IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,485

RONALD SMITH,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Introduction Defendant **was** charged, in an indictment filed on July 10, 1991, in the 11th Judicial Circuit Court, Dade County, case number 91-5033(A), along with codefendants Cornell Austin, Kelvin Bryant, Anthony Cobb, Kevin Noldon, and Towanah Glass, with (1) the first-degree premeditated and/or felony murder of Bridgette Gibbs, (2) the attempted first-degree murder of Trevor Munnings, (3) the robbery of Gibbs, (4) the robbery of Munnings, (5) the kidnapping of Gibbs, (6) the kidnapping of Munnings, (7) the burglary of Munnings's car, (8) the arson of Munnings's car, and (9) conspiracy to commit the alleged crimes. (R. 8-14). Kevin Noldon and Towanah Glass entered into plea agreements and testified at trial. Codefendant Tony Cobb's trial **was** severed. The remaining three defendants were tried jointly. The facts surrounding the disposition of the pretrial motions and voir dire will be addressed in the body of the argument where relevant.

Guilt Phase At trial, the details regarding the ordeal culminating in the murder of Bridgette Gibbs and attempted murder of Trevor Munnings were related primarily through the testimony of Trevor Munnings, Towanah Glass and Kevin Noldon. There was also police testimony as to the statements of Defendant, Austin and Bryant. Each defendant's statement **was** redacted prior to trial so that references to the other defendants being tried together were

deleted and replaced with nondescript pronouns, such as "he," or "some person," or "another person." Pursuant to the request and consent of the three codefendants, the redacted statements retained all references to the three codefendants who were not being tried at this trial *i.e.,* Noldon, Cobb and Glass. (T.4506). The jurors were also instructed that they were to consider each defendant's statement only against that defendant.[1]

On the evening of February 5, 1991, Trevor Munnings picked up Bridgette Gibbs. The two of them went out for the evening. After dropping off other friends and relatives at a high school basketball game, Munnings and Gibbs went out for dinner and a movie. (T. 3970-76). After the movie, they talked and drove around for a while, before stopping at a motel on Northwest 27th Avenue, near 79th Street. (T. 3981-82). Munnings' left the car, to rent a room, while Gibbs remained in the car. (T. 3986-88). Minutes later, Munnings returned and moved the car to another spot. (T. 3990-92). As Gibbs and Munnings got out of the car and walked towards the

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[1] Thus, shortly prior to Detective McDermott's testimony regarding Cornell Austin's confession, the judge instructed the jury that "[t]he following evidence is being offered against Defendant Cornell Austin and Defendant Cornell Austin only. It should not be considered in any way or in any regard with respect to Defendant Ronald Lee Smith or Defendant Kelvin Bryant," (T. 4465). A similar instruction was subsequently reiterated to the jury (T. 4491), and similar instructions were read to the jury prior to the admission of the statements of Kelvin Bryant (T. 4582).

room, someone walked up from behind him, grabbed him by the throat and shoved him to the ground. (T. 3993-94). A second person started searching his pockets, taking his wallet and cash; his car keys, which had been in his hand, fell while this was happening. Munnings was subsequently taken to the trunk of his car, ordered to get into it. (T. 33485). He then heard the perpetrators order Gibbs to get into the trunk. (T. 3486-87).

Munnings then described a car ride of "an hour or more" which entailed several stops along the way. At one of the stops, the trunk of the car was opened and Munnings was ordered to exit, He failed to do so and the perpetrators then grabbed him and pulled him out. (T. 4009-17). Munnings was placed on the ground and started to crawl under the car, but he was caught and pulled back out. (T. 4018). He then felt someone hit him on the back of the head with a rock and further heard someone say "to duct tape me up." (T. 4019-20). Munnings' hands, face and feet were taped, and he was placed back in the trunk. (T. 4020-21). He heard similar things occur to Gibbs. (T. 4028). After they were placed back in the trunk, the car ride proceeded and at another stop, about one half hour later, Gibbs was taken out of the trunk and she was never brought back. (T. 4029-31). The car ride proceeded again, and after about another half hour, the trunk was opened. Munnings continued to feign unconsciousness, as he had done since he was hit over the

head. (T. 4033). He was taken out of the trunk and dragged face down for several feet. Munnings heard the sound of water and heard someone say to "throw him over." (T. 4034-36). Munnings was then thrown into a body of water. (T. 4037). Munnings was able to extricate himself and ultimately obtained assistance from a police officer. (T. 4038-40, 4045). The Maxima was located shortly afterwards and it had been burnt. (T. 4048-49). Munnings was unable to identify any of the perpetrators, but was able to state that four or five black males had been involved in the kidnapping. (T. 4065).

Towanah Glass was one of the codefendants who testified for the prosecution. She had pled guilty to charges of second degree murder, attempted murder, two counts of kidnapping, two counts of robbery, arson and conspiracy, in exchange for a prison sentence of 18 years. (T. 4806). On February 5, 1991, Glass went out with Austin, and they ended up at a game room and bar, where Defendant and Kevin Noldon were present. (T. 4810). Austin, Defendant and Noldon were then joined by Bryant. (T 4812-13). Austin asked Glass to lure cars to the side of the street so that they could rob the occupants of the car, (T. 4813-14). Glass approached one car, but, believing that its occupants may have been police officers, she walked away. (T. 4816). Subsequently, Anthony Cobb drove up and spoke to the other men. (T. 4817-18). Defendant and Cobb were

talking in Cobb's car and, eventually, the five men and Glass all got into Cobb's car, with Noldon driving and Austin and Glass in the front seat, The other three were in the back seat. (T. 4819-20, 4898). Eventually, they ended up by the motel on 27th Avenue, where the victims were accosted. (T. **4820, 4825).** Someone in the back seat said "car in the mo," in reference to Munnings's Maxima. They drove into the lot in pursuit. (T. 4825-26, 4898). All five men exited the Cobb's car, while Glass remained. (T. **4826).** Glass observed Austin grab the male victim around the neck; she also heard Bridgette Gibbs scream and **saw** someone going through Munnings' pockets. (T. 4827). Noldon was holding Gibbs' shoulder while she was on the ground, and Defendant **was** with Austin while Austin was choking Munnings. (T. 4828). Glass saw one of the men open the Maxima's trunk with a key and she then saw Munnings putting his leg in the trunk. Defendant and Austin were in front of him. (T. **4828-29, 4886).** Cobb, Glass and Bryant then drove off in Cobb's car, while the others left the motel parking lot in the victims' Maxima. (T. 4830).

Glass was subsequently given a pocketbook. (T. 4831-32). Both cars continued to drive around, until Cobb's broke down, at which point they all got into the Maxima. (T. 4833). They then drove to Austin's home, where Glass went into the house with Austin, taking the pocketbook with her. (T. **4833-34).** While at Austin's, **Glass**

looked into the pocketbook and realized she knew Gibbs, which she told Austin. (T. 4834-36). Austin then got some tape from his house and rejoined the other four men, leaving with them in the Maxima. (T. 4836). Glass remained at Austin's residence and was not present during the commission of the subsequent acts. Id.

Two days later, the police came to Glass and she gave them Gibbs's purse, and the officers found Gibbs's watch in Glass's dresser. (T. 4848-49). Glass then gave a statement to the police and identified photographs of the other participants. (T. 4854-55).

Kevin Noldon pled guilty to nine offenses, including first degree murder, in exchange for a life sentence. (T. 4759, 5133-34). On the day of the offenses, Noldon met Defendant at a bar. (T. 5141-42). Eventually they met the others outside the bar. (T. 5143). Noldon, Defendant and Austin sat inside Cobb's car and discussed plans to rob someone. (T. 5143-44). Defendant then left for about an hour. When he returned, they resumed the robbery discussion. (T. 5145). They ultimately told Cobb what they wanted to do; Cobb agreed to participate, but did not want to drive. (T. 5145-46). Bryant joined the discussion later. (T. 5147). They drove a few blocks from the bar, and Austin then got Glass to try to stop a car for them to rob, and everyone got out of the car. (T. 5150). That plan did not work out, because Glass thought the occupants of the car that approached were police officers. (T. 5151). Everyone

got back into Cobb's car, and they drove further. (T. 5151-52). Defendant pointed out a car in a motel on 27th Avenue, and Noldon turned the car around and drove into the motel lot. (T. 5153-55). All five men exited the car, while Glass remained inside. (T. 5156-57).

Austin and Bryant approached Munnings, grabbed him and threw him to the ground. (T. 5157-58). Gibbs tried to run but did not make it to the room. (T. 5157). Defendant and Cobb grabbed her and threw her to the ground. (T. 5158). Noldon, saw the car keys on the ground, picked them up and opened the trunk of the Maxima. (T. 5158-59). Austin forced Gibbs into the trunk. (T. 5160). Noldon told Munnings to get into the trunk, because they did not want him to call the police. (T. 5159). After the victims were in the trunk, Noldon, Defendant and Austin got into the Maxima, while the others left in Cobb's car. (T. 5162-63). After Cobb's car broke down, they all got into the Maxima. (T. 5167-69). They heard the victims kicking and making noise in the trunk. *Id.* Austin and Defendant then discussed getting some tape, and they stopped at Austin's house to get some tape. *Id.* At Austin's house, Austin and Defendant went inside and returned with the tape. (T. 5169-70). Glass remained at the house, and the others drove off, looking for a place to tape up the victims. (T. 5171). They then stopped near Defendant's house. (T. 5172). All five men exited the car, and

Noldon opened the trunk. Noldon acted as the lookout while Cobb, Austin and Bryant taped up Munnings. (T. 5173). Munnings tried to crawl under the car, but he was pulled back, and someone hit him on the head with a rock. (T. 5174-75). After the taping, Munnings was placed back in the trunk. (T. 5176). The tape was not holding up well, so Defendant went to get better tape and returned with duct tape. (T. 5177). They pulled into the yard of an abandoned house, and Munnings was again taken out of the trunk and bound with the duct tape. (T. 5180-82). Defendant had "control" of the tape. (T. 5182). Munnings was then placed back in the trunk and Gibbs was taken out. (T. 5183). Defendant then taped her up, including her mouth and face, while she begged them not to. (T. 5184-85). Noldon heard Austin state that he wanted sex with Gibbs and left. (T. 5190). When he returned, the other defendants were holding her, and Defendant was standing in front of her, by her legs. Defendant was sticking an object into her. (T. 5195-92).

Gibbs was then placed back in the car. (T. 5199). At this point the victims had been in the trunk for around two hours. (T. 5200). Noldon continued driving, and there were discussions about dropping the victims off (alive) in the southwest section of Dade County. (T. 5201-02). That plan was changed, however, because

Defendant did not want to drive that far.[2] (T. 5202). Eventually, they drove north on Biscayne Boulevard to 36th Street, and onto the expressway to Miami Beach. (T. 5205). When they got to the top of a bridge, Defendant told Noldon to stop. (T. 5206). Noldon did so, opening the trunk as everyone got out. (T. 5207). Noldon then got back into the car and heard a splash, as the others got back into the car. (T. 5207-08). Defendant said "she was kicking," (T. 5208-09). Noldon resumed driving, and they returned to Biscayne Boulevard and eventually there was a bridge by a canal at a railroad crossing. (T. 5209-11). This time, Noldon helped carry Munnings towards the bridge with two or three others, and Noldon watched as Munnings was then thrown into the water. (T. 5212). Defendant and Austin participated in the throwing. (T. 5213). Defendant waited at the trestle, watching Munnings. He then reported back that Munnings had gotten loose. (T. 5214).

Afterwards, Defendant suggested burning the Maxima. They obtained some gasoline, wiped the prints off the car, and Defendant poured the gasoline on, while Cobb lit a cloth and threw it onto the car. (T. 5215-18). They then fled in Cobb's car, and went out for breakfast, using the stolen cash. Afterwards, they divided the remainder of the cash. (T. 5219-20). They each got $20. (T. 5221).

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[2] At some point Austin had mentioned that Glass knew Gibbs. (T. 5203).

Detective Romagni recounted Defendant's oral confession. (T. 5587). Defendant stated that he met Noldon at the bar on the night in question. They left the bar and encountered Glass, Cobb and some others outside. They were seated in Cobb's car and began to discuss doing some street robberies. They came up with a plan for Glass to pose as a prostitute, and rob anyone who stopped. (T. 5588). They stopped nearby, and Glass got out. The first car had two white males in it, but he also saw what appeared to be a radio, so they looked elsewhere, on foot. (T. 5589). That was also unsuccessful, so they got into Cobb's car, with Cobb driving, Glass and another in the front. He, Noldon, and the last person were in the rear. They drove around for a while, but did not see any victims. (T. 5590). They finally stopped around the corner from a motel on 27th Avenue. Defendant asserted that the others got out, while he and Glass remained in the car. Then he got out and told Glass to drive to the motel, while he walked, (T. 5591). At the motel parking lot, Defendant saw one of them getting into the driver's side of a Maxima. Cobb was standing by the car and Noldon and another one were in the Maxima already. He asked if they had robbed someone, and was told that they would tell him about it. Defendant then got back into Cobb's car, in the back. (T. 5592). Cobb and Glass were in front. They followed the Maxima until Cobb's car broke down, when they joined the rest in the Maxima. (T. 5592). He, Cobb, and

Noldon sat in the back. They began to drive to one of their houses to drop off Glass so they could do more robberies. He was shown a necklace that they got at the motel. (T. 5593). He was also shown $130 in cash, They arrived at the house, and sat deciding where to do more robberies. Defendant claimed that at this point he was told for the first time that the victims were in the trunk. Then one of them went into the house and came back with some clear tape. (T. 5594). Defendant then asked what they were going to do with the victims, and was told they did not know, They then decided to take them to South Dade, tape them up and leave them. Defendant noted that the tape was old and weak and suggested that they go to his house and get some duct tape. (T. 5595). They then took the victims to a nearby crack house. Noldon and another removed Munnings from the trunk. (T. 5596). He resisted, and tried to crawl away, and Noldon grabbed him and one of them struck him in the head. Then that person began to tape Munnings up, while Defendant went around front to act as a lookout. He saw Cobb with Munnings, and saw another remove Gibbs from the trunk and bind her as well. (T. 5597). Noldon and another then got back into the Maxima. He and Cobb got into Cobb's car, with Cobb driving, They followed the Maxima to Goulds or Perrine via the turnpike. They stopped in a dark wooded area, but decided not to leave the bodies there, because they were unfamiliar with the area. Someone suggested

taking them back and leaving them in the Miami area. They returned to Miami, and eventually exited from I-95 to the expressway to Miami Beach, They followed the person in the Maxima to the first bridge on the causeway. (T. 5598). They stopped on the swale area. Cobb pulled up next to them and the driver of the Nissan said he was going to throw the victims in the water. They began to laugh. The driver opened the trunk, and Cobb got out of his car. Defendant went to the back of Cobb's car to act as a lookout. (T. 5599). All the others got Gibbs out and threw her over. (T. 5599). They all looked over and watched her bob. Defendant said "gee," and the others laughed. Then they got back into the cars and proceeded to the location where Munnings was dumped. One of them told Defendant they were throwing Munnings into the canal, (T. 5600). Defendant stood on the tracks while two others, Defendant could not recall who, removed Munnings from the trunk. They threw him in, and they all ran back to the cars. Defendant could see him still moving around from the car. They went a short distance away to burn the Maxima. (T. 5601). Defendant and Cobb waited a few blocks away. Then they went and ate breakfast with the proceeds. They divided up the money afterwards, each receiving about thirty dollars. (T. 5602). Defendant thereafter fled town, and was arrested months later, in Tallahassee, (T. 5605-06).

The statements of Bryant and Austin, which were largely

consistent with the testimony of Noldon and Glass were related to the jury. (T.4466-4537, 4566-4617). As noted, all references to the on-trial codefendants had been excised.

