IN THE SUPREME COURT OF FLORIDA

GERALD D. MURRAY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 83,556

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, GERALD D. MURRAY, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State cannot accept Appellant's nine-page statement of the case and facts which, although reasonably accurate, is wholly incomplete, given that the record in this case is 2,967 pages long. Therefore, the State will offer its own statement of the case and facts as follows:

Appellant was indicted on April 9, 1992, for the first-degree murder of Alice Vest, for the burglary of her home with an assault, and for the sexual battery of Ms. Vest, all of which were allegedly committed on or between September 15-16, 1990. (R 1-2). Assistant Public Defender John Ledbetter was appointed to represent Appellant on April 28, 1992, and Dr. Harry Krop was appointed as a confidential mental health expert on May, 19, 1992. (R 10, 14-15). In July, Mr. Ledbetter was allowed to withdraw, and Teresa Sopp was appointed to represent Appellant. (R 22-23, 33; T 27, 31-32). Thereafter, Appellant filed a Notice of Alibi, and two continuances were granted at defense counsel's request, although the State's motion was denied. (R 37-38, 41, 42-45, 47-49; T 70-75, 76-77, 82-83). Appellant also waived his speedy trial rights. (R 50; T 83).

On November 21 or 22, 1992, Appellant escaped from the jail and was not rearrested until September 18, 1993. (R 74). Thereafter, Teresa Sopp was allowed to withdraw, and Henry Coxe was appointed to represent Appellant. (R 77-78, 84-85; T 96). Mr. Coxe immediately withdrew because of conflict, and Brent Shore was appointed to represent Appellant on October 7, 1993. (R 79, 82-83; T 103-05). Dr. Krop was again appointed to exam Appellant confidentially. (R 92-93, 94-95). On December 10, 1993, Mr. Shore moved to withdraw. (R 100-01; T 168-71, 175-77). During the pendency of that motion, the State filed two Williams rule notices. (R 102, 103).

On January 13, 1994, Mr. Shore was allowed to withdraw, and Roberto Arias was appointed to represent Appellant. Stephen Weinbaum was appointed shortly thereafter as co-counsel for the penalty

phase. (R 113, 114-15, 128; T 180-82, 187-94). Mr. Arias filed numerous pretrial motions on behalf of Appellant, including two motions to suppress statements (R 130-32, 260-62) and two motions to suppress physical evidence, the first of which was based on an allegedly defective search warrant (R 119-27, 134-36), numerous motions challenging the constitutionality of the death penalty statute (R 143-56, 164-90, 209-25, 246-50), a motion to declare the victim-impact statute unconstitutional (R 230-40), and a motion to exclude novel scientific evidence (DNA) (R 337-53). All of these motions were denied after separate hearings. (R 133, 264, 309, 311, 315, 317, 319, 331; T 211-42, 252-426, 873-96).

On February 25, 1994, three days before trial, defense counsel moved for a continuance over Appellant's objection. After a lengthy discussion among the parties, the trial court denied the motion. (T 430-64). Jury selection began the following Monday and concluded that day. During jury selection, the State struck three potential jurors peremptorily. Defense counsel objected that they were all black males, and the State volunteered that juror John Bates was struck because he wanted the law to require a fixed time for premeditation, and jurors Robert Smith and Lewis Parker were struck because they both had criminal records. The trial court found those reasons race-neutral. (T 858-59).

Following opening statements (T 914-21, 921-28), the State's first witness was Linda Engler, who had been friends with the victim for 15 years. Ms. Engler testified that Marilyn Vest was 59 years old, single, and lived alone on the corner of Plummer Grant Drive and St. Augustine Road. (T 930). Ms. Vest had a boyfriend, Stan Golden, who lived in California. (T 936). On Saturday, September 15, 1990, Ms. Engler and Ms. Vest went shopping, then went to Ms. Engler's, then went out for pizza, then returned to Ms. Engler's around 10:30-11:00 p.m. (T 931). Ms. Vest went home and phoned Ms. Engler around 11:30 p.m. to inform her that she had returned home safely. (T 932). Ms. Engler identified a pair of pruning shears owned by Ms. Vest which were found by the back screen door. (T 933-34). Ms. Engler also testified that Ms. Vest owned some gold chains and other jewelry. (T 935).

The State's next witness was Scott Perry, who lived across the street from the victim. Mr. Perry testified that Ms. Vest's boyfriend called him early Sunday morning, September 16, 1990, and asked if Ms. Vest's car was in the carport, which Mr. Perry reported that it was there. (T 938-39). Mr. Perry then went with his wife to Ms. Vest's trailer and saw the phone on the patio off the hook, the screen off of the kitchen window laying on the ground, and the back door ajar. (T 940-41). While his wife went home to call 911, Mr. Perry stuck his head inside the door and called the victim's name. She did not answer, so he waited outside for his wife to return. (T 941-42). When his wife returned with a neighbor, the neighbor stepped inside the door, saw Ms. Vest in the bedroom, said, "Oh, my God," and came back outside. They waited for the police to arrive. (T 942-43).

The State's next witness was Officer Gary Powers, an evidence technician with the Jacksonville Sheriff's Office. Officer Powers testified that he found a pair of pruning shears in the carport under the telephone line which had been cut. (T 949-50). The point of entry was determined to be the kitchen window, whose screen was laying on the ground underneath it. (T 950-52). The victim was found lying nude on her bed in the master bedroom. (T 963). The following pieces of evidence were recovered in the bedroom: a metal bar, a broken bottle neck, glass fragments, a pair of bloody scissors, a bloody paring knife, a brass candlestick, a piece of cord, a piece of belt, a turquoise blouse, a wallet, some jewelry, and a pair of jeans (T 955, 956, 964, 969, 969-70, 981-82, 986); a piece of cord similar to that found on the floor was wrapped loosely around the victim's neck (T 956); a curling iron with a broken cord was laying next to the victim's head, along with a broken bottle and glass fragments (T 956-57, 960, 964); a leather belt was underneath the victim's body (T 981); a bloody webbed belt was laying on the side of the bed (T 980); and a bloody footprint was on the comforter on the bed (T 978). In a second bedroom, the officer found several pieces of a purse, a wallet, and its contents strewn about on the floor. (T 984). David Chase, a second evidence technician, collected some suspect hairs from the victim's left leg and chest. (T 1017-

18). Michael LaForte, a third evidence technician, collected a damp, white shirt with a lotion-type substance on it and a bottle of lotion from the sink in the master bathroom. (T 1037-38). Although Officer Powers lifted several prints from the house, none of the prints matched Appellant's fingerprints. (T 998, 1185-86).

Dr. Bonofacio Floro, the medical examiner, was the State's next witness. Dr. Floro testified that the victim was nude when she was brought from the crime scene. (T 1053). Externally, the victim had the following injuries: several stab wounds to the neck (T 1068); an abrasion and bruising from her left forehead to her left cheekbone and a black eye consistent with being struck with the metal bar found at the scene (T 1069); an incised wound, a small abrasion on the right ear, and a bruise underneath her right ear (T 1070); a lacerated wound to the right side of her head consistent with being struck with the brass candlestick found at the scene (T 1070-71); bruising to her breasts caused by striking, squeezing, or sucking (T 1072); an abrasion on the side of her right breast (T 1072); a stab wound on the right side of her lower chest which penetrated her abdomen and liver (T 1072-73); two stab wounds on the upper part of her right thigh which were likely caused by two separate instruments (T 1073); four stab wounds to the right side of her back and shoulder (T 1073); a linear contusion around her neck which was consistent with the electrical cord found wrapped around her neck (T 1074); scratches on the left side of her lower back and bruising in the middle (T 1074); two stab wounds on the right side of her lower back (T 1074); a "thick band of bruising" around her neck which was consistent with the webbed belt found at the scene (T 1075); several fractures to the jaw bone which were consistent with being struck with the bottle found next to her head (T 1079-80). Based on the conditions of the wounds, Dr. Floro opined that Ms. Vest was stabbed in the neck before being strangled, and that she was alive when she was stabbed and strangled, and her breasts were bruised. (T 1077, 1085-86, 1087). The injuries to her neck were consistent with being strangled with the webbed belt, the leather belt, and the cord found at the scene. (T 1089). The cause of death was

multiple stab wounds and ligature strangulation. (T 1054).

On cross-examination, Dr. Floro agreed that Ms. Vest was likely struck first and rendered semi-conscious because there were no defensive wounds. (T 1091). He also opined that she died within ten minutes. (T 1095-96). On redirect, Dr. Floro identified two abrasions on the back of the victim's left hand which could be consistent with defensive wounds. (T 1096). He also clarified that he believed the victim was rendered semi-conscious or incapacitated but still knowledgeable of what was going on. He did not believe she was rendered unconscious. (T 1097).

The State's next witness was James Fisher, who lived with his parents next door to Appellant and his parents. He had known Appellant for about 18 years. (T 1101-02). On September 15, 1990, Appellant called Mr. Fisher and asked him to come over. At Appellant's suggestion, they left in Mr. Fisher's truck to pick up Appellant's friend, Stephen Taylor, on the north side of town. (T 1102-03). They drove back to the Mandarin area and shot pool at the Corner Pocket for about 45 minutes. They left at approximately 11:00-11:15 p.m., and Mr. Fisher dropped Appellant and Taylor off at the corner of Herdon Drive and Deeder Lane around midnight. (T 1104-05). Mr. Fisher did not see Appellant again for about three weeks. Appellant told him that he had gone to Georgia to see his grandmother with Taylor. (T 1109).

Juanita White was the State's next witness. Ms. White testified that she lives about two miles south of Ms. Vest in the Mandarin area with her son, Doyle "Skip" White. Around 12:40 a.m. on September 16, 1990, her dog started barking in the back yard. She turned her dog loose and it chased Appellant and Taylor, whom she recognized, from a barn in her backyard to the front of her house. (T 1117-18). About 30 minutes later, Appellant called Ms. White and asked if her son were home. She responded negatively. (T 1121-22).

The State's next witness was Appellant's brother, Cheavin Shea Murray. Shea testified that he saw Appellant and Taylor together on September 16, 1990 at about 4:00 p.m. They were both very quiet. (T

1131).

Next, Detective O'Steen testified that he was present when hair, blood, and saliva samples were taken from Appellant and Taylor. Appellant had consented, but Taylor had not and a search warrant was obtained. (T 1204, 1212). The samples were sent to the Florida Department of Law Enforcement (FDLE) crime lab in Jacksonville, then to the Federal Bureau of Investigation crime lab in Jacksonville, and then to Daniel Nippes at a crime lab in Ft. Pierce. (T 1206-10).

Katherine Warniment, a microanalyst for FDLE, next testified that she examined 25 items for the presence of trace evidence, one of which was a white shirt recovered from the sink in the master bathroom. The shirt was damp with a fragrant, oily or soapy substance. (T 1223). The debris from this shirt was sealed in a apiece of white paper and sent to another department for analysis. (T 1217, 1226).

Diane Hanson, a forensic serologist for FDLE, testified that the victim had Type "O" blood, Taylor was a Type "A" secretor, and Appellant was a Type "B" secretor. (T 1242). She found Type "O" blood on the knife found at the scene, human blood on the bottle neck which she was unable to type, a small smear of human blood on the metal bar, the presence of blood on the scissors, and human blood on the webbed belt, leather belt, and cord. (T 1243-46). Typing of the seminal fluid recovered by Dr. Floro from the victim's vagina was inconclusive. (T 1251). Semen on the left sleeve of the turquiose blouse was a Type "A" secretor, as was the semen found on the ruffle area of the comfortor. (T 1253-54). Tests were negative for the presence of blood or semen on the white shirt found in the master bathroom sink. (T 1255).

At this point in the testimony, the trial court held an evidentiary hearing on Appellant's motion in limine to exclude DNA evidence. Ultimately, the trial court denied Appellant's motion, finding that Appellant's challenges related to the weight of the evidence rather than its admissibility. (T 1265-1331). The trial court also denied Appellant's motion in limine to exclude the testimony of a hair analyst. (T

1331-34).

Thereafter, Special Agent Joseph Dizinno, a hair analyst for the FBI, testified that he analyzed the hairs collected from the left leg and chest of the victim, as well as several Caucasian head hairs, numerous animal hairs, several Caucasion body hairs, and several Caucasion pubic hairs collected by Katherine Warniment along with other trace evidence. (T 1366-67). After the trial court overruled defense counsel's challenge to the chain of custody of the hairs found on the victim's body (T 1351-63), Special Agent Dizinno testified that one pubic hair found on the victim's body "had the same microscopic characteristics" as Appellant's pubic hair. (T 1367). In addition, several Caucasion pubic hairs recovered from the white shirt found in the bathroom sink "had the same microscopic characteristics" as Appellant's pubic hair. (T 1367). Although he admitted that hair comparison is not an absolute positive identification, he stated that "it is rare that [he] can't distinguish between hairs from two individuals." (T 1368, 1377).

The State's next witness was Daniel Nippes, the Chief Criminologist in the Regional Crime Lab in Fort Pierce. Mr. Nippes testified that he is primarily responsible for the analytical examination of evidence in forensic cases, specifically physiological fluid and trace evidence materials. He has been with the Crime Lab for 22 years and began doing DNA analysis in 1988. (T 1388-89). DNA analysis on hair is one aspect of his job. (T 1389-90). Over defense counsel's objection, Mr. Nippes was qualified as an expert in DNA analysis. (T 1390-96).

Having explained the concept of DNA analysis and the two methods of analysis--Restriction Fragment Length Polymorphism (RFLP) and Polymerase Chain Reaction (PCR)--Mr. Nippes testified that he performed PCR analysis on the pubic hair removed from the victim's body, the pubic hair recovered from the white shirt in the bathroom sink, the pubic hair taken from Appellant, and the pubic hair taken from Stephen Taylor. (T 1398-1405). The pubic hair recovered from the white shirt matched the DNA characteristics of Appellant. The other suspect hair did not match the DNA characteristics of Taylor. (T

1405, 1417-18). Using a population database, Mr. Nippes opined that approximately 8.2 percent of the Caucasian population has the same DNA type as that found in the suspect hair that matched Appellant's DNA type. (T 1406, 1412). In other words, approximately 91.8 percent of the population would have a different DNA type. (T 1406).

The State then recalled Detective O'Steen to the stand. Detective O'Steen testified that he interviewed Appellant on April 8, 1993, after Appellant waived his Miranda rights. (T 1508-10). Appellant stated that "Bubba" Fisher dropped him and Taylor off at Appellant's house on the evening of September 15, 1990, and that he and Taylor went to "Skip's" house, but he was not home, so they went back to Appellant's house and drank beer in the garage. After awhile, Taylor left and Appellant went to bed. Appellant stated that he was drunk and could not remember anything else. (T 1510-11). Appellant then said that he had learned from Taylor's trial that his hair matched a hair found at the scene. He also said that Taylor "told on himself" by "coming in her." Appellant told Detective O'Steen that he would not find his come in her. When Detective O'Steen asked him, "What about on the rag?", Appellant responded, "You didn't find my come on no rag." (T 1511). When asked how his hair got at the scene, Appellant surmised that it must have been attached to a bag of "reefer" that he had pulled out of his crotch and given to Taylor. Then he surmised that the hair might have been on Taylor's clothes. When Taylor took off his clothes to rape the victim, the hair must have fallen off on the victim. When asked how he knew Taylor took off his clothes and raped the victim, Appellant responded that he just assumed those facts. (T 1511-12).

The State's next witness was Ricky Proctor, who testified that he was currently in jail for battery on a police officer, but that the State had made no deal with him for his testimony. (T 1519-20). He further stated that he had been in jail for grand theft auto in 1992 when Appellant was in jail for this murder. Appellant referred to himself and Taylor as the "Justice Team." Appellant stated that he and

Taylor "broke into this lady's house, they beat her up, they tied her up, and they had sex with her and they killed her." (T 1524). Appellant remarked that the State had no evidence against him except a pubic hair. (T 1525). When Mr. Proctor gave a sworn statement to the police regarding Appellant's comments, he was in jail for grand theft. He pled to the charge with the understanding that there would be a four-year cap on his sentence in exchange for his truthful testimony in this case. However, he was sentenced in February of 1993 to 342 days in jail because Appellant had escaped and the judge did not want to pass his sentencing any longer. (T 1526-27). In all, Mr. Proctor had been convicted of nine felonies for grand theft, grand theft auto, and burglary of an auto. (T 1528). On cross-examination, Mr. Proctor admitted that he confessed to 10 grand theft autos when he was arrested and agreed to give the police information regarding "chop shops," but did not do so after he posted bond because his life was threatened. In fact, he was about to flee the state when he was rearrested. (T 1535-37, 1541).

