IN THE SUPREME COURT OF FLORIDA

THOMAS MOORE,

Appellant,

v. Case #: 82,925

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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Appellant,

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Appellee.

_____/

PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, THOMAS MOORE, the defendant in the lower court, will be referred to in this brief as Moore. All references to the instant record on appeal will be noted by the symbol "R," and references to the transcripts by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

The state cannot accept Moore's three page statement of the facts as it is incomplete. Because Moore's version does not aid this Court in reviewing "the entire record" within the meaning of Gibson v. State, 351 So. 2d 948, 949 n.2 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978), the state provides its own statement of the case and facts.

Alan Dean, a friend and neighbor of the victim Johnny Parrish, saw his son Michael Dean, Willie Reese and Moore on the corner in front of Parrish's house, talking with Parrish, on January 21, 1993 (T 454-55). Vincent Gaines and Carlos Clemons walked up, and Moore moved off with Clemons (T 456-57). Although Moore and Clemons rejoined the group, they removed themselves to talk again (T 457). Moore, Clemons and Gaines remained after several people left (T 458). When Dean looked out again, Dean saw only Gaines standing on the corner (T 460). Before Dean looked out the window and saw Gaines, he heard a shot (T 461). Dean also witnessed Parrish's house on fire after that (T 462).

Bernice Cobb, Parrish's "catty-corner[ed]" neighbor, testified that, on January 21, 1993, she arrived home from work after 5:00 p.m. and noticed a skinny black guy standing by the outside of her fence (T 488-89). Because Cobb thought this man might have broken

into her house, she called her across-the-street neighbor; while they were talking, they heard two shots (T 490). About 10 to 15 minutes after she heard the shots, Cobb noticed that Parrish's house was on fire (T 490).

Michael Alan Dean testified that, on January 21, 1993, he had been standing outside the front of Parrish's house with some other youths (T 505). He saw Moore and Parrish drink moonshine and saw Parrish give Moore a dollar (T 507). When Moore saw Gaines and Clemons talking on the corner, Moore told Parrish that "those boys" had a gun (T 509). Parrish told Moore that they had better not come around his house, because he had a gun too (T 509). Dean left with Willie Reese, returned to his home across the street, and they talked there for a while; Gaines and Clemons joined them (T 510). While Dean stood in his yard, Moore asked him to rob Parrish (T 510). Dean refused, and went inside to tell his father and Ricky Waters what Moore had asked him to do (T 511). Dean laid down in his bed; after five to ten minutes, Ricky Waters came in his room and told him to look out his window (T 516). When he did, Dean saw Gaines standing in the rain on the corner (T 516).

Vincent Gaines testified that he met Moore for the first time on January 21, 1993 (T 539). Gaines met Clemons after school and they gathered with a group of kids in front of Parrish's house (T

541). Moore asked Gaines if he wanted to make some money; when Gaines said yes, Moore said Parrish had a lot of money (T 542). Moore left with Clemons for about 10 minutes (T 543); when they returned, Moore said they were going back to Parrish's house (T 544). Moore told Gaines and Willie Reese to be lookouts on the corner (T 545), and said he was going to introduce Clemons to Parrish as his cousin (T 546). Gaines did not see Moore or Clemons enter Parrish's home (T 547). Gaines waited on the corner for about seven minutes, expecting to receive a cut of the money for being a lookout (T 547). While he waited, Gaines heard two gunshots and saw Clemons run out of Parrish's house and then go back in (T 548).[1] Gaines became frightened and left (T 548). While Gaines was walking away, he saw Clemons again run from Parrish's house and jump the fence (T 548). Clemons caught up with Gaines and told him that Moore had shot Parrish twice in the chest (T 548-49). Gaines never saw Moore exit Parrish's home (T 549).

During cross examination, Gaines admitted to telling his mother that he was going to school on January 21, 1993, but actually went to his aunt's house and went back to bed (T 562). Gaines stated that he slept until noon, and then went outside "and

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[1] Clemons told Gaines that he went back in the house because Moore had a gun pointed on him and said they were not finished yet (T 591).

stood around talking with other fellows in the Flag Street neighborhood" (T 562). Gaines stated that, around 3:00 p.m., he went home and told his mother he was home from school (T 563). Gaines stated that he was waiting until after 3:00, when Clemons got out from school, so they could "hang out" together (T 563). Defense counsel asked Gaines whether he met up with Clemons at 8:00 a.m. and then again at noon on January 21, 1993; Gaines said no (T 564). Defense counsel asked to make a proffer and the following ensued at the bench:

> [Court]: First off, he has already said he didn't see him, period. Then you kept saying you didn't see him at 10:00, you didn't see him at 12:00 --
>
> [Defense]: Your Honor, --
>
> [Court]: But he said he hadn't seen him at all. Okay?
>
> [Defense]: All right, Your Honor.
>
> [Court]: Now, why do you want to ask him did you see him at 10:30, did you see him at 12:00, did you see him at 1:00, you know, over and over again.
>
> [Defense]: Because, Your Honor, when Mr. Clemons takes the stand in this case I fully expect that he will testify --
>
> [Court]: That's fine. He's already testified he didn't see him at all. Now, why do you have to ask him every hour on the hour.

[Defense]: Because, Your Honor, there are specific things that Mr. Clemons will testify to.

[Court]: Sobeit.

[Defense]: All right.

[Court]: I mean, you have already established his testimony. You don't have to ask him every hour, 8:00 o'clock, 10:00 o'clock, 12:00 o'clock. I mean, it's just -- laborious.

Now, what is it you want to proffer?

[Defense]: What I want to proffer at this point around noontime of that day Mr. Clemons and Mr. Parrish entered into the Grand Park area.

[Court]: Parrish?

[Defense]: Excuse me. Mr. Clemons and Mr. Gaines went into Grand Park.

[Court]: That's what you said;

At noon?

[Defense]: Yes, sir. Before school got out.

[Court]: Okay.

[Defense]: And they chased a young fellow named Little Terry, and Clemons was armed with a gun at that time.

[Court]: You asked him was he there at that time. He testified he wasn't even there. I mean, I can't make him testify to what you want him to testify to.

[Defense]: I understand, Your Honor.

I want to confront him with whether it's truthful or not whether he and Mr. Clemons chased Little Terry.

[Court]: And was he even with him at that time. If he says no, no use to ask him anything else.

[State]: Your Honor, this is the subject of a motion that --

[Court]: I'm aware of that.

I don't know if he is lying or telling the truth. He said he wasn't with him. Now, you know, -- you can sk him, you know, 11:30, how about 11:00, 11:40, you can go on and on. It doesn't prove anything.

What you have got is -- you have got his testimony now. If you want to prove he is lying, sobeit.

[Defense]: Yes, sir.

[Court]: Let's get on with it. But not through him.

[Defense]: Yes, sir.

Your Honor, on direct examination the State did ask him about his whereabouts and activities throughout the day and whether or not --

[Court]: I understand that. That's fine. You have asked him when did he first see Carlos [Clemons]. He said not until school was out. You have asked him over and over in that time frame. It's just objectionable and laborious.

[Defense]: Your Honor, --

[Court]: If you want to say did you see Carlos at 12:00 noon in Grand Park, which I think you have already asked him, he is going to say no.

[Defense]: Yes, sir.

[Court]: I guess.

[Defense]: All right.

[Court]: If he says no, there is no use going into all these suppositions. You say somebody else is going to say no. That doesn't make it so any either. It's impeachment --

[Defense]: Okay. Your Honor, I do intend to ask him, so I can deal with it now while we are here, whether or not Mr. Clemons had a silver o[r] chrome-plated .38.

[Court]: Fine. Ask him that.

[State]: On that given date?

[Defense]: Yes, sir.

[Court]: Go ahead.

Defense counsel then asked Gaines if he went to Grand Park with Clemons around noon on January 21, 1993, if he saw Clemons with a chrome-plated .38 that day, if he saw Little Terry that day, if he possessed any firearms that day, and if he threatened to

shoot anyone that day; Gaines responded negatively to each question (T 568-69).

Willie Reese testified that, on January 21, 1993, he saw Moore and Parrish drinking moonshine in front of Parrish's house (T 601). Reese also saw Gaines and Clemons move to the corner to talk; Parrish told Reese to tell those boys to get off his corner (T 602). Reese saw Moore talking to Clemons and Gaines as the group moved away from Parrish's house (T 602).

Javon Graves testified that, on January 21, 1993, he went to Michael Dean's house after school (T 631). There, he saw Ricky Waters, Willie Reese, Moore, Vincent Gaines, Michael Dean, and Carlos Clemons (T 632). Specifically, he saw Clemons, Gaines, and Moore talking in the street in front of Dean's house; when Graves attempted to approach these three, Moore told him to leave because Moore did not want Graves to hear what they were discussing (T 633). After these three finished talking, Graves saw them walk to the corner of Parrish's house (T 634). Later that night, Graves went to Willie Reese's house where he saw Moore who was crying (T 636-37).

