IN THE SUPREME COURT OF FLORIDA

JOSEPH BESARABA, JR.

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,016

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

SECOND AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant/Cross-Appellee, Joseph Besaraba, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee/Cross-Appellant, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the pleadings will be by the symbol "R," references to the pleading in the supplemental records will be by the symbol "SR [no.]," references to the transcripts will be by the symbol "T," and references to the supplemental transcripts will be by the symbol "ST [no.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State is in substantial agreement with Appellant's statement of the case and facts, to the extent that they are nonargumentative.

SUMMARY OF ARGUMENT

Issue I - The record supports the trial court's finding of the CCP aggravating factor. Even if it does not, there is no reasonable possibility that the sentence would have been different without it.

Issue II - The record supports the trial court's rejection of Appellant's nonstatutory mitigating evidence that he had an unstable and disadvantaged childhood. Even if it had been valid, the sentence would have been the same.

Issue III - Appellant's sentences of death are proportionate to others under similar facts.

Issue IV - The standard instruction for both statutory mental mitigating factors does not preclude consideration of mental mitigating evidence that is not "extreme" or "substantial."

Issue V - Appellant did not properly object to the flight instruction. Regardless, at the time of trial, the law allowed a flight instruction if supported by the evidence.

Issue VI - Appellant did not properly object to the testimony regarding Sergeant Jara's mental impression at the time of Appellant's apprehension and arrest. Regardless, such

testimony was proper evidence of consciousness of guilt. Even if it were not, it was harmless beyond a reasonable doubt.

Issue VII - Evidence of flight was properly admitted as evidence of consciousness of guilt. Even if it were not, it was harmless beyond a reasonable doubt.

Issue VIII - The trial court properly found the existence of the prior violent felony aggravating factor where the prior convictions were based on contemporaneous capital felonies of crimes of violence committed on a separate victim. Even if error, however, it was harmless beyond a reasonable doubt.

Issue IX - The jury recommendation does not have to be unanimous.

Issue X - Appellant invited the error about which he complains. Thus, the trial court did not abuse its discretion in denying Appellant's motion for individual, sequestered voir dire or his motion to strike panel based on juror's comments in the presence of the other veniremen.

Issue XI - The State did not violate the rule of sequestration. Even if it did, Detective Hoffman's testimony was not affected. Thus, Appellant suffered no prejudice.

Issue XII - Evidence of Appellant's apprehension and arrest was properly admitted under § 90.402, which does not require 10 days' notice. The evidence was also admissible under § 90.404(2)(b) and, even though the State's notice was deficient, the trial court implicitly found no prejudice to Appellant.

Issue XIII - The State was obligated by the constitution and the rules of criminal procedure to produce a live witness if available, notwithstanding the parties' agreement to perpetuate the testimony for trial.

Issue XIV - The State's comments in its guilt-phase closing arguments did not deprive Appellant of a fair trial.

Issue XV - The State's comments in its penalty-phase closing argument did not deprive Appellant of a fair sentencing proceeding.

Issue XVI - The State's comments in its penalty-phase closing argument regarding Appellant's apprehension and arrest in Nebraska was directly related to rebutting one of the mental mitigating factors and did not constitute a nonstatutory aggravating factor.

Issue XVII - The standard instruction on premeditated murder is a correct statement of the law. Thus, the trial court did not abuse its discretion in rejecting Appellant's proposed instruction.

Issue XVIII - This Court and others have previously upheld the constitutionality of the reasonable doubt instruction. Thus, the trial court did not abuse its discretion in rejecting Appellant's proposed instruction.

Issue XIX - Appellant's proposed instruction that the jury had to consider all of the mitigating evidence and could not give it no weight was an incorrect statement of the law and thus properly rejected.

Issue XX - The standard instruction on the catch-all provision for mitigating evidence is sufficient. Thus, the trial court properly rejected Appellant's request that individual nonstatutory mitigating evidence be instructed on.

Issue XXI - The trial court gave Appellant's requested instruction on the CCP aggravating factor. Thus, Appellant

should not be heard to complain that the standard instruction is unconstitutionally vague.

Issue XXII - This Court has previously held that the jury's sentencing recommendation does not have to be unanimous.

Issue XXIII - The standard instruction on the burden of proof in the penalty phase is valid. Thus, the trial court properly rejected Appellant's special instruction that aggravating factors must outweigh mitigating factors.

Issue XXIV - Appellant should raise a claim of ineffective assistance of counsel in a motion for post-conviction relief. Regardless, Appellant consented to the theory of defense that he would concede identity and argue second-degree murder.

Issue XXV - Appellant's motion to disqualify the trial judge was legally insufficient. Thus, the trial court properly denied it.

Issue XXVI - Any error in failing to inform Appellant that he was not entitled to another court-appointed attorney but could represent himself was harmless beyond a reasonable doubt.

Issue XXVII - Florida's death penalty statute is constitutional

Issue XXVIII - The prior violent felony and CCP aggravating factors are constitutional.

ARGUMENT

ISSUE I

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR (Restated).

Regarding the cold, calculated, and premeditated aggravating factor, the trial court made the following findings in its written sentencing order:

> This Court finds beyond a reasonable doubt that the capital felony for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. . . .
>
> The evidence in the case at bar established a heightened premeditated and a calculated or prearranged design to murder Sydney Granger. The Defendant's murder of Sydney Granger and Wesley Anderson was not a random act.
>
> The evidence showed that there was an initial confrontation on the bus between the Defendant and the bus driver, Sidney Granger. From this point until the time of the murders, the Defendant engaged in a series of actions over a period of approximately two hours which demonstrate a cold, calculated and heightened premeditated design to murder Sidney Granger.
>
> The Defendant was extremely familiar with the Broward County bus system and it's [sic] many bus routes. Stacks of bus schedules from Dade, Broward and Palm Beach Counties were found with the Defendant at the time of his capture and among his belongings left behind at the bus shelter.
>
> On the day of the murders, Sidney Granger was driving his bus in a northerly direction on U.S. 1. Granger stopped because he believed the Defendant was drinking alcohol on the bus. The Defendant refused to get rid of the drink and chose to get off the bus after a verbal exchange with Granger.

Thereafter, the Defendant reversed his northerly direction of travel and began traveling south. He traveled back to the Young Circle Bus Terminal in the city of Hollywood, Florida. He waited there for Granger's bus to arrive knowing that this was a place where the bus must stop. Prior to Granger's arrival, four other buses arrived at the terminal but the Defendant did not approach or fire at or into any of these buses.

When Granger's bus finally arrived, the Defendant walked up to that bus with his gun drawn. He fired shots at the outside of the bus, into the side panel and through a bus window. The Defendant then went to the front door of the bus and fired his gun inside.

One shot was fired into Granger's throat at very close range, another into Wesley Anderson's back, also at close range. The Defendant then walked calmly away from the bus and down the street to Scott Yaguda's car where Yaguda was waiting at a traffic light. At gun point, the Defendant ordered Yaguda to get out and give him the car stating, "I've just killed two people,... I'll kill you too." As Scott Yaguda walked away, the Defendant shot him in the back three times at point-blank range. The Defendant then fled the scene in Yaguda's car.

This type of behavior satisfies the requirement of highly premeditated conduct by the Defendant. Phillips v. State, 476 So.2d 194 (Fla.1985). The heightened premeditation does not have to be directed toward a specific victim so long as the evidence shows that the Defendant planned or prearranged to commit murder before the crime began. Provenzano v. State, 497 So.2d 1177 (Fla.1986). Wesley Anderson may not initially have been the Defendant's intended victim, but in the course of the premeditated murder of Granger, he became a victim as a matter of circumstance.

The killings were committed in a "cold manner", without any emotion or passion. There was no evidence that the Defendant's acts were prompted by wild emotion. Rather, the evidence established the Defendant's mental state to be highly unemotional and contemplative. There was a substantial

> period of reflection and thought by the Defendant followed by particularly lengthy and methodical planning period. There was no pretense of moral or legal justification for the Defendant's conduct.

(R 3357-60). Contrary to Appellant's assertion, there is competent, substantial evidence in the record to support this aggravating factor.

To support his conclusion that there was no "careful plan," Appellant points to the fact that (1) he bought a transfer ticket that would not have allowed him to ride Sydney Granger's bus again, (2) he did not conceal or store his "prized possessions," and did not take them with him, (3) he did not try to conceal his identity, and (4) he "selected a car that was completely boxed in by stationary traffic as a getaway vehicle." **Brief of Appellant** at 26-27. The "careful plan" required for this aggravating factor, however, does not have to be a smart one, much less a foolproof one. Though concededly speculation, Appellant may have planned on using his transfer ticket to escape the scene on another bus. As for his "prized possessions," the duffle bags found at the bus terminal contained nothing of value, see (T 1033-34, 1050), whereas the inventory of items taken from Appellant's person and from Scott Yaguda's car at the time of Appellant's arrest revealed passports, multiple driver's licenses, $450 in traveler's checks, $15.50 in currency, Appellant's concealed weapons permit, miscellaneous papers, toiletries, and other personal effects (T 1488-95). Moreover, the fact that he did not try to conceal his identity does nothing to negate this aggravating factor. Perhaps he thought he could escape and no one would find him. Finally, although Scott

Yaguda's car might have initially been blocked in by traffic, it is obvious that Appellant was able to extricate himself, since he ultimately used Scott Yaguda's car to drive to Nebraska.

Appellant's actions after shooting Granger and Anderson are not as revealing as his actions before shooting them. According to William Sorrells, Sydney Granger's supervisor, Granger was expected to be at the airport at 11:15 a.m., traveling north toward the Broward terminal. (T 1725). Ms. Bethea testified that Appellant got off Granger's bus just south of the airport. (T 1620-22). Greg Austing, who was traveling south on the same route, picked Appellant up just south of the airport around 12:32 p.m. (T 1660). Thus, Appellant changed his direction of travel.

Greg Austing also testified that Appellant looked "very nervous." He had his right hand in a plastic bag, which he removed, replaced quickly, then removed again to retrieve change from his pocket for the fare. Austing asked Appellant how he was doing, but Appellant gave no reply and sat down. Austing testified, "[T]he way he was looking at me made me very uncomfortable." (T 1664-65). When Austing stopped at the Young Circle terminal at 1:00 p.m., Appellant got off. (T 1675-76).

Sydney Granger's bus was expected to arrive at Young Circle heading north at around 1:35 p.m., since Granger's route was forty minutes ahead of Austing's route. (T 1672-74). Delbert Thomas testified that he was sitting next to Appellant on a bench for about fifteen minutes at the Young Circle terminal waiting for Granger's bus to arrive. Appellant took two or three drinks from a bottle concealed in a brown paper bag while they waited, and Appellant spoke to no one. (T 1788-91). When Granger's bus

pulled up, several people got off, and five or six people got on the bus before Thomas. When Thomas got four or five feet beyond the driver, he heard a pop, turned around, and saw Appellant shoot Granger. Appellant then "turned on a slight angle" and shot Wesley Anderson in the back. (T 1791-93). Several witnesses then saw Appellant walk "leisurely" with a gun in one hand and a sack in the other down the street to where Scott Yaguda was stopped at a traffic light. (T 1096-98, 1145-49). "He was very calm and walking very slowly too." (T 1103).

In sum, from the time Appellant left Sydney Granger's bus to the time he shot Sydney Granger and Wesley Anderson, Appellant had roughly two hours to plan and reflect on how, when, and where he was going to kill Sydney Granger. Having became familiar with this particular bus route, and having equipped himself with schedules of this route, Appellant knew how to arrange a mortal confrontation with Mr. Granger. With cold calculation, Appellant waited patiently for Mr. Granger's bus to arrive and then opened fire. Based on these facts, which are supported by the record, the trial court properly found that Appellant committed these murders in a cold, calculated, and premeditated manner. See Cruse v. State, 588 So.2d 983 (Fla. 1991); Gunsby v. State, 574 So.2d 1085 (Fla. 1991); Phillips v. State, 476 So.2d 194 (Fla. 1985); Haliburton v. State, 561 So.2d 248 (Fla. 1990); Swafford v. State, 533 So.2d 270 (Fla. 1988); Turner v. State, 530 So.2d 45 (Fla. 1987).

Even were this aggravating factor improperly found, however, Appellant's sentence should nevertheless be affirmed. This was a double homicide. Only by the grace of God was it not

a triple homicide since Scott Yaguda survived three shots to the back. Even without the CCP aggravating factor, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Thus, this Court should affirm Appellant's sentences of death.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY CONSIDERED APPELLANT'S UNSTABLE AND DISADVANTAGED CHILDHOOD AS A NONSTATUTORY MITIGATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings relating to Appellant's alleged disadvantaged or unstable childhood:

> A disadvantaged childhood, abusive parents, lack of education and training are valid non-statutory mitigating circumstances the court may consider. Brown v. State, 526 So.2d 903 (Fla. 1988)(abrogated in Fenelon v. State, 594 So.2d 292 (Fla. 1992) on issue of a "flight" instruction).
>
> The Defendant's father, Joseph Besaraba, Sr. testified that he had been captured by the Nazis. He escaped several times but was ultimately recaptured.
>
> When the Defendant was approximately a year old the family escaped from Poland to the American zone in Germany. They lived in an army barrack for four (4) years awaiting passage to the United States. Throughout the family's turmoils they were able to stay together.
>
> The Besarabas bought a home and small business in New York in 1960 and the family all worked there together. The witness testified that he never had any problems with the Defendant as a child. There was no evidence of any abusive parenting or a disadvantaged childhood. To the contrary, the Defendant's parents provided a stable environment in the face of extreme circumstances.
>
> The Defendant characterizes his childhood as abusive because his parents worked hard and they were unable to spend time with him. The Defendant ran away from home due to a distant relationship with his family and lack of a father figure. However, there is no testimony of any abuse. The Court finds that this mitigating factor has not been established.