The State's next witness was Charles Torak, who has been convicted three times for grand theft, and who shared a cell with Appellant in 1992 when he was in jail for failing to pay child support. (T 1568-69). On Appellant's first night in the cell, he told Mr. Torak that he was suspected of being the driver of the getaway car from a house of someone killed in Mandarin. (T 1571). Appellant also said he was with his best friend, and that the police had DNA evidence against him. (T 1571). The next night, Mr. Torak asked Appellant if he had testified against his friend and Appellant responded, "No, I was with him." (T 1572). Appellant said it was a "surprise burglary." The lady surprised his friend, and his friend told Appellant, "We have no choice, she knows our face, she'll recognize us." (T 1573). His friend stabbed her first, then Appellant stabbed her, then they strangled her. (T 1573). Appellant said his friend just "snapped and went almost like berserk." (T 1573-74). His friend brought his own knife with him but thought that it would be considered premeditated, so he got a knife from the victim's house. (T 1574). Appellant commented that the victim was "very good-looking for her age and that she put up a hell of a

fight for an older lady." (T 1574). He said they stole jewelry, particularly a necklace with a unicorn and a ruby on it. (T 1574-75). After the murder, they buried some bloody clothes and left town immediately. (T 1575).

On cross-examination, Mr. Torak testified that he and Appellant shared a cell for about five to seven days. (T 1590). He admitted that he waited four months to report Appellant's comments because he saw a newspaper article that confirmed what Appellant had told him. (T 1579). He also admitted that he had worked for the sheriff's office for two years as a confidential informant and had been paid about $15,000. (T 1576-77). He had not, however, made a deal with the State for his testimony. (T 1575).

Next, Sergeant Freeland testified that Appellant was in the Duval County Jail from April 9, 1992, until he escaped on November 21 or 22, 1992. He was rearrested in Las Vegas and returned on September 18, 1993. (T 1625-28). Officer Groves, a correctional officer at the jail, testified that Appellant and two other inmates, Anthony Smith and Emory Griffen, escaped sometime between 11:00 p.m. on September 21, 1992, and 7:00 a.m. on September 22, 1992. (T 1632-33). Sergeant Powell testified that the escapees crawled through air conditioning ducts to the outside. (T 1636-38).

The State's next witness was Anthony Smith, one of the inmates who escaped with Appellant. Mr. Smith testified that he and Appellant were in the same cellblock. He knew Appellant was in for murder, as was he. One day he assisted Appellant in researching cases relating to hair evidence. (T 1642-43). On September 22, he and Appellant found the door to a maintenance room open, so they crawled through ventilation ducts and busted through sheetrock until they reached the outside where they pretended they were trustees picking up trash. (T 1644-47). They walked to the Main Street bridge and then to the Riverwalk where Appellant called his mother to come pick them up. (T 1647-48). Appellant's mother picked them up and drove them to Lake City where they stayed for two or three days. They drove to Texas together and then walked to Mexico where they split up. (T 1650, 1657-58).

While they were in Lake City, Appellant told Mr. Smith about his case. Appellant said that his friend "Steve" came over, left to get beer, came back, and got Appellant drunk. (T 1651). He and Steve left, and Steve wanted to rob a house. Appellant resisted for awhile, but relented after becoming more intoxicated. (T 1652). They broke into this house or house trailer and realized a woman was home. Appellant wanted to leave, but Steve "grabbed the woman with a knife." (T 1653). Steve told Appellant "he wanted to get some pussy from this woman or he wanted [to] screw this woman." (T 1653-54). Steve handed the knife to Appellant and raped the woman. Appellant commented that the victim "acted like she enjoyed the sex." (T 1654-55). Appellant did not want to touch the woman but feared that Steve would harass him so he made the woman perform oral sex on him. (T 1655). Appellant then left Steve with the woman in the room and searched the house. He returned five or six minutes later and Steve had stabbed the woman 15 or 16 times. (T 1656). The victim was not dead, however, so they got an electrical cord and strangled the woman until she died. Then they gathered up valuables and left. (T 1656-57).

Mr. Smith then explained that he had been charged with murder for hitting a woman whom he knew over he head with a pistol 64 times. He stated that they had an argument over money that he owed her and he "just lost control." (T 1658-59). After he killed her, he tried to make it look like a robbery, so he was charged with armed robbery as well. (T 1660-61). He pled guilty to the murder and will serve 25 years in prison before being eligible for parole. He also pled guilty to the armed robbery and will serve a consecutive life sentence. For the escape, he will serve a consecutive 15 years in prison. He must first complete a federal sentence of 88 months for three unarmed bank robberies, escape, and a weapons charge which were committed during his escape from the Duval County Jail. (T 1660-63). In exchange for his truthful testimony, the State agreed not to seek the death penalty for his murder. (T 1661).

On cross-examination, Mr. Smith gave his father's phone number as 904-783-1839. He did not know a person named Rachael Harkins. (T 1664). He could not remember if he called his father the night

before he escaped. (T 1665-66).

The State's next witness was Charles Petty, a security manager and records custodian for Southern Bell. Mr. Petty testified that a five-minute collect call was made to Appellant's mother, Francis Perry, on November 22, 1992, at 7:37 a.m. from a pay phone at the Riverwalk near the Main Street bridge. (T 1726-28).

The State's final witness was Special Agent David Kerns of the FBI, who testified that he arrested Appellant in Las Vegas in June of 1993. On Appellant's person, Special Agent Kerns found a Nationwide Check Service card with Appellant's picture and the name Doyle R. White. He also found a social security card with the name Doyle Rex White, II. (T 1732-35).

Thereafter, the State rested its case and defense counsel made a motion for judgment of acquittal, which was denied. (T 1736-37). On his own behalf, Appellant called Charles Petty as his first witness. Mr. Petty testified that a 14-minute collect call was made to 904-783-1839, listed under Rachael Harkins, from a coinless inmate phone at the jail at 10:23 p.m. on November 21, 1992. (T 1743).

Appellant's next witness was Michael Brown, a twice-convicted felon who was in the same cellblock with Ricky Proctor. (T 1746, 1774). Mr. Brown testified that Mr. Proctor told him that he would "do anything at any time to get his sentence cut down because he was looking at a lot of time." (T 1746). In fact, Mr. Proctor said that he was going to "turn State evidence" against Appellant to reduce his sentence. (T 1747). Mr. Brown also testified that the facts of Appellant's case were well-known around the cellblock because Stephen Taylor's trial had just concluded prior to Appellant's arrival. (T 1773). Thomas Williams also testified that the facts of Appellant's case were common knowledge. (T 1834).

At that point, Appellant proffered the testimony of three witness--Thomas Williams, Paul Pinkham, and William Drew. Mr. Williams would have testified that he was in the cellblock at the time Appellant was there, that the facts of Appellant's case were common knowledge from Taylor's trial and from

significant press coverage, and that Appellant wanted a speedy trial because he did not think the State had enough evidence to convict him. (T 1789-94). Mr. Pinkham would have testified that he is a reporter for the Jacksonville Times-Union, that Appellant called him while on escape status, that Appellant said he would turn himself in if the State would drop the escape charge and the trial court would appoint "that famous lawyer in Jacksonville," that Appellant complained about his former attorney, and that he was tired of the delays in his trial. Mr. Pinkham called the State Attorney's Office with Appellant's message, and the State Attorney's Office indicated that it would not drop the escape charge. (T 1795-1806). Mr. Drew would have testified that he talked to Appellant about Appellant's case, particularly the hair evidence, and that Appellant did not think he was being treated fairly regarding the delays in his trial. Although Appellant did not disclose any facts of his case, Appellant did say that Taylor wore his clothes and that is how his hair got at the scene of the murder. (T 1806-12). Following each proffer, the trial court ruled the testimony inadmissible hearsay evidence which did not fall within any of the exceptions. (T 1794, 1800-06, 1812).

Appellant's next witness was Dr. James Pollack, a forensic serologist with FDLE. Dr. Pollack testified that Taylor's DNA matched a semen stain on a turquoise blouse found at the scene. The statistical probability that it would match someone else was one in six million. (T 1821). On cross-examination, Dr. Pollack testified that PCR analysis is "every bit as reliable" as RFLP analysis and that PCR analysis is generally recognized as being very reliable in the scientific community. He also testified that RFLP analysis cannot be done on a hair root because the sample is too small, nor can it be done on DNA amplified by PCR analysis. (T 1822-23, 1826).

Appellant's final witness was Dr. David Goldman, the lab chief at the National Institute of Health in Bethesda, Maryland. (T 1868). Dr. Goldman was qualified as an expert in population genetics and molecular genetics. (T 1873). He then testified that RFLP analysis can be done on DNA amplified by

PCR. (T 1879-80). He also did not agree with Mr. Nippes methods of calculating matching probabilities because Mr. Nippes' methods did not take into consideration any sampling error or large differences between populations. (T 1891-92). He believed that Mr. Nippes should have applied the "ceiling principle" as suggested by the National Research Council. (T 1894-96). After applying that principle to this case Dr. Goldman calculated the probability of a match to be 28.2 percent. (T 1897-98). Dr. Goldman further opined that if he selected any two Caucasians or Hispanics, the probability that one would match the DNA of the hair is 48 percent. (T 1899).

At that point, the defense rested and renewed its motion for judgment of acquittal which was denied. (T 1913, 1916). Following closing arguments (T 1932-75, 1975-2025, 2027-60) and jury instructions (T 2063-92), the jury returned a verdict of guilty on March 8, 1994, on each count as charged in the indictment after two hours and twenty minutes of deliberations (T 2094, 2101-04). After denying defense counsel's motion for a continuance, the trial court set the penalty phase for March 24. (T 2105-07).

At a pretrial conference on March 23, defense counsel objected to the use of hearsay to establish any prior violent felonies, and the trial court indicated that it would rule on the objections during the testimony. (T 2119-21). The following day, defense counsel renewed all of his previous penalty phase motions, including his motion for a continuance. The trial court made no express ruling. (T 2134-36). As for defense counsel's motion in limine regarding the State's use of hearsay during the penalty phase, the State agreed to paragraphs seven and eight, and the trial court denied the rest of the motion. (T 2137-38).

As its first witness, the State called Detective Robert Amy of the Jacksonville Sheriff's Office. Detective Amy testified, over Appellant's objection (T 2140), that on May 25, 1988, Appellant began banging on the door and windows of Tamara Byrd's home. Fearful of Appellant, Ms. Byrd attempted to

run to her mother's house, but Appellant grabbed her, dragged her by her hair to a car waiting at the roadway, and forced her into the back seat. He then held an empty Jack Daniel's bottle to her throat and told her that he could break the bottle and cut her throat, so she should not move. Appellant began to pull his pants down as the car drove away. Shortly thereafter, Detective Amy pulled the car over for a traffic infraction. When the car slowed down, Ms. Byrd jumped from the car and ran. Appellant was arrested. (T 2141-42).

Next, Officer Manwarren of the Jacksonville Sheriff's Office testified that on October 22, 1990, Appellant went to the apartment of Brett Melhouse and knocked on the door. When Mr. Melhouse opened the door, Appellant and two others began beating him. At one point, Appellant hit him over the head with a glass from Mr. Melhouse's table. (T 2145-46). A witness named April Campbell, who was Mr. Melhouse's ex-girlfriend, told Officer Manwarren that Appellant came to her house with blood on him and said, "I fucked him up, I kicked Brett's ass." (T 2146-47).

The State's next witness was Officer Dennis Feehley of the Jacksonville Sheriff's Office. Officer Feehley testified that he was called to the Corner Pocket, a pool hall, regarding shots fired in the parking lot. (T 2151). Witnesses told him that a pickup truck came into the parking lot. Words were exchanged between the passenger of the truck and some persons in the parking lot. The passenger then fired a handgun out of the window. The truck drove through the parking lot and stopped. The passenger got out and said, "Here I am, come on, I'm going to kill you all." He then fired shots at the crowd, but no one was injured. Officer Feehley traced the owner of the truck and interviewed the son of the owner who was driving. The son identified Appellant as the passenger in the truck that night. (T 2152-54).

Next, the State called Darryl Hanzelon, the supervisor of the felony division in the clerk's office. Mr. Hanzelon identified three certified copies of judgment and sentence for Gerald Delane Murray. In the first one, Appellant had been adjudicated guilty for false imprisonment. In the second one, he had been

adjudicated guilty for aggravated battery. In the third one, he had been adjudicated guilty for aggravated assault. Appellant had pled guilty to all three charges. (T 2159-62). Jody Phillips, a latent print examiner for the Jacksonville Sheriff's Office, then testified that Appellant's fingerprints matched the fingerprints on the certified copies of conviction. (T 2164-66).

At that point, the State rested, and Appellant called Hodges Snead on his behalf. Mr. Snead testified that he was the General Director of Student Services for the Duval County School Board. (T 2171). He identified school records belonging to Appellant. According to the records, the highest grade Appellant completed was seventh grade. He was retained twice in the fourth grade. (T 2171-72, 2173-74). He missed numerous days of school during each academic year. (T 2172-73). In all his years at school, Appellant got no "A's," two "B's," numerous "C's" and "D's" and some "E's" which indicated a failing grade. (T 2174-75). Appellant was in special education classes for a specific learning disability. (T 2175).

Appellant's next witness was Patricia Newell, who was the supervisor of the juvenile justice program for HRS. (T 2179). Ms. Newell testified that she wrote a predisposition report on Appellant in July 1986 when Appellant was 17 years old. (T 2180, 2193). Appellant had pled guilty or been adjudicated guilty for battery. (T 2182). According to her report, Appellant was born on February 5, 1969. He lived with his mother and stepfather. He had two brothers, one stepbrother, and two stepsisters. (T 2181). He dropped out of school in the seventh grade. He was "a constant truant problem and trouble-maker on the school bus." He had been reported to the dean several times for harassing girls, and he did not get along well with his peers in general. (T 2183). He went to the Jacksonville Marine Institute, which was a day program, where he worked on his GED, but he continued to engage in criminal activity so he was removed from the program. (T 2183, 2196). He then went to the Nassau Start Center, a half-way house, where he stayed longer than normal. (T 2183, 2187, 2195). Appellant has held several jobs, namely, for Publix and Winn-Dixie as a bagboy, for two different Exxon stations on four or five different

occasions, as a bricklayer, and as a landscaper. Appellant reported that he enjoyed working around cars and in gas stations. (T 2183-84).

Appellant's mother reported to Ms. Newell that Appellant made "some very poor friendships," and engaged in criminal activities with one in particular. She described Appellant as "hyper" and in need of something to do at all times. She saw no signs of drug abuse, but Appellant drank beer on occasion. (T 2184). According to her, she and her husband had a good relationship with Appellant. She and her husband had been married for about 13 years and had a good relationship. Appellant's stepfather has "a genuine interest and concern" for Appellant. She reported that Appellant had always been truthful when he had done something wrong, that he exhibited no violence in the home, and that he had no trouble with his siblings. (T 2185). His mother believed, however, that the police had classified him as a serious habitual felony offender and had been harassing him. (T 2189, 2192). Ms. Newell noted that Appellant's prior history is "severe" and that Appellant has been committed twice. (T 2191). Appellant had been committing residential burglaries. (T 2200).

Ms. Newell's report also indicated that Appellant had suffered a concussion when he jumped from a freight train. (T 2186). A psychological exam was done on Appellant on January 26, 1984, and he was diagnosed with a "conduct disorder, socialized aggressive." (T 2186). Appellant was admitted to the hospital for 30 days because his mother reported some "bizarre behavior patterns," but his family was unable to pay for continued in-patient or out-patient treatment. (T 2186-87). Appellant was hospitalized again at St. John's River Hospital for "bizarre behavior," but again the family could not afford treatment. (T 2189-90).

Appellant's next witness was his 26-year-old brother, Harry Murray, who is married and has two children. Harry testified that Appellant played with his children and that his four-year-old loves Appellant. (T 2238-39). He also testified that he and Appellant were two of six children and that Appellant was "a

normal kid." (T 2239-40). When Appellant was 10 or 12 years old, he met Stephen Taylor and began spending time with him. Taylor had a bad reputation in the community because of his commission of crimes and use of drugs. (T 2240-41). Taylor got Appellant in trouble. (T 2242). Taylor was the leader and Appellant was the follower. (T 2245). In fact, Appellant did not drink unless he was with Taylor. (T 2245).