Larry Ewing testified that, on January 21, 1993, he was at Willie Reese's house before the fire (T 655). When he walked down the street in front of Parrish's house, he saw Moore and Clemons

standing by Parrish's door and Gaines standing on the corner (T 656).

Bobby Tyrone Kennedy testified that, on January 21, 1993, he noticed a group of youths in the vicinity of Parrish's home (T 687). Later, he noticed smoke coming out of Parrish's house (T 688). Kennedy went inside, saw Parrish kneeling on the floor, head slumped (T 689, 691). Kennedy dragged Parrish out the front door (T 691).

Larry Dawsey testified that, on January 21, 1993, he saw Moore in front of Parrish's house when Dawsey dropped Willie Reese off (T 709). Moore came up to Dawsey and asked him if he wanted a drink of moonshine; Dawsey declined (T 710). When the state asked Dawsey what Moore said to him about Parrish's murder, defense counsel objected (T 711). At the bench, the state said that it expected Dawsey to say that Moore showed him a gun and said that, if people did not stop saying that Moore had killed the victim, someone would be dead for real (T 712). Defense counsel stated: "I think the Court has severely restricted testimony concerning possession of weapons." (T 712). The trial court explained that the statement was not from a witness, but from the defendant, and that it was "all the same incident, he showed it to him and testified to it and made the statement to him . . . . Verbal acts -- or demonstrative

acts by the defendant, they are certainly admissible against him . . . ." (T 712). Defense counsel objected that there was no evidence tying this gun in with the gun used to kill Parrish and that this evidence suggested that Moore habitually carried a gun for no reason (T 713). The state responded that the evidence showed that Moore threatened witnesses (T 713). The trial court permitted the question (T 713).

Dawsey then recounted that, a few days after the murder, Moore said that he was going to kill someone because he was tired of everyone telling him that he killed Parrish (T 714). Moore showed Dawsey a gun (T 714). Solomon Fields testified that, on January 21, 1993, around 5:00 p.m., he heard two gunshots (T 719). Ethel Lee Singleton testified that Parrish had burglar bar doors which he usually kept locked, but "if he knew you he would let you in" (T 727). Singleton recalled seeing a .38 weapon at Parrish's house (T 727). Singleton also stated that Parrish always kept money on him, around $200 (T 728).

Dr. Floro testified that Parrish had a gunshot wound to his head, entry near the left temple, exit near the jaw and a gunshot wound to the left chest area (T 736). Although Parrish had some burn marks due to the fire, Dr. Floro testified that the burns occurred after death because there was no reaction to the burn, and

Parrish's blood did not contain evidence of carbon monoxide "which you usually get when you inhale smoke" (T 737). The chest gunshot wound passed through the right lung and aorta (T 738). This wound would have caused Parrish's blood pressure to "come down abruptly" and could have caused unconsciousness within seconds (T 738). The gunshot wound to the head was not immediately fatal, but Parrish could have still walked after this wound (T 739).

Dr. Floro opined that Parrish was shot from a distance greater than 24 inches (T 739). Parrish's blood alcohol content was .17 percent, the equivalent of about eight beers, which would cause mental confusion, staggering, and slurring of speech (T 740). Based on the extreme angle of the head gunshot wound, Dr. Floro opined that the chest gunshot wound happened first, causing Parrish to kneel, and the head gunshot wound followed (T 744).

Carlos Clemons testified that, on January 21, 1993, prior to speaking with Moore and Gaines alone, he had never been in Parrish's yard, inside his fence or inside his home (T 786). When Moore, Gaines, and Clemons were alone, Moore asked Gaines and Clemons if they had any money (T 787). When they responded no, Moore said he knew where they could get money, pointing to Parrish's house (T 787). Clemons agreed to stand outside with Gaines (T 788). Moore told Clemons that Willie Reese had gone, and

Moore told Clemons to go in Parrish's house with him (T 790). Clemons stated that, at this time, he and Gaines had no gun, and he was not aware that Moore had one (T 791).

Moore knocked on Parrish's door, told Parrish that Clemons was his cousin, and asked for some more moonshine (T 792-93). Parrish unlocked the door and burglar bars, and let them in (T 793). After Parrish provided the moonshine, Moore, Clemons, and Parrish (in that order) walked toward the front door (T 796). Moore turned, pushed Clemons out of the way, pulled out a gun, and asked Parrish where the money was (T 796). When Parrish did not answer, Moore shot him in the chest (T 796, 798). Clemons then tried to run, but Moore pointed the gun at him and told him they were not finished (T 799, 804). Clemons said that shooting was never part of the plan, and that he would have never gotten involved if he had known that (T 800); Clemons said the plan was to get Parrish drunk and take the money (T 800). Clemons heard the second shot, but did not see it (T 800). Clemons saw Parrish kneeling on the floor (T 800).

During cross examination, defense counsel asked Clemons what he "did with the chrome-plated .38 caliber revolver that you had on the date Mr. Parrish" was killed (T 826). The state objected that there was no predicate for the question, and the trial court sustained the objection (T 826). Defense counsel then asked

Clemons if he had a chrome plated .38 caliber revolver on January 21, 1993; Clemons said no (T 826-27). Clemons admitted to having a "run-in" with Little Terry on that day around midday, and stated that he and Gaines chased Little Terry down the street (T 827-28).

When defense counsel asked if Clemons's testimony was that he was not armed when he chased Little Terry, the state objected on the ground that the question had been asked and answered; the trial court agreed (T 828). Defense counsel then asked whether Clemons or Gaines had threatened to shoot Little Terry; Clemons said no (T 828). When confronted with his deposition, Clemons explained that, when he said that he told Little Terry that he and Gaines were going to beat him up and Gaines said they were going to shoot Little Terry, that was not on the day of the murder, but was "a long time ago" (T 829).

Fire Captain Earl David Mattox testified that the fire originated in the hallway and that there was a separate fire that had been started in the rear storage room (T 905, 909).[2] Mattox concluded that the cause of the fires was arson (T 905) and that the fires were started by "either setting the clothing or some

[2] This rear room contained a lawn edger (T 914).

paper or something of that nature on fire in the area." (T 912). Mattox did not detect the use of any accelerants (T 913).

During cross examination, defense counsel asked Mattox a number of questions about accelerants (T 917). The trial court questioned counsel about the breadth of this inquiry, noting that it wanted the cross examination kept relevant (T 913). Defense counsel continued, but received a relevance objection from the state when he began questions about gas chromatography machines (T 920).[3] The trial court found "absolutely no relevancy for this line of questioning" (T 920), and denied the defense request for a mistrial (T 921).

Detective C. L. Conn testified that, during her inspection of Parrish's house, she noticed that one clock had stopped at 5:10 p.m. and the other at 5:14 p.m. (T 926). Conn and another officer visited Clemons's school because Clemons was willing to give a statement (T 928). After Clemons's statement was marked for identification, defense counsel objected that the statement was hearsay (T 923). The state countered that "the relevancy is Mr. Clemons' credibility has been attacked. In opening statements [comments] were made essentially he fabricated that statement. I

[3] "He has already testified no[accelerant] was used. No samples were selected. It would be irrelevant." (T 920).

believe that this is relevant to show before he had any contact with anyone he made that statement." (T 932). The trial court allowed the statement to be admitted as a prior consistent statement (T 934).

Conn answered questions about the statement and stated that Clemons also identified the participants in the incident by photo spread (T 936). Conn stated that she also interviewed Gaines, who made a statement and identified the participants via photo spread (T 939). Conn testified that the gun which killed Parrish was never recovered (T 941).

Randy Jackson testified that he and Moore shared a cell in the Duval County Jail (T 965). Jackson knew Moore and Parrish, and asked Moore if he killed Parrish; the first time Jackson asked, Moore said no (T 966). When Jackson asked again several days later, Moore stated that he killed Parrish, did not mean to, but had to because Parrish knew him (T 967). Jackson did not bring this to the attention of police until Conn visited his house about a week before trial (T 968).

Christopher Shorter testified that he saw Moore before 5:00 p.m. and at 5:00 p.m., and at both times Moore was wearing a "blue Dickie suit" (T 990). When Shorter saw Moore after 5:00 p.m., Moore had on a tan Dickie suit and gave Shorter a bag of clothes (T

994). Moore asked for a lighter so he could burn the clothes, but Shorter took the bag and threw it in his back yard, and later threw the bag in the trash at the Texaco station (T 995-96). Shorter saw Moore the day after the fire, and Moore "started to tell [him] that he had done killed [Parrish]" (T 999). Moore tried to tell Shorter again later that day (T 1000).

Two days after the fire, Moore told Shorter that he killed Parrish and provided details (T 1000). Specifically, Moore stated that he had to kill Parrish; that he told Parrish to "give it up"; that he shot Parrish in the chest and head; that Parrish "slumped to the side" after the first shot, but was still alive, so Moore shot him again; that Clemons had gone in the house with Moore; that Clemons had gotten scared and run out of the house when Moore shot Parrish; that Moore searched the house after Clemons left and found a long nosed .38; that Moore took the top off of a lawnmower he found and set it on fire; that Moore set the house on fire to clean up the fingerprints; and that Moore locked the front door, took the keys, and exited the side door when he left (T 1001-04). Shorter did not call police, but called his mother who called Detective Hickson (T 1005).

