IN THE SUPREME COURT OF FLORIDA

ALPHONSO CAVE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 82,333

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR MARTIN COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Alphonso Cave, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T" and reference to the supplemental record will be by the symbol "SR[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On May 20, 1982, Appellant was indicted along with John Earl Bush, J.B. Parker, and Terry Wayne Johnson for the first-degree murder, armed robbery, and kidnapping of Frances Julia Slater, allegedly committed on April 27, 1982, in Martin County, Florida. (R 1). A jury found Appellant guilty as charged on December 8, 1982, and recommended a sentence of death the following day by a vote of seven to five. (R 21-23, 29). The trial judge ultimately followed the jury's recommendation and sentenced Appellant to death on December 10, 1982, finding the existence of three aggravating factors--"felony murder," "avoid arrest," and HAC--and nothing in mitigation. (R 5-7, 2448-49). This Court affirmed his conviction and sentence, Cave v. State, 476 So.2d 180 (Fla. 1985), and the United States Supreme Court denied Appellant's petition for writ of certiorari, Cave v. Florida, 476 U.S. 1178 (1986). This Court later affirmed the denial of Appellant's motion for postconviction relief, which alleged, among other things, ineffective assistance of counsel. Cave v. State, 529 So.2d 293 (Fla. 1988).

Appellant then filed a habeas petition in federal district court, renewing his claims of ineffective assistance of counsel. On August 3, 1990, the United States District Court for the Middle District of Florida vacated Appellant's sentence based on its finding that Appellant had received ineffective assistance of counsel during the penalty phase of his trial. Cave v. Singletary, 971 F.2d 1513, 1520-30 (11th Cir. 1992). In so holding, the District Court directed the State to "schedule a new sentencing proceeding at which [Appellant] may present evidence to a jury on

or before 90 days from the date of th[e] Order. Upon failure of the [State] to hold a new sentencing hearing within said 90 day period without an order from this Court extending said time for good cause, the sentence of death imposed on [Appellant] will be vacated and [Appellant] sentenced to life imprisonment." Id. at 1530. On September 25, 1990, the District Court stayed its ruling pending the State's appeal to the Eleventh Circuit. On August 26, 1992, the Eleventh Circuit affirmed the district court's order vacating Appellant's sentence. 971 F.2d at 1513-20. Mandate issued from that court on September 21, 1992. (R 1164-65).

On October 20, 1992, Thomas Walsh was designated as an acting circuit court judge to preside over Appellant's resentencing, and the Public Defender's Office was appointed to represent Appellant. (R 30, 32). Two days later, Judge Walsh held a status conference and set the resentencing for November 30, 1992. The State was directed to have Appellant transported from Starke, and the assistant public defender was directed to determine whether his office had a conflict of interest in representing Appellant. (R 34, 1148-52). On November 17, 1992, the assistant public defender filed a motion to continue the resentencing until April and waived Appellant's right to a speedy trial. (R 37-38). That same day, the trial court reset the resentencing to April 26, 1993. (R 41). On December 16, 1992, the assistant public defender moved to withdraw from the case citing a continued conflict of interest, which was granted on January 14, 1993. (R 49-50, 53; T 1022-25). Jeffrey Garland was appointed as a special assistant public defender to represent Appellant on January 28, 1993. (R 55-56). On

February 8, 1993, the resentencing was reset upon the State's motion to March 3, 1993, because the week of April 26 marked the tenth anniversary of the victim's death and her family requested a short continuance. (R 69).

After Mr. Garland's appointment, both defense counsel and the State filed numerous pretrial motions. Among them were motions by defense counsel challenging the constitutionality of the death penalty statute and the instructions relating to the aggravating factors. (R 89-192, 201-45). Those motions were later denied at a hearing. (R 2464-82). Defense counsel also moved pretrial to have Dr. Rifkin, who had examined Appellant for his original trial, appointed as a confidential expert. (R 199-200). The State moved to have Appellant examined by its own mental health expert, Dr. McKinley Cheshire, in order to rebut any potential mental mitigation. (R 72-74). In addition, the State moved to require defense counsel to provide the names any mental health experts who were going to testify at the trial so that the State could depose the expert before the resentencing. (R 284-86).

On February 24, 1993, the trial court held a hearing on the State's motion for a psychiatric examination of Appellant by its own mental health expert, and on defense counsel's motion to appoint Dr. Rifkin as a confidential expert. After argument by counsel, the trial court ruled that it would appoint Dr. Rifkin as a confidential expert. However, if it determined after reading the record from Appellant's previous trial and postconviction proceedings that Dr. Rifkin had testified or that his report had been used, then Dr. Rifkin would not be appointed as a confidential

expert and it would grant the State's motion for a psychiatric exam. (T 1039-55).

On March 31 and April 1, 1993, the trial court held a hearing on the State's motion to require defense counsel to disclose the names of any mental health witnesses he intended to call at trial. The trial court also considered defense counsel's motion to appoint Dr. Rifkin as a confidential expert. Defense counsel asserted that he could not list any witnesses because Appellant had not yet been evaluated. After extensive argument by the parties, the trial court ruled that it would not appoint Dr. Rifkin as a confidential expert because Dr. Rifkin's report from the original trial was introduced into evidence at Appellant's federal evidentiary hearing in 1988, thereby waiving his confidentiality. The trial court also denied defense counsel's alternative motion for the appointment of another confidential expert. (T 1077-96).

Following this discussion, the State indicated that defense counsel had just filed a motion to disqualify Judge Walsh from presiding over the resentencing based on the fact that Judge Walsh had been a prosecutor in the Fort Pierce State Attorney's Office when Appellant was originally tried. (T 1096; R 303-07). In response, the State presented, over defense counsel's objection, the testimony of Bruce Colton, the chief assistant state attorney in the Fort Pierce office during the original trial; James Midelis, one of the lead prosecutors during the original trial; Tom Ranew, the lead investigator for the State Attorney's Office during the original trial; David Powers, the supervisory detective for the Martin County Sheriff's Office during the original trial; and Rick

Barlow, the assistant state attorney who defended the State in Appellant's postconviction proceedings. (T 1096-97, 1100-07).

Mr. Colton testified that now-Judge Walsh was an assistant state attorney in the Fort Pierce office, but was not involved in prosecuting Appellant during his original trial and was not involved in any pretrial preparation. Mr. Colton was also not aware of any conversations regarding the case between Judge Walsh and either of the lead prosecutors. At that time, Judge Walsh was one of the least experienced prosecutors in the office and James Midelis, one of the lead prosecutors on Appellant's case, was one of the most experienced; thus, it would have been unlikely that Midelis would have sought advice from him regarding the case. (T 1110-12, 1120).

James Midelis testified that he never discussed the case with Judge Walsh. Moreover, most of the pretrial preparation was done in Martin County, and all four defendants were tried outside of St. Lucie County. The investigators also worked out of a separate building. Since Judge Walsh prosecuted cases exclusively in St. Lucie County (Fort Pierce), he would not have been present during the preparation and prosecution of the cases. (T 1126-35).

Over defense counsel's objection, the State presented an affidavit from Robert Stone. Mr. Stone averred that he and James Midelis were the lead prosecutors on Appellant's case during his original trial. Judge Walsh did not participate in any way, nor did anyone consult with Judge Walsh about any matters related to Appellant's case. (T 1141-42).

Next, Tom Ranew testified that he was the lead investigator

for the State Attorney's Office and worked out of the Martin County office. He did not talk to Judge Walsh about the case or ask him to do anything related to the case. All of the pretrial preparation was conducted out of the Martin County office. (T 1145-47).

David Powers then testified that he supervised the detectives in the Martin County Sheriff's Office during the investigation of the case. Judge Walsh was not present during any of the pretrial meetings and did not participate in the investigation. (T 1155-60).

Finally, Rick Barlow testified that he defended the State in the postconviction proceedings of Cave, Parker, and Bush. To his knowledge, Judge Walsh did not participate in any way in those cases during that time. (T 1161-63).

Defense counsel argued that, not only was the motion legally sufficient on its face, but the State's presentation of evidence required recusal. (T 1192-93). The State responded that it presented evidence solely to show that a reasonable person with all of the facts would not fear bias or prejudice by the judge. (T 1193-96). Thereafter, the trial court ruled that the motion was legally insufficient. (T 1196; R 540).

Also at this hearing, the trial court reconsidered defense counsel's motion for the appointment of a confidential expert. Defense counsel argued that a confidential expert should be appointed since the trial court ruled that Dr. Rifkin could not be appointed again on a confidential basis. The trial court ruled, however, that Cave had already had two evaluations on a

confidential basis--one by Dr. Rifkin in the first trial, and one by Dr. Harry Krop for postconviction purposes. The trial court could find no authority for appointing another confidential expert and could find no prejudice to the defense if one were not appointed. (R 541; T 1197-1222). Thereafter, the trial court appointed Dr. Rifkin as a defense expert, but not on a confidential basis, which meant that the prosecutor and/or the State's expert could be present during Dr. Rifkin's evaluation of Appellant. (T 1222-26).

On April 6, 1993, defense counsel filed a motion and memorandum of law seeking to vacate the death penalty and impose a life sentence based on the fact that Appellant had not been resentenced within the 90-day period required by the federal district court. (R 404-27, 325-28). At the hearing on the motion, the State argued that it was not given adequate notice of the time requirement; that Appellant failed to show any prejudice; that Appellant's right to a constitutional speedy trial was not violated; that the district court had no authority to set a time limit, but that, if it did, the time began to run when the mandate was issued by the Eleventh Circuit, in which case, the resentencing was commenced within the 90-day period; and that defense counsel moved for a continuance which exceeded the 90-day period. (T 1155-74). Defense counsel responded that the Attorney General's Office was served with the Eleventh Circuit's mandate, that the State should have sought an extension of time from the federal district court, and that the trial judge did not have proper authority to preside over the case when the resentencing was initiated on

October 22, 1992, because venue had been relinquished improperly back to Martin County. (T 1174-77). Upon questioning by the court, defense counsel admitted that he was not prepared to go to trial on the date of this hearing. (T 1177-78). The trial court denied defense counsel's motion, finding that Pinellas County was served with the mandate which issued on September 21, 1992, and thereafter relinquished jurisdiction back to Martin County. The trial judge was immediately appointed and set a status conference for October 22, 1992. At that status conference, the resentencing was set for November 30, 1992, which was within 90 days from the issuance of the mandate. Thereafter, defense counsel moved to continue that case outside the 90-day period. Thus, Appellant suffered no prejudice. (R 583-84; T 1182-85).

Also at this hearing, the State objected to the wording of defense counsel's proposed order denying Appellant's motion for disqualification because the order could be interpreted to mean that the judge passed on the factual allegations of the motion. Defense counsel agreed to modify the order to indicate simply that the motion was denied as legally insufficient. (T 1186-87).

On April 16, 1993, the State filed a motion for emergency hearing, and a hearing was held that day. (R 347-61; T 1243-84). At this hearing, the State sought sanctions against Appellant for his refusal, pursuant to defense counsel's advice, to answer questions posed by the State's expert at his authorized mental health evaluation. Specifically, Appellant refused to answer questions relating to any events occurring between April 25, 1982, and May 5, 1982, and relating to any prior criminal activities. (T

1243-50, 1253, 1260-80). Defense counsel responded that Appellant had yet to be examined by his own expert, and that defense counsel would probably limit Dr. Rifkin's examination similarly. (T 1252-53). The State argued, however, that Dr. Rifkin could still rely on Dr. Krop's evaluation, wherein Appellant discussed the facts of the crime and his previous criminal activities. (T 1253). The trial court ordered Appellant to answer all of the questions and explained to him the ramifications of refusing to do so. (T 1280-84).

The following Monday, April 19, 1993, the State informed the trial court that Appellant persisted in his refusal to answer Dr. Cheshire's questions and asked the trial court to hold him in contempt and, if he persisted, prohibit his introduction of mental health mitigation. (T 1285-92). In response to the trial court's questioning, defense counsel indicated that Appellant would never comply with the court's directive, and the trial court held Appellant in contempt of court, sentencing him to a consecutive five months and 28 days in jail. (T 1297-1301). When Appellant refused to comply, the trial court ruled that Dr. Rifkin could interview Appellant. If his examination was limited to the same information that Dr. Cheshire was limited to, then Dr. Rifkin would be allowed to testify at the trial. If his examination were not similarly limited, then he would not be allowed to testify unless Dr. Cheshire was permitted a full examination. (T 1309-13).

That Friday, following Dr. Rifkin's examination of Appellant, the State informed the trial court that Dr. Rifkin's examination was as limited as Dr. Cheshire's, thereby rendering Dr. Rifkin

unable to render an opinion relating to mental mitigation. However, after reviewing Dr. Krop's report and testimony from 1988, Dr. Rifkin had changed his diagnosis from 1982 and no longer believed that Appellant has an antisocial personality disorder. (T 1321-35). After hearing Dr. Rifkin's testimony (T 1339-76), the trial court ruled that neither Dr. Rifkin nor Dr. Krop could testify regarding any mental mitigation. Dr. Rifkin could testify, however, regarding Appellant's IQ. (R 441-44; T 1383-86).

The following week, on April 29, 1993, Appellant personally waived the "no significant history" mitigating factor. (T 1418). The trial court also considered at this hearing the State's fifth motion in limine seeking to exclude evidence of the death of Appellant's son on December 30, 1992. (R 457-59). The State argued that the evidence was not relevant to Appellant's character, record, or the circumstances of the offense. Defense counsel contended that the evidence was relevant to Appellant's character. The trial court granted the motion, however, finding the evidence irrelevant. (T 1440-48).

Appellant's resentencing commenced on May 3, 1993, with jury selection. (T 2-221). The following day, the parties gave their opening statements. During the State's opening statement, defense counsel objected, sought a curative instruction, and, in the alternative, moved for a mistrial when the State commented that the police took a statement from John Earl Bush, played the taped statement to Appellant, and then "he too confessed . . . ." (T 249). The trial court sustained the objection, told the State to rephrase its argument relating to Bush's taped statement, denied

defense counsel's motion for mistrial, and gave the jury a curative instruction. (T 250-51).

Following defense counsel's opening statement, the State presented the testimony of Sheriff Robert Crowder of the Martin County Sheriff's Office. Sheriff Crowder testified that he was dispatched to the Li'l General Store located at 801 North Federal Highway in Stuart around 6:00 a.m. on April 27, 1982, regarding an abduction and robbery. (T 265). Danielle Symons, a newspaper carrier, had told the police that she saw a dark-colored car with a white top parked in front of the store at around 2:45 a.m. One to three people, possibly Black or Puerto Rican, were inside the store. (T 269-70). At 4:50 p.m. that same day, the body of Frances Julia Slater, the store's clerk, was found by passersby on State Road 76 about twelve miles west of the convenience store in a rural part of Martin County. (T 270-71). A St. Lucie County deputy later reported stopping a car fitting Ms. Symons' description the morning of the murder. The driver produced a driver's license and registration in the name of John Earl Bush. There were three other passengers in the car. (T 272-73).

Later, officers located Bush's car at Bush's father's house in Fort Pierce and obtained a search warrant for it. (T 279-81). On May 4, 1982, Bush and his girlfriend came to the police station inquiring about his car. Bush was read his rights and questioned about the crime. After the second interview, Bush was arrested for the murder. (T 282-83). As a result of Bush's statement, Cave was questioned. He voluntarily went to the State Attorney's Office and initially denied any involvement, so the officers played Bush's

taped statement for him, at which point Cave gave a statement and was arrested. (T 283-85, 295). The police later arrested J.B. Parker and Terry Wayne Johnson. (T 285). Several days later, the crime lab indicated that several fibers were found on the victim's clothes and in Bush's car which matched some carpet fibers found at the victim's house. (T 286).

Following Sheriff Crowder's testimony, Lieutenant Thomas Madigan, a crime scene technician with the Martin County Sheriff's Office, explained photographs of the crime scenes, the autopsy, and Bush's car. He also testified to the collection of a bullet and hair from the victim's body during the autopsy. (T 297-357).