(R 3365-66).

Appellant claims that, by finding no evidence of physical abuse by his parents, the trial court applied the wrong standard and improperly rejected valid mitigating evidence. **Brief of Appellant** at 34-37. The State submits, however, that the record supports the trial court's finding.

As this Court stated in Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) (emphasis added), "[w]hen addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." Moreover, "[t]he decision as to whether a particular mitigating circumstance is established lies with the judge. Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So.2d 450, 453 (Fla. 1991). Further, "[t]he resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as the appellate court, [this Court has] no authority to reweigh that evidence." Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991). See also Lucas v. State, 568 So.2d 18, 23 (Fla. 1990) ("We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion.").

According to Appellant, "the circumstances of Nazi Germany created instability and disadvantaged Appellant during his

formative years." **Brief of Appellant** at 35 (emphasis in original). He quotes at length from his own sentencing memorandum, which details the evidence from his subjective perspective. Id. at 35-36. As noted previously, however, factual conflicts in the evidence are for the trial court to resolve.

The record establishes that, although Appellant was born while his parents were being held captive by the Germans, they were allowed to live as a family unit. (T 2297, 2330-31). "[T]he German government was a little softer already. . . . It was close to the close of the war. It was a little softer." (T 2330-31). Food was scarce, but Appellant's father bartered with German farmers for necessities to feed his family. (T 2298). While no doubt the atmosphere was oppressive, his family was liberated when Appellant was four months old, and they returned to Poland to stay with relatives when Appellant was ten months old. (T 2297-2301). With the hope of freedom in America, the family journeyed to the American zone in Frankfurt, Germany, when Appellant was one year old. (T 2301-05). Although they lived in military barracks for two years, their living conditions were markedly improved. (T 2306-08, 2332-33). Appellant's father described their attitudes during the time they spent in the American zone: "We rented a boat. We go on the river toward the North Sea and back. We have a good time together. We met friends. We go picnicking. Nobody was chasing us like before. We were happy. We were happy because it was free." (T 2336).

When Appellant was about five years old, the Besarabas made their way to America, where Appellant's uncle found them a four-

room apartment in Brooklyn, New York, and Appellant's father got a job in a bakery. (T 2308-09). Appellant and his sister attended Catholic school, and would often go to the beach with the children of the boss of Appellant's father. (T 2310-11). After only two years, Appellant's father had saved enough money to buy his own home.[1] (T 2311). Within four years, Appellant's father had saved enough money to buy a pastry business, where the whole family worked. (T 2311-12). While Appellant was still in high school, his sister collapsed with a brain tumor and died two years later. (T 2312-14). At some point during that time, Appellant was expelled from school after an altercation of some sort with a teacher. (T 2315). Appellant never returned to finish school.

At some point, Appellant's father sold the business and the house and moved to Richmond Hill. (T 2315-16). Appellant lived with them for a couple of years, but could not hold a job. He preferred to travel, and at some point his mother gave him some money for him to travel through Europe for six months. (T 2316). When he came back, he lived with his parents and continued to travel, at one point to the Bahamas. (T 2317).

"Although cultural deprivation and a poor home environment may be mitigating factors in some cases, sentencing is an individualized process." Jones v. State, 580 So.2d 143, 146 (Fla. 1991) (affirming the trial court's rejection of nonstatutory mitigating factor). "Evidence is mitigating if, in

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[1] Contrary to Appellant's assertion, there is no evidence in the record that the Besarabas lived in "an inner city impoverished area where it was still a struggle to survive." **Brief of Appellant** at 37.

fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Wickham v. State, 593 So.2d 191, 194 (Fla. 1991). As the record reveals, Appellant had anything but an unstable and disadvantaged childhood. The trial court even noted that "the Defendant's parents provided a stable environment in the face of extreme circumstances." (T 3365). His parents worked very hard to keep the family together and to provide for their children. While they did not live in the lap of luxury, they obviously did well for themselves in America, buying a home after only two years, and a business four years later. In addition, it must not be forgotten that Appellant was forty-four years old when he committed these crimes. His childhood had long since passed.

As is obvious from the trial court's order, it considered all of Appellant's nonstatutory mitigating evidence, but concluded, based on the evidence presented, that Appellant's evidence was not of a truly mitigating nature. As noted previously, the weight to be accorded aggravating and mitigating circumstances is within the trial court's discretion, Campbell, 571 So.2d at 420, and there is competent, substantial evidence in this record to support the trial court's findings. See Jones; Francis v. State, 529 So.2d 670, 673 (Fla. 1988) (finding evidence of cultural deprivation and abuse as child too remote in time from murder by 31-year-old defendant to constitute mitigating evidence); Maqueira v.State, 588 So.2d 221, 224 (Fla. 1991) (record supported trial court's rejection of mitigating circumstances that defendant acted under extreme duress or

substantial domination of another, suffered from an abused childhood, and suffered from alcohol and drug abuse since childhood).

Even if the trial court should have considered this evidence as a mitigating factor, there is no reasonable possibility that the sentence would have been different. The trial court gave substantial weight to both of the aggravating factors in this case. This was a double homicide, committed in a cold, calculated, and premeditated manner. Conversely, the trial court gave minimal weight to Appellant's mitigating evidence. It is clear from the trial court's order that death was the appropriate penalty. (R 3371). Therefore, even if the trial court had considered this evidence in mitigation, there is no reasonable possibility that it would have imposed a life sentence. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). As a result, Appellant's sentences of death should be affirmed.

ISSUE III

WHETHER APPELLANT'S SENTENCES OF DEATH ARE PROPORTIONATE TO OTHERS UNDER SIMILAR FACTS (Restated).

Regarding the murders of Sydney Granger and Wesley Anderson, the trial court found the existence of two aggravating factors. Although it also found the existence of two statutory mitigators, as well as several nonstatutory mitigating factors, it ultimately determined that "the mitigating circumstances do not outweigh the aggravating factors." (R 3371). As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence is proportionately warranted, the facts should control.

Here, the evidence established that Appellant was riding a county bus north at approximately 11:15 a.m., holding a beverage concealed in a paper bag, when the driver, Sydney Granger, asked Appellant to get off the bus because drinking on the bus was prohibited. Appellant got off the bus just south of Fort Lauderdale International Airport. (T 1615-29). At 12:30 p.m., Gregory Austing, who was driving a bus south on the same route as Sydney Granger, picked up Appellant and another person at an obscure bus stop just south of the airport. Appellant seemed very nervous and had his right hand in a plastic bag. Upon boarding the bus, Appellant pulled his hand out of the bag, put it back in quickly, then pulled it out again and retrieved change from his pants pocket. Appellant paid an extra ten cents for a transfer. Mr. Austing asked Appellant how he was doing, but Appellant did not respond. Appellant was not drinking and did not appear to be intoxicated. (T 1646-66).

Mr. Austing's bus arrived at the Young Circle terminal at approximately 1:00 p.m., where Appellant got off. (T 1675-76). According to William Sorrells, the Superintendent of safety and training for Broward County Mass Transit, Sydney Granger's bus was scheduled to arrive at Young Circle at approximately 1:35 p.m.[2] (T 1723-25). Shortly before 1:30 p.m., Sydney Granger's bus arrived. Appellant, who had been sitting on a bench at that particular bus stop, walked up to the bus and fired two or three shots. He made his way to the door of the bus, where he fired two or three more shots. (T 1145-46, 1152-53, 1396-1404, 1788-94). One bullet hit Sydney Granger in the throat (T 1295), one bullet hit Wesley Anderson in the back (T 1318), one bullet went through a bus window barely missing Donald Kocher's head (T 1402), one bullet went into the side of the bus (T 1020), and bullet fragments were found embedded in a bus seat (T 1023).

After shooting Granger and Anderson, Appellant walked down the street with his gun in one hand and a plastic bag in another to where several cars were lined up in the left turn lane at a traffic light. He walked up to Scott Yaguda's car and tapped on the window. While pointing the gun at Mr. Yaguda, Appellant said, "I just killed two people. I'm going to kill you. Give me your car." (T 1108-13, 1147-50, 1411-16). Mr. Yaguda got out and started to walk away when Appellant shot him three times in the back and drove off in his car. (T 1112-13, 1252-54, 1416-17). Two and a half days later, nineteen hundred miles away in Brule, Nebraska, Appellant was found sleeping in the back seat of

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[2] Greg Austing testified that it was not unusual to arrive a little early.

Scott Yaguda's car. As two sheriff's deputies were attempting to handcuff Appellant, he jumped back into the car and grabbed a gun, the same gun he had used to kill Granger and Anderson, and paralyze Yaguda. The two deputies had to wrestle the gun away from him using considerable force. (T 1439-56, 1461-94).

To mitigate this senseless murder, Appellant presented sufficient evidence to establish (1) that he had no significant history of prior criminal activity (yet he was convicted of DUI and arrested for simple battery)--which was accorded "some weight"; (2) that he was under an extreme mental or emotional disturbance at the time of the murders--which was accorded "some weight"; (3) that he had used drugs and alcohol in the past, had consumed alcohol prior to the murders (although it did not play a major role in the murders), had suffered the loss of his sister and mother earlier in his life, was emotionally immature, had low self-esteem, and had an overall bad state of health--which was accorded "little weight"; (4) that he had good character and a reliable work record (although he had not held a steady job in several years and was homeless)--which was accorded "very little weight"; and (5) that he had adjusted well to prison and was amenable to rehabilitation--which was accorded "some weight." (T 3360-70).

It is well-established that this Court's function is not to reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991), cert. denied, 116 L.Ed.2d 102 (1992); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). Rather, as the basis for proportionality review, this Court must

accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court. State v. Henry, 456 So.2d 466 (Fla. 1984). It is upon that basis that this Court determines whether the defendant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). The two (actually three) aggravating factors found in this case are supported by competent, substantial evidence and, according to the trial court, far outweigh the mitigating evidence presented. As a result, the trial court conscientiously concluded that death was warranted. Contrary to Appellant's assertion, his sentence is not disproportionate to other defendants' sentences for similar murders.

Appellant cites to several cases to support his claim to the contrary. Those cases, however, are easily distinguishable. In Kramer v. State, 619 So.2d 274, 278 (Fla. 1993), this Court found that "[t]he evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk." Such was hardly the case here.

In Livingston v. State, 565 So.2d 1288 (Fla. 1988), which involved the murder of a convenience store clerk, this Court found that

> Livingston's childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him. Livingston's youth [seventeen years of age], inexperience, and immaturity also significantly mitigate his offense. Furthermore, there is evidence that after these severe beatings Livingston's intellectual functioning can best be

> described as marginal. These circumstances, together with the evidence of Livingston's extensive use of cocaine and marijuana, counterbalance the effect of the factors found in aggravation [prior violent felony and felony murder].

Id. at 1292. Here, in contrast, Appellant was forty-seven years old with an I.Q. that was average or above (T 1836-37), and established no evidence of physical abuse as a child.

Similarly, in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), which involved the murder of a police officer after the defendant took several persons in a real estate office hostage, this Court found the death penalty unwarranted where there was substantial evidence by a "panel of experts" that Fitzpatrick had extensive brain damage and that his emotional age was between nine and twelve years of age. Such evidence established both statutory mental mitigators and the statutory mitigator of age: "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." Conspicuously absent were the HAC and CCP aggravating factors. Id. at 811-12. The mitigating evidence in the present case, however, does not even remotely compare to that in Fitzpatrick. Moreover, the CCP aggravating factor was properly found. See Issue I, supra.

Finally, and most distinguishable, is Jackson v. State, 575 So.2d 181 (Fla. 1991), which involved the murder of a hardware store owner by Jackson and his brother, wherein this Court found that Jackson's death sentence was not proportional to his culpability, since there was insufficient evidence that he was a major participant and that he actually killed, intended to kill,

or attempted to kill the victim. Id. at 189-193. There is no question that Appellant killed Sydney Granger and Wesley Anderson; there was no co-perpetrator. Thus, Jackson is not applicable.

Rather, the State relies on Gunsby v. State, 574 So.2d 1085 (Fla. 1991) (sentence proportionately warranted where defendant killed grocery store owner whose brother fought with the defendant's friend earlier in the day); Asay v. State, 580 So.2d 610 (Fla. 1991) (sentence proportionately warranted where defendant killed black man who was arguing with defendant's friend and black transvestite who allegedly cheated the defendant out of $10 for oral sex); Wickham v. State, 593 So.2d 191 (Fla. 1991) (sentence proportionately warranted where defendant used female friend and children to lure victim to stop along interstate whom he robbed of $4.05); Cruse v. State, 588 So.2d 983 (Fla. 1991) (sentence proportionately warranted where defendant loaded his car with guns and ammunition and opened fire on shopping center because he believed people were trying to turn him into a homosexual). "If a proportionality analysis leads to any conclusion, it is that death was a penalty the jury properly could recommend and the trial court properly could impose." Wickham, 593 So.2d at 194. Therefore, this Court should affirm Appellant's sentences of death for the first-degree murders of Sydney Granger and Wesley Anderson.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTIONS FOR BOTH STATUTORY MENTAL MITIGATING FACTORS (Restated).

During the charge conference, Appellant proposed special instructions relating to the two statutory mental mitigating factors. Specifically, Appellant wanted to delete from the standard instructions the modifiers "extreme" and "substantial" as they related to "extreme mental or emotional disturbance" and "substantial impairment" in one's capacity to appreciate the criminality of one's conduct and to conform that conduct to the requirements of law. Appellant claimed below, as he does here, that the modifiers preclude consideration of mental mitigation if it does not rise to the level of "extreme" or "substantial." (SR 91; T 2177-78). The State disagrees.