Audrey McCray testified that, between the time she saw Moore on January 21, 1993, at 5:00 p.m. and about five minutes later,

Moore had changed clothes (T 1040). When McCray pointed out the fire to Moore, Moore stated that Parrish was cooking a pot of greens and might have fallen asleep and the greens caught on fire (T 1041). Shorter told McCray that Moore had given him a bag of clothes to bury in his backyard, but Shorter put the bag in a dumpster behind the Texaco on Flag Street (T 1042).

The state recalled Detective Conn, who testified that she had witnessed a pot of collard greens on the stove in Parrish's kitchen (T 1049). At this point, the state rested its case (T 1050). Defense counsel called 12 witnesses in its case in chief (T 1070-1198). The state called Officer Conn in its case-in-rebuttal (T 1200), and then rested (T 1201).

During the penalty phase, the state relied on the evidence adduced in the guilt phase, and requested that the trial court admit into evidence two judgments and sentences for armed robbery and aggravated battery (T 1458-59). The state called Detective Goff testified regarding the armed robbery charge (T 1462). At the bench, the state explained that it wished to call Parrish's daughter for victim impact evidence, "limited to the fact that he was a kind man and helpful to everyone in the neighborhood. That's it." (T 1464). Defense counsel responded that that did not "fall[] within the statutory classification of uniqueness to the

community." (T 1464). The state responded that the evidence showed uniqueness in Parrish's community, which was "a neighborhood where shots are heard routinely and where crime occurs routinely." (T 1465). The trial court permitted that "limited question" (T 1465). The state then asked Doris Parrish what was unique about Parrish, her father, and she stated: "My dad was a good man. He never bothered nobody. And he was very free-hearted, you know. He loved everybody." (T 1466).

Defense counsel called Moore's mother, who testified that she was four months' pregnant with Moore when she learned that Moore's father was married to another woman (T 1470). Mrs. Moore raised Moore by herself in a home where not only she and Moore lived, but her father, mother, sisters, and niece lived (T 1472). Mrs. Moore stated that her son was very smart in elementary school -- "[t]hey wanted him to skip when he was in elementary school" -- and made A's and B's (T 1473). Mrs. Moore stated that Moore worked at his grades because she was very strict and that there were only normal disciplinary problems (T 1474). Mrs. Moore said that Moore had home chores and worked with her at her job sometimes (T 1474). Moore saw his father sometimes at his grandparents' home (T 1475).

Moore's father was shot and killed when Moore was seven (T 1476). Mrs. Moore said the funeral was emotional because Moore did

not understand that his father was married to another woman; when the family of Moore's father was acknowledged, Moore asked why his name was not called (T 1478). Moore told Mrs. Moore that he was going to pave the streets because of all the holes and the difficulty they had getting to the burial plot (T 1479). Moore was a patrol guard and played football in middle school (T 1479). Moore had trouble with migraines and vomiting (T 1479).

Moore was conscientious about his grades (T 1479), but once Mrs. Moore found a note Moore had written to his father: "[H]e was saying, 'Dear Dad.' He said, 'I miss you.' He said, 'I wish you were here because Mama don't understand.' He said, 'If I make a B, she want me to make an A. She won't let me ride my bicycle across Kings Road to grandmother's.' And he said I wouldn't let him got to the park. And if he was there it might be different." (T 1480). When Mrs. Moore picked him up from school that day, "usually I get him a snack. But that day he didn't want anything. I couldn't understand why. But it was report card day and Thomas had made a C, or a D I believe it was, and everything I offered im he wouldn't have it. So, I didn't understand until we got home and he gave me the report card. And normally I would say for your punishment you won't ride, or you won't play Nintendo, or you won't have company. But I said, "Thomas," I said, "It's just the first

report. There will be other times you can pull it up." (T 1480-81). Moore improved his grades (T 1481). When Moore's closest friend Tony went into the service, Moore started hanging out with other kids (T 1482). Moore received his G.E.D. (T 1493). Moore also helped Mrs. Moore care for her father (T 1486-87).

Ernest Squire testified that he was the assistant principal of students services and knew Moore when he was in seventh through ninth grades (T 1491). Squire stated that Moore seemed to be very sociable, well liked, and only had minor disciplinary referrals (T 1492).

Jessie Mae Leonard, Moore's paternal grandmother, testified that she did not learn of Moore's existence until he was nine months old (T 1494). Leonard saw Moore two or three times a week, and said that Moore helped her around the house (T 1495). Vanessa Leonard, Moore's aunt, testified that Moore was respectful to his grandparents and played nicely with her daughter (T 1500). Mary Ann Harris, Moore's aunt, testified that Moore was pleasant and "mannerable" when he was around adults (T 1503). Vontreace Israel, Moore's half sister, stated that her mother had no contact with Moore (T 1507). Lela Harold, Moore's neighbor, testified that she babysat Moore and found him to be "an excellent, extra manageable

kid" (T 1509). Harold stated that the death of Moore's father had "disturbed him" (T 1510).

Theresa Moore, Moore's cousin, testified that Moore was smart and very active when he was young, helped her with her math and homework, and always wanted to stay home and help (T 1512). Theresa Moore's children love Moore (T 1513). Shirley Ann Moore, Moore's aunt, testified that Moore helped to take care of his grandfather and to take care of her son Brandon (T 1517). Defense counsel then rested its case (T 1519). By a vote of nine to three, the jury recommended that Moore be sentenced to death (T 1553).

In its written sentencing order, the trial court found the following aggravating circumstances applicable: (1) prior violent felony conviction -- aggravated battery and armed robbery; (2) committed to avoid arrest; and (3) committed for pecuniary gain (T 502). Although Moore argued that his age should be considered as nonstatutory mitigation, the trial court found:

> The Defendant was first treated as an adult in the Courts of Duval County at the age of 15 years for the crime of Armed Robbery and was subsequently convicted of this offense, as well as, the offense of Aggravated Battery, and while the Defendant may seem young by calendar years, his continued criminal activities precludes any excusal because of his age. The Defendant has exhibited a criminal maturity beyond his age. Consequently, this Court attaches slight

> weight to this mitigating circumstance. The Defendant has failed to offer any evidence of other statutory mitigating circumstances.

(T 503). As for nonstatutory mitigation, the trial court noted the testimony of family friends and members regarding Moore's character, but noted that "[m]ost of the[m] either have little knowledge or attach little significance to the criminal history of the Defendant. Consequently, the Court attaches no significance or value to this evidence." (T 503-04). The trial court weighed the aggravating circumstances against the mitigating, and determined that death was the appropriate penalty (T 504).

SUMMARY OF THE ARGUMENT

As to Issue I, the trial court did not abuse its discretion in limiting the cross examination of state witnesses Gaines and Clemons, because the limited portions were redundant or improper. As to Issue II, the trial court did not abuse its discretion in limiting the cross examination of state witness Fire Captain Mattox, because the proposed area of questioning concerning accelerants was irrelevant based on Mattox's direct testimony.

As to Issue III, the trial court did not abuse its discretion in making rulings on various objections during the guilt phase of Moore's trial, because all of the trial court's actions and rulings, placed in context, were proper. As to Issue IV, the trial court did not abuse its discretion in admitting state witness Larry Dawsey's testimony that he saw Moore with a gun several days after Parrish's murder, because it constituted an admission by a party opponent.

As to Issue V, the trial court did not abuse its discretion in admitting state witness Carlos Clemons's statement as a prior consistent statement, because the state offered it to rebut the implication of improper influence, motive, or recent fabrication by defense counsel during the cross examination of Clemons. As to Issue VI, the trial court did not abuse its discretion in admitting

victim impact evidence via the testimony of the victim's daughter, as this evidence met the statutory requirements and was very limited in nature. As to Issue VII, the trial court did not abuse its discretion in permitting the state to argue that mitigating evidence did not ameliorate the enormity of Moore's actions, as such constituted proper penalty phase argument.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING MOORE'S CROSS EXAMINATION OF STATE WITNESSES GAINES AND CLEMONS.

Wide latitude is permitted on cross-examination in a criminal proceeding, the scope and limitation of which lies within the sound discretion of the trial court and is not subject to review except for a clear abuse of discretion. Sireci v. State, 399 So. 2d 964, 969 (Fla. 1981). In the present case, the trial court did not abuse its discretion in limiting the cross examination of state witnesses Gaines and Clemons, because the limited portions were redundant or improper.

As shown in the statement of the case and facts, defense counsel sought to impeach Gaines's testimony by placing Gaines with Clemons before school was released for the day. Although Gaines specifically testified that he did not see Clemons until 3:00 p.m. that day, after school was released, defense counsel persisted in asking Gaines if he met with Clemons at 8:00 a.m. that day, and then at noon that day (T 564). The trial court understandably found these questions laborious and objectionable, in light of Gaines's very unequivocal response that he had not seen Clemons until 3:00 p.m. As the trial court pointed out, counsel had to

accept those answers, and then seek impeachment through Clemons's contrary testimony later.