Miles Heckendorn, the crime scene supervisor, testified that he assisted in processing the murder site. He also testified that he later received a telephone call from Deputy Bargo of the St. Lucie County Sheriff's Office regarding a car he had stopped on the morning of the murder near where the victim was found. The car was a white over medium blue 1974 Buick Century containing four black males. The driver identified himself as John Earl Bush, the front passenger identified himself as Mike Goodman, and the two men in the back seat identified themselves as Willie Jerome Brown and Alphonso Brown. (T 274-75). Mr. Heckendorn later assembled live lineups containing all four defendants and took pictures of them. (T 376-83). On cross-examination, Mr. Heckendorn testified that the person in the back seat who identified himself as Alphonso Brown also gave a date of birth of November 12, 1958, which is Appellant's birth rate. (T 385-86).

Next, Deputy Timothy Bargo of the St. Lucie County Sheriff's

Office testified to his stop of Bush's car. Deputy Bargo was on road patrol in the southwest section of St. Lucie County, which is just north of Martin County. At approximately 3:45 a.m., Deputy Bargo met a white over blue car going north on Range Line Road. One of the car's taillights was flickering so Deputy Bargo turned around and stopped the car. As the car was stopping, the deputy saw the front passenger lean over as if to put something in the floorboard or under the seat. (T 388-92). The driver produced a driver's license and registration indicating that he was John Earl Bush. None of the other three passengers could produce identification, but they identified themselves as Mike Goodman (front passenger seat), Willie Jerome Brown (right rear seat), and Alphonso "King" Brown (left rear seat). (T 393-96). Deputy Bargo could not identify any of the passengers as Cave. (T 409).

Because Bush's license came back valid, Deputy Bargo gave him a warning for the taillight and let them go. (T 398-99). Shortly thereafter, dispatch indicated that there was a discrepancy with the tag on the car, so Deputy Bargo called his supervisor, Willie "Poochie Man" Williams, for backup and stopped Bush's car again around 4:16 a.m. The car's VIN matched the registration, and the four were allowed to leave again. (T 399-401). Several days later, Deputy Bargo read about the robbery/murder and called Miles Heckendorn with this information. (T 402-03).

Next, Dr. Wright, the medical examiner, testified that the victim had been stabbed once in the abdomen and shot once in the back of the head. The stab wound was nonfatal, but painful, and was inflicted before death. The gunshot was fired from at least

two feet away, and the angle of the shot is consistent with the victim being down on her knees. The victim's pants were stained with urine. (T 414-22).

The State's next witness was Nancy Anderson, a cashier at the Li'l General, who related the process of "ringing out" the register and putting money in the floor safe. (T 438-41). The State then offered the prior trial testimony of Mark Hall, who was unavailable for the resentencing. Mr. Hall testified that he entered the Li'l General Store at around 3:00 a.m. and found the store empty and the cash register open. He then called the police. (T 446-49). Karen Perligozzi, the manager of the Li'l General, then testified that the victim was working the 11:00 p.m. to 7:00 a.m. shift. Ms. Perligozzi had stopped in to check on the victim between 2:00 and 2:20 a.m. A total of $134 was missing from the cash register after the victim's abduction and murder. (T 451-57).

The following day, May 5, 1993, the State presented the testimony of Danielle Symons Girouard, who was a newspaper carrier at the time of the murder. Ms. Girouard testified that she was on her way to work around 3:00 a.m. on April 27th and was stopped at a traffic light facing the Li'l General Store. She saw a single car in the parking lot. It was a big car with weathered paint and metal bumpers. She also saw three black males inside the store and someone in the back seat of the car. (T 462-71).

Detective Margaret Schwartz of the Martin County Sheriff's Office testified that she drove by the Li'l General Store around 2:15 a.m. that morning and saw the victim sweeping the floor. When she was dispatched to the store at 3:04 a.m., the victim was gone,

and the cash register and floor safe were open and empty. (T 472-85).

Corporal Willie "Poochie Man" Williams of the St. Lucie County Sheriff's Office then testified that he assisted Deputy Bargo in stopping a car in the early morning hours of April 27. He identified Appellant, whom he knew from previous encounters, as one of the occupants of the car. Appellant and Bush were outside the car trying to get it to start while two other passengers remained in the back seat. (T 485-96).

The State's next witness was Brenda Strachen, who was Appellant's girlfriend in 1982. Ms. Strachen testified that she was at her mother's house on April 27 when Appellant knocked on the door. Appellant looked pale. Appellant told her that he and others robbed the Li'l General Store, and he gave her some rolled coins from the robbery. Appellant also said that the victim was pleading for her life as they drove her out of town. According to Appellant, Bush shot the victim. However, later in the day, after Appellant met with Bush, Parker, and Johnson in the yard of Ms. Strachen's mother's house, Appellant changed his story and told her that Bush stabbed the victim and Parker shot her. Appellant told her that they killed Ms. Slater because either Bush or Parker decided that they did not want to leave any witnesses to the robbery. (T 504-12). On cross-examination, Ms. Strachen further testified that Appellant told her that the victim was crying and pulling her hair out and he (Appellant) begged Bush and Parker not to kill her. (T 517).

Lieutenant Charles Jones of the Martin County Sheriff's Office

confirmed that Bush gave two taped statements, one of which was played for Cave. (T 524-29). Sergeant Lloyd Jones of the Martin County Sheriff's Office then testified that he interviewed Bush, and that Bush confessed. At that point, defense counsel objected, moved for a curative instruction and, in the alternative, moved for a mistrial. The objection was sustained, the motion for mistrial was denied, and a curative instruction was given. (T 535-36). Thereafter, Sergeant Jones testified that Appellant initially denied any involvement in the robbery/murder, was confronted with Bush's taped statement, and then admitted that he robbed the victim and ordered her into the car at gunpoint. The victim pled for her life and offered to "do anything" if they would let her go. According to Appellant, Bush stabbed her in the stomach and Parker shot her in the head. (T 538-39).

At that point, Appellant's taped statement was played for the jury. In that statement, Appellant related the following after waiving his Miranda rights: He was with "Bo Gator" (Terry Wayne Johnson), "Pig" (J.B. Parker), and John Earl Bush. They went to the Li'l General Store several hours prior to the robbery/murder to "check it out." When they went back, the victim was sweeping the floor. They all went in and demanded money. They were drunk, but Appellant knew what he was doing. Appellant, who had the gun, and Bush went behind the counter and ordered the victim to open the cash register, which she did and gave the money to Bush. Appellant asked her where the rest of the money was, she told him it was in the floor safe, and he ordered her to get it, which she did. He then ordered her at gunpoint out of the store and into the car and

they drove off. Appellant believed that they were going to let her go. When they finally stopped, everyone but Appellant got out on one side of the car and he got out on the other side. He then saw Bush stab the victim with a knife that was in the car, and he saw Parker shoot her with Bush's .38 caliber gun. Killing the store clerk was not in "the plan." It was Bush's idea. On the way back to town, they were stopped by the police, one of whom Appellant knew as "Poochie Man." They then went to Bush's brother's house, where Bush went in with the gun. They got about $100 from the robbery and split the money. (T 545-62). According to Sergeant Jones, neither the gun nor the knife were ever found. (T 564).

Next, the State called Michael Bryant as a witness. Mr. Bryant testified that he was in the Martin County Jail in 1982 and shared a cell with Appellant. One day, Mr. Bryant overheard Appellant and Bush talking. Bush was lamenting that they would not be in there if Appellant had not tried to burn the victim with a cigarette. Appellant responded that Bush was the one who stabbed her in the stomach, and Bush replied that Appellant was the one who "popped a cap in the back of her head." (T 570-72). The next morning, Appellant asked Mr. Bryant if he was going to tell the guards what he heard, and Mr. Bryant said that he would not. Appellant then told Mr. Bryant that if he told anyone about the conversation he overheard he (Appellant) would see to it that somebody took care of him. Appellant and three others then beat up Mr. Bryant, which required him to go to the hospital. (T 572-73).

On cross-examination, defense counsel asked Mr. Bryant why he was in jail at the time, and the State objected to it as improper

impeachment. After lengthy discussion, the trial court sustained the objection. (T 574-608). Thereafter, Mr. Bryant testified that he was in jail on a burglary charge from Broward County. (T 610). He then stated that he was scared and did not immediately report Appellant's conversation to the guards. (T 610). When defense counsel asked Mr. Bryant if he tried to escape from the emergency room, the State again objected, the objection was sustained, and the jury was instructed to disregard the question. (T 610-11). Mr. Bryant then testified that he later told Art Jackson, the jail supervisor, and Robert Stone, the lead prosecutor, about Appellant's conversation with Bush. (T 612). Defense counsel was prohibited from asking Mr. Bryant about photos of nude white woman that Appellant allegedly had displayed in his cell, and about whether Mr. Bryant had filed a civil suit against Martin County at the time of the first trial relating to the battery. (T 615-16, 618-20).

The State's next witness was Lieutenant Arthur Jackson, the jail supervisor while Mr. Bryant and Appellant were incarcerated. Lieutenant Jackson testified that Mr. Bryant reported to a guard that he had been beaten up by another inmate. Mr. Bryant was brought to Lieutenant Jackson's office and questioned about it. Mr. Bryant's eyes and face were swollen, and his nose was broken. Mr. Bryant told him the following: He overheard Appellant bragging about the murder. Appellant then came over to where he was sleeping, pulled down the cover, and said he wanted "some booty." Mr. Bryant told Appellant to go away or he (Mr. Bryant) would tell the guards what he had overheard. Appellant left. Later,

Appellant asked Mr. Bryant whether he would tell anybody, and Mr. Bryant told him that he would not. Appellant said that he would make sure, and beat up Mr. Bryant. (T 625-26). Mr. Bryant also told Lieutenant Jackson that Appellant said "they" stabbed the victim and "he got sick of hearing her hollering and he shot her." (T 627). Appellant was arrested for battery on Mr. Bryant. (T 627).

After defense counsel's motion to suppress was denied, Lieutenant Jackson further testified that, as Appellant was being taken to his office for questioning regarding the battery, Appellant told Mr. Bryant that he would do more to him if he did not change his story. (T 628-33). Lieutenant Jackson did not include Mr. Bryant's statements regarding the conversation between Cave and Bush in his report on the battery because he was concerned only with the battery and did not believe the overheard comments were relevant to his investigation. (T 634). He could not remember if he told anyone related to Appellant's prosecution about the conversation that Mr. Bryant allegedly overheard. (T 634).

Next, the State called Daniel Nippes, the chief criminalist for the Regional Crime Lab, who testified that he processed Bush's car and the victim's clothes for trace evidence. He found fibers on the victim's clothes that were consistent with carpet fibers from Bush's car. In addition, he found carpet fibers in Bush's car and on the victim's clothes that were consistent with carpet fibers from the victim's home. (648-63).

The State's final witness was Sheriff Robert Crowder, who was recalled to testify regarding a video reenactment of the murder

that he made prior to the resentencing. (T 664-66). Defense counsel's objections based on relevancy and prejudice were overruled by the trial court and the video was played for the jury. (T 666-69). The video was shot from the back seat of a car at night as the car traveled the 17 minutes from the Li'l General Store to the murder site. (T 670-73). After the tape was played, defense counsel renewed his objection and moved to strike it because a gunshot was heard at the end of the tape. The motion was taken under advisement. (T 674-75). The State rested. (T 675).

On Appellant's behalf, defense counsel called James and Valerie Carswell as witnesses. Mr. and Mrs. Carswell both testified that they owned a rooming house in Ft. Pierce in which Appellant lived. In exchange for his cleaning the common areas of the house, Appellant was allowed to live there for free. Both Mr. and Mrs. Carswell described Appellant as a very nice, polite person, who did good work. (T 677-80, 681-83).

Following their testimony, the trial court questioned the State about the gunshot at the end of the video reenactment and learned that defense counsel had been provided a copy of the tape prior to trial. Defense counsel admitted that he had not reviewed the tape. Because of that, the trial court overruled the objection and denied the motion to strike. (T 687-88).

During this recess in the testimony, defense counsel proffered testimony of Lieutenant Jackson and Michael Bryant regarding nude pictures which Appellant allegedly hung in his cell. Lieutenant Jackson testified that the jail does not allow the display of nude photographs and if they are found they are confiscated. Lieutenant

Jackson did not remember whether Appellant had nude photos displayed in his cell, nor did he remember whether Michael Bryant told him that there were nude photos in Appellant's cell. (T 688-92). Michael Bryant testified that Appellant had pictures of nude white women covering a two by two-and-a-half foot section of his cell wall, and that he told Lieutenant Jackson about the photos. (T 692-94). The trial court ruled that the testimony was irrelevant, was improper impeachment, and beyond the scope of direct. (T 696-97).

The following day, May 5, 1993, defense counsel called Dr. Sheldon Rifkin as an expert in clinical psychology and renewed his objection to the trial court's limitation of his testimony. (T 701-02). Dr. Rifkin then testified that he examined Appellant in 1982 and again in April of 1993. Both times he administered an IQ test. In 1982, Appellant had a full scale IQ of 76, and in 1993, Appellant had a full-scale score of 75, which is in the borderline range of intelligence. (T 704-10). Appellant's school records indicated that Appellant was repeating the tenth grade when he dropped out of school with consistently failing grades. (T 744-47).

On cross-examination, Dr. Rifkin admitted that IQ does not measure a person's understanding of right and wrong, nor does it indicate a propensity to commit violence. (T 712-14). He could also not say that Appellant's IQ related to his ability to conform his conduct to the requirements of the law. (T 748). Dr. Rifkin found no indication that Appellant had a mental disease or defect. (T 722).

Following Dr. Rifkin's testimony, defense counsel presented the testimony of numerous family members and neighbors who had lived close to Appellant's family as he was growing up. These witness included Appellant's mother and stepfather, Connie and Frank Hines; Appellant's younger sister, Patricia Young; Appellant's maternal aunt, Emma Andrews; Appellant's cousin, Luvenia Lockhart; and Appellant's next-door neighbors, June Dunn, Annie Pearl Anderson, and Versie Wells. All of these witnesses testified that Appellant was a happy, well-mannered, well-behaved, caring, sensitive child and teenager, who was close to his family. (T 758, 771-73, 777, 781, 790, 799, 813-16, 869). Appellant did chores around the house and for neighbors, and played baseball. (T 765, 800, 814, 865). When Appellant was nine or ten years old, he rescued one of his cousins who had fallen in the river while fishing and could not swim. (T 779-80). Several witnesses also testified that Appellant had a good relationship with his son and worked to support him. (T 766-67, 781).

Appellant's mother testified that, when she was called to the state attorney's office during Appellant's interview by the police, Appellant told her that he robbed the victim at gunpoint, but had no idea that she was going to be killed. Appellant begged the others not to kill her as she was pleading for her life, but Bush stabbed her and Parker shot her. (T 818-19, 825-26). Appellant later proffered his mother's testimony that Appellant's relationship with his son, Alphonso Freeman, was very good, and that Appellant was devastated when his son was killed on December 30, 1992, while riding his bicycle. (T 855-58). Defense counsel

argued that such testimony was relevant to Appellant's character and his ability to grieve, but the trial court affirmed its previous ruling to exclude such testimony. (T 859-61).

Appellant's final witnesses were Tom Ranew, the lead investigator in this case for the State Attorney's Office; David Powers, the supervisory detective in this case for the Martin County Sheriff's Office; David Phoebus, one of the prosecutors during the original trial; and Robert Stone, the lead prosecutor during the original trial. All four witnesses testified that they were unaware during the first trial of the conversation overheard by Michael Bryant between Cave and Bush in 1982. (T 830, 836, 848, 853). The trial court sustained the State's objection when defense counsel attempted to question David Phoebus about a meeting he allegedly had with Lieutenant Jackson on July 23, 1992, finding that defense counsel was improperly trying to impeach Lieutenant Jackson through Mr. Phoebus. (T 842-48).

After the defense rested its case, the trial court held a charge conference, at which it denied all of defense counsel's special requested jury instructions. (R 1000-24, 1324; T 906). Thereafter, the State presented the testimony of Dr. McKinley Cheshire over defense counsel's renewed objection. (T 927). Dr. Cheshire testified that he interviewed Appellant on April 16, 1993, and reviewed the report and taped deposition of Dr. Rifkin. (T 929-30). Regarding IQ tests, Dr. Cheshire stated that they are not indicative of a person's overall intelligence, nor do they adequately reflect a person's ability to function in society. Moreover, the test administered to Appellant by Dr. Rifkin was

created by and tested upon Caucasians and does not adequately test African Americans. (T 932-35). Based on his interview with Appellant, he believed that Appellant had a higher IQ than the test revealed. (T 941). He believed that Appellant "is a very smart person, particularly street smart. He has the ability to concentrate, he has an excellent memory and he has an ability to analyze and these are the things that have to do with intellectual capacity evaluation and they must be factored into this test if we're going to get a fair idea of the intelligence." (T 954). Dr. Cheshire did not equate Appellant's low grades with low intelligence because a motivation to learn is required for good grades. (T 941).