In Foster v. State, 614 So.2d 455, 461 (Fla. 1992), this Court found that the instructions as a whole adequately informed the jury that it could consider mental mitigating evidence even if it did not rise to the level of "extreme" or "substantial." Here, the jury was given the standard instructions for both mental mitigators, and the catch-all provision. In discussing these mitigating circumstances, defense counsel told the jury that "[t]here are mitigating circumstances that you are allowed to consider that go beyond the ones specified by the Court. The fourth mitigating factor the Judge will tell you is any other aspect of the defendant's character or background and any other circumstances of the offense. That gives you a wide open door on what you are to consider." (T 2484) (emphasis added). Included

in his discussion of nonstatutory mitigating evidence, defense counsel told the jury that it was "allowed to consider whether Joseph was emotionally disturbed." (T 2487-90). He also discussed Appellant's behavior in terms of his inability to "conform his actions to what he knew was wrong." (T 2489-90). Thus, as in Foster, there is "no reasonable likelihood that the jurors understood the instruction to preclude them from considering any relevant evidence." 614 So.2d at 462. See also Lemon v. State, 456 So.2d 885, 887 (Fla. 1984).

ISSUE V

WHETHER THE TRIAL COURT ERRED IN GIVING A FLIGHT INSTRUCTION TO THE JURY OVER APPELLANT'S OBJECTION (Restated).

During the charge conference, the State requested an instruction on flight. The trial court asked defense counsel if he had an objection. Defense counsel responded, "Yes." The trial court then asked defense counsel if he wanted to state a reason, and defense counsel replied, "No." (T 1912). The trial court granted the State's request and instructed the jury on flight. (T 2088).

Relying on Fenelon v. State, 594 So.2d 292 (Fla. 1992), Appellant now claims that the trial court erred in giving the flight instruction to the jury over his objection. **Brief of Appellant** at 43-44. Initially, the State submits that, by failing to state a basis for objection below, Appellant has failed to preserve this issue for review. See Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to preserve for review an issue arising from a trial court's ruling on a question of admissibility of evidence, the specific ground to be relied upon must be raised before the court of first instance."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n 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.").

Regardless, Fenelon does not apply to this case. The jury rendered its verdicts on February 5, 1992. (R 3243-47). Fenelon was issued on February 13, 1992, after the jury's verdict.

Recently, in Taylor v. State, 18 Fla. L. Weekly S643 (Fla. Dec. 16, 1993), this Court reaffirmed that Fenelon was to be applied prospectively only. Thus, Fenelon is inapplicable.

Even were the instruction erroneously given, the error would be harmless in light of the evidence at trial supporting the defendant's guilt. Numerous witnesses identified Appellant as the person who shot Sydney Granger and Wesley Anderson, then commandeered Scott Yaguda's car and shot him three times in the back. (T 1115, 1152, 1261, 1420, 1627-29). Scott Yaguda and David Bilkis both testified that Appellant told Scott Yaguda, "I just killed two people. I'm going to kill you. Give me your car." (T 1112-13, 1415-16). Even after Mr. Yaguda complied, Appellant shot him three times in the back before driving off in his car. (T 1112-13, 1416-17). Two and a half days later, Appellant was apprehended in Nebraska with Scott Yaguda's car and the gun that was used in the shootings. (T 1437-56, 1461-94, 1560-77). Based on all of this evidence, there is no reasonable possibility that the verdict would have been different absent the instruction on flight. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's conviction.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF OFFICER JARA'S STATE OF MIND (Restated).

During the hearing on Appellant's motion to suppress, Sergeant Joseph Jara of the Keith County Sheriff's Department in Nebraska testified to the circumstances surrounding Appellant's apprehension and arrest. During his testimony, Sergeant Jara stated that he pulled Appellant and Deputy Richard Cook out of the car and tried to subdue Appellant and wrestle the gun out of his hand. In explaining his efforts to do that, Sergeant Jara stated, "And then I figured, well, I was hanging on to his left arm and then all of a sudden, why am I being such a nice guy. This guy might have a gun, he's going to kill me. I took my knee and put it in the back of his neck and took his hair and jerked it back. And at that time, he said, 'I quit, I quit, no more.' And Rich - when I relaxed it, Rich pulled the arm out, threw the gun or the gun went down in the ditch." (T 180). Defense counsel made no objection to this testimony.

During discussions on Appellant's motion in limine to exclude evidence of flight, however, defense counsel complained that the State's notice of intent to use collateral crime evidence was insufficiently specific to apprise the defense of the crimes, wrongs, or acts sought to be introduced. Specifically, defense counsel was concerned that the State was going to argue that Appellant's actions constituted attempted murder of the officers. At that point, the following colloquy occurred:

MR. BAILEY: Judge, the conduct apparently that Mr. Morton intends to include includes attempted murder in Nebraska.

MR. MORTON: I don't intend to argue that.

MR. BAILEY: I'm going by the notice you gave me.

MR. MORTON: It could have been articulated better. I'm talking about the conduct. He keeps talking about the specific charge. That's not what I'm trying to get in. I think it's clear we are talking about his conduct at the time of the arrest.

THE COURT: So I still don't know. If he just wants to present the conduct of your client under 404, what is the prejudice to you? He is not going to say that. He is not trying to present the fact that some crime of attempted murder was committed.

MR. BAILEY: Then I take it no witness is going to testify this man tried to kill me --

THE COURT: I doubt that.

MR. BAILEY: You doubt that?

THE COURT: I doubt that. I don't know. Mr. Morton will have to answer that. I don't know what evidence he wants to present.

MR. BAILEY: That sounds like attempted murder to me. I know of nothing like that.

MR. MORTON: I remember from the testimony and the hearing that I believe it was Sergeant Joseph Jara who said at one point when he was struggling over the gun he realized - he said why am I being so nice. Mr. Besaraba, if I recall, he said that that was the thinking in his head. He was struggling for the gun. Why am I being so nice. This man is trying to kill us, kill me.

Because of that he grabbed his hair and put his knee in his back. At that point with that kind of pain then he let go of the gun and they kicked the gun away.

He doesn't necessarily have to get that statement in evidence. I just want him to describe what happened, what he did in order to get the gun out of his hand. The jury can conclude anything after as far as the relevance to the issues in this case. It's inseparable from the crime, his apprehension and attempt to avoid apprehension in this case which is inseparable from the crime.

If you don't want him to characterize in my own mind I thought he was trying to kill me. That's why I pulled his hair and put my knee in his back. Even if he were to say that the cautionary instruction would be he is not on trial for any of the conduct or the charges or the crime or any crimes that were committed in Nebraska. Even if you were to say that cautionary instruction, that could alleviate any problem or meliarate any problem. That's the only testimony that I recall concerning murder, is when he said that. In my mind, that's what I thought he was trying to do. It's a conclusion on his part.

THE COURT: Well, I don't even see a problem there, myself.

MR. BAILEY: The defense position is that the nature of the actions out in Nebraska, not the fact that they recovered the weapon and other physical evidence but the nature of the actions in Nebraska during the course of his arrest are too remote in time and space to be part of the res gestae in this case. They do require the Williams Rule.

The Williams Rule notice that was supplied was legally insufficient. The patent negligence of the motion prejudiced the defendant in the trial and that evidence should not be allowed.

THE COURT: Well, I initially ruled on 402. That's my ruling.

(T 1199-1202).

During the trial, Sergeant Jara testified to the circumstances surrounding Appellant's apprehension. When he explained his use of force based on his belief that Appellant was trying to kill him, defense counsel objected:

> MR. BAILEY: Judge, in the arguments on the nature of the testimony from Nebraska Mr. Morton indicated he would instruct this witness he was not to testify that he was trying to kill me. That's exactly what he just testified. That's the statement I objected to. The objection is to that statement and move for a mistrial at this time.
>
> MR. MORTON: True, you asked what his testimony would be. I told you that I recall from the hearing that he said that and I didn't ask him about any charges or anything. That simply explains the context of what he did.
>
> THE COURT: State of mind.
>
> MR. MORTON: That's exactly the same problem. You said you didn't see any problem.
>
> THE COURT: Overruled.

(T 1455).

In this appeal, Appellant complains that "[i]t was error to introduce evidence of Jara's state of mind when it was not relevant." **Brief of Appellant** at 45. Initially, the State submits that Appellant has failed to preserve this issue for review. At the motion in limine hearing, defense counsel objected to Sergeant Jara's testimony because it tended to establish attempted first-degree murder and defense counsel was seeking to prohibit evidence of other crimes. He did not object on the ground that Sergeant Jara's state of mind was not relevant.

Similarly, at the trial, defense counsel made a vague objection and referenced it to the parties' discussion at the motion in limine hearing. Although the trial court mentioned state of mind, the basis for defense counsel's objection and

motion for mistrial is not clear. It certainly cannot be equated with the argument made on appeal. See Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to preserve for review an issue arising from a trial court's ruling on a question of admissibility of evidence, the specific ground to be relied upon must be raised before the court of first instance."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n 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."). Moreover, "both a motion to strike the allegedly improper testimony as well as a request for the trial court to instruct the jury to disregard the proffered testimony are thought to be necessary prerequisites to a motion for mistrial." Palmer v. State, 486 So.2d 22 (Fla. 1st DCA 1986). Here, Appellant failed to satisfy his burden. He neither moved to strike the testimony nor requested a curative instruction. Thus, he has failed to preserve this issue for appeal.

Even were his vague objection sufficient, "a motion for a declaration of a mistrial is addressed to the sound discretion of the trial judge," and "the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity." Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). As discussed infra in Issue VII, the trial court properly admitted evidence of Appellant's flight to Nebraska and resistance to arrest. Such evidence has traditionally been admitted to show consciousness of guilt. See, e.g., Straight v. State, 397 So.2d 903, 908 (Fla. 1981) ("When a

suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance." (emphasis added)). Here, Appellant's attempt to obtain a weapon, ostensibly to evade arrest, and Sergeant Jara's necessary efforts to prevent his escape, were admissible for such purpose. Thus, the trial court properly overruled Appellant's objection and denied his motion for mistrial.

Appellant cites to several cases to support his proposition that evidence of Sergeant Jara's state of mind was improperly admitted. These cases, however, relate to the state of mind hearsay exception and are thus inapplicable. Sergeant Jara's testimony did not relate an out-of-court statement, but rather his impression of Appellant's intentions. When taken in context, it is clear that Sergeant Jara was attempting to justify his decision to use substantial force to restrain Appellant. In addition, his testimony was offered to relate the seriousness of the confrontation and Appellant's demeanor at the time. Since there was no out-of-court statement, however, citation to "hearsay" cases is misplaced.

Even if Sergeant Jara's mental impressions should not have been relayed to the jury, any error in allowing him to do so was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In light of the overwhelming evidence that Appellant committed the charged offenses, including his statement to Scott Yaguda that he had just killed two people and

would kill him too, there is no reasonable possibility that the verdict would have been different absent Sergeant Jara's testimony that he thought Appellant was trying to kill him. Therefore, this Court should affirm Appellant's convictions.

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF APPELLANT'S FLIGHT AND SUBSEQUENT ARREST OVER APPELLANT'S OBJECTION (Restated).

Prior to trial, the State filed its notice of intent to rely on collateral crime evidence relating to Appellant's flight and subsequent apprehension in Brule, Nebraska, two and a half days after the murders. (R 3091). Almost two months after the State's notice, and eight days after the trial had begun, Appellant filed a "Motion in Limine to Prohibit Introduction of Evidence of Other Crimes, Bad Character."[3] As grounds for the motion, Appellant alleged that (1) the State's notice was fatally deficient, in that it failed to allege with sufficient specificity the essential facts or offenses it intended to offer, and (2) such evidence was highly prejudicial and would render his trial fundamentally unfair. (R 3175-82).[4] After several discussions regarding the motion (T 932-37, 949-63), the trial court denied Appellant's motion in limine, finding that the evidence was relevant to a material issue and was not unduly prejudicial. (T 1185-86).

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[3] Defense counsel purposefully waited until the jury was about to be sworn before filing the motion because "if the issue is taken up before the jury is sworn the State has the opportunity to then to go remedy the problem which is, you know, which takes the motion away from the defense. It's not - I'm not doing my client any service by giving the State notice on how to do their job." (T 933). In other words, defense counsel was trying to sandbag the State and create a "gotcha" by waiting until double jeopardy attached.

[4] The sufficiency of the State's notice is addressed separately in Issue XII, infra.

In this appeal, Appellant claims that the trial court abused its discretion in allowing "details of Appellant's fighting and struggling with police at the time of his arrest in Nebraska." Such evidence, according to Appellant, was not relevant to prove anything but bad character or propensity for violence, and, if relevant, was more prejudicial than probative. **Brief of Appellant** at 46-49. The State disagrees.

As this Court recently reaffirmed, evidence of flight, if supported by the evidence, is admissible to show consciousness of guilt. See Fenelon v. State, 594 So.2d 292 (Fla. 1992). Here, the evidence established that Appellant shot Sydney Granger and Wesley Anderson at the Young Circle bus terminal, then walked a short distance away and commandeered Scott Yaguda's car after shooting him three times in the back, paralyzing him for life. Using Mr. Yaguda's car, Appellant fled to Nebraska, where he was found two and a half days later sleeping in the back seat of the car. When the officers discovered that Appellant was a suspect in a double homicide in Florida and attempted to arrest him, Appellant jumped back into the car and grabbed the gun used to kill Granger and Anderson and paralyze Yaguda, ostensibly to facilitate his escape.