During direct examination, Clemons testified that he had no gun on the day in question (T 791). Inexplicably, defense counsel asked on cross examination what Clemons had done with the chrome plated .38 caliber revolver he had on that day (T 826). The state properly objected that there was no predicate for this question, and the trial court sustained the objection (T 826). Nevertheless, defense counsel was permitted to explore the area about "Little Terry," asking Clemons if he had such a gun and if he and Little Terry had had a run-in: Clemons responded no to the gun question, and explained that he and Little Terry had had run-in and he had chased Little Terry down the street (T 827-28).

When defense counsel asked if Clemons had chased Little Terry with a gun on that day, the state correctly objected that the question had been asked and answered, and the trial court agreed (T 828). Defense counsel asked Clemons if he had stated that he was going to shoot Little Terry and confronted Clemons with his deposition (T 828). Clemons explained that, "a long time ago," he had said he was going to beat up Little Terry and Gaines had said he was going to shoot Little Terry (T 829).

Section 90.612(1), Florida Statutes (1993), recognizes the inherent power of the trial court to "[f]acilitate, through effective interrogation and presentation, the discovery of truth," to "[a]void needless consumption of time," and to "[p]rotect witnesses from harassment or undue embarrassment." In cross examining both Gaines and Clemons, defense counsel failed to engage in effective interrogation, and the trial court properly exercised its discretion in limiting such questioning. Nevertheless, defense counsel was not precluded from exploring the defense theory that Gaines and Clemons were in possession of a gun before Parrish was killed. "Because the essence of the witnesses' bias was established through direct and cross-examination," the trial court committed no error in curtailing defense counsel's redundant questioning. Dufour v. State, 495 So. 2d 154, 160 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987).

For this same reason, any error committed on this point was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Defense counsel presented the information he sought through proper questioning, and the trial court's limiting of the testimony of these witnesses was brief.

Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING MOORE'S CROSS EXAMINATION OF STATE WITNESS FIRE CAPTAIN MATTOX.

Wide latitude is permitted on cross-examination in a criminal proceeding, the scope and limitation of which lies within the sound discretion of the trial court and is not subject to review except for a clear abuse of discretion. Sireci v. State, 399 So. 2d 964, 969 (Fla. 1981). In the present case, the trial court did not abuse its discretion in limiting the cross examination of state witness Fire Captain Mattox, because the proposed area of questioning -- accelerants -- was irrelevant based on Mattox's direct testimony.

During his testimony on direct examination, Mattox stated that he was unable to detect any odors or patterns of an accelerant, i.e., gasoline, kerosene, charcoal lighter, cigarette lighter, alcohol products, perfumes (T 913). Mattox acknowledged that, if a small amount of accelerant had been used, it could have been evaporated by the heat or burned up by the heat of the fire (T 914). Mattox also noted that, if an accelerant were used and it were water soluble, the water used by the fireman to halt the fire would have washed it away (T 914).

Nevertheless, in questioning Mattox about his expertise, defense counsel asked about the indicia of fire and accelerants (T 917). Understandably, the trial court stated that it wanted the questioning kept relevant (T 918). Despite Mattox's very clear testimony that he found no evidence of accelerants, trailers,[4] or containers of flammable liquids, defense counsel persisted in asking about the ability of the Florida Fire College Laboratories to test for flammable liquids and its possession of gas chromatography machines (T 920). The state objected on obvious relevance grounds, and the trial court agreed, denying the defense request for a proffer and mistrial (T 920).

Moore can show no abuse of discretion by the trial court. This line of questioning was completely irrelevant, in light of Mattox's unequivocal testimony that no accelerants were found at the scene of the fire. To continue to question along this line, despite Mattox's previous testimony, would have served no purpose, other than confusing the jury.

Moore's claim that this prohibited line of questioning would have shown conclusively that state witness Shorter was lying when he said Moore told him he killed Parrish and then set fire to the

---

[4] "A trailer is a trail of flammable liquid that is normally used to speared fire from one room to another." (T 919).

house by using gasoline from the lawn mower found in the house. This is incorrect, as shown by Mattox's own testimony that a small amount of accelerant could have been used, and could have been burned up by the fire so that he found no traces.

In any event, any error on this point was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). This limiting of testimony was short in nature, and did not preclude defense counsel from pointing out inconsistencies in Shorter's testimony during his cross examination of Shorter.

Issue III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING RULINGS ON VARIOUS OBJECTIONS DURING THE GUILT PHASE OF MOORE'S TRIAL.

The trial court, in the exercise of its discretion, controls the comments made in opening statements, the conduct of counsel during trial, and the comments made in closing arguments. Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 111 S. Ct. 2067 (1991); Robinson v. State, 520 So. 2d 1 (Fla. 1988), cert. denied, 112 S. Ct. 131 (1992); Hooper v. State, 476 So. 2d 1253 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986). Absent a showing of a clear abuse of discretion, this Court will not overturn a trial court's ruling in this regard. Id. The trial court did not abuse its discretion in the instant case, because all of the trial court's actions and rulings, placed in context, were proper.

Moore states that the trial court repeatedly made comments on the evidence and comments disparaging defense counsel, remarks which "are too numerous to list here," but Moore nevertheless lists 17 specific examples. Initial Brief at 15. Although Moore lists these instances, because he does little more, this Court is under no obligation to address them. Nevertheless, the state addresses them in the order listed. Because most, if not all, of these

examples are lifted out of context, the state provides the full context in which these instances occurred. See Lister v. State, 226 So. 2d 238, 239 (Fla. 4th DCA 1969) (statements must be considered in context, not in isolation); United States v. Ramos, 933 F. 2d 968, 973 (11th Cir. 1991) (same).

(1) In questioning Gaines about his plea agreement, defense counsel asked if Gaines "got it dropped from a murder charge all together" (T 581). The state objected to the phrasing that Gaines had anything to do with the state's reduction of the charges (T 581). The trial court stated: "Well, he didn't do anything, just like Ms. Corey didn't indict anybody, Mr. Cofer. Okay? Let's get it right. You know how to get it right without going through that. Let's ask him what his agreement was." (T 581). As is readily seen in context, the trial court made no disparaging remark, but simply reminded counsel that the proper way to get the information he sought was to ask questions about the agreement itself, which counsel proceeded to do.

(2) Regarding Gaines's sentence for accessory after the fact, defense counsel asked if it were Gaines's understanding that he would receive a sentence for no more than three and a half years. Gaines answered yes. When defense counsel asked whether Gaines expected to serve any more than seven months on that sentence, the

state objected that this was knowledge uniquely within the province of the Department of Corrections (T 582). The trial court agreed: "He might think he's going to get out last week, Mr. Cofer. But that ain't true either. So, you know, what he expects is . . . Don't ask him what he expects what the sentence might be. We are not getting into gain[] time and all, the Department of Corrections, all that." (T 582). This was eminently proper. Gaines's expectation regarding time to be served in prison made no difference. The critical testimony that Moore in fact elicited was that Gaines received only an accessory charge and a minimal sentence, in comparison to Moore.

In any event, defense counsel received what he wanted, as he was permitted to ask Gaines how much time he expected to serve, and Gaines answered, about 10 months, but he was not sure (T 582).

(3) On redirect examination, the state asked Gaines what Clemons said about why he went back into the house right after Parrish was killed (T 586). Defense counsel objected on hearsay grounds, and the state explained that it was a spontaneous statement and also rebutted Moore's charge of recent fabrication (T 587). When the trial court overruled the defense objection, defense counsel queried: "How does what someone else told him establish reason -- or rebut fabrication of this on this witness'

part?" (T 587). The trial court stated that it was not sure how this testimony "did anything" for either side (T 587). The following dialogue then took place at sidebar:

> [Defense]: Your Honor, I would ask the Court if the Court would please refrain from making comments and rendering opinions about the quality of my cross examination, the nature or intention of my questions. It's amounting to comment upon the evidence by the Court and comment by --
>
> [Court]: I'm asking you not to be repetitive over and over again.
>
> [Defense]: Your Honor, --
>
> [Court]: If that's a comment. I don't think it is. If you ever read the transcript you will be amazed about the repetitive nature of the questions over and over and over again.
>
> [Defense]: Your Honor --
>
> [Court]: And the thing I brought out to you earlier about asking about every minute and hour, somebody has got to run this trial, Mr. Cofer, and not just allow you to do anything and everything you want to do completely out of the realm. It should be objected to by the State. I don't know, one, if they are too ignorant to object or they just don't want to object. One of the tow. You have gone outside the scope of examination on one witness after another. They haven't objected. I don't say anything. It just goes on and on. It's not accomplishing anything. Okay?
>
> [Defense]: Your Honor, the Court is restricting my ability to cross examine a

critical witness, that being a purported co-defendant in the case. I would object to it.

[Court]: I have not restricted your examination, except when it's repetitive, over and over again.

[Defense]: Your Honor, sometimes when the answers are not responsive to the questions I pose to a witness, I do intend to repeat them and get a clear answer from the witness.

[Court]: Well, you are being repetitive and getting the same answer.