Thereafter, the State rested, the parties made closing arguments, the trial court instructed the jury, and the jury retired to deliberate. (T 955, 957-74, 974-87, 987-98, 999). Three hours later, the jury returned a recommendation of death by a vote of 10 to 2. (T 1012-15).

On June 7, 1993, defense counsel filed a motion for new trial. (R 1342-50). At the hearing on the motion, on June 11, 1993, defense counsel focused primarily on the trial court's restriction of his cross-examination of Michael Bryant. To support his argument that Bryant's testimony was critical to the State's case because it implicated Appellant as the shooter, defense counsel submitted various portions of the codefendants' trials to show that the State had taken inconsistent positions regarding the actual shooter. The trial court took the motion under advisement, but later denied it by written order. (R 1525, 1573-74; T 1461-72).

Also at this hearing, both the State and the defense argued its respective positions regarding the appropriate sentence. (T 1474-1528). Appellant declined to speak on his own behalf. (T 1527). On June 25, 1993, the trial court imposed a sentence of death, finding the existence of five aggravating factors--"felony murder," "avoid arrest," "pecuniary gain," HAC, and CCP--and several nonstatutory mitigating factors--that Appellant had a low IQ, that he had a proper upbringing, that he was polite and loving as a child, that he may not have been the shooter, that the State has taken inconsistent positions regarding the actual shooter, that Appellant was loved and cherished by family and friends, and that Appellant confessed to the crimes. (R 1584-94). Ultimately, it determined that the "mitigating evidence [was] not substantial and it [was] not of sufficient weight to outweigh any one of the aggravating circumstances proved beyond a reasonable doubt." (R 1596).

On July 12, 1993, defense counsel filed a motion to correct a factual finding, to reconsider the sentence, and for rehearing. Specifically, defense counsel argued that there was no evidentiary basis for the trial court's finding that the victim was forcibly removed from the car by her hair, which pulled out and remained in the car. (R 1637-46). By written order, the trial court denied the motion on July 22, 1993. (R 1636). Defense counsel filed a notice of appeal on July 23, 1993, and this appeal follows.

SUMMARY OF ARGUMENT

Issue I - Although the State challenged the factual allegations in Appellant's motion to disqualify the judge, the trial court did not pass on the truth of the facts alleged, and the State's evidence and argument should not be imputed to the trial court. The trial court properly found the motion legally insufficient.

Issue II - Appellant had already had the benefit of two confidential mental health experts; thus, the trial court properly exercised its discretion in refusing to appoint a third. Even if error, it was harmless given that Appellant was precluded from presenting mental mitigation because he refused to allow the State's expert to examine him. The trial court properly exercised its discretion in allowing the State's expert to examine Appellant in order to rebut potential mental mitigation. When Appellant refused to answer the expert's questions, the trial court properly ruled that Appellant could not offer mental mitigating evidence. Given that Appellant's expert was appointed on a nonconfidential basis, it was not error to allow the State to be present during the examination.

Issue III - Defense counsel requested only the catchall mitigating factor instruction and presented no evidence relating to any other mitigating factor; thus, the trial court did not abuse its discretion in not instructing the jury on all the mitigating factors.

Issue IV - The trial court did not abuse its discretion in restricting defense counsel's cross-examination of Michael Bryant

and direct examination of David Phoebus because defense counsel was trying to improperly impeach these or other witnesses. Even if it did err, such error was harmless beyond a reasonable doubt.

Issue V - The prosecutor's and a state witness' reference to Bush's confession did not constitute a Bruton violation since the substance of the statement was not admitted, and since neither reference indicated that Bush implicated Appellant in the robbery/murder. Even if they were error, they were harmless beyond a reasonable doubt.

Issue VI - Although the jury was given the unconstitutional CCP instruction, the evidence established all four elements of this aggravating factor; thus, any error in giving the unconstitutional instruction was harmless beyond a reasonable doubt.

Issue VII - The federal district court had no authority to order the imposition of a life sentence were Appellant not resentenced within a 90-day period. Its conditional grant of the writ was merely a custody order. Regardless, the trial court commenced the proceedings within the appropriate time period, but Appellant moved for a five-month continuance. Thus, the trial court did not err in denying Appellant's motion to impose a life sentence.

Issue VIII - The State's videotaped reenactment of the victim's seventeen-minute "death ride" was relevant to prove several of the aggravating factors, and its relevance was not outweighed by its prejudicial effect. Even if it were admitted in error, it was harmless beyond a reasonable doubt.

Issue IX - Evidence that Appellant's son had died just prior

to the resentencing was not relevant to Appellant's character or prior record; thus, the trial court did not err in excluding it. Even if it were error, it was harmless beyond a reasonable doubt.

Issue X - Contrary to Appellant's assertion, the trial court considered all of his nonstatutory mitigation. Even if it did not, there is no reasonable possibility that the sentence would have been different had it done so.

Issue XI - As discussed in Issue VI, the record supports the trial court's finding of the CCP aggravating factor.

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

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

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

Issue XV - This Court has previously found the amended HAC instruction, which was given in this case, constitutional.

Issue XVI - This Court has previously found the "avoid arrest" instruction constitutional.

Issue XVII - This Court has previously found the "pecuniary gain" instruction constitutional.

Issue XVIII - The record fully supports the trial court's factual finding that the victim's hair was forcibly removed either by herself or by one of the defendants pulling her out of the car by her hair. Even if it does not, there is no reasonable possibility that the sentence would have been different.

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR DISQUALIFICATION OF JUDGE (Restated).

On March 31, 1993, defense counsel filed a motion to recuse Judge Walsh from the case. In this motion, counsel alleged that Judge Walsh was an assistant state attorney in the Fort Pierce office when Cave, Bush, Parker and Johnson were tried originally, that the felony division was small, that he had an office on the same hall as the lead prosecutors, that he shared secretaries with the lead prosecutors, and that the investigators working on the four cases were also in the same building. (R 304-05). As a result, Appellant feared that he would not receive a fair trial because information that may not be presented at the resentencing "may have come to [Judge Walsh's] attention" and "may affect or tend to affect the decision making process of the Court." (R 305). To support this speculative assertion, Appellant relied on his belief that "attorneys within the St. Lucie County felony division did regularly consult with one another for opinions, perspectives, current case law and advice." (R 305). Thus, because of Judge Walsh's physical proximity to the prosecutors and investigators working on Appellant's case and the "collegial nature of the practice of law," there was "an appearance of impropriety" which justified Appellant's fear of prejudice or bias. (R 305-06).

In response, the State argued at a hearing on the motion that no reasonable person, given the true facts, would fear that they could not receive a fair trial. To support their argument, the State offered the testimony of Bruce Colton, the chief assistant

state attorney in the Fort Pierce office during the original trial; James Midelis, one of the lead prosecutors, who is now a county court judge; Tom Ranew, the lead investigator for the State Attorney's Office; David Powers, the supervisory detective for the Martin County Sheriff's Office; and Rick Barlow, the assistant state attorney who defended the State in Appellant's postconviction proceedings. (T 1096-97, 1100-07).

Mr. Colton testified that now-Judge Walsh was an assistant state attorney in the Fort Pierce office, but was not involved in prosecuting Appellant during his original trial and was not involved in any pretrial preparation. Mr. Colton was also not aware of any conversations regarding the case between Judge Walsh and either of the lead prosecutors. At that time, Judge Walsh was one of the least experienced prosecutors in the office and James Midelis, one of the lead prosecutors in Appellant's case, was one of the most experienced; thus, it would have been unlikely that Midelis would have sought advice from him regarding the case. (T 1110-12, 1120).

James Midelis testified that he never discussed the case with Judge Walsh. Moreover, most of the pretrial preparation was done in Martin County, and all four defendants were tried outside of St. Lucie County. Since Judge Walsh prosecuted cases exclusively in St. Lucie County, he would not have been present during the preparation and prosecution of the cases. Moreover, the investigators worked out of a separate building. (T 1126-35).

Over defense counsel's objection, the State presented an affidavit by Robert Stone. Mr. Stone averred that he and James

Midelis were the lead prosecutors on Appellant's case. Judge Walsh did not participate in any way, nor did anyone consult Judge Walsh about any matters relating to Appellant's case. (T 1141-42).

Tom Ranew testified that he was the lead investigator for the State Attorney's Office and worked out of the Martin County office. He did not talk to Judge Walsh about the case or ask him to do anything related to the case. All of the pretrial preparation was conducted out of the Martin County office. (T 1145-47).

David Powers then testified that he supervised the detectives in the Martin County Sheriff's Office during the investigation of the case. Judge Walsh was not present during any of the pretrial meetings and did not participate in the investigation. (T 1155-60).

Finally, Rick Barlow testified that he defended the State in the postconviction proceedings of Cave, Parker, and Bush. To his knowledge, Judge Walsh did not participate in any way in those cases during that time. (T 1161-63).

Defense counsel argued that, not only was the motion legally sufficient on its face, but the State's presentation of evidence required recusal. (T 1192-93). The State responded, however, that it presented evidence solely to show that a reasonable person with all of the facts would not fear bias or prejudice by the judge. (T 1193-96). Thereafter, the trial court ruled that the motion was legally insufficient. (T 1196; R 540).

In this appeal, Appellant renews his argument that, by allowing the presentation of evidence by the State, disqualification was required. In the alternative, Appellant

maintains that the motion was legally sufficient on its face and should have been granted. Thus, Appellant seeks a new sentencing hearing. **Brief of Appellant** at 46-49.

As this Court has previously stated, the purpose of the disqualification rule is "to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983). Thus, a defendant must show "a factual foundation for the alleged fear of prejudice. The movant's subjective fears are not sufficient." Jernigan v. State, 608 So.2d 569 (Fla. 1st DCA 1992). Without passing on the truth of the allegations, the trial court must then determine "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Id. at 1087.

Here, the trial court properly determined that Appellant's allegations failed to meet the objective test required by law. Although the prosecutor challenged Appellant's factual allegations by presenting the testimony of several witnesses, "[t]he state's improper response to the facts [should] not be imputed to the judge." Chastine v. Broome, 629 So.2d 293, 294 n.1 (Fla. 4th DCA 1993). See also Randolph v. State, 626 So.2d 1006 (Fla. 2d DCA 1993) ("The prosecutor's comments . . . should not be attributed to the trial judge."). As in Randolph, the trial judge denied the motion to recuse without comment, and thus did not create "an

adversary atmosphere" with Appellant. 626 So.2d at 1008. In fact, nothing in the record indicates that Judge Walsh in any way passed on the truth of the facts alleged by Appellant. Thus, reversal is not mandated simply because the State challenged Appellant's factual allegations.

As for the merits of the motion, the trial court properly found the motion legally insufficient. Taking the facts alleged as true, no reasonably prudent person would fear that Judge Walsh would not fairly and impartially hear Appellant's case. Appellant's allegations were based solely on conjecture and supposition. He made no allegation that Judge Walsh was, in fact, involved with his, or his codefendants', original prosecutions and/or collateral proceedings. Nor did he allege that Judge Walsh, in fact, possessed otherwise inadmissible information. Rather, he alleged only "an appearance of impropriety" based on his belief that information that may not be presented at the resentencing "may have come to [Judge Walsh's] attention" and "may affect or tend to affect the decision making process of the Court." (R 305) (emphasis added). The entire basis for such an allegation was Appellant's assumption that the attorneys prosecuting Appellant's case discussed the case with him and/or sought advice from him. Such a speculative allegation would not lead a reasonably prudent person to fear that Judge Walsh would not be fair and impartial. State ex rel. Shelton v. Sepe, 254 So.2d 12, 14 (Fla. 3d DCA 1971) (holding that the trial judge's employment as an assistant state attorney when the relator [defendant] was bound over for trial was not legally sufficient to warrant disqualification: "It was

disclosed that the respondent, while so acting as assistant state attorney, had no dealings or contact with the prosecution proceeding involving the relator."). Thus, this Court should affirm the trial court's ruling and Appellant's sentence of death.

ISSUE II

WHETHER APPELLANT WAS DENIED AN OPPORTUNITY TO EXPLORE AND PRESENT MENTAL MITIGATING EVIDENCE (Restated).

Prior to trial, the State moved to have Appellant evaluated by its own expert, Dr. McKinley Cheshire, so that it could fairly rebut any mental mitigating evidence that Appellant presented during his resentencing. (R 72-74). Defense counsel moved for the appointment of Dr. Sheldon Rifkin as a confidential expert, who had been appointed as a confidential expert at Appellant's original trial. (R 199-200). After extensive discussion, the trial court granted the State's motion and authorized Dr. Cheshire to interview Appellant. (R 259-61; T 1039-55). The trial court denied, however, defense counsel's motion to appoint Dr. Rifkin as a confidential expert because Dr. Rifkin's original report had been admitted into evidence at Appellant's federal evidentiary hearing in 1988. (T 1039-55, 1077-96). As a result, defense counsel requested the appointment of another confidential expert, but the trial court ruled that Appellant had already had the benefit of two--Dr. Rifkin during his original trial and Dr. Harry Krop during his postconviction proceedings--and denied defense counsel's motion for a third one. (R 317-19, 541; T 1092-96, 1197-1222). However, the trial court appointed Dr. Rifkin as a defense expert, although not on a confidential basis, which meant that the State and/or its own expert could attend Dr. Rifkin's examination of Appellant. (R 428-29; T 1222-26).

Several weeks later, the State called an emergency hearing and moved for sanctions against Appellant for his refusal, pursuant to

defense counsel's advice, to answer questions posed by the State's expert at his authorized mental status evaluation. (R 347-61; 1243-45). According to Dr. Cheshire, Appellant refused to answer questions relating to any events occurring between April 25, 1982, and May 5, 1982, and relating to any prior criminal activities. (T 1263-70). Defense counsel responded that Appellant had yet to be examined by his own expert, and that defense counsel would probably limit Dr. Rifkin's examination similarly. (T 1252-53). The State argued, however, that Dr. Rifkin could still rely on Dr. Krop's evaluation from 1988 during which Appellant discussed the facts of the crime and his previous criminal activities. (T 1253). The trial court ordered Appellant to answer all of the questions and explained to him the ramifications of refusing to do so. (T 1280-84).

The following Monday, April 19, 1993, the State informed the trial court that Appellant had persisted in his refusal to answer Dr. Cheshire's questions and asked the trial court to hold him in contempt. In addition, the State suggested that, if Appellant persisted in his refusal to answer Dr. Cheshire's questions, the trial court should prohibit the introduction of any mental mitigation by Dr. Rifkin or Dr. Krop on Appellant's behalf. (T 1285-92). In response to the trial court's questioning, defense counsel indicated that Appellant would never comply with the court's directive, and the trial court held Appellant in contempt of court, sentencing him to a consecutive five months and 28 days in jail. (T 1297-1301). When Appellant continued to refuse to comply, the trial court ruled that Dr. Rifkin would be allowed to

testify on Appellant's behalf only if his evaluation of Appellant were similarly limited, or, if not so limited, if Dr. Cheshire were allowed to fully examine Appellant. (T 1309-13).

That Friday, following Dr. Rifkin's examination of Appellant, the State informed the trial court that Dr. Rifkin's examination was as limited as Dr. Cheshire's. Because of the limitation, Dr. Rifkin was not able to render an opinion relating to mental mitigation. However, after reviewing Dr. Krop's report and testimony from 1988, Dr. Rifkin had changed his diagnosis from 1982 and no longer believed that Appellant has an antisocial personality disorder. (T 1321-35). After hearing Dr. Rifkin's testimony (T 1339-76), the trial court ruled that neither Dr. Rifkin nor Dr. Krop could testify regarding any mental mitigation. Dr. Rifkin, however, could testify regarding Appellant's IQ, which he did. (R 441-44; T 701-54, 1383-86).