In 1989, Appellant married the mother of his first child, who was five years old at the time of the trial. Appellant had a loving, caring relationship with his wife and son. (T 2247-48). His wife forbade Appellant from seeing Taylor. (T 2249). Appellant and his wife had a second son in July 1990. (T 2249). Ten days after the birth of his son, Appellant's wife died of an embolism. Appellant became very depressed and began drinking heavily. (T 2250-52). He also began spending time with Taylor again. (T 2253).

Appellant's final witness was Sonja Rickson, who met Appellant in Las Vegas in June 1993. (T 2264). She knew Appellant as "Doyle White." (T 2265). Appellant worked in construction and she was a changer purser at a casino. (T 2264, 2266). On July 4, 1993, they decided to rent an apartment together and then buy a house. (T 2265). Two of her children, ages 7 and 10, lived with them and Appellant was very good to them. Her youngest son called him "Dad." (T 2267). Appellant was never violent. He babysat the kids, did chores around the house, and cared for her when she was sick. (T 2267-68).

Appellant was arrested on September 9, 1993. They were supposed to get married on her birthday, September 12. She still loves Appellant and would still marry him. (T 2269). Even though he had lied about his identity and had committed the crimes for which he was on trial, she did not feel betrayed. (T 2273).

At that point, Appellant admitted into evidence and published to the jury progress notes of Dr. Henry Lepley which were dated November 9-14, 1990. On November 9, Appellant was admitted to

"MHRC"[1] because of an alleged attempted suicide. Appellant had allegedly taken one capsule of his mother's thyroid medication and was threatening to slit his wrists when his mother and brother intervened. (T 2275). Dr. Lepley noted that Appellant's wife had died two months previously and that Appellant had two children, who were nine weeks and two years old. Appellant had been depressed and suicidal since his wife's death. Appellant reported that he had lost 20 pounds, that he had lost his job, and that he had been drinking three to six cans of beer a day. (T 2275-76). Appellant smiled and said that he wanted to be with his wife. (T 2276).

According to the notes, Appellant was the second oldest of six kids in his family, that his parents divorced when he was one year old, that his mother remarried soon thereafter, and that he had one stepsister and two stepbrothers. He dropped out of school in the tenth grade, worked as a rigger, and had been in jail several times for driving with a suspended license. (T 2275). At the time of the report, Appellant's mental status was healthy and "[t]here was no evidence of thought or perceptual disorders." (T 2278). Though not tested, his I.Q. appeared to be about average. (T 2278).

On November 10, 1990, Dr. Lepley reported that Appellant had been removed from a suicide watch because he exhibited no suicidal conduct. Appellant was more assertive and confident. (T 2279). The following day, Dr. Lepley noted that Appellant complained of suicidal ideations and insomnia. His affect was flat, but Appellant seemed to be eating well and socializing with the other patients. Dr. Lepley proscribed Prozac and discontinued the Sinequan. (T 2279-80). The following Monday, November 14, 1990, Appellant was discharged from the hospital. Dr. Lepley noted that Appellant had a broad affect and that Appellant denied having suicidal ideations. (T 2280-83).

Following Dr. Lepley's report, the defense rested, the parties presented closing arguments (T 2294-2328, 2328-57), and the trial court instructed the jury (T 2357-64). Forty-six minutes after retiring to

[1] Appellant was prohibited from explaining the abbreviations or any notation in the notes because the doctor was not present to testify.

deliberate, the jury returned with a recommendation of death by a vote of eleven to one. (T 2364-66). At a presentencing hearing on March 14, 1994, the trial court denied Appellant's motion for new trial (T 2377-87), Sonja Rickson read a statement to the court (T 2392-95), and the parties argued their respective positions (T 2387-91, 2396-2406). The following day, the trial court sentenced Appellant to death for the murder, to a consecutive term of life imprisonment as a Habitual Felony Offender for the burglary with an assault, and to a consecutive life sentence for the sexual battery. (T 2410-16). In its written sentencing order, which was filed contemporaneously with the sentencing hearing, the trial court explained that it found the existence of four aggravating factors: prior violent felony (false imprisonment, aggravated battery, aggravated assault), felony murder (burglary/sexual battery), pecuniary gain, and HAC. (R 465-71). The trial court found nothing in mitigation. (T 472-77). This appeal follows.

SUMMARY OF ARGUMENT

Issue I - By failing to challenge the jury before it was sworn, Appellant failed to preserve this issue for review. Regardless, the State's reasons for striking the jurors were both race- and gender-neutral.

Issue II - Appellant failed to preserve this issue for review. Regardless, Appellant consented to the search and seizure. Even if his consent was not valid, the warrant validly authorized the seizure of Appellant's pubic hair.

Issue III - PCR DNA analysis is generally accepted as reliable within the scientific community.

Issue IV - The State properly established the chain of custody relating to the pubic hair recovered from the victim's body. Even if there was sufficient evidence of probable tampering, the introduction of Special Agent Dizinno's testimony relating to this hair was harmless beyond a reasonable doubt.

Issue V - The trial court did not abuse its discretion in denying defense counsels' motions for continuance made at the beginning of both the guilt and penalty phases of the trial.

Issue VI - Appellant failed to preserve this issue for appeal. Regardless, the trial court did not abuse its discretion in admitting evidence of Appellant's pretrial escape, theft of automobiles, and possession of false identification. Even if it were error, it was harmless beyond a reasonable doubt.

Issue VII - The trial court did not abuse its discretion in excluding on hearsay grounds the testimony of four defense witness who would have testified to statements made by appellant regarding his intent to escape. Even if it were error, however, it was harmless beyond a reasonable doubt.

Issue VIII - The State's comment during its guilt-phase closing argument was sufficiently cured by the trial court's curative instruction and did not vitiate the entire trial.

Issue IX - The evidence was sufficient to support Appellant's convictions for first-degree murder, burglary of a dwelling with an assault, and sexual battery.

Issue X - The record supports the trial court's finding of the heinous, atrocious or cruel aggravating

factor given that victim was beaten, bludgeoned, raped, stabbed, and strangled in her own home. Even were it not supported by the record, Appellant's sentence would not have been different absent this factor.

Issue XI - The trial court did not abuse its discretion in rejecting Appellant's special requested instruction on the HAC aggravating factor. The newly amended instruction, which this Court has previously affirmed, was given in this case.

Issue XII - The record supports the trial court's rejection of Appellant's statutory and nonstatutory mitigation. The trial court considered all of Appellant's mitigation but found that it was not supported by the evidence and/or not mitigating in nature.

Issue XIII - Appellant did not request a doubling instruction. Regardless, none was needed where the felony murder aggravator was based alternatively on sexual battery.

Issue XIV - The record supports the trial court's finding that the murder was committed for pecuniary gain since Appellant admitted to several persons that he and Taylor stole jewelry from the victim. Even were it found in error, there is no reasonable possibility that the sentence would have been different.

Issue XV - Appellant had a fair opportunity to rebut any hearsay admitted during the penalty phase proceeding. Even if he didn't, any error was harmless.

Issue XVI - All of the State's complained-of comments in closing argument were fair comments on the evidence. Even were they not, they were harmless beyond a reasonable doubt.

Issue XVII - Appellant's ex post facto challenges to the victim-impact statute have previously been rejected. Appellant's other challenges were not made in the trial court, and thus were not preserved for review. Regardless, they have been rejected previously as well.

Issue XVIII - The trial court's use of Appellant's contemporaneous convictions for burglary and sexual batter to support the felony murder aggravator did not constitute a double jeopardy violation.

Issue XIX - Appellant did not raise a Caldwell challenge to the instructions. Thus, he failed to preserve this issue for review. Regardless, it has been rejected previously.

Issue XX - This issue appears duplicative of other issues, especially Issue XXII. The State will rely on its arguments made therein.

Issue XXII - Florida's death penalty statute is not unconstitutional because electrocution is not cruel and unusual punishment.

Issue XXIII - Appellant's sentence is proportionate to other cases under similar facts.

Issue XXIV - Appellant's sentence to life imprisonment as a habitual felony offender for the burglary was improperly imposed consecutively to the murder.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTIONS TO THE STATE'S PEREMPTORY CHALLENGES OF THREE PROSPECTIVE JURORS (Restated).

During jury selection, the State informed the panel that the law does not set a specific amount of time necessary for one to premeditate a murder. (T 604-05). When asked if anyone believed that a specific amount of time should be required, John Bates indicated that he believed so even though the law does not require it. (T 605-06). Even after the trial court read the premeditation instruction to the jury, Mr. Bates persisted in his opinion that a specific time should be required. (T 607). When questioned by defense counsel, however, Mr. Bates indicated that he would follow the court's instruction on premeditation. (T 634-35).

At the end of the questioning, the State moved to have Mr. Bates stricken for cause because of his comments relating to premeditation. Because he had indicated that he would follow the instruction, the trial court denied the motion. (T 849-50). Later, the State struck three potential jurors peremptorily: Mr. Bates, Robert Smith, and Lewis Parker. (T 857-58). At that point the following colloquy occurred:

> MR. ARIAS: Your Honor, let it be shown that the State's first three strikes are all black males.
>
> MR. DE LA RIONDA: Yes, I'll be glad to -- I don't know if the Court [sic] rises to that level but I'll be glad to.
>
> Mr. Bates is being stricken because of what he specifically said. In fact, I think the Court should have allowed my request to strike him for cause. He said he specifically would require, when it comes to premeditation, a specific amount of time. He said he could not agree with the fact of somebody who just after thinking about it for a few seconds premeditates something.
>
> As to Mr. Parker and Mr. Smith, they all have records, as you all are aware of, that is Mr. Arias and Mr. Weinbaum, in that we turned over their

> records to him. Mr. Parker has been convicted or actually pled to battery in 1992, no contest plea and got a withhold, and Mr. Smith had a trespass, adjudicated guilty in 1992.
>
> THE COURT: All right. It does not appear to me that those are racially motivated challenges. The State has explained them without the Court requiring it, but will require for the Neil purposes and will deny the challenge.

(T 858-59). No other objections or comments were made.

In this appeal, Appellant first complains that the trial court applied an improper legal standard in assessing the State's reasons for striking the three jurors. According to Appellant, the trial court's finding that the State's challenges were not "racially motivated" was not sufficient. Rather, Appellant claims that the trial court must specifically find that the proffered reasons are reasonable, race-neutral, and nonpretextual. **Brief of Appellant** at 19-25. Second, Appellant complains that the State's reasons were not reasonable, race-neutral, and nonpretextual. Id. at 22-25. Third, Appellant complains that the trial court made no inquiry or findings regarding the issue of gender. Id. at 25-28.

Initially, the State submits that Appellant has failed to preserve this issue for review. Appellant accepted the final jury of twelve without any objections or reservation of his prior objection. The following day, Appellant made no objection prior to the jury being sworn. In Joiner v. State, 618 So. 2d 174 (Fla. 1993), this Court agreed with the district court that

> counsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn. We therefore approve the district court to the extent that the court held that Joiner waived his Neil objection when he accepted the jury.[2] Had Joiner renewed his objection or accepted the jury subject to his earlier Neil objection, we would rule otherwise. Such action would have apprised the trial judge that Joiner still believed reversible error had occurred. At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.
> ---

> [2] Were we to hold otherwise, Joiner could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial.

Id. at 176. See also Wilkins v. State, 659 So. 2d 1273, 1274-75 (Fla. 4th DCA 1995). Since Appellant did not renew his objections to the State's peremptory challenge of these three jurors prior to the jury being sworn, he has failed to preserve this issue for review.

Even had Appellant preserved his objections, they are wholly without merit. As for Appellant's first claim, the State submits that the trial court is not required to utter any magic words. Its ruling in this case clearly indicates that it knew the legal standard to apply and that it found the State's reasons race-neutral, i.e., not motivated by racial bias. *A fortiori* the trial court found the State's reasons reasonable and nonpretextual. It should not have to parrot these exact words in order for its findings to withstand appellate scrutiny. See Fotopoulos v. State, 608 So. 2d 784, 788 (Fla. 1992) (emphasis added) ("[A] trial court is vested with broad discretion in determining whether peremptory challenges are racially motivated.").

As for the propriety of the trial court's finding that the State's reasons were race-neutral, this Court has previously stated that, "[i]n Florida, there is a presumption that peremptories will be exercised in a nondiscriminatory manner." State v. Johans, 613 So. 2d 1319, 1321 & 1322 (Fla. 1993). Once the objecting party makes a sufficient objection, it is incumbent upon the trial court to hold a Neil inquiry. Id. at 1322. At that point, the challenged party must proffer "valid nonracial reasons why the individual minority jurors were struck." Reed v. State, 560 So. 2d 203, 205 (Fla. 1990). "[T]he trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved." Id. at 206. In reviewing such determinations on appeal, reviewing courts "must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process." Id. "Substituting an

appellate court's judgment for that of the trial judge on the basis of a cold record is not a solution because it would provide an automatic appeal in every case where a prospective minority juror was challenged." Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992).

Although Mr. Bates indicated during defense counsel's questioning that he would follow the law regarding premeditation, he emphatically indicated during the State's questioning that he believed the law should set a specific time for premeditation. (T 605-07, 634-35). "The State does not have to establish grounds sufficient to have the juror excused for cause." Happ v. State, 596 So. 2d 991, 996 (Fla. 1992). The fact that Mr. Bates may require more than the law requires is a valid race-neutral reason to strike him. See Alexander v. State, 643 So. 2d 1151, 1152 (Fla. 3d DCA 1994) (finding state's challenge facially race-neutral given juror's responses during voir dire that he "might not be able to follow a specific jury instruction"); Green v. State, 583 So. 2d 647, 651-52 (Fla. 1991) (finding state's challenge facially race-neutral given juror's dissatisfaction with death penalty even though juror could follow the law).

As for Robert Smith and Lewis Parker, the State indicated that Mr. Smith had been adjudicated guilty for trespass in 1992, and Mr. Parker had pled no contest to battery in 1992. (T 858-59). The fact that potential jurors have criminal records has previously been held to be a race-neutral reason. Files, 613 So. 2d at 1302; Wilkins, 659 So. 2d at 1274; Willacy v. State, 640 So. 2d 1079, 1082 (Fla. 1994); Stephens v. State, 559 So. 2d 687, 690-91 (Fla. 1st DCA 1990), approved on other grounds, 572 So. 2d 1387 (Fla. 1991); Knight v. State, 559 So. 2d 327, 328 (Fla. 1st DCA), rev. denied, 574 So. 2d 141 (Fla. 1990).

Appellant complains, however, that the reason appears to be pretextual in his case because juror Stewart Caldwell admitted during questioning that he had a prior arrest for theft.[2] **Brief of Appellant** at

[2] Appellant also points to juror Sandlin who admitted that he was arrested for carrying a concealed weapon upon his return from Desert Storm but the charges were dropped. Mr. Sandlin was later excused for cause because of his inability to recommend the death penalty under any circumstances. Given that cause challenges were exercised before any peremptory challenges, Mr. Sandlin can hardly be used to support a claim that the State's reasons for excusing Mr. Smith and Mr. Lewis were pretextual.

24. Because Appellant never challenged the State's reasons as pretextual, the State was not given an opportunity to respond and the trial court was not able to address the issue. As a result, Appellant failed to preserve this argument for appeal. Wilkins, 659 So. 2d at 1274. Nevertheless, the record would support a finding that the reasons were not pretextual. The distinction lies in the fact that, while juror Caldwell was arrested, jurors Smith and Parker were convicted. Moreover, when the State asked the panel whether anyone had been arrested, only jurors Caldwell and Sandlin responded. Mr. Lewis and Mr. Parker did not respond. Only because the State had independently investigated the arrest records of the potential jurors was it aware that jurors Smith and Parker had been convicted of a crime. Thus, the fact that they withheld this information provides additional validity for the State's reasons. See Files v. State, 586 So. 2d 352, 356 (Fla. 1st DCA 1991), approved as modified, 613 So. 2d 1301 (Fla. 1992).