And, again, if you ever read it later you will find that out. I'm sitting here listening to it. It's the same thing, same answer over and over again.

Now, somebody is going to be in charge of this trial. It's going to be you or Ms. Corey or me. Now, I'm in charge of it and if you do the same thing over and over again I'm going to bring it to your attention.

[Defense]: If you do, Your Honor, we would ask that it be done outside the presence of the jury so it doesn't --

[Court]: Just don't do it. How about that? Wouldn't that be simpler? Just don't do it.

[Defense]: Well, Your Honor, what the comments --

[Court]: You know what it permissible. You know.

Let me say one other thing. It used to be, I don't guess it is anymore, it used to be in the canons of ethics that it was unethical

> for a lawyer to ask a question that they knew was objectionable. I think they removed that. I don't know why. There [are] all kinds of questions which have been objectionable. Whether or they are objected to doesn't have anything to do with the ethics of the attorneys, okay?
>
> [Defense]: Does the Court have something in particular --
>
> [Court]: You are going outside the scope of the direct on more witnesses than I can tell you. That's objectionable. Whether or not they object, that's another thing.
>
> Okay.

(T 588-90).

The court's explanation here is borne out by the record. The court did not rebuke counsel, but simply, within its discretion, chose to enforce the evidentiary rules applicable to the proceeding and did so in a permissible manner both in and out of the jury's presence.

(4) During the redirect examination, the state asked Graves if he remembered the statement he gave to Conn (T 646). Defense counsel objected, stating: "We have never indicated at any time when he told Detective Conn anything." (T 647). The trial court found that defense counsel had tried to imply that: "You asked him about it. You know, if you didn't think it existed, why would you ask him?" When defense counsel replied it was another detective,

the trial court stated: "That confused everyone. I will overrule the objection."

This was not a comment on the evidence, but was merely an observation. Defense counsel created a confusing situation, stating that he never said Graves made a statement, when the record clearly shows that that is exactly what defense counsel brought out on cross examination of Graves (T 644-45).

(5) During cross examination of Dr. Floro, defense counsel queried: "[W]hen such an individual [as Parrish who stood 6'1"] goes to a kneeling position are there averages as to the amount of height he would lose?" (T 755). Dr. Floro responded: "I did not measure the knees to the heel area whatsoever. But there is a significant height loss when you kneel." (T 755). Defense counsel then asked: "Would it range, do you think, 20 to 22 inches?" (T 756). The state objected to this question on the ground that the witness had already answered (T 756). The trial court asked defense counsel if he were asking the doctor to guess (T 756). When defense counsel stated that the doctor was an expert, the trial court responded: "He is not an expert on how tall somebody is when they are kneeling I don't think . . . ." (T 756).

The trial court's statement was a proper equivalent of sustaining the objection. Dr. Floro specifically stated that he

did not measure the distance, and thus did not know. In any event, defense counsel pursued this line of questioning by asking Dr. Floro "what percentage of an individual's height is represented by the portion between their knees and floor under the norm" (T 756). Dr. Floro responded: "I have no idea, sir." (T 756).

(6) Defense counsel asked Dr. Floro during cross examination: "[I]f Mr. Parrish was standing directly facing his assailant when the shot was fired, would that be inconsistent with our autopsy findings?" (T 757). When the state objected that there were no facts in evidence to support this hypothetical, the court responded that "I think the answer was obvious." (T 757).

Again, this was not a comment on the evidence, but an observation by the trial court. In any event, Dr. Floro answered affirmatively.

(7) During direct examination, the state asked Clemons to step down from the stand for a demonstration (T 796). During the demonstration, defense counsel asked for the record to reflect that Clemons was standing about five to six feet away from the other person involved in the demonstration (T 798). The court simply observed that it did not know if that measurement were accurate (T 798).

This was not an impermissible comment on the evidence, but a ruling from the trial court that it could not have the record reflect a measurement which could not be verified by simple observation. In any event, when defense counsel pointed out that the arm was stretched out straight from the shoulder, the court agreed (T 798).

(8) During direct examination, Clemons testified that he did not possess a gun on the day that Parrish was killed. Nevertheless, during cross examination, defense counsel asked Clemons: "[P]lease tell me and tell this jury what you did with the chrome-plated .38 caliber revolver that you had on the date Mr. Parrish" was killed (T 826). The state objected that no predicate had been laid for this question, and the trial court sustained the objection (T 826). When defense counsel queried, "Sir?" the trial court responded: "I sustained the objection. There is no evidence of that." (T 826).

Based on Clemons's testimony on direct, the trial court's ruling was proper and was not a comment on the evidence. Nevertheless, defense counsel then posed the proper question, i.e., whether Clemons was in possession of such a gun on that day, and Clemons answered no (T 826-27).

(9) During cross examination, defense counsel questioned Shorter about his sworn statement to Detective Conn (T 1025). Shorter admitted to one lie during his oral interview with Conn, i.e., that he and Moore did not discuss Parrish's death (T 1027). During redirect examination of Shorter, the prosecutor asked Shorter about his sworn statement to Conn and his deposition by defense counsel (T 1029-30). As the prosecutor recounted a question from the deposition, defense counsel objected that his "questions went to this young man's statements in the sworn statement. He's admitted he made those statements and they were false when given . . . ." (T 1031). The trial court responded: "He hasn't admitted everything is false. Let's let her rehabilitate him if she can. I will overrule the objection." (T 1031).

This ruling was correct, and was not a comment on the evidence. The jury was aware that Shorter had admitted to lying, and realized that, on redirect examination, the prosecutor would attempt to have Shorter explain.

(10) Defense counsel asked Gaines whether his lawyer had explained the difference between first and second degree murder; when Gaines stated no, the trial court simply stated that he did not have to tell defense counsel what he had discussed with his

lawyer -- "You may, but you don't have to. Mr. Cofer is aware of that, too." (T 580).

This was no rebuke of counsel. As the record makes clear, the trial court was being careful to make certain that the witnesses, many of whom were minors, understood their rights. In stating that Mr. Cofer was aware, the trial court simply reminded counsel and implied that there were other methods of getting the information he sought.

(11) In discussing Gaines's sentence, defense counsel asked Gaines how much time he expected to serve (T 582). When Gaines responded about 10 months, defense counsel pointed to Gaines's deposition, in which Gaines had estimated about seven months. The following dialogue ensued:

> [Defense]: Do you recall you[r] answering, "Seven months"?
>
> [Gaines]: About seven.
>
> [Defense]: Sir?
>
> [Gaines]: I said about seven.
>
> [Defense]: You said seven months;
>
> Do you remember that?
>
> [Gaines]: About seven. That's what I said.

> [Defense]: So, that's what you expect you will be doing?
>
> [Gaines]: That's what my friends told me. I don't know.
>
> [Court]: Mr. Cofer, you are going so repetitive. You have repeated this same thing --
>
> [Defense]: Your Honor, may I approach side bar?
>
> [Court]: Just let the record reflect you just repeated what he said again, after you got the answer, and then you said you expected you are going to do seven months. I mean, it's just been repetitive and time-consuming. And I wish you would, once you establish something, establish it and move on to something else without repeating it over and over and over again.

(T 584).

The jury no doubt was painfully aware of the seven or ten month discrepancy, and the trial court understandably desired the cross examination to move on to another topic to keep the trial moving and the evidence relevant. This comment was not improper.

(12) During cross examination, defense counsel asked Ewing about his relationship with Clemons and whether he would report Clemons to police if he saw Clemons commit a crime (T 671). Ewing stated that he would, and that he had witnessed Clemons commit a crime and he had reported it during deposition (T 672-73). Defense

counsel then asked: "So, you are somewhat selective in who you will tell the truth about?" (T 673). The state objected that the question was argumentative (T 673). The trial court agreed: "That is argumentative. I agree. Sustain the objection. Mr. McGuinness is probably aware of that also." (T 673).

Defense counsel had established that Ewing had reported Clemons's criminal activity during deposition, not to police. To continue by asking a question designed to provoke was unnecessary, as the trial court properly observed.

(13) During cross examination, defense counsel asked Clemons about juvenile sanctions as part of his plea agreement (T 818). Defense counsel also asked Clemons whether he had smoked marijuana while on home detention (T 819). Clemons stated that he did not smoke marijuana, but was around people who did (T 819). Clemons admitted being taken back to jail as a result of the positive urinalysis (T 819). When defense counsel asked whether Clemons had been charged with marijuana charges, the state objected (T 819). The trial court responded: "You know that we don't need to discuss it. It's an improper question. Okay?" (T 820).

This was no rebuke of defense counsel, but was a ruling on the state's objection. The trial court properly sustained the objection because the question was about a completely collateral

matter. In any event, defense counsel then asked whether anything was "done to" Clemons about the positive urinalysis, and the trial court permitted that question (T 820).

(14) During cross examination, defense counsel asked Clemons: "About a week ago you learned that the deal that the State Attorney had cut with you back in March was illegal?" (T 821). Clemons stated yes, and that his attorney had told him that he had to withdraw his plea (T 821). The trial court interjected: "Now, Mr. Cofer, let's -- he doesn't have to tell you anything, and he doesn't know that because he is 14 years old, I guess. You don't have to testify about any conversation that you had with your attorney; Do you understand that?" . . . . You don't have to. Okay. Mr. Cofer, of course, is aware of that, too, I assume." (T 822).