The medical examiner testified that the cause of death of Gibbs was drowning.' (T. 5031). She further testified that Gibbs's chest cavity had an unusually large amount of fluid in it, a result of her lungs attempting to rid themselves of the salt water. (T. 5023). She stated that Gibbs's death would have taken 3 to 6 minutes, once she was in the water, (T. 5050).

The remaining evidence in the **case** consisted of police evidence regarding items found at the various crime scenes, including Gibbs's shorts, which were recovered from an abandoned lot near Defendant's house, (T. 4783, 5064, 5566), and an earing which matched one found on Gibbs's body, that was found in the trunk of the Maxima. (T. 4273, 5005). Defendant **was** found guilty as charged on all nine counts on November 10, 1993, (T. 5950-51).

Penalty Phase The penalty phase commenced on November 30, 1993. The only evidence introduced by the State at the penalty phase **was** documentary proof of Defendants prior violent felony

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} Gibbs **was** found wearing only one shoe, a blouse, and a bra. She was bound hand and foot, and her eyes and mouth were taped shut. (T. 4325, 4349). The medical examiner noted that there was no evidence of rape, but she could not rule it **out** either. (T. 5030).

convictions.[4]

Defendant presented the testimony of various relatives and family friends, who testified as to Defendant's kind and loving nature. (T. 6015-80, 6101-06). A mental health counselor discussed Defendant's alleged alcoholism. (T. 6105-18).

On December 2, 1993, the jury returned a recommendation, by a vote of 9 to 3, that Defendant be sentenced to death, (T. 6541). A sentencing hearing was held before the court on January 14, 1994, at which Defendant presented the testimony of a childhood friend who averred that Defendant had told him he wanted to change.[5] (T. 6666-72). Defendant also gave a statement, asking for mercy. (T. 6673).

On February LO, 1994, the court sentenced Defendant to death for the murder of Bridgette Gibbs. (T. 6700-10, R. 1205-12). The court found that the state had established the aggravating circumstances of: (1) nine prior violent felony convictions; (2)

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[4] Defendant was previously convicted of robbery and attempted robbery, Dade case no. 89-34007, an unrelated robbery, no. 89-43823, and a third, unrelated robbery, no. 90-4148(B). (T. 6013-14). At counsel's request, the jury was informed that Defendant was sentenced, on June 26, 1991, to twenty-five years imprisonment for the third case. (T. 6014). These felonies are in addition to Defendant's violent felony convictions in the instant case for attempted first-degree murder, and two counts each of robbery and kidnapping.

[5] This conversation took place before Defendant's arrest on the present charges, however.

murder committed in the course of a kidnapping; (3) murder committed for pecuniary gain; (4) murder committed to avoid arrest; (5) murder was heinous atrocious or cruel. (R. 1205-08). The court further found that the aggravating circumstances outweighed the established mitigation. (R. 1212). The court had found that the statutory mitigator of age did not apply. (R. 1209). It also rejected the proffered mitigation that Defendant was a good candidate for rehabilitation, noting Defendant's escalating pattern of criminal violence. (R. 1211). The court found that the following nonstatutory factors existed, but gave them little weight: Defendant's contributions to society, his performance of exemplary deeds, that he was loved by children, that he was a good father, son, brother, boyfriend and father figure, that he respected his elders and helped others. (R. 1210-11). The court found that Defendant was considerate to his fellow prisoners, but gave this fact very little weight. (R. 1211). The court gave substantial weight to the finding that Defendant was an alcoholic, and was under the influence at the time of the offense. (R. 1211). Finally, the court gave "some weight" to the codefendants' sentences. (R. 1211). This appeal followed.

SUMMARY OF THE ARGUMENT

1. Defendant has failed to demonstrate reversible error regarding the denial of his cause challenges where the jurors all plainly stated that they could follow the court's instructions.

2. The trial court properly granted the State's challenge for cause of a juror who stated he would follow his conscience in the event of a conflict between it and the instructions or law.

3. The State supplied valid race-neutral reasons for the exercise of its peremptory strike. Defendant's claim that the proffered reason was pretextual was not raised below, and in any event, is without merit.

4. Defendant's contraction of the common flu during voir dire in no way infringed upon any substantial rights. Nor did the circumstances reasonably lead to the conclusion that Defendant's competency was in question.

5. The record reflects that Defendant never invoked his right to counsel at the time he confessed; further, his confession was wholly voluntary and was properly admitted,

6. The confessions of all three on-trial defendants were sanitized to remove **all** specific references to the other defendants, and as such were properly admitted at the joint trial. Further, any error was harmless where Defendant confessed, and two other codefendants pled guilty and testified against him.

7. The evidence of the sexual battery was inextricably linked with the whole course of events over the evening and morning in question, and further was relevant to prove one of the elements of kidnapping, with which Defendant was charged,

8. Defendant's claims of prosecutorial misconduct are simply not supported by the record.

9. Polygraph evidence has long been held inadmissible in this State; Defendant failed to produce any evidence below upon which a reconsideration of that stance could be based. He likewise failed to establish that he had need of a so-called "group violence expert," or that failure to appoint such an expert would render his trial fundamentally unfair.

10. As noted, Defendant was properly tried with his codefendants; nothing raised at the penalty phase altered that fact where the evidence relating to that portion of the trial would not likely confuse the jurors.

11. Again, the record fails to reflect any prosecutorial misconduct during the penalty phase.

12. The evidence was more than sufficient in this murder/kidnapping/robbery to support the pecuniary gain and avoid arrest aggravators where the victims were immediately relieved of their valuables upon abduction, and where the murder victim knew one of the defendants. Any error was harmless in view of the three

other strong aggravators and weak non-statutory mitigation.

13. Defendant's sentence is not disproportionate to the life sentences of two of his codefendants where strong evidence of Defendant's leadership role was contradicted only by Defendant's self-serving statement, and where one of the two pled to all counts as charged in exchange for a life sentence, and testified for the State.

14. The jury was given proper instruction regarding the importance of its role in the sentencing phase.

15. The trial court properly instructed the jury that Defendant would not be eligible for parole for 25 years if sentenced to life.

16. The death penalty is constitutional.

Defendant's convictions and sentences should be affirmed.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CHALLENGES FOR CAUSE.

Defendant's first claim is that the trial court erred in refusing to grant challenges for cause of jurors Nieves, Forsht, Leon and Broche. Defendant has failed to demonstrate reversible error.

Under ***Trotter v.*** State, **576** So. 2d 691 (Fla. 1991), a defendant may only assert error based upon the denial of a cause challenge if, after the denial of the challenge, he used a peremptory to strike the challenged juror, subsequently used all his peremptories, and thereafter requested an additional peremptory to challenge an identified juror. Id. Defendant only requested two additional peremptories, and it therefore follows that if any two of the cited cause challenges were properly denied, he has not shown reversible error.

Defendant asserts that jurors Forsht, Leon and Broche should have been excused for cause because they allegedly "harbored bias in favor of the credibility of police testimony." (B. 23, 26 & 32).[6] This contention is not, however, supported by the record. The

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[6] Defendant also asserts that the trial court erred in not granting his challenge for cause of juror Nieves. However, the record shows that the court followed, without objection, the standard practice of allowing ten peremptories for the 12-person panel, and one strike each for the alternates. (T. 3782-90). Nieves would have served as the second alternate juror, (T. **3785,** R. 138),

trial court is granted wide latitude in determining cause challenges, which are a mixed question of law and fact, and absent manifest error, its conclusions should not be disturbed. ***Castro*** *v.* ***State,*** 644 So. 2d 987, 990 (Fla. 1994); ***Hooper v. State, 476 So.*** 2d 1253, 1256 (Fla. 1985).

Forsht Contrary to the impression given from the snippets that Defendant cites in his brief, juror Forsht repeatedly, and at length, indicated that he would be a fair and impartial juror.[7] The subject of police testimony was first discussed by the prosecutor; Forsht stated that he would have no problem treating police witnesses the same as others:

> MR. LAESER: Mr. Forsht, your background sort of says, I know a lot of cops, friends with a lot of cops. In this case there are going to be police officer's [sic] testifying from the witness stand. Is it going to be especially difficult for you to say, I really have to apply the same rules to those witnesses as to all

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and as such the peremptory which Defendant used to strike her would not have been available to strike the jurors Defendant sought to strike, Whitted-Miller and Ruiz. It follows, therefore, that the peremptory strike of Nieves did not serve to meet the preservation requirements of ***Trotter.*** Whether she should have been stricken is thus irrelevant to this claim,

[7] Defendant's assertion, (B. 31), that Forsht knew "several" state witnesses, and that one of him was his employee is unfounded. Forsht only said that he knew people in the law-enforcement field in Dade County, and that "most [were] troopers and marine patrol," (T. 2705). The employee's affiliation was not noted in the record. Id. In any event as even being a law enforcement officer is not ***per*** se grounds for excusal, ***State v. Williams,*** 465 So. 2d 1229 (Fla. 1985), these allegations are irrelevant.

witnesses because that is what the judge told me to do?
MR. FORSHT: Absolutely, no problem.
MR. LAESER: You think you can do that, you see someone testifying from the witness stand you don't think that person is being one hundred percent honest, is that going to make a difference whether that's a police officer or civilian?
MR. FORSHT: That is correct.

(T. 2393-94). He could follow the court's instructions:

MR. FORSHT: I would accept the Judge's charge and act accordingly.
MR. LAESER: ... Do you think you would be attempted [sic] to disregard the Judge's instructions?
MR. FORSHT: Not at all.

(T. 2585).[8] Further, he would apply the same standards to all witnesses, and could accept the notion that police would lie on the stand:

MS. WARD: ... if a member of law enforcement were to take the stand and testify would you give that person's testimony greater weight or greater credibility because they are a member of law enforcement.
MR. FORSHT: Not at all.
MS. WARD: Would you give them less weight?
MR. FORSHT: I would give them identical weight.

* * *

MS. WARD: ... And one of the ways, [of evaluating the defendant's statement] -- and I understand -- I'm sure you are familiar with -- is whether it was freely and voluntarily given.
Do you think you can make that determination?
MR. FORSHT: Absolutely.
MS. WARD: And what would you consider for that purpose?
MR. FORSHT: Well, whether it was voluntary or whether coercion was used, whether promises were made.
MS. WARD: And you are sort of an expert in this area

[8] Forsht also understood and agreed with the State having the burden of proof. (T. 2837-38).

as compared to many jurors. Do you think that would intrude on your ability to be a juror?
MR. FORSHT: I don't think so.
MS. WARD: Well, the other aspect is in addition to considering whether or not a statement presented as evidence, a statement supposedly given by one of the accused, one of the things I said, the first thing is whether it was freely and voluntarily given and with it [sic] was even given at all.
MR. FORSHT: I understand.
MS. WARD: And what I mean by that is whether or not or not [sic] you are going to have to decide whether or not a law enforcement officer, when he is reciting the statements supposedly made by an accused, whether or not he is making it up.

Can you conceive of that, or would you even consider that a law enforcement officer would take the stand and just say someone made a confession and that it's not even true?
MR. FORSHT: Yeah, I can conceive of that. He's human.
MS. WARD: We're not talking about a mistake. We're not talking about human error, but someone actually getting on the stand, a fellow law enforcement officer getting on the stand and saying, "This is the confession; this is an oral statement that was made to me," and you have to decide whether or not that officer is telling the truth when he says that.

So, do you think it's possible that a law enforcement officer to take the stand and swear to tell the truth and talk about a confession he heard and it's all a lie?
MR. FORSHT: It's feasible, yes.

(T. 2873-75). Moreover, his acceptance of the argument that the police could lie was based on his personal experiences:

MR. SUMNER:' Personally have I know [sic] someone lying on the stand? Yes.
MS. WARD: How about you, Mr. Forsht?
MR. FORSHT: Yes I have.

(T. 2876). The trial court appropriately found that Forsht could

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[9] Juror Sumner was also a police officer.

follow the rules and the law as they were given to him. (T. 3015).

Leon Despite Defendant's creative editing of Leon's statements, the record shows that the cause challenge was properly denied. He plainly indicated, throughout the questioning, that he would follow the court's instructions. Further, in the excised portion of Defendant's quote, (B. 24), Leon explained that his likelihood of believing an officer was not because he was a policeman, but because all witnesses are under oath:

> ***You said something about the truth. I don't know that it's the law enforcement officer.*** He's under oath. He is supposed to tell the truth.

(T. 2879) (language omitted from quote in Defendant's brief in italics). Furthermore, Leon was simply asserting that he was unlikely to disbelieve a witness unless there were some reason to cast suspicion on the witness's testimony:

> MS. WARD: What about you, Mr. Leon, would you feel that unless an accused took the stand and testified that you would probably be inclined to take the officer's word?[10]
>
> * * *
>
> What I'm asking you is whether or not the factors that would be conclusive to you is whether or not the accused took the stand and refuted it.
>
> MR. LEON: Well, if the accused took the stand, I have to consider whatever I have to compare whatever he said, you know, with him and the law enforcement officer, what he said. I don't know.
>
> MS. WARD: What if the accused did not take the stand?

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[10] Leon did not initiate the subject of Defendant taking the stand.

MR. LEON: Then you would have to prove to me the law enforcement officer is lying.

MS. WARD: Would the fact that the accused did not take the stand and refute it be such a strong factor with you that it would be the only thing you would consider in determining whether or not the law enforcement officer was being truthful?

* * *

MR. LEON: *I would have to hear whatever happens in the trial, because I make up my mind about the officer to see the law enforcement as to whether he was lying.*

(T. 2881-82). Defendant appears to argue that unless a juror was prepared to believe that a law enforcement officer was lying without any reason for such a belief, the juror would be unfit. Such is not the basis for a cause challenge.

Broche Finally, the challenge to juror Broche was also properly denied. Like Leon, Broche appeared to be willing to give weight to the witness's testimony, not because he was a police officer, but because he was under oath:

> Just like if you [defense counsel] sit there and give me your testimony I would probably believe what you say too as a citizen.

(T. 3746). Further, in response to questioning by defense counsel, Broche reiterated that he would follow the court's instructions:

> MS. LYONS Do you think that you'd be able to, listening to the testimony of the police officer, look at him the way you would look at any other witness, and at the end of the trial the Judge would instruct you that when you are listening to someone testify there is a whole variety of things you need to take into consideration to determine whether or not that person is being truthful or umtruthful [sic].
>
> Do you think if the Judge would give you those

instructions you'd be able to listen to them and apply them fairly to a police officer the same as any other witness who might take the stand and testify?
MR. BROCHE: I think I would.

(T. 3231-32). Indeed, Broche specifically asserted that he would follow the court's instructions:

THE COURT: I am saying would you believe the testimony of a police officer, more than someone else?
MR. BROCHE: No. I will listen to both.
THE COURT: Will you follow my instructions?
MR. BROCHE: Yes, sir.
THE COURT: As to how you are to evaluate the testimony of all witnesses?
MR. BROCHE: Yes, sir.

(T. 3745).

In view of the foregoing, it cannot be said that the trial court, which was in the best position to judge the demeanor of the jurors, erred in denying Defendant's challenges. ***Johnson v. State, 660*** So. 2d 637, 644 (Fla. 1995) (despite juror's strong feelings, where she said she thought she could follow the law, trial court's conclusion which had benefit of observation of juror's attitude and demeanor would not be reversed based on "cold record"); *Padilla* ***v. State, 618 So.*** 2d 165, 169 (Fla. 1993) (no error where jurors ultimately agreed they could follow instructions and law); ***Penn*** *v.* ***State, 574 so.*** 2d 1079, 1081 (Fla. 1991) (same). Defendant has failed to show manifest error, and as such this claim should be rejected.

II.

THE TRIAL COURT PROPERLY GRANTED THE STATE'S CHALLENGE FOR CAUSE.

Defendant's second contention is that the trial court erred in granting the State's cause challenge of juror Laitner. This claim is not preserved for review, and in any event, is without merit.