As for Appellant's claim that the trial court made no findings relating to his gender-based objection, the State submits that Appellant failed to preserve this specific objection as well. Although Appellant objected that "the State's first three strikes are all black males" (T 858) (emphasis added), Appellant did not pursue his objection on the gender basis. The State gave its reasons and the trial court found that they were not racially motivated. At that point, Appellant should have pressed his gender-based objection and let the trial court know that his objection was two-fold, i.e., race-based and gender-based. Because he did not, he failed to preserve this objection for review. See Wilkins, 659 So. 2d 1274 (failure to raise pretextual claim waives objection for appeal).

Regardless, for the reasons discussed above, the State's bases for striking these jurors are as equally gender-neutral as they are race-neutral. Mr. Bates expressed his disagreement with the law on premeditation, and Mr. Smith and Mr. Parker had been convicted of crimes which they failed to disclose to the court upon questioning. Thus, had Appellant pursued his gender-based objection, the trial court would have been within its discretion in finding the State's reasons gender-neutral as well.

In sum, Appellant failed to preserve this issue by accepting the final jury without objection. Regardless, the trial court did not abuse its discretion in finding that the State's reasons for striking the minority jurors were race-neutral. Had Appellant challenged the reasons as pretextual, the trial court also would have acted well within its discretion in finding the reasons nonpretextual. Similarly, had Appellant pursued his claim or gender bias, the trial court would not have abused its discretion in finding the State's reasons gender-neutral. Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Marilyn Vest.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE, NAMELY, HAIR, WHICH WAS SEIZED BASED ON AN ALLEGEDLY DEFECTIVE SEARCH WARRANT (Restated).

Prior to trial, Appellant filed a motion to suppress "any test results conducted from the Defendant's blood[,] saliva and hair seized from him by law enforcement agents of the State of Florida on February 15, 1991." (R 119). As grounds for this motion, Appellant claimed that (1) the affidavit used to secure a search warrant did not state sufficient probable cause to justify a search of his person and seizure of evidence, and (2) the search warrant improperly authorized the seizure of hair from Appellant where the affidavit did not specifically state that hair was sought to be obtained from Appellant. (R 119-26).

At the hearing on the motion, Detective T.C. O'Steen, a seventeen-year veteran of the Jacksonville Sheriff's Office, testified that he questioned Appellant on February 15, 1991. (T 253-54). Detective O'Steen knew that Appellant had previously waived his Miranda rights that day. (T 273). The detective asked Appellant if he would consent to give blood, saliva, and hair samples, and Appellant told him to "go ahead. . . . You won't find nothing." (T 274). The detective and the prosecutor decided to seek a search warrant for blood, hair, and saliva from Stephen Taylor because Taylor refused to consent. (T 255). They

decided to prepare an affidavit and warrant for Appellant as well so that they would not have to do it later in the event Appellant revoked his consent. (T 260). Detective O'Steen discussed with the prosecutor the facts to support such a warrant, the prosecutor had the affidavits and warrants typed up, and the detective reviewed them. (T 257-58). The detective and prosecutor took the affidavits and warrants to Judge Santora, who reviewed the affidavits and warrants before signing the warrants. (T 262-69). Although the affidavits did not specifically mention hair, the warrants did so. (T 266). While they were at the jail having the samples taken, Detective O'Steen gave Appellant the warrant. Appellant had never withdrawn his consent. (T 274, 293).

When asked what his probable cause was based on for seeking the warrant, Detective O'Steen responded that "Mr. Fisher had dropped [Appellant] and Stephen Taylor off near where the victim lived and they were together that night." (T 275-76). The affidavit also indicated that Appellant and Taylor left town the next day. (T 294). He believed that Stephen Taylor had been involved because they had found some of the victim's jewelry at Taylor's former residence, and they had found a vehicle stolen from the victim's neighborhood near Taylor's house. (T 282). Thus, Detective O'Steen believed he had probable cause to obtain samples from Appellant because Appellant was known to have been in Taylor's company the night of the murder. (T 278, 283).

Detective John Bogers then testified that he went with Detective O'Steen and Appellant to the jail to collect the samples. (T 298). Although he knew that a search warrant was being prepared, Detective O'Steen had indicated that Appellant had consented to giving the samples. (T 299-300). He saw the warrant at the nurses' station at the jail. Detective Bogers did not remember Appellant asking for a warrant. (T 300). Appellant did not ask for an attorney. (T 301).

Appellant then testified that he was in jail awaiting transfer to state prison when he was taken to the police station and then to the jail. (T 303). At the jail, prior to any samples being taken, Appellant

asked the officers if they had a warrant. A detective put it on the table and said, "How do you know?" (T 308). On cross-examination, Appellant thought he had been convicted of three prior felonies. (T 308). He admitted that he signed a form at 3:35 p.m. acknowledging that he understood his rights. (T 308-09). He denied, however, that he waived his rights. (T 309). In fact, Appellant claimed that he asked for an attorney three or four times that day. (T 309). He admitted that he cooperated with the police "[t]o some extent" regarding his whereabouts at the time of the murder, but claimed that he requested an attorney, then requested the search warrant, and then requested an attorney again. (T 310-11).

In rebuttal, Lieutenant Seibler testified that Appellant read his rights to Detective Scott, then signed the form after acknowledging that he understood his rights. Detective Scott noted that Appellant had a ninth grade education. (T 316-17). According to Lieutenant Seibler, Appellant never requested an attorney or refused to speak to them. (T 317-18). Detective O'Steen, Detective Bogers, and Detective Gilbreath also confirmed that Appellant did not request an attorney or refuse to speak to them. (T 328, 342, 349).

Following the testimony, defense counsel argued that (1) Appellant was never informed of the consequences of a waiver (T 400), (2) the evidence failed to show that Appellant intelligently, knowingly, and voluntarily consented to the search and seizure (T 401), (3) the police did not have probable cause to obtain samples from Appellant (T 401-05), and (4) the good-faith exception does not apply in this case because probable cause was lacking (T 405-06). The trial court took the motion under advisement. (T 426-27). Although the trial court penned at the bottom of Appellant's motion, "2-17-94. Denied for reasons recited on record. Alban E. Brooke," the record contains no other oral or written denial, and no factual findings.[3]

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[3] Undersigned counsel made a substantial attempt to determine whether an additional hearing was held but not transcribed. Both the clerk's office and the state attorney's office confirmed that no additional hearings were held.

In this appeal, Appellant claims that the search warrant was invalid, thereby rendering any test results from his hair samples inadmissible as fruit of the poisonous tree. To support this contention, Appellant complains that there was no probable cause to seize his pubic hair samples, especially given the affidavit's failure to specify hair as an object of the search and seizure. **Brief of Appellant** at 29-34. Moreover, Appellant claims that he did not give Detective O'Steen valid consent to obtain the blood, saliva, and hair samples, but was merely yielding to apparent lawful authority. Id. at 34-36. Finally, Appellant claims that the "good-faith exception" is not applicable because Detective O'Steen knew that hair had been omitted from the affidavit and because the issuing magistrate had no independent basis to include the hair. Id. at 36-38.

Initially, the State submits that Appellant has failed to preserve this issue for review. During the State's case-in-chief, Appellant made no objection when the State presented the testimony of Detective O'Steen, who testified that he was present when the samples of hair, blood, and saliva were taken from Appellant and delivered to the various laboratories for testing. (T 1209-10). Appellant also failed to renew his motion to suppress when Special Agent Dizinno testified that he compared Appellant's pubic hair samples with pubic hairs found at the scene. (T 1335-85). Likewise, Appellant failed to renew his motion to suppress when Daniel Nippes testified that the DNA in Appellant's pubic hair matched the DNA in a pubic hair found at the scene. (T 1387-1503).[4] "To preserve an issue about evidence for appellate review, an appropriate objection must be made at trial when the evidence is offered." Terry v. State, 21 Fla. L. Weekly S9, 10 (Fla. Jan. 4, 1996); Lawrence v. State, 614 So. 2d 1092, 1094 (Fla. 1993); Lindsey v. State, 636 So. 2d 1327, 1328 (Fla. 1994); Correll v. State, 523 So. 2d 562, 566 (Fla. 1988). Here, Appellant failed to renew his motion to suppress when the State sought to admit the evidence into the trial. Thus,

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[4] Appellant cites to page 1507 of the transcripts to support his claim that his motion was denied, but that objection relates to his motion to suppress statements, not his motion to suppress physical evidence.

Appellant has failed to preserve this issue for review.

Even if he had preserved it, however, his arguments have no merit. It is well-established that "in matters of suppression, the trial court sits as both trier of fact and of law, and that matters pertaining to the credibility of witnesses and the weight of the evidence are exclusively within its province." Davis v. State, 606 So. 2d 460, 463 (Fla. 1st DCA 1992). Moreover, "the trial court's order comes to this court clothed with a presumption of correctness." Id. Even if Appellant had preserved his argument, he could not have overcome the presumption.

As this Court has previously held,

> Although a warrantless search is per se unreasonable under the Fourth Amendment, the search will be considered lawful if conducted pursuant to consent which was given voluntarily and freely. . . .
>
> > The question of whether a consent is voluntary is a question of fact to be determined from the totality of the circumstances. . . . [T]he voluntariness of the consent must be established by a preponderance of the evidence.

Washington v. State, 653 So. 2d 362, 364 (Fla. 1994) (citations omitted) (quoting Reynolds v. State, 592 So. 2d 1082, 1086 (Fla. 1992)).

Here, as in Washington, Appellant was given and waived his Miranda rights before the police sought consent to search. (T 273). Thereafter, Appellant expressly consented to give hair, blood, and saliva samples: "[G]o ahead. . . . You won't find nothing." (T 274). At no time did Appellant revoke his consent. (T 274, 293). Detective O'Steen obtained a search warrant for Appellant only out of convenience, since he was having to obtain one for Stephen Taylor. (T 255). Although Appellant testified that he did not consent and that he requested a search warrant (T 308), it is implicit in the trial court's denial of the motion that it found Detective O'Steen more credible than Appellant. Thus, the trial court could have properly denied the motion to suppress based on Appellant's consent to take the samples. See Washington, 653 So. 2d at 364 (finding that defendant consented to search and seizure of blood).

Appellant claims, however, that he did not consent freely, but merely acquiesced to authority. Though Appellant fails to cite any factual basis for such a claim, he cites to three cases, all of which are easily distinguishable. In State v. Hall, 537 So. 2d 171, 172 (Fla. 1st DCA 1989), two officers approached Hall's car at either door, one officer shone a flashlight in Hall's eyes and then demanded that Hall give him the drugs that Hall had put under the seat. In Lockwood v. State, 470 So. 2d 822, 823-24 (Fla. 2d DCA 1985), two deputies and an HRS representative went to Lockwood's house to investigate a report of child abuse. When the owner of the house refused to allow the deputies and HRS worker into the house to examine the children's living area, they threatened to take the children into immediate protective custody. In Powell v. State, 332 So. 2d 105, 106-07 (Fla. 1st DCA 1976), the defendant pulled into an agriculture inspection station claiming that he was hauling hay but could not find the key to his trailer. Without probable cause to obtain a search warrant, the inspection officers threatened to obtain a warrant if Powell did not get a key or break the lock. He broke the lock and the officers discovered marijuana. Obviously, in all of these cases there was some evidence of force, pressure, or coercion which invalidated the consent. Here, on the other hand, no such force, pressure, or coercion occurred.

Were this Court to find, however, that Appellant's consent was not valid, the State submits that the search warrant was valid.

> When a fact is omitted from an affidavit filed in support of an application for a search warrant the reviewing court must determine whether the omission constitutes a material omission. A fact constitutes a material omission if a substantial possibility exists that knowledge of the omission would have altered a reasonable magistrate's probable cause determination. In determining whether a material omitted fact should invalidate the search warrant the reviewing court must view the affidavit as if it had included the omitted fact and then determine whether the affidavit provides sufficient probable cause.

State v. Panzino, 583 So. 2d 1059, 1062 (Fla. 5th DCA 1991). Here, Appellant claims that the search warrant was invalid because "[t]here was nothing in the affidavit seeking a hair sample or proving the

judge had probable cause to issue a warrant for seizure of hair, as the hair could not be used to determine blood type or status as a secretor." **Brief of Appellant** at 31. Adding facts to support the seizure of hair and listing hair as an object of the search, however, would only have further supported the finding of probable cause to obtain body samples from Appellant.

In Johnson v. State, 660 So. 2d 637 (Fla. 1995), the defendant strangled and stabbed to death an elderly woman in her home. The police obtained a warrant to search Johnson's apartment for blood-stained clothing and "'hair, fiber, tissue, or any other items of forensic comparison value.'" Id. at 643. The affidavit, however, "made no mention that fibers had been gathered at the scene of the crime." Id. at 644. On appeal, this Court rejected Johnson's challenge to the validity of the warrant, finding that

> [a]s a general rule, American courts have permitted a warrant to include some items not specifically addressed in the affidavit if the overall circumstances of the crime are sufficiently established and the items added are reasonably likely to have evidentiary value with regard to the type of crime. There is no doubt here that a murder occurred and that there was probable cause to believe Johnson committed it. Gathering any fiber evidence is a common object of any murder investigation, and we therefore find that the warrant lawfully included it because of the high probability such evidence would be relevant to the type of crime in question.

Id.

As in Johnson, the overall circumstances of this crime established that Appellant's hair samples were reasonably likely to have evidentiary value. The victim in this case had been sexually assaulted, beaten, bludgeoned, stabbed, and strangled. According to the affidavit, "Ms. Vest's naked body was discovered lying half on and half off her bed in the bedroom." (R 124). The affidavit also indicated that "numerous items were collected and taken to the Florida Department of Law Enforcement for examination. Among the items recovered from the scene were a quilt taken from the victim's bed and a blouse also taken from her bedroom." (R 124). There was probable cause to believe that Appellant had committed this crime. It was highly likely that the perpetrator(s) had left hair at the scene of this crime. Thus, even

though the affidavit did not specifically mention that hair evidence had been collected at the scene, or that hair was a desired object of the search, the search warrant, which did list hair, was valid. Washington.

Appellant takes issue, however, with the magistrate's determination, and the trial court's determination, that the police had probable cause to seize any body samples.

> The task of the magistrate when reviewing an application for a search warrant is to make a practical, common sense decision whether, given all the circumstances before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The trial court's duty upon reviewing the magistrate's decision to issue a search warrant is not to conduct a de novo determination of probable cause, but instead, to determine whether substantial evidence supports the finding that based on the totality of the circumstances probable cause existed to issue the warrant. A magistrate's determination of probable cause must be accorded a presumption of correctness and not be disturbed absent a clear demonstration that the magistrate abused his discretion.

Panzino, 583 So. 2d at 1061-62 (citations omitted). See also Clark v. State, 635 So. 2d 1010, 1012 (Fla. 1st DCA 1994).

Appellant claims that the trial court erred in denying his motion to suppress not only because the affidavit failed to alleged probable cause to seize hair, as discussed previously, but also because the affidavit's "tenuous facts in no way constitute probable cause to justify any search of Mr. Murray." **Brief of Appellant** at 32. The affidavit, however, alleges that numerous items were collected from the crime scene, preliminary reports indicated the presence of semen on the bedspread which came from a Type "A" secretor, jewelry was missing from the victim's home, a car seen parked next to the victim's home on the night of the murder was found parked near Steven Taylor's residence, the victim's jewelry was found buried at Taylor's residence, Richard Fisher took Appellant to pick up Taylor at this same residence and later dropped both Appellant and Taylor off near the victim's home, and Appellant and Taylor both left town a few days after the murder. (R 124-25). After according a presumption of correctness to the magistrate's finding of probable cause, the trial court could have found that there was substantial evidence

based on the totality of the circumstances to support the magistrate's finding. Likewise, after according a presumption of correctness to the trial court's finding, and drawing all reasonable inferences in favor of sustaining the trial court's ruling, this Court should affirm said ruling. See Neary v. State, 384 So. 2d 881, 885 (Fla. 1980) (finding probable cause sufficient where defendant initially possessed murder victim's jewelry, defendant lived near victim, blue buttons from blue shirt were found at scene, and defendant had blue shirt in closet).

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE NOVEL SCIENTIFIC EVIDENCE (DNA) (Restated).

On the second day of trial, Appellant filed a "Motion in Limine to Exclude Novel Scientific Evidence," namely, the testimony of Daniel Nippes relating to DNA testing. In his motion, Appellant stated that the method of DNA analysis used by Mr. Nippes--polymerase chain reaction (PCR)--"must be sufficiently established to have gained general acceptance in the particular field in which it belongs. In addition, Appellant claimed that the database used by Mr. Nippes must come from a truly random mating population that is large enough to be statistically significant and must be in Hardy-Weinberg equilibrium. Appended to his motion were three scientific articles relating to probability statistics. (R 337-53).

