IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,072

JIMMIE LEE CONEY,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

The Appellee, **THE STATE OF FLORIDA**, was the prosecution in the trial court. The Appellant, **JIMMIE LEE CONEY** was the defendant. The Appellant will be referred to as "Coney" and the Appellee will be referred to as it stood in the lower court. The symbol "R" will designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

On April 25, 1990 a two (2) count indictment was filed charging Coney with the following crimes: (I) first degree murder of Patrick Southworth and (II) first degree arson of an occupied structure. (R. 1-2A).

On February 11 and 13, 1992, a pretrial hearing was held to determine the admissibility of the victim's dying declarations. (R. 425-631, 842-954). Correctional Officer Steve Barney testified that he was working the midnight shift at Dade Correctional Institution (D.C.I.) on April 6, 1990. (R. 434). At approximately five a.m., Officer Barney was sent to dormitory B to assist in packing the property of an inmate who was being transferred to a different correctional facility. (R. 435). As Officers Sanchez and Pesante completed an inventory of the inmate's property, Officer Barney heard a scream from within the B dorm. (R. 435). Officer Barney ran out of the officer's station and observed smoke coming from one of the first floor rooms. (R. 435).

Officer Barney ran downstairs and observed the victim, Patrick Southworth, inside of his cell with his chest, face, and hair on fire. (R. 436). When Barney first saw the victim, he was crouched in the back of his cell attempting to extinguish the fire on his chest. (R. 436). The door to the cell was closed and locked, so Barney yelled for Officer Sanchez to throw him the keys. (R. 436). As Officer Sanchez tossed the keys to Barney, Officer Pesante ran downstairs with a fire extinguisher. (R. 436). Officer Barney opened the cell door, but was unable to enter due to the overwhelming smoke. (R. 437). Officer Pesante sprayed into the cell and extinguished the fire on the victim. (R. 437). Thereafter, Officer Barney assisted the victim in walking out of the cell and to an exit on the lower floor where the victim sat in a chair. (R. 438).

The prison lieutenant instructed Officer Barney to take the victim to the prison medical clinic. (R. 438). As Barney assisted the victim in walking to the clinic the victim stated, "I hurt" and "Why me, why did they do this to me?". (R. 439). Officer Barney and the victim were met at the elevator by Nurse Mix and led upstairs to the clinic. (R. 441). Officer Barney testified that the victim was exhibiting signs of pain and asking, "Am I dying? Am I dying?". (R. 440, 443). The victim screamed in pain as Nurse Mix wrapped him in sterile sheets. (R. 442). Barney described the victim as looking "very frightened" and as if he knew he was not going to be all right. (R. 443).

Nurse Mix testified that she was working in the medical clinic at D.C.I. on April 6, 1990 when she received an emergency call regarding a burn incident. (R. 536-37). She grabbed her emergency equipment and oxygen and proceeded towards the dorm of the occurrence at approximately five a.m. (R. 537). On her way out of the clinic, Nurse Mix encountered the victim as he was being escorted by guards to the clinic. (R. 538). She described the victim as upset, crying, in pain, and physically shaken. (R. 538). Nurse Mix took the victim upstairs to the emergency treatment room, placed him on an examining table, and wrapped him in sterile wet saline sheets. (R. 538-39). She noted that the victim had second and third degree burns around his mouth and nasal area. (R. 539). Further, the hair had been singed off of his head and his shirt had been burned off of his body. (R. 539). The victim stated that his injuries hurt, "really hurt bad". (R. 539). As Nurse Mix treated the victim, he inquired as to how bad his burns were. (R. 540). He also repeatedly asked, "Am I going to die?" and "Why did they do this to me?". (R. 540). The nurse attempted to reassure the victim that he was going to be fine and that he should remain calm. (R. 540).

While Nurse Mix continued treating the victim, the chief of security at D.C.I., Major Thompson, arrived at the medical clinic. (R. 462). Major Thompson approached the victim, inquired who had done this to him, and the victim replied, "James Coney". (R. 464, 541). When the major asked "Why?", the victim told him,

"Because I'm a homosexual.". (R. 464). Thompson asked the victim what had happened and the victim described feeling something wet on himself, then looking up, and seeing Coney. (R. 465). He also added that he thought his roommate was involved because the lock on his cell door could not be picked. (R. 467). During the major's conversation with the victim, Nurse Mix administered Demerol to the victim to alleviate the intense pain. (R. 468, 543).

The Dade County Fire Department dispatched paramedics Armando Gonzalez and Eric Beneby, and Lieutenant Jack Cole to the emergency at D.C.I. on April 6, 1990. (R. 508-9, 571, 924). When they arrived at the D.C.I. medical clinic, the victim was lying on a stretcher wrapped in sterile sheets and Nurse Mix informed them that the victim needed to be airlifted. (R. 510). After viewing the victim's injuries and observing that he had second and third degree burns on over seventy percent (70%) of his body, the paramedics concurred and radioed for a helicopter. (R. 510, 579). Paramedic Gonzalez spoke to the victim and asked him what had happened and the victim stated, "My lover threw liquid on me and set me on fire". (R. 512-13). When Gonzalez asked him "Why?", the victim said either, "I left him" or "We broke up". (R. 512). When the victim made these statements he was conscious, alert, and oriented. (R. 513).

D.C.I. security officer Darrell Huffman was directed to travel with the victim on the helicopter to Jackson Memorial

Hospital (JMH). Huffman wrote a log of his actions and noted that the victim was airlifted at approximately 5:47 a.m. and arrived at JMH at approximately 6:10 a.m. (R. 860-64). Once at the hospital, the victim was taken to the emergency trauma room where he was complaining of pain and asking for medication while responding to questions about his age, weight, etc. (R. 866).

The medical personnel asked Officer Huffman if he knew what liquid the victim had been burned with, so Huffman called the prison and the officials did not know. (R. 868). While the victim was in the x-ray room, Huffman asked him how he had received the burns and the victim stated that a guy had thrown gasoline on him and set him on fire. (R. 870). When Huffman asked the victim if he knew who the perpetrator was, the victim stated, "Yeah Coney, Jimmie Coney". (R. 870). Thereafter, Huffman asked why Coney did it, and the victim responded, "I'm a homosexual and I told Coney I wouldn't fuck him anymore." (R. 870). After the x-rays were completed the victim was moved to the burn unit, intubated on a respirator, and given pain medication which made him unconscious. (R. 848, 874-75).

The victim died the next morning at 8:56 a.m. (R. 500). Associate Medical Examiner Roger Mittleman, M.D. performed an autopsy on the victim on April 7, 1990. (R. 492-93). He described how the extensive skin burns on the victim's head, neck, chest, and abdomen were second and third degree burns covering approximately fifty-five to sixty percent (55-60 %) of

the body. (R. 495). Dr. Mittleman explained that second degree burns cause extensive pain, but that third degree burns are not painful because the nerve endings have been burnt away. (R. 496). After reviewing the victim's JMH medical records, Dr. Mittleman concluded that the victim was conscious during treatment, was aware that he was having difficulty breathing, and was cognizant of the degree of damage to his body. (R. 499).

After reviewing the evidence presented, the Honorable Fredricka G. Smith ruled that the statements made by the victim to Major Thompson, Armando Gonzalez, and Officer Huffman, were admissible as dying declarations. (R. 957-61).

Voir dire commenced on February 12, 1992 and was completed on February 14, 1992. (R. 642-840, 967-1232). Thereafter, the jury was sworn and opening statements were made by both parties. (R. 1125, 1268-95). On February 14, 1992 the State began presentation of its case. (R. 1295). The following testimony was presented to the jury:

Correctional Officer Jose Sanchez testified that he was working the midnight shift in the B dormitory at D.C.I. on April 6, 1990. (R. 1526-27). As the only officer assigned to supervise the one hundred (100) inmates in B dorm, Sanchez had to walk around the dorm once every hour and to conduct two counts of the inmates, at 12:30 and 4:30 a.m. (R. 1528-310). Regular wake up time for the inmates was at 6 a.m., but on the morning of April

6, 1990, Officer Sanchez had been instructed to wake inmates Archie McKnight and Jimmie Coney at 4 a.m., as they were being transferred to a different correctional facility. (R. 1531-32). It was necessary to wake the two inmates earlier than usual to allow time for an inventory of their property prior to transfer. (R. 1532). Sanchez woke the two prisoners, told them to get up, pack their property, and report to the officer's station for inventory. (R. 1534). When Sanchez woke Coney in cell 112, Coney asked why and where he was being transferred. (R. 1535).

Thereafter, Coney went to the officer's station and asked Sanchez for a plastic bag for his property. (R. 1535). Sanchez told him that he did not have any bags, but would obtain one for Coney to use. (R. 1536). As Coney left the office he picked up the telephone in front of the office and Sanchez instructed him that the phone was turned off until 6 a.m. (R. 1537). Coney began to walk back toward his cell when his cellmate, Hason Jones, walked up to the officer's station. (R. 1537). Officer Sanchez told Jones to return to his cell, so he and Coney returned to their room. (R. 1537-38).

After waking McKnight and Coney, Officer Sanchez proceeded to take the 4:30 a.m. inmate count. (R. 1540). It took Sanchez between eight and ten minutes to complete the count. (R. 1540). When Sanchez reached the victim's cell, cell 120, he observed Coney in the vicinity. (R. 1542). Sanchez saw Coney leave room 112, enter the bathroom area, and then return to room 112. (R.

1542-44). Other than Jimmie Coney, Hason Jones, and Archie McKnight, there were no other inmates awake and moving about that morning. (R. 1559).

As Sanchez completed his count on wing A, Archie McKnight was the only inmate awake on the wing. (R. 1544). McKnight was the first of the two inmates to arrive at the officer's station for an inventory of his property. (R. 1544). Coney returned to the station to again request a plastic bag and Sanchez told Coney that he still did not have a bag, but that his property would be inventoried next. (R. 1547). Coney returned to his room as Officer Barney arrived at the officer's station to assist in the inventories. (R. 1547, 1667).

While Officer Barney assisted Sanchez, Coney reappeared and renewed his request for a plastic bag. (R. 1549, 1668). When Sanchez informed him that there were no bags, Coney left and returned moments later with his property packed in plastic bags. (R. 1549, 1668-69). Coney was instructed to wait outside the door, so he placed his bags by the door and stood outside of the office. (R. 1549-50, 1669).

Officer Pesante, Sergeant at D.C.I., was the complex supervisor responsible for collecting the count sheets on April 6, 1990. (R. 1616-17). Shortly after Coney was instructed to wait in the hallway, supervising Officer Pesante entered the officer's station for the 4:30 a.m. count figures. (R. 1551,

1670-71). When Pesante entered the officer's station of B dorm to pick up the 4:30 a.m. count, he did not see anyone in the hallway outside of the officer's station. (R. 1619). As he picked up the count sheet from the desk, Pesante heard wild, hysterical screaming and ran out to the B dorm. (R. 1620-21). As Officer Pesante entered the office someone began screaming, "My roommate is on fire!". (R. 1552, 1671).

Officer Barney went to the railing and looked downstairs where he saw a white man running in his boxer shorts and a black man running dressed in his "blues".[1] (R. 1686). Barney ran downstairs to room 120 as Officer Pesante grabbed the fire extinguisher from the office. (R. 1553, 1621-22, 1672). When Pesante reached the upstairs railing, he saw Santerfeit running around downstairs and yelling that his roommate was on fire. (R. 1621). Meanwhile, Officer Sanchez pulled the fire alarm and stood by the upstairs railing. (R. 1553). When Officer Barney realized that the door to room 120 was locked, Officer Sanchez tossed the keys down to him. (R. 1554, 1673).

When Officer Pesante arrived at cell 120, Officer Barney was standing outside of the door and waiting for the key from Officer Sanchez. (R. 1622, 1674). Officer Barney could see the victim

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[1] The inmates were not normally dressed in their "blues" at 5 a.m. However, both Coney and McKnight were dressed in their "blues" that morning because they were going to be transferred. Officer Barney was unable to identify either man because he did not usually work on B dorm and was not familiar with the inmates. (R. 1687-88).

inside the cell sitting back against the wall, crouched down, and covered with flames. (R. 1674). After Officer Barney opened the door, smoke came out while the victim was inside engulfed in flames. (R. 1623). The victim took a couple of steps and then fell to his knees in front of the door. (R. 1623, 1676). The victim's skin was curling back, the top of his pajamas was baked into his skin, and the victim was yelling as Pesante put the fire on the victim out with two short bursts from the fire extinguisher. (R. 1623, 1677). Next, Pesante extinguished the fire in the back part of the cell. (R. 1625).