In this appeal, Appellant claims that he was denied a fair trial because the trial court (1) refused to appoint a confidential defense expert, (2) authorized the State's expert to be present during Dr. Rifkin's evaluation of Appellant, (3) authorized the State's expert to interview Appellant, and (4) excluded his mental mitigation evidence when he refused to answer questions of the State's expert relating to the facts of the crime and his prior criminal activities. **Brief of Appellant** at 49-60. The State submits, however, that the trial court properly exercised its discretion in making the foregoing rulings.

At Appellant's original trial, Dr. Rifkin was appointed as a confidential expert. According to Dr. Rifkin, Appellant declined

to answer any questions relating to the crime at that time. (T 1372). During his postconviction proceedings, however, collateral counsel hired Dr. Krop to evaluate Appellant, and Appellant related the facts of the crime to him and discussed his prior criminal activities. Dr. Krop testified at Appellant's postconviction proceedings. (T 1043). Thus, prior to resentencing, Appellant had had the benefit of two confidential mental health experts. Given the fact that Appellant could have introduced the testimony of either or both experts at his resentencing for mitigation purposes, the trial court did not abuse its discretion in denying Appellant a third confidential expert.

In Ake v. Oklahoma, the United States Supreme Court held that

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

470 U.S. 68, 83 (1985). Regarding the penalty phase of a capital trial, the Court also held that "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in the preparation of sentencing." Id. at 84. However, the Court confined its holding:

> This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.

Id. at 83. Appellant had "access" to two mental health experts.

In Burch v. State, 522 So.2d 810 (Fla. 1988), this Court reversed the defendant's conviction. Upon retrial, the defendant sought the appointment of an internationally known expert on the effects of PCP. The trial court ultimately determined, however, that the "two local experts who had assisted in the earlier trials were competent and would be assigned." Id. at 812 (emphasis added). Citing to Ake, this Court affirmed the trial court's ruling. Id. See also Morgan v. State, 639 So.2d 6, 10 (Fla. 1994) ("[A] defendant is not entitled to an infinite number of experts . . . ."). In the present case, the trial court acted well within its authority to deny Appellant a third confidential expert.

Even if the trial court should have appointed another expert to evaluate Appellant on a confidential basis after it determined that Dr. Rifkin could not be appointed as such, its failure to do so did not prejudice Appellant under the circumstances of this case. Because Appellant refused to answer the State's expert's questions relating to the events surrounding the murder and his prior criminal activities, Appellant was properly precluded from presenting any mental mitigation. Thus, even if the trial court had appointed a confidential expert to evaluate Appellant, the expert would not have testified given the trial court's sanction for Appellant's refusal to allow an examination by the State's expert. Consequently, the trial court's refusal to appoint a confidential expert, if error, was harmless beyond a reasonable doubt under the totality of the circumstances. See State v.

DiGuilio, 491 So.2d 1129 (Fla. 1986).

Appellant takes issue, of course, with the premise underlying such an argument, namely, that the trial court properly authorized the State's expert to interview him, and then, when he refused to cooperate, excluded Appellant's mental mitigation. At the time of this resentencing, this Court's decision in Henry v. State, 574 So.2d 66 (Fla. 1991) (plurality), had issued. In Henry, a majority of the Court explicitly stated that "[i]f a defendant seeks to pursue an insanity defense, the state should have an equal opportunity to obtain evidence relevant to that issue." Id. at 70. When Henry refused to cooperate with the State's expert, the trial court struck Henry's insanity defense. This Court found no abuse of discretion. Id. Based on Henry and circuit court orders from other circuits striking mental mitigation evidence, the trial court held that the State was "entitled to an equal opportunity to obtain evidence relevant to all issues presented and bears the burden of rebutting allegations concerning the defendant's mental health status if it is raised and presented by the defense." (R 260) (emphasis in original).

Since Henry, this Court has issued several other opinions which support the trial court's ruling in this case. Foremost is Dillbeck v. State, 643 So.2d 1027, 1030 (Fla. 1994), wherein this Court found no abuse of discretion in requiring Dillbeck, a capital defendant, to submit to a mental health examination by a State expert prior to the penalty phase. In so holding, this Court noted the requirement that the trial court must accept all mitigating evidence that is unrebutted by the State, and then stated that

"[n]o truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved." Id.

To facilitate this new ruling in capital cases, this Court adopted the procedure outlined in Hickson v. State, 630 So.2d 172, 176 (Fla. 1993), which requires written notice by the defense of its intent to use expert testimony and then allows the State the opportunity to have the defendant interviewed by an expert who can testify at the trial to rebut the defendant's expert testimony. Id. While awaiting from the Criminal Rules Committee of the Florida Bar a proposed rule addressing this issue, this Court adopted as an interim measure an initial draft. This initial draft provides that, if the defendant seeks to present the testimony of a mental health expert during the penalty phase who has interviewed the defendant, then the State is entitled to examine the defendant after the conviction and after the State certifies that it will seek the death penalty. Id.

Although Dillbeck and Hickson had not issued at the time of Appellant's resentencing, they support the trial court's ruling in this case.[1] The pith of these cases is that both parties should have the equal opportunity to present relevant evidence, be it substantive or rebuttal evidence. The defendant should not be able to circumvent the search for truth by claiming a privilege that

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[1]Appellant may argue in his reply that Hickson and Dillbeck do not apply because they issued after Appellant's resentencing, but, as this Court recently explained, "new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise." Wuornos v. State, 19 Fla. L. Weekly S455, 459 n.4 (Fla. Sept. 22, 1994).

will ultimately be waived when the defendant's expert witness is called to testify. By allowing the State's expert to interview the defendant, the trial court merely leveled the playing field. Once leveled, Appellant decided that he did not want to play by the rules.

Appellant challenges, of course, the trial court's sanction for his failure to cooperate as too harsh and a violation his right to a fair trial. **Brief of Appellant** at 54-60. This Court held to the contrary in Henry and should apply the same rationale in the present case. In Henry, this Court reaffirmed that

> 'where a defendant in a criminal case serves notice that she will rely upon a defense of insanity and the court over her objections orders her to give testimonial response to court-appointed psychiatrists under pain of forfeiting the testimony of her privately-engaged psychiatrist, the defendant's rights to freedom from self-incrimination are not invaded.'

574 So.2d at 70 (emphasis added) (quoting Parkin v. State, 238 So.2d 817, 822 (Fla. 1970), cert. denied, 401 U.S. 974 (1971)). Moreover, in Hickson, which was adopted in Dillbeck, this Court established the following procedure:

> When a defense expert [who has interviewed the defendant] will be used to demonstrate the presence of the [battered-spouse] syndrome, the state will then have the opportunity to have the defendant examined by its expert, who will be allowed to testify at trial to rebut a defense expert's testimony. This presents a defendant with the choice of either 1) having her expert testify directly about her case, in which instance the state may have her examined by its expert, or 2) both sides may present the testimony of experts who have not examined the defendant and who will not testify about the facts of her case.

630 So.2d at 176. See also Dillbeck, 19 Fla. L. Weekly at 231.

Clearly, the appropriate sanction for noncompliance with the trial court's order to cooperate with the State's expert was striking the defendant's expert testimony which was based on the facts of the case as related by the defendant. Henry, Hickson, and Dillbeck authorize the trial court's sanction in this case.

Lastly, Appellant claims that the trial court abused its discretion in authorizing the State to be present during Dr. Rifkin's examination of him. **Brief of Appellant** at 51-52. Dr. Rifkin, however, was not a confidential expert. Dr. Rifkin testified at Appellant's original trial. His report from that trial was subsequently admitted into evidence at a federal evidentiary hearing in 1988. Based on these two events, the confidential nature of Dr. Rifkin's initial appointment no longer existed and could not be reinstated. See Tucker v. State, 484 So.2d 1299, 1301 (Fla. 4th DCA) ("The law is clear that once communications protected by the attorney-client privilege are voluntarily disclosed, the privilege is waived and cannot be reclaimed."), rev. denied, 494 So.2d 1153 (Fla. 1986); Lovette v. State, 636 So.2d 1304 (Fla. 1994) (calling expert as witness waives attorney/client privilege). Nevertheless, Dr. Rifkin was appointed at Appellant's behest with the understanding that he would not be a confidential expert. As a result, the State was entitled to be present at Dr. Rifkin's examination of Appellant.

Regardless, even if the State had not been present during the examination and Appellant had fully confided in Dr. Rifkin, the State would have been able to depose the doctor and obtain his report. Moreover, because of Appellant's refusal to answer

questions by the State's expert, Dr. Rifkin would still not have been able to testify regarding any mental mitigation. Thus, the State's presence at Dr. Rifkin's examination, if error, was harmless beyond a reasonable doubt.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON ALL OF THE STATUTORY MITIGATING CIRCUMSTANCES THAT APPELLANT HAD NOT SPECIFICALLY WAIVED (Restated).

In this appeal, Appellant claims that he was denied a fair sentencing proceeding because the trial court did not instruct the jury on all of the statutory mitigating factors that specifically had not been waived by defense counsel. **Brief of Appellant** at 60-63). This Court has previously held, however, that the "Florida Standard Jury Instructions state that the jury be instructed only on those factors for which evidence has been presented." Stewart v. State, 549 So.2d 171, 174 (Fla. 1989) (citing **Fla. Stand. Jury Instr. in Crim. Cases** 78 (1981)). See also Bowden v. State, 588 So.2d 225, 231 (Fla. 1991) (same), cert. denied, 112 S.Ct. 1596, 118 L.Ed.2d 311 (1992); Johnson v. Singletary, 612 So.2d 575, 577 n.2 (Fla. 1993) ("The trial court has discretion not to instruct on factors clearly unsupported by any evidence . . . .").

The record reveals in the instant case that defense counsel formally waived the "no significant history" mitigating factor (R 484), and requested only the catchall instruction. He made no objection to the instructions as prepared by the State (T 921), and no objection to the instructions as given. In its sentencing order, the trial court specifically stated that defense counsel had waived the "no significant history" mitigating factor, and that no evidence was presented relating to the other statutory mitigators. (R 1591). Additionally, it noted that defense counsel "did not request instructions for any of the statutory mitigating

circumstances." Nevertheless, the trial court "made its own review of the evidence as to the applicability of these sections and [found] no evidence that would sustain any of the above-listed statutory mitigating circumstances." (R 1592). Appellant has shown no abuse of discretion. Thus, this Court should affirm Appellant's sentence of death.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RESTRICTING APPELLANT'S CROSS-EXAMINATION OF MICHAEL BRYANT AND DAVID PHOEBUS, AND IN RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE (Restated).

During its case-in-chief, the State presented the testimony of Michael Bryant. Mr. Bryant testified that he was in jail with Appellant prior to the original trial and overheard Appellant and John Earl Bush talking about the robbery/murder. According to his testimony, he heard Bush state that Appellant shot the victim. Believing that Mr. Bryant might tell someone about the conversation he overheard, Appellant beat him up and caused him to go to the emergency room. (T 570-73).

During cross-examination, defense counsel asked Mr. Bryant why he was in jail, and the State objected. (T 574-75). At sidebar, defense counsel indicated that Mr. Bryant was in jail on a burglary charge arising out of Broward County. At some point prior to Appellant's original trial, Mr. Bryant was sentenced to probation on the burglary charge and adjudication was withheld. Defense counsel believed that the circumstances surrounding Mr. Bryant's incarceration was proper impeachment to show a subjective belief by Mr. Bryant that he would receive a benefit in exchange for his testimony. (T 577).

In addition, defense counsel believed that he could question Mr. Bryant about several other matters. First, counsel indicated that he wanted to question Mr. Bryant about an escape charge that was brought after he went to the emergency room. Mr. Bryant apparently tried to leave the hospital and was charged with escape.

Prior to his testimony in Appellant's original trial, Mr. Bryant pled to resisting arrest without violence and was ordered to pay a $100 fine. (T 577). Second, defense counsel believed that he could question Mr. Bryant about whether he had filed a civil lawsuit against the county relating to Appellant's battery upon him. (T 578). Third, defense counsel wanted to question Mr. Bryant about his failure to report the conversation he overheard to the guards. (T 578). Lastly, defense counsel wanted to impeach Mr. Bryant regarding a statement that he made during his deposition that he had never been in trouble in Okeechobee County when, in fact, he had been arrested twice, once for a misdemeanor battery and once for the violation of a civil restraining order, although both charges had been dropped. (T 578, 581). The trial court found the latter area of cross-examination improper impeachment. (T 582). After extensive discussion, the trial court made the following rulings regarding the other matters:

> I don't find any testimony whether this was or was not a favorable resolution insofar as the burglary charge was concerned. I do sustain the State's objection in the following manner and overrule in the following manner; number one, Mr. Garland, you may ask any of the Cummings' questions, that is to say, [whether the witness has ever been convicted of a felony or a crime involving dishonesty or false statement and, if so, how many times].
>
> You may ask if the witness received any favorable treatment or any plea deals for the charge of burglary. You may ask what he was in jail for, I will allow that. You may ask if he has ever entered into any agreements with the State or the county as agreeing to testify.
>
> You may not ask regarding the resolution of the burglary case or any other case, specifically or generally, nor may you suggest

> that there are any other cases when you ask if he has ever entered into any agreements or deals with the State of Florida in any other manner except, of course, the Cummings' exception.
>
> You may ask if he reported this confession or statement to any law enforcement person and, if so, when. . . . When you ask these questions we are all going to live with the answers, Mr. Barlow. And you open a door I'm going to let Mr. Barlow walk through it.

(T 607-08). Regardless of the trial court's ruling, when defense counsel resumed cross-examination, he asked Mr. Bryant if he tried to escape from the emergency room, which brought an admonishment at sidebar from the trial court and a curative instruction to the jury. (T 610-11).

Later, defense counsel asked Mr. Bryant whether Appellant had a collection of pictures of nude white women in his cell. After the witness responded affirmatively, the State objected as beyond the scope of direct since the witness had never testified to such. The trial court sustained the objection. (T 615-17). Defense counsel later proffered the testimony of Michael Bryant to the effect that Appellant had photographs of nude white women displayed in his cell and that he (Bryant) told Lieutenant Jackson about it. (T 692-94). He also proffered the testimony of Lieutenant Jackson that photographs of nude women in jail cells are prohibited and confiscated when found. Lieutenant Jackson did not remember whether Appellant had such pictures in his cell or whether Mr. Bryant told him that Appellant had some. (T 688-92). After the proffer, the trial court reaffirmed its ruling that the testimony was irrelevant, improper impeachment and beyond the scope of direct examination. (T 697-99).

Finally, defense counsel asked the trial court whether he could question Mr. Bryant about his civil lawsuit against Martin County. When the trial court asked what relevance it had to the present resentencing, defense counsel responded that it was relevant to show that Mr. Bryant had a financial interest in testifying for the State during the original trial. The trial court prohibited counsel from pursuing such questioning. (T 618-20).

In this appeal, Appellant claims that the trial court abused its discretion in restricting his cross-examination of Mr. Bryant as related above. **Brief of Appellant** at 63-69. None of this "impeachment," however, related to any potential bias or prejudice that Michael Bryant may have had in testifying at the resentencing. Defense counsel was allowed to elicit the fact that Mr. Bryant was in jail with Appellant in 1982 because of a burglary charge. (T 610). Defense counsel also impeached Mr. Bryant with the fact that he did not testify at Appellant's original trial to the conversation he overheard between Appellant and Bush. (T 610). Although Mr. Bryant claimed at the resentencing that he told Lieutenant Jackson and Robert Stone, one of the prosecutors, about Bush's and Cave's conversation, Lieutenant Jackson and Mr. Stone later testified that neither of them recalled being given that information, which would have been important evidence at Appellant's first trial. (T 612, 634, 853).