Contrary to Appellant's assertion, such evidence was not offered to show bad character or propensity for violence; rather, it was offered to show consciousness of guilt. In light of the multitude of direct evidence of Appellant's guilt, evidence of Appellant's flight and apprehension was properly admitted as circumstantial evidence of intent. See Straight v. State, 397 So.2d 903, 908 (Fla. 1981) (holding that evidence of the

defendant's flight from and attempted murder of officers in California who were trying to arrest him for a murder in Florida relevant to show consciousness of guilt); Bundy v. State, 471 So.2d 9, 21 (Fla. 1985) (holding that evidence of defendant's flight from officers six days after victim's disappearance was properly admitted as circumstantial evidence of guilt); State v. Escobar, 570 So.2d 1343 (Fla. 3d DCA 1990) (holding that evidence of defendants' shoot-out with police in another state one month after murder was admissible to establish defendants' consciousness of guilt), cause dismissed, 581 So.2d 1307 (Fla. 1991).

Even if it were error to admit such evidence, however, any error was harmless beyond a reasonable doubt. Numerous people saw Appellant stand at the door of the bus and shoot Sydney Granger and Wesley Anderson and then commandeer Scott Yaguda's car after shooting him in the back. Though circumstantial, the State's evidence of premeditation sufficiently rebutted Appellant's intoxication defense. Thus, even without the evidence of flight, there is no reasonable possibility that the verdict would have been different. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN FINDING THE EXISTENCE OF THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR BASED ON CONTEMPORANEOUS CONVICTIONS (Restated).

In its sentencing order, the trial court made the following findings regarding the "prior violent felony" aggravating factor:

> 1. The Court finds beyond a reasonable doubt that the Defendant has been previously convicted of another capital offense or felony involving the use of or threat of violence to some person:
>
> a. The crime of murder in the first degree is a capital felony. The Defendant was convicted of murdering Sydney Granger and Wesley Anderson.
>
> b. The crimes of attempted murder in the first degree and robbery with a firearm are felonies involving the use of or threat of violence to another person. The Defendant was convicted of the attempted murder, and armed robbery of Scott Yaguda.

(R 3357). In Knowles v. State, 18 Fla. L. Weekly S646 (Fla. Dec. 16, 1993), this Court recently reaffirmed that a contemporaneous conviction for murder can be used to establish the "prior violent felony" aggravating factor. Here, Appellant was convicted of murdering Sydney Granger and Wesley Anderson. Thus, the murder of one was properly used to establish this aggravating factor as to the other. See also Correll v. State, 523 So.2d 562, 568 (Fla. 1988), cert. denied, 488 U.S. 871 (1989).

In addition, this Court has previously held that "the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes." Pardo v. State, 563 So.2d 77, 80 (Fla. 1990), cert. denied, 114 L.Ed.2d 127 (1991).

Here, Appellant was also convicted of the attempted first-degree murder and armed robbery of Scott Yaguda. Thus, his convictions for those offenses can be used to establish this aggravating factor for the two murders.

ISSUE IX

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH DOES NOT REQUIRE A UNANIMOUS JURY RECOMMENDATION, IS CONSTITUTIONAL (Restated).

Prior to trial, Appellant moved to declare Florida's death penalty statute unconstitutional on the ground that it allows a jury recommendation that is not unanimous. (R 2711-16, para. 10). At a hearing on the motion, the trial court denied the motion. (T 237; R 3085-89). Appellant renews his constitutional challenge in this appeal, but fails to acknowledge that this Court has previously rejected this argument. See, e.g., Brown v. State, 565 So.2d 304, 308 (Fla. 1990); Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Fleming v. State, 374 So.2d 954, 957 (Fla. 1979); Alvord v. State, 322 So.2d 533, 536 (Fla. 1975). Based on these cases, Appellant's sentence should be affirmed.

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO STRIKE THE JURY PANEL (Restated).

Prior to trial, Appellant filed a motion for individual, sequestered voir dire and a supporting memorandum of law. (R 2738-40, 2717-20). At the hearing on the motion, the trial court denied Appellant's motion: "I really don't see [a] need for it." (T 256-60). During voir dire, the trial court seated Lane Roosa in the panel of prospective jurors and sought biographical information from him. Dr. Roosa indicated that he was a psychologist and was the Director of Psychological Services for the Broward County School District. When asked whether he would like to sit as a juror on this case, Dr. Roosa stated, "Like most people, I'd be willing to. It would be a hardship in terms of my department but if necessary I will." (T 558). In response, the trial court asked if there was any reason why he could not or should not sit as a juror on this case, and he responded,

> I can think of some instances where being a psychologist might not be appropriate in some cases. Not a problem for me but I'm a skeptic in terms of some of the associations that are attempted to be made between mental impairment and criminal behavior. So in a case where that might be an issue I could see it being a problem for one side or the other.

(T 558-59). At that point, the trial court stated,

> [I'll] tell you what. I don't know if it's an issue or it isn't. If the lawyers think it may be an issue I'll let them question you regarding that aspect of it privately so everybody doesn't get your professional opinions. How about that? Obviously, you are not a witness in the case. Regarding that aspect, if anybody wishes to question him about that we can do that privately during one of the recesses.

(T 559) (emphasis added).

During the State's questioning of the venire, it elicited only background material from Dr. Roosa. (T 561-64). Appellant, however, asked Dr. Roosa to explain his skepticism in front of the other prospective jurors:

> MR. BAILEY: Mr. Roosa, could you expound a little bit? You made a comment that you were skeptical on some of the psychological issues involving causation with criminal acts.
>
> MR. ROOSA: Yes.
>
> MR. BAILEY: Have you dealt much with that area?
>
> MR. ROOSA: I have occasion to generally deal with it through records. I have occasion to review records and sometimes help psychologists who are going into court to testify who have been subpoenaed to testify in cases.
>
> MR. BAILEY: Psychologists involved with the school board?
>
> MR. ROOSA: If we have seen students in the past and now they come to court for a variety of charges, we are often called to talk about that evaluation and what that might mean in terms of the current charges against the youngster, in terms of mental capacity.
>
> Someone may have had a low IQ score or something like that but that doesn't have anything to do with his ability to reason or make appropriate decisions. Emotional problems in the child's background; that type of thing. Sometimes they are adults by the time we are called to do that. So I'm very often involved in reviewing those records and helping them to prepare for what their contribution might be.
>
> MR. BAILEY: Why do you say you are skeptical?
>
> MR. ROOSA: Basically, because I've seen a number of instances where a case has been, people try to make a case for a connection

between a person's background, whether they were abused as a child, for example, and whether they should be held accountable for what they may have done right now and very seldom is there a solid connection in my experience.

I don't rule that out as a possibility but it's a low frequency occurrence. That's what I meant by skeptic.

MR. BAILEY: You have not testified in a criminal courtroom?

MR. ROOSA: No.

MR. BAILEY: How long have you held your present position?

MR. ROOSA: Since 1988. Three and a half years.

MR. BAILEY: Are you mostly an administrator now or are you seeing students as well?

MR. ROOSA: Mostly administrator and a supervisor who works with interns and psychologists in terms of their work. I don't see very many students. I'm also the records custodian. So that's why I end up dealing with a number of attorneys, either prosecutors or defense people who want records on students.

MR. BAILEY: Thank you, sir.

(T 730-32).

During a break in defense counsel's questioning, the trial court suggested that they question a couple of people privately. The State mentioned Dr. Roosa, and defense counsel agreed. (T 775). Thereafter, the parties questioned Dr. Roosa privately about his skepticism, and, upon defense counsel's motion, the trial court excused Dr. Roosa for cause. (T 799-805). The next day, Appellant personally moved to strike the panel based on Dr. Roosa's comments made while in the presence of the other venire

members. (T 857-58).[5] The trial court, however, did not "see where he's tainted anybody." It did not have "any indications that that would taint the jury in any way." (T 864). Therefore, it denied Appellant's motion. (T 865).

In this appeal, Appellant complains that the trial court erred in denying his motion to strike the panel. Impliedly, Appellant also challenges the trial court's denial of his motion for individual, sequestered voir dire. **Brief of Appellant** at 56. Whether to allow individual voir dire is solely within the trial court's discretion. Johnson v. State, 608 So.2d 4, 9 (Fla. 1992); Randolph v. State, 562 So.2d 331 (Fla. 1990), cert. denied, 112 L.Ed.2d 548 (1991); Jackson v. State, 498 So.2d 406, 409 (Fla. 1986), cert. denied, 483 U.S. 1010 (1987). Here, Appellant requested individual voir dire primarily for death qualifying the jury. In the trial court's experience, individual voir dire was not warranted on this basis. During voir dire, however, the trial court did, in fact, question jurors individually when necessary, e.g., about their knowledge of the case, or about potential biases. (T 323-83, 775, 798-809). Thus, upon a proper factual basis, the trial court was amenable to individual voir dire.

More importantly, when Dr. Roosa made the initial comment, the trial court specifically told the parties that they could question Dr. Roosa individually. Defense counsel decided, however, to question him about his skepticism in the presence of

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[5] Defense counsel joined in the motion although Appellant had just approached him about making such a motion and he had not had an opportunity to discuss the issue with Appellant. (T 858-59).

the other members. Thus, any prejudice was invited by the defense and should not be imputed to the State or the trial court. Pope v. State, 441 So.2d 1073 (Fla. 1983) ("A party may not invite error and then be heard to complain of that error on appeal.").

Regardless, the State maintains, as the trial court found, that Dr. Roosa's comments did not taint the venire. Consequently, Appellant has failed to show that the trial court abused its discretion in denying his motion to strike the venire. See Randolph, 562 So.2d at 337 (finding mistrial unwarranted where potential juror, who was ultimately excused for cause, commented that she had heard that the victim was "brutally murdered"); Stone v. State, 208 So.2d 676 (Fla. 3d DCA 1968) (finding no error in trial court's denial of motion to disqualify panel where comments by two jurors were not sufficiently prejudicial).

ISSUE XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EXCLUDE THE TESTIMONY OF A STATE WITNESS (Restated).

During the State's case-in-chief, defense counsel invoked the rule of sequestration. (T 1163). Later, during the cross-examination of Detective Hoffman, defense counsel asked the detective if his investigation revealed whether the bullet that killed Mr. Anderson went through one of the windows of the bus. Detective Hoffman testified that he learned from the medical examiner's office that the bullet that struck Mr. Anderson did not go through the window. (T 1752-53). Thereafter, defense counsel sought to impeach Detective Hoffman with his deposition testimony wherein the detective stated that his investigation led him to believe that the bullet that struck Mr. Anderson did go through the window first. Detective Hoffman explained, however, that after his deposition he learned of the medical examiner's contrary conclusion. (T 1753-56). When asked how recently he had learned of this conclusion, Detective Hoffman responded, "Within the past couple days." (T 1756).

At that point, defense counsel moved to exclude the witness' testimony, claiming that the State had violated the rule of sequestration. The State responded that it was allowed under the rule to speak to its witnesses individually before their testimony. Even though the medical examiner had already testified, both the prosecutor and the witness indicated that the medical examiner's testimony per se was not discussed. Rather, in light of the detective's deposition testimony, the State

informed the witness that the medical examiner had reached a different conclusion regarding the path of the bullet that struck Mr. Anderson. (T 1756-62). The trial court overruled the objection and denied the motion to strike the witness' testimony. (T 1762).

In this appeal, Appellant claims that the trial court abused its discretion in overruling his objection and denying his motion. **Brief of Appellant** at 57-58.[6] The State submits, however, that the rule of sequestration was not violated. "It is undisputed that an attorney may talk to a witness about the testimony the witness will give, and that the witness's credibility should not be challenged on the basis of the discussion." Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988) (allowing prosecutor and state witness to converse during middle of witness' cross-examination within judicial discretion). Here, the State confronted the lead investigator with the medical examiner's contrary conclusion that the bullet that struck Mr. Anderson did not go through the window. Although the medical examiner had already testified, the State's discussion was not based on his testimony per se, but rather his overall conclusion which had been reached prior to his testimony. Importantly, Detective Hoffman did not change his testimony. Rather, when defense counsel asked the detective whether he was able to

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[6] The State would merely note for the record that Appellant's penalty-phase expert witness sat through the testimony of Appellant's other penalty-phase witnesses and, in fact, admittedly spoke to them the night before their testimony even though Appellant had invoked the rule, but had not sought an exception for this witness. (T 2376-77).

determine whether the shot that killed Mr. Anderson came through the glass, the following colloquy occurred:

> A [By Detective Hoffman] My determination or what I found out from the Medical Examiner's Office?
>
> Q [By defense counsel] Did you find out from the Medical Examiner's Office whether the bullet went through the glass?
>
> A That it didn't go through the glass.
>
> Q It did not?
>
> A Didn't go through any other object, no.
>
> * * * *
>
> Q Do you recall giving a different answer than that, sir, in your deposition?
>
> * * * *
>
> A Yes.
>
> * * * *
>
> Q Do you know whether there was a determination that the bullet that struck Mr. Anderson went through the glass first?
>
> A I since learned that after that deposition.
>
> Q That it did not?
>
> A Correct.
>
> Q As of March, 1991 your conclusion was that it had?
>
> A I speculated that it had gone through the class; correct.
>
> Q What do you mean by speculated?
>
> A Based on where Mr. Anderson was seated on the bus and the proximity of the projectile hole through the glass I assumed that was the bullet that Mr. Anderson was struck with.

* * * *

> Q Were you just giving me speculation and assumptions in answer to my questions, sir?
>
> A I was giving you through my investigation what I assumed. Like you asked me the questions as to the position of the body; who was shot first. That was speculation based on my investigation. This I subsequently learned from the Medical Examiner's Office that the bullet that struck Mr. Anderson did not go through any portion of the bus prior to striking him.