Pesante instructed Officer Barney to get the victim out of the cell, and as he did the victim was muttering, "It hurts, it hurts so bad." (R. 1625). When the victim walked out of the cell, he was walking slowly "like a robot". (R. 1625). Officer Barney observed the victim's skin peeling away, with blood and pus coming out of the wounds. (R. 1678). His blood and body fluid were dripping onto the floor of the cell. (R. 1679-80). After the victim was out of the cell the fire started again in the back of the cell and Officer Pesante extinguished it. (R. 1626). Thereafter, Pesante closed the door to cell 120 to preserve the scene of the crime. (R. 1626). As the other officer extinguished the fire, Officer Sanchez began evacuating the inmates from B dorm. (R. 1555). All of the inmates were ordered out into the courtyard and then into the dining hall. (R. 1556). After all of the inmates had been evacuated from B dorm, Pesante sealed off the dorm as well. (R. 1626).

Officer Barney was directed to take the victim to the prison medical clinic. (R. 1681). As Barney walked with the victim to the clinic, the victim walked slowly and stated, "Why me? Why did they do this to me?" (R. 1682). Barney recalled that the victim held his hands out to his side as he shook, moaned, and gritted his teeth. (R. 1682). It took the victim three to five (3-5) minutes to walk forty to sixty-five (40-65) yards, and he said, "It hurts. It hurts bad.". (R. 1683).

Officer Barney compared a photograph of the victim prior to April 6, 1990 with his recollection of the victim after he was burned. (R. 147, 1680). After the fire the victim no longer looked like his booking photograph. (R. 1681). Barney recounted that the victim did not have any hair, his skin was peeled away around his neck and lower jaw, and he had charred matter on his chin and upper lip after being set on fire. (R. 1681).

D.C. I. Nurse Mix met Barney and the victim with oxygen at the elevator to the clinic. (R. 1684, 1734). Officer Vincent observed the trio when they exited the elevator to enter the prison clinic. (R. 1725). He observed that the victim's skin was completely black and charred. (R. 1726). His lips were bleeding and blood was dripping from his fingertips as he walked "robot-like" and stated, "Oh, it hurts. Oh, it hurts.". (R. 1726). Vincent also recalled hearing the victim state, "I can't believe (either he or they) did this to me." (R. 1728).

The victim was taken into the clinic, placed on a table, and wrapped up in sterile saline sheets. (R. 1684-85, 1735). As the victim was being wrapped in sheets, he began to scream as if he was in a lot of pain. (R. 1685, 1735-36). The victim asked Nurse Mix, "Am I dying? Am I dying?" (R. 1685). Major Thompson arrived shortly thereafter and Officer Barney left the clinic. (R. 1685).

Nurse Mix, (R. 1732-61), Major Thompson, (R. 1761-78), Paramedic Armando Gonzalez (1782-90), and Officer Huffman (R. 1794-1817), testified at trial in conformity with their testimony previously given at the pretrial hearing regarding the admissibility of the victim's dying declarations.

Dade County Fire Department Investigator Lieutenant. Platteis arrived on the scene of the fire at 6:46 a.m. on April 6, 1990. (R. 1321-24). Lt. Platteis testified at trial, as an expert in determining the origin and cause of fires, about his investigation in this case. (R. 1323). After arriving at D.C.I., Lt. Platteis observed and photographed the scene, and preserved and collected evidence. (R. 1324-1425). Lt. Platteis recalled that as he went down the stairway to the location of the fire he detected an odor of paint or lacquer thinner coming from a garbage pail. (R. 1333). Inside of the garbage pail, Platteis found a cardboard shoe box, soda cans, tissue paper, bread slices, and cell keys. (R. 1333, 1400-5). He sealed the garbage

can, so the odor would not evaporate. (R. 1334). The keys were recovered and found to unlock cell 120. (R. 1400-5). Platteis used a hydrocarbon sniffer, an instrument which detects particles of flammable vapors that are left by the flammable liquids sometimes used in starting fires, to analyze the scene and the physical evidence. (R. 1350-51). Strong hydrocarbon readings were registered by the five soda cans found in the trash pail. (R. 1351). In fact, everything in the garbage pail registered positive on the hydrocarbon sniffer. (R. 1353).

Lt. Platteis photographed and described cell 120, where the fire had occurred. (R. 1335). The bunk bed was against the wall and a "butt can" was found on the floor underneath the bottom bunk. (R. 1342). Platteis discovered a newspaper, which had been twisted to form a wick and lit, on the floor. (R. 1343). After viewing the scene of the fire, Platteis determined that the fire was "incendiary in origin", as opposed to accidental, inasmuch as it was intentionally started. (R. 1420). An accelerant was transported into the room with the "butt can" and liquid was first spilled towards the head of the bed and second spilled to where the "butt can" ended up under the bed. (R. 1343, 1421). Lt. Platteis opined that the person who applied the accelerant moved into the cell close to the locker area and splashed the liquid towards the lower bunk. (R. 1420). The first splash went from the victim's arm, into the bed, and against the wall. (R. 1421). The second poured on the floor as the can rolled under the bed. (R. 1422).

Latent print examiner Vincent Chew explained that he was not surprised that he did not recover any prints of value from the evidence recovered in the victim's cell. (R. 1950). Given the extreme heat of the fire, there was little chance of developing any prints. (R. 1951). Furthermore, the dry chemical fire extinguisher had a washing effect on the prints, thus reducing the likelihood of finding prints of comparison value. (R. 1951).

Metro Crime Laboratory Technician McBee testified as an expert in the field of arson evidence examination. (R. 1864). He examined the soda cans and shoe box recovered from the garbage pail to determine if accelerants were present. (R. 1883). A standard sample was taken from the D.C.I. auto body shop drum of lacquer thinner, and McBee used the standard for comparison value against the accelerant found on items in the garbage pail. (R. 1490, 1885-90). McBee found alcohol, toluene, and methyl ethyl ketone present on both the soda cans and the shoe box. (R. 1893-94). He expected to find toluene present in the standard sample, but only found the alcohol and methyl ethyl ketone. (R. 1895). The technician's findings were consistent with some of the standard sample having been mixed with a second container of a different unknown chemical compound before being placed in the soda cans. (R. 1908). They could also be consistent with the standard sample either being diluted or evaporated. (R. 1908). Technician McBee defined an "incendiary fluid" as a substance used to start a fire. All three of the substances found on the

soda cans and shoe box, alcohol, toluene, and methyl ethyl ketone, are incendiary compounds; individually and in combination. (R. 1919).

Arson Detective Juan Odio was directed to investigate the fire at D.C.I. (R. 1465-66). After securing the scene of the crime, Detective Odio was assigned to conduct witness interviews while Officers Platteis and Samper gathered evidence and investigated the cause/origin of the fire. (R. 1470). Odio began interviews at 9:30 a.m. on the morning of the fire. He took statements from the prison guards who had been on duty, the medical personnel in the prison clinic, and from four inmates. (R. 1473-74). The next morning, Odio was informed that the victim had died and the investigation was transferred to the homicide unit. (R. 1496).

In addition to giving statements after the murder, the inmates were called to testify at trial. Inmate James Young knew Coney and the victim while he was incarcerated at D.C.I. in 1990. (R. 1830-31). He observed that the two men were always hanging around together and assumed that they were "run-in partners". (R. 1833). Coney left D.C.I. for outside medical treatment and after he returned to the prison, Young noticed friction between Coney and the victim. (R. 1834).

Approximately one week before the murder, Young had a conversation with Coney at the D.C.I. vocational auto body shop

where Young worked. (R. 1835). Young worked with lacquer thinner in the auto shop and Coney asked Young to get him some lacquer thinner. (R. 1836). Coney told Young that he needed the lacquer thinner to thin paint so he would have enough paint to cover the walls of his cell. (R. 1837). The lacquer thinner was locked up and issued to inmates as they needed it, but Young told Coney that he would try to get some. (R. 1837). Young instructed Coney to come back after lunch and he would give Coney the excess lacquer thinner from the job he was working on. (R. 1839). After lunch, Coney returned with some soda cans and Young filled one of the cans with lacquer thinner. (R. 1841). The soda can was not a "Coke" can, rather it was an off-brand cola can. (R. 1840).

Gregory Hoover was also an inmate at D.C.I. at the time of the homicide. (R. 1980-81). He knew Coney from working with him at the central storage/warehouse area of the prison. (R. 1982). Hoover testified that he usually saw Coney with the victim and that the nature of their relationship seemed evident. (R. 1983). Coney introduced Hoover to the victim and described the victim as "his boy". (R. 1981-84). Hoover explained that in state prison this term is specifically used in reference to a homosexual partner who plays an inferior role in the relationship. (R. 1985). Coney and the victim were frequently observed touching; usually with Coney's arm over or around the victim. (R. 1984).

On the day before the murder, Coney approached Hoover between 5:30 and 6 p.m. as Hoover sat on a bench. (R. 1986).

Coney asked Hoover if he was still applying for the clerical job in the main kitchen. (R. 1987). Hoover recalled that the victim had that job and asked Coney, "Well, what about Pat [Southworth]? Coney responded, "I'm going to get that motherfucker." (R. 1987). Hoover was startled by this response and asked what Coney meant, whereupon Coney said, "I'm going to burn his ass." (R. 1988). Hoover thought this meant that Coney was going to cause the victim to lose his job. (R. 1988). The morning after the fire, Hoover recalled this conversation and relayed it to the prison authorities. (R. 1989-90).

Coney's cellmate at the time of the murder, Hason Jones, was the last of the inmates to testify for the State. (R. 2012). Although Jones and Coney shared cell 112, they were not friends with each other. (R. 2015, 2019). Jones recalled that, prior to Coney leaving D.C.I. for outside medical treatment, the victim and Coney were always together on the prison compound. (R. 2016). After Coney left D.C.I. the victim "took up" with "Chicken Wing". (R. 2016). "Chicken Wing" was inmate Daries Barnes' nickname. (R. 2017). When Coney returned to D.C.I. and saw the victim with Barnes, he asked the victim to come to his cell. (R. 2017). Jones remembered that the victim came to their cell and returned property to Coney. (R. 2017). After the victim returned Coney's property, Jones did not observe the victim and Coney together. (R. 2018).

On April 6, 1990, an officer woke Coney at 4 a.m. and told him to pack his property for a transfer. (R. 2018). Jones was already awake because it was a Muslim religious holiday and he awoke early to read his Koran. (R. 2052, 2082). After the officer woke him up, Coney left the cell and went to the bathroom. (R. 2019). When Coney came back in the cell he stated, "I knew this cracker was going to do this to me, you know. I just wish I wasn't getting transferred now. I wish instead of Friday, I wish it could have been Monday for I could have got some gas." (R. 2020-21).

After making this statement, Coney reached under the bunk bed and pulled out a shoe box containing two soda cans inside of some plastic bags. (R. 2021). Jones identified the shoe box admitted into evidence at trial as the one he had seen Coney retrieve from under his bed. (R. 2041). Jones watched Coney take out the two cans and pour their contents into a "butt can" used to hold cigarette ashes. (R. 2022). The liquid poured from the two soda cans smelled like paint thinner. (R. 2022). Coney left the cell and told Jones that he was going to call someone to tell of his transfer. (R. 2022). He returned and asked Jones for change because the officer would not allow him access to the telephone. (R. 2023). Soon thereafter the count was taken and Coney kicked the "butt can" next to the lockers when the officer came by the cell for the count. (R. 2023-24).

After the officer left, Coney again left the cell and returned moments later, stating, "I got the key". (R. 2027). At that point Jones got up, took his Koran, left the cell, and went to the upstairs card room. (R. 2027-28). The card room was across from the officer's station and Jones could see two officers checking the property of inmate McKnight, who was being transferred. (R. 2028). Jones did not see Coney at that time. (R. 2029). However, a few seconds after he saw a sergeant enter the officer's station, he heard inmate Santerfeit screaming. (R. 2030). Santerfeit was the victim's cellmate. (R. 2030).

After hearing the screams, Jones walked out of the card room and stood at the upstairs railing. (R. 2031). Two officers were trying to open the door to the victim's cell as a third officer was upstairs pulling the fire alarm and ordering the inmates to evacuate. (R. 2032). Jones evacuated with the other inmates to the courtyard where he saw Coney who stated, "Isn't that bad?". (R. 2033). When the inmates were moved to the dining hall, Coney sat down next to Jones and told him, "Take that to the grave with you.". (R. 2033).

Assistant Medical Examiner Roger Mittleman, M.D., described the autopsy which he performed on the victim on April 7, 1990. (R. 1295-99). He noted that there were burns on fifty-five to sixty percent (55-60 %) of the victim's body. (R. 1302). While some of the burns near the victim's head were first degree, the majority of them were second and third degree burns. (R. 1306).