When the State ultimately[11] moved to challenge Laitner for cause, none of the defendants' counsel said anything at all. (T. 2261). As such, their acquiescence in the strike prevents review of the issue on appeal. *Joiner v.* State, 618 So. 2d 174, 176 (Fla. 1993) ; *Gunsby v. State, 574 So.* 2d 1085, 1088 (Fla. *1991); Hoffman v. State,* 474 so. 2d 1178, 1181 (Fla. 1985).

Assuming, *arguendo,* that the issue were preserved, it would be without merit. Juror Laitner repeatedly explained that if a conflict arose between his personal moral code and the instructions given, he would follow his conscience:

> MR. LAITNER: ... I guess if I had a strong conviction which was contrary to the instructions or contrary to the law that I felt, those feelings, I would follow them.
> MR. LAESER: I'm not quibbling with you.
> If there is that type of conflict with what the Judge's instructions are and your own moral code, your tendency would be or your feelings would be that you *would put aside those instructions and follow what your*

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[11] Counsel for the codefendants did initially oppose the strike, and the court ruled that further, individual, examination would be conducted. (T. 2253-56). However, when the state again moved to strike him after further examination, (the substance of which will be discussed *infra),* counsel all stood mute. (T. 2260-62).

conscience tells you as the right course of action?
MR. LAITNER: Yes, *absolutely.*

(***T. 1915).***

> MR. ZENOBI: ... Could you follow the Judge's instructions and do what you have to even though you would rather not?
> MR. LAITNER: I don't know what those instructions would entail, I don't know the specifics of this ***case.*** In all probability I could, *but as I said before* **that** *if there* **was** *something* about *that process or procedure* that was *contrary to my beliefs,* ***I would have no problem disregarding those instructions*** and I guess *I maintain that position* today *and fairly strong.*

(T. 2147).

After the State initially moved for cause, the court recalled Laitner for further examination. The juror again confirmed that he would follow his heart over the law:

> MR. LAITNER: I think if I weighed your instructions and there was still something in my belief that would not ***allow*** me to follow those, *I would have no choice but to not follow those.*

(T. 2262-61). Laitner was immediately thereafter stricken on the State's motion, without objection or rehabilitation by the defense. The trial court did not err. *Hill v. State, 477 So.* 2d 553, 555 (Fla. 1985) (juror who cannot render verdict based solely on evidence and instructions should be stricken).

111.

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PEREMPTORILY STRIKE JUROR ALSTON.

Defendant's third claim is that the State's peremptory challenge of prospective juror Alston was not supported by race-neutral reasons. Defendant's arguments that the challenge was pretextual in nature were not presented to the trial court and therefore should not be considered on appeal. Furthermore, Defendant's factual arguments are also repudiated by the record.

Prior to the State's peremptory challenge of Alston, the State had exercised nine other peremptory challenges.[12] Defense counsel had previously raised a *Neil* objection to the State's challenge of Juror Mcultry on the grounds that she was black. (T. 3738-40). The State responded that Moultry was the first peremptory challenge which the State had exercised on a black person and that the State had previously accepted four black jurors on the panel. *Id.*

Alston was the State's tenth and final peremptory. (T. 3774-75). Defense counsel raised a *Neil* objection and the State, subsequent to the trial court's inquiry, provided several race-neutral reasons:

> MR. LAESER: Several things. Obviously several things. One that is not so obvious, her line of work which involves counseling. *I think that counseling in and of*

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[12] Hernandez, (T.2265); Martinez, (T. 3026); Rodriguez-Framil, (T. 3034); Moultry, (T. 3740); Preston, (T. 3741); Ramos, (T. 3749); Ebanks, (T. 3754); Rojas, (T. 3757); Kleer, (T. 3774).

itself, guidance counseling that is the type of work that I would call a help profession. Certainly not the type of juror that I would consider for a penalty phase. She is substantially, my feelings about her responses that if she was going to commit an error in [sic] should be on the side of life. She can believe that of course but that certainly substantiates that she will favor one side **as** opposed to another on the death penalty issues. I think the only other thing that struck me much more personal that [sic] anything else, anybody who would site [sic] Oprah Winfrey for her opinion strikes me as strange and unusual. The nature of the work and prior to that in New York and that fact that she specifically said that she would err on the side of life on behalf of the defense. We would believe that she would be slightly bias [sic] towards the defense and we believe that is the basis for her excusal preamtorily [sic].

(T. 3775-76) (emphasis supplied). The trial court then permitted the State to exercise the peremptory challenge. (T. **3777).**

"Erring on the Side of Life" During voir dire by counsel for codefendant Bryant, Alston commented about erring on the side of life:

MR. ZENOBI: Ms. Alston we have discussed with Ms. Kleer and Ms. Galup the nature of the death penalty in the State of Florida, we discussed it with these fine people here, it is a tough decision. ***You are a guidance counselor, you see people go wrong at a very early age, that might be part of the mitigating circumstances.*** I would suspect it would be if we get to that phase. How do you feel sitting **as** a juror in this case, tell me about if you could accept the responsibility, are you a good person?

MS. ALSTON: Yes I think the responsibility is part of being an upright citizen and I think accepting our responsibility is what makes the system work. I would like to see it and I think those men are entitled to **a** fair and impartial hearing on whatever the charges are and I look at it as part of a civic responsibility to participate. I also feel that and agree with the

> legislatures that err, you *should err on the side of life.*

(T. 3713-14) (emphasis supplied).

Defendant's comparison of the instant case to *Gilliam v. State,* 645 so. 2d 27 (Fla. 3d DCA 1994), is thus misplaced. In *Gilliam,* the challenge was deemed pretextual because the record wholly failed to support the given reason. Here, by contrast, the prosecutor's reason below was plainly supported by the record.

Further, Defendant does not now claim that "erring on the side of life" is not a race-neutral reason, or unsupported by the record. Rather, Defendant asserts that the reason was pretextual, because the prosecutor failed to strike jurors[13] who allegedly gave similar answers. (B. 37). Defendant never asserted this claim below, however.[14] As such, the argument may not now be presented for the first time on appeal. Although this court has not addressed this precise issue, it has held that the trial court's only obligation, after a race-neutral reason has been proffered, is to review the record for support for the reason, *if* the explanation is challenged by opposing counsel. *Floyd v. State, 569 So.* 2d 1225,

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[13] Green, Feliciano, Framil, Hubbard, Laitner, Ruiz, Gomez and Prater.

[14] When the State complained about Alston's comment about erring on the side of life, defense counsel's sole retort was that Alston had previously indicated that she believed in the death penalty, (T. 3776).

1229-30 (Fla. 1990). It thus follows that the objecting party has the burden of raising the issue of pretext. See also *Joiner v. State,* 618 *so.* 2d 174 (Fla. 1993), which requires a timely renewal of prior objections before the swearing in of the jury, reflecting the policy that the trial court be given an opportunity to correct *error,* and *Bowden v. State, 588 So.* 2d 225 (Fla. 1991), which held that failure to object to the reason waives the *Neil* issue.[15]

Assuming, *arguendo,* that this argument were preserved for review, it would be without factual support. Defendant would compare Alston with jurors Feliciano, Green, and Gomez who were excused pursuant to stipulated challenges for cause. (T. 2228-29, 2263-65, 3012-15, 3018-22). There was thus no reason for the State to exercise any peremptory challenges on these jurors, even if the same reason existed for them as for Alston. Laitner was also stricken for cause, on the State's motion.[16] (T. 2260-62). Any

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[15] Out-of-state jurisdictions that have considered the issue have held that the claim of pretext must be raised in the trial court. See People *v. Allen, 629* N.Y.S.2d 1003, 1008-09, 653 N.E.2d *1173* (N.Y. *1995); State v. Antwine, 743* S.W.2d 51, 64 (Mo. 1987) (en banc), *cert. denied, 486* U.S. 1017, 108 S. Ct. 1755, 100 L. Ed. 2d 217 (1988)("If the State comes forth with a neutral explanation, 'the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity.' Defendant now has the obligation to demonstrate that the State explanations are merely pretextual and, thus, not the true reason for the use of the State's peremptory challenges ."); *U.S. v. Alvarado-Sandoval,* 997 F.2d 491 (8th Cir. 1993); *Jones v. Jones, 938* F.2d 838 (8th Cir. 1991) .

[16] See Point II, *supra.*

comparison between Alston and these jurors is therefore utterly frivolous.

Juror Hubbard was excused pursuant to a defense peremptory challenge. (T. *3023).* As such this comparison is also specious. Nevertheless, Hubbard made no comment comparable to Alston's. Hubbard only stated that he did not have a problem with following the law even if he did not philosophically agree with it. (T. 2106-*07).* Also, he had no problem with the death penalty. (T. 1699).

Like Alston, the State excused Framil peremptorily. (T. 3034). During the ***Neil*** inquiry,[17] and the prosecutor explained that she had been involved in a trespass, theft, and a battery on the arresting officer. (T. 3053-54). Framil did not disclose this to the State during her voir dire discussion of the post-arrest internal affairs investigation that she initiated. *Id.* In view of such a compelling reason for a peremptory challenge, Framil's views on the death penalty were utterly irrelevant and academic. Further, Framil's comment was the same as Hubbard's. (T. 2106-07).

The final two jurors to whom Defendant compares Alston are Ruiz and Prater, both of whom served on the jury. In discussing the standards for mitigating circumstances, Ruiz stated he thought they were "fair," and further stated that he would be able to make a decision based on all relevant circumstances. (T. 2941). Similarly,

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[17] The objection was based on Framil's status as a hispanic.

Prater stated, "I believe I can do it [apply the death penalty] justly." (T. 2943). Neither ever said anything remotely resembling Alston's comment. They simply professed an ability to be fair.

Not only do the facts refute any valid analogies between Alston and the jurors cited, they also underscore the value of raising the pretext claims in the trial court, where the State would be able to explain why some jurors were desirable, despite any alleged facial similarity to the stricken juror.

Occupation as Guidance Counselor As noted, the State also cited Alston's profession as a guidance counselor as a basis for the peremptory challenge. The State specifically tied its concern to potential penalty phase proceedings. (T. ***3775).*** Defendant now asserts that this reason was pretextual because the prosecutor did not question her in detail about the significance of her profession or challenge other prospective jurors with similar occupations.

State v. *Slappy*, 522 So. 2d 18, 22 (Fla. 1988), lists certain factors, ***inter alia,*** which tend to show pretext: "(1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, . . . and (5) a challenge based on reasons equally applicable to juror who were not challenged." None of these factors is present here.

Under *Slappy*, a lack of questioning by the State is

significant ***only*** if there is also an absence of pertinent questioning by both the judge and opposing counsel. Here, the court asked some background questions about Alston's employment, as did the State. Defense counsel then engaged in more substantial questioning. (T. 3110-11, 3302-05, 3606-08, 3713-15). Ample basis for the State's concerns about Alston's evaluation of mitigating circumstances thus emerged. Defense counsel specifically questioned Alston about the relationship between her profession and her evaluation of mitigating circumstances:

> You are a guidance counselor, you see people go wrong at a very early age, that might be part of the mitigating circumstances. I would suspect it would be if we get to that phase. How do you feel sitting as a juror in this case, tell me about if you would accept the responsibility, **are you** a good person?

(T. 3703). Alston made the comment about her inclination to "err on the side of life" in response to this question. (T. 3713-14) Further, Alston had previously indicated that as a guidance counselor, she dealt with problems of young people on a daily basis, including matters such as assaults and prostitution. (T. 3606-07). In view of the distinct connection that Alston made between mitigating circumstances and "erring on the side of life," the State fairly concluded that Alston's background as a guidance counselor, her background of dealing with young people's problems on a daily basis, made her someone who was unduly inclined to place

excessive weight on alleged mitigating circumstances. Thus, in contrast to the cases relied upon by Defendant, this is not a case of insufficient questioning or where "the alleged group bias [is] not shown to be shared by the juror in question."

Defendant's remaining argument, that other prospective jurors with similar professions were not peremptorily stricken by the State, was never presented to the trial court, and as such is not preserved for appellate review, as discussed above. Assuming, ***arguendo,*** that the issue were preserved, Defendant's argument would again be factually flawed. Defendant now seeks to compare Alston's background with that of jurors Menendez, Whitted-Miller, Hach, and Aragon. Hach was not a guidance counselor; she was a vocational school technical teacher. (T, 1777). She **was** ultimately challenged for cause by the defense attorneys and excused. (T. 3037-38).[18] Moreover, Hach had a brother-in-law who was a police officer; Alston did not. (T. 1671, 3110). Hach had been harassed by a potentially dangerous psychologically disturbed woman; (T. 1836); Alston's experience as a crime victim was limited to a non-violent car theft. (T. 3303-04). Hach expressed a very cogent understanding

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[18] Defendant makes much of the State's passing up a prior opportunity to peremptorily strike Hach. Defendant's argument is misleading. Jury selection proceeded for approximately 2% weeks, with three panels of jurors. Backstriking of jurors from any of the panels was permitted at any time, and many were. A party's failure to strike an early stage is thus of minimal significance.

and acceptance of the principles of felony murder, (T. 1939-40), and indicated that her dealings with school psychologists were infrequent. (T. 2112). Aragon was likewise not in the counseling field; she was a middle school English teacher. (T. 1666). Furthermore, she was peremptorily stricken by defense counsel. (T. 3749).

Menendez, who did serve on the jury, was not a guidance counselor but was a second grade teacher. (T. 3087, 3685). Further, her godfather, with whom she was very close, was a police officer. (T. 3087). As previously noted, Alston did not have any law enforcement officers in her family. Lastly, Whitted-Miller," who also served on the jury, was an administrative contract manager, (T. 3119, 3337). Her involvement as an elementary school mentor for girls was solely in a volunteer capacity. (T. 3719). She had family members who were police officers, including her sister, who was with Metro Dade Police Department, (T. 3120, 3327), and her professional work **was** related to crime prevention organizations. (T. 3321-22). She had previously worked with **a** prominent Assistant State Attorney, and she had social contacts with two Assistant U.S. Attorneys. (T. 3518-21).

Reference to Oprah Winfrey The prosecutor's final comment

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[19] Defense counsel below noted at one point that Whitted-Miller was "a black woman." (T. 3806).

regarding the strike of Alston was that she allegedly based some of her opinions on Oprah Winfrey. (T. 3775-76). Defendant claims that this reason is not supported by the record. While Defendant appears to be correct, Defendant never raised the point below. As discussed, he should not be permitted to raise the issue now. ***Floyd, 569 So.*** 2d at ***1230;*** *Bowden*, ***588 So.*** 2d at 229; ***State v. Fox,*** 587 So. 2d ***464*** (Fla. 1991);. ***see also*** *McNair* ***v. State, 579 So.*** 2d 264 (Fla. 2d DCA 1991) (where prosecutor had apparently confused comments by prospective jurors, failure of defense to contest prosecutor's factual predicate constituted waiver of issue for appellate purposes).

Lastly, Defendant argues that the reference to Oprah Winfrey is not a race-neutral reason, because Oprah Winfrey is black. That, however, is far from correct. State could effectively have been saying that it did not hold in high esteem individuals who form opinions on serious issues on the basis of what are frequently viewed as "junk-television" talk shows. The prosecutor's reasoning could thus very well refer to the genre of shows of which Winfrey is a part,[20] while having absolutely no relation to any matter of **race,** just as if the alleged response of the prospective juror had referred to Geraldo, Ricki Lake, or Phil Donahue. However, at trial not a peep was heard from the defense that the reference to Winfrey

[20] She is undoubtedly one of the best-known such hosts.

was either factually incorrect or **race-based,** leading the trial court to believe that counsel accepted this as a valid reason.