At the hearing on the motion, defense counsel related his objections as follows:

> I think that, firstly, I want to elicit through [Mr. Nippes'] testimony or will attempt to elicit testimony not only that [PCR] is not your regular DNA which has been around for a number of years; secondly, that even the DNA that has been around since the early 1980's is still even not generally accepted among some argument of criticism in the scientific community as to its usefulness in scientific communities; thirdly, that this gentleman doesn't know about the population data on which he is basing his figures of 8.2 percent, that is that . . . 8.2 percent of all Caucasians would have this hair which turns out to be one out of every 11 persons, white persons.

(T 1271-72).

At that point, the State called Daniel Nippes as a witness. Mr. Nippes testified that he is the Chief Criminalist at the Regional Crime Lab in Ft. Pierce. He has been with the crime lab for 22 years. He is responsible for the scientific operations of the laboratory and performs physiologic analysis of trace evidence and fluids, including DNA analysis. (T 1273-74). Mr. Nippes then noted the two types of DNA analysis: Restriction Fragment Length Polymorphism (RFLP) and Polymerase Chain Reaction (PCR). The former analysis is used when there is a large amount of forensic sample available for testing, and the latter is used when there is a small amount of sample available for testing. (T 1274-75).

According to Mr. Nippes, PCR analysis has been available since 1985. (T 1277). He has been performing PCR analysis personally since 1988. (T 1275). When asked to relate the reliability of PCR analysis, Mr. Nippes noted that the Swedish Academy of Science awarded the Nobel Prize to the founder of PCR analysis in 1993. (T 1275). He also testified that there are "a tremendous amount of built-in constraints to ensure that [the scientists] don't incur contamination that exists more than normally in samples that are recovered from scenes." (T 1276). When asked if PCR analysis is generally accepted as reliable in the scientific community, Mr. Nippes responded, "There's no question about that." (T 1276-77). Regarding the database used for calculating the probability of a match, Mr. Nippes testified that he had coauthored an article that was going to be published by the Academy of Forensic Sciences wherein population data from four crime labs within Florida was collected and analyzed for use as a standard database in Florida for calculating probabilities of matches in PCR DNA cases. (T 1277-78).

On cross-examination, Mr. Nippes testified that PCR analysis was developed in 1985 by the Cetus Corporation and was begun to be used in the forensic setting in 1988. (T 1279). For this particular case, Mr. Nippes used the population data in the Helmuth Study Manual which was published by the Cetus Corporation in 1989 or 1990. (T 1279-80). There are several sources of population data with percentages

as high as 11.4 percent (observed value) and as low as 4.0 percent. He used the Helmuth study with an observed value of 8.2 percent. (T 1280-82). The database that he helped to compile was not completed until 1993. (T 1290).

After explaining the purpose of the National Research Council's 1992 report, Mr. Nippes admitted that its biggest criticisms related to the probability statistics. However, Mr. Nippes believed that the council's criticisms were leveled at RFLP analysis rather than PCR analysis. (T 1282-84). When presented with the articles appended to Appellant's motion, Mr. Nippes agreed that there were some negative comments made about DNA analysis, but that there were other articles that had been published that had challenged these articles. He could not, however, remember the names of those articles off the top of his head. (T 1285-87). When asked if he agreed that there was a conflict among scientists regarding DNA analysis, Mr. Nippes responded, "Not forensic scientists and not the majority of scientists." (T 1287-88).

Mr. Nippes then explained the concept of "Hardy-Weinberg equilibrium" as it related to the population databases and stated that all of the available databases were in equilibrium. According to Mr. Nippes, the difference between a 4.0 percentage and an 11.4 percentage is statistically insignificant and would not, as defense counsel suggested, nullify the databases. (T 1292-95). Using the Helmuth study data, the frequency of occurrence of the DQalpha genotype in this case is 8.2 percent; the probability of occurrence is 12.2 percent. In other words, one out of 12 persons would have the same genotype combination. (T 1301-02). The frequencies are approximate, not absolute. (T 1294, 1308-09). Moreover, the higher the frequency used, the more conservative the probability. (T 1310-11).

In response to the court's questioning, Mr. Nippes testified that a negative result, not a false positive result, would occur if the sample were contaminated. (T 1313). During defense counsel's follow-up questions, Mr. Nippes explained that a false positive result could occur if samples were switched, but

contamination would cause a negative result. (T 1315).

Following Mr. Nippes' testimony, defense counsel renewed his objections to Mr. Nippes' testimony on the ground that Mr. Nippes "is not competent to testify as to other laboratories' percentages or the result of the percentages." (T 1321). Rather, counsel believed that the person who compiled the database that Mr. Nippes used should testify so that he or she could be cross-examined. (T 1321). When the trial court noted that Mr. Nippes' competency was not a part of Appellant's motion in limine, defense counsel clarified that he was objecting on relevancy grounds and competency grounds. As for the Frye standard, defense counsel claimed that PCR analysis was a new procedure and "hasn't been tested enough to be admitted and to be recognized within the forensic scientist community as to whether or not this procedure is appropriate and should be used." (T 1322-23).

In ruling on Appellant's motion, the trial court noted that Mr. Nippes used a database with 131 samples and that Mr. Nippes stated he would have been comfortable using a database with only 100 samples. (T 1323). Moreover, Mr. Nippes used a database with a more conservative frequency (8.2%) than the database used by the FBI (4%). (T 1323-24). The trial court commented on the articles offered by defense counsel and quoted extensively from a draft of the NRC report that was supplied by defense counsel at the hearing (T 1324-30), before concluding:

> I think from all of this, from the three documents, from this [NRC report] . . . [a]nd from the testimony from Mr. Nippes, I'll deny your motion in limine. It appears to me that is one of the clearer matters of not being an admissibility question but a weight [question]. You're certainly going to argue extensively the weight that the jury can give to whatever weight and conclusions he draws based upon the database, I presume through other matters, such as the question about whether or not the database of Caucasian is somehow corrupted by not knowing whether they're from a particular area or from a general group. There are a number of things, but every one of those goes to weight, not admissibility.
>
> I will allow the DNA testimony and I will allow Dr. Nippes to testify and, of course, the cross-examination will be yours.

(T 1330-31). When defense counsel asked if it was rejecting his argument that the evidence should be precluded because the person who compiled the database used in this case did not testify, the trial court responded, "I am in part because it is the generally accepted database and, secondly, because he testified that he had examined at least five separate areas of database and for a white male Caucasian they were all significant -- all insignificantly different." (T 1331).[5]

In this appeal, Appellant claims that the trial court abused its discretion in admitting Mr. Nippes' testimony. Specifically, Appellant claims (1) that the trial court applied the wrong standard when it determined that Appellant's objections related more to the weight of the evidence than to its admissibility, **brief of appellant** at 43-44; (2) that PCR analysis was not generally accepted as reliable within the scientific community at the time the evidence was admitted in this case, id. at 44-46; and (3) that "the non-ceiling principle evidence offered by the State was not generally accepted at the time of Mr. Murray's trial," id. at 46-47.

As stated in Vargas v. State, 640 So. 2d 1139, 1144 (Fla. 1st DCA 1994) (citing Flanagan v. State, 625 So. 2d 827 (Fla. 1993) and Stokes v. State, 548 So. 2d 188 (Fla. 1989)), rev'd on other grounds, 20 Fla. L. Weekly S594 (Fla. Dec. 14, 1995), "the correct manner of review is a de novo review of whether the evidence in question is generally accepted in the relevant scientific community, encompassing expert testimony, scientific and legal writings, and judicial opinion." Numerous other states and the District of Columbia have adopted a de novo standard of review for cases involving the admissibility of DNA evidence. E.g., United States v. Porter, 618 A.2d 629, 635 (D.C. App. 1992); People v. Marlow, 41 Cal.Rptr.2d 5, 25-26 (Cal.App. 6 Dist. 1995); People v. Amundson, 41 Cal.Rptr.2d 127, 131-32 (Cal. App. 4 Dist. 1995); Taylor v. State, 889 P.2d 139, 131-32 (Okl.Cr. 1995); Lindsey v. People, 892 P.2d 281, 290

[5] Shortly thereafter, Mr. Nippes testified and was cross-examined at length by defense counsel. (T 1387-1503). In his own defense, Appellant called Dr. David Goldman, the laboratory chief at the National Institute of Health in Bethesda, Maryland, who was qualified as an expert in population and molecular genetics. (T 1867-1912).

(Colo. 1995); State v. Kalakosky, 852 P.2d 1064, 1072 (Wash. 1993); State v. Cauthron, 120 Wash.2d 879, 846 P.2d 502, 505-06 (1993); State v. Bible, 175 Ariz. 549, 858 P.2d 1152, 1181 (1993); State v. Futch, 123 Or.App. 176, 860 P.2d 264, 269 (1993); State v. Vandebogart, 136 N.H. 365, 616 A.2d 483, 491 (1992); State v. Fenney, 448 N.W. 2d 54, 58 (Minn. 1989). Therefore, this Court should review the issue in this case de novo. See Hayes v. State, 660 So. 2d 257, 262-65 (Fla. 1995) (using post-trial NRC report and case law to determine admissibility of DNA evidence).

In Ramirez v. State, 651 So. 2d 1164, 1166 (Fla. 1995), this Court set forth the following four-step inquiry that a trial court must apply before admitting into evidence the expert opinion testimony of a new scientific principle:

> 1) whether such expert testimony would assist the jury in understanding the evidence or in determining a fact in issue;
>
> 2) whether such testimony is based on a scientific principle which has gained general acceptance in that particular scientific community; and
>
> 3) whether the expert witness is sufficiently qualified to render an opinion on the subject.
>
> 4) if all of the above are met, then the jury can assess the expert's credibility and either accept or reject his or her opinion.

In Hayes v. State, 660 So. 2d 257 (Fla. 1995), after applying the Ramirez test, and discussing the National Research Council's report and recommendations, id. at 262-64, this Court found that the DNA evidence in that case would have assisted the jury in determining a fact in issue. Id. at 264. It is equally true in this case that Mr. Nippes' testimony would have assisted the jury in understanding the evidence. Therefore, the first prong has been met.

As for the second prong, this Court, in Hayes, "[took] judicial notice that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the Frye test to protect against false readings and contamination." Id. Because the opinion does not indicate the specific type of DNA analysis performed in that case, i.e.,

RFLP or PCR, one could conclude that this Court took judicial notice that DNA tests results based on any scientific technique are generally accepted as reliable in the scientific community. Given the ambiguity in the phrase "testing procedures," however, one might conclude that the general scientific principle and technique are still subject to challenge. Thus, the State will discuss the issue of PCR acceptance out of an abundance of caution.

The State is mindful that the National Research Council stated in its report that "PCR analysis is extremely powerful in medical technology, but it has not yet achieved full acceptance in the forensic setting." **Nat'l Research Council**, DNA Technology in Forensic Science 70 (Nat'l Academy Press 1992). However, the NRC also stated that "[c]onsiderable advances in the use of PCR in forensic analysis can be expected soon; the method has enormous promise." Id. At the time of this trial in March 1994, when asked if PCR analysis was generally accepted as reliable within the scientific community, Mr. Nippes responded, "There's no question about that." (T 1276-77). Moreover, since the release of this report in 1992, numerous courts around the country have admitted PCR DNA test results. In fact, a California District Court of Appeal made the following comments:

> The NRC report does not undermine a finding of general acceptance of PCR analysis. Since that report was written, the reliability of PCR testing for forensic use has consistently been proven by the testimony of experts, hundreds of authoritative scientific articles and other literature supporting this testing technique, and by the overwhelming acceptance of PCR testing in dozens of judicial decisions. . . .
>
> Moreover, the report's observation that PCR analysis has not yet achieved "full acceptance" for forensic use is not a valid criticism under the admissibility standards of [People v. Kelly, 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976)]. A new scientific technique need only have gained "general acceptance" in the relevant scientific field. "Indeed, if scientific unanimity of opinion were necessary, very little scientific evidence, old or new, could be used."

People v. Admundson, 41 Cal.Rptr.2d 127, 133-34 (Cal. Ct. App. 1995) (and cases cited therein).[6] See also State v. Hill, 895 P.2d 1238, 1244-47 (Kan. 1995) (finding PCR properly admitted under Frye standard) (and cases cited therein); People v. Lee, 212 Mich.App. 228, 537 N.W.2d 233, 248-58 (1995) (finding PCR properly admitted under Frye standard) (and cases cited therein).

As for the third prong of the Ramirez test, Mr. Nippes testified at the motion hearing that he is the Chief Criminalist at the Regional Crime Lab in Ft. Pierce. He has been with the crime lab for 22 years. He is responsible for the scientific operations of the laboratory and performs physiologic analysis of trace evidence and fluids, including DNA analysis. (T 1273-74). According to Mr. Nippes, PCR analysis has been available since 1985, and he has been performing PCR analysis personally since 1988. (T 1275, 1277). Moreover, Mr. Nippes testified that he had coauthored an article that had been accepted for publication by the Academy of Forensic Sciences wherein population data from four crime labs within Florida was collected and analyzed for use as a standard database in Florida for calculating probabilities of matches in PCR DNA cases. (T 1277-78). Although Mr. Nippes was never qualified as an expert witness at the motion hearing, he certainly meets the qualifications of an expert witness. See Sponsors' Note to § 90.702, Fla. Stat. (1993) ("The definition of an expert is similar to that of § 90.231 of the Florida Statutes and of Florida Rule of Civil Procedure 1.390 which define an expert as 'one possessed of special knowledge or skill about the subject upon which he is called to testify.'"). See also State v. Moore, 885 P.2d 457, 473 (Mont. 1994) ("The degree or extent of a witness' qualifications affects the weight of the expert's testimony, not its admissibility. Furthermore, cross-examination is the shield to guard against unwarranted opinions."). Thus, the third prong of the Ramirez test has been met.

At the motion hearing, defense counsel challenged the competency of Mr. Nippes, but only in relation to his testimony about the population data that he used in this case. Defense counsel believed that

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[6] In assessing the admissibility of novel scientific evidence, California applies a slight variation of the Frye test which was enunciated in Kelly.

Mr. Nippes was not qualified to explain his use of this data because the population database was compiled in California and Mr. Nippes knew nothing about how the database was compiled or who the subjects were that made up the database. (T 1319-21). Defense counsel's concerns, however, did not relate to Mr. Nippes' qualifications as an expert witness. Rather, as the trial court found, they related to the weight of his testimony.

Based on this particular finding by the trial court, Appellant claims that the trial court applied the wrong standard in assessing his challenges to the DNA evidence. There is no indication, however, that the trial court did not know the proper standard to apply. Appellant challenged the admission of Mr. Nippes' testimony by filing a motion in limine which sought a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). (R 337). At the hearing on the motion, defense counsel reminded the court that he was seeking exclusion of the DNA evidence under the authority of Frye. (T 1266). Although Mr. Nippes testified about the general acceptance of PCR analysis, the bulk of his testimony, especially his cross-examination, related to Mr. Nippes' application of statistical probabilities and his qualifications to render an opinion based on his use of someone else's population data. Since Appellant offered no expert witness, and since the articles he was using to support his position related solely to calculating statistical probabilities, the trial court did not make specific findings under Frye relating to the general acceptance of PCR analysis. Rather, the trial court determined that Appellant's challenges to Mr. Nippes' qualifications and his statistical calculations related more to the weight of his testimony than to its admissibility. The fact that the trial court made such a finding, however, does not mean that it applied the wrong standard. after all, the trial found that the database used by Nippes was generally accepted. (T 1331). It simply means it did not believe Appellant's challenges were the proper subject of a Frye hearing.