Second degree burns were described as being very painful burns because the nerve fibers are still present under the skin. (R. 1308).

The victim had considerable burns on his head, neck, chest, abdomen, back, upper extremities, palms, arms, knees, and left calf. (R. 1301-2, 1306-7). The injuries sustained by the victim were consistent with him being in his bunk, with his head on a pillow, and having a liquid poured or thrown on him. (R. 1316). Further, the victim's brain was not affected by the fire and at the time he was taken into the hospital he was oriented to place, time, and person. (R. 1308).

As a result of the forty-five (45) quarts of fluid given to the victim during treatment, his body was very bloated and he was much heavier at the time of the autopsy than he had been before. (R. 1303-4). The internal examination revealed that his body tissues were watery and his lungs were filled with fluid. (R. 1304). The cause of death was identified as generalized skin burns. (R. 1309).

After the State rested, the defense made a motion for judgment of acquittal arguing that there was no evidence that Coney had committed the crimes. (R. 2094-96). The motion was denied. (R. 2096).

The defense presented the testimony of inmate Alex Severance that Hason Jones made a statement to him on the day after the incident that Jones did not really know if Coney had done it. (R. 2106). Severance was certain that he had spoken to Jones on April 7, 1990, but the prison records revealed on cross examination and on rebuttal that Jones was in administrative confinement from 7:45 a.m. on April 6 until April 17, 1990. (R. 2124, 2439-41). Inmates in confinement were not allowed access to or conversations with other inmates. (R. 2441).

Daries Barnes, a.k.a. "Chicken Wing", stated that he and the victim worked together and were friends, but that they did not have a homosexual relationship. (R. 2149). Barnes recalled a conversation that had taken place in his cell between Coney and the victim wherein the two were arguing about their relationship. (R. 2151). When Barnes took the victim's side in the argument with Coney, Coney told Barnes not to "step on his toes". (R. 2151). Barnes replied that Coney could not dictate another person's life and that the victim did not want to be bothered with Coney. (R. 2151). The discussion became very heated and Coney said to the victim, "That's fucked up, how you handling me, after I go out of my way for you." and "You treat me like some motherfucker.". (R. 2152). Thereupon Barnes kicked Coney out of his cell and Coney threatened the victim, "That's fucked up and I'll get back with you." (R. 2152). In the days after the discussion, Barnes observed Coney following the victim all over the prison compound. (R. 2153).

Barnes was asleep in his cell on April 6, 1990 when he heard the "hollering" of Santerfeit and Officer Barney. (R. 2136). Barnes walked out of his upstairs cell and saw officers and Santerfeit downstairs near the smoke. (R. 2138). While Barnes and the other inmates were standing at the upstairs railing looking down near the victim's room, Coney was standing looking out the door toward the prison yard. (R. 2169). He observed one officer going into the cell with a fire extinguisher, and then saw the victim trying to walk from his cell to the door. (R. 2139-40). After the remaining inmates were evacuated from the dorm, Coney, Santerfeit, Jones, McKnight, and Barnes were taken into confinement. (R. 2141).

Byrel Santerfeit, a.k.a. "T.C.", testified that he was the victim's cellmate at the time of the murder. (R. 2184). Santerfeit was asleep in the top bunk when the victim was set on fire and Santerfeit woke up because the bunk bed became hot. (R. 2193). He thought he was dreaming, laid his head back down, then saw flames coming up the bed, put his head over the bed, singed his hair, and jumped off of the bed. (R. 2193). Santerfeit saw that flames had engulfed the victim's bed and ran out of the cell yelling, "My roommate is on fire!". (R. 2194).

Santerfeit stated that he had a sexual relationship with another inmate, Samuel Sapp, and that he would give Sapp his cell door key for Sapp to wake him up to go to work in the laundry

room. (R. 2189). Santerfeit believed that Daries Barnes and the victim were also homosexual lovers, but he had never observed them engaged in sexual acts as he had Coney and the victim. (R. 2217, 2228-29). As a result of whatever relationship the victim had with Barnes, friction developed between Coney and the victim and between Coney and Barnes. (R. 2229). At one point, Santerfeit had kicked Coney, Barnes, and the victim out of the cell for causing friction. (R. 2229).

Coney called Eric Beneby of Metro Dade Fire Rescue as a witness. (R. 2238). Beneby responded to D.C.I. and treated the victim prior to transport via helicopter. (R. 2339). Beneby stated that he did not recall hearing the victim identify the person who had set him on fire. (R. 2342). However, Beneby stated that he was busy working with the other two rescue personnel and did not hear every conversation that occurred. (R. 2347).

Flight medic Robin Pomerantz spoke to the victim as he was being airlifted to JMH. (R. 2353-55). The victim told Pomerantz that someone had poured liquid or fluid on him and burned him. (R. 2355). Although in his deposition Pomerantz had stated that the victim said he had been burned because he was an "informant", at trial Pomerantz was concerned that he had imposed some of his own conjecture about how the victim was injured, as opposed to actually having heard those words from the victim. (R. 2357-59). Pomerantz was trained to only write down medical information in

his reports, thus he had not transcribed any of the victim's statements at the time they were made. (R. 2358-59).

Coney testified that he was an inmate at D.C.I. in April 1990 with five (5) prior felony convictions. (R. 2370). The victim and Coney were friends and had known each other since 1985. (R. 2370, 2382). He and the victim had a homosexual relationship wherein Coney was the aggressive partner and the victim the "recessive" one. (R. 2382). After Coney was transferred out of D.C.I., the victim was with "Chicken Wing", but that was not the only guy he was with. (R. 2398). When Coney returned to D.C.I. the victim continued to do as he wanted and he and Coney no longer had sex together, but Coney insisted there was no grudge or hostility between the two. (R. 2410). Coney also insisted that he did not kill the victim, Patrick Southworth. (R. 2389).

On the morning that Patrick was killed, Coney was woken up at 4:30 a.m. to pack his property for transfer. (R. 2372). After leaving the cell to go to the bathroom, Coney returned to his cell and then to the officer's station to obtain a plastic bag to pack his property. (R. 2373). The officer told Coney to go back to his cell, whereupon he did and realized that the plastic bag he had was torn. (R. 2374). When Coney went back to the officer's station to ask for another plastic bag, he was standing outside of the office when Santerfeit ran out screaming that his roommate was on fire. (R. 2374). Coney continued standing close

to the window of the officer's station as the officers ran out and downstairs. (R. 2375). Coney stood on the stairway until the officer ordered the inmates to evacuate and to go outside to the courtyard. (R. 2376).

Coney explained to the jury that the three inmates who had testified for the prosecution did so out of ill will towards him. Inmate Hoover made up the statement that Coney said he "was going to burn [the victim's] ass" because Coney had implicated Hoover in an incident involving supplies missing from the warehouse. (R. 2380-81). Young fabricated his testimony regarding giving lacquer thinner to Coney because Young had borrowed money from Coney and never paid it back on time. (R. 2379). Coney stated that Hason Jones made up the story about seeing him take out the shoe box, pour liquid from soda cans into a butt can, and leave the cell, because there were bad feelings between Coney and Jones. (R. 2411). Coney attributed the bad feelings to an incident where Coney had intervened when Jones was harassing the victim. (R. 2382). At the conclusion of Coney's testimony, the defense rested. (R. 2423).

Thereafter the State presented rebuttal witnesses and rested. (R. 2424-2524). The defense renewed its motion for judgment of acquittal based upon a lack of evidence. (R. 2524). The motion was denied and closing arguments were given. (R. 2524-2611). The jury was instructed and retired to deliberate. (R. 2621-36). The jury found Coney guilty of both counts as charged.

(R. 2642-44). Coney was adjudicated guilty on all counts and the cause was passed for sentencing. (R. 2652-53).

On March 9, 1992 the penalty phase proceedings commenced. (R. 2656). The defense informed the trial court that Coney was not relying on any statutory mitigating factors, but would be presenting evidence of the following nonstatutory mitigating circumstances: 1. background; 2. "depraved childhood"; 3. caring, giving, and helping others; 4. no father; 5. polio; and 6. being a church member. (R. 2660). The jury reconvened for the sentencing phase and the trial court gave them preliminary instructions. (R. 2690-91). Opening statements were not made by either side.

Initially, the State presented the testimony of I. Richard Jacobs, former assistant state attorney, who prosecuted Coney in 1965 for the rape of Bernie Patricia Davis in Case #2241. (R. 2691).[2] Jacobs recounted the circumstances of Coney's prior violent felony for the jury as follows: Davis was on her way to work when she lost control of her car and had a flat tire. (R. 2695). A group of people stopped to assist her in changing her tire. (R. 2695). After the tire was changed, Davis continued driving to work, but had to stop again because the tire was scraping the fender. (R. 2695). When Davis pulled her car over,

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[2] The Honorable Gerald Kogan was also an assistant state attorney in 1965 and was the co-prosecutor on Coney's case, thus prompting a Notice of Potential Conflict which has been filed in the instant case.

Coney pulled his car up and forced Davis into his car. (R. 2695). Thereafter, Coney and codefendant Willie B. Long drove Davis to Black Creek Dump where Coney bit Davis on her face and jaw as he unsuccessfully attempted to rape her. (R. 2696-99). Coney was subsequently able to penetrate the victim's vagina. (R. 2697). After Coney had completed his sexual battery, Long attempted unsuccessfully to penetrate the victim vaginally. (R. 2700).

Davis told the two men that she was a virgin and that it had not been as bad as she thought it would be. (R. 2700). She stated that she believed it would be better the next time, thus prompting Coney to inquire if there would be a next time. (R. 2700). The victim told Coney that she would arrange to meet him again in three or four days because she thought if she agreed to do that, Coney would not kill her. (R. 2701). Coney and Long drove Davis to a field and dropped her off. (R. 2701). Davis walked to a phone and called her parents who took her to the police. (R. 2701-2). After a trial by jury, Coney was found guilty of rape and sentenced to twenty (20) years imprisonment. (R. 259-61, 2703).

Next, the State called Susan Ross Lumas who testified that she encountered Coney on March 24, 1976 when she was twelve years old. (R. 2710). Susan testified that she was alone at home preparing to leave to attend the late shift of a split-session school when she heard a knock at the door. (R. 2711). When she opened the door, a tall, thin, black man asked if she needed any

lawn care or gardening work to be done. (R. 2711). She told him that her mother was not at home, that there was no work to be done, and tried to close the door. (R. 2712). As she tried to close the door , the man, she identified as Coney, pushed the door open and forced his way into the house. (R. 2712, 2716). Susan became afraid and moved away from Coney. (R. 2713).

Coney made a phone call and then forced Susan into her mother's bedroom where he made her perform oral sex on him. (R. 2713). It was an unsuccessful attempt, because Susan stated that she had no idea what Coney was forcing her to do. (R. 2713). Thereafter, Coney ordered Susan to take her pants off and she complied. (R. 2713). Coney then unsuccessfully tried to penetrate her and became angry because Susan was crying. (R. 2713). He grabbed Susan by her hair and pulled her around the house as he took jewelry and valuables. (R. 2713). After stealing the property, Coney took Susan into her sister's room and raped her. (R. 2713). After raping Susan, Coney tied a macrame cord around her neck and left. (R. 2714). Susan recalled hearing the phone ringing, answering it, and asking for help. (R. 2714).

Meanwhile her mother, Ann Ross Ferre, was working as a teacher and called Susan during her lunch break. (R. 2728-29). Someone answered the phone and rasped, "help me, help me". (R. 2729). Ferre told the secretary to send a rescue unit to her house as she left to go home. (R. 2729). On the way home Ferre

flagged a police officer to accompany her. (R. 2729). When the two entered the house, they found Susan on the couch, unconscious with a cord tied around her neck. (R. 2730). Susan had blood running from her vagina, blood on her chest and legs, red eyes, and a swollen head. (R. 2730). The officer cut the cord off and picked Susan up, and carried her outside, where he was met by rescue personnel who took her to the hospital. (R. 2730). Susan testified that she was in the hospital for approximately four days and had vaginal reconstructive surgery. (R. 2715).

Coney's Judgment and Sentence for sexual battery, robbery, burglary, and attempted first degree murder, in Case # 76-3199, involving Susan Ross Lumas, was admitted into evidence. (R. 279-81, 2717).

After introducing the medical examiner's photographs of the victim in the instant case, Patrick Southworth, the State rested. (R. 284-95, 2732-33).

Coney presented the testimony of his mother, Pearl May Sanford. (R. 2734-65). She stated that she lived with her parents and family in Georgia when Coney was born on April 18, 1947. (R. 2735-36). They lived in a rural community and Pearls's father supported the family. (R. 2735-36). When Coney was one and one-half (1½) years old, Pearl moved to another town to work and left Coney with her parents and siblings. (R. 2737). Pearl testified that Coney was never deprived of love and affection.