Miscellaneous Factors Finally, the ultimate question to be resolved through the Neil inquiry is not the validity of the reason itself, but whether the peremptory challenge was impermissibly race-based. ***Slappy; State v. Neil,*** 457 So. 2d 481 (Fla. 1984); *Batson* ***v. Kentucky, 476*** U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Thus, numerous other factors can be relevant, apart from those focused on by Defendant. First, it is highly significant that the State, prior to the challenge in question, had tentatively accepted several black jurors on the panel. (T. 3220-21). ***See Reed*** *v.* ***State,*** 560 So. 2d 203, 206 (Fla. 1990) (significance of fact that two blacks had already been accepted as of time of challenge at issue); *Valle* ***v. State,*** 581 So. 2d 40, 44 n.4 (Fla. 1991) (significance of fact that two blacks served as jurors and a third **as an** alternate); U.S. *v. Marin,* 7 F.3d 679, 686 n.4 (7th Cir, 1993); U.S. *v.* Cooper, 19 F.3d 1154, 1159 (7th Cir. 1994). Similarly, it is also significant that the State had 20 unused peremptories at the conclusion of the jury selection while it apparently had left several black jurors on the final jury.[21]

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[21] In a capital trial with three codefendants, the State would have ten peremptory challenges for each codefendant, or 30 altogether. Rules 3.350(a) and 3.350(b), Florida Rules of Criminal Procedure. ***See*** *Marin;* ***Capers v. Singletax-y, 989*** F.2d 442, 444-45 (11th Cir. 1993).

The trial court is vested with considerable discretion in evaluating the ultimate question of whether a peremptory challenge is race-based. ***Reed; Fotopoulos*** v. ***State, 608 So.*** 2d 784, 788 (Fla. ***1992).*** The foregoing demonstrates the trial court acted correctly.

IV.

DEFENDANT'S CONTRACTION OF THE COMMON FLU DURING VOIR DIRE DID NOT DENY HIM THE RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE TRIAL, AND THE TRIAL COURT DID NOT ERR IN FAILING TO ORDER AN UNREQUESTED MENTAL EXAMINATION.

Defendant's fourth claim is that he was denied the right to be present during voir dire, because he was suffering from the flu at the time. This claim is not supported by the record. He further claims that his due process rights were violated by the court's failure to order a mental status examination. This contention is both unpreserved and without merit.

Defendant was not "Absent" from Voir Dire Contrary to Defendant's assertions, (B. 40), he was not "as early as day six" seeking to be excused for his alleged illness. Counsel made absolutely no reference to illness on October 16, 1993:

> MS. WARD: . . . because of being in jail all the time and everything, he is having trouble staying awake and sitting through the jury selection process, and he has asked if he can be excused from the jury selection process and that he will return for the trial.

(T. 2805-06). Plainly, after six days of jury selection, Defendant

was simply bored.[22] Despite Defendant's assertion that he agreed with counsel's request, (T. 2808), the court declined the request, noting that it did not believe it to be in Defendant's best interest to absent himself. (T. ***2806-08).*** Counsel thereafter explained Defendant's apparent boredom to the jury:

> It is also pressure on these three young men facing trial, and from time to time you may see Ron Smith, my client, and he may look like his eyes are closed, . . . and I don't want you to read into it that he is bored or not taking it seriously . . .

(T. ***2832).*** All of the foregoing took place ***three*** days before any mention appeared that Defendant might be ill. The first inkling arose on October 19, when Defendant indicated to the court that he did not feel well, and did not wish to attend. (T. 3386) . Counsel's initial reaction was to proceed without him: "I have no problem with him being here." Id. The court nevertheless had Defendant produced. *Id.* Defendant appeared and explained that he thought he had the flu. (T. 3390). The court then proposed that Defendant be taken to the clinic during the morning session. No objection was raised by counsel regarding this proposed absence:

> THE COURT: ... So you are actively waiving his presence for the purposes of jury selection this morning?
> MR. KAEISER: Yes.
> THE COURT: Waiving any appellate issues as they may exist with regard to him not being present during the

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[22] The trial court clearly took that to be the situation, observing, "Jury selection is long and arduous, and I get tired, too." (T. 2806).

> selection of his jury in the first degree murder death penalty?
> MR. KAEISER: Certainly, if that's what he wants. It's his wish.
> THE COURT: Are you waiving any appellate rights that you are not so [sic] present during the selection of your jury selection [sic]?
> DEFENDANT SMITH: I'm passing it to my attorney. I don't know the law.

(T. 3391-92). Indeed, the only party to raise any objection was the prosecutor, who insisted that the waiver had to be personal, *Id.* After that objection, counsel then, *for the first time,* proposed a "recess," or "[i]n the alternative we can proceed in his absence." *Id.* The court then stated that Defendant had to request the absence and waive his appellate rights himself. *Id.* Defendant, who was apparently more aware of the proceedings than now alleged, interjected, "That is what I am doing." (T. 3393). The court then questioned Defendant:

> THE COURT: So you are waiving your right to be present during the selection of the jury.
> DEFENDANT SMITH: Yes, sir.
> THE COURT: And you are waiving any possible appellate issues which go to your not being present during this phase of these proceedings, this jury selection?
> DEFENDANT SMITH: As far as the jury goes?
> THE COURT: Yes, sir.
> DEFENDANT SMITH: Yes, sir.

(T. 3393). After further discussion, however, it was decided that Defendant should attend the morning session, and go to the clinic during the noon break. (T. 3393-95). Upon counsel's objection (for the first time) that Defendant was not able to assist in the

process, the court noted Defendant appeared completely functional:

> The Court specifically notes that Mr. Smith is awake, he's alert, he's intelligent, he's engaged in conversation with the Court and he appears to be in good enough shape to proceed and advise his counsel and take part in any discussions with counsel.

(T. ***3397)*** . The court's observations are borne out by its exchange with Defendant, as quoted above.

Defendant was examined during the break, and the nurse reported back to the court: Defendant had the common flu. His vital signs were "fine," and he was not running a fever. (T. 3484-85). The clinic gave him Tylenol,[23] Sudafed, and an over-the-counter, non-narcotic cough syrup to 'control the symptoms." ***Id.*** For the first time counsel now switched the order of their preferences from absence to continuance. However, the court rejected the motion for continuance, noting that although serious illness would justify postponement of the trial, a delay was not warranted under the present circumstances. (T. 3486).

The following day, Defendant reported to the court that he was feeling better.(T. 3636).[24] No further mention of illness was made ***during*** the voir dire. Indeed, it was obvious Defendant was

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[23] Contrary to Defendant's implication, (B. 42), he was *not* given Tylenol cold and flu formula, just 'plain ole" Tylenol.

[24] A conversation was had between Defendant and the court regarding the delivery of his medication. Defendant was plainly coherent. (T. ***3636).***

participating. At one point counsel reported going over the list of jurors with Defendant. Counsel then peremptorily struck juror Faria at Defendant's personal request. (T. 3763). During the ensuing Neil inquiry requested by the State, counsel explained that Defendant had "commented . . . that it seemed to him that [the juror] was treating the death penalty at the same level as [sic] seriousness as balancing books." (T. 3765).

It was not until the eleventh day of voir dire, October 21, 1993, after the jury had been chosen, that Defendant's alleged inability to participate was again raised. (T. 3803). Defendant at that time moved to strike the third panel. *Id.* However, Defendant's alleged "absence" was not even the first ground raised.[25] The court denied the motion, noting that although Defendant was not feeling well, it had been observing Defendant, and had not seen any evidence of his lack of participation:

> That motion is denied and once again observe that although Mr. Smith was not feeling well, we checked him out and he was seen by a doctor, by a nurse, by the people in the clinic. They diagnosed it at the most as a common flu, He received medication for it, he was awake, he was alert, he was intelligent in as far as the Court could observe from this vantage point.
>
> He assisted counsel in the selection of his jury, even before it was indicated to the Court that he was not feeling well. In terms of him dozing off he may have from time to time, I'm not really sure. . . . I don't think that hampered his ability in any way, shape or form.

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[25] Defendant's first reason was because of an alleged prosecutorial reference to publicity. (T. 3803).

(T. 3804-05). Defense counsel noted that when Defendant allegedly dozed off she just woke him, "t-he same thing I **do** with my husband." *Id.* Contrary to Defendant's assertions regarding "uncontroverted record evidence," (B. 44), the only record "proof" that Defendant even fell asleep was thus counsel's claim, two days after the alleged occurrence. The alleged incidents were apparently not of such significance **as** to warrant mention at the time. Further, as discussed *ante* Defendant **was** apparently having trouble staying interested well before there was any suggestion of illness. In view of the foregoing course of events, it cannot be said the trial court abused its discretion in denying Defendant's motions for continuance and to strike the panel.

Competency Examination Defendant also claims, (B. 48), that his due process rights were violated when the court failed to order a competency examination of Defendant. Such an examination was never requested by counsel.[26] **In** the absence of such a request, the trial court is only required to order a competency evaluation where it reasonably appears to the trial court that there is some doubt as to Defendant's competency to proceed. Fla. R. Crim. P. 3.210; *Groover v. State,* 574 So. 2d 97, 99 (Fla. 1991). Here, at most, Defendant may have been drowsy as a result of taking an unspecified

[26] The only examination requested **was medical.** As **discussed** above, Defendant was sent to the clinic and received medication for his flu symptoms.

quantity of an over-the-counter decongestant. As discussed above, the trial court repeatedly observed that Defendant was not impaired in any meaningful way. As such this contention is wholly without merit. ***Groover,*** 574 So. 2d at 99 (where defendant did not exhibit any signs of incompetency, trial court was not obligated to conduct competency evaluation despite fact that he was taking Mellaril); ***Krawczuk*** v. State, 634 So. 2d 1070, 1073 (Fla. 1994) (no error despite defendant being mildly depressed and on Elavil); *Fallada* ***v.*** *Dugger*, 819 F.2d 1564 (11th Cir. 1987) (no error despite seizure the previous night, administration of unspecified quantity of Thorazine, and counsel's claims of inability to assist where trial court observed defendant to be lucid and functional). The facts of cases cited by Defendant in which error was found are qualitatively different from those here. ***See, e.g.,*** Moran ***v. Godinez, 40*** F.3d 1567, 1572 (9th Cir. 1994) (defendant taking Inderal, Dilantin, Phenobarbital and Vistaril, and was suicidal); ***Hill v. State, 473*** So, 2d 1253, 1254-55 (Fla. 1985) (defendant had history of grand mal epileptic seizures, was mentally retarded, behaved bizarrely at trial, suffered organic brain damage, etc.); *Hansford* ***v. U.S., 365*** F.2d 920, 922 (D.C. Cir. 1966) ('uncontradicted" evidence that defendant had "acute brain syndrome" as a result of heroin or morphine use and/or withdrawal; expert testified that defendant was "grossly impaired"); ***U.S. v. Renfroe, 825*** F.2d 763, 767 (3d Cir.

1987)(expert testimony regarding defendant's cocaine use and mental disorders); ***Scott v. State, 420 So.*** 2d 595, 597 (Fla. 1982) (counsel made numerous requests for evaluation); *Riggins v.* ***Nevada, 504*** U.S. **127, 112 S.** Ct. 1810, 118 L. Ed. 2d 479 (1992) (defendant taking 800mg of Mellaril daily; in any event issue before court was impropriety of ***forced*** medication); U.S. v. Mason, 52 F.3d 1286, 1290 (4th Cir. 1995)(defendant attempted suicide, expert testimony indicated mental disease).

V.

DEFENDANT'S MOTION TO SUPPRESS WAS PROPERLY DENIED.

Defendant's fifth claim is that the trial court erred in refusing to suppress his statement. He urges two bases for his position: that the statement was given in violation of his right to trial counsel, and that his waiver of his ***Miranda*** rights was invalid. Defendant has failed to overcome the presumption of correctness that attaches to trial court determinations of suppression issues. ***See Jones v. State, 612 So.*** 2d 1370, 1373 (Fla. 1992). Further, any putative error would have been harmless beyond a reasonable doubt.

Right to Counsel Defendant first asserts that his right to counsel under the Sixth Amendment to the U.S. Constitution and under Article I, Section 16 of the Florida Constitution was violated when police interviewed him after his right to counsel had

attached and been invoked. It is beyond cavil that Defendant's right to counsel had attached at the time he was apprehended and gave his statement to the police in Tallahassee on May 2 & 3, 1991. An indictment had been filed on March 11, 1991, (R. 1-7). The Sixth Amendment/s 16 right to counsel attached at that time. Traylor v. State, *596 So.* 2d *957, 970, 972* (Fla. *1992); Kirby v. Illinois, 406 U.S.* 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). The question presented here is whether Defendant *invoked* his right to counsel. Because Defendant never invoked his right to counsel, notwithstanding the trial court's *in absentia* "appointment" of counsel on his behalf, he may not claim that his right to counsel was breached.

Defendant takes the position that he "need not do anything" to invoke his right to counsel. (B. 54). Defendant's contention wholly conflicts with both this court's construction of Article I, §16, as well as the U.S. Supreme Court's reading of the Sixth Amendment. In *Traylor,* this court rejected Defendant's position under factually similar circumstances. In that case, the defendant was charged by information and the police subsequently initiated questioning of him. The Court held that although Traylor's §16 rights had attached, his statement did not require suppression because "Traylor had not retained or requested counsel" on the charge, and his waiver of counsel was knowing and voluntary. *Traylor, 596 So.*

2d at 972; *see also Phillips v. State,* 612 So. 2d 557, 558 n.2 (Fla. 1992) ("Regardless of when the [§16] right attaches, the defendant must still invoke the right in order to be protected").

Here, Defendant's waiver of his right to counsel was likewise knowing and voluntary. The uncontradicted evidence[27] showed that once he was escorted to an interview room by FDLE Agent Mario Cornelius and Metro-Dade Detective Tom Romagni, Defendant's handcuffs were removed. (T. 953). The detectives then informed Defendant, *inter alia,* of his rights to silence and to counsel:

> Number 2, should you talk to me, anything which you might say might be introduced into evidence in a court, against you.
>
> * * *
>
> Number 3, if you want a lawyer to be present during questioning at this time or at any time hereafter, you are entitled to have the lawyer present,
>
> * * *
>
> Number 4, if you cannot afford to pay for a lawyer, one will be provided for you, at no cost, if you want one.

(T. 946). After the explanation, Defendant was asked:

> Knowing these rights, are you willing to answer my questions, without having a lawyer present?

(T. 947). Defendant responded in the affirmative and in addition to initialing the "yes" box for the explanation of each of the rights, as well as the last paragraph quoted above, signed the following statement at the conclusion of the form:

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[27] Defendant did not testify at the suppression hearing.

THIS STATEMENT IS SIGNED OF MY OWN FREE WILL WITHOUT ANY THREATS OR PROMISES HAVING BEEN MADE TO ME.

(R.702). This written waiver was witnessed and signed by Romagni and Cornelius. (T. 945, R. 702).

Defendant further told them that he had completed the 11th grade, and was not intoxicated. (T. 946). He did not exhibit any behavior suggesting he was under the influence of drugs or alcohol. There was no odor, his speech was clear, and he was coordinated. (T. 947). Defendant did not appear to suffer any memory or speech deficits, and understood what Romagni said to him. Romagni made no promises or threats. Further, Defendant was provided with food, a burger, fries, and a soda. He was also allowed to use the rest room, (T. 953). Defendant was cooperative, alert and attentive. (T. 949). The conversation consisted of Defendant giving narrative answers with the detective occasionally interrupting for the purpose of clarification or details. (T. 950). The total interview took approximately three hours. (T. 951). After the interview, Defendant asked to call his mother, which he was permitted to do. (T. 953).