As for Appellant's claim that "the non-ceiling principle evidence offered by the State was not generally accepted at the time of Mr. Murray's trial," **brief of appellant** at 46-47, the State submits that

this latter argument relating to the application or nonapplication of the ceiling principle was not preserved for review. Appellant did not raise the issue in his motion in limine,[7] and he did not articulate this argument at the motion hearing--either before, during, or after Mr. Nippes' testimony. Rather, Appellant challenged Mr. Nippes' use or nonuse of the ceiling principle through cross-examination and through the use of his own expert at the trial. (T 1493-95, 1891-99). At that point, the trial court had already ruled on the issue of admissibility. Thus, Appellant's complaint that Mr. Nippes had not applied the ceiling principle when determining the statistical probability of a match affected only the weight of his conclusions and opinions. Since Appellant did not make this argument to the trial court, either in the motion in limine or at the hearing, he has failed to preserve this issue for review. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even if Appellant did articulate this particular argument before the trial court, the trial court properly rejected it. As in Robinson v. State, 610 So. 2d 1288, 1291 (Fla. 1992), Appellant produced nothing to rebut Mr. Nippes' testimony that PCR analysis was generally accepted as reliable in the scientific community (T 1277), and that the database upon which he relied to calculate the probability of a match was valid (T 1295). As for the three articles that defense counsel submitted, Mr. Nippes testified that there were follow-up articles to those (T 1285-86). He also unequivocally stated that there was not a conflict or argument regarding DNA among forensic scientists or the majority of scientists. (T 1287-88). Appellant presented no evidence to dispute Mr. Nippes' testimony. Thus, the trial court would have acted within its discretion in denying Appellant's motion on this ground.

As for the scientific acceptance of population databases in the context of PCR analysis, very few challenges have been reported. In Harmon v. State, 908 P.2d 434, 441-42 (Alaska Ct. App. 1995), the

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[7] Rather, Appellant claimed that the database used by Mr. Nippes must come from a truly random mating population that is large enough to be statistically significant and must be in Hardy-Weinberg equilibrium.

defendant challenged "the statistical problem of population substructures to attack the admissibility of DNA evidence in general." Id. at 441. The court heard extensive testimony on the subject and determined that "the methods that were used to determine the probability of a match incorporated conservative assumptions that, if anything, were designed to overstate the probability of a match." Id. at 441. The forensic serologist from the FBI who calculated and reported the results testified that she used "a conservative method recommended by the Nation Research Council." Id. at 442. The "conservative method" used, however, was not discussed in the opinion

In a case from Nebraska, on the other hand, the supreme court reviewed the issue of population subgroups as it related to PCR analysis and found (1) that the underlying method of calculating a statistical probability must meet the Frye test, (2) that there was substantial disagreement within the scientific community relating to the role of population substructure, (3) that, as a result, there was no general acceptance of the Forensic Science Associates' statistical probability calculations, (4) that DNA evidence cannot be admitted without "statistical probability evidence that has been calculated from a generally accepted method," and (5) that the admission of DNA evidence based on invalid probability calculations constituted per se reversible error. State v. Carter, 524 N.W.2d 763, 774-86 (Neb. 1994).

Given the paucity of decisions on this subject and the convergent nature of the decisions in existence, and given the paucity of the evidence in the present case relating to this issue, if this Court determines that Appellant has preserved this particular issue for review, the State submits that this Court should relinquish jurisdiction for a more complete evidentiary hearing so that the State can establish in more detail the specific method used by Mr. Nippes to calculate the probabilities of a match. See State v. Vargas, 20 Fla. L. Weekly S594, 595-96 (Fla. Dec. 14, 1995) (Overton, J., dissenting).

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HAIR EVIDENCE OVER APPELLANT'S CHAIN OF CUSTODY COMPLAINTS (Restated).

During the State's case-in-chief, David Chase testified that he was one of the evidence technicians who collected evidence from the scene of the crime. (T 1016-17). Officer Chase testified that he collected "[s]ome hairs" from the left leg and chest area of the victim. (T 1017). Using tweezers, he removed the hairs and sealed them in a manilla envelope and then put them in the sheriff's office property room. (T 1018). He specifically identified State's Exhibit YY as the envelope into which he placed the evidence. (T 1017-18). When asked on cross-examination how many pieces of hair he collected, Officer Chase responded, "I think it was one from the left leg and one from the chest. (T 1019) (emphasis added).

Detective O'Steen later testified that he personally took all of the hair samples and other evidence from the property room of the sheriff's office to the FDLE lab in Jacksonville and then to the FBI lab in Jacksonville. He took all of these samples in a sealed box (State's Exhibit QQQ). From there, the Jacksonville FBI lab sent the sealed exhibits to their Washington, D.C., lab, where they were analyzed and returned to the Jacksonville FBI lab. Once they returned, Detective O'Steen personally took them from the Jacksonville FBI lab to the Regional Crime Lab in Ft. Pierce where he saw Daniel Nippes remove some exhibits from the box for DNA analysis. (T 1205-11).

Special Agent Dizinno, the hair analyst from the FBI lab in Washington, testified that he received a sealed box (State's Exhibit QQQ) from the Jacksonville FBI lab. (T 1343-44). In the box, he found numerous individually sealed exhibits, including head and pubic hair samples from the victim, head and pubic hair samples from Appellant, head and pubic hair samples from Stephen Taylor, "debris removed from a white garment of Alice Vest" from which hairs were found and placed under microscopic slides, and "debris removed from the left leg and chest of Alice Vest." (T 1344-49, 1351, 1354). Each sample

was sealed in a brown paper bag inside a sealed plastic container. (T 1347). The "debris" from the white shirt was in a sealed piece of folded white paper which was also sealed in a manilla envelope. (T 1349-50). The "debris" from the left leg and chest of the victim was sealed in a small manilla envelope which was in turn sealed in a slightly bigger manilla envelope. Special Agent Dizinno did not remember how it was sealed exactly. (T 1351-52). All of these individual exhibits were admitted without objection by Appellant. (T 1345, 1346, 1348, 1350, 1352).

Special Agent Dizinno then identified several slides upon which he mounted all of the hairs (State's Exhibits TTT, UUU, VVV). (T 1358). When he identified the slide upon which the hairs from the victim's leg and chest where mounted (State's Exhibit VVV), defense counsel asked him how many hairs were on that slide. The witness responded that there were several Caucasian head hairs, several Caucasian body hairs, and one Caucasian pubic hair. (T 1359-60). At that point, defense counsel objected to the admission of that exhibit based on the fact that Officer Chase testified that he collected two hairs and Special Agent Dizinno testified that he received more than two hairs. (T 1360-63). The State responded that there were other hairs in the same envelope with the suspect pubic hair but it did not seek to introduce the other hair because it was not helpful to its case:

> Judge, just for the purpose of the record, I show you this envelope which shows a CCR number and it shows hairs 22, 23 and 33 were inside those, also two other things, and that's where that came from, rather than put the whole thing in since these are not germane to this. I only introduced those two and that's how it was. There's no issue here as to chain of custody or anybody tampering with it.

(T 1363). At that point, the trial court ruled:

> I'm going to deny your motion. I think that chain of custody is established. If there is a discrepancy, it's an apparent one to be argued and for the jury to determine in their collective judgment.

(T 1363).

In this appeal, Appellant claims that the trial court abused its discretion in admitting the hair

evidence from the victim's leg and chest because there was an indication of probable tampering. **Brief of Appellant** at 47-49. Appellant also complains that the evidence was improperly admitted because its probative value was substantially outweighed by the danger of unfair prejudice given the discrepancy in the number of hairs collected. Id. at 50. This latter argument, however, was not made to the trial court. Therefore, Appellant cannot make it here for the first time on appeal. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

As for the chain of custody claim, "the state is not required to elicit testimony from every custodian in the chain. Relevant physical evidence is admissible unless there is some indication of probable tampering with the evidence." Dodd v. State, 537 So. 2d 626, 627 (Fla. 3d DCA 1988) (emphasis added). See also Peek v. State, 395 So. 2d 492, 495 (Fla. 1981). Appellant seizes on Officer Chase's testimony to support his position, but Officer Chase did not state unequivocally that he collected two hairs. Rather, he testified that he thought he collected two. (T 1019). As the State explained later during defense counsel's objection, it only asked Officer Chase to identify part of the evidence collected from the victim's body. Since it was not going to admit other evidence collected, it did not bother to have the officer identify the other evidence. (T 1363). However, Special Agent Dizinno testified that the other evidence included several body hairs and several head hairs, the latter of which matched the victim's head hair. (T 1352-53, 1375-76). Thus, there is no indication of probable tampering with the hair evidence collected from the victim's body. Peek, supra.

Were this Court to find, however, that Appellant made the requisite showing of probable tampering, any error in the admission of State's Exhibit VVV and Special Agent Dizinno's testimony regarding the characteristic similarity between Appellant's pubic hair and the pubic hair found on the victim's body was harmless beyond a reasonable doubt. Other permissible evidence upon which the jury could have relied to find Appellant guilty includes Appellant's presence near the scene of the murder at the time of the

murder with someone already convicted of the murder; the presence of several pubic hairs on a white shirt in the victim's bathroom sink that are characteristically similar to Appellant's pubic hair, one of which matches Appellant's DNA structure within a probability of 91.2 percent; admissions to Ricky Proctor, Charles Torak, and Anthony Smith that he murdered the victim with Stephen Taylor; and Appellant's pretrial escape from jail and possession of fake identification upon his arrest, both of which show a consciousness of guilt. Based on this evidence, there is no reasonable possibility that the verdicts would have been different had Special Agent Dizzino's testimony regarding the pubic hair found on the victim's body not been admitted. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's convictions.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTIONS FOR CONTINUANCE MADE JUST PRIOR TO TRIAL AND PRIOR TO THE PENALTY PHASE (Restated).

Appellant was indicted for this murder on April 9, 1992. (R 1-2). Assistant Public Defender John Ledbetter was appointed to represent Appellant on April 28, 1992. (R 10). Three months later, Appellant complained about Mr. Ledbetter's representation; Mr. Ledbetter's motion to withdraw, citing a breakdown in their relationship, was granted on July 22, 1992. (R 22-23; T 27). Teresa Sopp was then appointed to represent Appellant. (R 33; T 31-32). On October 5, 1992, the State's motion for a one-week continuance was denied, but defense counsel's motion for continuance was taken under advisement and granted two days later over Appellant's objection. The trial was reset for November 2, 1992. (R 41, 42-45; T 70-75, 76-77). On October 27, 1992, defense counsel filed a waiver of speedy trial and another motion to continue, which was granted. (R 47-49; T 82-83).

Appellant escaped from the county jail on November 22, 1992, and was not returned to custody

until September 18, 1993. (R 74; 1627-28). Immediately thereafter, Ms. Sopp moved to withdraw, citing "[i]rreconcilable differences" between her and Appellant. (R 77-78). Said motion was granted on September 21, 1993. (R 84-85; T 96). Henry Coxe was then appointed to represent Appellant, but he was allowed to withdraw based on a conflict of interest. (R 84-85; T 103-05). Brent Shore was appointed on October 7, 1993. (R 82-83). On November 3, 1993, defense counsel moved for a confidential mental health expert and a continuance, to which Appellant did not object. (R 92-93; T 160-63). The trial court granted both motions and reset the trial from December 13, 1993, to February 28, 1994. (R 94-95; T 160-63).

On December 10, 1993, defense counsel refused to adopt Appellant's pro se motion for speedy trial; thus, the motion was rendered a nullity. (T 166). Shortly thereafter, Appellant indicated that he wanted to fire Mr. Shore. (T 168-). As a result, counsel moved to withdraw that day, citing "[i]rreconcilable conflicts . . . which have made continued effective representation virtually impossible." (T 100-01). Said motion was granted on January 13, 1994. (R 113).

Appellant's ultimate trial attorney, Roberto Arias, was appointed the following day. (R 114-15; T 180-82). The trial court specifically reminded defense counsel that trial was set for, and would proceed on, February 28. (T 180). Mr. Arias acknowledged the date and Appellant's strong desire to proceed on that date. (T 180-81). Stephen Weinbaum was appointed as co-counsel on January 28, 1994. (R 117, 128; T 187-94).

On the Friday before the Monday trial, both Mr. Arias and Mr. Weinbaum, who was focusing on the penalty phase, moved for a continuance. As grounds therefor, Mr. Arias claimed that he had not been able to (1) contact his DNA expert witness after sending him all of the necessary information and arrange for his testimony (T 431-33), (2) locate persons who had been in jail with an inmate named Glasgow who might testify to statements made to him by Appellant (T 433-34), (3) investigate for impeachment purposes

Charles Torak's alleged use by the DEA as a confidential informant and any prior convictions outside of Florida (T 434-37), and (4) investigate for impeachment purposes Anthony Smith's background and prior inconsistent statements regarding his escape with Appellant from jail (T 437-38).

Mr. Weinbaum alleged that he had not been able to (1) interview and reinterview unnamed family members, (2) investigate fully Appellant's prior criminal record which may be used by the State to support an aggravating factor, (3) interview "no fewer than ten mental health professionals," only two or three of which are in the Jacksonville area, (4) obtain and review records from the Nassau Start Center, St. Johns Hospital, the Jacksonville Marine Institute, school records, and "other records regarding his early life," (5) research the law relating to aggravating and mitigating factors, especially mental mitigating factors, and (6) research the effects of psychotropic drugs on Appellant. (T 443-44).

Thereafter, the trial court had a lengthy discussion with Appellant, wherein Appellant protested the motion for continuance and stated emphatically that he wanted to go to trial on Monday despite defense counsels' stated reasons for a continuance. (T 447-52). At that point, the trial court discussed with the attorneys Appellant's ability to waive effective assistance of counsel. (T 454-56). Following a Faretta-type inquiry of Appellant (T 456-61), the trial court denied the motion for continuance. (T 463-64).

On the morning of trial, Mr. Arias renewed his motion for continuance without further argument. That motion was denied. (T 475-76). Verdicts were rendered on March 8, 1994. (T 2101-04). By request of defense counsel, the penalty phase was scheduled for March 24, 1994. (T 2105-07). On the morning of March 24, Mr. Weinbaum renewed his motion for continuance. When asked if any witnesses who were otherwise not available could be available if he were given additional time, defense counsel responded, "There's no one that I know of that is not available for me today. Just, as I say, people that I've not been able to contact." (T 2135-36). Without explicitly ruling, the trial court called the jury into the courtroom and the penalty-phase began. (T 2136).

In this appeal, Appellant claims that the trial court abused its discretion in denying his attorneys' motions for continuance, thereby rendering their representation ineffective and violating his right to a fair trial. **Brief of Appellant** at 51-54. As this Court has previously held, "[t]he granting or denial of a motion for continuance is within a court's discretion and will not be overturned absent a palpable abuse of discretion." Lusk v. State, 446 So. 2d 1038, 1040 (Fla. 1984). Moreover, in a case cited to by Appellant, the First District Court of Appeal has noted that

> [f]actors to be considered in determining whether the denial of a continuance is error based on the lack of preparation time are: 1) the time available for preparation, 2) the likelihood of prejudice from the denial, 3) the defendant's role in shortening preparation time, 4) the complexity of the case, 5) the availability of discovery, 6) the adequacy of counsel actually provided and 7) the skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime.

McKay v. State, 504 So. 2d 1280, 1282 (Fla. 1st DCA 1986).

In this case, Appellant had fired, or caused the withdrawal of, three attorneys prior to his trial.[8] In the two years between Appellant's indictment and trial, three separate defense motions for continuance had been granted and speedy trial had been waived. Appellant had also escaped from custody for ten months. When Mr. Arias was appointed in January 1994, he had 45 days to prepare for Appellant's trial. He was an experienced defense attorney and had tried other capital cases. (T 442). He indicated at the time he was appointed that, according to previous counsel, "discovery ha[d] been 98 percent completed." (T 180-81). Moreover, Appellant's codefendant had already been tried and convicted; thus, the facts of the case were already well-established. Mr. Arias was also provided co-counsel who sat with him through the entire guilt phase of the trial. Terminally, Appellant consistently maintained that he wanted a speedy trial, and he objected to the motions for continuance.