(R. 2756). In fact, Coney had a close relationship with his grandmother, Pearl's mother, an upright and religious woman. (R. 2757). Both Pearl and her mother taught Coney the difference between right and wrong. (R. 2757).

When Coney was three (3) years old he was stricken with polio and Pearl returned home to care for him and assist him with his therapy. (R. 2737, 2759). Coney was in the hospital for several months and when he was released he returned to Pearl's parents' house to live. (R. 2739). The polio made Coney walk with a limp. (R. 2744). Although other children teased Coney about his limp, his family never did, rather they gave him reassurance. (R. 2752, 2761). Pearl continued to visit Coney regularly until she moved to Miami. (R. 2739-41). After living in Miami, Pearl returned to Georgia and took her other two children, Earl and Larry, to Miami to live with her. (R. 2741). She could not take care of all three children, so Coney continued living with his grandparents. (R. 2742). However, Pearl always did her best to let Coney know that she loved him. (R. 2758).

Approximately five (5) years later, Coney moved to Miami to live with Pearl, his siblings, and his stepfather, Mr. Sanford. (R. 2743). By this time, Pearl had another child, a daughter. (R. 2743). Pearl remembered Coney as being helpful around the house, doing chores, etc. (R. 2749-50). The relationship between Coney and Mr. Sanford was not good, Sanford got along better with the other three (3) children than he did with Coney. (R. 2746).

However, Pearl only recalls once incident where Sanford hit Coney during a fight about a car. (R. 2748).

Pearl described Coney as being helpful to his family members. (R. 2751). She recalled that he helped his sister get off of drugs and he played a part in helping his brother become a born again Christian. (R. 2750-51). Not only did Coney help his brother, but Coney also became a born again Christian and Pearl noticed that Coney changed after he "found the Lord". (R. 2753). Pearl recalled that Coney became a born again Christian approximately two and one-half to three (2½-3) years ago. (R. 2761).

Pearl May Sanford's brother Bonny Coney testified that he is Coney's uncle, but felt more like his brother. (R. 2766). Coney's grandfather, Bonny's father, supported the family when Coney and Bonny were growing up together. (R. 2768). Bonny described the family's living conditions while growing up as being "healthy" and never lacking in food. (R. 2773). Bonny recalled that when Coney was a child that others looked up to Coney as a leader. (R. 2770). About five (5) years ago, while imprisoned, Coney became a born again Christian and began to help Bonny, who is a minister, with his ministry. (R. 2766, 2771-72).

Virginia Lee Coney testified that she first met Coney, while he was in prison, when she married his uncle Bonny nineteen (19) years ago. (R. 2773-4). Although she described Coney as "always

respectful to women", she acknowledged that he was convicted of his second rape after she met him. (R. 2777-79).

Jessie Coney, uncle of Coney and brother of Bonny and Pearl, described growing up with Coney in his parent's house. (R. 2780). Jessie's parents, Coney's grandparents, were very religious people. (R. 2784). Jessie recalled that Coney dealt with his limp from polio very well, that it was not a handicap for him, and he never felt sorry for himself. (R. 2782). Jessie testified that Coney's stepfather, Mr. Sanford was a very good father. (R. 2789). He was not aware of any fight ever occurring between Coney and Sanford, or of Sanford ever hitting Coney. (R. 2789). Jessie described Coney as a "good person" who helped family members by talking to them and giving them advice. (R. 2785-87). Specifically, Coney talked to his sister and motivated her to get off of drugs. (R. 2786).

That sister, Elaine Harrell, was called to testify about Coney. (R. 2790). Elaine does not remember when Coney went to prison the first time and never really got to know him until after he was incarcerated. (R. 2791-92). She recalled that she had a very bad drug problem three to four (3-4) years ago and that Coney helped her kick the habit by talking to her and telling her to give her life to Jesus Christ. (R. 2792).

Fred Lee Thomas stated that he met Coney in 1953 when Thomas married Coney's aunt. (R. 2793-94). He recalled that Coney was

six or seven (6 or 7) years old at the time and was a nice "kid" who always treated him with respect. (R. 2796). Thomas was aware that Coney's grandmother was a religious person who made sure that Coney attended church. (R. 2797). He recalled hearing that Coney and his stepfather had exchanged some words, but did not know this for a fact. (R. 2796). Thomas had also heard of Coney and Mr. Sanford having a falling out, but only on one occasion. (R. 2797).

A good friend of Coney's mother, Barbara Fontenot, described meeting Coney about five (5) years earlier when she began corresponding with and visiting him in prison. (R. 2800). She recounted how Coney felt abandoned by his mother when she had moved to Miami and left him in Georgia with his grandparents. (R. 2802). Coney also told her that he had not had much communication with his father, but this was just a fact of life and did not bother him as much as his mother moving away. (R. 2802-3). Coney told Fontenot that his father figure had been his grandfather, who was very nice and very religious. (R. 2805).

Coney described his relationship with his stepfather, Mr. J.T. Sanford, as troublesome. (R. 2807). J.T. Sanford was mean to both Coney and his mother and did not "take to" Coney when he eventually moved to Miami to be with his mother. (R. 2806-8). He also told her of one fight he and J.T. Sanford had engaged in over a car. (R. 2808).

Fontenot also described how Coney said he had a difficult time in school because of his limp from polio. (R. 2810). Coney was unable to run and the other children ridiculed him. (R. 2810). She was also aware of instances where Coney had tried to help other people while incarcerated. (R. 2810). He gave advice to his siblings and attempted to get them to stop abusing drugs. (R. 2810-11).

Reverend Wellington Ferguson met Coney a little more than one year before trial. (R. 2847-48). He visited Coney in prison, talked with him, and prayed for him. (R. 2849). After discussing salvation with Coney, Coney accepted Jesus Christ and asked Ferguson to baptize him. (R. 2849-50). Although Ferguson believed Coney was sincere when he told him that he accepted Jesus as his personal savior, Ferguson was not aware that family members testified that Coney told them he had accepted Jesus two and one-half (2½) years before. (R. 2853).

At the conclusion of Reverend Ferguson's testimony, the defense rested. (R. 2853). The State did not call any rebuttal witnesses.

After both sides rested, closing arguments were given. (R. 2854-83). The State argued that the following aggravating factors were applicable: (1) §921.141(5)(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control; (2) §921.141(5)(b) The defendant was

previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; and (3) §921.141(5)(h) The capital felony was especially heinous, atrocious, or cruel. (R. 2858-63).

In mitigation, defense counsel argued that the jury should consider the following: (1) Coney was born into poverty; (2) Coney's mother and father were absent during his childhood; (3) Coney was ridiculed as a child for his physical problems; (4) Coney's stepfather was mean to him; and (5) Coney went to prison at a young age. (R. 2879-83).

Thereafter, the jury received the penalty phase instructions. (R. 297-307, 2883-88). The jury returned an advisory sentence on Count I, the murder of Patrick Southworth, of death with a vote of 7 to 5. (R. 2296, 2888-89).

Sentence was imposed on March 27, 1992. (R. 2897). On Count II, of first degree arson, Coney was sentenced to thirty years imprisonment. (R. 310, 2919). The sentence on Count II was ordered to be consecutive to the sentence imposed on Count I. (R. 308-10, 2917-19).

The trial court entered a written sentencing order on March 27, 1992. (R. 312-16). The following aggravating factors were found for the murder of Patrick Southworth:

> 1. The capital felony was committed by a person under sentence of imprisonment. (R. 313).

> 2. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. (R. 313).
>
> 3. The defendant knowingly created a great risk of death to many persons. (R. 314).
>
> 4. The murder was committed while the defendant was engaged in the commission of an arson. (R. 314).
>
> 5. The murder was especially heinous, atrocious, or cruel. (R. 314-15).

The trial court considered all of the mitigating circumstances and found that there were none applicable. After noting that the defendant had not offered any evidence of statutory mitigating circumstances, the trial court specifically addressed the proposed nonstatutory mitigating circumstances, to-wit: impoverished childhood, abuse by stepfather, and assistance to family members, and concluded that they were controverted by the evidence, not supported by the record, and insufficient to lessen Coney's moral culpability for this depraved homicide.

The sentencing order concluded with the following:

> In conclusion, the Court finds that there are more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the death penalty. The Court finds no mitigating circumstances. On this record, the sentence of death is not disproportionate.
>
> (R. 316).

A Belated Notice of Appeal was filed on June 17, 1992. (R. 340-41). This appeal then followed.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION ON DYING DECLARATIONS?

II.

WHETHER THE TRIAL COURT PROPERLY ADMITTED THE DYING DECLARATIONS OF THE VICTIM?

III.

WHETHER CONEY WAS DENIED HIS RIGHT TO BE PRESENT AT CRITICAL PHASES OF THE TRIAL?

IV.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING REPETITIOUS DISCUSSION OF LEGAL DEFINITIONS DURING VOIR DIRE?

V.

WHETHER THE TRIAL COURT CORRECTLY RULED ON THE ADMISSION OF EVIDENCE DURING THE COURSE OF THE TRIAL?

VI.

WHETHER, DURING THE SENTENCING PHASE, THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE CIRCUMSTANCES OF CONEY'S PRIOR VIOLENT FELONY CONVICTION?

VII.

WHETHER THE TRIAL COURT CORRECTLY DENIED CONEY'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR MADE NO IMPROPER COMMENTS DURING PENALTY CLOSING ARGUMENT?

VIII.

WHETHER CONEY'S SENTENCE FOR THE MURDER OF PATRICK SOUTHWORTH IS DISPROPORTIONATE?

IX.

WHETHER THE TRIAL COURT PROPERLY FOUND IN AGGRAVATION THAT CONEY CREATED A GREAT RISK OF DEATH TO MANY PERSONS?

X.

WHETHER THE TRIAL COURT PROPERLY CONSIDERED EACH MITIGATING FACTOR PROPOSED BY CONEY?

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying Coney's proposed jury instruction regarding the admissibility of dying declarations where it was not only an improper comment on the evidence, but also an improper instruction to the jury to determine preliminary legal conditions.

Defense counsel objected at trial to the admission of the victim's dying declarations due to the State's inability to establish that the victim was in immediate fear of dying. After an extensive hearing on this issue, the trial court properly found the statements to be admissible. However, the claim on appeal, that the statements were improper evidence of motive, was not presented below and is not properly before this Court. Furthermore, the trial court properly admitted the statements and Coney has not shown this ruling to be clearly erroneous.

The pretrial conference on January 31, 1992 was not a critical stage where purely ministerial matters were discussed. Furthermore, even if he had been present, Coney could not have participated and his absence did not frustrate the fairness of his trial. Coney's absence during purely legal discussion of challenges for cause was similarly harmless where he could not have contributed.

Not only did Coney fail to preserve his claim regarding limitation of voir dire, but the trial court did not abuse its

discretion in curtailing repetitive questioning of jurors regarding legal definitions. Given the overall voir dire questioning and the instructions given by the court, Coney cannot establish that the trial court abused its discretion during voir dire.

The details of Officer Sanchez' statement given on the morning of the murder were properly admitted where the defense did not object to them and, in fact, elicited them during examination of the witness. The trial court properly prohibited defense counsel from presenting improper impeachment evidence where the necessary predicate for the introduction of reputation testimony had not been established. Evidence that Coney and the victim were in bed together was not prejudicial where their homosexual relationship was undisputed and evidence had previously been presented regarding their sexual activities together. The trial court did not abuse its discretion in allowing the expert arson investigator to testify about the use of the materials he found in the garbage pail at the scene.

The trial court properly admitted evidence of the circumstances of Coney's 1976 prior violent felony. The testimony of the victim's mother was concise, limited, nonrepetitive, and essential. Furthermore, any error in admitting this brief testimony is harmless.

The trial court did not abuse its discretion in denying Coney's motion for mistrial made in response to the prosecutor's closing argument during sentencing phase. Furthermore, the basis for the objection at trial, that the jury should prevent Coney from committing more crimes, is not the basis for the point on appeal, that the jury should send a message to the community, and did not properly preserve this claim for appellate review.

The sentence is not disproportionate where the murder of Patrick Southworth was not the result of a heated domestic confrontation. Coney stated that there were no ill feelings between the two men, thus he did not commit the murder in a rage of anger. Furthermore, when compared to other cases, the sentence of death is not disproportionate where Coney has two prior violent felony conviction, was under sentence of imprisonment, committed the murder during commission of a felony, created a great risk of death to many persons, and killed the victim in a heinous, atrocious or cruel manner.