Based on the foregoing, the trial court properly determined that Defendant had not invoked, but rather had affirmatively waived his right to counsel. A warning that expressly tells the defendant that he has a right to counsel and that an attorney will be

appointed if he cannot afford one, combined with an apprisal of the "ultimate adverse consequences" of waiver, ***i.e.,*** that anything said could be used against him, is "sufficient for general Section 16 purposes." Traylor, 596 So. 2d at 973. Where the waiver is made after a proper warning, complies with Fla. R. Crim. P. 3.111(d) (4) (out of court waiver of counsel must be written and signed by two witnesses), and there is no evidence of deficiency in mental condition, age, education, experience, or any other factor, the waiver will be deemed knowing and intelligent. *Id.*

The foregoing evidence clearly demonstrates that Defendant's waiver of his §16 right to counsel was "valid" under ***Traylor.*** The evidence is likewise unambiguous that Defendant never "requested" counsel. See Traylor, 596 So. 2d at 972. The only question then is whether Defendant had "retained" counsel. *Id.* It cannot be reasonably said that he had.

William Robinson was "appointed" on April 5, 1991, by Judge Gerstein to represent Defendant at a hearing in which the record reflects no appearance by the State. (T. 125-127). Neither Defendant, nor anyone on his behalf, had contacted Robinson seeking representation, (T. 1037). Robinson never spoke with Defendant before his arrest, but did speak to the family. (T. 1038-39). Robinson did not know if Defendant had funds to retain his own attorney, and the issue was not broached at the "appointment"

hearing. (T. 1039, 126-127). Plainly Defendant did not "retain" Robinson,

Defendant's reliance upon *Phillips* and Owen v. **State,** 596 So. 2d 985 (Fla. 1992), is thus misplaced. In each of those cases, the right to counsel was *invoked,* and counsel appointed at the defendant's first appearance, before he gave his statements to the police. *Phillips, 612 So.* 2d at 558-59; *Owen, 596 So.* 2d at 987. Here Defendant never invoked his right before giving his statements. Defendant was initially arrested in Tallahassee on May 2, 1991, pursuant to a warrant and capias, by Cornelius. (T. 984). Cornelius mirandized Defendant before speaking with him. Defendant did not demand an attorney, invoke his right to silence, or request that Cornelius cease questioning. (T. 942, 999). Cornelius interviewed Defendant for 30-45 minutes, at which time he denied involvement in the crimes. At that point Cornelius terminated the interview. (T. 942) . Although he denied involvement in the Gibbs murder, Defendant answered Cornelius's questions. (T. 1000). Defendant was then booked into Leon County Jail at 9:00 p.m. on May 2, 1991, although he was never taken before a magistrate in Leon County. (T. 990, 985). After taking him to the jail, Cornelius had no further discussion with Defendant. (T. 991). Unlike Phillips and Owen, Defendant never invoked his right to counsel, and counsel was never appointed *at Defendant's request.*

Defendant's reliance on the provisions of Fla. R. Crim. P. *3.111* is likewise misplaced. He argues that under that rule appointment of counsel for indigent defendants is mandatory, and therefore purported appointment of an attorney thereunder constitutes an invocation of counsel. (B. *54-55).* Part of the fallacy of Defendant's argument lies in his rewriting of the rule. Defendant edits the initial phrase of R. 3.111(a) to read: "A[n indigent] person *shall* have counsel appointed . . ." (B. 54). The actual rule reads:

> A person *entitled to the appointment of counsel as provided herein* shall have counsel appointed . . .

R. 3.111(a),Fla. R. Crim. P. (emphasis supplied). Among the requirements "provided herein" are a showing of indigency, and advice of the consequences of accepting appointed counsel:

> The court shall, prior to appointing a public defender:
>
> (A) inform the accused that if the public defender is appointed, a lien for the services rendered by the public defender may be imposed under section 27.56, Florida Statutes;
>
> (B) make inquiry into the financial status of the accused in a manner not inconsistent with the guidelines established by section *27.52,* Florida Statutes. The accused shall respond to the inquiry under oath;
>
> (C) require the accused to execute an affidavit of insolvency in the format provided by section 27.52, Florida Statutes.

R. 3.111(b)(5). None of the foregoing provisions were complied with prior to the court's "appointment" of Robinson to represent

Defendant.[28] Indeed, the factual situation presented here underscores the impracticality of adopting as policy Defendant's contention that, based upon R. 3.111, "in Florida a court is *obliged* to appoint counsel to an indigent defendant as soon as he is formally charged." (B. 54). Defendant was, at the time of his indictment and of the "appointment" of counsel, on the run from the law. It would thus have been physically impossible to comply with the rule. As such Defendant was not "a person entitled to the appointment of counsel," for the purposes of the rule and may not bootstrap his failure to invoke counsel from the provisions of R. 3.111. *See Rollins v. State,* 299 So, 2d 586, 589 (Fla. 1974) **("a** defendant is not entitled to state-appointed counsel until he establishes indigency"); *see also State v. Burns, 661 So.* 2d 842, 848 (Fla. 5th DCA 1995) (noting that providing of public defenders at time of giving of breathalyzer test to DUI suspects problematic because of the lack of judicial determination of right to public counsel at that time). Finally, noncompliance with R. 3.111 may not form the basis of the suppression of a confession, absent a showing of prejudice. *Johnson* v. State, 660 So. 2d 637, 643 (Fla. 1995).

Furthermore, absent the assent of the purported client, an attorney may not act on his behalf, *Durocher v. Singletary, 623 So.*

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[28] Section 27.52, Fla. Stat., defines indigency and requires proof thereof before state-paid counsel may be appointed.

2d 482, 484-85 (Fla. 1993) (counsel may not "represent" defendant without his consent); ***Florida Bar v. Jasperson, 625 So.*** 2d 459, 461 (Fla. 1993) (improper conduct warranting disciplinary action for lawyer to act on behalf of "client" he had never met). As such Robinson's purported notice of appearance, filed before he ever contacted Defendant, was simply unauthorized and may not form the basis for attacking the detectives' conduct.

As it is clear that Defendant at no time invoked his right to counsel, and the waiver was valid, he may not claim that his §16 rights were violated. *Traylor*, 596 so. 2d at 972. ***See also Patterson*** *v.* ***Illinois, 487*** U.S. 285, 292-94, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988) (valid waiver of ***Miranda*** rights by indicted detainee who had not yet invoked right to counsel was sufficient waiver for 6th Amendment purposes).

Finally, even if counsel were deemed to have invoked counsel by virtue of the ex *parte* in absentia "appointment" of Robinson, Defendant initiated the contact with Romagni.[29] The record shows that when Romagni arrived Defendant was sitting in a waiting room. Romagni approached and informed him that he was there to return Defendant to Miami. After ascertaining that Romagni was not with the Miami Police Department, Defendant began talking to Romagni, asserting that he was not the leader. The detective told him to

[29] No incriminating statements were made to Cornelius.

wait until they got to the FDLE office where they could talk. (T. 943). Where the defendant initiates the conversation, no §16 violation occurs. ***Palmes v. State, 425 So.*** 2d 4, 6 (Fla. 1983); ***Patterson,*** 487 U.S. at 291 (defendant-initiated conversation not violate 6th Amendment).

Miranda* Waiver** Defendant also avers that his statement should have been suppressed on the ground that his waiver of his ***Miranda rights was not voluntary. As discussed above, the wholly uncontradicted evidence showed that Defendant was fully apprised of his rights, he understood them and initialed and signed the waiver form. He was intelligent, aware, not under the influence, and was not subject to coercion or promises. In short, this latter claim simply is without any factual basis. Further, Defendant's contentions regarding the failure to apprise him of the "appointment" of Robinson are without merit. Police are not required to try and convince a defendant that he needs counsel. ***Palmes v. State,*** 397 So. 2d 648, 652 (Fla. 1981). Furthermore, such information has no bearing on whether the defendant's waiver is knowing and voluntary. ***Moran v.*** *Burbine*, ***475*** U.S. 412, 422, 106 S. ct. 1135, 89 L. Ed. 2d 410 (1986). Finally, there was no evidence that the police were even aware of Robinson's ex ***parte*** appointment. This is not a case like ***Haliburton v. State, 514 So.*** 2d 1088 (Fla. 1987), where, in contravention of an express court order, the

police refused **access** to the defendant by counsel who was present in the station house demanding to speak to his client. See also *Valle v. State, 474 so.* 2d 796, 799 (Fla. 1985) (waiver valid despite counsel's generalized instruction directly to police that they not speak to defendant). The court did not abuse its discretion in declining to suppress Defendant's confession.

Harmless Error Finally, even assuming either of the claims regarding the suppression of the statement had merit, any putative error would be harmless. Two eyewitnesses testified as to Defendant's substantial involvement in the abduction, robbery and disposal of Gibbs and Munnings.[30] *See Traylor v. State, 596 So.* 2d at 973; *Peoples v. State,* 612 So. 2d 555, 557 (Fla. 1992).

VI.
DEFENDANT WAS PROPERLY TRIED WITH HIS CODEFENDANTS.

Defendant's sixth claim is that his trial should have been severed from his nontestifying codefendants' because of the introduction of their statements. This claim is without merit, and any alleged error would be harmless.

The crucial fact in *Bruton v.* U.S., 391 U.S. 123, 88 S. Ct. *1620, 20* L. Ed. 2d 476 (1968), which held that a defendant's 6th Amendment rights were violated when a nontestifying codefendant's

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[30] As Defendant points out numerous times in his brief, his confession minimized his role; it **was** the only evidence introduced at trial to do so.

confession was introduced at a joint trial, was that the nontestifying codefendant's confession *expressly* incriminated the defendant as a participant. 391 U.S. at 124 n. 1. The principles of *Bruton* are not applicable when the codefendant's confession does not refer to the defendant. Thus, in *Richardson v. Marsh, 481* U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), the Court held "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." While the Supreme Court "express[ed] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun," 481 U.S. at 211 n. 5, all jurisdictions to consider that related question have concluded that redactions that substitute the defendant's name with neutral pronouns eliminate the Confrontation Clause problem.[31]

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[31] *See U.S. v. Tutino, 883* F. 2d 1125, 1135 (2d Cir. 1989), *cert. denied, U.S.* , 110 S. Ct. 1139, 107 L. Ed. 2d 1044 (1990) ("a redacted statement in which the names of co-defendants are replaced by neutral pronouns, with no indication to the jury that the original statement contained actual names, and where the statement standing alone does not otherwise connect co-defendants to the crimes, may be admitted without violating a co-defendant's *Bruton* rights."); U.S. *v. Vogt,* 910 F. 2d 1184, 1191-92 (4th Cir. 1990); U.S. *v. Kreiser,* 15 F. 3d 635 (7th Cir. 1994) (term "source" used); U.S. *v.* Strickland, 935 F. 2d 822, 825-26 (7th Cir. 1991) ("another person"); *U.S. v. Washington, 952* F. 2d 1402 (D.C. Cir. 1992) ("individual" or "others."); *U.S. v. Enriquez-Estrada, 999* F. 2d 1355 (9th Cir. 1993) (same); U.S. *v. Vasquez, 874* F. 2d 1515

Subsequent ***to Richardson,*** redacted statements have been deemed improper only where the trial court neglected to give a limiting instruction, ***see U.S. v. Petit, 841*** F. 2d 1546 (11th Cir. 1988); ***U.S.*** *v.* ***Soriano, 880*** F. 2d 192 (9th Cir. 1989); U.S. v. *Perez-*Garcia, 904 F. 2d 1534 (11th Cir. 1990), or the substituted references were clearly understood to be references to the other defendant. See, e.g., *U.S.* v. ***Long, 900*** F. 2d 1270 (8th Cir 1990) (FBI witness, on cross-examination, made it clear that "someone" was codefendant).

While *Bruton* concluded that a limiting instruction could not be presumed to be effective when the statement directly names the other defendant, ***Marsh*** reached a contrary conclusion when the defendant's name is redacted from the statement:

> The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. On the precise facts of ***Bruton,*** involving a facially incriminating confession, we found that accommodation inadequate. As our discussion above shows, the calculus changes when confessions that do not name the defendant are at issue.

481 U.S. at 211. Thus, the above-noted decisions routinely conclude that the limiting instruction suffices when the defendant's name is redacted, and references to that name are replaced by neutral

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(11th Cir. 1989) ("individual") .

pronouns that do not compel the conclusion that the pronoun is indeed the defendant. Under those circumstances, the important interests of the State in utilizing joint trials, 481 U.S. at 209-10, were deemed to prevail.

Thus, it cannot be concluded here that the use of the redacted statements, coupled with neutral pronouns and limiting instructions, violated Defendant's Sixth Amendment rights, As such, severance was properly denied. In neither Austin's statement nor Bryant's statement was Defendant ever referred to by name or by any other form of reference which, on the face of the statement, would compel the conclusion that the neutral pronoun referred to Bryant.

While the State does not believe that other in-court testimony compelled the conclusion that various neutral pronouns in Austin's and Bryant's redacted statements referred to Defendant, even if such "linkage" did exist, it did not result in a 6th Amendment violation. Under *Marsh* there is a difference between codefendants' statements that directly incriminate the defendant and those that do so only when linked with other evidence:

> [I]n this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony).
>
> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit

> the crime" is more vivid than inferential incrimination, and hence more difficult to be thrust out of mind.

481 U.S. at 208. The Court noted that statements that become incriminating, not on their face, but "only when linked with evidence introduced later at trial," are not such as to negate the effect of a proper limiting instruction to the jury. 481 U.S. at 208. ***See also U.S. v. Markopoulos,*** 848 F. 2d 1036 (10th Cir. 1988) (codefendant's statement that was only inferentially incriminating as to other defendant did not result in violation of confrontation clause); ***Vasquez,*** 874 F. 2d at 1518 (although there was other evidence from which jury could speculate that neutral pronouns referred to defendant, where the other evidence did not compel any such conclusion there was no violation of ***Bruton); Tutino, 883*** F. 2d at 1135 ("Under this analysis, whether a co-defendant's statement would be incriminating when linked with other evidence in this case is not relevant if the statement is not incriminating on its face.") .[32]

Defendant's reliance on ***Bryant*** v. State, 565 So. 2d 1298 (Fla. 1990), is misplaced. Three distinguishing factors stand out from the ***Bryant*** decision. First, that decision does not make any reference to the use of limiting instructions by the trial court.

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[32] The ***Marsh*** Court also pointed out that ***Bruton*** involved a codefendant's express implication of his accomplice. 481 U.S. at ***208; Bruton,*** 391 U.S. at 124 n. 1.

More importantly, the Court in ***Bryant*** concluded that the redactions in that particular case resulted in a high degree of confusion. Absent the confusion caused by the particular redactions, it is clear that the result could have differed:

> Further justification for severance in this cause is the prejudicial effect of the redacted statements, which could have confused the jury as to each participant's involvement. This case is distinguishable from *McCray*, in which we found that the "evidence presented **was** not so complex that the jury would be confused by it and incapable of applying it to the conduct of each individual defendant," ***416*** So. 2d at 807, and concluded that the trial judge properly denied the motion for severance. We are unable to make that conclusion from this record. We conclude that these appellants cannot properly be tried together.

565 So. 2d at 1303. Notwithstanding the redactions and substituted pronouns here, there **was** nothing confusing about any evidence presented to the jury. Each redacted statement presented a straight narrative, following a strict time sequence, from beginning to end. Neither the facts of the case nor the various statements were so confusing that the use of the redacted statements would pose a problem for the jury

Finally, the redacted statements in ***Bryant*** were deemed, when considered with one another, to have "effectively inculpated the other codefendants." Id. No such statement can be asserted in the instant case. As previously detailed herein, neither Bryant's nor Austin's statements, in the redacted forms, said anything

incriminating about Defendant, either in and of themselves or when considered with each other.