The fact that Mr. Bryant got probation and that adjudication was withheld on the burglary charge prior to his testimony in the first trial, the fact that Mr. Bryant was charged with escape and

pled to a misdemeanor prior to his testimony in the first trial, and the fact that he had filed a civil lawsuit against the county prior to his testimony in the first trial, did not in any way relate to his bias or prejudice for testifying at the resentencing in 1993. Even if Mr. Bryant had a subjective belief in 1982 that he would get favorable treatment if he testified, no one knew then that Appellant would receive a new sentencing hearing so that Mr. Bryant could come forth with this new information. In other words, any subjective belief of favorable treatment for his testimony in 1982 had long since dissipated. Had the impeachment material related to charges pending or recently resolved prior to the resentencing, there is no question that it would have been relevant, and thus admissible. As it was, the charges had been disposed of eleven years prior to the resentencing. They hardly related to any potential bias in testifying at the resentencing. Thus, the trial court did not abuse its discretion in restricting defense counsel regarding the burglary and escape charges, and the civil lawsuit. Jones v. State, 508 So.2d 490, 491 (Fla. 3d DCA 1987) (because witness was not in position to benefit from his testimony at retrial, cross-examination of witness regarding lessened sentence obtained prior to first trial was properly restricted); West v. State, 503 So.2d 435, 435-36 (Fla. 4th DCA 1987) (cross-examination properly limited where witness had successfully completed pretrial intervention program two years before trial and there was no possibility at time of trial that charges might be reactivated); Williams v. State, 625 So.2d 994, 995-96 (Fla. 1st DCA 1993) (cross-examination properly limited in

light of other evidence challenging credibility of witness); Mosley v. State, 616 So.2d 1129, 1130-31 (Fla. 3d DCA 1993) ("[A] defendant's right to cross-examine on the question of bias is not unlimited[.]").

As for the testimony relating to the nude pictures and the statement that he (Bryant) had never been in trouble in Okeechobee, these matters were clearly irrelevant. Counsel wanted to question Mr. Bryant about the nude photographs, although they were never a subject of direct examination, so that he could then impeach Mr. Bryant with Lieutenant Jackson's equivocal testimony that he did not remember being informed of any photos or discovering any photos in Cave's cell. Lieutenant Jackson's testimony, however, would have been improper impeachment on a collateral matter. Matthews v. State, 574 So.2d 1174, 1175-76 (Fla. 5th DCA 1991) ("[A] witness may not be impeached by proof of statements as to irrelevant or immaterial matters."); Dupont v. State, 556 So.2d 457 (Fla. 4th DCA 1990) (holding that an answer by a witness on cross-examination regarding a nonmaterial collateral matter cannot be rebutted by the contradictory testimony of another witness). Similarly, defense counsel wanted to question Mr. Bryant about his deposition statement, which was also not a subject of direct examination, so that he could then impeach him with evidence of the restraining order violation and the misdemeanor battery, neither of which were admissible any other way. As the trial court ruled, these matters were improper impeachment. Thus, the trial court did not abuse its discretion in restricting cross-examination on these issues. See Dupont, 556 So.2d at 458 (finding that impeachment of a witness'

credibility must be by reputation evidence only); Brockington v. State, 600 So.2d 29, 30 (Fla. 1992) (prior inconsistent statement may not be that of third party rather than that of person sought to be impeached); Jones v. State, 440 So.2d 570, 576 (Fla. 1983) (finding that there was no absolute right for defendant to cross-examine court witness on matters not raised on direct).

Finally, Appellant claims that the trial court erred in sustaining the State's objection when defense counsel attempted to question David Phoebus about a meeting he allegedly had with Lieutenant Jackson on July 23, 1982. Mr. Phoebus testified that he recognized his case notes from 1982, and that they reflected that he met with Lieutenant Jackson, but he had "no independent recollection of the items listed on [there] other than as reflected on [that] piece of paper." (T 842). When defense counsel asked whether, in fact, he had met with Lieutenant Jackson on July 23, 1982, the State objected that counsel was trying to impeach Lieutenant Jackson on a collateral matter. (T 842-43, 844-45). Defense counsel then proffered Mr. Phoebus' testimony to the effect that his notes reflected two meetings with Lieutenant Jackson regarding the alleged battery on Michael Bryant by Appellant, but that he had no independent recollection of the meetings or whether Lieutenant Jackson related the conversation overheard by Mr. Bryant. (T 843-44). Following the proffer, the trial court indicated that its recollection of Lieutenant Jackson's testimony was that Lieutenant Jackson did not remember whether he told anyone involved with Appellant's prosecution about the conversation overheard by Mr. Bryant. Based on its recollection of the

testimony, the trial court ruled that defense counsel was improperly trying to impeach Lieutenant Jackson with extrinsic evidence. (T 845-48).

Defense counsel's stated reason for eliciting this testimony was so that "the jury [could] draw the inference that Art Jackson could have and should have in the exercise of good police experience, skills, call it what you will, [related the conversation overheard by Mr. Bryant to the prosecution team], and he didn't do it." (T 847). Defense counsel, however, elicited from Mr. Phoebus that his notes reflected a meeting with Lieutenant Jackson, that he did not believe that he had received any information relating to the conversation overheard by Mr. Bryant, and that such information would have been important to the prosecution. (T 842, 848-49). The only questions that defense counsel was not allowed to ask Mr. Phoebus were the direct questions of whether he, in fact, met with Lieutenant Jackson, and whether, in fact, Lieutenant Jackson told him about the conversation Mr. Bryant overheard between Bush and Appellant. Because the information was ultimately elicited, the State cannot understand Appellant's complaint. Be that as it may, the trial court understood and properly determined that defense counsel was trying to impeach Lieutenant Jackson through Mr. Phoebus. Matthews, 574 So.2d at 1175-76 ("[A] witness may not be impeached by proof of statements as to irrelevant or immaterial matters."); Dupont, 556 So.2d at 457 (holding that an answer by a witness on cross-examination regarding a nonmaterial collateral matter cannot be rebutted by the contradictory testimony of another witness).

Even were the trial court's rulings, either singularly or cumulatively, in error, such error was harmless beyond a reasonable doubt. Appellant's guilt was not at issue. Even had defense counsel been allowed to examine Mr. Bryant and Mr. Phoebus as desired, all of the aggravating factors were proven independently beyond a reasonable doubt. Thus, even if Mr. Bryant's testimony was totally disbelieved, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different. See Jones, 508 So.2d at 491; Aldridge v. State, 503 So.2d 1257, 1258-59 (Fla. 1987), sentence vacated on other grounds, 925 F.2d 1320 (11th Cir. 1991). Therefore, this Court should affirm Appellant's sentence of death.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL DURING THE STATE'S OPENING STATEMENT AND DURING DETECTIVE JONES' TESTIMONY WHEREIN THE STATE AND THE WITNESS REFERRED TO A CODEFENDANT'S CONFESSION (Restated).

During the State's opening statement, the prosecutor was giving a chronology of the events that led to Appellant's arrest when he made the following comments:

> The police questioned the defendant about the murder and robbery and kidnapping of Fran and at first the defendant denied any involvement or any knowledge about the murder, the robbery and the kidnapping. The defendant claimed he had an alibi, claiming he was with his girlfriend on the night of April 27th at the time of the murder and he didn't commit the murder. Police then told Alphonso Cave that they had a taped statement from his co-defendant and friend, John Earl Bush. The defendant, Alphonso Cave, that sits before you, didn't believe him, so the police played the statement of John Earl Bush for him. And after the defendant heard the statement of John Earl Bush he too confessed to the murder, the kidnapping and robbery.

(T 249). Defense counsel objected, moved for a curative instruction, and in the alternative moved for a mistrial based on the State's comment that "he too confessed." (T 249-50). The trial court ordered the State to rephrase its argument, denied the motion for mistrial, and gave the following curative instruction:

> Ladies and gentlemen, in just a moment the prosecutor will be able to finish his opening statement. I do direct you to consider the opening statement as a guide in order to anticipate and assist you in listening to the evidence and testimony, both from the prosecutor and from the defense lawyer. Insofar as confessions or statements are concerned, I instruct you to disregard any reference that was made in regard to what any

> other person said. What we're interested in here is that which was said by the defendant in this particular case and consider the opening statement for that purpose and that purpose alone.

(T 250-51). The State then continued with its opening statement: "The police then played for this defendant the taped statement of John Earl Bush. Only after the statement of Bush was played did the defendant then begin to reveal his role in the murder, the kidnapping and robbery. . . ." (T 251). Defense counsel made no objection.

Later, during the direct examination of Sergeant Lloyd Jones, the following colloquy also occurred:

> Q [By the State] Did there come a point in the investigation that you were aware that Lieutenant Charles Jones had interviewed a John Earl Bush?
>
> A [By Sergeant Jones] Yes, sir, that's correct.
>
> Q On what date was that, sir?
>
> A Best I can recall, I believe it was May 3rd or May 4th, I believe. I believe it was May 4th he spoke to John Earl Bush and he obtained a confession from him.

(T 535). At that point, defense counsel made an objection and moved for a mistrial. In the alternative, he moved to strike the answer and requested a curative instruction. (T 535). The trial court denied the motion for mistrial and gave the following curative instruction:

> Ladies and gentlemen, I'm going to instruct you to disregard the common phrase or terminology of confession in any way, shape or form and make any sort of reference to that in the future. We're going to be referring to the taped statement of John Earl Bush as the statement and nothing further than that point.

(T 536-37).

In this appeal, Appellant renews his claim that the references to Bush's taped statement as a confession violated the dictates of Bruton v. United States, 391 U.S. 123 (1968), and were especially prejudicial because they "had the direct effect of buttressing [Michael] Bryant's testimony" regarding Bush's statement to Appellant that Appellant shot the victim. **Brief of Appellant** at 71-73. The State submits, however, that neither the prosecutor's nor the witness' statement violated Bruton. In Bruton, the United States Supreme Court held that it was error for the Government to introduce into Bruton's and a codefendant's joint trial the confession of the nontestifying codefendant which implicated Bruton. 391 U.S. at 126. Of significance in that case was the fact that the substance of the codefendant's confession was admitted and that the confession inculpated Bruton. Here, on the other hand, the prosecutor's and the witness' comment only indicated that Bush had confessed. The substance of the confession was never admitted, nor did either comment indicate that Bush implicated Appellant. Rather, in recounting the sequence of events leading up to Appellant's arrest and confession, the prosecutor and the witness merely indicated that Appellant confessed after initially denying involvement and then hearing Bush's confession upon request. Appellant did not object to the prosecutor's comment or the witness' testimony that Appellant confessed after hearing Bush's taped statement. Thus, under these facts, Bruton is not implicated, much less violated.

Even were the prosecutor's and the witness' comment violative

of Bruton, such error was harmless beyond a reasonable doubt given the trial court's curative instructions that the jury disregard their reference to a "confession." Moreover, as previously noted, the prosecutor commented and the witness testified, without objection, that Appellant confessed after hearing Bush's taped statement. (T 251, 538). Finally, the jury heard Appellant's taped confession during Sergeant Jones' testimony wherein Appellant implicated himself and his three codefendants in the robbery/murder. Given these facts, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different had the prosecutor and the witness not made the allegedly erroneous comments. See Grossman v. State, 525 So.2d 833, 838 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Delgado v. State, 574 So.2d 1129, 1130 (Fla. 3d DCA), rev. denied, 591 So.2d 631 (Fla. 1991); Verni v. State, 536 So.2d 1162, 1163 (Fla. 2d DCA 1988), pet. for rev. denied, 542 So.2d 1335 (Fla. 1989); Adams v. State, 445 So.2d 1132, 1133-34 (Fla. 2d DCA 1984); Andrews v. State, 372 So.2d 143, 149-50 (Fla. 3d DCA 1979), pet. for rev. denied, 390 So.2d 61 (Fla. 1980); Cave v. Singletary, 971 F.2d 1513, 1515 & 1524 (11th Cir. 1992). Therefore, this Court should affirm Appellant's sentence of death.

ISSUE VI

WHETHER THE COLD, CALCULATED, AND PREMEDITATED JURY INSTRUCTION IS UNCONSTITUTIONAL (Restated).

Prior to trial, defense counsel filed a motion challenging the constitutionality of both the CCP aggravating factor and its attendant jury instruction. (R 201-14). The trial court denied the motion at a subsequent hearing. (ST 2479-80). During the charge conference, defense counsel also filed a written objection to the CCP instruction and submitted a proposed instruction, which was denied. (R 1017-20; T 906). The jury was given the standard CCP instruction (T 989), which this Court found unconstitutional a year later in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994).

Since Jackson, this Court has issued Walls v. State, 641 So.2d 381, 387 (Fla. 1994), wherein this Court held that any error in giving the Jackson instruction can be harmless if "the murder could only have been cold, calculated, and premeditated without any pretense of moral or legal justification even if the proper instruction had been given." See also Wuornos v. State, 19 Fla. L. Weekly S455, 457-58 (Fla. Sept. 22, 1994). The State submits that the four elements of cold, calculated and premeditated were sufficiently established in this case.

In Jackson, this Court defined "cold" as "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." 19 Fla. L. Weekly at 217. The evidence established, as the trial court found, that Appellant robbed the victim at gunpoint and forced her into the car. He and his

codefendants then drove to a secluded area in a rural part of the county during the middle of the night and forced her out of the car. While the victim stood there on the side of the road begging for her life, John Earl Bush stabbed her in the stomach with a small knife, and either Appellant or J.B. Parker shot her in the head. According to Appellant's statement to the police, Bush had already decided that she had to die. Clearly, her murder was not prompted by "emotional frenzy, panic, or a fit of rage." Thus, this element was sufficiently proven.

This Court also defined "calculated" as "a careful plan or prearranged design to commit murder before the fatal incident." Jackson, 19 Fla. L. Weekly at 217. As noted previously, instead of leaving the clerk temporarily subdued at the store, Appellant forced her at gunpoint into the car and they drove seventeen minutes out of town to a remote location. According to Appellant's own confession to the police, Bush decided during the drive that she should die. In keeping with his decision, they forced her out of the car, Bush stabbed her in the stomach, and either Appellant or Parker shot her in the head. "By definition, this sequence only could be the product of a careful plan or prearranged design." Wuornos, 19 Fla. L. Weekly at 458. This element was also sufficiently established by the evidence.

This Court has defined "premeditated" as "'heightened premeditation' over and above what is required for unaggravated first-degree murder." Wuornos, 19 Fla. L. Weekly at 458. As noted in Wuornos, this Court has found this factor present "when the prevailing theory of the case established 'deliberate ruthlessness'

in committing the murder." Id. Here, the State's theory was that Appellant possessed and used the only firearm to rob the victim. After completing the robbery, Appellant and his codefendants could have physically incapacitated her and made their escape. Instead, Appellant personally forced the victim into their car, still using the only firearm. Following the seventeen-minute "death ride," they forced the victim out of the car, whereupon Bush stabbed her in the stomach. While the victim pled for her life, Appellant executed her with the gun he had used throughout the ordeal. Although Appellant claimed that he thought they were going to let her go, the jury and judge properly could have rejected this evidence. Since the evidence established the heightened premeditation to the degree required by law, this element also exists here.

Finally, this Court requires proof that the defendant had no pretense of moral or legal justification. Jackson, 19 Fla. L. Weekly at 217. This Court has defined "pretense" as "any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Walls, 641 So.2d at 388 (footnote omitted). Clearly, the facts of this case do not establish any justification for this senseless murder. The victim was a young woman who was taken at gunpoint in the middle of the night by Appellant and his three codefendants to an unknown, remote location where she pled for her life and offered to "do anything" in return for her safety. She presented neither resistance nor threat to her captors which would

justify being stabbed in the stomach and, while kneeling in pain, shot execution-style in the head. There can be no question that this element, like the other three, would have been proven based on the new instruction. Therefore, any error in not giving the Jackson instruction was harmless beyond a reasonable doubt. Consequently, this Court should affirm the trial court's finding of the CCP aggravating factor and Appellant's sentence of death.

ISSUE VII

WHETHER THE STATE COMMENCED RESENTENCING WITHIN NINETY DAYS AS ORDERED BY THE UNITED STATES DISTRICT COURT AND, IF NOT, WHETHER APPELLANT IS AUTOMATICALLY ENTITLED TO A LIFE SENTENCE (Restated).

On August 3, 1990, the United States District Court for the Middle District of Florida vacated Appellant's sentence based on its finding that Appellant received ineffective assistance of counsel during the penalty phase of his trial. Cave v. Singletary, 971 F.2d 1513, 1520-30 (11th Cir. 1992). In so holding, the district court directed the State to

> schedule a new sentencing proceeding at which [Appellant] may present evidence to a jury on or before 90 days from the date of th[e] Order. Upon failure of the [State] to hold a new sentencing hearing within said 90 day period without an order from this Court extending said time for good cause, the sentence of death imposed on [Appellant] will be vacated and [Appellant] sentenced to life imprisonment.

Id. at 1530. On September 25, 1990, the district court stayed its ruling pending the State's appeal to the Eleventh Circuit. On August 26, 1992, the Eleventh Circuit affirmed the district court's order vacating Appellant's sentence. 971 F.2d at 1513-20. Mandate issued from that court on September 21, 1992. (R 1164-65).