Coney was not entitled to a list of aggravating circumstances the State would be relying on, thus his due process rights were not abridged. The trial court properly found that the aggravating circumstance of great risk of death to many persons was applicable to Coney. The evidence supports beyond a reasonable doubt the finding that there was a likelihood or probability of death to many persons.

The trial court properly found the mitigating evidence presented by Coney to be insignificant and this decision is supported by competent substantial evidence. The trial judge correctly rejected the nonstatutory factors where they were contradictory, not supported by the evidence, and did not diminish Coney's culpability for the brutal homicide. Furthermore, any mitigation was outweighed by the substantial uncontroverted aggravation.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION ON DYING DECLARATIONS.

Initially, Coney maintains the trial court erred in denying his request for a jury instruction on dying declarations. Coney has failed to show that the trial court abused its discretion in denying his request where his proposed instruction was a misstatement of the law and would have been an improper comment by the trial judge on the evidence.

At trial, Coney tendered a proposed jury instruction regarding the credibility of the victim's dying declaration and a determination of whether the victim had an attitude about dying. (214-15). This instruction was properly rejected by the trial court as an improper statement of the law. (R. 2479). Thereafter, Coney proposed a different jury instruction which instructed the jury that if the dying declarations of the victim "were not made when he was conscious of immediate and impending death", they should be disregarded. (R. 216-17). The trial judge correctly rejected this proposed instruction with the following:

> THE COURT: Let me say this: I've thought about this further, and even though I had initially raised it and certainly, apparently, other courts have discussed the issue, it seems to me that no instruction should, in fact, be given. And this is why I think so. At first it seemed to me that this was analogous to the situation of confession, but I think really it is not. The rules about confessions, first of all, involve a constitutional right, the 5th Amendment right, whereas this, of course, is a rule of

evidence. And furthermore, or associated with that, the instruction about confessions is put in to protect the defendant and to protect specifically the constitutional rights.

What we're talking about here, although at first it seemed analogous to me, is really a little different case. We're talking only about a rule of evidence and, of course, in some cases, it could go the other way. That is, in this case, perhaps, the instruction would be to benefit the defendant, but certainly there are situations where it could benefit the state. That is, the rules about dying declarations are not rules to protect the defendant as compared with the rule about confessions, which is always in to protect the defendant.

I mean, obviously there could be some situations where the decendent made a statement right before he died saying it was someone other than the defendant, and then the state would want or may want a similar instruction. So, obviously, it wouldn't always be to protect the defendant's rights.

It is simply a rule of evidence. I think it's more analogous to other rules that the court would have to make, such as the [Frye] Test situation where the court has to determine whether there is sufficient scientific backing for an expert opinion before that opinion could be admitted to the jury., and then the court does not give any instruction to the jury about the [Frye] Test and scientific acceptability or other kinds of rules of evidence that the court makes even, for example, the competency of a witness to testify and so on.

So I really think its more analogous to those rules and, in fact, a flight instruction. That's why I mentioned it. There's a very recent case cited by the Florida Supreme Court. [Fenelon] v. State. I have the opinion. It was decided on February 13, 1992, where they discuss whether a flight instruction should be given and the court decides.

They say, "We can think of no valid reason why a trial judge should be permitted to

> comment on evidence of flight as opposed to any other evidence adduced at trial." To me, this is analogous to the question here. Why should the court make any comment on this evidence, the dying declaration, as opposed to any other evidence?
>
> After thinking about it further, I think that it would be improper to instruct the jury. This is not to say, of course, that you can't argue this. In fact, obviously you can. You can argue everything about this, about whether it's reliable and that he wasn't here testifying under oath and anything else that is appropriate to argue. Certainly you can make that argument. But I think, on second thought, that it would be improper to give any instruction.
>
> (R. 2496-98).

The trial court did not abuse its discretion in following the policy of this Court and denying the requested instruction.

The proposed instruction would have been an invasion of the jury province by the trial court; similar to the giving of a flight instruction in Fenelon v. State, 594 So. 2d 292, 294 (Fla. 1992), which was addressed by this Court with the following:

> ...The flight instruction, however, treats that evidence differently from any other evidence. It provides an exception to the rule that the judge should not invade the province of the jury by commenting on the evidence or indicating what inferences may be drawn from it.
>
> Especially in a criminal prosecution, the trial court should take great care not to intimate to the jury the court's opinion as to the weight, character, or credibility of any evidence adduced.
>
> *Whitfield v. State*, 452 So. 2d 548, 549 (Fla. 1984).
>
> In reconsidering the flight instruction, we can think of no valid policy reason why a

> trial judge should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial.
>
> Fenelon, 594 So. 2d at 294.

Similarly, the trial court in the instant case did not abuse its discretion in refusing to comment on evidence.

Determination of whether the victim's statement was made with the consciousness of impending death was held by this Court to be a legal issue for the trial judge to resolve when deciding admissibility, rather than a matter of instruction for the jury:

> That the judge is to pass on the preliminary condition necessary to the admissibility of evidence is unquestioned [citation omitted]. It follows, as of course, that, since a consciousness of impending death is according to the foregoing principles legally essential to admissibility, the *judge must determine* whether that condition exists before the declaration is admitted.
>
> "After a dying declaration, or any other evidence has been admitted, the *weight* to be given to it is a matter exclusively for the jury. They may believe it or may not believe it; but, so far as they do or do not, their judgment is not controlled by rules of law. Therefore, though they themselves do not suppose the declarant to have been conscious of death, they may still believe the statement; conversely, though they do suppose him to have been thus conscious, they may still not believe the statement to be true. In other words, their canons of ultimate belief are not necessarily the same as the preliminary legal conditions of admissibility, whose purpose is an entirely different one [citation omitted]. It is, therefore, erroneous for the judge, after once admitting the declaration, to instruct the jury that they must reject the declaration, or exclude it from consideration, if the legal requirement as to consciousness of death does not in their

> opinion exist. No doubt they *may* reject it, on this ground or on any other; but they are not to be expected to follow a definition of law intended for the Judge."
>
> Soles v. State, 119 So. 791, 792 (Fla. 1929).

If the jury had been instructed as requested, they would have been placed in the position of determining preliminary legal conditions and addressing the admissibility of evidence, thereby invading the province of the trial judge, which is equally contrary to the policy of Florida.

Moreover, defense counsel argued that the victim's statements were unreliable and should be disregarded. (R. 2598-99). Additionally, several defense witnesses testified that they were present when the statements were allegedly made, yet they did not hear them. (R. 2238-44, 2353-57, 2360-63). Coney was not prejudiced by the absence of an instruction regarding the conditions for admissibility of the victim's statements. Moreover, numerous State witnesses implicated Coney in the murder of Patrick Southworth. Inmate Young testified that he provided Coney with the lacquer thinner, (R. 1829-47); Inmate Hoover testified that he heard Coney state that he was going to "burn [the victim's] ass", (R. 1972-92); and Inmate Jones observed Coney with the "butt can" of accelerant moments before the murder. (R. 2012-35). Given the defense attack on the statements of the victim and the additional evidence implicating Coney in the murder, there is no reasonable possibility that the absence of the proposed jury instruction contributed to the verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

II.

THE TRIAL COURT PROPERLY ADMITTED THE DYING DECLARATIONS OF THE VICTIM.

In his next argument, Coney alleges that statements of the victim regarding motive were improperly admitted by the trial court. Specifically, Coney claims that dying declarations of the victim, referencing hostility between the two of them, were inadmissible. However, Coney neglected to raise this basis for exclusion at trial and is precluded from bringing it up on appeal. Rodriguez v. State, 609 So. 2d 493, 499 (Fla. 1992).

Prior to trial, Coney filed a "Motion for Order in Limine" to exclude "The victim's, PATRICK SOUTHWORTH, hearsay testimony." (R. 60-61). At the pretrial hearing on the motion in limine, defense counsel argued that the victim's dying declarations were inadmissible based on the following grounds:

> [Defense Counsel]: ...The state's case to a very large extent hinges on a dying declaration of the victim. I will submit that there's variation of the dying declaration, but during the course of discovery, I feel that the predicate may not be laid, or they will have some difficulty laying the predicate for a dying declaration, which is *fear of imminent death*....
>
> (R. 397).

As the discussion continued between the trial judge, prosecutor, and defense counsel regarding the scope and issues of the hearing, defense counsel further explained the basis for the motion in limine:

[Defense Counsel]: There's another version for the sake of completeness. It was right after he was let out of his cell. After being put out, his statement was, "Why did they do this to me? Why did they do this to me? And he continued to make that statement numerous times even while inside of the clinic, prior to Major Thompson supposedly hearing this.

There is a question in my mind whether a proper predicate can be laid as to whether or not he was in *fear of imminent death*. Case law requires that that predicate be laid. I believe the court has wide discretion in making that determination.

The case I read states once a determination is made, it would be difficult to reverse, which is usually standard anyway.

What I would like to do, and I know this is maybe somewhat inconvenience [sic.] for [the prosecutor] as well as the court, opening statements will more likely than not concentrate on that statement.

Now, the scenario, potential scenario I see, opening statements are made, and for some reason this court--

THE COURT: You'd like to have a hearing before the opening statements?

[Defense Counsel]: That's what I was going to suggest, for the sake just to be safe. Just to be on the safe side.

Now, I understand there may be a lot of witnesses that [the prosecutor]--in all fairness to him, he's not prepared and I kind of hit him with it right now and I filed the motion a few days ago.

THE COURT: You would like to have a hearing on which the state would offer witnesses to show--to prove the predicate that this is a dying declaration, in particular that the declarant was--

[Defense Counsel]: In fact, in *fear of imminent death*. That's only a suggestion. Because assuming the scenario I put out, if they mention it during opening statement, and then it doesn't come in, we have a mess.

> THE COURT: Well, it makes sense as a way to handle it probably.
>
> (R. 399-400).

After hearing two days of testimony, the trial judge ruled that the victim's dying declarations were admissible, as follows:

> THE COURT: ...This is what I'd like to do. I'd like to tell you about my ruling first on the pretrial motion. As I understand it, there are three statements that the state would be seeking to introduce as dying declarations under that exception to the hearsay rule. First, the statement made to Major Thompson shortly after 5:00 a.m. in the prison medical facility. I'm not going to detail the content of the statement. Second, the statement to Armando Gonzalez, the fire rescue worker, also I believe at the prison medical facility, and third, to Darrell Huffman, the security officer at D.C.I., who traveled with the victim to Jackson Hospital and the statement was made in the x-ray room about 6:30 a.m. I find that all of these statements fall within the dying declaration exception to the hearsay rule. And let me just indicate a few things.
>
> First, it's clear to me from the evidence that the statements were made, and the fact that they may not have been overheard by others who were in the vicinity is completely understandable under the circumstances. All the witnesses who testified that they did not hear the statements, I find them to be believable as well, but I understand why they didn't hear the statements. The fact that they were made is corroborated by certain circumstances.
>
> As to the statement to Gonzalez, I find it significant that the Fire-Rescue team had a conversation shortly after the incident where they were discussing the content of the statement. And that was agreed to, I believe, by at least two of the three. I'm not sure whether that was asked of Beneby.

And as to the statement to Huffman, to me it's significant that the statement was recorded by Huffman at or near the time that it was made in that log. And further, as I indicated earlier today, the fact that he had this memory of that incident between the defendant and the victim to me indicates that the statement actually was made, that is, as to whether they were actually made.

Then the question, which I think is a harder *question, is whether they were made while the declarant would reasonably believe that his death was imminent*. Let me say a lot of times the question that was asked to the witnesses by defense counsel was, "Is he in *fear of imminent death*?" The idea of fear, I don't believe, is in the rule, because I guess some people could have a fear of dying and some type of acceptance of dying. But in any case, I don't think you have to show fear, although I'm not sure that fear wasn't here. I think the *question is whether the person reasonably believed that his death was imminent*.

I find the following facts to be very significant. First, the actual facts regarding the severity of his injury. They're not controverted here. They're very serious injuries, and, in fact, of course, the victim died the day following the statements. And, according to what was testified to today, although I haven't seen the complete records or hospital records, apparently he became unconscious several hours after the statements were made. I don't know whether he regained consciousness, but he fell into an unconscious state several hours after the statements were made and then died the following day.

Secondly, I find significant the statements that, I believe, from the testimony were made by the victim to Nurse Mix, that is, "Am I going to die?" which were repeatedly made and have been corroborated by two witnesses here, Steven Barney and Penny Vincent, who was called by the defendant. Both of them indicated that they did hear the victim ask that question several times. Nurse Mix, I found her to be a very believable witness.