Again, the trial court simply restated the rights of Clemons, who was a minor, and suggested that defense counsel could obtain the information he sought through other questions. Nevertheless, defense counsel then asked if Clemons's lawyer had told him that he had to withdraw his plea, and Clemons responded yes (T 822).

(15) During cross examination of Clemons, the following dialogue took place:

[Defense]: Now, Mr. Clemons, as a result of you[r withdrawing your plea] you realized that the State cannot use the sworn statement that they took from you against you if they had to prosecute you? You realize that, don't you?

[Clemons]: Yes, sir.

[Defense]: And you realize that they can't use the deposition I took of you against you?

[Clemons]: Yes, sir.

[Defense]: And you realize that they can't use the testimony that you give today to this jury against you?

[Clemons]: Yes, sir.

[Defense]: And you also realize that if you lie today they can't charge you with perjury?

[Clemons]: Yes, sir.

(T 823-24). The state objected, and the trial court queried: "I don't know. Regardless of anything? Whether it's true or not? That was the question?" (T 824). When defense counsel asked to approach the bench to show the court the hearing transcript, the trial court responded: "Well, Mr. Cofer, let me say this: The charging -- whatever they promised is still charged. Whether or not it's binding or upheld, sobeit. I mean, you have a misnomer or misstatement." When defense counsel again asked to approach the

bench, the trial court stated: "Yes, sir, you can approach the bench one more time." (T 824).

This is not a rebuke of counsel, and Moore's underlining of this passage in his initial brief does not make it so. Initial Brief at 18. If it were said in the manner that Moore would have this Court believe, it seems likely that defense counsel would have registered an objection at sidebar.

(16) In the defense case in chief, after Moore had testified, defense counsel recalled Detective Conn (T 1146). After the trial court reminded Conn of her previous oath, defense counsel asked for "a moment" (T 1146). The trial court evidently did not hear this request, asking "I'm sorry?" (T 1146). Defense counsel again asked for a moment, but then said "[n]ever mind" (T 1146). The trial court then stated: "Everybody uses that term. I think we ought to eliminate that from this trial." (T 1146).

As the record shows, both parties used the phrase "moment" numerous times. This was no rebuke of defense counsel, but simply an observation by the trial court.

(17) During direct examination, defense counsel asked Moore whether Parrish had made any statements to Moore about his intentions for dinner on the day he was killed (T 1107). The state objected on hearsay and relevance grounds (T 1107). The trial

court sustained the objection, stating: "It's obviously hearsay, Mr. Cofer. You know that." (T 1107).

This was not a disparagement of defense counsel, who was attempting to get the victim's statements into evidence through Moore. The victim's statement was obviously made out-of-court, and thus constituted hearsay, and did not qualify under any of the statutorily enumerated hearsay exceptions.

The record very clearly shows that, other than the sidebar discussion early in the trial during Gaines's testimony, defense counsel made no other complaints or objections to the trial court about its rulings or comments. If defense counsel, who was present at trial and could observe the trial court's demeanor, had perceived the court's comments as so improper as now alleged, surely he could have pointed this out more than once and requested curative instructions. See Jones v. State, 612 So. 2d 1370, 1373 (Fla. 1992), cert. denied, 126 L. Ed. 2d 78 (1993); Harmon v. State, 527 So. 2d 182, 187 (Fla. 1988). See also Huff v. State, 495 So. 2d 145, 148 (Fla. 1986) ("Any prejudice which theoretically could have resulted from the remark could have been dispelled had the defense requested a curative instruction from the trial court.").

Furthermore, **Fla. Stat.** § 90.106 (1993) prohibits a trial court from summing up the evidence and from commenting upon the weight of the evidence, the credibility of the witnesses, and the guilt of the accused. As to the first nine alleged errors, it is clear that none of the comments fell in the above categories. Compare United States v. Abrams, 568 F. 2d 411, 424-25 n.60 (5th Cir. 1978).

In any event, the trial court's statements were brief, not directed to the jury, and the court specifically instructed the jury to consider only "the evidence that you have heard from the answers of the witnesses and have seen in the form of the exhibits in evidence and these instructions." (T 1368). See United States v. Cortez, 757 F. 2d 1204, 1208 (11th Cir. 1985) ("The record indicates that while counsel was interrupted on various occasions by the trial court, none of those interruptions exceeded the bounds of judicial propriety. The comments were in response to acts of defense counsel and were used to instruct, elicit facts, or clarify. Furthermore, the court's comments when the jury was present were brief, not directed to the jury, and the jury was instructed not to consider the court's comments as evidence."); United States v. Onori, 535 F. 2d 938, 944 (5th Cir. 1976) ("The allegedly prejudicial comments occupied but a few seconds of a

lengthy trial. The comments were directed to defense counsel rather than to the jury. In its instructions, the trial court advised the jury that, "[i]f during the trial, the Court has intimated any opinion as to the facts, the jury may entirely disregard such intimation, since the jurors alone are sole and exclusive judge of the facts.").

Additionally, Florida courts have recognized that there are occasions when there is no error in correcting defense counsel in the presence of the jury. Jones v. State, 385 So. 2d 132 (Fla. 4th DCA 1980). See also Brown v. State, 367 So. 2d 616, 620 n.3 (Fla. 1979) ("Brown has selected isolated comments and rulings of the trial judge to demonstrate alleged hostility to counsel and resultant prejudice to the defense. Our review of the full record reveals that the firmness of the trial court's rulings was warranted, if not required, by the tactics and persistence of defense counsel in respect to evidentiary matters and various other alleged trial errors."). This is especially so in this case, where none of the comments by the trial court "pass[ed] beyond the bounds of neutrality or impartiality." Hamilton v. State, 366 So. 2d 8, 11 (Fla. 1978).

Finally, as the trial court made clear on several occasions, it simply sought to control the timing and content of the trial,

and such actions were well within its discretion. See United States v. Butera, 677 F. 2d 1376, 1382 (11th Cir. 1982) ("[T]he trial judge is not a mere moderator or observer, but is responsible for the tone and tempo of the proceedings, may comment on the evidence and may exercise his discretion to curtail pursuit of irrelevant matters."; "the remarks by the court below were temperate and restrained, and evidently motivated by a desire to keep all counsels' attention on the issues in the case."); United States v. Jackson, 470 F. 2d 684, 687 (5th Cir. 1972) ("Trial judges may admonish counsel who make improper or repetitious comments"; "[i]t was therefore not prejudicial to prohibit defense counsel from placing so remote an inference before the jury."); Sultan v. United States, 249 F. 2d 385, 388 (5th Cir. 1959) (nearly all the comments "were responses of the Court as Court and counsel were engaged in advancing, testing, and countering with arguments, pro and con, on objections or rulings on evidence. This was running colloquy typical of any well-conducted trial in which the Judge seeks to indicate for the benefit both of earnest counsel, whose contentions are being rejected, as well as the appellate court if the point is asserted on appeal, the basis of his action.").

The cases cited by Moore are clearly inapposite. Wilkerson v. State, 510 So. 2d 1253 (Fla. 1st DCA 1987), involved the "browbeating" of counsel by the trial court. Alley v. State, 619 So. 2d 1013 (Fla. 4th DCA 1993), involved evidence of the trial court's hostility and intemperance. March v. State, 458 So. 2d 308 (Fla. 5th DCA 1984), involved prayers by the trial court at the start of sessions. McDonald v. State, 578 So. 2d 371 (Fla. 1st DCA 1991), however, contains some significant language:

> [A] trial judge abuses his discretion when his rebukes so severely call into question an attorney's level of advocacy and sense of fairness that the attorney's client is unjustly prejudiced. Here, the disputed remarks were occasioned by defense counsel's repetition of racially-based statements in his closing argument, despite an initial warning against such remarks, made out of the jury's hearing. While we note that the better practice is to issue any such warning out of the presence of the jury, we do not find that the error is reversible given the nature of defense counsel's remarks, and the comparatively mild tenor of the rebuke.

Id. at 374. As the record makes apparent in this case, there were no severe rebukes, only those occasioned by defense counsel's repetitive conduct.

Issue IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING DAWSEY'S TESTIMONY THAT MOORE WAS IN POSSESSION OF A GUN TWO DAYS AFTER PARRISH'S DEATH.

The decision to admit evidence is committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in admitting Larry Dawsey's testimony that he saw Moore with a gun several days after Parrish's murder, because it constituted an admission by a party opponent.

During direct examination, the state asked Dawsey if he saw Moore "within the next couple of days after th[e] murder" (T 711). When Dawsey responded affirmatively, the state queried if Moore had said anything to him about the murder (T 711). Defense counsel objected, and the following dialogue took place at side bar:

> [State]: Do you want me to say what he is going to say?
>
> [Court]: Yes.
>
> [State]: I think he is going to say that this defendant showed him a gun and said, "If they don't stop saying that I killed the

victim, somebody is going to be dead for real," and he showed him a black snub-nosed -- long-nosed .38.