(T 1753-56).

Even assuming arguendo that the State's discussion with Detective Hoffman was in violation of the rule, the test to determine whether exclusion of a witness' testimony is warranted is "whether the testimony of the challenged witness was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been had he not heard testimony in violation of the rule." Steinhorst v. State, 412 So.2d 332, 335-36 (Fla. 1982). However, "the rule must not be enforced in such a manner that it produces injustice." Wright v. State, 473 So.2d 1277, 1280 (Fla. 1985).

> Just as the defendant has the constitutional right to present witnesses in his behalf, the people of the state, acting through the state attorney, have the inherent sovereign prerogative to present evidence of the defendant's criminal conduct. It is the duty of the state attorney to carry out this prerogative of the people. Just as a defense witness . . . *should not be excluded* without inquiry into whether the rule violation occurred with the knowledge or by the connivance of the defendant or defense counsel, so also should a state witness who has violated the rule not be excluded without similar inquiry.

Steinhorst, 412 So.2d at 336.

Here, the trial court inquired into the circumstances of the alleged violation (T 1757-62) and implicitly determined that it was not a willful violation. Moreover, as the above excerpts reveal, Detective Hoffman acknowledged his prior deposition testimony, but clarified that he had since learned new information. He was never asked whether he agreed with the medical examiner's conclusion or had adopted it as his own. He was merely asked what information he possessed. Thus, it cannot be said that his testimony was unduly influenced by the prosecutor's discussion with him regarding the medical examiner's testimony. In other words, Appellant suffered no prejudice in his ability to confront and cross-examine the witness against him. Consequently, exclusion of the witness' testimony, which is an unduly harsh remedy, was not warranted. See Spencer v. State, 133 So.2d 729, 731 (Fla. 1961) ("The burden is on the complaining party to demonstrate an abuse of discretion with resultant injury. In the instant case, we fail to find that the trial judge abused his discretion and there is no indication that the presence of the two officers in the court room during the trial resulted in harm to the appellant."); Zamora v. State, 361 So.2d 776, 781-82 (Fla. 3d DCA 1978) ("In that appellant has failed to demonstrate actual prejudice to his case, we find no abuse of the trial judge's discretion in refusing to impose sanctions, in the form of a new trial."), cert. denied, 372 So.2d 472 (Fla. 1979); Acevedo v. State, 547 So.2d 296, 297 (Fla. 3d DCA 1989) (finding sequestration rule violation harmless where circumstances surrounding violation were brought out on cross-examination).

However, even were the witness' testimony stricken, there is no reasonable possibility that the verdict would have been different. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The most important aspect of Detective Hoffman's testimony was the fact that Roseanne Bethea had identified Appellant from a photo spread as the person who shot Granger and Anderson. (T 1741-45). Roseanne Bethea had already testified to this fact. (T 1627-29). Thus, the detective's testimony was cumulative. In light of the other substantial evidence of Appellant's guilt, any error in refusing to strike Detective Hoffman's testimony was harmless beyond a reasonable doubt. Consequently, this Court should affirm Appellant's conviction.

ISSUE XII

WHETHER THE TRIAL COURT FAILED TO MAKE THE REQUIRED FINDINGS WHEN THE STATE ALLEGEDLY FAILED TO COMPLY WITH THE TEN-DAY NOTICE REQUIREMENT OF SECTION 90.404(2)(b) OF THE FLORIDA STATUTES (Restated).

On November 26, 1991, the State filed its notice of intent to rely on collateral crime evidence. (R 3091). On January 22, 1992--almost two months after the State's notice, and eight days after the trial had begun--Appellant filed a "Motion in Limine to Prohibit Introduction of Evidence of Other Crimes, Bad Character."[7] As grounds for the motion, Appellant alleged that (1) the State's notice was fatally deficient, in that it failed to allege with sufficient specificity the essential facts or offenses it intended to offer, and (2) such evidence was highly prejudicial and would render his trial fundamentally unfair. (R 3175-82). After several discussions regarding the motion (T 932-37, 949-63), the trial court denied Appellant's motion in limine:

> Regarding the motion in limine filed by the defense to prohibit introduction of evidence of other crimes and bad character relating to the incident which occurred in the State of Nebraska during the capture of Mr. Besaraba, the Court finds that the circumstances of the defendant's capture in Nebraska are admissible under 90.402, which is the relevan[ce] section of the Florida Evidence Code.

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[7] Defense counsel purposefully waited until the jury was about to be sworn in before filing the motion because "if the issue is taken up before the jury is sworn the State has the opportunity to then to go remedy the problem which is, you know, which takes the motion away from the defense. It's not - I'm not doing my client any service by giving the State notice on how to do their job." (T 933). In other words, defense counsel was trying to sandbag the State and create a "gotcha" by waiting until double jeopardy attached.

> The Court finds that those, the capture and the incident of the capture is relevant to all the issues in this case. The flight and capture of the defendant are part of the same criminal episode. The evidence of the uncharged offenses - what I mean is the Nebraska offenses - [a]rises out of the same transactions, the charged offenses.
>
> The Court finds the evidence is inseparable. It's not extrinsic. It establishes an entire context of a criminal episode which began in Hollywood, Florida, on January [sic] 23, 1989, and ended with his capture three days later, some, I believe, 19 hundred miles away in the State of Nebraska. In effect, it's part of the res gestae of the entire crime.
>
> I find in addition to being relevant that the probative value of the evidence of the defendant's flight and the capture outweighs any prejudice that it may have to the defendant.

(T 1185-86).

Following the court's ruling, defense counsel questioned the sufficiency of the notice. (T 1186). The trial court found the notice insufficiently specific, but found that no notice was required under section 90.402, which was the basis for his ruling. After much discussion, the trial court also indicated that the evidence was alternatively admissible under § 90.404(2)(a), but since the basis for his ruling was § 90.402, it did not make findings of fact regarding the effect of the deficient notice. (T 1186-1203). The trial court did, however, offer to give the jury a cautionary instruction on the limited purpose for which the evidence of Appellant's flight and subsequent arrest would be introduced. (T 1203-05). Defense counsel requested the cautionary instruction (T 1203-05), and one was later given when each of the three witnesses testified and again during the final charge. (T 1427, 1437, 1515-16, 2088-89).

In this appeal, Appellant complains that the trial court erred in finding the evidence of flight and arrest inseparable from the charged offenses, and thus admissible under § 90.402. Rather, according to Appellant, the evidence was admissible only under § 90.404(2)(a), which requires specific notice of the alleged acts sought to be introduced. As a result, since the trial court found that the State's notice was deficient, Appellant argues that the trial court reversibly erred in failing to make the required findings of fact regarding the nature of the State's violation and the resulting prejudice to Appellant. **Brief of Appellant** at 58-60.

The State submits here, as it did below, that Appellant's arrest three days later, which resulted in the recovery of Scott Yaguda's car and the murder weapon, was part of the entire criminal episode that began on July 23 and ended on July 26. This Court and others around the state have allowed the admission of evidence of other crimes when the other crimes are "inextricably intertwined" with the charged offense. See, e.g., Jackson v. State, 522 So.2d 802 (Fla. 1988), cert. denied, 488 U.S. 871 (1989); Henry v. State, 574 So.2d 66, 70-71 (Fla. 1991); Austin v. State, 500 So.2d 262 (Fla. 1st DCA 1986), rev. denied, 508 So.2d 13 (Fla. 1987); Garcia v. State, 521 So.2d 191 (Fla. 1st DCA 1988); Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA), rev. denied, 496 So.2d 144 (Fla. 1986); Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), rev. denied, 576 So.2d 286 (Fla. 1991). Thus, evidence of Appellant's arrest was admissible under § 90.402 to establish the entire context out of which the criminal conduct arose.

Appellant killed Sydney Granger and Wesley Anderson on July 23, 1989, at approximately 1:30 p.m. Immediately after shooting them, he stole Scott Yaguda's car after shooting him three times in the back. Approximately fifty-nine hours later, on July 26, 1989, at approximately 12:30 a.m., Appellant was found sleeping in the back seat of Scott Yaguda's car on the side of the road in Brule, Nebraska, nineteen hundred miles from Fort Lauderdale. As the police attempted to handcuff him, he dove back into the car and grabbed the gun he had used to kill Granger and Anderson and paralyze Yaguda, in an attempt to escape capture and prosecution. These facts were part and parcel of the entire criminal episode. "This evidence is not admitted because it shows the commission of other crimes or because it bears on character, but rather because it is a relevant and inseparable part of the act which is in issue." Ehrhardt, Florida Evidence § 404.17 (1993 Edition). As such, it was properly admitted under 90.402, which does not require compliance with the ten-day notice provision. Id. See also Erickson, 565 So.2d at 333 ("[T]he state need not comply with the ten-day notice provision of section 90.404(2)(b) as a prerequisite to offering inseparable crime evidence."); Byrd v. State, 503 So.2d 451 (Fla. 5th DCA 1987) ("Evidence of violence occurring after a completed robbery, when the victim attempts to retake his property or to apprehend the defendant, while not relevant of the proof of the elements of the robbery charge itself . . . may, nevertheless, in a case such as this one, be admissible as part of the res gestae, as evidence of the intent of the defendant, as evidence of absence of mistake, as evidence of flight, or as evidence relevant to some other material factual

issue, such as the victim's opportunity to see and to identify the defendant as the perpetrator. All evidence tending to prove or disprove any material fact is admissible if not excluded by law.").

Even were this evidence improperly admitted under § 90.402, however, there is no question that this evidence could have been admitted under § 90.404(2)(b). See Straight v. State, 397 So.2d 903, 908 (Fla. 1981) (holding that evidence of the defendant's flight from and attempted murder of officers in California who were trying to arrest him for a murder in Florida relevant to an issue of material fact, i.e., to show consciousness of guilt); Bundy v. State, 471 So.2d 9, 21 (Fla. 1985) (holding that evidence of defendant's flight from officers six days after victim's disappearance was properly admitted as circumstantial evidence of guilt); State v. Escobar, 570 So.2d 1343 (Fla. 3d DCA 1990) (holding that evidence of defendants' shoot-out with police in another state one month after murder was admissible to establish defendants' consciousness of guilt). Although, the trial court found that the State's notice pursuant to § 90.404(2)(b) was deficient, in that it did not state with sufficient specificity the essential facts or offenses it intended to offer (T 1186), the trial court nevertheless conducted a Richardson hearing, and the State sufficiently established that Appellant would suffer no prejudice by the admission of the evidence. (T 1186-1203). As noted, the State's notice clearly related to Appellant's apprehension in Brule, Nebraska. Prior to the State's notice, the parties conducted a hearing on Appellant's motion to suppress physical evidence and

statements obtained as a result of that apprehension. (T 139-211). In addition, defense counsel deposed all of the officers involved in Appellant's apprehension. Thus, the defense was well aware of the facts surrounding his arrest.

Although the trial court did not make specific findings on the record because it had decided to admit the evidence under § 90.402, it nevertheless found that the evidence was also admissible under § 90.404(2)(b): "It seems to me it is admissible under 404." (T 1203). Implicitly, it had determined that Appellant would suffer no prejudice from the State's deficient notice. Out of an abundance of caution, it agreed to give a cautionary instruction prior to the admission of the evidence. Such an instruction was, in fact, given prior to or during the testimony of the three applicable State witnesses, and was given again during the final instructions to the jury. (T 1427, 1437, 1515-16, 2088-89).

Appellant cites to several cases claiming that the trial court's "[f]ailure to make the required findings involving the prosecutor's violation of the notice requirement is per se reversible error." **Brief of Appellant** at 60. These cases, however, establish a rule of per se reversal where the trial court fails to conduct any inquiry. Here, the trial court conducted an extensive inquiry. However, "[t]he court's failure to call the inquiry a 'Richardson' hearing or to make formal findings concerning each of the pertinent Richardson considerations does not constitute reversible error." Wilkerson v. State, 461 So.2d 1376, 1379 (Fla. 1st DCA 1985). The findings are implicit in the trial court's discussion with the parties and

its ultimate conclusion to admit the evidence along with cautionary instructions. Consequently, reversal is not warranted.[8] See Miller v. State, 19 Fla. Law Weekly D396 (Fla. 3d DCA Feb. 22, 1994).

[8] Because the propriety of the admission of the evidence is addressed in a separate issue, the State will rely on its arguments therein, including its argument based on harmless error.

ISSUE XIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING A STATE WITNESS TO TESTIFY IN PERSON EVEN THOUGH THE PARTIES HAD PERPETUATED HIS TESTIMONY FOR TRIAL (Restated).

Prior to trial, on December 10, 1991, the State and the defense agreed to perpetuate the testimony of Scott Yaguda, the victim of the attempted first-degree murder charge, because he lived in Virginia, was confined to a wheelchair, and would be unable to appear for trial.[9] During the trial, on January 27, 1992, defense counsel filed a motion in limine, seeking to exclude the live, in-court testimony of Mr. Yaguda, who had ultimately been able to appear in person. (R 3253-58). In his motion and at the hearings on the motion, defense counsel claimed that he was prejudiced by the witness' appearance because (1) Mr. Yaguda's appearance at trial in a wheelchair would engender sympathy from the jury, (2) he was not able to soften the effect on the jury during opening statements, and (3) the State was able to gain a tactical advantage by having previewed Appellant's cross-examination of Mr. Yaguda through the deposition. Thus, the agreement between the parties should be enforced by the trial court, i.e., only the deposition should be admitted during the trial. (R 2353-58; T 1268-84, 1349-62, 1365-77).