On October 20, 1992, Thomas Walsh was designated as an acting circuit court judge to preside over Appellant's resentencing, and the Public Defender's Office was appointed to represent Appellant. (R 30, 32). Two days later, Judge Walsh held a status conference and set the resentencing for November 30, 1992. The State was directed to have Appellant transported from Starke, and the

assistant public defender was directed to determine whether his office had a conflict of interest in representing Appellant. (R 34, 1148-52).

On November 17, 1992, the assistant public defender filed a motion to continue the resentencing until April and waived Appellant's right to a speedy trial. (R 37-38). That same day, the trial court granted the motion and reset the resentencing to April 26, 1993. (R 41). On December 16, 1992, the assistant public defender moved to withdraw from the case citing a continued conflict of interest, which was granted on January 14, 1993. (R 49-50, 53; T 1022-25). On January 28, 1993, Jeffrey Garland was appointed as a special assistant public defender to represent Appellant. (R 55-56). On February 8, 1993, the resentencing was reset to March 3, 1993, upon the State's motion, because the week of April 26 marked the tenth anniversary of the victim's death and her family requested a short continuance. (R 69).

On April 6, 1993, defense counsel moved to have a life sentence imposed because the State failed to hold a sentencing hearing within the 90-day period proscribed by the district court's order. (R 404-27, 325-28). In this motion, counsel alleged that the district court entered its original order on August 3, 1990, and stayed that order fifty-three days later on September 25, 1990. Once the Eleventh Circuit issued its opinion on August 26, 1992, affirming the district court's order, the State had thirty-seven days within which to conduct the resentencing. According to counsel, the State had up to and including October 5, 1992. The trial court did not hold the first status conference until October

22, 1992. Thus, counsel claimed, the proceedings were not commenced within the 90-day period. Moveover, because venue remained in Pinellas County and was improperly relinquished to Martin County, Judge Walsh was not authorized and had no jurisdiction to resentence Appellant until this Court specifically appointed him on March 23, 1993. (R 404-07).

At the hearing on the motion, the State argued that it was not given adequate notice of the Eleventh Circuit's mandate; that Appellant had failed to show any prejudice; that Appellant's right to a constitutional speedy trial was not violated; that the district court had no authority to set a time limit, but that, if it did, the time began to run when the mandate was issued by the Eleventh Circuit, in which case, the resentencing was commenced within the 90-day period; and that defense counsel moved for a continuance which exceeded the 90-day period. (T 1155-74). Defense counsel responded that the Attorney General's Office was served with the mandate, that the State should have sought an extension of time from the federal district court, and that the trial judge did not have proper authority to preside over the case when the resentencing was initiated on October 22, 1992. (T 1174-77). Upon questioning by the court, defense counsel admitted that he was not prepared to go to trial on the date of this hearing. (T 1177-78). The trial court thereafter denied defense counsel's motion, finding that Pinellas County was served with the mandate which issued on September 21, 1992, and then relinquished jurisdiction back to Martin County. The trial judge was immediately appointed and set a status conference for October 22,

1992. At that status conference, the resentencing was set for November 30, 1992, which was within 90 days from the issuance of the mandate. Defense counsel then moved to continue the case outside the 90-day period. Thus, Appellant suffered no prejudice. (T 1182-85).

On April 16, 1993, four days after this hearing, defense counsel filed a "Motion for Enforcement of Writ of Habeas Corpus" in the federal district court. [App. A]. On July 19, 1994, the district court denied the motion. [App. B]. Based on defense counsel's allegation that he did not receive a copy of the district court's order, counsel moved to file a belated appeal from the denial of his motion for enforcement, which was granted. As a result, defense counsel filed a notice of appeal on November 4, 1994. [App. C]. Counsel's application for a certificate of probable cause was granted by the district court on January 6, 1995. [App. D]. The appeal to the Eleventh Circuit is still pending.

In this appeal, Appellant claims that the trial court erred in denying his motion to impose a life sentence. He renews his claims that the State failed to resentence him within the 90-day period, given that 53 days elapsed before the district court stayed its order and the remaining 37 days elapsed after the Eleventh Circuit issued its mandate. Even if the 90 days did not begin to run until the Eleventh Circuit issued its mandate, Appellant argues in the alternative that the State never sought a continuance from the district court as required and failed to resentence him within 90 days. To support his contention, Appellant relies principally upon

Beckam v. State, 397 So.2d 449 (Fla. 3d DCA 1981). **Brief of Appellant** at 74-76.

In Beckam, a federal district court, pursuant to a petition for writ of habeas corpus, ordered that the defendant be allowed to reinstate his guilty plea and be resentenced, or that he be granted a new trial "within a reasonable time thereafter, failure of which the Writ of Habeas Corpus will be granted and the Petitioner released from custody." The defendant's motion for discharge under Florida's speedy trial rule, which was filed less then five months after the district court's order, was denied, and the defendant appealed. The Third District concluded that federal courts have the inherent power to grant conditional writs, and that, because habeas corpus is civil in nature, the time limit in the order controls over the state speedy trial rule. If no specific time is stated, then constitutional speedy trial limitations control. Id. at 450-51.

Since Beckam, the Eleventh Circuit Court of Appeals has addressed the identical issue presented by Appellant. In Moore v. Zant, 972 F.2d 318 (11th Cir. 1992), a federal district court ordered that the defendant be resentenced within 180 days after the state's right to appeal had lapsed or mandate had issued from the court of appeals, "failing which[,] upon motion[,] a writ of habeas corpus discharging him from custody shall issue." Id. at 319. One year and eight months after the United State's Supreme Court denied certiorari, the defendant moved to enforce the federal district court's order. The State sought, and was granted, additional time, and the defendant appealed to the Eleventh Circuit. Id.

On appeal, the Eleventh Circuit concluded that the district court's conditional grant of the writ did not act to foreclose resentencing after the 180 days. Rather, the time period acted as a custody order, at the conclusion of which the defendant must be released from custody absent the required state action, i.e., resentencing. The state could still prosecute/resentence the defendant, but was subject to the constitutional speedy trial limitation. The Eleventh Circuit emphasized that the district court could not adjudicate speedy trial rights prospectively and in the abstract unless that was the basis for granting the writ, which it was not. Id. at 320-21.

Here, as in Beckam and Moore, the district court granted a conditional writ and gave the State 90 days within which to resentence Appellant before the State would lose custody over him. Regardless of whether the State had only 37 days or the full 90 days from the Eleventh Circuit's mandate within which to resentence Appellant, the trial court commenced the proceedings within the appropriate time. Thirty-one days after the Eleventh Circuit's mandate issued, the trial court held a status conference and set Appellant's resentencing for November 30, 1994. Appellant, however, through his appointed counsel, moved for a five-month continuance. Appellant should not now be heard to complain that he was not resentenced within the appropriate time.[2]

In sum, to the extent that the district ordered the imposition of a life sentence were Appellant not resentenced within 90 days,

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[2]Appellant's ultimate trial attorney was appointed on January 28, 1993. At no time did he move for a speedy trial. Moreover, he waited two months to enforce the district court's order.

it had no authority to do so under Moore. Its conditional grant of the writ to provide the state time within which to correct its unlawful custody of Appellant was merely a custody order. The trial court, however, commenced the resentencing proceedings within the appropriate time. Appellant, however, moved to continue the proceedings outside of the 90-day period, thereby nullifying the 90-day limitation. Therefore, since he is not, and was not, entitled to the automatic imposition of a life sentence, this Court should affirm the trial court's ruling and Appellant's sentence of death.

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO PLAY A VIDEO REENACTMENT OF THE MURDER TO THE JURY (Restated).

During the State's case-in-chief, the prosecutor sought to introduce a videotape created by Sheriff Crowder portraying the ride by the victim at night from the Li'l General Store to the murder site 12 miles away. Defense counsel initially objected that the video did not accurately reflect the drive as it was in 1982, that it was not relevant, and that it was prejudicial because it was cumulative to other witnesses' testimony regarding the length of the drive and the time it took to get to the murder site. (T 666-68). The State responded that the videotape was relevant for several reasons. First, the State sought to show the movement of the victim from the store to the murder site in order to prove that the victim was murdered during the course of a felony (kidnapping). Second, the State sought to show the remoteness of the location and the time it took for them to take the victim to this location where they ultimately executed her, in order to prove that the victim was murdered to avoid arrest. The remoteness of the location belied any claim that the defendants were going to let her go. Although they could have let her out numerous places along the way, they chose to drive her out to an undeveloped part of the county where no one would hear the gunshot and no one would see them kill her. Third, and most probative, the State sought to show, in real time, how long the victim had to contemplate her impending death and the mental anguish she must have felt while being driven at night to a

remote location by four men intent on killing her, in order to prove that the victim's murder was especially heinous, atrocious, or cruel. (T 667-69). Defense counsel's objections were overruled. (T 669).

After the seventeen-minute tape was played for the jury, defense counsel renewed his objection that the tape was unduly prejudicial and moved to strike the entire tape based on the fact that the sound of a gunshot was included at the end of the tape. (T 674). The trial court initially took the motion under advisement, then later questioned the State about the gunshot. The State responded that it had provided the tape to defense counsel prior to the resentencing and he made no objection to it. Defense counsel admitted that the State had provided the tape in discovery, but that he had not reviewed it. (T 687-88). Consequently, the trial court denied the motion to strike. (T 688). The tape was again played over defense counsel's objection during the State's closing argument. (T 973).

In this appeal, Appellant claims that the trial court abused its discretion in refusing to strike the videotaped reenactment. He renews his arguments that the video was not relevant, and even if marginally so, was more prejudicial than probative because of the gunshot at the end of the tape. **Brief of Appellant** at 76-78. The State submits that the video reenactment was relevant to prove the "felony murder," "avoid arrest," and HAC aggravating factors. Although several witnesses testified to the distance between the scene of the abduction and the scene of the murder, and the time that it took to travel the distance between them, the video more

accurately related the distance, the time, and the remoteness of murder site. Given the fact that the State had to prove these aggravating factors beyond a reasonable doubt, the videotape was relevant. See Grant v. State, 171 So.2d 361, 363-65 (Fla. 1965), cert. denied, 384 U.S. 1014 (1966); Dowell v. State, 516 So.2d 271, 274 (Fla. 2d DCA 1987), rev. denied, 525 So.2d 877 (Fla. 1988). See also Brown v. State, 550 So.2d 527, 528 (Fla. 1st DCA 1989) ("Demonstrative exhibits to aid the jury's understanding may be utilized when relevant to the issues in the case . . . . The determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion."), rev. denied, 560 So.2d 232 (Fla. 1990); Morgan v. State, 518 So.2d 186, 189 (Ala. Crim. App. 1987).

As for Appellant's prejudice argument, defense counsel initially claimed that the videotape was prejudicial because it was cumulative to other witnesses' testimony and because it did not accurately depict the area as it was in 1982. (T 668). After the tape was played for the jury, defense counsel asked the prosecutor in front of the jury what the loud noise was at the end of the tape, and the prosecutor indicated that it was a gunshot "to simulate the point where the murder would have occurred." (T 673-64). At sidebar, defense counsel merely moved to strike the tape because of the gunshot. He did not move for a curative instruction or a mistrial. (T 674). Later, defense counsel admitted that he had not reviewed the tape, and the trial court denied his motion to strike. (T 687-88). It is disingenuous at this point to claim that Appellant deserves a new sentencing hearing because of this

videotape. Defense counsel had every opportunity to review the tape prior to its admission, but chose not to do so. The relevance and/or prejudicial nature of the gunshot should have been argued before it was played to the jury, not after. See Lowe v. State, 19 Fla. L. Weekly S621, 623 (Fla. Nov. 24, 1994). Moreover, Appellant's failure to request a curative instruction or move for a mistrial precludes review of this issue. See Parker v. State, 641 So.2d 369, 375-76 n.8 (Fla. 1994).

Be that as it may, the State submits that the videotape was not unduly prejudicial because of the gunshot. It was the conclusion of a seventeen-minute "death ride" endured by the victim, and it was the conclusion of an otherwise unoffensive simulation of a most terrifying event. Contrary to Appellant's assertion, this videotape was not even remotely similar to the one detailing "the decaying, animal-ravaged remains of a body lying in a wooded area" found to be irrelevant and prejudicial in Pottgen v. State, 589 So.2d 390, 391 (Fla. 1st DCA 1991). Nor is it similar to the audiotape of the defendant's interrogation in Pausch v. State, 596 So.2d 1216, 1219 (Fla. 2d DCA 1992), wherein the detective "persistently condemned Pausch as an unfit mother, and predicted that . . . she would eventually kill [her son]." Rather, this videotaped reenactment was relevant to establish several aggravating factors, and its relevancy was not outweighed by any prejudicial effect it may have had. See Dowell, 516 So.2d at 274; Brown, 550 So.2d at 529.

Even were it admitted in error, however, such error was harmless beyond a reasonable doubt. Appellant had already been

convicted of the murder of Francis Julia Slater. Moreover, the jury was already aware that the victim was shot in the head and that the defendants drove away and left her on the side of the road. The State had already proved beyond a reasonable doubt that the murder was committed during the commission of a felony, that it was committed to avoid arrest, that it was committed for pecuniary gain, that it was committed in a cold, calculated and premeditated manner, and that it was committed in a heinous, atrocious, or cruel manner. Given the unavailing nature of Appellant's mitigating evidence, there is no reasonable possibility that the jury's recommendation or the trial court's sentence of death would have been different had the video reenactment not been played for the jury. Duncan v. State, 619 So.2d 279, 281-82 (Fla.) (admission of prejudicial photograph in penalty phase harmless error given that jury was already aware of facts underlying offense committed on victim in photo), cert. denied, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993); Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, this Court should affirm the trial court's ruling and Appellant's sentence of death.

ISSUE IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING MITIGATING EVIDENCE RELATING TO THE DEATH OF APPELLANT'S SON (Restated).

Prior to trial, the State filed a motion in limine seeking to exclude evidence by Appellant relating to the death of his son on December 30, 1992. The State argued that such evidence was not relevant to Appellant's character, prior record, or the circumstances of his offense. (R 457-59). At the hearing on the motion, defense counsel alleged that such evidence was relevant to Appellant's character. (T 1445-46). The trial court ruled that the evidence was not relevant and granted the State's motion. (T 1447-48).

At trial, defense counsel proffered the testimony of Appellant's mother, who stated that Appellant's relationship with his son, Alphonso Freeman, was very good, and that Appellant was devastated when his son was killed on December 30, 1992, while riding his bicycle. (T 855-58). Defense counsel argued that such testimony was relevant to Appellant's character and his ability to grieve, but the trial court affirmed its previous ruling to exclude such testimony. (T 859-61).

In this appeal, Appellant claims that the trial court abused its discretion in excluding such testimony. He renews his argument that the evidence was relevant to his character, i.e., his ability to maintain close familial relationships while in prison, his ability to grieve for the loss of his son, and his ability to understand the consequences of his criminal actions. **Brief of Appellant** 79-80. In Lockett v. Ohio, 438 U.S. 586 (1978)

(plurality), the Supreme Court held that the sentencer must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (emphasis in original; footnote omitted). However, the Court also noted that nothing in its opinion "limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at 604 n.12. Thus, the trial court may not prohibit the defendant from presenting relevant mitigating evidence. Saffle v. Parks, 494 U.S. 484 (1990).

Here, the fact that Appellant's son had died in 1992 while Appellant was awaiting resentencing (ten years after the murder) was simply not relevant to his character. Rather, it would have done nothing but inflame the passions of the jury. Although the trial court "must not cut off full and fair consideration of mitigating evidence[,] . . . it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice." Id. at 493. The jury and judge were already aware that Appellant had a son, had a good relationship with his son, and worked to support him prior to the murder. (T 766-67, 781). The fact that his son had just died was not relevant to his character or record, or the circumstances of the offense. Thus, this Court should affirm the trial court's ruling and Appellant's sentence of death. Hitchcock v. State, 578 So.2d 685, 689-90 (Fla. 1990) (affirming the trial court's restriction of irrelevant mitigating

evidence), sentence vacated on other grounds, 614 So.2d 483 (Fla. 1993); Stewart v. State, 558 So.2d 416, 419-20 (Fla. 1990) (same), cert. denied, 114 S.Ct. 478, 126 L.Ed.2d 429 (1993).