Lastly, the State would note that even if the admission of the redacted statements, with limiting instructions, were a violation, any alleged error would be harmless. Even in the absence of the codefendants' redacted statements, the remaining evidence compels the conclusion that Defendant was guilty of all of the charged offenses. Noldon and Glass attributed to Defendant the dominant role in the offenses. Defendant's own confession acknowledged his presence and participation in various acts during the night. Defendant remained, by his own admission, with the rest of the group throughout the night's events, sharing the proceeds of the robbery after the murder and attempted murder occurred. Even if, by any stretch of the imagination, Defendant did nothing else, his involvement in the continuing abduction would render him equally guilty of all of the offenses, including the murder of Ms. Gibbs, insofar as all of the related offenses were the natural and foreseeable consequences of the initial acts in which Defendant participated. See *Lovette* v. *State,* 636 So. 2d 1304, 1306-07 (Fla. 1994). Similarly, there has never been any claim that Defendant,[33] while participating in the proceeds of the robbery after the

[33] Even accepting his dubious claim of not having participated in the initial robbery.

completion of the night's work, somehow withdrew from the subsequent acts and communicated such withdrawal to his accomplices. ***See Smith*** *v.* ***State, 424 So.*** 2d 726 (Fla. 1982); *Miller* **v.** ***State,*** 503 so. 2d 929 (Fla. 3d DCA 1987). Under such circumstances, with or without the codefendants' statements, Defendant is a guilty defendant without a defense. Without presenting any form of evidence at trial, all that Defendant could assert was that: Noldon must be lying; Glass must be lying; and Romagni was lying. Perhaps Defendant's "defense" is true; and perhaps the sun won't rise tomorrow, but until the latter happens, the only plausible conclusion is that any *Bruton*/severance error must be deemed harmless. ***See Grossman v. State, 525 So.*** 2d 833 (Fla. 1988) (applying harmless error analysis in context of possible ***Bruton*** error); ***U.S.*** *v.* ***Bennett, 848*** F. 2d 1134 , 1142 (11th Cir. 1988) (same); U.S. *v.* ***Long, 900*** F. 2d 1270, 1280 (8th Cir. ***1990)*** (same); ***U.S.*** *v.* ***Perez-Garcia, 904*** F. 2d 1534 (11th Cir. 1990) (same); ***U.S. v. Soriano, 880*** F. 2d 192, 197 (9th Cir. 1989).

VII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE SEXUAL BATTERY OF THE MURDER VICTIM.

Defendant's seventh claim is that it was error to permit the introduction of testimony regarding the sexual battery of Gibbs with an object. Defendant also asserts that this sexual battery became a feature of the trial. These claims are both factually and

legally without merit

Evidence of uncharged offenses that are inextricably interwoven with the charged offenses, such that the charged offenses cannot be fully or coherently explained without reference to the uncharged offenses, is properly admissible. *Griffin v. State, 639 So.* 2d *966, 969-70* (Fla. *1994); Kelly v. State, 552 So.* 2d 1140, 1141-42 (Fla. 5th DCA 1989); *Jackson* v. *State, 522 So.* 2d *802* (Fla. *1988); Erickson v. State, 565 So.* 2d 328, 332-33 (Fla. 4th DCA *1990); Ashley v. State, 265 So.* 2d *685* (Fla. *1972); Smith* v. *State,* ***365*** So. 2d 704 (Fla. 1978); Byrd v. *State, 504 So.* 2d ***451*** (Fla. 5th DCA 1987); *Reese v. Wainwright, 600* F.2d 1085, 1090 (5th Cir. 1979). Further, the evidence of the sexual battery that came in through Glass's testimony about Austin's statement to Glass, constituted a statement against Austin's penal interest, under section 90.804(2)(c), Florida Statutes, which was fully admissible against all codefendants. *See Maugeri v. State, 460 So.* 2d 975 (Fla. 3d DCA 1984).[34] Moreover, that evidence was introduced with

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[34] Although the Supreme Court of the U.S. has recently given a more limiting interpretation to Federal Rule of Evidence 804(b)(3) than this Court's construction of Florida's rule of evidence, see, ***Williamson v. U.S.,*** 512 U.S. , ***114 s.*** Ct. ___, 129 L. Ed. 2d 476 (1994), that was done as a matter of federal substantive law, not as a matter of constitutional law. Therefore, this Court's construction of the state rule of evidence remains valid under state law. Furthermore, it should be noted that cases such as *Nelson v. State, 490 So.* 2d 32 (Fla. 1986) and ***Williams v. State, 593 so.*** 2d 1189 (Fla. 3d DCA 1992), involved trials occurring prior to the 1990 amendment of section 90.804(2)(c), and

a limiting instruction, advising the jury to consider it solely as to Austin; it was not admitted as to Defendant.[35] The judge also admonished the jurors that the defendants were not on trial for any offenses not charged in the indictment. (T. 5190). Lastly, under no stretch of the imagination did the sexual battery become a feature of the trial. The evidence regarding it consisted of a few short questions and answers from Glass, a few questions and answers from Noldon, and one comment in Bryant's statement to Detective McDermott. In the context of over 1,500 pages of evidentiary proceedings, those references were clearly ***de minimis***. ***See, e.g., Wilson v. State, 330 So.*** 2d 457 (Fla. 1976) (extremely extensive similar fact evidence that spanned over 600 pages approached but did not reach over boundary where prejudice begins to outweigh probative value); ***Dean*** *v.* ***State, 277 So.*** 2d 13 (Fla. 1973) (no error where four other victims used to prove one rape charge); ***Stano v. State, 473 So.*** 2d 1282 (Fla. 1987) (evidence of eight prior murders used to prove aggravating factor in sentencing phase proceedings); Rogers *v.* State, **511 So.** 2d 526 (Fla. 1987) (detailed evidence of two other robberies did not become feature of case);

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their holdings, that statements implicating both the codefendant and defendant are not admissible, are no longer valid, since the 1990 amendment to section 90.804(2) (c) deleted the last sentence to that subsection, which, prior to 1990, had caused such statements to be inadmissible.

[35] Defendant concedes it did not incriminate him. (B. 62).

Burr v. State, 466 So. 2d 1051 (Fla. 1985) (evidence of three other incidents); *Talley v. State,* 160 Fla. 593, 36 So. 2d 201 (1948) (eight other victims used to prove one rape); *Headrick v. State,* 240 So. 2d 203 (Fla. 2d DCA 1970) (nine witnesses called to establish six collateral burglaries); *Johnson v. State, 432 So.* 2d 583 (Fla. 4th DCA 1983) (no feature merely from volume of testimony); *Espey v. State, 407 So.* 2d 300 (Fla. 4th DCA 1981) (score of sexual batteries committed on five other victims to prove one charged crime); *Snowden v. State,* 537 So. 2d 1383 (Fla. 3d DCA 1989) (detailed evidence of two prior sexual batteries used to prove charged offense); *Oats v. State, 446 So.* 2d 90 (Fla. 1984) (five witnesses rebutted defendant's claim that a collateral shooting was accidental). The sexual battery did not constitute a feature of this trial.

Further, the sexual battery was not merely "collateral," even though Defendant was not charged with it. Defendant was charged with the kidnapping of Gibbs and the sexual battery evidence was highly relevant to the proof of the kidnapping. One of the manners of proving kidnapping is by proving the confinement or abduction of a person with the intent to inflict bodily harm upon or to terrorize the victim. §787.01(1)(a)(3), Fla. Stat. As Defendant was charged with the kidnapping, and Defendant is responsible, as a principal, for the acts of his codefendants, and there was

testimony that he was either holding Gibbs down or standing in front of her while the sexual battery was being perpetrated, the acts constituting the sexual battery were clearly relevant to the proof of the statutory elements of the kidnapping. As such, the proof of the terrorization that the sexual battery entailed serves to prove one of the elements of the kidnapping - *i.e.,* abduction for the purpose of terrorizing. Defendant's fundamental premise of this argument - that the sexual battery is essentially a collateral offense since Defendant was not charged with it -- is thus flawed?

Finally, Defendant asserts that any alleged error could not be harmless, because the brief mention of the battery was so "inflamatory." (B. 65). This contention is unsupportable. The most likely source of any combustion of the jury was listening to a tale of two people minding their own business who were set upon by a gang of thugs, who robbed them, stuffed them into their own trunk, drove them around for hours, taped them hand, foot, mouth, and eyes, rode them around some more, callously pitched them into the water alive to drown while bound and gagged, burnt their car, and then casually went for breakfast, all for a profit of twenty dollars apiece. There is no reasonable probability the battery testimony affected the verdict.

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[36] The bulk of Defendant's argument is not a proper discussion of the evidence's *admissibility,* but rather its believability. The latter is plainly the province of the jury.

VIII.

THE PROSECUTOR'S CONDUCT DURING TRIAL DID NOT REQUIRE THE COURT TO GRANT A MISTRIAL.

Defendant next asserts that during closing argument the State improperly commented on Defendant's right to silence, on his codefendant's confessions, and on other matters. He further asserts that there **was** prosecutorial misconduct during opening and the presentation of State witnesses. This claim is without merit

Closing Argument Right to Silence Defendant asserts that the prosecutor's comments regarding the veracity of his statements to the police amounted to a comment on his right to silence. This contention is wholly without merit. Rather, the comments were merely a comment on the evidence presented, and fair reply.

Defendant's entire theory of defense was that there was no credible evidence tying him to the murder, and that the police fabricated all the proof of Defendant's involvement. Counsel expounded, at length, on this theory during opening:

> [O]ne thing you will find in this case, first of all, is that their [sic] isn't any physical evidence that proves Ronald Smith is guilty of first degree murder in this case.
>
> * * *
>
> Now what does that leave? Well that leaves the testimony of witnesses, and their [sic] is really, in our view, in analyzing this case, two types of witnesses. You will see neutral and unbiased witnesses, and you will hear and see witnesses who have a motive to tell something other than the truth.
>
> * * *
>
> Now that leaves us with biased witnesses.

We believe the evidence will show you this, too, and also show you that these witnesses have motives to tell something other than the truth about Ronald Smith.

This group can be divided, once again, into two categories. We have what we call accomplices and we have police witnesses. . . . We have police witnesses who were under intense pressure to solve this case and to arrest people in this case. . .

Now the prosecutor's case -- and, once again, let's look at the source of this evidence. You heard the story. You heard the overview from the prosecutor. Where is it coming from? And it's coming directly from these two sources, biased witnesses with motives to sell [sic] something other than the truth.

* * *

Now let's talk about the other police witnesses in the case.

What you will find -- and you heard from the prosecutor -- they will introduce a statement that the police claimed that Ronald Smith made. What you are going to find and what you are going to hear is that this statement was given to the same police who used questionable interrogation techniques with Mr. Noldon that he will tell you about.

What you are going to find is, as I noted before, that the police in this case were under intense pressure to make arrests and to solve this crime. Mr. Smith was not arrested until well after these other people were arrested. The police will claim to you that Ronald Smith was arrested up in Tallahassee,

They will claim to you that he voluntarily spoke to them and gave them what we call an oral confession. What that means is their [sic] is not a thread of physical evidence to back up what the police say Ronald Smith said to them. It is their testimony. They are going to get up their [sic] and tell you Ronald Smith made a statement to them, and what you are going to find is that Mr. Smith never wrote anything for the police. Mr. Smith's statement was not tape recorded by the police. Mr. Smith's statement was not taken down by a court reporter by the police. The police did not video tape anything between themsleves and Ronald Smith. All of this happened behind closed doors.

In fact, you are going to hear from the police that they even destroyed their notes of this alleged

confession that Ronald Smith made.

Ladies and gentlemen, it simply did not happen.

Now the police will claim to you that this same Ronald Smith who voluntarily confessed that he was guilty of first degree murder of such a terrible magnitude some how [sic] or another refused after he voluntarily refused [sic] to give them any, any, any kind of statement. It doesn't make any sense. It never has.

* * *

You will find from the evidence that their claims are unbelievable.

(T. 3903-06, 3909-11). At trial, however, there was absolutely no testimony from any witness that the police fabricated Defendant's confession. Nevertheless, counsel continued to sing the same song in closing:[37]

[T]he paramount issue in the case against Ronald Smith, the issue that permeates the proof introduced against Ronald Smith, is the issue of police misconduct.

Now this has come to be an underlying theme, connecting thread, of the case against Ronald Smith, a case built on evidence born of beating, torturous lies and deceit.

* * *

Police cover-ups in this country present a long, sad history; and its [sic] been said that the police have the only job where the customer is always wrong and you never hear the police admit that they are wrong.

And as I said before, the reason that we have this sort of mentality is because of the mentality of, the ends justifying the means. We have a terrible murder. Undisputed. The police want to solve this murder. And the evidence shows that they went beyond any legal means to do that.

* * *

We also heard about Romagni's claim that Ronald Smith refused to give this taped statement because of some experience that he had in jail. And I will show you

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[37] Defendant preceded the State in presenting closing argument.

why that is absurd.

* * *

And I submit to you, in a case like this, where there is not even a record of the defendant's statement, you must spend or pay even more attention to that statement, because the possibility of tampering, exageration, lying about that statement is so much greater when there is no record and that just makes sense.

* * *

Romagni will lie for a reason. And what bigger reason is there than getting the most damaging type of evidence possible, a confession against somebody who is a suspect in a case of this magnitude? What bigger reason is there than that?

Now we heard about the Romagni approach. That is to go up there and get a confession. I'd like you to contrast that approach with some of the other witnesses in this case. . . . [N]ow contrast that with Romagni, and I think you begin to see most of the problems that we have considering Ronald Smith's alleged statements to the police.

Ronald Smith did not make this statement. Romagni made this statement.

Now, I submit to you that is what happened in this case, that Romagni wrote it down, he wrote down what he knew the evidence to be and he concocted this statement from Ronald Smith. Now, why did Ronald Smith not give a recorded statement? Romagni wants you to believe that he didn't give you a recorded statement because he was a sophisticated criminal that knew you don't give recorded statements.

Well, that is simply a lie. That was shown to be a lie during this trial.

* * *

It's simply a lie and it's simply another attempt, as I already argued, to prejudice you. It's a cheap shot, calculated to divert your attention, which is the fact that Romagni has no recorded statement of Ronald Smith.

* * *

So we ask you not to fall into the trap that the police fell into in this case, the ends justify the means.

(S.T. 10, 24, 25-26, 28-29, 31-32, 33, 38).[38]

Given the tenor of the defense presentation, the prosecutor's observation that there was "not a single bit of testimony that [the detectives] acted improperly," (T. 5806, B. 68), and his rhetorical questions as to whether there was "one iota of testimony" "from anyone" that Romagni had "acted wrongly," (T. 5734, B. 67), or whether "there [was] any evidence whatsoever" of misconduct by Romagni, (T. 5802, B. 67), were fair comment on the evidence and fair response to defense counsel's assertions.

In ***Dufour v. State,*** 495 So. 2d 154, 160-161 (Fla. 1986), this court held that virtually identical comments[39] were not improper: "[f]ar from commenting on appellant's failure to testify, . . .the statement merely permissibly commented on the evidence," and "merely referred to the lack of evidence on the question," and as such, "fell into trhe category of an 'invited response' by the preceding argument of defense counsel concerning the same subject."

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[38] The morning session of November 9, 1993, during which the defendants presented their initial closing arguments, was omitted from the trial transcripts. The State has moved to supplement the record with a copy of the supplemental transcript of that session from codefendant Bryant's appeal, ***Bryant v. State,*** Fla. 3d DCA case no. 94-1209. References will be to "S.T. ___."

[39] The prosecutor in ***Dufour*** argued, "Nobody has come here and said, [the witnessl's testimony was wrong, or incorrect" and that "you haven't, number one, heard any evidence that Donald Dufour had any legal papers in his cell with him." ***Dufour, 495 So.*** 2d at 160.

See also White v. State, 377 So. 2d 1149, 1150 (Fla. 1980) ("You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument," was "proper" reference to the evidence, or lack thereof, before the jury). Here the State was clearly, and properly, pointing out that there was absolutely no evidence supporting the argument of counsel that Romagni had fabricated Defendant's statement or otherwise acted improperly.[40] This claim should be rejected.