As for Mr. Arias' stated reasons for needing more time, the record indicates that counsel was either

[8] A fourth attorney withdrew based on a conflict of interest.

able to do, or did not need to do, those things specified. For example, Mr. Arias was ultimately able to confer with his DNA expert witness, who testified in Appellant's defense. (T 1867-1912). Mr. Glasgow did not testify for the State; thus, Mr. Arias did not have to impeach him. As for Charles Torak, Mr. Arias questioned him extensively regarding his work as a confidential informant with the sheriff's department and DEA. (T 1576-78). The State elicited Mr. Torak's prior criminal history. (T 1568-69). As for Anthony Smith, Mr. Arias impeached him with prior inconsistent statements relating to who assisted him and Appellant in escaping, and Mr. Smith's criminal background was explored at length. (T 1658-63, 1672-74, 1685-1708). Not only did Mr. Arias adequately cross-examine the State's witnesses, but he also presented the testimony of five witnesses in Appellant's behalf. More importantly, at the close of Appellant's case, defense counsel made no indication that he wanted to produce other evidence, but could not for lack of time. Thus, under these circumstances, the trial court did not abuse its discretion in denying Mr. Arias' motion for continuance. Lusk, 446 So. 2d at 1040-41; Grossman v. State, 525 So. 2d 833, 836 (Fla. 1988); Woods v. State, 490 So. 2d 24, 26 (Fla. 1986), cert. denied, 479 U.S. 954 (1987); Echols v. State, 484 So. 2d 568, 572 (Fla. 1985).[9]

Likewise, the trial court did not abuse its discretion in denying Mr. Weinbaum's motion for continuance. Mr. Weinbaum was sought as co-counsel by Mr. Arias solely for the purpose of the penalty phase. (T 187-89, 442). He too was an experienced defense attorney and had previously tried capital cases. (T 442). In total, Mr. Weinbaum had 55 days to prepare for the penalty phase. He chose, however, to spend nine days assisting Mr. Arias in the guilt phase of the trial. Following the trial, he had sixteen

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[9] Although not cited to by Appellant, Valle v. State, 394 So. 2d 1004 (Fla. 1981), presents a far different factual scenario than in this case. In Valle, a single defense attorney was given 24 days from Valle's arraignment within which to investigate both the guilt and penalty phase aspects of Valle's trial. As the record revealed, counsel was unable to interview 24 of the State's 59 witnesses, was denied a confidential mental health expert, and was denied the opportunity to present evidence relating to his pretrial motions. Clearly, the circumstances of Appellant's prosecution do not begin to compare with those in Valle. Thus, that case is wholly inapplicable to this case.

days to investigate and prepare.

Prior to trial, he made nothing more than vague references to people he would like to contact. At the beginning of the penalty phase, Mr. Weinbaum could not name one person whom he would like to call as a witness if given more time. After calling Appellant's brother as a witness, Mr. Weinbaum made no indication that other family members might be interested in testifying. As for Appellant's criminal history, Mr. Weinbaum had a predisposition report from July 1986 which detailed Appellant's juvenile history. (T 2178-2209). It also contained biographical information about Appellant, his family, his education, and his employment history (T 2181-85); it contained mental health information, including Appellant's admission to St. John's Hospital (T 2186-87, 2189-90); and it contained information relating to Appellant's participation in programs at the Start Center and the Marine Institute (2183, 2187-88). Appellant presented a separate witness to relate his difficulties in school. (T 2170-77). As for counsel's inability to research case law, the record indicates that Mr. Weinbaum filed numerous motions relating to the penalty phase, including motions attacking the aggravating factors and jury instructions. (T 139-41, 143-56, 164-90, 209-25, 230-40, 246-50, 414-16, 417-18, 419-23).

Moreover, the day before the penalty phase, the State indicated that it had provided Mr. Weinbaum with the certified copies of conviction that it intended to use to prove the "prior violent felony" aggravating factor. Mr. Weinbaum seemed well-versed in the facts of those cases, and which witnesses the State intended to present to prove that factor. (T 2115-22). In fact, Mr. Weinbaum stated, "I went through those judgment and sentences and did some investigation as best I could given the time provided on those cases, and there are certain pitfalls that are there, Your Honor." (T 2121). In all, Mr. Weinbaum presented the testimony of four witnesses in Appellant's behalf. At no time did counsel indicate that he wanted to call other witnesses but was unable. Under these circumstances, the trial court properly denied his motion for a continuance. Lusk; Grossman; Woods; Echols. Therefore, this Court should affirm Appellant's

convictions and sentence of death.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF APPELLANT'S PRETRIAL ESCAPE, THEFT OF AUTOMOBILES, AND POSSESSION OF FALSE IDENTIFICATION (Restated).

Prior to trial, the State filed its notice of intent to rely on evidence of other crimes, wrongs, or acts, namely, Appellant's escape from the pretrial detention facility. (R 102). Four days later, the State filed a second notice of intent to rely on evidence that Appellant had in his possession upon his arrest a false identification and social security card. (R 103). Thereafter, Appellant filed a motion to suppress the false identification and social security card on the grounds that the FBI did not have a search warrant or consent to search. (R 134-36). Although Appellant's motion for new trial makes reference to the denial of his motion to exclude collateral crime evidence, namely, his escape (R 405-08, ¶ 20), the record contains no such motion or order denying such a motion. At a hearing on the motion to suppress, the trial court denied Appellant's motion to suppress, finding that the false identification was found pursuant to a lawful frisk for weapons. (T 873-96).

During the State's case-in-chief, it presented the testimony of Sergeant Freeland, Officer Groves, Sergeant Powell and Anthony Smith relating to Appellant's pretrial escape from the jail. (T 1625-30, 1631-33, 1634-38, 1640-41, 1644-58). At no time did Appellant object to the presentation of this evidence.

During Mr. Smith's cross-examination by defense counsel, the following colloquy occurred:

> Q [BY DEFENSE COUNSEL] And while you're on the road you wanted to stay out of trouble?
>
> * * * *

A [BY MR. SMITH] Yes, sir, I wanted --

Q You committed three bank robberies?

A Yes, sir.

Q Possessed a short sawed-off shotgun?

A Yes, I possessed a short sawed-off shotgun.

Q For which you got sentenced in federal court?

A Yes.

Q Stole cars?

A Yes.

(T 1690). Then, on redirect examination, the State informed the trial court at sidebar that Appellant was with Mr. Smith when he stole those cars, and asked if he could inquire into it. (T 1713-14). Defense counsel objected on relevancy grounds, but the trial court found that defense counsel had opened the door. (T 1714). Thereafter, Mr. Smith testified that he and Appellant stole a truck in Lake City, that it overheated in Mississippi, and that they then stole a car. (T 1715-16). At that point, defense counsel objected because the State was eliciting facts surrounding the robberies as opposed to the mere fact that Appellant was with Mr. Smith when the vehicles were stolen. Defense counsel also objected because the State had not notified him of their intent to rely on this evidence. (T 1716-17). Again, however, the trial court found that defense counsel had opened the door and that the State was not required to give him any notice. (T 1717).

Later during the State's case-in-chief, Special Agent Kerns of the FBI, testified that he arrested Appellant in Las Vegas in June 1993. He also testified without objection that he recovered from Appellant's person a social security card with the name of "Doyle Rex White, II" and a Nationwide Check Service card with Appellant's photograph but the name of "Doyle R. White." (T 1732-35).

In this appeal, Appellant claims that "[d]espite defense counsel's objections and motions, the trial court permitted the State to introduce evidence of Mr. Murray's collateral crimes or bad acts." **Brief of Appellant** at 54. Regarding the escape evidence, Appellant claims that he "moved to exclude collateral crimes evidence," but cites only to his motion for new trial. Id. at 55. It is Appellant's burden, however, to show that error exists in the record. Here, there is no motion and no order in the record. Thus, Appellant has failed to meet his burden. See State v. Kelley, 588 So. 2d 595, 599-600 (Fla. 1st DCA 1991) (on motion for rehearing); Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994); Snead v. State, 415 So. 2d 887, 889-90 (Fla. 5th DCA 1982). Moreover, Appellant failed to object when the evidence was admitted. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).[10]

As for the evidence that Appellant possessed false identification upon his arrest, Appellant only challenged this evidence pretrial as an unlawful search and seizure, and then he failed to object to the evidence when it was admitted. At no time did Appellant challenge the admission of this evidence as collateral crime evidence. He may not do so now for the first time on appeal. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).[11]

Regarding Mr. Smith's testimony relating to the stolen cars, Appellant first objected based on relevance. Only after the entire testimony had been admitted did defense counsel object as improper Williams rule evidence. Such an objection was not timely. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Even if it were timely, defense counsel had opened the door during cross-examination. The State

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[10] Even if Appellant had filed a motion which the trial court denied, and had objected when the evidence was admitted this Court has previously held that evidence of a defendant's escape is relevant to show consciousness of guilt. Harvey v. State, 529 So. 2d 1083, 1086 (Fla. 1988); Straight v. State, 397 So. 2d 903, 908 (Fla.), cert. denied, 454 U.S. 1022 (1981).

[11] Even if Appellant had challenged the evidence of his possession of false identification as improper collateral crime evidence, this Court has previously held that such evidence is relevant to show consciousness of guilt. Straight, 397 So. 2d at 908; Weston v. State, 452 So. 2d 95, 95 (Fla. 1st DCA), rev. denied, 456 So. 2d 1182 (Fla. 1984).

was properly allowed to inquire further. See Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986) ("Generally, testimony is admissible on redirect which tends to qualify, explain, or limit cross-examination testimony.").

Even were it error for the State to elicit the facts surrounding the car thefts by Mr. Smith and Appellant, such evidence was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The permissible evidence upon which the jury could have relied to find Appellant guilty includes Appellant's presence near the scene of the murder at the time of the murder with someone already convicted of the murder; the presence of a pubic hair on the victim's body that is characteristically similar to Appellant's pubic hair; the presence of several pubic hairs on a white shirt in the victim's bathroom sink that are characteristically similar to Appellant's pubic hair, and which matches Appellant's DNA structure within a probability of 91.2 percent; admissions to Ricky Proctor, Charles Torak, and Anthony Smith that he murdered the victim with Stephen Taylor; and Appellant's pretrial escape from jail and possession of fake identification upon his arrest, both of which show a consciousness of guilt. Based on this evidence, there is no reasonable possibility that the verdicts would have been different had Mr. Smith's redirect testimony relating to the stolen cars not been admitted. Therefore, this Court should affirm Appellant's convictions.

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING THE TESTIMONY OF THREE DEFENSE WITNESSES WHO WOULD HAVE TESTIFIED TO STATEMENTS MADE BY APPELLANT REGARDING HIS INTENT TO ESCAPE (Restated).

During the State's case-in-chief, the prosecutor introduced evidence that Appellant escaped from the county jail while awaiting trial for these crimes. Such evidence was admitted to show a consciousness of guilt. In his defense, Appellant sought to introduce the testimony of four witnesses regarding statements he made to them either in jail or while on escape status. As proffered, Michael Brown would have testified that Appellant thought he was being "railroaded," that he wanted to go to trial, but that the attorneys kept continuing the trial, and that "he thought about leaving if he had a chance." (T 1753-55). Appellant also expressed concern to him that his wife had just died, that his in-laws had a lot of money, and that he needed to get his case settled one way or the other before his in-laws got custody of his children and he would never see them again. (T 1755). Thomas Williams would have testified that Appellant repeatedly complained about the delays in his trial. Appellant did not believe the State had a case against him; thus, he wanted to go to trial as soon as possible. (T 1790-92, 1794). Paul Pinkham, a reporter for the Times-Union, would have testified that Appellant called him after he had escaped from jail and told him that he was dissatisfied with his attorney and the delays in his trial. Appellant indicated, however, that he would turn himself in if the State would drop the escape charge and if the court would appoint "that famous lawyer in Jacksonville." Mr. Pinkham relayed the offer to the State, which declined Appellant's offer. (T 1795-1800). Finally, William Drew would have testified that Appellant told him he was not being treated fairly regarding his trial. Appellant did not believe his attorney was working on his case, and he was worried that he was going to be "railroaded." (T 1807-09, 1812).

When Appellant sought to introduce Mr. Brown's testimony, the State objected on hearsay grounds. Defense counsel claimed that such testimony was admissible under the state of mind exception to the

hearsay rule. The trial court, however, found the evidence inadmissible absent Appellant's testimony at the trial. (T 1749-53). The trial court maintained its ruling following the proffer of the other three witnesses. (T 1794, 1800, 1812).

In this appeal, Appellant claims that the trial court abused its discretion in precluding the testimony of these witnesses. He maintains that their testimony was admissible under the state of mind exception to the hearsay rule. **Brief of Appellant** at 59-63. It is well-established that "[e]xculpatory statements made by a defendant who chooses not to testify at trial constitute inadmissible hearsay not within any of the exceptions to the hearsay rule." Moore v. State, 530 So. 2d 61, 63 (Fla. 1st DCA 1988) (and cases cited therein). Professor Ehrhardt agrees, but notes that a hearsay exception may apply under limited circumstances: "When the defendant seeks to introduce testimony concerning his or her own out-of-court statements for the truth of the matter stated, it is hearsay and it is not admissible. In a few situations, there might be an applicable exception." Ehrhardt, Florida Evidence § 801.3 (1995 Edition) (footnote omitted).

Appellant seeks to apply the state of mind exception. Under this exception, the following are admissible even though the declarant is available as a witness:

> (3) Then-Existing Mental, Emotional, or Physical Condition.
>
> (a) A statement of the declarant's state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.
>
> (b) However, this subsection does not make admissible:
>
> * * * *
>
> 2. A statement made under circumstances that indicate its

lack of trustworthiness.

Section 90.803(3), Fla. Stat. (1993).

Given the inherent unreliability of a defendant's self-serving exculpatory statements made either before or after committing a crime, the exception's requirement of proof of trustworthiness must be a preeminent consideration in deciding whether to admit such statements. See Ehrhardt, Florida Evidence § 803.3a at 623-24 ("The trial judge must determine whether a particular statement falls within section 90.803(3) and whether or not there are any circumstances that indicate the lack of trustworthiness of the statement, which would make it inadmissible under section 90.803(3)(b)2."). Here, although the State put Appellant's state of mind in issue by introducing evidence of Appellant's escape to show a consciousness of guilt, it was incumbent upon Appellant to show that the statements were made under circumstances indicating their trustworthiness.

During his proffer, Michael Brown testified that he was in the county jail from December 1991 to December 1992 and shared the same cellblock with Appellant.[12] He could not say, however, when Appellant made those statements sought to be introduced. He thought it was sometime during the Summer, but he was not sure. (T 1762-65). Although defense counsel asserted that Appellant made some statements "just prior to his escape" (T 1755), Mr. Brown could not give a time period for any of Appellant's statements.

Similarly, although Thomas Williams was in the county jail with Appellant from March 1991 to November 1992, he did not say when Appellant made statements to him regarding his desire to get a speedy trial. (T 1790-94). Likewise, although William Drew was in the county jail with Appellant from July 1992 to April 1993, he did not say when Appellant made statements to him regarding his case. (T 1807-11). Finally, Paul Pinkham would have testified to statements made by Appellant more than five

[12] Appellant was in the county jail between April 1992 and November 1992 before he escaped. (T 1627-28).

months after Appellant escaped. (T 1795-1800). Given the fact that Appellant allegedly made these statements while in jail awaiting trial for this murder, that he made them to other inmates and to a newspaper reporter, and that there is no evidence as to when these statements were made in relation to when Appellant escaped from the jail, Appellant failed to show sufficient indicia of trustworthiness. Hearsay is inherently unreliable. The general rule precludes the admission of such statements. To be admitted, Appellant must do more than show that the statements were made and that they are relevant.

To support his contention that the trial court should have admitted his self-serving hearsay statements, Appellant cites to Downs v. State, 574 So. 2d 1095 (Fla. 1991), Morris v. State, 487 So. 2d 291 (Fla. 1986), and Jenkins v. State, 422 So. 2d 1007 (Fla. 1st DCA 1982), modified on other grounds, 444 So. 2d 947 (Fla. 1984), all of which are easily distinguishable. In Downs, the defendant's statements to several witnesses mere hours before the murder should have been admitted under the state of mind exception because they were relevant to the issue of the defendant's intent at the time of the murder and because they were sufficiently reliable.

Morris and Jenkins are even more distinguishable. In those case, unlike in this case, the defendant was attempting to introduce the statement of someone else through a third witness. For example, in Morris, the defendant sought to introduce, as part of his entrapment defense, the hearsay statements of an informant (Donaldson) to another person (Gotbaum) that the informant was going to set Morris up in a drug deal. This Court found that Gotbaum's testimony should have been admitted as evidence relating to predisposition. Id. at 292-93. Similarly, in Jenkins, the defendant sought to introduce the hearsay statements of the victim (Thorne) made shortly before the murder to a witness (Furlough) which related to Jenkins' defense of self-defense. The fact that the victim indicated he was going to "straighten [the defendant] up," had a knife in his possession, then approached Jenkins in a "slow run," was important to the district court in determining the Furlough's testimony should have been admitted. Obviously, neither

Morris nor Jenkins concerns hearsay statements made by the defendant. Thus, given the more strict standards for admission of defendants' hearsay statements, these cases are inapplicable.