Even if the trial court erred, however, in restricting Appellant from presenting this evidence, such error was harmless beyond a reasonable doubt. When coupled with his otherwise unavailing mitigating evidence, this evidence pales in comparison to the five aggravating factors found in this case. Thus, under the facts of this case, there is no reasonable possibility that the jury's recommendation or the judge's sentence of death would have been different even with the admission of this evidence. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, this Court should affirm the trial court's ruling and Appellant's sentence of death.

ISSUE X

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF CERTAIN NONSTATUTORY MITIGATING EVIDENCE (Restated).

In this appeal, Appellant claims that the trial court failed to consider as nonstatutory mitigation that he saved his cousin from drowning, and worked steadily to help support his son. **Brief of Appellant** at 80-81. The trial court's sentencing order reveals, however, that such evidence was, in fact, considered and weighed:

> The defendant, through his counsel, presented numerous witnesses that established that the defendant was and is a loved and valued member of a family unit. Additionally, it was established that the defendant was twenty-three years of age at the time of the offense, that he was living in his own apartment, had a girlfriend, had fathered a child, served as a caretaker for the rental property where he lived and, basically, supported himself independently of any familial or other economic dependence.
>
> * * * *
>
> Additional witnesses established that the defendant was a friendly, polite and caring youngster--participated in organized sports with other children and accepted supervision and guidance from adults. As an adolescent the defendant was a good neighbor and helped rescue a childhood friend when the child fell into a river on a fishing trip, thereby reflecting an appreciation of the need to help and protect persons who require same.
>
> * * * *
>
> This Court specifically concludes that these mitigating cricumstances [sic] have been established by the greater weight of the evidence.

(R 1592-94) (emphasis added). Although the trial court did not specifically mention the fact that Appellant helped support his son

who lived with the child's mother in Fort Meyers, it is apparent from the order that the trial court considered and weighed all of Appellant's mitigating evidence. Lucas v. State, 568 So.2d 18, 23 (Fla. 1990).

Even if it failed to consider such evidence, there is no reasonable possibility that the sentence would have been different had it considered such. The trial court specifically stated that the mitigating evidence presented did not sufficiently mitigate even one of the five aggravating factors found to exist. (R 1596). There is no reasonable possibility that Appellant's financial support of his son, if considered, would have reduced Appellant's degree of culpability such that a life sentence would have been imposed. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Thus, Appellant's sentence of death should be affirmed.

ISSUE XI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE CCP AGGRAVATING FACTOR (Restated).

In Issue VI, supra, Appellant challenged the constitutionality of the CCP instruction that was given in this case. In response, the State argued that any error in giving the instruction found unconstitutionally vague in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994), was harmless because "the murder could only have been cold, calculated, and premeditated without any pretense of moral or legal justification even if the proper instruction had been given." Walls v. State, 641 So.2d 381, 387 (Fla. 1994). This State will rely on its arguments made in Issue VI regarding the applicability of the CCP aggravating factor to the facts of this case.

ISSUE XII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE HAC AGGRAVATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings regarding the HAC aggravating factor:

> The evidence established to this Court, beyond and to the exclusion of every reasonabl [sic] doubt, that as previously enumerated, the defendant personally "cased out", personally planned, personally entered the store, personally possessed and utilized the only firearm to threaten and rob the victim, Frances Julia Slater. Moreover, the defendant, ALPHONSO CAVE, while still armed with the only gun, personally forced the victim in the back seat/floorboard area of the car, personally held a gun to her head as he held the victim at gunpoint, with her face and head in the lap/crotch area of the defendant and personally confined her for no less than fifteen minutes while she was transported thirteen miles outside of town to a desolate, remote and lonely area on the side of a country road. During this confinement and transportation, the victim begged, pleaded and cried for mercy and for her life to be spared. Frances Julia Slater knew she was going to be murdered no less than fifteen munutes [sic] before she was senselessly killed, and knowing same, offered to "do anything" for and to the defendant and his three male co-defendants in exchange for her life and her freedom.
>
> After arrival at the desolate area and the situs of Frances Julia Slater's last moments of life, the defendant, still armed with the firearm, removed the victim from the rear of the car. The evidence reflects that the victim's head hair was forcibly removed from her head and remained in the rear of the vehicle. The evidence reflects that either the victim herself removed her own hair as she pled for her life in desperate frustration, or equally feasible is the premise that she was forcibly removed by her head hair and dragged, pulled or carried to an area a few feet from the vehicle where one co-defendant stabbed her in the stomach and another co-defendant shot the victim, execution style, in the back of

> her head. It is clear to this Court that the last sounds Frances Julia Slater heard on this earth were her own words begging and pleading for her life. It is equally clear that the last smells she experienced were the lap/crotch area of the defendant, and the last touch from another human being was when one of the defendants stabbed her in the stomach immediately preceding her death.

(R 1589-90).

In this appeal, Appellant claims that the record does not support this aggravating factor because (1) "the efficient and instaneous [sic] cause of death was a single gunshot to the back of the head," **brief of appellant** at 86; and (2) Appellant did not know how she would be killed, so this factor cannot be applied vicariously to him, id. at 83-84. However, based on the same basic facts, this Court found the existence of this aggravating factor in Appellant's original appeal and in J.B. Parker's appeal. Cave v. State, 476 So.2d 180, 188 (Fla. 1985); Parker v. State, 476 So.2d 134, 139-40 (Fla. 1985). Although the record reveals that Appellant told the police that he thought the victim would be released unharmed (R 599), it also shows that Appellant forced the victim at gunpoint into a car with four unknown black males (T 538-39; R 599), that either Bush or Parker did not want to leave a witness to the robbery and decided to kill her (T 512; R 603), that the victim begged for her life during the 13-mile ride out of the city and offered to "do anything" if they would not kill her (T 508, 517, 538-39), that the victim either pulled her own hair out or was pulled from the car by her hair (T 517, 659-60), that the victim was forcibly removed from the car and stood surrounded by four males in a remote location in the middle of the night, that

the victim was stabbed superficially in the stomach by one of the males, causing her to drop to her knees, at which point she was shot in the head and left to die in a ditch along a rural roadway (R 599). Even if Appellant did not shoot the victim personally, he was well aware during that drive out of town that the gun he had wielded or was wielding on the victim would in all probability be used to end her life. As the trial court found, "this young woman would not have been murdered but for and directly due to the defendant's, ALPHONSO CAVE'S, actions and his clear and reckless indifference to human life." (R 1590). Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984) (aggravating factors, including HAC, were imputed to defendant even though codefendant killed victim because defendant was principal in and fully participated in crimes), habeas granted on other grounds, 565 So.2d 1348 (Fla. 1990).

As for the fact that the victim was killed by a single gunshot to the head, this Court affirmed the finding of the HAC aggravating factor in Parker, finding that "'fear and emotional strain preceding a victim's death may be considered as contributing to the heinous nature of the capital felony.'" 476 So.2d at 139 (quoting Adams v. State, 412 So.2d 850, 857 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982)). Here, the victim, having already complied with the robbers' demands for money, spent the last twenty minutes or so of her life crying, fearing her death, and begging for her life. At whatever point she knew for sure that she was going to be killed, the succeeding time until the bullet eviscerated her brain stem during which she suffered

inexorable mental and emotional strain amply qualifies this murder as one that was conscienceless, pitiless, or unnecessarily torturous to the victim. Parker, 476 So.2d at 139; Preston v. State, 607 So.2d 404, 409-10 (Fla.), cert. denied, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1992); Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988); Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987), cert. denied, 485 U.S. 943 (1988); Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986).

However, were this aggravating circumstance not supported by the evidence, Appellant's sentence should nevertheless be affirmed. There would remain four valid aggravating factors and little in mitigation. Moreover, the trial court specifically stated that the mitigating evidence presented did not sufficiently mitigate even one of the five aggravating factors found to exist. (R 1596). Thus, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different absent this aggravating factor. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, this Court should affirm Appellant's sentence of death.

ISSUE XIII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "AVOID ARREST" AGGRAVATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding the "avoid arrest" aggravating factor:

> The evidence clearly reflects a conscious, pre-planned, previously agreed upon motive of eliminating Frances Julia Slater, the only witness as to the identification of the defendant, ALPHONSO CAVE, and the only identification witness as to his co-defendants. The Court finds that the evidence reflects that neither the defendant, nor his co-defendants, attempted to conceal their identities in any manner. If they had decided to do so instead of deciding to kill the victim, they had more than sufficient time between the time they had previously "cased out" the store and their prospective victim and the time of the crime in order time [sic] to obtain an item, or items, that would have sufficiently concealed each defendant's identity.
>
> In addition, co-defendant John Earl Bush stated contemporaneous to this crime that he did not want any witnesses and that he did not want to return to prison due to a subsequent witness identification.
>
> The kidnapping and transportation of the victim, Frances Julia Slater, to another location before the victim was murdered corroborates and substantiates this Court's conclusion that a previous plan had been formulated, that is, to eliminate the witness in order to prevent subsequent identification of the defendant, ALPHONSO CAVE and/or his co-defendants.

(R 1586-87).

Appellant claims that, because he did not personally kill the victim, this aggravating factor cannot be applied to him unless he intended to commit the acts underlying this factor. According to

Appellant, the evidence does not sufficiently rebut his claim that he did not intend that the victim be eliminated as a witness. **Brief of Appellant** at 88-91. In the original opinion, this Court found that Appellant personally robbed the victim at gunpoint and forced her into the car, was present during the thirteen-mile ride and heard her plead for her life, and was present when she was forcibly removed from the car, stabbed, and shot in the back of the head. Under these facts, "it cannot be reasonably said that appellant did not contemplate the use of lethal force or participate in or facilitate the murder." Cave v. State, 476 So.2d 180, 187 (Fla. 1985). In addition, this Court held that "[t]he evidence leaves no reasonable inference but that the victim was kidnapped from the store and transported some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery." Id. at 188. See also Parker v. State, 476 So.2d 134, 139 (Fla. 1985) ("In the instant case, the victim was told by the defendants that they were going to kill her so she could not identify them and, in a 13-mile death-ride, she continued to plead for them not to hurt her.").

In this resentencing, the evidence was no less wanting that the dominant motive for the victim's death was to eliminate the sole witness to the robbery. Although the decision the kill the victim may not have been made by Appellant initially, he contemplated the use of lethal force or participated in or facilitated the murder. Thus, the "avoid arrest" aggravating factor is equally applicable to him. Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984) (aggravating factors, including "avoid

arrest," were imputed to defendant even though codefendant killed victim because defendant was principal in and fully participated in crimes), habeas granted on other grounds, 565 So.2d 1348 (Fla. 1990); James v. State, 453 So.2d 786, 792 (Fla. 1984) (upholding the "avoid arrest" aggravator even though the codefendant killed the victim: "[W]ho is the actual killer is not determinative because each participant is responsible for the acts of the other. . . . [T]he aggravating circumstances which arose because of the motive and method of the killing are equally applicable to the two participants."), sentence reversed on other grounds, 615 So.2d 668 (Fla. 1993); Shere v. State, 579 So.2d 86, 95 (Fla. 1991) ("avoid arrest" aggravator upheld where codefendant killed victim); Beltran-Lopez v. State, 583 So.2d 1030, 1032 (Fla. 1991) (same).

However, were this aggravating circumstance not supported by the evidence, Appellant's sentence should nevertheless be affirmed. There would remain four valid aggravating factors and little in mitigation. Moreover, the trial court specifically stated that the mitigating evidence presented did not sufficiently mitigate even one of the five aggravating factors found to exist. (R 1596). Thus, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different absent this aggravating factor. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, this Court should affirm Appellant's sentence of death.

ISSUE XIV

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "PECUNIARY GAIN" AGGRAVATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding the "pecuniary gain" aggravating factor:

> The evidence established beyond and to the exclusion of any reasonable doubt that the defendant planned to rob the Li'l General Store with his co-defendants and that he personally entered the store earlier to "case out" the store and the victim; then he discussed the plan with his co-defendants, then personally entered the store at a later time armed with the only firearm, personally held the gun on the victim, personally threatened the victim and robbed the victim of approximately $134.00 in currency and coin, personally participated in dividing up the money after the murder of the victim, Frances Julia Slater, and later the same day personally transferred his share of the funds, approximately $30.00, to his girlfriend. The defendant, ALPHONSO CAVE, told his girlfriend that he robbed the money from the store and acknowledged that the female clerk was murdered. Subsequently, the defendant, in a taped statement, acknowledged "casing out" the store, planning the robbery and while armed, personally robbing the victim and personally obtaining his share of the proceeds.

(R 1587-88).

Appellant claims that this aggravating factor was improperly found because the robbery had already been completed, and "there was no evidence that the assailants would profit further from the victim's death." **Brief of Appellant** at 91-92. This Court affirmed the finding of this aggravating factor in J.B. Parker's case. Parker v. State, 476 So.2d 134, 140 (Fla. 1985). This Court has also upheld this aggravating factor in numerous cases like this one

where the murder follows a robbery. E.g., Preston v. State, 607 So.2d 404 (Fla.), cert. denied, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1992); Engle v. State, 510 So.2d 881 (Fla. 1987), cert. denied, 485 U.S. 924 (1988); Copeland v. State, 457 So.2d 1012, 1019 (Fla. 1984) ("[T]he murder was the culmination of a course of events that began when appellant went into a store, robbed the clerk at gunpoint, and abducted her from the store."), habeas granted on other grounds, 565 So.2d 1348 (Fla. 1990); Card v. State, 453 So.2d 17, 24 (Fla. 1984) ("[T]he murder was the culmination of a series of interrelated events stemming from the act of taking money from the Western Union office."), cert. denied, 469 U.S. 989 (1984).

Were this Court to conclude, however, that the record does not support this aggravating factor, Appellant's sentence should nevertheless be affirmed since there are four other valid aggravating factors and very little in mitigation. Absent the "pecuniary gain" aggravating factor, there is still no reasonable possibility that the sentence would have been different. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, this Court should affirm Appellant's sentence of death.

ISSUE XV

WHETHER THE JURY INSTRUCTION RELATING TO THE HAC AGGRAVATING FACTOR IS UNCONSTITUTIONAL (Restated).

Prior to trial and again at the charge conference, defense counsel challenged the constitutionality of the newly amended standard HAC aggravating factor instruction. (R 175-92, 1011-16). Both motions were denied (R 339-41; ST 2478-79; T 906), and the jury was given the newly amended standard instruction (T 988-89). Appellant renews his claim that the instruction was vague because the limiting instruction does not truly limit the types of crime for which this factor applies and does not define "unnecessarily torturous." **Brief of Appellant** at 92-94. This Court has recently reaffirmed the constitutionality of the new standard instruction. Hall v. State, 614 So.2d 473, 478 (Fla. 1993), cert. denied, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993); Whitton v. State, 19 Fla. L. Weekly S639, 641 & n.9 (Fla. Dec. 1, 1994); Wuornos v. State, 19 Fla. L. Weekly S455, 458 (Fla. Sept. 22, 1994). As in Whitton, Appellant has provided no adequate reason for this Court to recede from its rulings. Therefore, this Court should affirm Appellant's sentence of death.

ISSUE XVI

WHETHER THE JURY INSTRUCTION RELATING TO THE "AVOID ARREST" AGGRAVATING FACTOR IS UNCONSTITUTIONAL (Restated).

Prior to trial and again at the charge conference, defense counsel challenged the constitutionality of the "avoid arrest" aggravating factor instruction. (R 150-60, 1006-07). Both motions were denied (R 339-41; ST 2475-76; T 906), and the standard instruction was given to the jury (T 988). Appellant renews his claim that the instruction was vague because it failed to advise the jury that the dominant or only motive for the murder was the elimination of a witness. **Brief of Appellant** at 94-95. This Court has recently upheld this aggravating factor. Whitton v. State, 19 Fla. L. Weekly S639, 641 & n.10 (Fla. Dec. 1, 1994) ("The avoiding arrest factor, unlike the heinous, atrocious, or cruel factor, does not contain terms so vague as to leave the jury without sufficient guidance for determining the absence or presence of the factor. Accordingly, Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and its progeny do not require a limiting instruction in order to make this aggravator constitutionally sound."). As in Whitton, Appellant has provided no adequate reason for this Court to recede from its rulings. Therefore, this Court should affirm Appellant's sentence of death.