Thirdly, the testimony of Nurse Mix herself regarding the appearance of the victim,

> especially as he was being wheeled out of the prison clinic. Now, I know these things are very subjective, and if it weren't for all the other matters, this alone might not convince me, but adding that to the other factors makes it significant.
>
> And, lastly, the total circumstances that the victim was in at the time that he made these statements, and in particular the fact that he had a very serious injury and there was some urgency about his treatment. After all, he was taken by helicopter to Jackson, and anyone could figure out that if you're flown to Jackson instead of being taken in an ambulance, that your circumstances must be very critical. At least it was very urgent that he get the treatment. And then all the discussion about the medical personnel, and the rescue workers talking about what was going on. And even though there certainly isn't any testimony that they said, you know, "We're going to lose this guy", or anything like that, still, all that hustle and chaos and tubes and all of that, I think would have to convince anybody that there certainly was concern that he was going to die.
>
> Anyway, given all of those factors, that's my decision.
>
> (R. 957-61).

At trial, defense counsel renewed the objection which was litigated in the pretrial hearing, but did not add any additional grounds:

> Your Honor, we obviously had a long motion--we obviously dealt with or litigated this. I just want to make sure it's clear on the record that I have a continuing objection to the introduction of any dying declaration at this point. I want to just make sure that is clear on the record.
>
> (R. 1741).

Throughout the hearing and again at trial, defense counsel asserted that the statements should be excluded based on the

State's inability to establish the victim's "fear of imminent death". The jury instruction, which is the subject of Argument I, also addressed the issue of "fear of imminent death". Coney never objected to the statements on the basis of improper evidence of motive and is prohibited from raising it now. See Castor v. State, 365 So. 2d 701, 703 (Fla. 1978)(An objection must be specific enough "to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.").

Furthermore, the dying declarations were properly admitted at trial. In Lester v. State, 37 Fla. 382, 20 So. 232, (Fla. 1896), this court established the rule for admission of dying declarations, saying:

> To render such declaration admissible, however, the court, must be satisfied that the deceased declarant, at the time of their utterance, knew that his death was imminent and inevitable, and that he entertained no hope whatever of recovery. This absence of all hope of recovery, and appreciation by the declarant of his speedy and inevitable death, is a preliminary foundation that must always be laid to make such declarations admissible. It is a mixed question of law and fact for the court to decide before permitting the introduction of the declarations themselves.....It may be gathered from any circumstance or from all the circumstances of the case, and is sufficient if the evidence upon such test question fully satisfies the judge that the deceased knew and appreciated his condition as being that of an approach to certain and immediate death.
>
> Lester, 20 So. at 233.

The trial court properly admitted the statements after the State established that the victim knew his death was imminent and Coney has not shown that this ruling was clearly erroneous. Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988), cert. denied 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239; Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); Henry v. State, 613 So. 2d 429 (Fla. 1993).

Furthermore, in addition to the dying declarations of the victim, evidence of the animosity between Coney and the victim was introduced, without objection, during cross examination of defense witness Barnes. Barnes recalled that he took up for the victim when Coney was arguing with the victim about the relationship between Coney and the victim. (R. 2151). The discussion grew very heated and Coney used foul language to threaten both the victim and Barnes. (R. 2152). Given this evidence, coupled with the other inmates' testimony implicating Coney, the introduction of hearsay statements regarding motive was harmless.

III.

CONEY WAS NOT DENIED HIS RIGHT TO BE PRESENT AT CRITICAL PHASES OF THE TRIAL.

In his third argument, Coney alleges reversible error due to his absence from a pretrial conference on January 31, 1992 and from portions of voir dire. Coney's absences did not thwart the fundamental fairness of the trial court proceedings and he was not prejudiced.

At the pretrial conference, defense counsel waived Coney's presence. (R. 389). Thereafter, the trial judge, prosecutor, and defense counsel discussed scheduling of the upcoming trial, (R. 389-396). Defense counsel advised the trial court that he had filed a motion in limine which also needed to be heard. (R. 396). A discussion regarding the number of witnesses, time needed for the hearing, and other scheduling matters followed. (R. 397-409). The trial judge, while specifically stating that she was "not taking any position", inquired as to the scheduling of the penalty phase. (R. 409-14). Defense counsel also requested additional funds to cover his investigation costs. (R. 414--16). The final matter of pretrial importance involved preparation by defense counsel for the penalty phase, e.g. neurological examination, interviews with family members, etc. (R. 418-22).

This pretrial conference was not a critical stage of the trial as defined by Florida Rule of Criminal Procedure 3.180. During the status conference, no evidence was presented, no legal

matters were argued or resolved, and no motions were heard. See Stano v. State, 473 So. 2d 1282, 1287-8 (Fla. 1985)(Defendant not prejudiced by absence from pretrial conference where purely ministerial matters were resolved.)

If the pretrial conference was a critical stage, Coney was not prejudiced because the matters dealt with during this hearing concerned administrative or procedural issues and legal argument, all matters in which, even if he had been present, Coney could not have participated. See Roberts v. State, 510 So. 2d 885, 890-91 (Fla. 1987), cert. denied 108 S.Ct. 1123, 99 L.Ed.2d 284. This Court recently held as follows:

> The constitutional right to be present is rooted to a large extent in the Confrontation Clause of the Sixth Amendment. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). However, the right of presence is protected to some extent by the Due Process Clause where the defendant is not actually confronting witnesses or the evidence against him. *Id.* A defendant has a due process right to be present at any stage of the proceeding that is critical to its outcome, if his presence would contribute to the fairness of the proceedings. *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); *Francis v. State*, 413 So. 2d 1175, 1177 (Fla. 1982). A defendant has no right to be present when his presence would be useless or the benefit a shadow. *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934). The exclusion of a defendant from a trial proceeding should be considered in light of the whole record. *Id.* at 115, 54 S.Ct. at 335.
>
> Rose v. State, 617 So. 2d 291, 296 (Fla. 1993).

A review of the entire record demonstrates that Coney could not have contributed or assisted his counsel at the status conference and therefore was not prejudiced by his absence. See Garcia v. State, 492 So. 2d 360, 363 (Fla. 1986) cert. denied 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (Garcia not prejudiced by absence from pretrial hearing of numerous motions where his presence would not have aided defense counsel). Coney's absence did not frustrate the fairness of his trial.

Coney also alleges reversible error due to his absence during portions of voir dire, yet any error is subject to a harmless error analysis. Francis v. State, 412 So. 2d 1175 (Fla.1982). A review of the circumstances surrounding Coney's absence establishes beyond a reasonable doubt that this error was harmless.

After limited questioning to death qualify the venire, the trial court entertained challenges for cause outside of the presence of Coney. (R. 721-37). The State moved to excuse six (6) jurors[3] , and defense counsel agreed with all six challenges for cause. (R. 722, 723, 724, 724, 724, 737). On two (2) other jurors, Jackson and Brant, defense counsel objected to the State's challenges for cause, and they were both denied. (R. 722, 725-26). With respect to defense challenges, two were made outside of Coney's presence and both granted, over State

[3] The six jurors were: Sineus; Arias; Chiu; Caraballo; Moore; and Kinser.

objection. (R. 725, 1082). Only one State challenge for cause was granted, over defense objection, when Coney was not present. (R. 723). However, the striking of Juror Clark has not been raised on appeal or otherwise alleged to have been improper and prejudicial to Coney. Additionally, defense counsel specifically stated that he discussed each juror with Coney, thus he was not uninformed or prejudiced by his absence. (R. 1094-96).

Furthermore, the challenges for cause involved legal issues toward which Coney would have had no basis for input. His absence was harmless because he "obviously suffered no prejudice as a result". Harvey v. State, 529 So. 2d 1083, 1086 (Fla. 1988) cert. denied 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237.

Coney was present for the questioning of Juror Schopperle, regarding her knowledge of "Operation Court Broom", a federal investigation of state judges and attorneys. (R. 1087-89). However, he was not present at the sidebar wherein the scope of the questioning was discussed. (R. 1081-85). This sidebar discussion was not a critical stage of the proceeding in which Coney was entitled to participate. Juror Schopperle was later removed with a peremptory strike, (R. 1112), and any allegation of prejudice as a result of Coney's absence is speculative and unfounded.

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING REPETITIOUS DISCUSSION OF LEGAL DEFINITIONS DURING VOIR DIRE.

As his next point, Coney claims that he was denied his right to a fair and impartial jury where the trial court prohibited further discussion about reasonable doubt. However, not only did Coney fail to properly preserve this issue for appellate review, he has neither shown that the limitation of discussion operated to his detriment nor that the trial court abused its discretion.

After defense counsel asked the venire several questions about the concept of reasonable doubt, (R. 1036, 1060, 1061), the trial court curtailed the discussion and defense counsel agreed as follows:

> THE COURT: I don't want to cut you off, but we can't have further discussion about reasonable doubt. It doesn't lead to any further understanding of the juror's qualifications.
>
> [Defense Counsel]: I'll continue then, judge. Mr. Griffin, I think you were the last person I spoke to on line three. Let me see if there's any more specific questions on specific individuals....
>
> (R. 1062).

Unlike the case of Lavado v. State, 492 So. 2d 1322, 1323 (Fla. 1986), defense counsel in the instant case did not object to the court's limitation of inquiry. Furthermore, the defense indicated its full satisfaction with regard to the panel which

was ultimately selected and did not object or otherwise indicate any dissatisfication with the trial court's limitation of discussion regarding reasonable doubt.

Given the overall voir dire questioning and the instructions by the trial court at the beginning and end of the case, Coney's right to be tried by a fair and impartial jury was not abridged. Not only did the trial judge extensively discuss reasonable doubt with the potential jurors, (R. 662, 667, 671, 672, 675, 687, 757-60, 1058), but she also gave preliminary instructions to the jurors regarding reasonable doubt. (R. 1263-68). See Coney v. State, 348 So. 2d 672, 675 (Fla. 3d DCA 1977)(Trial court did not err in precluding defense counsel from repetitive questioning concerning the prospective jurors' understanding of the law on presumption of innocence). Thus, as recognized by this Court, the trial court was properly controlling repetitive voir dire.

> While 'counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors,' it is the trial court's responsibility to control unreasonably repetitious and argumentative voir dire. *Jones v. State*, 378 So. 2d 797, 797-98 (Fla. 1st DCA 1979), *cert. denied*, 388 So. 2d 1114 (Fla. 1980). The test for determining a juror's competency is whether that juror can lay aside any prejudice or bias and decide the case solely on the evidence presented and the instructions given. [citations omitted]. The prospective juror that Stano now complains about met that test, as did all those persons who eventually served on the jury. Stano has shown no abuse of discretion in the trial court's restriction of defense counsel's voir dire.

Stano v. State, 473 So. 2d 1282, cert. denied 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907.

The method of conducting voir dire is left to the sound discretion of the trial court and will be upheld unless an abuse of discretion is found. The trial court did not abuse its discretion in curtailing repetitious voir dire examination of the prospective jurors' understanding of the concept of reasonable doubt.

V.

THE TRIAL COURT CORRECTLY RULED ON THE ADMISSION OF EVIDENCE DURING THE COURSE OF THE TRIAL.

Coney contends that the trial court made four errors with respect to the admission of evidence at trial. The rulings of the trial court were correct in all four instances and Coney's position is without merit.

As his first example, Coney identifies the admission of testimony during the redirect examination of Officer Sanchez. However, not only did Coney fail to preserve an objection to this testimony at trial, he waived any objection by eliciting the evidence he now complains of. On direct examination, Officer Sanchez stated that the last time he saw Coney before the fire that Coney was in the hall, but that Sanchez was busy with a property inventory and not paying attention to Coney. (R. 1550-52). On cross examination, defense counsel brought out Sanchez' statement in the Incident Report he wrote on April 6, 1990, that Coney was in the hallway when Officer Pesante walked in. (R. 1576-80). On redirect examination when the State asked Sanchez about the statement he gave to Detective Odio on the morning of April 6, 1990, the following exchange occurred:

> [Defense Counsel]: Objection, judge.
>
> [PROSECUTOR]: It's a prior consistent statement. He's attempted to impeach his statement here at trial, judge.
>
> THE COURT: Do you have a dispute about that?

> [Defense Counsel]: Your Honor, then I would like an opportunity to recross.
>
> (R. 1591).

Thereafter, Officer Sanchez testified that on the morning of the murder he told Detective Odio that he did not know where Coney was at all times. (R. 1597). Subsequently, defense counsel was permitted to conduct recross examination of Sanchez. (R. 1605-11). And, not only did defense counsel elicit further details of the statement given on April 6, 1990, (R. 1605-10), he also presented evidence of a statement made by Sanchez on April 10, 1990, wherein he stated that Coney was standing outside the office when Sanchez did the property inventory. (R. 1610-11). After having his request for recross granted, defense counsel did not object to the admission of the contents of the April 6, 1990. Further, any error with respect to its admission was waived when defense counsel presented the evidence during recross.