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[9] There is no written agreement or stipulation in the record on appeal. The only evidence of the nature of the agreement is as stated by the prosecutor and defense counsel at the hearing on Appellant's motion in limine to exclude the in-court testimony of Mr. Yaguda, and in the motion itself. (R 3253-58; T 1268-84, 1349-62, 1365-81).

To support his contention that the State had entered into a binding stipulation that precluded its use of Mr. Yaguda's live testimony under any circumstances, Appellant relied upon the following comments made by the State just prior to Mr. Yaguda's deposition:

> Before we get started with the questioning of Mr. Yaguda, I would just to -- make a few statements for the record. The attorneys in the case, myself and Mr. Bailey, have agreed to perpetuate or to allow Mr. Yaguda to testify in this case by virtue of this video taped sworn statement. The statement will be presented in court at the time of the trial and it will be used as testimony at the time of the trial.

(R 3253-54). The prosecutor responded at the hearing, however, that he sought this agreement with defense counsel because he was reasonably certain that Mr. Yaguda would be unavailable for trial and because he did not want to make the formal motions that were necessary to perpetuate his testimony. In other words, the agreement was merely to waive the procedural requirements for perpetuating testimony. Since Mr. Yaguda was ultimately able to appear for trial, the rule authorizing perpetuated testimony prohibited its introduction if the witness' attendance could be procured.

In addition, the prosecutor argued that presenting his live testimony in no way prejudiced Appellant. The fact that Mr. Yaguda was confined to a wheelchair because of Appellant's actions was going to be presented in his testimony regardless. Moreover, the videotaped deposition showed him in a wheelchair. As for opening statements, the prosecutor asserted that they were not intended for Appellant's stated purpose. Defense counsel had

discussed Mr. Yaguda's handicap during voir dire and could discuss the issue of sympathy during closing argument. Likewise, the State's knowledge of Appellant's cross-examination did not provide any unfair tactical advantage. (T 1268-84, 1349-62, 1365-77).

Ultimately, the trial court denied Appellant's motion in limine, citing to Florida Rule of Criminal Procedure 3.190(j)(6), which prohibits the use of a deposition perpetuated for trial if the attendance of the witness can be procured. In addition, it found that Appellant was not prejudiced by the sudden change of events. Having read the transcript of the videotaped deposition, the trial court found defense counsel's cross-examination "very basic." There was nothing unusual or out of the ordinary which would benefit the State. As for the effect of Mr. Yaguda's appearance in a wheelchair, the trial court noted that defense counsel could discuss the issue of sympathy in closing argument. In addition, the trial court offered to give a cautionary instruction prior to Mr. Yaguda's testimony to the effect that sympathy should not play a role in their deliberations. While not waiving his objection, defense counsel requested such an instruction, and one was in fact given to the jury. (T 1377-81, 1408-09).

In this appeal, Appellant renews his argument that the State should have been forced to abide by the agreement, regardless of the express language of Rule 3.190(j)(6). The State submits, however, that the agreement was based on the good faith belief that the victim was "unavailable" as defined by Rule 3.190(j). The rule provides that a witness' testimony can be

perpetuated if it is shown that "a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition to prevent a failure of justice." Rule 3.190(j)(1). Here, the victim resided in Virginia, beyond the territorial jurisdiction of the court, and his testimony was material and necessary. Thus, the State sought an agreement by the defense in order to bypass the formal pleading requirements of seeking leave of court to perpetuate his testimony.

When the witness ultimately decided to appear in person, the State determined that its right and obligation was to present the victim's live testimony. Mr. Yaguda was the victim, not merely a witness, and the State had the burden of proving the charges against Appellant beyond a reasonable doubt. Moreover,

> [t]here is a clear constitutional preference for in-court confrontation of witnesses. U.S. Const. amend. VI; Ohio v. Roberts, 448 U.S. 56, 65, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597, 607 (1978); Art. I, § 16, Fla. Const.; State v. Dolen, 390 So.2d 407 (Fla. 5th DCA 1980). The purpose of the confrontation clause is to afford an accused the fundamental right to compel a witness 'to stand face to face with the jury [or trier of fact] in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'

Palmieri v. State, 411 So.2d 985, 986 (Fla. 3d DCA 1982) (quoting Barber v. Page, 390 U.S. 719, 721 (1968)). Finally, Rule 3.190(j)(6) clearly prohibits admission of the deposition where the witness' appearance can be procured.

Although the State's burden of proving "unavailability" prior to the deposition's admission can be waived by agreement of the parties, McMillon v. State, 552 So.2d 1183, 1184 (Fla. 4th DCA 1989), there was no express agreement between the State and the defense that Mr. Yaguda would be prohibited from testifying in person if he chose to do so. Rather, the agreement to use the deposition at trial was based on the underlying premise that Mr. Yaguda was not going to be there. When the premise proved false, the State and the trial court had an obligation to present Mr. Yaguda's live testimony.

By doing so, however, Appellant suffered no manifest injustice. As the trial court found, there was no tactical advantage to the State in previewing defense counsel's cross-examination where the questions were "very basic" and not unusual. In addition, any prejudice suffered by Appellant based on his inability to temper the effect of the victim's handicap during opening statements could have been cured by defense counsel's statements in closing argument and a cautionary instruction by the court.[10] Moreover, regardless of whether Mr. Yaguda testified by deposition or in person, the jury was going to learn that he was paralyzed and confined to a wheelchair for the rest of his life as a result of Appellant's actions. Thus, Appellant suffered no irreparable harm by the victim's personal appearance. See State v. DiGuilio, 429 So.2d 1129 (Fla. 1986). Consequently, this Court should affirm Appellant's convictions.

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[10] Although defense counsel chose not to discuss this issue, the trial court did, in fact, give the requested instruction. (T 1408-09).

ISSUE XIV

WHETHER THE STATE COMMITTED FUNDAMENTAL ERROR DURING ITS GUILT-PHASE CLOSING ARGUMENT (Restated).

In this appeal, Appellant cites to four instances in the record where the State allegedly made improper comments during its guilt-phase closing arguments. **Brief of Appellant** at 62-64. In the first instance, Appellant complains of the following remarks:

> Members of the jury, you look at the instructions. You are not going to see anywhere in that instruction [that] death has to be logical. Is the point of the evidence to prove that death occurred logically? Death has no logic. You know that. You [have] lived long enough. Death has no logic. This is random, he says. Random, yes. Could have happened to another bus driver. Another bus driver who may have had the same confrontation with Mr. Besaraba. Picked him out. That was random.

(T 1972-73) (emphasis added). When the State made these comments, defense counsel made the following objection and motion:

> Mr. Morton just argued it could have happened to another bus driver who had another confrontation with Mr. Besaraba. He is in effect telling this jury if they don't put him away for this bus driver we are going to end up with another dead bus driver. I object and move for mistrial.

(T 1973).

Initially, the State submits that Appellant failed to properly preserve this issue for review. "The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." Duest v. State, 462 So.2d 446, 448 (Fla. 1985). See

also Palmer v. State, 486 So.2d 22 (Fla. 1st DCA 1986) ("Generally, both a motion to strike the allegedly improper [comments] as well as a request for the trial court to instruct the jury to disregard the [comments] are thought to be necessary prerequisites to a motion for mistrial."). Here, Appellant failed to satisfy his burden. Although he raised a timely objection, he made no request for a curative instruction before seeking the harshest of remedies. Regardless, it is clear from the context of the State's argument that the comments were in direct response to Appellant's preceding argument and did not convey the message ascribed to them by defense counsel. They were, rather, legitimate comments on the evidence. See Breedlove v. State, 413 So.2d 1 (Fla. 1982).

In the second instance, Appellant renews his complaint about the State's use of hypotheticals to explain the difference between first-degree and second-degree murder. **Brief of Appellant** at 62-63. Again, since the State was seeking convictions for first-degree premeditated murder, and the defense was seeking convictions for second-degree murder, explaining the distinction between the two was proper comment on the evidence. See Breedlove.

In the third instance, Appellant complains that the State improperly "bolster[ed] its case by stating that it could have produced other or additional witnesses." **Brief of Appellant** at 63. During its closing argument, defense counsel commented:

> Remember what I said when [Detective] Doyle was on the stand, the lead detective on the case? Mr. Morton, will he be back? Remember his answer? Yes. He will be back as a witness. Never came back. The reason

why he never came back is because the Hollywood police had to go back to what they threw out, unravel it and sell it as a motive.

(T 1992). In response, the State made the following comments:

That kind of attack upon the prosecution and upon the police: The lead detective didn't do this and he didn't call this detective back as if you are trying to hide something.

I called Sergeant Hoffman. He's another lead detective who worked with Doyle and everything for the purpose, for the specific purpose of what was wrong. I could have called the lead detective and rehashed everything in this case. You have heard all of that. That would be redundant going through all of that.

* * * *

There are certain things you have to prove. You don't have to put on everybody. I could have called Doyle back to say the same thing. Hoffman could say the same thing. The purpose was to call the lead detective back for the identification and they both participated in that and instead of calling Doyle I called Hoffman. He was available. There's no diabolical attempt to try to confuse you and that kind of attack even on Hoffman and the story is this and then changes. It's clear from his statement the determination was made.

(T 2027-28). Defense counsel made no objection. Thus, he has failed to preserve this issue for review. Duest. Regardless, the State was clearly responding to defense counsel's comments. When viewed in context, they were proper comments and did not, as Appellant contends, intimate that the State had other witnesses. Breedlove.

Finally, Appellant complains that the State made personal attacks on defense counsel and the theory of defense. **Brief of Appellant** at 63-64. In one instance, the State made the following comments:

> The only concerns I have is that you do not make this trial between lawyers or anything that you may have seen that I did that you didn't like or Mr. Bailey did that you didn't like or even liked. Because your oath is not to try the lawyers. Your oath is to try this case, the issues between the State of Florida and Mr. Joseph Besaraba according to the law and the evidence.
>
> One thing you can't do in a case such as this nature, no matter who you are, no matter what a great orator you are. No matter how glib you are. No matter how smooth you are. No matter how sharp you are. One thing you can't do. You can't change the facts. You may talk about them. Interpret them differently. Try to interpret them differently. The bottom line is you can't change the facts. Mr. Bailey can't pull a rabbit out of a hat for you. Mr. Bailey can't make 12 reasonable people who see black say that it's white or who see white say that it's black. Neither can I.

(T 1948). Again, Appellant raised no objection; thus, he has failed to preserve this issue for review. Duest. In any event, these were not disparaging remarks about defense counsel. The prosecutor obviously included himself in the analysis. Thus, they were not improper. See Breedlove.

The second instance involves comments relating to defense counsel's attempt to impeach Detective Hoffman regarding his initial conclusion that the bullet that killed Mr. Anderson went through the bus window first:

> Speculating that he believes that the bullet went through a window, so forth and so on. That kind of attack is like a defense where you simply just muddy the waters. You are being attacked, so muddy the waters, spread out dark ink, just hope you can escape and get away.

(T 2028). Once again, Appellant failed to raise an objection. Duest. Regardless, the State's comments were not improper. See Breedlove.

In sum, Appellant's failure to object to most of these comments precludes review of them. Even if he had objected to them, however, the State committed no error. All of the remarks were proper comments on the evidence. Even were they not, they were harmless beyond a reasonable doubt. See State v. Murray, 443 So.2d 955 (Fla. 1984). In light of the quality and quantity of permissible evidence upon which the jury could have relied to reach its verdicts, there is no reasonable possibility that the State's comments, if improper, affected the jury's verdicts. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, Appellant's conviction should be affirmed.

ISSUE XV

WHETHER THE STATE COMMITTED FUNDAMENTAL ERROR DURING ITS PENALTY-PHASE CLOSING ARGUMENT (Restated).

In this appeal, Appellant points to three instances during the State's closing argument during the penalty phase proceeding that he alleges were improper. **Brief of Appellant** at 64-66. None of these comments were objected to by defense counsel below; thus, none of them have been preserved for review. Henry v. State, 586 So.2d 1033, 1036 (Fla. 1991). Contrary to Appellant's contention, they do not, either singularly or together, constitute fundamental error.

In the first two instances, the State was trying to explain to the jury the purpose of the penalty phase and how it differed from the guilt phase. Specifically, the State was informing the jury that it could consider not only Appellant's rights but also the rights of the people to ensure that justice is done and that the punishment fits the crime. The State was beseeching the jury to impose the maximum sentence for what it considered to be a crime worthy of the death penalty. (T 2443, 2469). These comments were not improper. See Breedlove v. State, 413 So.2d 1, (Fla. 1982).

In the third instance, the State was responding to defense counsel's inevitable argument that Appellant be allowed to die in prison:

> In spite of that kind of aggravating conduct essentially that argument boils down to we will now give him a comfortable life. Let him die perhaps in prison. Something he denied Sydney Granger and Wesley Anderson. They didn't have the opportunity to die comfortably.

(T 2458). While the State's reference to the victims was perhaps inappropriate, it does not constitute fundamental error. See Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992); Davis v. State, 604 So.2d 794, 797 (Fla. 1992); Hodges v. State, 595 So.2d 929, 934 (Fla. 1992), vacated on other grounds, 121 L.Ed.2d 6 (1993). Based on the quality and quantity of evidence in aggravation and the dearth of evidence in mitigation, there is no reasonable possibility that the recommendation or sentence would have been different absent this isolated comment, which was not even deemed appropriate for objection at the time it was made.

In sum, the State's comments, either singularly or in combination, either were not improper, or, if improper, were harmless beyond a reasonable doubt. See Bertolotti v. State, 476 So.2d 130 (Fla. 1985) ("In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial."); Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 480 U.S. 951 (1987). Thus, Appellant's sentences of death should be affirmed.