Codefendant Statements Defendant **also** claims that the prosecutor improperly used the codefendant's statement against him. This claim simply is not supported by the transcript of the prosecutor's argument.

Defendant asserts as his first alleged example of improper argument the prosecutor's reading from Bryant's statement regarding the use of tape to tie up the victims as evidence of premeditation. (T. 5749-50, B. 69). However, right in the middle of the quoted passage, a fact which Defendant ignores, is the following statement:

> That is *in defendant Bryant's mind* two and a half hours before the murder. *He* knew when they said they were going to get the tape to tape the people up that they were going to kill them.

(T. 5749). The second example offered by Defendant, (T. 5811, B.

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[40] The trial court specifically noted that it did not feel that the State was commenting on Defendant's silence. (T. 5830).

69), was clearly not an attempt to use Bryant's statement against Defendant. On the contrary the record reflects that the prosecutor discussed the defendants and their statements individually. First he addressed Austin's statement, (T. 5807-10), then Bryant's,[41] (T. 5810-12), and then he proceeded to Defendant's statement. (T. 5812-18). Defendant's final example of alleged impropriety was no more than a concluding discussion of how witnesses testimony may vary in minor ways, but that the small discrepencies did not create a reasonable doubt where each of the defendants admitted that a murder and robbery was carried out and each admitted his own participation. See T. 5818.

A reading of the closing argument as a whole fails to support Defendant's position. Rather, in his lengthy closing the prosecutor focused almost entirely upon the elements of the crimes charged, the claims raised by the various defense counsel in their closing arguments, and the other evidence adduced. There simply was no attempt to use the statements of the codefendants against each other. Indeed, in almost 100 pages of transcript, (T. 5724-5825), the only references found to the defendants' statements at all are found at the above-cited 14 pages, only three of which contain any comment that Defendant finds objectionable. The remainder of

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[41] The discussion included the statement of which Defendant complains.

argument was devoted to the other ample evidence adduced at trial.

Comments To Which Objections Sustained Defendant's final contention regarding closing argument pertains to a pair of comments to which objections were sustained. (B. 70). These comments were brief, not made a feature of the case, and were followed by instructions for the jury to disregard them or for the prosecutor to move on. (T. 5748, 5823). They do not present a basis for reversal.

Other Alleged Impropriety Defendant argues two other allegedly improper comments in this multi-week trial, and from there jumps to the startling conclusion that the entire trial was "permeated" with misconduct by the State.[42] The two complained-of references were brief, a curative was given, and the subject was never mentioned again during this lengthy trial. As such the trial court clearly did not abuse its discretion in declining to grant a mistrial.

Harmless Error As discussed previously, the evidence adduced

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[42] Defendant's characterization of the comment regarding the "random victims" in his brief **as** suggesting the jurors could have been the victims, (B. 71), is not accurate. The prosecutor was discussing what the evidence would show. She **was** explaining that even after stuffing Gibbs and Munnings into the trunk of the car, the evidence would show that the defendants continued to cruise around looking for further robbery victims. (T. 3886). There was clearly no insinuation of a threat to the jurors.

The claim regarding the alleged presentation of perjured testimony through Noldon is addressed at Point IX, *infra*.

was such that any purported error as alleged would have been harmless beyond a reasonable doubt.

IX.
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING POLYGRAPH EVIDENCE OR REFUSING TO APPOINT A "GROUP VIOLENCE" EXPERT.

Defendant argues that the trial court erroneously prevented the defense from admitting, during the penalty phase,[43] the results of various polygraph examinations to which Kevin Noldon submited. The lower court's refusal to do so was fully in accordance with the decisions of this court. Further, this claim is not preserved.

Polygraph This Court has consistently held that polygraph evidence is inadmissible in trial courts absent a stipulation between the parties. See *Delap* v. State, 440 So. 2d 1242, **1247** (Fla. 1983); Davis v. State, 520 So. 2d 572 (Fla. 1988). Whatever reasons may allegedly exist for revisiting this issue, on the basis of scientific advances in polygraph examination, etc., Defendant never argued in the trial court that advances in the art of polygraph examination warrant any reconsideration of the issue; the defense did not proffer any scientific advances; the defense did

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[43] He does not argue that they were admissible during the guilt phase. Although that claim was initially pressed below, it was subsequently abandoned. (T. 4991-92). Further, it should be clear that Defendant does not appear to be arguing that Noldon's ***inconsistent statements to*** the polygraph operators were improperly excluded. ***See Jacobs v.*** *Singletary*, ***952*** F.2d 1282, 1288 (11th Cir. 1992). In any event, such a claim would be meritless, as the statements themselves were not inconsistent. (T. 4369-70).

not proffer testimony from any experts regarding reasons why polygraphs should now be deemed acceptable while they were not in the past. As such, the instant case does not present a viable basis for this court to reevaluate any prior decisions regarding the admissibility of polygraph examinations. Moreover, in view of the failure of the defense to proffer, in the trial court, any scientific advances regarding polygraphs, the question of reconsideration of the admissibility of polygraphs is one that should further be deemed unpreserved for appellate review. See *Correll v.* ***State,*** 523 So. 2d 562, 567 (Fla. 1988) (when a party wishes to challenge the admissibility of scientific evidence that has previously been held inadmissible in Florida, such a party should present a timely request in the trial court, asserting the authorities that are now being posited as the basis for a lack of general scientific acceptance of the testing technique).

The apparent principal basis for the Defendant's request to revisit the issue of polygraph evidence is the decision of the U.S. Supreme ***Court*** in ***Daubert*** *v. Merrell* ***Dow Pharmaceuticals, Inc., 509 U.S.*** ___, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), in which the Supreme Court indicated that the Federal Rules of Evidence had superseded the "general acceptance" standard for admission of

expert testimony.[44] The decision in *Daubert* relates solely to the Federal Rules of Evidence, has no constitutional dimension, and is completely inapplicable to states which choose to rely on different criteria, such as the *Frye* test, for determining the admissibility of scientific evidence. Thus, Florida appellate decisions subsequent to *Daubert* still rely on the *Frye* test. See *Ramirez v. State,* 651 So. 2d 1164, 1167 (Fla. 1995). Defendant posits no compelling basis for either abandoning *Frye,* or as noted previously, for revisting the admissibility of polygraph results.

Finally, even were Defendant's arguments preserved and well-taken, any error would be harmless. Contrary to the editorial presented in Defendant's brief, the test results only challenged Noldon's assertions regarding *his* involvement in the crimes, and even then only three instances. Nothing in the proffers in any way cast doubt on his testimony regarding Defendant's role or the roles of the other defendants. Finally, as Defendant has repeatedly noted in his brief, herculean efforts were made by all three defense teams to try to impeach Noldon as a liar who was only out to save his own skin. The addition of the polygrapher's opinions, which the State could have impeached with well-documented evidence of the tests' lack of reliability, see, e.g., **Farmer** v. City *of Ft.*

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[44] The "general acceptance" test is commonly referred to as the *"Frye"* test, from *Frye v. U.S., 293* F. 1013 (D.C. Cir. 1923).

Lauderdale, 427 So. 2d 187, 190-91 (Fla. 1983) (documenting the many failings of the tests), would have been cumulative, and could not reasonably have affected the outcome.

'Group Violence" Expert As for the claim that he was entitled to a "group violence" expert, Defendant cites no authority for the proposition that he is entitled to have such an expert at public expense. The State has unearthed no precedent directly addressing this point. However, the law regarding the appointment of experts for indigent defendants is quite clear.

This court applies an abuse of discretion standard when reviewing the trial court's refusal to provide funds for the appointment of experts for indigent defendants. *Martin v. State,* 455 So. 2d 370, 372 (Fla. 1984); *Quince v. State, 477 So.* 2d 535, 537, (Fla. 1985), *cert. denied, 475* U.S. 1132, 106 S. Ct. 1662, 90 L. Ed. 2d 204 (1986). The courts that have considered the question generally apply a two part test in determining whether a defendant was improperly deprived of the assistance of expert assistance: (1) whether the defendant made a particularized showing of need, and (2) that denial of such assistance would result in a fundamentally unfair trial. See Moore v. Kemp, 809 F. 2d 702, 710-712 (11th Cir.), *cert. denied, 481* U.S. 1054, 107 S. Ct. 2192, 95 L. Ed. 2d 847 (1987); *Dingle v. State, 654 So.* 2d 164, 166 (Fla. 3d DCA 1995) ; *Cade v. State,* 658 So. 2d 550, 553-555 (Fla. 5th DCA

1995) (on rehearing).

Before applying that test to Defendant's claims, however, it should be noted that to the extent he is asserting a federal claim under *Ake v. Oklahoma, 470* U.S. 74, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), (B. 71), his claim of entitlement to *nonpsychiatric* expert assistance is of questionable merit. See Moore, 809 F.2d at 711:

> The Supreme Court's statement in *Caldwell* implies that the government's refusal to provide nonpsychiatric assistance could, in a given case, deny a defendant a fair trial. The implication is questionable, however, in light of the Court's subsequent statement that it had "no need to determine as a matter of federal constitutional law what *if any* showing would have entitled a defendant to assistance of the type [Caldwell] sought." *Id.*

Citing to *Caldwell v. Mississippi, 472* U.S. 320, 324, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) (emphasis the 11th Circuit's).

Defendant clearly has not met his burden of showing need for a "group violence expert." Defendant's sole record explanation of need was that the expert "could offer expert testimony that the Defendant's individual will and intent was overcome by that of the group." (R. 1180). Perhaps the doctor could testify to such, but in the absence of any evidence *whatsoever*[45] that Defendant's will was

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[45] Even Defendant's statement, which minimizes his participation, fails to contain any claim that Defendant was in any way acting against his own free will. On the contrary, he stated that he was a "tough" person. Further, his own penalty-phase witnesses all extolled his leadership qualities.

overcome, any such testimony woul.d be theoretical at best. See Moore, 809 F.2d at 712 (*Ake* and *Caldwell* hold that defendant must show more than a mere possibility of benefit from a requested expert); *Caldwell*, *472* U.S. at 323 n.1 ("Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision"); *McKinley v. Smith, 838* F.2d 1524, 1530 (11th Cir. 1988) (request for pathologist properly denied where defendant averred little more than that such expert would be beneficial); **Baxter** *v.* Thomas, 45 F.3d 1501, 1511 (11th Cir. 1995) (no error where defendant did not show "substantial basis" for appointment of expert); *cf. Dingle,* at 166 (showing of need sufficient where "defendant eloquently argued" that the State's evidence the expert would have attacked "was pivotal to a determination of guilt").

Likewise, Defendant has failed to show that denial of funds for a such an expert rendered the trial fundamentally unfair. Both Noldon and Glass[46] testified that Defendant was the leader of the group, who pointed out Munnings and Gibbs at the motel, got the better tape, decided not to go south, decided to dump Gibbs in the bay, and decided to burn the car. Defendant's own mitigation

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[46] Glass testified that she thought Defendant was the organizer. (T. 4932, 4937).

witnesses testified that Defendant was strong willed, owned his own home, held a management job at a restaurant, and set aside savings for his children. Any testimony or argument that this tower of strength was in fact a helpless pawn of the mob simply could not have possibly had any effect on the outcome. Finally, *as* noted, any such evidence would have drawn rebuttal from the State, including countervailing expert testimony, which clearly would have had greater factual basis. Additionally, the State could have gone into the underlying facts of Defendant's three prior robberies, which although it was entiled to do, it did not, resulting in further detriment to Defendant. As such the failure to appoint the expert did not render the trial fundamentally unfair.

X.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SEVER DEFENDANT'S PENALTY-PHASE PROCEEDINGS FROM THAT OF BRYANT AND AUSTIN.

Defendant's tenth contention is that the trial court erred in refusing to sever his penalty-phase proceeding from his codefendants'. He alleges that the joint proceeding improperly invited the jurors to compare the defendants' mitigation, to his detriment.[47] This claim is without merit.

To the extent that Defendant suffered any detriment it was

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[47] To the extent Defendant would base this claim on the admission of the redacted statements during the guilt phase, see Point VI, *supra*.

not, as he claims, because his mitigation paled in comparison to his codefendants but because it paled in comparison to the *aggravation* proved against him. The trial court found five aggravating circumstances applied: (1) nine prior violent felony convictions, four of which were unrelated to the present spree; (2) murder committed in the course of a kidnapping; (3) murder committed for pecuniary gain; (4) murder committed to avoid arrest; and (5) murder heinous atrocious or cruel, all of which are well supported by the evidence.[48] (R. 1205-08). By comparison, he failed to prove, or even suggest, (T. 6338), the existence of any statutory mitigation. His nonstatutory mitigating evidence consisted, as noted in his brief, (B. 80-81), primarily of evidence showing that he grew up in a stable and wholesome home environment, was a Boy Scout, was known as "church boy," was goal-oriented when he wanted to be, capable of holding a responsible job and providing for his children's future. It is arguable that these facts, rather than mitigating Defendant's conduct, tend to show that he had absolutely no excuse for his behavior.[49] The only other mitigation

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[48] Defendant has challenged only two of these aggravators. His claim that the facts did not support the pecuniary gain and witness elimination factors is also meritless. See Point XII, *infra.*

[49] The trial court nevertheless found that these facts established mitigation, but were entitled to little weight. (R. 1210-11). Defendant does not challenge any of the court's findings regarding mitigation.

presented related to Defendant's alleged alcoholism and use of alcohol on the night of the murder. Although the court found these factors to exist and jointly gave them substantial weight, (R 1211), the evidence supporting them was, in fact, weak. The claim of alcoholism was attested to only by a social worker who relied solely on self-report. Defendant's family and friends denied any drinking problems. Likewise, although the witnesses attested to the use of drugs and alcohol during the night of the murder, they also stated that he was not impaired, a claim borne out by Defendant's extensive activities and clear recollection of events throughout the night. In short, when Defendant's proffered mitigation was weighed against the substantial aggravation, the jury's recommendation was inevitable.

Furthermore, severance may be granted only when failure to do so would deny the defendant a "fair determination" of the issues by the jury. *McCray v. State,* **416 So.** 2d 804, 806 (Fla. **1982);** ***Espinosa v. State, 589 So.*** 2d 887, 891 (Fla. 1991). No severance is necessary when the circumstances are such that the jury will not become confused:

> This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to

> determine the individual defendant's [sentence].

Espinosa, 589 So. 2d at 891, ***quoting*** *McCray*, ***416 So.*** 2d at 806. The Court further explained that in the non-*Bruton* context[50] certain "general rules" apply. These "rules" provide that a better chance of acquittal, strategic advantage, or hostility among defendants are not valid bases for severance. ***Id.*** Yet plainly such factors are the very basis of Defendant's claim.

The record reflects that there was no chance that the jury was unable to provide him with a "fair determination" of his sentence. As noted above, Defendant's problem was not a comparison of his mitiagation with his codefendants' but with his deeds. Further, the record reflects that the prosecutor addressed each of the Defendant's individually.[51] (T. 6402-06, 6406-12, 6412-17). He reminded that jurors that the defendants were to be treated separately, (T. 6431-32), as did defense counsel. (T. 6452). Ultimately, the jury's recommendation of life for Bryant and Austin and death for Defendant makes it abundantly clear that they ***did*** treat the defendants individually;[52] that appears to be his real

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[50] As discussed above, the codefendants' confessions were properly admitted here, and in any event their admission was harmless. See Point VI, *supra*.

[51] Defendant's allegations, (B. 81), of prosecutorial misconduct are meritless. See Point XI, ***infra.***

[52] The varying sentences are proper. See Point XIII, ***infra.***

complaint, despite his characterization of the issue to the contrary. This claim should be rejected.

XI.

THE PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT WAS NOT IMPROPER.

Defendant's eleventh claim is that the prosecutor improperly used his codefendants' statements against him during the penalty-phase closing argument. This contention is without merit.