ISSUE XVII

WHETHER THE JURY INSTRUCTION RELATING TO THE "PECUNIARY GAIN" AGGRAVATING FACTOR IS UNCONSTITUTIONAL (Restated).

Prior to trial and again at the charge conference, defense counsel challenged the constitutionality of the "pecuniary gain" aggravating factor instruction. (R 161-67, 1008-10). Both motions were denied (R 339-41; ST 2476-77; T 906), and the standard instruction was given to the jury (T 988). Appellant renews his claim that the instruction was vague because it failed to advise the jury that this factor is limited to those cases where the murder is an integral step in obtaining some sought-after specific gain. **Brief of Appellant** at 96-97. This Court has previously upheld the constitutionality of this aggravating factor. Kelley v. Dugger, 597 So.2d 262 (Fla. 1992), and cases cited therein. Since Appellant has provided no adequate reason for this Court to recede from its ruling, this Court should affirm Appellant's sentence of death.

ISSUE XVIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO RECONSIDER ITS FINDING THAT THE VICTIM'S HAIR WAS FORCIBLY REMOVED AS SUPPORT FOR THE HAC AGGRAVATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings of fact as they related to the HAC aggravating factor:

> After arrival at the desolate area and the situs of Frances Julia Slater's last moments of life, the defendant, still armed with the firearm, removed the victim from the rear of the car. The evidence reflects that the victim's head hair was forcibly removed from her head and remained in the rear of the vehicle. The evidence reflects that either the victim herself removed her own hair as she pled for her life in desperate frustration, or equally feasible is the premise that she was forcibly removed by her head hair and dragged, pulled or carried to an area a few feet from the vehicle where one co-defendant stabbed her in the stomach and another co-defendant shot the victim, execution style, in the back of the head.

(R 1588-89). Several weeks after the trial court rendered its order, defense counsel filed a "Motion to Correct Finding of Court; For Reconsideration of a Sentence of Death; and for Rehearing." In this motion, defense counsel argued that the evidence did not support the trial court's finding that the victim could have been forcibly removed from the car by her hair, and thus requested an evidentiary hearing on this matter. (R 1637-46). The trial court denied the motion without a hearing. (R 1636).

In this appeal, Appellant renews his claim that the evidence did not support this finding, and thus alleges that the trial court's refusal to consider his additional evidence denied him an

opportunity to rebut the evidence: "As there was no particularized evidence from which Judge Walsh could have drawn this conclusion, the Defendant was not on reasonable notice that it was or would be an issue at the resentencing proceeding." **Brief of Appellant** at 97-99. This Court had previously found in Appellant's and Parker's original appeals that the victim was "maneuvered or controlled by grasping her by the hair" and that she was "forcibly removed from the car with such force that large chunks of her hair were torn out by the roots." Cave v. State, 476 So.2d 180, 188 (Fla. 1985); Parker v. State, 476 So.2d 134, 140 (Fla. 1985). During Appellant's resentencing, the State called Daniel Nippes, the chief criminologist at the Regional Crime Lab, who testified that some of the victim's head hair had been forcibly removed and was found in the right rear quadrant of Bush's car. (T 659-60). Defense counsel chose not to cross-examine Mr. Nippes regarding the possible circumstances under which the victim's hair could have been removed. (T 663). Rather, he waited until after Appellant was sentenced to seek to question Mr. Nippes regarding the removal of the victim's hair. (R 1639).

Faced with conflicting evidence,[3] the trial court found in its order either that the victim pulled her own hair out or that it was forcibly removed when one of the defendants pulled her out of the car by her hair. (R 1589). Defense counsel even stated in his motion to correct the finding that "the forcible removal of hair as the victim was being dragged, pulled or carried is consistent with

---

[3]Appellant told his girlfriend, Brenda Strachen, that the victim was crying and pulling her hair out as she begged them not to kill her. (T 517).

the evidence, but not to the exclusion of other explanations." (R 1638) (emphasis added). This Court has long-since held that "[t]he resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as the appellate court, [this Court has] no authority to reweigh that evidence." Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991), cert. denied, 112 S.Ct. 136, 116 L.Ed.2d 102 (1992). Since the evidence supports either of the two versions, and since either of the two versions supports the HAC aggravating factor, the trial court did not abuse its discretion in denying defense counsel's motion to correct the finding.

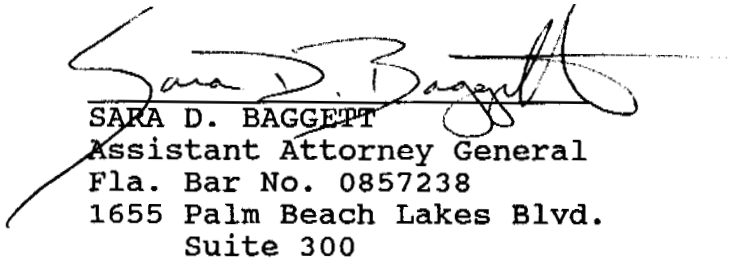
Even had the trial court decided not to consider this evidence in determining Appellant's sentence, other evidence as outlined in Issue XII, supra, amply supports the HAC aggravating factor. Thus, even if this factual finding was made in error, such error was harmless, and there is no reasonable possibility that Appellant's sentence would have been difference without it. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, this Court should affirm Appellant's sentence of death.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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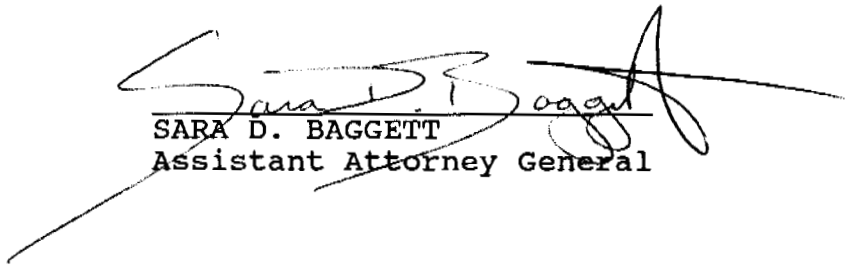
(407) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the above document was sent by U.S. mail to Jeffrey H. Garland, Esquire, Kirshner & Garland, P.A., 102 North Second Street, Fort Pierce, Florida 34950, this 16th day of February, 1995.



SARA D. BAGGETT
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALPHONSO CAVE, Petitioner, v. HARRY F. SINGLETARY, Secretary Florida Department of Corrections, Respondent	CASE NO. 88-977-Civ-T-15B

MOTION FOR ENFORCEMENT OF WRIT OF HABEAS CORPUS

The Petitioner, ALPHONSO CAVE, requests the court to enforce, against the State of Florida, the Order dated August 3, 1990 granting the Petitioner's Petition For Habeas Corpus, for failure of the State of Florida to hold a new sentencing hearing within the required ninety (90) day period or to seek an order from the court extending the time period for good cause.

As grounds for this motion, the Petitioner would state:

1. On August 3, 1990, this Court entered an Order granting the Petitioner's Petition For Writ of Habeas Corpus regarding the sentencing phase of his trial. The court, in relevant part, stated:

> Petitioner's Petition For Writ of Habeas Corpus Relief is granted as to Petitioner's claim of ineffective assistance of counsel during the sentencing phase of his trial. Respondent, the State of Florida, is directed to schedule a new sentencing proceeding at which Petitioner may present evidence to a jury on or before 90 days from the date of this order. Upon the failure of the Respondent to hold a new sentencing hearing within said 90 day period without an order

from this court extending said time for good cause, the sentence of death imposed on the Petitioner will be vacated and the Petitioner sentenced to life imprisonment.

Cave v. Singletary, 971 F.2d 1513, 1530 (11th Cir. 1992) (District Court Order was attached as appendix to reported case).

2. On September 25, 1990, a stay was entered pending Respondent's appeal.

3. The decision of the Eleventh Circuit Court of Appeals was rendered on August 26, 1992 in Cave v. Singletary, Supra. The mandate issued from the Eleventh Circuit Court of Appeals on September 17, 1992.

4. Respondent did not file a motion for rehearing before the Eleventh Circuit Court of Appeals, nor did Respondent seek review by the United States Supreme Court.

5. Contrary to the specific order of this court, the Respondent did not hold a new sentencing hearing within ninety (90) days, nor did Respondent seek an extension of time as was specifically provided in the order.

6. Respondent having failed to comply with this court's writ of habeas corpus, Petitioner is entitled to entry of an order requiring Respondent to sentence him to a term of life imprisonment.

7. Respondent objects to the relief sought in this motion.

WHEREFORE, the Petitioner, ALPHONSO CAVE, requests the court to enter an order enforcing the order entered August 3, 1990, and affirmed on appeal; requiring the Petitioner to be sentenced to life imprisonment; prohibiting further resentencing proceedings now pending before the Circuit Courts of 19th and 6th Judicial

Circuits; and such further relief as the court may deem necessary and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Celia A. Terenzio, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, and to Richard A. Barlow, Assistant State Attorney, Office of the State Attorney, 411 South Second Street, Fort Pierce, Florida 34950, on this 15th day of April, 1993.

Respectfully submitted,

CARBIA, KIRSCHNER & GARLAND, P.A.

By: _____

Jeffrey H. Garland, Esquire
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100 Avenue A, Suite 1-F
Fort Pierce, Florida 34950
(407) 489-2200
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALPHONSO CAVE, Petitioner, v. HARRY F. SINGLETARY, Secretary Florida Department of Corrections, Respondent	CASE NO. 88-977-Civ-T-15B

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR ENFORCEMENT OF WRIT OF HABEAS CORPUS

The Petitioner, ALPHONSO CAVE, pursuant to local rule 3.01(a), files this Memorandum of Law in support of his Motion For Enforcement of Writ of Habeas Corpus.

THIS COURT SHOULD ENFORCE ITS WRIT OF HABEAS CORPUS BY COMPELLING RESPONDENT TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT

The Court's conditional writ of habeas corpus automatically operated to discharge Petitioner from the possibility of the death penalty. Such relief is clearly authorized under the habeas corpus statute, especially when the custodian fails to comply within a specified time period. Burkett v. Cunningham, 826 F.2d 1208 (3rd Cir. 1987) ("Where a court order has denied discharge on the condition that a lesser remedy be granted, but that order has gone unfulfilled, discharge is indeed appropriate".) Hammontree v. Phelps, 605 F.2d 1371 (5th Cir. 1979); Jones v. Smith, 685 F. Supp. 604 (S.D. Miss. 1988) (writ issued requiring imposition of life sentence).

In Moore v. Zant, 972 F.2d 318 (11th Cir. 1992), a Petitioner sought to bar a second capital resentencing trial based upon a conditional writ which discharged him from custody if not retried within 180 days of the order becoming final. It was stated:

> At the outset, we stress that we do not read the District Court's 1988 order to say that, if Moore were not sentenced within 180 days, he could never be resentenced. The District Court's words do not expressly purport to limit George's resentencing powers to a certain period. Instead, we read it as saying unless Moore were resentenced within 180 days Moore would have to be treated by Georgia not as someone in its custody pursuant to a death sentenced, but as an unsentenced person. Still Georgia, as we shall discuss, might even then seek to resentence Moore to death. ''

972 F.2d at 320.

In contrast to the conditional writ reviewed in Moore v. Zant, supra, the August 2, 1990 conditional writ expressly provided that the death penalty would be discharged upon non-compliance by Respondent within the prescribed time. The relief was automatic and did not require a subsequent application.[1]

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[1] The Respondent could easily have avoided this problem by making a timely request for extension of time. The only Florida court addressing this issue has agreed with Petitioner's position:

> [W]e hold that where a habeas corpus proceeding grants a retrial, the time for such retrial is not governed by the speedy trial rule; instead, the time stated in the court's order controls, and in the absence of a stated time, the constitutional reasonableness standard applies. Instead, the time stated in the court's order controls (Emphasis supplied).

Beckham v. State, 397 So.2d 449, 451 (Fla. 3rd DCA 1981).

CONCLUSION

The court should enforce the writ by precluding a new resentencing hearing and by directing Respondent to impose a sentence of life imprisonment.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Celia A. Terenzio, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, and to Richard A. Barlow, Assistant State Attorney, Office of the State Attorney, 411 South Second Street, Fort Pierce, Florida 34950, on this 23rd day of April, 1993.

Respectfully submitted,

CARBIA, KIRSCHNER & GARLAND, P.A.

By: _____

Jeffrey H. Garland, Esquire
Florida Bar No. 320765
102 N. Second Street
Fort Pierce, Florida 34950
(407) 489-2200
Attorney for Petitioner

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALPHONSO CAVE,

Plaintiff,

vs.

CASE NO. 88-977-CIV-T-25B

HARRY F. SINGLETARY,
Secretary Florida Department
of Corrections,

Defendant.

_____/

ORDER

Upon consideration of the Petitioner's Motion for Enforcement of Writ of Habeas Corpus (Dkt. #66), Response to the Motion and record in this case, the Court makes the following findings:

1. This Court granted Petitioner's Writ of Habeas Corpus on August 3, 1990 (Dkt. #54) directing the State to schedule and conduct a new sentencing within 90 days. Failure to do so would result in the sentence of death being vacated and replaced with a sentence of life imprisonment.

2. On September 25, 1990, a stay was entered pending appeal by the State. On September 17, 1992, the 11th Circuit issued a mandate affirming this Court's Order. Thus, the State had until October 25, 1992 to comply with this Court's Order regarding Petitioner's re-sentencing.

3. The State Court timely commenced the re-sentencing proceedings on October 22, 1992 (Dkt. #72). Upon agreement of the parties the trial date was set for November 30, 1992. Upon the request of Petitioner's counsel, the trial was continued until April

1993. Moreover, the record shows that following several other delays either caused or consented to by the Petitioner, an Order re-sentencing the Petitioner was entered on June 25, 1993.

4. Based upon the foregoing, the re-sentencing of the Petitioner complied with this Court's Order (Dkt. #54).

DONE AND ORDERED, at Tampa, Florida, this 18th day of July, 1994.

HENRY LEE ADAMS, JR
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALPHONSO CAVE,

Petitioner,

v.

HARRY F. SINGLETARY, Secretary Florida Department of Corrections,

Respondent

CASE NO. 88-977-Civ-T-25B

NOTICE OF APPEAL

Notice is hereby given that the Petitioner, ALPHONSO CAVE, hereby appeals to the United States Court of Appeals for the 11th Circuit from the Order denying his Petition For Enforcement of Habeas Corpus entered in this case on July 18, 1994, by United States District Judge Henry Lee Adams, Jr.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sara B. Baggett, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach,

Florida 33401-2299, on this 4th day of November, 1994.

Respectfully submitted

KIRSCHNER & GARLAND, P.A.

By: _____

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Attorney for Petitioner

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALPHONSO CAVE,

Plaintiff,

vs. **CASE NO. 88-977-CIV-T-25B**

HARRY F. SINGLETARY,
Secretary Florida Department
of Corrections,

Defendant.

_____/

ORDER

Upon consideration of the pending motions, responses to such motions and the record herein, it is **ORDERED AND ADJUDGED** that:

1. Petitioner's Application for Certificate of Probable Cause (Dkt. #82) is **GRANTED**. Fed. R. App. P. 22 (b); Stano v. Dugger, 846 F.2d 1286, 1288 (11th Cir. 1988); Clements v. Wainwright, 648 F.2d 979 (11th Cir. 1981).

2. Petitioner's Motion for Leave to Proceed on Appeal In Forma Pauperis (Dkt. #84) is **GRANTED**. 28 U.S.C.. § 1915.

3. The Agreed Motion to Substitute Counsel (Dkt. #87) is **GRANTED**. Jeffrey H. Garland is hereby substituted as counsel for Andres J. Valdespino and Bruce M. Wilkinson who are withdrawn and discharged from further representation of Petitioner in this matter.

4. Petitioner's Motion for Appointment of Counsel (Dkt. #86) is **GRANTED**. 17 U.S.C. 3006A. The interests of justice and due process require appointment of counsel on appeal for this indigent Petitioner. Schultz v. Wainwright, 701 F.2d 900

(11th Cir. 1983). Thus, Jeffrey H. Garland is appointed as counsel for the purposes of appeal.

DONE AND ORDERED, at Tampa, Florida, this 6th day of January, 1995.

HENRY LEE ADAMS, JR
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record