ISSUE XVI

WHETHER THE STATE PRESENTED EVIDENCE WHICH CONSTITUTED NONSTATUTORY AGGRAVATING EVIDENCE (Restated).

During the initial penalty-phase charge conference, defense counsel made a motion in limine to preclude the State from arguing "the circumstances surrounding the arrest in Nebraska as they apply to any aggravating facts or mitigating facts." (T 2221). The State responded that such evidence was relevant to prove the CCP aggravating factor and to rebut mitigating evidence. (T 2221-23). The trial court agreed and denied defense counsel's motion. (T 2223-24).

In this appeal, Appellant claims that the State's argument relating to Appellant's apprehension in Nebraska constituted nonstatutory aggravating evidence. **Brief of Appellant** at 66-67. In fact, the State's argument relates directly to rebutting a mitigating factor:

> Obviously, this man appreciated and knew the nature of his conduct, his crime. He knew what he had done. He knew it was wrong. He jumped in that car and he escaped and when he was caught in Nebraska he did whatever he could even if it meant attempting to resort to more violence to get away. He certainly had an appreciation of his criminal conduct and the ability to conform regardless of what you heard and what anyone tells you as to his homeless situation if you look at the facts and the circumstances.

(T 2451-52). Clearly, these comments do not suggest a nonstatutory aggravating factor. Rather, they specifically rebut one of the mental mitigating factors and were properly allowed. See Valle v. State, 581 So.2d 40, 47 (Fla. 1991) ("The state may properly argue that the defense has failed to establish a mitigating factor.").

Even if they were improper, however, in light of the strong evidence in aggravation and the minimal evidence in mitigation, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different absent the State's remarks. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, Appellant's sentence of death should be affirmed.

ISSUE XVII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL REQUESTED INSTRUCTION ON PREMEDITATED MURDER (Restated).

Prior to trial, Appellant filed a written special instruction on premeditated murder, which the trial court rejected at a hearing prior to jury selection and again at an early charge conference. (R 3190-91; T 287-90, 1854). Appellant filed an amended instruction the following day (R 3192-93), which was also denied (T 1873-79). The standard instruction was read to the jury. (T 2054, 2059).

In this appeal, Appellant renews his objection to the standard instruction, claiming that the instruction "impermissibly relieves the state of the burdens of persuasion and proof as to an element of first degree murder." **Brief of Appellant** at 67-72. To support his argument, Appellant relies principally on McCutchen v. State, 96 So.2d 152 (Fla. 1957), wherein this Court defined the phrase "premeditated design." Since 1957, however, this Court has adopted and revised the standard jury instructions in criminal cases numerous times. To a great extent, Appellant's proposed instruction mirrors the standard instruction on first-degree murder as amended in 1976.

In 1977, this Court requested the Supreme Court Committee on Standard Jury Instructions in Criminal Cases to revise the instructions. These revisions, which were adopted by this Court in 1981, resulted in an instruction that has remained unchanged to this date. See In re Jury Instr. in Crim. Cases, 431 So.2d 594 (Fla. 1981). As the instruction reads now, the defendant

must "consciously decid[e]" to kill, and "[t]he premeditated intent to kill must be formed before the killing." **Fla. Stand. Jury Instr. in Crim. Cases** 63 (Oct. 1981). This is a correct statement of the law. Thus, the trial court did not abuse its discretion in rejecting Appellant's modifications. See Parker v. State, 456 So.2d 436, 444 (Fla. 1984) ("[T]he requested instructions were encompassed within the standard jury instructions which were properly given."). Consequently, Appellant's convictions should be affirmed.

ISSUE XVIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL REQUESTED INSTRUCTION ON REASONABLE DOUBT (Restated).

Prior to trial, Appellant filed a written special instruction on reasonable doubt and a memorandum of law supporting his request, which the trial court rejected at a hearing prior to jury selection, again during the trial, and again at a charge conference. (R 3107-14, SRII 28-29; T 287-90, 1185, 1915-16). The standard instruction was read to the jury. (T 2082-83).

In this appeal, Appellant renews his claim that the standard instruction is unconstitutional. **Brief of Appellant** at 72-74. In Woods v. State, however, the Fourth District recently rejected an identical claim:

> Nothing in the Cage opinion . . . causes us to question a reasonable juror's ability to properly interpret the Florida instruction as requiring that the jury find the defendant not guilty if there is a reasonable doubt as to guilt. Nor does Cage place in doubt the effort in the Florida instruction to assist a juror in evaluating the circumstances in which a doubt may not be reasonable. We also note that just prior to the U.S. Supreme Court opinion in Cage, Florida's reasonable doubt instruction was again examined and upheld by the Florida Supreme Court in Brown v. State, 565 So.2d 304 (Fla.), cert. denied, ___ U.S. ___, 111 S.Ct. 537, 112 L.Ed. 547 (1990).

596 So.2d 156, 158 (Fla. 4th DCA 1992), rev. denied, 599 So.2d 1281 (Fla. 1992), cert. denied, 113 S.Ct. 256 (1993). As noted in Woods, this Court recently rejected a challenge to the "reasonable doubt" instruction in Brown: "According to Brown the standard instruction dilutes the quantum of proof required to

meet the reasonable doubt standard. We disagree. This Court has previously approved use of this standard instruction. The standard instruction, when read in its totality, adequately defines 'reasonable doubt,' and we find no merit to this point." Brown, 565 So.2d at 307. Thus, based on Brown, which Appellant fails to acknowledge, and Woods, the trial court did not abuse its discretion in giving the standard reasonable doubt instruction over Appellant's revised instruction. Consequently, Appellant's convictions should be affirmed.

ISSUE XIX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL REQUESTED INSTRUCTION THAT IF A MITIGATING CIRCUMSTANCE IS FOUND IT CANNOT BE GIVEN NO WEIGHT (Restated).

During the penalty-phase charge conference, Appellant requested the following special instruction:

> You must consider all evidence of mitigation. The weight which you give to a particular mitigating circumstance is a matter for your moral, factual, and legal judgement. However, you may not refuse to consider any evidence of mitigation and thereby give it no weight.

(SR 90; T 2174). The trial court denied the request, finding it a misstatement of the law. Appellant renews his claim here. **Brief of Appellant** at 74-76.

The standard instructions provide in pertinent part:

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> Among the mitigating circumstances you **may** consider if established by the evidence are . . . .
>
> * * * *
>
> And you also **can** consider any other aspect of the defendant's character or his background or any other circumstances of the offense.
>
> * * * *
>
> A mitigating circumstance need not be proved beyond a reasonable doubt by the defense. If you are reasonably convinced that a mitigating circumstance exists, you **may** consider it as established.

(T 2497-98). Clearly, if the jury is not reasonably convinced that a mitigating circumstance has been established, it does not have to consider it. Thus, the trial court properly rejected Appellant's instruction which was not a correct statement of the law. See Carron v. State, 414 So.2d 288, 291 (Fla. 1982) ("It is not error to refuse to give an instruction which is an incorrect statement of the law."), approved, 427 So.2d 192 (Fla. 1983).

ISSUE XX

WHETHER THE TRIAL COURT PROPERLY DEFINED NONSTATUTORY MITIGATING CIRCUMSTANCES (Restated).

During the penalty-phase charge conference, Appellant requested that the trial court instruct the jury on each individual nonstatutory mitigating circumstance. (SR 91; T 2179). The trial court declined to do so, and Appellant takes issue therewith. **Brief of Appellant** at 76-79. This Court has previously held several times, however, that the catch-all instruction is sufficient. See, e.g., Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992) ("Finally, the standard jury instruction on nonstatutory mitigators is sufficient, and there is no need to give separate instructions on individual items of nonstatutory mitigation."); Robinson v. State, 574 So.2d 108 (Fla. 1991); Randolph v. State, 562 So.2d 331 (Fla.), cert. denied, 498 U.S. 992 (1990). Thus, the trial court did not abuse its discretion in rejecting Appellant's requested instructions. Consequently, this Court should affirm Appellant's sentences of death.

ISSUE XXI

WHETHER THE JURY INSTRUCTION FOR THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IS UNCONSTITUTIONALLY VAGUE (Restated).

During the penalty-phase charge conference, Appellant submitted the following special instruction on the cold, calculated, and premeditated aggravating factor:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> In considering the aggravating factor of cold, calculated and premeditated, you are instructed that simple premeditation does not qualify under this circumstance. This aggravating circumstance requires proof of premeditation in a heightened degree, a degree higher than that required for premeditation necessary to convict for first degree murder.
>
> Cold means totally without emotion or passion.
>
> Calculated means a careful plan or prearranged design.

(SR 87). Although there was relatively no discussion regarding this instruction, Appellant's special requested instruction was given to the jury. (T 2496-97). Nevertheless, he complains on appeal that "[t]he instruction given was vague." **Brief of Appellant** at 79-81. The State submits, however, that Appellant has waived an objection to the instruction where he has received his requested version. See Pope v. State, 441 So.2d 1073 (Fla. 1983).

ISSUE XXII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL REQUESTED INSTRUCTION THAT MITIGATING EVIDENCE DOES NOT HAVE TO BE FOUND UNANIMOUSLY (Restated).

During the penalty-phase charge conference, Appellant proposed the following special instruction:

> Unanimity is not required for the finding of a mitigating circumstance; each juror may individually determine whether he or she believes a mitigating circumstance exists.

(SR 92). The trial court denied the requested instruction. (T 2193). Appellant now claims that the trial court abused its discretion in doing so. **Brief of Appellant** at 81. He neglects to mention, however, that this Court has previously decided that such an instruction is not warranted. Waterhouse v. State, 596 So.2d 1008, 1017 (Fla. 1992) ("Waterhouse claims that the jury instructions failed to specify that each juror should make an individual determination as to the existence of any mitigating circumstance. . . . Florida law does not require such an instruction."). Therefore, Appellant's sentences of death should be affirmed.

ISSUE XXIII

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE STATE'S BURDEN OF PROOF IN THE PENALTY PHASE (Restated).

In this appeal, Appellant complains that the penalty-phase jury instruction which defines the burden of proof improperly shifts the burden to the defendant to establish that the mitigating evidence outweighs the aggravating circumstances. **Brief of Appellant** at 82. This Court has consistently rejected this argument and should continue to do so. See, e.g., Arango v. State, 411 So.2d 172, 174 (Fla. 1982), cert. denied, 474 U.S. 1015 (1983); Stewart v. State, 549 So.2d 171, 174 (Fla. 1989), cert. denied, 118 L.Ed.2d 313 (1990); Robinson v. State, 574 So.2d 108, 113 n.6 (Fla. 1991), cert. denied, 116 L.Ed.2d 99 (1992).

ISSUE XXIV

WHETHER APPELLANT WAS DENIED DUE PROCESS, THE ASSISTANCE OF COUNSEL, AND HIS RIGHT TO TRIAL BY JURY WHEN DEFENSE COUNSEL CONCEDED HIS GUILT IN OPENING STATEMENT (Restated).

In this appeal, Appellant claims that his rights to due process, effective assistance of counsel, and a trial by jury were violated when his attorney conceded in opening statement without his consent that he was guilty of second-degree murder. **Brief of Appellant** at 82-83. To the extent that Appellant claims defense counsel rendered ineffective assistance of counsel, the State submits that this issue is more properly raised in a motion for post-conviction relief. See Jones v. State, 612 So.2d 1370, 1373 n.4 (Fla. 1992); Ventura v. State, 560 So.2d 217 (Fla.), cert. denied, 498 U.S. 951 (1990). Regardless, as discussed at length in Issue XXVI, Appellant was fully aware of, and consented to, defense counsel's plan to argue as the theory of defense that Appellant was guilty of second-degree rather than first-degree murder. (T 1055-73, 1125-40). Thus, his rights to due process, assistance of counsel, and trial by jury were not violated.

ISSUE XXV

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISQUALIFY (Restated).

Prior to trial, on April 16, 1991, Appellant filed a motion to disqualify the trial judge. As grounds therefor, Appellant alleged that (1) Judge Kaplan was confined to a wheelchair, as was Scott Yaguda, one of the victims in this case; (2) Appellant "noted clear and consistent facial expressions and eye contact from the Judge which convey remarkable scorn and disdain;" (3) Judge Kaplan "treated [Appellant] with great displeasure and animosity" during a hearing on Appellant's motion for substitution of counsel on April 19, 1990; and (4) Judge Kaplan "has treated [Appellant] with a presumption of guilt so strong as to convey to [Appellant] a clear message of personal hatred." (R 2924-31). Attached to this motion was one supporting affidavit--from Appellant--instead of the two that were then required by Florida Rule of Criminal Procedure 3.230(b).[11] At a hearing on the motion, on April 30, 1991, the trial court denied the motion, finding it legally insufficient on its face. (ST II 9-14; R 2965, 2967).

Three months later, on July 25, 1991, Appellant filed an amended motion to disqualify, alleging the same facts, but attaching a second affidavit. (R 2985-92, 2979-84). At a

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[11] Rule 3.230 was repealed effective January 1, 1993. It was replaced by Florida Rule of Judicial Administration 2.160, which no longer requires two affidavits. The Florida Bar Re: Amendment to Florida Rules of Judicial Administration, 609 So.2d 465 (Fla. 1992). Rather, the motion to disqualify must be sworn to by the party, either by signing the motion under oath or by a separate affidavit. Rule 2.160(c).

hearing on August 8, 1991, the trial court again denied the motion, finding "that the allegations on their face do not constitute grounds for recusal." (T 130-35). Appellant now complains that the trial court erred in denying his motion to recuse. **Brief of Appellant** at 82-85. The State disagrees.