Contrary to his contention regarding his joking as Gibbs bobbed helplessly in the water, his *own* statement revealed that he locked at her and said "Gee?" in a humorous manner, which caused his codefendants to laugh. (T. 5600). Likewise, the argument that the State was using Bryant's assertion that they drowned Gibbs so she would not identify them against all defendants is without basis. The record shows that on the contrary, the prosecutor was arguing that ***even though*** only Bryant explicitly said as much, the motive of all the defendants demonstrated by ***their*** *own* actions. (T. 6421-24).

The alleged issue concerning reference to serial killers is not preserved. Although defense objection was sustained, no request for either a curative or mistrial was requested+ (T. 6402). ***Ferguson v. State,*** 417 So.2d 639 (Fla. 1982). As to the second comment, a curative was given. Both comments were brief, a curative was given when requested, and the subject was never mentioned

again. As such the trial court clearly did not abuse its discretion in declining to grant a mistrial.

XII.

THE EVIDENCE WAS MORE THAN SUFFICIENT TO ESTABLISH THE PECUNIARY-GAIN AND AVOID-ARREST AGGRAVATORS.

Defendant's next contention is that the trial court erred in finding pecuniary gain and avoid-arrest as aggravating factors. The evidence clearly supported both findings. Further, any error was harmless.

Pecuniary Gain The evidence in this case clearly supports the pecuniary gain aggravating factor. Ample evidence showed that the *only* reason Gibbs was initially abducted was in furtherance of the robbery.[53] Further, that abduction lead in inexorable sequence to her death, and Defendant admittedly shared in the proceeds. The trial court properly applied this factor. *Allen v. State, 662 So.* 2d 323, 330 (Fla. 1995) (factor proper where evidence showed defendant's "entire association" with victim was motivated by financial gain); *Finney v. State,* 660 so. 2d 674, 680 (Fla. 1995) (aggravator proper where defendant was motivated at least in part by pecuniary gain, and defendant received personal gain); *Thompson* v. State, 648 So. 2d 692; 695 (Fla. 1994) (aggravator

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[53] Despite challenging several other factors as factually unsupported, the defense did not object to instructing the jury on this factor. (T. 6328).

proper where defendant gained financially and thereafter killed victim to eliminate witness); ***Preston v. State, 607 So.*** 2d 404, 409 (Fla. 1992) (same); ***Harmon v. State,*** 527 So. 2d 182 (Fla. 1988) (same). Defendant claims, (B. 85), that upholding the aggravator here would sanction ts finding in any **case** where "a homicide followed, by any time period, a property offense against the victim." Such is clearly not the case here. All the events related at trial, culminating in Gibbs's death, were plainly part and parcel of one continuing transaction.

Avoid Arrest Likewise, the evidence also supports the conclusion that the murder **was** committed to eliminate the only witness who knew one of the defendants, Gibbs. The evidence showed that Glass knew Gibbs, and that that information was related to the group. Further, Noldon testified that Gibbs's drowning was refered to as a solution to their "problem."[54] ***Preston v. State, 607 SG.*** 2d 404, 409 (Fla. 1992) (aggravator proper where robbery victim abducted from scene of crime to another location and killed; factor may be proved by circumstantial evidence); ***Thompson v. State, 648*** So. 2d 692, 695 (Fla. 1994) (same); ***Harmon v. State, 527 So.*** 2d 182

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[54] Defendant's claim, (B. 87), that the witness elimination motive is belied by the defendants' inaction in the face of their knowledge that Munnings had gotten loose, is meritless. The testimony was clear that only Gibbs knew any of the defendants, a fact borne out by Munnings's inability to identify any of the defendants.

(Fla. 1988) (same); *Swafford v. State 533 So.* 2d 270 (Fla. 1988); *Cave v. State,* **476** So. 2d 180, 188 (Fla. 1985), *sentence vacated on other grounds, Cave v. Singletary,* 971 F.2d 1513 (11th Cir 1992) (same).

Harmless Error Finally, as has been discussed, this was a case of substantial aggravation, including nine prior violent felonies, a very strong case of HAC, and the commission of murder during a kidnapping, none of which is challenged, and minimal nonstatutory mitigation. As such there is no reasonable possibility that even if either or both of these factors was improperly found, the sentence would have been different. *Peterka v. State, 640 So.* 2d 59, 71-72 (Fla. 1994).

XIII.
DEFENDANT'S SENTENCE IS PROPORTIONAL.

Defendant next asserts that his sentence is disproportionate as to codefendants Austin and Noldon. Neither of these contentions is sustainable. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright,* 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State, 564 So.* 2d 1060, 1064 (Fla. 1990),

cert. *denied,* *U.S.* ___, 111 S.Ct. 1024, 112 L.Ed. 2d 1106 *(1991)*. "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." *State v. Henry, 456* So. 2d 466, 469 (Fla. 1984).

Defendant's claim regarding the sentence of his codefendants is without merit. The primary inquiry that this court undertakes in conducting proportionality review is not the comparison of codefendants' sentences, but a comparison between the defendant's sentence and those of others whose death sentences have been upheld or reversed. See *Garcia* v. State, 492 So. 2d 360, 368 (Fla. 1386):

> Appellant's argument misapprehends the nature of our proportionality review. Our proportionality review is a matter of state law. Pulley v. *Harris, 465* U.S. 37, 1.04 S. **Ct. 871,** 79 L. Ed. 2d 29 (1984); *State v. Henry, 456 so.* 2d 466 (Fla. 1984). Such review compares the sentence of death to the cases in which we have approved or disapproved a sentence of death. It has not thus far been extended to cases where the death penalty was not imposed at the trial level. *Proffitt v. Florida, 428* U.S. 242, 259, n. 16, 96 S. Ct. 2960 n. 16, 49 L. Ed. 2d 913 (1976) ; *Palmes v. Wainwright, 460 So.* 2d 362 (Fla. 1984); *Brown v. Wainwright, 392 So.* 2d *1327* (Fla.) *cert. denied,* 454 U.S. 1000, 102 S. Ct. 542, 70 L. Ed. 2d 407 (1981).

Furthermore, taking the evidence in the light most favorable to sustaining the result below, Defendant was substantially more culpable than his codefendants. Defendant was the oldest, by several years. Acccording to Noldon, discussion of the planned robbery was suspended in Defendant's absence. Defendant pointed out

the motel and victims. Defendant was involved in the initial idea of taping the victims up. Defendant was the one who determined that the original tape was inadequate and went and got the duct tape, and was in "control" when the victims were being taped. Defendant rejected the plan to release Gibbs and Munnings alive in South Dade. Defendant told Noldon when to stop on the bridge where Gibbs was dumped. Glass felt Defendant was the organizer. None of the evidence attributed such a leadership role to any of the other defendants.

Further, Noldon pled guilty and agreed to be a witness for the State, in exchange fcr a life sentence.[55] The State also submits that under Florida's sentencing scheme, the question of "culpability" by definition necessarily includes the factors in aggravation and mitigation. Defendant had four prior violent. felonies to Austin's one. As noted previously Defendant's mitigation was weak. Austin, however, in addition to being younger than Defendant, presented much more significant mitigation. In contrast to Defendant's idyllic upbringing, Austin's father was imprisoned for armed robbery for five years when he was a baby, and again incarcerated when Austin was a teenager, He was raised by a

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[55] The decision to prosecute or not, or to grant immunity is wholly within the discretion of the State Attorney. Her decisions in such matters are questions of executive prerogative not subject to judicial scrutiny. *State* v. Bloom, 497 So. 2d 2, 3 (Fla. 1986).

distant stepfather who berated him and told him he would be a jailbird just like his dad. The stepfather also drank and beat his mother on a regular basis. He had a borderline IQ and performed scholastic functions at an elementary school level. He contracted meningitis as a child, which could have resulted in organic brain dysfunction. Finally, the clinical psychologist testified to an incident, which the doctor believed to be sincere, in which Austin broke down and cried, stating that he wished he could take Gibbs's place.'"

In contrast, Defendant's background information reflected that he had had a good childhood in a loving home. He was a Bcy Scout, and went to church regularly. As an adult, he had held a responsible job, was able to purchase a home, and put money aside for his children's future. He simply should have known better.

Under such circumstances, this court has repeatedly approved the imposition of the death penalty where a codefendant received life. Cardona *v. State, 643. So.* 2d 361, 365 (Fla. 1994) (challenge to proportionality of death sentence in face of codefendant's life

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[56] Although Defendant has not challenged his sentence vis-a-vis Bryant, it should be noted that Bryant was only 17, he had no prior violent felony convictions, and his mitigation was more compelling, including the fact that both his parents had died of AIDS, which his father had given to his mother. The trial court apparently noted these distinctions also. Defendant received death, Austin consecutive life sentences, and Bryant concurrent life sentences.

sentence rejected where defendant more culpable) ; *Steinhorst v. Singletary, 638 So.* 2d *33, 35* (Fla. 1994) (same); *Hannon v. State, 638* So. 2d 39, 44 (Fla. *1994)* (same); *Colina v. State, 634 So.* 2d 1077, *1082* (Fla. *1994)* (same); *Coleman v. State, 610 So.* 2d 283, *1287* (Fla. 1992) (same); *Robinson v. State, 610* So. 2d 1288, 1292 (Fla. 1992) (same); *Downs v. State, 572 So.* 2d 895, 901 (Fla. 1990) (same); *Williamson v. State,* 511 So. 2d 289, 293 (Fla. 1987) (same); *Troedel v. State, 462* So. 2d 392, 397 (Fla. 1984) (same); *Tafero v. State, 403* so. 2d *355, 362* (Fla. 1981) (same); *Jackson v. State, 366* So. 2d *752, 757* (Fla. 1978) (same). Defendant's sentence should be affirmed.[57]

XIV.

THE JURY WAS NOT MISLED AS TO ITS ROLE AND RESPONSIBILITY DURING THE PENALTY PHASE.

Defendant's fourteenth claim is that the jury was misled as to its resposiblity for sentencing. This claim is not preserved, and is without merit.

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[57] Although not raised by Defendant, the State is aware that the Court conducts review in all capital cases to ensure that their sentences are proportional to other cases in which the death penalty has been imposed, As noted, this case presents five strong aggravators and minimal nonstatutory mitigation. Under similar factual circumstances, this court has repeatedly upheld a sentence of death. See *Preston v. State,* 607 So. 2d 404, 409 (Fla. 1992); *Thompson v. State, 648 So.* 2d 692 (Fla. 1994); *Harmon v. State, 527 So.* 2d 182 (Fla. 1988); *Swafford v. State 533 So.* 2d 270 (Fla. 1988); *Cave v. State, 476 So.* 2d 180 (Fla. 1985), *sentence vacated on other grounds, Cave v. Singletary,* 971 F.2d 1513 (11th Cir. 1992).

Defendant bases his claim on comments made by the State and the court during voir dire and his assertion that the standard instruction is inadequate. These claims were not raised below and as such are not preserved. *Sochor v. Florida,* 504 U.S. , 112 s. ct. 2114, 119 L. Ed. 2d 326, 338, n. * (1992) (objection necessary to preserve sentencing jury instruction issues) ; *Reichmann v. State,* 581 So. 2d 133 (Fla. 1991) (claim of prosecutorial misconduct not reviewable on appeal unless preserved by objection and request for curative instruction).

Even assuming, *arguendo,* that these claims were properly before the court, they would be without merit. *Caldwell v. Mississippi,* 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), "is relevant only to certain types of comment -- those that mislead the jury as to its role in the sentencing process in **a way** that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright, 477 U.S. 168, 184,* n. 15, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). Here, the prosecutor did note during voir dire that the ultimate decision regarding Petitioner's sentence would be in the hands of the judge. The prosecutor's statements, however, went further, and did not create the misleading impression condemned in *Caldwell* and *Mann.* He pointed out, during voir dire, and again in his penalty phase closing argument, as the Florida Supreme Court established in

Tedder, that the the judge was supposed to give the jury's recommendation "great weight." (T. 1870, 6387). He also admonished the jurors as to the gravity of their duty. (T. 6388). Further, the solemnity of the jurors' responsibility was emphasized by the court:

> [I]t *is now your duty to advise the court as to what punishment should be imposed upon the Defendant . . .* it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings. . . .
>
> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating against the mitigating circumstances, and your advisory sentence must be based on these considerations . . .
>
> The fact that the determination of whether or not a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without *due regard to the gravity of these proceedings.* Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, *realizing that a human life is at stake,* and bring to bear your best judgment . . .

(T. 6531, 6535-36). As such, the comments of the prosecutor and judge did not serve to diminish the jury's sense of responsibity, but emphasized the gravity of their responsibilities. No error occurred.

XV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE EFFECT OF A LIFE SENTENCE.

Defendant alleges that the trial court erred in refusing to instruct the jury "on the meaning of a life sentence." (B. 92). This claim is without merit. The record reflects that what Defendant sought was not a proper instruction that Defendant was subject to life without possibility of parole for 25 years,[58] but rather an instruction that would have charged the jury to presume that a life sentence meant Defendant would never be released. (T. 6355). Such is a clear mistatement of the law under which Defendant was sentenced, and was properly denied. *Simmons* v. ***South Carolina,*** ***U.S.*** ___, **114 S.** Ct. 2187, 129 L. Ed. 2d 133 (1994), does not compel1 a contrary result. *Simmons* only requires that a defendant be allowed to inform the jury, ***either-*** through counsel or the court of ineligiblity for parole under state law, where future dangerousness is an issue.

First, future dangerousness is not an aggravating circumstance in Florida. Second, even if it were, the only accurate statement that could be given under the law at the time of Defendant's offense and trial was that life meant at least 25 years without possibility of parole. Anything beyond that would be speculative,

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[58] The standard instruction to that regard was given, at both the beginning and end of the proceedings. (T. 5999, 6536).

and not a proper instruction.

In any event, the court acceeded in Defendant's request to admit into evidence Defendant's 1991 25-year habitual violent felony offender sentence. (T. 6014). Counsel then argued during closing that Defendant would be subject to a 25-year minimum mandatory, that he could be consecutively sentenced, that he would serve the 1991 sentence before he even started his sentence in this case, and that each of the nine offenses in this case could also be consecutively sentenced, and that as a result he would probably never be released. (T. 6460-62). Defendant was given all to which he was entitled in this regard. *Turner v. Dugger, 614 So.* 2d 1075, 1080 (Fla. 1992)(such argument proper, jury instruction not required) . The jury was in no way mislead as to Defendant's potential sentences. As such, Simmons, to the extent it is deemed to apply here, was also satisfied

XVI.

FLORIDA'S DEATH PENALTY PROVISIONS ARE CONSTITUTIONAL.

Defendant's final contention is that the death penalty statute is unconstitutional for failure to require a unanimous verdict, and for failure to provide the jury with adequate guidance in "the finding of sentencing circumstances." (B. 93). As Defendant notes such contentions have been previously rejected. *Dixon v. State, 283 so.* 2d 1 (Fla. *1973); Proffitt v. Florida, 428* U.S. 242, 96 S. Ct.

2960, 49 L. Ed. 2d 913 *(1976); Arango v. State, 411 So.* 2d 172, 174 (Fla.), *cert. denied, 457* U.S. 1140, 102 S. Ct. 2973, 73 L. Ed. 2d 1360 (1982), *rev'd on other grounds, 467 So.* 2d 692 (Fla. 1985); *Stewart v. State, 549 So.* 2d 171, 174 (Fla. 1989); *Robinson v. State,* 574 So. 2d 108, 113, n. 6 (Fla. 1991); *Walton v. Arizona,* 497 U.S. 639, 649-651, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to, **BENJAMIN WAXMAN**, 2250 Southwest Third Avenue, Fourth Floor, Miami, Florida 33129, this 19th day of July, 1996.

RANDALL SUTTON
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