[Defense]: Okay.

[Court]: Okay.

[Defense]: This is on a day not -- other than the day of the offense.

[Court]: Yes.

[Defense]: I think the Court has severely restricted testimony concerning possession of weapons.

[Court]: This is a statement made by the defendant. Not witnesses. This is a statement made by the defendant.

[Defense]: Well, she is apparently intending to introduce also testimony that Mr. Moore was in possession of a revolver on that date.

[Court]: If it's all the same incident, he showed it to him and testified to it and made the statement to him, -- I'm going to let him testify to that. Verbal acts -- or demonstrative acts by the defendant, they are certainly admissible against him, I think.

[Defense]: Your Honor, there is no evidence that this particular gun had anything to do at all with Mr. Parrish's death. There is no testimony of the nature of the gun that was involved in Mr. Parrish's death.

[Court]: Well, I understand that.

[Defense]: What this is doing is attempting to suggest he habitually carries a

> gun for no purpose. It's not directly eliciting testimony concerning his possession of a gun.
>
> [State]: It goes to show a guilty mind and he basically, I think, threatened witnesses.
>
> [Court]: I'm going to allow it.

(T 711-13). Dawsey then testified that Moore "said he was going to kill someone because he was tired of everybody telling him he killed that man." (T 714). Dawsey stated that Moore showed him "[a] pistol. A revolver. . . . Black. Brown-like. . . . Dark. Black. Brown-like. . . . It looked like a .38 . . . . [The nose] looked long." (T 714-15).

Moore argues that Dawsey's testimony on this point was irrelevant, showed only that Moore had a propensity for murder, and improperly showed that Moore committed another, separate crime. Initial Brief at 20-21. This Court soundly rejected all of these arguments in Swafford v. State, 533 So. 2d 270 (Fla. 1988), where this Court approved the admission of a defendant's statements as admissions under **Fla. Stat.** § 90.803(18) (1993):

> An admission of a party-opponent is admissible as an exception to the hearsay evidence rule. § 90.803(18), Fla. Stat. (1985). In contrast to other hearsay exceptions, admission are admissible in evidence not because the circumstances provide special indicators of the statement's

reliability, but because the out-of-court statement of the party is inconsistent with his express or implied position in the litigation. The admissibility of admission of a party has been recognized by numerous Florida decisions. Of course, like all evidence, an admission must be relevant; i.e., it must have some logical bearing on an issue of material fact. In the context of a criminal trial, an admission of the defendant is admissible if it tends in some way, when taken together with other facts, to establish guilt.

Swafford argues that even if his admissions are recognized as an exception to the hearsay rule, the evidence still must be tested against the restrictions embodied in the *Williams* rule because it showed the commission of a collateral crime or wrongful act. *Williams*, however, explicitly recognized the "general canon of evidence that any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion." This Court also observed that "evidence which has a reasonable tendency to establish the crime laid in the indictment is not inadmissible merely because it points to another crime," and concluded that "evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion."

Since *Williams* we have acknowledged many times its basic teaching that evidence showing collateral crimes or wrongful acts is admissible if it is relevant for any purpose other than to show the bad character or criminal propensity of the accused. The examples given in *Williams* and in subsection

> 90.404(2)(a) are not an exclusive list of the purposes for which such evidence can be found relevant. While Johnson's testimony certainly had the effect of casting Swafford in a bad light, it cannot be said that is *sole* relevancy was on the matter of character or propensity.
>
> The framework within which every evidentiary problem must be resolved entails an analysis of two related issues: relevance and materiality. To be admissible, evidence first must be relevant to a particular material issue to be proved.

Id. at 274-75 (citations & footnotes omitted).

In this case, Moore's statement to Dawsey clearly qualifies as an admission by a party opponent. For a statement to constitute an admission, it need not speak directly to guilt. It may be a statement from which guilt can be inferred when the statement is analyzed in the context of other admissible evidence. **C. W. Ehrhardt, Florida Evidence** Admissions § 803.18, at 664 (1994 ed.). Moore's statement, when considered with other evidence of his guilt -- namely, evidence from Clemons, Gaines, and Shorter -- certainly gave the jury a basis from which to infer guilt: Moore threatened with a gun to kill witnesses who were telling law enforcement that Moore had killed Parrish. See Bruno v. State, 574 So. 2d 76, 80 (Fla. 1991) (direct threats attributable to a defendant are admissible in state's case in chief). Compare Gore v. State, 599

So. 2d 978, 983 (Fla. 1992); Christopher v. State, 583 So. 2d 642, 645 (Fla. 1991); Jackson v. State, 530 So. 2d 269, 272 (Fla. 1988).

In any event, if there is error on this point, any such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Dawsey's testimony on this point was very limited, and even without this testimony, the state presented substantial evidence of Moore's guilt through many other witnesses.

Issue V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING CLEMONS'S STATEMENT GIVEN TO POLICE AT THE TIME OF HIS ARREST AS A PRIOR CONSISTENT STATEMENT.

The decision to admit evidence is committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in admitting Carlos Clemons's statement as a prior consistent statement, because the state offered same to rebut the implication of improper influence, motive, or recent fabrication by defense counsel during the cross examination of Clemons.

Defense counsel began his cross examination of Clemons with questions about his lying to police in the past (T 814-15). Defense counsel continued with questions concerning the seriousness of the charges facing Clemons resulting from Parrish's murder, the possible sentence for the charges, and then asked: "So, the least amount of time you could cut a deal for, -- that would be good for you?" (T 816). Defense counsel explored Clemons's plea agreement for no prison time (T 817). Defense counsel also discussed the

withdrawal of Clemons's plea agreement, and asked if Clemons "figure[d] if you don't cooperate with the State now you are not going to be in their good graces, are you?" (T 823). Defense counsel also asked: "If you lie in this proceeding you understand that your statement cannot be utilized to charge you with perjury or to prosecute you for perjury, don't you?" (T 826).

As is readily apparent, defense counsel sought to establish Clemons had every reason to fabricate his testimony --- the very real possibility of jail time and the falling-through of his plea agreement for no jail time. Accordingly, the state sought to admit his prior consistent statement to rebut this implication of "improper influence, motive or recent fabrication." **Fla. Stat.** § 90.801(2)(b) (1993).

When the state asked Detective Conn whether she recognized the statement that Clemons gave to her on January 29, 1993, defense counsel requested an explanation (T 932). The state explained: "The relevancy is [that] Mr. Clemons' credibility has been attacked. In opening statement[,] statements were made essentially [that] he fabricated that statement. I believe that this is relevant to show [that,] before he had any contact with anyone[,] he made that statement." (T 932). The trial court agreed (T 934).

This Court's own case law supports the trial court's decision in this regard. See Anderson v. State, 574 So. 2d 87 (Fla. 1991) ("During cross-examination, defense counsel attempted to impeach Beasley by suggesting that she fabricated her trial testimony after negotiating a favorable plea. Thus, if Beasley's statements to Velboom were made before her alleged motive to falsify arose, the state was entitled to present Beasley's prior consistent statements to rebut the implication of recent fabrication . . . ."), cert. denied, 116 L. Ed. 2d 83 (1992); Stewart v. State, 558 So. 2d 416 (Fla. 1990) (same); Dufour v. State, 495 So. 2d 154 (Fla. 1986) (same), cert. denied, 479 U.S. 1101 (1987); Kelley v. State, 486 So. 2d 578 (Fla. 1986) (same), cert. denied, 479 U. S. 871 (1987). See also Flanagan v. State, 586 So. 2d 1085 (Fla. 1st DCA 1991) (*en banc*) (same).

If the trial court erred in admitting Clemons's statement, any such error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Beyond a reasonable doubt, the statement did not affect the jury verdict, because the jury heard Clemons's in-court testimony and was well aware of Clemons's credibility problems.

Issue VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE OF MOORE'S TRIAL.

The admission or exclusion of evidence in the penalty phase of a capital trial is within the trial court's discretion, and a ruling in this regard will not be disturbed on appeal absent a clear showing of an abuse of discretion. King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). In the instant penalty phase, the trial did not abuse its discretion in admitting victim impact evidence via testimony of the victim's daughter, as this evidence met the statutory requirements and was very limited in nature.

Before the state called Parrish's daughter to the stand, defense counsel objected that the fact that Parrish "was kind in the community [did not] fall[] within the statutory classification of uniqueness to the community." (T 1464). The state responded that Parrish's "community [w]as a neighborhood where shots are heard routinely and where crime occurs routinely. Someone of his individual characteristic is unique in that type of incident." (T 1465). The trial court permitted limited testimony (T 1465), and the victim's daughter testified that Parrish "was a good man. He

never bothered nobody. And he was very free-hearted, you know. He loved everybody." (T 1466).

Moore claims that, because the testimony of Parrish's daughter did not relate any information "about the community or the 'uniqueness' of any of its members, including PARRISH," it should not have been admitted. Initial Brief at 25. Such a claim is disingenuous, in light of the plain meaning of these words.