Moreover, the trial court properly allowed the State to elicit the statement of April 6, 1990 after defense counsel had impeached Sanchez on cross examination about the location of Coney immediately prior to the fire. This impeachment was sufficient to create an inference of improper motive to fabricate and thereby allow admission of the prior consistent statement. The State was properly allowed to present testimony to rebut such an inference. §90.801(2)(b), Fla. Stat. (1992). Coney has not shown that the trial court abused its discretion in admitting

this evidence. However, if the evidence was improperly admitted, there is no reasonable possibility that, absent this evidence, the verdict would have been different.

The next alleged evidentiary error occurred when defense counsel was prohibited from asking a defense witness on redirect if he knew Coney's cellmate to be a "snitch". (R. 2131). However the trial court correctly prohibited defense counsel from obtaining an answer to the improper impeachment. (R. 2131).

When Hason Jones testified, he was never questioned about whether he had ever been a snitch, thus questioning a different witness about an issue which was not presented to Jones was an attempt at improper impeachment of Jones' testimony. cf Lusk v. State, 531 So. 2d 1377 (Fla. 1977)(Impeachment evidence of victim's lack of truthfulness should have been permitted on cross examination of the victim.). Here, rather than asking the question of Jones, defense counsel waited until another witness was testifying and improperly attempted to elicit reputation testimony, contrary to the dictates of §90.609, Fla. Stat. (1992). See Rogers v. State, 511 So. 2d 526, 530 cert. denied 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988)(Not error to exclude reputation testimony where defendant failed to provide the necessary predicate for such testimony.).

Additionally, testimony that Jones was a religious person was properly elicited on cross examination of Severance, where

defense counsel had suggested during examination of Jones that he had conveniently found religion in prison (R. 2957), thus it was not an improper attempt to introduce evidence of good character.

Coney's next claim of evidentiary error is based on the admission of evidence that he and the victim were caught in his bed by an officer on March 2, 1990. It was undisputed at trial that Coney and the victim had a homosexual relationship. Further this evidence was cumulative to other evidence which had been previously admitted without objection. When the victim's cellmate, Santerfeit, was testifying, he stated that he had observed Coney and the victim engaging in homosexual sex acts and had walked in on the two of them when they were having sex in his and the victim's cell. (R. 2228). Coney cannot establish that the prejudicial impact of testimony, regarding being in the bed with the victim, outweighs the probative effect where the date of the activity was relevant to establish proximity to the date of the murder. Furthermore, any error in eliciting this evidence is harmless.

Appellant's final claim of evidentiary error arose from the statement of the arson investigator that the paper found in the garbage pail "was probably used to seal the top of the cans." (R. 1406). A trial court has wide discretion regarding the admissibility of evidence and the range of subjects about which an expert can testify. Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d

1322 (1982). Coney has not established that the trial court abused its discretion in allowing the witness to give his opinion. Additionally, the jury was instructed that experts were like other witnesses and that they could "believe or disbelieve all or any part of an expert's testimony." (R. 2631). Accordingly, there is no reasonable possibility that the single statement regarding the use of paper to seal the cans contributed to the verdict.

VI.

DURING THE SENTENCING PHASE, THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE CIRCUMSTANCES OF CONEY'S PRIOR VIOLENT FELONY CONVICTION.

Appellant concedes that, for purposes of establishing the aggravating circumstance, it is appropriate to introduce evidence of the details of prior felony convictions involving the use or threat of violence. However, Coney contends that the trial court erred in allowing the State to introduce the testimony of the victim's mother, Ann Ross Ferre, regarding the circumstances which led to his prior violent felony convictions for the rape and attempted murder of Susan Ross Lumas because the prejudicial impact of the evidence outweighed its probative effect. Coney's argument that admission of the testimony was unduly prejudicial is without merit.

Appellant's argument fails because it is proper to introduce during the penalty phase of a capital trial, not only evidence of the prior conviction, but also evidence of the circumstances surrounding any prior conviction involving the use or threat of violence. As held by this Court:

> Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.

Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989).[4]

The testimony of the victim's mother was relevant to fully apprise the jury of the background of Coney's sexual battery and attempted first degree murder convictions in 1976.

The victim, who was twenty-eight years old at the time of the instant trial, gave limited testimony of her recollection of Coney's attack on her in 1976 when she was twelve years old. (R. 2709-16). Susan Ross Lumas, the victim, described how Coney entered the house, forced her into a bedroom, unsuccessfully attempted to have her perform oral sex and vaginal intercourse, took her throughout the house as he stole property, made her go into a different bedroom where he committed sexual battery through vaginal intercourse, and finally tied a macrame cord around her neck and strangled her. (R. 2712-14). The victim's mother arrived home immediately after the attack and found her unconscious with the cord still tied around her neck. (R. 2730). Due to her unconsciousness, the victim was unable to fully describe the violent nature of the attack, thus the testimony of her mother was necessary to give a complete description of the circumstances of Coney's prior violent felonies. Furthermore, the victim had never seen photographs of herself after the attack and the defense refused to stipulate that photographs were those

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[4] In Rhodes, this Court upheld the admission of a police officer's testimony regarding the facts of the prior violent felony, and held the admission of a tape recording to be error, albeit harmless error. However, the evidence in the instant case did not violate the Appellant's confrontation rights as the evidence did in Rhodes.

of the victim. (R. 2687). Although the trial court sustained the defense objection to photographs of the victim taken on the day of the attack, (R. 2725), the testimony of the mother was essential for admission of the photograph of the victim taken several weeks after the attack. (R. 282-3, 2725).

After reviewing a proffer of the mother's testimony, the trial court permitted her limited testimony with the following:

> THE COURT: I'm going to allow her to testify. First, she can testify certainly about the color photograph to identify that--the defendant did not want to stipulate that that was the victim in that case, and she certainly can testify to that. I'm also going to allow the state to ask her about what she observed when she arrived home, because that is the essence of the probative nature of this in the testimony, is the degree of the violent attack in that case, and the victim really couldn't testify about that. She certainly explained what had happened, but from her testimony, I don't think you would understand--a jury would understand--well, the effect of strangling--trying to strangle her or tying the rope around her neck. The fact that the injury was really quite severe from that, which is probably one of the most violent aspects of that attack. So I think it's probative. She also did not seem to me unduly emotional, at least in the proffer. Now, I know this has been quite some years ago, but she seemed matter-of-fact.
>
> (R. 2724-25).

Thereafter, the mother briefly testified about the physical condition of the victim immediately after Coney's violent attack. (R. 2728-31). Her testimony was neither cumulative to that of her daughter, nor unduly prejudicial. The trial court did not abuse its discretion in admitting the evidence.

Contrary to Appellant's assertions, the testimony of Ann Ross Ferre was not a prejudicial presentation of the "horrors that she experienced when she saw the unspeakable brutality that had been perpetrated on her twelve-year-old daughter", rather it was a concise probative accounting of the violent nature of Coney's prior crimes as well as a necessary identification of a photograph of the victim. Finally, even if the testimony of Ann Ross Ferre was improperly admitted, there is no reasonable possibility that the jury would have recommended, and the trial judge would have imposed a sentence other than the death penalty. Freeman v. State, 563 So. 2d 73 (Fla. 1990)(Error in admitting testimony from spouse of victim of prior violent felony was harmless error.).

VII.

THE TRIAL COURT CORRECTLY DENIED WATSON'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR MADE NO IMPROPER COMMENTS DURING PENALTY CLOSING ARGUMENTS.

Appellant's next claim is that the prosecutor made four statements during the penalty phase closing argument that were so egregious as to warrant a new sentencing hearing. However, this claim has been waived as to three of the comments because Coney did not object at trial. Clark v. State, 363 So. 2d 331 (Fla. 1978). With respect to the one statement that was objected to, Coney has failed to demonstrate that it was improper or that the trial court abused its discretion in denying his motion for mistrial.

Coney is precluded from raising an objection to the following three statements of the prosecutor:

> We, as a group of human beings, formed a society and the society is based on the rule of law, not of man. Rules have been designed to proscribe certain activity. And if there's one universal rule, it is against the unlawful killing of another. Society has seen fit, this community has seen fit in this state and throughout the country, if someone violates the proscription, he must face the death penalty.
> (R. 2871).
>
> The jury's role is that of an advisory board to the court. You supply the court with a conscience of the community. You tell the judge how those selected from our community feel about this crime.[5]
> (R. 2873).

[5] Not only was this comment a correct statement of Florida law,

> Reason among yourselves using your common sense and your every day life experiences to discuss frankly and candidly what as members of our society, a society we all live in, a society with rules we all share, a society that makes us responsible, makes us accountable for our own actions, what as a society we are to do with someone who violates the highest crime, that of first degree murder. The decision that you will render will speak for you, speak for the community. (R. 2873).

Coney did not follow the dictates set out by this Court for preserving claims for appellate 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 (Fla. 1985).

Furthermore, contrary to Coney's assertions, his single objection to an earlier comment of the prosecutor did not preserve his objection to all subsequent comments. The trial court instructed defense counsel to continue to raise his objections as follows:

> [Defense Counsel]: You Honor, if you want, I can continue objecting every time.
>
> THE COURT: I think you better--or for which?
>
> [Defense Counsel]: Well, I don't know what is coming up in the future.

[See Grossman v. State, 525 So. 2d 833 (Fla. 1988)], but Coney failed to raise it as a violation of Caldwell v. Mississippi, 471 U.S., 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), at trial and only did so in footnote #14 of Appellant's Brief.

> THE COURT: I think if you have an objection that hasn't been previously been raised, you should raise it, because if I agree, I'd like to advise.
>
> (R. 2869).

Thereafter, in response to the above-listed three statements, defense counsel neither raised another objection nor made a motion for mistrial, thereby denying the trial court of an opportunity to address any possible error. Accordingly, Coney's objection to these three comments was not preserved for appeal. See Wilson v. State, 436 So. 2d 908, 910 (Fla. 1983)(Single objection to one comment did not preserve objection to remaining comments.).

Furthermore, Coney's basis for objection to the initial statement on appeal is different from the basis presented to the trial court. At trial, the following statement and objections were made:

> [PROSECUTOR]:...The question you have to answer is, does the mitigation change the circumstances of the victim's murder? The death penalty is a message sent to certain members of our society who choose not to follow the rules. It is only applicable for a first degree murder, for those who violate the sacredness and sanctity of human life. Such behavior cannot, nor will not, be tolerated, because life has value, has meaning, has purpose. This community will not condone, nor permit, nor allow this type of behavior. We must outlaw it. We must condemn it. We must punish individuals convicted of first degree murder.
>
> [Defense Counsel]: Objection, Your Honor. Preserve now or would you like to hear it at this point?

THE COURT: What in particular are you objecting to?

[Defense Counsel]: The statements.

THE COURT: Why don't you approach the bench?

[AT SIDEBAR]:

[Defense Counsel]: The argument this community will not tolerate it is, I submit improper. It is suggesting to the jury, if they don't stop this man, there's potential that he might come out in the community and do this again.

THE COURT: I didn't get that at all.

[Defense Counsel]: Well--

THE COURT: I don't think that's an inference to draw from the argument. I don't think that's what was said. Could you read that back?

(Thereupon, the above referred to portion was read back by the court reporter.).

THE COURT: I don't think there's anything in what he said that indicated an argument that this jury should recommend death so that other people wouldn't be exposed to his violence. I'll overrule the objection.

[Defense Counsel]: Your Honor, I assume also that you would deny my motion for mistrial as well.

THE COURT: Yes.

(R. 2867-69).

At trial, defense counsel argued that the comment was improper as telling the jury that they should stop Coney before he goes out into the community and commits crimes again. (R. 2868). Yet, on appeal this objection has been miraculously transformed into one admonishing the jury to "send a message to the community". Accordingly, this issue was likewise not presented to the trial court for ruling or preserved for review.

This Court recently addressed a similar situation, where no objection was made to an allegedly improper argument of sending a message to the community with the following:

> ...However, we have also recognized that wide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). The control of comments made to the jury is within the trial court's discretion, and an appellate court will not interfere unless an abuse of discretion is shown. *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990), *cert. denied*, 111 S.Ct. 2067, 114 L.Ed.2d 471 (1991); *Breedlove*, 413 So. 2d at 8. A review of the record shows that the prosecutor's comments in the context of the closing argument in its entirety and the penalty phase do not constitute fundamental error. Absent fundamental error, we find that the defense counsel failed to preserve the issue for review, thus precluding appellate review. Davis v. State, 461 So. 2d 67, 71 (Fla. 1984), *cert. denied*, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). Even if we considered these issues preserved for appeal, we find that the prosecutor's comments are not so outrageous as to taint the jury's finding of guilt or recommendation of death. *See Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985).
>
> Crump v. State, 18 Fla. L. Weekly S331, 334 (Fla. June 18, 1993).