The purpose of the disqualification rule is "to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983). Consequently, "[t]he facts alleged in the motion need only show that 'the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge.'" Id. (quoting State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697 (1938)) (emphasis supplied). "'If the attested facts supporting the suggestion are reasonably sufficient to create such a fear, it is not for the trial judge to say that it is not there.'" Id. (quoting State ex rel. Davis v. Parks, 141 Fla. 516, 518, 194 So. 613, 614 (1939)). Thus, although Rule 3.230 does not allow the trial court to "pass on the truth of the facts alleged nor adjudicate the question of disqualification," the trial court must nevertheless assess the legal sufficiency of the motion by determining if the movant has an objectively "well-grounded fear" based on "reasonably sufficient" facts. "A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Id.

After reviewing the motion and accompanying affidavits, the trial court determined as a matter of law that the grounds for the motion would not cause a reasonable person to fear receiving an unfair trial. As a result, it properly denied Appellant's motion. Since Appellant has failed to show an abuse of discretion, this Court should affirm the trial court's ruling and Appellant's convictions and sentences. See Massetta v. Kaplan, 557 So.2d 919, 921 (Fla. 4th DCA 1990) ("A judge's remarks that he is not impressed with a lawyer's, or his client's behavior are not, without more, grounds for recusal."); Mobil v. Trask, 463 So.2d 389, 391 (Fla. 1st DCA 1985) ("A judge is not required to abstain from forming mental impressions and opinions during the course of the presentation of evidence."), rev. denied, 476 So.2d 674 (Fla. 1986); Dempsey v. State, 415 So.2d 1351, 1352 (Fla. 1st DCA 1982) (trial court's display of anger and displeasure at defendant when it held defendant in contempt for his appearance in court was not sufficient to establish prejudice by the judge against the defendant), rev. denied, 424 So.2d 761 (Fla. 1983).

ISSUE XXVI

WHETHER THE TRIAL COURT CONDUCTED A PROPER NELSON INQUIRY WHEN APPELLANT SOUGHT TO DISCHARGE HIS COURT-APPOINTED COUNSEL (Restated).

At Appellant's probable cause hearing, Assistant Public Defender Warner Olds was appointed to represent Appellant. (T 3). At arraignment, on September 5, 1989, Appellant wanted another lawyer. When asked if he felt confident in Mr. Olds, Appellant responded, "No, I met him twice and I want somebody else." (T 3). The trial court agreed and appointed Hilliard Moldof as a Special Assistant Public Defender. (T 3-4). On October 25, 1989, Mr. Moldof moved to withdraw at Appellant's request because Appellant refused to cooperate with him. Appellant complained that Mr. Moldof had only been to see him once and would not return his calls. (T 8-10). After noting to Appellant that it had already replaced Mr. Olds, the trial court agreed to appoint a third lawyer. (T 10-13).

At some point, Parke Masterson was appointed as a Special Assistant Public Defender. At a motion hearing on January 18, 1990, Appellant indicated that things were going well. (T 21). However, by May 16, 1990, Appellant was unhappy with Mr. Masterson and wanted him replaced. After a lengthy discussion between the trial court and Appellant, the trial court determined that Appellant's reasons were insufficient and denied his pro se motion to discharge counsel. (T 37-46). Ten days later, however, Mr. Masterson moved to withdraw because he was closing his law practice. (SR 58). Dennis Bailey, Appellant's fourth attorney who ultimately defended him at trial, was appointed to

represent Appellant on October 4, 1990. (R 74-76).[12] Sometime in January 1991, Appellant filed a grievance against Mr. Bailey with the Florida Bar. By May 14, 1991, however, Appellant did not want Mr. Bailey removed from the case. (ST 21-25).

During opening statements, Mr. Bailey stated up front: "There's not going to be a lot of questions about who did this. It's not a mystery who done it. Joseph Besaraba did this." (T 974). Later, after discussing the evidence that was going to be presented, defense counsel concluded, "Mr. Besaraba committed extremely serious violent acts on July 23rd of 1989. Nobody argues that. But the evidence will show you that the nature of the crime is so depraved that it lacks all logic and is murder in the second degree." (T 985-86).

The next day, during a recess in the State's case, Appellant moved to have a new attorney appointed because he "was not made privy or did not have knowledge of Mr. Bailey's opening statement." Appellant steadfastly maintained his innocence and disclaimed any knowledge that defense counsel was going to concede identity. (T 1055). Defense counsel, however, asserted that, for the past six months, the theory of defense had been to try and get a conviction to second-degree rather than first-degree murder. He and his defense team had discussed the theory with Appellant, and Appellant had consented to it. (T 1056-57, 1059-62, 1069-73). Appellant admitted that he had consented to the theory of defense, but did not realize that defense counsel would directly concede identity. (T 1057-59, 1062-69). At that

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[12] Upon motion by Mr. Bailey, Jane Fishman was appointed as co-counsel on July 9, 1991. (R 125-27).

point, the trial court took Appellant's motion under advisement until the court had an opportunity to question defense counsel's private investigator who was alleged to have been present during the discussion with Appellant about the theory of defense. (T 1073).

The next day, Gary Crep, the private investigator, testified that Appellant consented to the theory of defense and knew that they were going to affirmatively admit that he committed the murders. (T 1126-29). Appellant maintained, however, that he did not know that defense counsel would concede identity. (T 1129-40). Ultimately, the trial court held, "At this point I'm not going to grant any motion to discharge Mr. Bailey. . . . I feel from what I've heard that was the understanding that everybody had and that this is the way it was to go forward. So, that's my feeling at this time after hearing the evidence and the statements by both counsel and the defendant." (T 1140). At the end of closing arguments, Appellant renewed the motion on the same grounds, which was again denied. (T 2047-48).

In this appeal, Appellant claims that the trial court reversibly erred because it never advised Appellant of his right to proceed pro se. **Brief of Appellant** at 86-87. The State submits, however, that any error in failing to do so is harmless beyond a reasonable doubt.

In Capehart v. State, 583 So.2d 1009, 1014 (Fla. 1991), the defendant wrote a letter to the trial judge after the jury returned a guilty verdict, alleging, among other things, that his attorney "'did not put up a very good defense.'" Specifically, Capehart alleged that, during closing arguments, his attorney

"'spoke as if he was trying to prosecute'" him. As a result, Capehart asked that his attorney be replaced. The trial court denied the request after a brief inquiry and then proceeded with the penalty phase proceeding. On appeal, Capehart claimed that the trial court failed to conduct an adequate hearing. In rejecting this claim, this Court stated:

> Without establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel. Capehart at no time asked to represent himself. His letter indicated only a dissatisfaction with his counsel and the guilty verdict, and it clearly is addressed to the replacement of counsel. The court addressed his allegations in open court and found them to be insufficient. While the better course would have been for the trial court to inform Capehart of the option of representing himself, we do not find it erred in denying Capehart's request for new counsel.

Id. at 1014.

Here, as in Capehart, Appellant at no time asked to represent himself. His motion indicated only a dissatisfaction with defense counsel's choice of words in opening statement. The trial court made extensive inquiry into Appellant's allegations and found them to be insufficient. While the better course would have been for the trial court to inform Appellant of his option of representing himself, any error in failing to do so was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt, which included numerous eyewitnesses and Appellant's statement to Scott Yaguda that he had just killed two people and would kill him too. Consequently, Appellant's conviction should be affirmed since there is no reasonable possibility that the verdict would have been different had the

trial court informed Appellant of this option. See Beatty v. State, 606 So.2d 453, 453-54 (Fla. 1992) (finding inquiry sufficient where defendant moved to replace his privately retained attorney with a court appointed one after the verdict. "To allow appellant to discharge his counsel at this late date in the proceedings without adequate ground would thwart the orderly administration of justice."); Parker v. State, 570 So.2d 1053, 1055 (Fla. 1st DCA 1990) ("In light of the overwhelming evidence of guilt, the legal insufficiency of the motion, the defendant's failure to pursue the motion although having the opportunity to do so, and a record which reveals no evidence of incompetence, we find that the failure to conduct an inquiry was harmless error."), rev. denied, 581 So.2d 1309 (Fla. 1991).

ISSUE XXVII

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL (Restated).

In this appeal, Appellant claims that Florida's death penalty statute is unconstitutional for the following reasons: 1) the penalty-phase jury instructions relating to the HAC, CCP, and "felony murder" aggravating factors "assure arbitrariness" because they merely mirror the language of the statute, which is itself unconstitutionally vague, (2) "[t]he lack of unanimous verdict as to any aggravating circumstance" is unconstitutional, (3) "[t]he standard instructions do not inform the jury of the great importance of its penalty verdict," (4) "[t]he failure to provide adequate counsel assures uneven application of the death penalty," (5) "[t]he trial court has an ambiguous role in our capital punishment system," (6) this Court does not provide meaningful appellate review because (a) its attempts at construing the HAC, CCP, and "felony murder" aggravating factors have led to contrary results, (b) it refuses to reweigh the aggravating and mitigating evidence, (c) the contemporaneous objection rule and retroactivity principles have institutionalized disparate application of the law in capital sentencing, and (d) it inconsistently judges the appropriateness of a jury override, (7) the law does not provide for special verdicts, (8) a condemned inmate's inability to seek mitigation of sentence under Florida Rule of Criminal Procedure 3.800(b) "violates the constitutional presumption against capital punishment and disfavors mitigation," (9) "Florida law creates a presumption of death where but a single aggravating circumstance

appears," and (10) death by electrocution is cruel and unusual. **Brief of Appellant** at 85-97. Of these ten claims, however, the only one raised in the trial court below related to the constitutionality of the CCP aggravating factor. (R 2671-94). This claim has also been raised separately in Issue XXVIII, infra. None of the other claims have been preserved for review; thus, they are not cognizable in this appeal. Johnson v. Singletary, 18 F.L.W. S90 (Fla. Jan. 29, 1993); Fotopoulos v. State, 18 F.L.W. S18 (Fla. Dec. 24, 1992); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, 120 L.Ed.2d 931 (1992). Even if they had been preserved for review, they have been repeatedly decided adversely to Appellant. See Hodges v. State, 18 Fla. L. Weekly S255 (Fla. April 15, 1993); Preston v. State, 17 F.L.W. S669 (Fla. Oct. 29, 1992); Power v. State, 17 F.L.W. S572 (Fla. Aug. 27, 1992); Fleming v. State, 374 So.2d 954, 957 (Fla. 1979); Schad v. Arizona, 501 U.S. ___, 115 L.Ed.2d 555, 564 (1991); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990); Copeland v. State, 457 So.2d 1012, 1015-16 (Fla. 1984), cert. denied, 471 U.S. 1030 (1985); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); Campbell v. State, 571 So.2d 415 (Fla. 1990); Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990); Remeta v. State, 522 So.2d 825 (Fla.), cert. denied, 488 U.S. 871 (1988); Patten v. State, 598 So.2d 60, 62 (Fla. 1992); Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976); Sims v. State, 444 So.2d 922 (Fla. 1983), cert. denied, 467 U.S. 1246 (1984); White v. State, 446 So.2d 1031 (Fla. 1984),

cert. denied, 111 L.Ed.2d 818 (1985). As a result, Appellant's sentences of death should be affirmed.

ISSUE XXVIII

WHETHER THE COLD, CALCULATED AND PREMEDITATED AND THE PRIOR VIOLENT FELONY AGGRAVATING FACTORS ARE CONSTITUTIONAL (Restated).

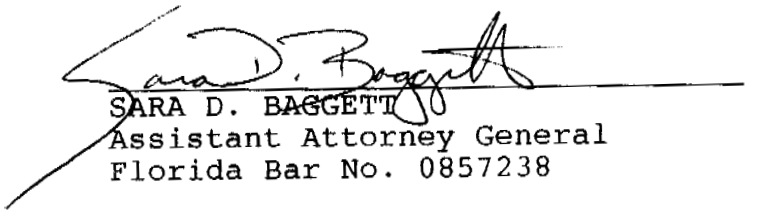
In this appeal, Appellant challenges the constitutionality of the CCP and prior violent felony aggravating factors. Below, however, he challenged only the CCP factor. Thus, any challenge to the prior violent felony factor has not been preserved. See Johnson v. Singletary, 18 F.L.W. S90 (Fla. Jan. 29, 1993); Fotopoulos v. State, 18 F.L.W. S18 (Fla. Dec. 24, 1992); Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, 120 L.Ed.2d 931 (1992). Regardless, his claims have no merit. As this Court stated in Dougan v. State, 595 So.2d 1, 4 (Fla. 1992), "Florida's death penalty statute, and the instructions and recommendation forms based on it, set out a clear and objective standard for channeling the jury's discretion." See also Cruse v. State, 588 So.2d 983 (Fla. 1991) (reaffirming the constitutionality of the CCP aggravating factor). Thus, Appellant's sentences of death should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's convictions and sentences of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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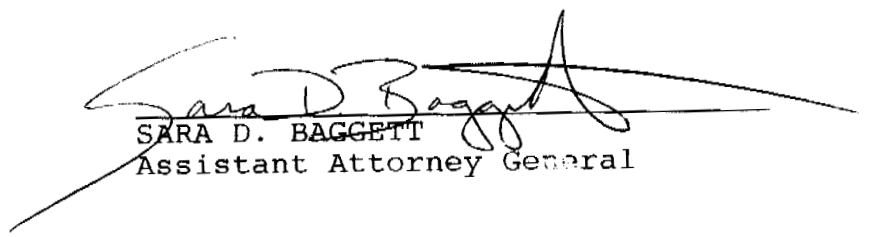
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jeffrey L. Anderson, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 18th day of April, 1994.



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