Webster's Third New International Dictionary, Unique at 2500 (1981 ed.),[5] defines unique as unusual or notable. Certainly, an individual like Parrish is unusual and notable in his "free-hearted" quality in this day and age, particularly in his neighborhood. Guilt phase evidence showed that Parrish knew the neighborhood children, socialized with them frequently, and was well known to his neighbors.

Additionally, one definition of community is "a group sharing a particular economic or social belief and living communally." **Webster's Third New International Dictionary**, Community at 460 (1981 ed.). Considering the testimony given during the guilt phase from Parrish's neighbors, along with the penalty phase testimony of Parrish's daughter, it is clear that Parrish's neighborhood

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[5] This is the dictionary on which this Court has relied previously in defining statutory terms. See e.g., Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987).

constituted a "community." It can be presumed that the legislature intended to use the word "community" so as not to preclude persons who might suffer a legitimate loss who would otherwise be excluded with the use of a term like "neighborhood," i.e., family, work friends, school friends, church friends, teachers, etc. This Court should construe the word "community" as used in **Fla. Stat.** § 921.141(7) (1993) to include a victim's neighborhood. As this Court previously has recognized, it has an obligation in interpreting statutory language "to give ordinary words their plain and ordinary meaning." Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987).

In any event, the presentation of brief humanizing remarks, like those at issue, does not constitute grounds for reversal, and if improper, are harmless beyond a reasonable doubt. See Stein v. State, 632 So. 2d 1361 (Fla.), cert. denied, 115 S. Ct. 111 (1994). The testimony of Parrish's daughter constituted only one half of a page of the instant, approximately 1600 page transcript. Compare Windom v. State, 656 So. 2d 432, 441 (Fla. 1995) (Anstead, J., concurring) (five pages of transcript). Beyond a reasonable doubt, this brief comment did not affect the jury verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue VII

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ARGUE AGAINST MITIGATION IN THE PENALTY PHASE OF MOORE'S TRIAL.

The trial court, in the exercise of its discretion, controls the comments made in closing argument, and this Court has held repeatedly that a trial court's on such matters will not be overturned absent a showing of a clear abuse of discretion. Hooper v. State, 476 So. 2d 1253 (Fla. 1987), cert. denied, 475 U.S. 1098 (1986); Davis v. State, 461 So. 2d 67 (Fla. 1984). The trial court in this case did not abuse its discretion in permitting the state to argue that mitigating evidence did not ameliorate the enormity of Moore's actions, as such constituted proper argument.

Toward the end of its penalty phase closing argument, the state argued:

> Now, we expect that the Court will give you instructions on how to weigh the aggravation and how to weigh the mitigation and what you do with it after you have weighed it. I would submit to you that it's not a process of numbers. It is not numbers of witnesses who have testified in this proceeding, nor is it numbers of aggravating factors compared to mitigating factors. It is not a quantitative decision. It is a qualitative decision for you to make.
>
> What is the quality of the aggravation and the quality of mitigation? I would submit to you that the Defense put on a lot of

mitigation. They brought in, as I told you, all of the wonderful people who had known this defendant his entire life, who nurtured him, who loved him, who spent holidays with him, who said that he was treated just like their son, their brother, their cousin. That he did well in school. That he played football. That he had a normal life. And, ladies and gentlemen, it may sound like mitigation, but to me its' the most -- well, I would submit to you that it's the most aggravating factor of all. That he alone --

. . . .

Ladies and gentlemen, look at these photographs that the Defense put in. They show a young man who was loved, they show a young man who gave love and got love. It could be mitigation that he was that type of person, but I would submit to you that is all the more reason that he should not have committed any of these crimes; because he did grow up in a decent, loving environment. He knew right from wrong. He had a home, a safe place to go to. He had people who worked and made money. He was taken care of. He did not have to work for a living. He did not have to kill Mr. Johnny Parrish to get money from him. But he did and he chose to do that. And because he did, and because he committed a crime which eliminated a witness, did the crime for financial gain, and had already committed two prior violent felonies, then ladies and gentlemen, that aggravation outweighs the mitigation by any stretch of the imagination.

And for all of those reasons, if you follow the law and if you weigh the aggravating and the mitigation, then, ladies and gentlemen, your advisory sentence, your advisory recommendation, which the Judge will

consider and give great weight to, according to the law, should be one of death.

(T 1526-28) (emphasis supplied).[6]

Regardless of how unartfully worded the underlined portion of the state's closing argument may be, the fact remains that the state correctly described the weighing process and properly argued that very little weight should be given to the mitigating evidence. The mitigating evidence did not explain or excuse Moore's actions, but instead showed exactly why Moore and did not have to commit the horrible acts that he did. Placed properly in context, it is clear that the state meant precisely this.

Moreover, it is clear from the trial court's instructions to the jury (T 1543-48) and the trial court's written (R 501-04) and oral findings (T 1582-86) that the trial court did not portray or consider mitigation as aggravation. Contrast Miller v. State, 373 So. 2d 882, 885 (Fla. 1979).

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[6] Defense counsel asked to approach the bench to make an objection right after the underlined comment; when the trial court told counsel to voice his objection from where he was, defense counsel chose to "voice it after the completion of argument." (T 1527). When the state finished its argument, defense counsel again requested to approach the bench (T 1528). The trial court again asked counsel to make his objection from where he was, and counsel chose to reserve his objection until the close of his argument (T 1529). At the end of defense counsel's closing argument, he made no objection (T 1542). Instead, after the trial court had instructed the jury and the jury had retired, defense counsel registered his objection (T 1549-50).

In any event, any error committed on this point was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). At most, the state's comment was a fleeting one, and was not mentioned in that terminology again. The rest of the state's argument was unobjectionable, and in fact, correctly stated the law regarding weighing and properly argued that the aggravating factors far outweighed any mitigation.

Although not raised by Moore, the state addresses proportionality. It is clear that Moore's death sentence is proportionate to death sentences affirmed by this Court in other cases involving similar facts and a similar balance of aggravating and mitigating circumstances. Watts v. State, 593 So. 2d 198 (Fla. 1992).

The trial court found three aggravating circumstances -- prior violent felony convictions for aggravated battery and armed robbery; the murder was committed to avoid arrest; and the murder was committed for pecuniary gain (T 502). As statutory mitigation, the trial court found Moore's age, but gave it little weight (T 503). Although the trial court considered the testimony of Moore's family and friends as nonstatutory mitigation, it gave this evidence no weight (T 503-04). Compare Gore v. State, 599 So. 2d 978 (Fla. 1992) (24 year old defendant; three aggravating factors

-- pecuniary gain, committed during a kidnapping, and prior violent felony conviction; no mitigation); Gunsby v. State, 574 So. 2d 1085 (Fla. 1991) (defendant, with functional intellect on third or fourth grade level, shot grocery store clerk; three aggravating circumstances -- cold, calculated, and premeditated, prior violent felony conviction, and under sentence of imprisonment; statutory mitigating factor of mild retardation); LeCroy v. State, 533 So. 2d 750 (Fla. 1988) (17 year old defendant shot campers during robbery; three aggravating factors -- prior violent felony conviction, committed during a robbery, and committed to avoid arrest; two statutory mitigating factors -- age and no significant criminal history; various nonstatutory mitigation); Remeta v. State, 522 So. 2d 825 (Fla. 1988) (defendant with mental age of 13 shot store clerk during robbery; four aggravating factors -- prior violent felony conviction, committed during a robbery, committed to avoid arrest, and cold, calculated and premeditated; various mitigation); Preston v. State, 607 So. 2d 404 (Fla. 1991) (19 year old defendant killed store clerk; four aggravating factors -- committed during a kidnapping, committed to avoid arrest, pecuniary gain, and heinous, atrocious, or cruel; statutory mitigating factor of age; minimal nonstatutory mitigation); Deaton v. State, 480 So. 2d 1279 (Fla. 1985) (18 year old defendant killed victim during robbery; three

aggravating factors -- heinous, atrocious, or cruel, committed during a robbery, and cold, calculated, and premeditated; no mitigation).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Moore's conviction and sentence of death.

Respectfully submitted,

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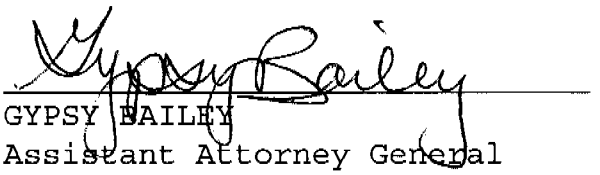
ATTORNEY GENERAL



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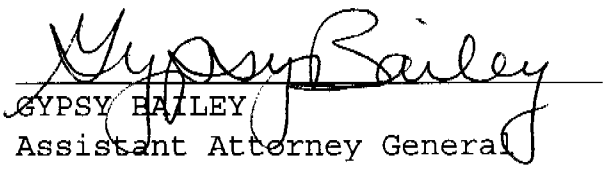
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to BILL SALMON, ESQ., Post Office Box 1095, Gainesville, Florida 32602, this 6th day of March, 1996.



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