It is axiomatic that the trial court must exercise its discretion to control closing arguments and the trial court's ruling on these matters will not be reversed absent a showing of a clear abuse of discretion. Hooper v. State, 476 So. 2d 1253, 1257 (Fla. 1985). Coney has not made such a showing in this case.

Moreover, Coney's argument that a jury recommendation of seven to five prohibits a finding of harmless error is spurious. This Court has previously rejected arguments regarding the relative closeness of the jury's vote as "sheer conjecture" and having "no relevance". Clark v. State, 443 So. 2d 973, 977 (Fla. 1983); Craig v. State, 510 So. 2d 857, 867 (Fla. 1987)., cert. denied 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680.

VIII.

CONEY'S SENTENCE FOR THE MURDER OF PATRICK SOUTHWORTH IS NOT DISPROPORTIONATE.

In his next argument, Coney puts forth the absurd proposition that his death sentence for the murder of Patrick Southworth is disproportionate because of the domestic nature of the case. This position is directly contrary to Coney's following trial testimony:

> [Prosecutor] Q: And you would never hold a grudge? You would never be angry that your lover left you?
>
> [Coney] A: I can't say that that. I have held grudges in my life. Between Pat and I, there was no grudge between us. There was no hard feelings between us. Everybody have their differences and what differences we had we have always managed to work out.
>
> (R. 2410).

Coney relies upon Blakely v. State, 561 So. 2d 560 (Fla. 1990); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Garron v. State, 528 So. 2d 353 (Fla. 1988); and Wilson v. State, 493 So. 2d 1019 (Fla. 1986), to support his position that when the murder is a result of a heated domestic confrontation, the death penalty is not proportionately warranted. However, according to his own admission, he did not harbor any ill feelings toward the victim.

The cases relied upon by Coney are also distinguishable on other factors. Blakely was the result of a long-standing domestic dispute between a husband and wife. Blakely's only prior criminal conviction had been for driving under the

influence twenty (20) years prior to the murder of his wife. Similarly, Ross also had no significant history of violence, as well as no reflection prior to the murder. Ross, Id. at 1174 Conversely, the evidence established that Coney had a plan to kill Patrick Southworth. He obtained the lacquer thinner the week before the murder. He told inmate Hoover that he was going to burn the victim's ass. He stated to Hason Jones that he was angry that he did not have more time to enable him to get some gasoline.

This was not a case involving a sudden fit of rage. Notwithstanding Coney's statement that he held no grudge, even if Coney's motivation was grounded in passion for the victim, he contemplated the murder well in advance. As in Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), the circumstances of this case depict a cold-blooded, premeditated killing. Given this evidence, plus the strong aggravating factors which were uncontroverted: under imprisonment, prior violent felony convictions, during commission of a felony, and heinous, atrocious or cruel, the totality of the circumstances lead to the conclusion that death is proportional. See Morgan v. State, 415 So. 2d 6 (Fla. 1982), cert. denied 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982)(Death penalty not disproportionate where Morgan was under imprisonment, had prior violent felony conviction, and stabbing of fellow inmate was heinous, atrocious or cruel.); Marshall v. State, 604 So. 2d 799 (Fla. 1992)(Death sentence not disproportionate where Marshall was under

imprisonment, had prior violent felony convictions, and killing of fellow inmate was heinous, atrocious or cruel, and during course of a burglary.); Duncan v. State, 18 Fla. L. Weekly S268 (April 29, 1993)(Given strong aggravating circumstances and failure to establish mitigating factors, death not disproportionate in domestic killing).

IX.

THE TRIAL COURT PROPERLY FOUND IN AGGRAVTION THAT CONEY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

As his next point, Coney argues that his due process rights were abridged by the trial court's finding that his murder of Patrick Southworth created a great risk of death to many persons, where the State had not listed this aggravating circumstance as one it would be relying on at sentencing. However, it is well settled that a defendant has no right to a statement of particulars as to the aggravating circumstances upon which the State will rely in seeking the death penalty. Ruffin v. State, 397 So. 2d 277 (Fla. 1981). Accordingly, Coney cannot claim a due process violation for the absence of something to which he is not entitled.

Pursuant to the requirements of §921.141(3), Fla. Stat. (1992), the trial court must set forth in writing the findings of aggravation as enumerated in the statute. The trial judge in the instant case complied with this statutory duty and evaluated the applicability of the enumerated aggravating circumstances set forth in subsection (5).

Coney also alleges that the aggravating circumstance of "great risk of death" was not established beyond a reasonable doubt and that the trial court utilized the wrong standard in finding the aggravating circumstance of "great risk of death". In the sentencing order, the trial judge stated:

> The evidence at trial proved that the defendant, in the early morning hours before the wake-up call for prisoners, gained access to Patrick Southworth's cell, which Mr. Southworth shared with another prisoner, threw a flammable liquid on him while he was asleep in the bottom bunk bed, ignited the liquid, engulfing the victim in flames, and left the room. The victim's roommate sleeping in the top bunk, was awakened by the feeling of heat and the flames on his bed and narrowly escaped from the burning cell, screaming that his roommate was on fire. By the time the prison guards understood what was happening, the cell door slammed shut, and it took several minutes while the fire was raging, for them to unlock the door and extinguish the fire.
>
> There were approximately 100 inmates housed in that wing of the prison at the time of the fire.
>
> The defendant therefore should have reasonably foreseen that the fire would pose a great risk to the inmates and others in the prison. See *King v. State,* 390 So. 2d 315 (Fla. 1980); *Welty v. State, 402 So. 2d 1159 (Fla. 1981).*
>
> *(R. 314).*

Although the sentencing order cites to King v. State, 390 So. 2d 315 (Fla. 1980), reversed, 514 So. 2d 354 (Fla. 1987), which has been overruled, the facts supporting the finding of this aggravator establish that there was a "likelihood or high probability" of death to many persons. Furthermore, the sentencing order also cites to Welty v. State, 402 So. 2d 1159 (Fla. 1981), which was expressly referred to in King, 514 So. at 360, as a case where the factor could properly be found.

The instant case is also one where the factor was properly found. The evidence at trial established that there were over one hundred (100) people in the B dormitory when Coney set fire

to Patrick Southworth. All of the ninety-nine (99) inmates, with the exception of Coney, McKnight, and Jones, were asleep. The victim was locked inside of his room with one other inmate and officers were unable to immediately enter the cell. Even after the door to the cell was opened, they could not immediately enter due to the overwhelming smoke within the cell. Coney doused the victim with lacquer thinner, a highly flammable liquid, and ignited him. Although the officers had a fire extinguisher to quell the fire, the fire started again after it had been extinguished. Additionally, Coney placed items containing the accelerant into a garbage pail in the dormitory common area. Given the flammable nature of the liquid, the confinement of the inmates, the timing while everyone was asleep, and the number of people in the surrounding area, the finding of the trial court is supported by the record.

Moreover, if this factor is found not to be applicable to the instant case, then death is still the appropriate sentence. This aggravating circumstance was not presented to the jury for their consideration and they recommended the death penalty. There is no reasonable possibility that the sentence would be different if the judge had not found that the murder created a great risk of death to many persons. With the remaining uncontested aggravating factors, to-wit: under imprisonment; prior violent felony conviction; during commission of a felony; and heinous, atrocious or cruel, weighed against the dearth of mitigation the death penalty is appropriate.

X.

WHETHER THE TRIAL COURT PROPERLY CONSIDERED EACH MITIGATING FACTOR PROPOSED BY WATSON?

In his final claim, Coney contends that the sentencing order is deficient because the trial court concluded that the proposed mitigating factors were insignificant and did not lessen Coney's culpability for the brutal homicide of Patrick Southworth. There is competent substantial evidence to support the trial court's rejection of the mitigating circumstances and this argument fails. The jury was instructed on nonstatutory mitigation and defense counsel argued as nonstatutory factors that Coney was raised in poverty, abandoned as a child, ridiculed for his limp, abused by his step-father, and responsible for performing good acts from jail. (R.). It is presumed that the judge followed her own instructions to the jury regarding the consideration and weighing of mitigating evidence. Johnson v. Dugger, 520 So. 2d 565 (Fla. 1988). As in Johnson, "When read in its entirety, the sentencing order, combined with the court's instructions to the jury, indicates that the trial court gave adequate consideration to the evidence presented." Id. at 566.

In Rogers v. State, 511 So. 2d 526, cert. denied 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), this Court enunciated the following three-part test for consideration of mitigating evidence:

> [T]he trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether

> the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.
>
> Rogers, 511 So. 2d at 534.

The well reasoned sentencing order demonstrates that the trial court adhered to the procedure required by Rogers. In its written order the trial court expressly evaluated each mitigating circumstance proposed by Coney.

The trial court specifically addressed each of the proposed nonstatutory mitigators as required by Campbell v. State, 571 So. 2d 415 (Fla. 1990). Testimony was presented that Coney, grew up in poverty, did not have daily contact with his mother and father, did not get along with his stepfather, was a born again Christian, and had performed good deeds for others while incarcerated. (R. 2734-2853). However, this evidence was repeatedly controverted and diminished in significance. Although Coney did not live with his mother and father, he was not bothered by the absence of his father, (R. 2802-3), and had regular love, affection, visits, assistance, and guidance from his mother. (R. 2756, 2739-41, 2758, 2759). Furthermore, he had a close relationship with his loving and religious grandparents, and his grandfather served as his father figure. (R. 2757, 2805). Evidence that Coney did not get along with, and had a single

altercation with, his stepfather Mr. Sanford, was contradicted by testimony that family members were not aware of any conflict between Mr. Sanford and Coney, (R. 2789). Testimony that Coney had become a born again Christian since murdering Patrick Southworth, (R. 2849-50, was directly refuted by claims that he professed to having accepted Jesus Christ two or three years earlier. (R. 2761). Finally, evidence that Coney had performed good deeds from jail by talking to his sister and brother was extinguished by evidence that he had committed sexual battery, robbery, burglary, attempted first degree murder and the instant first degree murder during the same period of imprisonment. The contradictions in the evidence diminished its forcefulness and the trial court properly found that it did not reduce Coney's culpability for the brutal homicide with the following:

> Turning as the law requires, to an examination of any mitigating factors, the Court finds none that apply. The defendant offered no evidence of any of the mitigating circumstances specifically set forth in the statute. He did offer the testimony of many relatives, who described the defendant's childhood and early life in an impoverished rural community. However, the testimony showed that in spite of the material deprivation suffered by the defendant, he received love and support of a large extended family headed by strong religious grandparents.
>
> Defendant later moved to Miami as an adolescent and lived with his mother, step-father and several other children. Although the defendant has implied that he was abused by his step-father, the evidence showed only that they did not have a good relationship and that the step-father hit him once during an argument about a car. This certainly in no way bears upon or mitigates the depravity of

> defendant's acts. Nor is the Court persuaded to mitigate the sentence because the defendant encouraged his sister to give up drugs or tried to help other people from his jail cell.
>
> (R. 115).

Resolution of such factual conflicts is entirely the responsibility and duty of the trial court and such credibility determinations should not be conducted on appeal. Jones v. State 580 So. 2d 143, 146 (Fla. 1991), cert. denied, 112 S.Ct. 221, 116 L.Ed.2d 179.

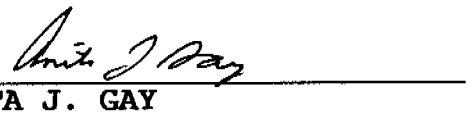
In conclusion, the trial court found "that there are more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the death penalty. The Court finds no mitigating circumstances. On this record, the sentence of death is not disproportionate." (R. 315-16). Moreover, if the trial court erred in according no weight to the nonstatutory mitigation presented, any error is harmless where, the record supports the conclusion that the mitigating factors were either not established or were outweighed by the aggravating factors. Hall v. State, 614 So. 2d 473 (Fla. 1993). Because the substantial aggravating factors outweigh any nonstatutory mitigating evidence, the death penalty is the appropriate sentence.

CONCLUSION

Based upon the foregoing points and authorities the State respectfully urges this Court to affirm Appellant's convictions and sentences.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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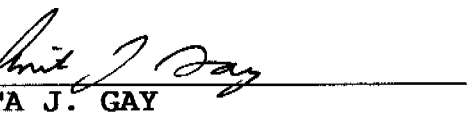
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by mail to **HOWARD BLUMBERG,** Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 16th day of July, 1993.



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