The State relies instead on Overton v. State, 429 So. 2d 722, 723 (Fla. 1st DCA 1983), and Logan v. State, 511 So. 2d 442, 443 (Fla. 5th DCA 1987). In Overton, the defendant sought to introduce the testimony of his arresting officer to whom he stated immediately after his arrest that the police had the "wrong guy" and that they were letting the "right guy" get away. The defendant sought to introduce these statements "to show his state of mind at the time of apprehension and to show that he did not have time to fabricate his version of the events." Id. at 723. The district court affirmed the trial court's rejection of this testimony, finding that "[a]lthough the statement was made at the time of Overton's apprehension and may be considered as part of the res gestae, if it is so self-serving and made under circumstances that indicate its lack of trustworthiness, then it should be excluded." Id.

Similarly, in Logan v. State, 511 So. 2d 442, 443 (Fla. 5th DCA 1987), the Fifth District held that the trial court did not abuse its discretion in refusing to allow the arresting officer to testify as to the defendant's exculpatory statements made over four hours after the crime. According to the district court, the self-serving statements were made under circumstances showing their lack of trustworthiness.

As in Overton and Logan, Appellant failed to prove that his statements to the four witnesses were trustworthy, i.e., not fabricated or contrived. As a result, the trial court properly excluded these witnesses from testify to Appellant's self-serving statements. Even if the trial court erred, however, there is no reasonable possibility that the verdict would have been different had these witnesses testified. Assuming that their testimony would have negated the consciousness of guilt implied by Appellant's escape and possession of false identification, there was a multitude of other evidence upon which the jury could have relied to find Appellant guilty: Appellant's presence near the scene of the murder at the time of the murder with someone already convicted of the murder; the presence of a pubic hair on the victim's body that is

characteristically similar to Appellant's pubic hair, and which matches Appellant's DNA structure within a probability of 91.2 percent; the presence of several pubic hairs on a white shirt in the victim's bathroom sink that are characteristically similar to Appellant's pubic hair; and admissions to Ricky Proctor, Charles Torak, and Anthony Smith that he murdered the victim with Stephen Taylor. Thus, even if the trial court erred in excluding Appellant's witnesses, such error was harmless beyond a reasonable doubt. See Downs, 574 So. 2d at 1098; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE VIII

WHETHER THE STATE'S COMMENTS DURING ITS GUILT-PHASE CLOSING ARGUMENT DEPRIVED APPELLANT OF A FAIR TRIAL (Restated).

During the State's rebuttal closing argument in the guilt phase, the prosecutor stated,

> Mr. Arias says, well, we're showing you these pictures just for shock value and I apologize if you think that, but this is righteous indignation is what I would term it. You have the right to look at this and be angered by the senseless, brutal nature of this murder --

(T 2058). At that point, defense counsel objected and the following ensued at sidebar:

> THE COURT: Mr. Hardee, they do not have the right to be angered by anything.
>
> MR. ARIAS: Judge, that was my objection to improper argument. The only reason why this argument could be made was to inflame the jury's passions and prejudices.
>
> THE COURT: His predicate was you have the right to be angry. They do not have such a right and I will instruct them otherwise in the instructions. I'll sustain the objection. You go on to something else.
>
> MR. HARDY: Okay.
>
> MR. ARIAS: Judge, I would move for a mistrial.
>
> THE COURT: I'll deny the motion for mistrial.

(T 2058-59). The trial court then gave the following curative instruction to the jury:

> Ladies and gentlemen, I've sustained the objection that was made and I will instruct you that the jury, you, do not have a right to be angry. I'll further instruct you about that in closing charges of the law.

(T 2059-60). As promised, the trial court instructed the jury at the close of the evidence that

> [t]his case must be decided only upon the evidence that you have heard from the answers of the witnesses and have seen in the form of the exhibits in evidence and these instructions. This case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone.

(T 2086) (emphasis added).

In this appeal, Appellant claims that the State's comment unfairly prejudiced him, that the trial court's curative instruction was of "dubious value," and that the only appropriate remedy is a new trial. **Brief of Appellant** at 63-65. This Court has previously held, however, that "prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless." State v. Murray, 443 So. 2d 955, 956 (Fla. 1984). Rather, "[w]here, as here, prosecutorial misconduct is properly raised on objection, the judge should sustain the objection, give any curative instruction that may be proper and admonish the prosecutor and call to his attention his professional duty and standards of behavior." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). See also Broxson v. State, 505 So. 2d 1361, 1364 (Fla. 1st DCA) ("Even though there is a valid basis for objection to a comment made during trial, the preferred remedy is a curative instruction."), rev. denied, 518 So. 2d 1273 (Fla. 1987). Here, the trial court rebuked the prosecutor and gave an appropriate curative instruction. As detailed in previous issues, based on the quality and quantity of evidence upon which the jury could have relied to render its guilty verdicts, any error engendered by the State's comment was harmless beyond a reasonable doubt. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992); Watts v. State, 593 So. 2d 198, 203 (Fla.), cert. denied, 112 S.Ct. 3006, 120 L.Ed.2d 881 (1992); Williams v. State, 544 So. 2d 1114, 1115 (Fla. 3d DCA 1989).

ISSUE IX

WHETHER THE RECORD SUPPORTS APPELLANT'S CONVICTIONS FOR FIRST-DEGREE MURDER, BURGLARY WITH AN ASSAULT, AND SEXUAL BATTERY (Restated).

In this appeal, Appellant claims that the evidence was insufficient to prove any of the offenses charged. **Brief of Appellant** at 65-66. Contrary to Appellant's assertion, however, "the only evidence that the State was able to offer to establish [his] presence" was not "one hair, which should have been suppressed, and the incredible, impeached testimony of four jailhouse snitches." **Brief of Appellant** at 66. Moreover, the State's evidence was not "scant and incredible." Id. James Fisher testified that he took Appellant to pick up Stephen Taylor, and then dropped them both off around midnight on the night of the murder just down the street from the victim's home. (T 1102-06). Juanita White, who lived approximately two miles to the south of the victim, testified that she saw Appellant and Taylor run from her backyard to the front of her house around 12:40 a.m. on the night of the murder. (T 1115-18). The medical examiner testified that the victim had been stabbed repeatedly, beaten, bludgeoned, and strangled. A vaginal swab was taken which indicated the presence of semen. (T 1049-98). Diane Hanson testified that semen found on a garment laying next to the victim and on the bed comforter had the same blood type as Taylor. (T 1252-54). Special Agent Dizinno testified that a pubic hair found on the victim's body and several pubic hairs found on a white shirt in the victim's bathroom sink were characteristically similar to Appellant's pubic hair. (T 1367). Daniel Nippes testified that one of the pubic hairs found on the white shirt matched Appellant's DNA pattern. (T 1405, 1411). Ricky Proctor testified that Appellant told him in jail that he and Taylor "broke into this lady's house, they beat her up, they tied her up, and they had sex with her and they killed her." (T 1524). Charles Torak testified that Appellant told him in jail that he was with a friend when they committed a "surprise burglary." The lady surprised his friend, and his friend told Appellant, "We have no choice, she knows our face, she'll recognize us." (T 1573). His friend stabbed her first, then

Appellant stabbed her, then they strangled her. Appellant said his friend just "snapped and went almost like berserk." His friend brought his own knife with him but thought that it would be considered premeditated, so he got a knife from the victim's house. Appellant commented that the victim was "very good-looking for her age and that she put up a hell of a fight for an older lady." He said they stole jewelry, particularly a necklace with a unicorn and a ruby on it. After the murder, they buried some bloody clothes and left town immediately. (T 1573-75). Finally, Anthony Smith testified that, while he and Appellant were on escape status, Appellant told him that his friend "Steve" came over, left to get beer, came back, and got Appellant drunk. (T 1651). He and Steve left, and Steve wanted to rob a house. Appellant resisted for awhile, but relented after becoming more intoxicated. (T 1652). They broke into this house or house trailer and realized a woman was home. Appellant wanted to leave, but Steve "grabbed the woman with a knife." (T 1653). Steve told Appellant "he wanted to get some pussy from this woman or he wanted [to] screw this woman." (T 1653-54). Steve handed the knife to Appellant and raped the woman. Appellant commented that the victim "acted like she enjoyed the sex." (T 1654-55). Appellant did not want to touch the woman but feared that Steve would harass him so he made the woman perform oral sex on him. (T 1655). Appellant then left Steve with the woman in the room and searched the house. He returned five or six minutes later and Steve had stabbed the woman 15 or 16 times. (T 1656). The victim was not dead, however, so they got an electrical cord and strangled the woman until she died. Then they gathered up valuables and left. (T 1656-57).

As for the veracity and credibility of the State's witnesses, this Court has previously stated,

> It is not the province of this Court to reweigh conflicting testimony. Rather it is within the province of the jury to determine the credibility of witnesses and to resolve factual conflicts. Absent a clear showing of error, its finding will not be disturbed.

Melendez v. State, 498 So. 2d 1258, 1261 (Fla. 1986) (citations omitted). No such error has been shown in this case. See also Carter v. State, 560 So. 2d 1166, 1167-68 (Fla. 1990) (affirming conviction for first-

degree murder and stating, "[T]he issue of [the co-defendant's] credibility was properly an issue for the jury. This Court thus may not disturb the verdict."). Given the foregoing evidence adduced by the State, Appellant's presence at the scene and his commission of the offenses as charged were established beyond a reasonable doubt. Together and in concert with Stephen Taylor, Appellant committed first-degree murder, burglary with an assault, and sexual battery on Alice Marilyn Vest. Therefore, his convictions should be affirmed. See Taylor v. State, 630 So. 2d 1038 (Fla. 1993); Capehart v. State, 583 So. 2d 1009, 1012 (Fla. 1991); Reilly v. State, 601 So. 2d 222, 223 (Fla. 1992); Duckett v. State, 568 So. 2d 891, 894-95 (Fla. 1990).

ISSUE X

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR (Restated).

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

> FACTS:
>
> 1. The victim suffered 20 stab wounds which were inflicted by two different instruments; a knife and a pair of scissors.
> The wounds were to both front and back
>
> 2. In addition to the wounds made by the two stabbing instruments, there were 20 or more other lacerations, bruises and contusions to the entire body.
>
> 3. The victim also suffered a number of injuries to the head and face caused by blows from heavy objects and a bottle.
> Her jaw was broken.
>
> 4. The victim was sexually battered and abused. She suffered multiple trauma to her breasts which Dr. Floro attributed to very hard squeezing, or sucking or multiple blows from a fist.

5. First the victim was stabbed and then while still alive she was beaten. Then, still alive, she was strangled, initially with a webbed belt, and finally with an electric cord.
Until her death, by strangulation, she remained alive and at the mercy of this defendant and any accomplice. She was sexually battered and abused. The sum total of what this poor lady was put through can be described in no less a term than "torture."

CONCLUSION: This is an aggravating circumstance. One must be drawn, in addition to the multiple wounds, to the rape and the length of time all this torture took. Had the intent been only to kill this lady that could have been accomplished quickly. No! The conclusion is inescapable that pain, suffering and fear were to precede death.

* * * *

The evidence shows that the defendant broke into this grandmother's home at, or after, midnight. He carefully planned that she could not call for help. Thereafter he caused a multitude of injuries to this 59 year old lady. There were more than 40 wounds ranging from stabs and cuts to a broken jaw. The severity of the torture is clearly borne out by the photographs taken at the scene and those taken later by the medical examiner. She knew she was going to die and that there could be no escape. The acts of the defendant were without pity and conscienceless. These acts clearly meet the definition of the standard jury instruction which defines "cruel", as meaning "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." Other than to torture, there is no reason for the methods used. The definition describes this murder. I give great weight to this circumstance.

(R 470-71, 481).

In this appeal, Appellant claims that the record does not support the trial court's finding because "[t]he evidence in this case is entirely consistent with the victim being unconscious or semi-conscious during the portions or her attack upon which the trial court relied in finding this factor." **Brief of Appellant** at 67-68. Appellant also claims that this factor does not apply because the evidence does not demonstrate the he "actually intended to cause unnecessary and prolonged suffering." Id. at 68. In Taylor v. State, 630 So. 2d 1038, 1042-43 (Fla. 1993), this Court rejected Taylor's claim that there was no evidence the victim was conscious or that she endured great pain or mental anguish during the murder.

In fact, this Court found that the HAC factor "was clearly supported by the record." Id. at 1043 (citing Perry v. State, 522 So. 2d 817 (Fla. 1988); Johnston v. State, 497 So. 2d 863 (Fla. 1986); Brown v. State, 473 So. 2d 1260 (Fla.), cert. denied, 474 U.S. 1038 (1985)).

As for Appellant's argument that he did not personally intend to cause unnecessary and prolonged suffering, this Court has previously held that aggravating factors, including HAC, can be imputed to a defendant who did not actually wield the torturous blows because the defendant was a principal to and fully participated in the crime. Copeland v. State, 457 So. 2d 1012, 1019 (Fla. 1984), habeas granted on other grounds, 565 So. 2d 1348 (Fla. 1990). Here, the trial court specifically found that "the defendant Gerald Murray did contemplate that lethal force would be used during the course of the sexual battery and/or burglary and was, in addition, a major participant in those crimes and that his acts demonstrated a reckless disregard of human life and that he did, with another, kill the victim." (R 478). Since the record supports such a finding, this claim has no merit. As a result, this Court should affirm Appellant's sentence of death.

ISSUE XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S SPECIAL REQUESTED INSTRUCTION ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR (Restated).

Prior to the penalty phase, Appellant objected to the standard HAC instruction (R 419-23) and proposed the following additional instructions relating to this factor:

> This aggravating factor requires that the victim's suffering must have taken place over some substantial period of time. Acts against the victim after she lost consciousness or died cannot establish this aggravating factor. Suffering by the victim which is not a result of this Defendant's purpose to cause pain does not establish this aggravating factor. A crime is unnecessarily torturous if the Defendant meant the victim to suffer deliberate and extraordinary mental anguish or physical pain. Fear and emotional strain may establish this aggravating factor only if the victim had a prolonged awareness of her impending death. If you find that the victim

> suffered from the actions of the Defendant, but that the Defendant did not intend such suffering to occur, then that suffering is not relevant to this aggravating factor. The Defendant's remorse or lack of remorse should play no part in your deliberation as to this aggravating factor. If you find that this aggravating factor applies, and that it resulted from an irrational frenzy by the Defendant, you should weigh that mitigating evidence against this aggravating factor.

(R 414-16) (citations omitted). The trial court overruled Appellant's objection to the standard instruction and rejected his proposed amendments. (T 2214-16) The jury was given the newly amended standard instruction (T 2359-60).

Appellant renews his claim that the instruction was vague because the instruction does not truly limit the types of crime for which this factor applies. **Brief of Appellant** at 72-77. This Court has recently reaffirmed the constitutionality of the new standard instruction. Hall v. State, 614 So. 2d 473, 478 (Fla. 1993), cert. denied, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993); Whitton v. State, 649 So. 2d 861, 867 & n.9 (Fla. 1994); Wuornos v. State, 644 So. 2d 1000, 1009 (Fla. 1994). As in Whitton, Appellant has provided no adequate reason for this Court to recede from its previous rulings. Therefore, this Court should affirm Appellant's sentence of death.

ISSUE XII

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S STATUTORY AND NONSTATUTORY MITIGATION (Restated).

In this appeal, Appellant claims first that the trial court applied the wrong legal standard in assessing mitigating factors. **Brief of Appellant** at 77. However, Appellant does not point to any statement in the record wherein the trial court misstated or misunderstood the standard to apply. Without such explication, the State cannot begin to respond to this claim. To the extent Appellant's complaint rests in general on the trial court's rejection of his perceived unrebutted mitigation, the State will respond

accordingly. But there is nothing in the record to indicate that the trial court did not know the standards to apply and/or did not apply them.

Appellant's major complaint is that the trial court rejected the following mitigating evidence: (1) that Appellant committed the murder while under the influence of an extreme mental or emotional disturbance, (2) that Appellant was an accomplice and his participation was relatively minor, (3) that Appellant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirement of the law was substantially impaired, (4) that "Appellant has or had a living relationship with his nephew, late wife and children," (5) that Appellant "helped provide food to the poor," (6) that Appellant was "emotionally devastated by his wife's unexpected death ten days after the birth of their second son and less than a month before the homicide of Ms. Vest," (7) Appellant was "unduly influenced by Steven Taylor to drink heavily and commit crime[s] except during his marriage," and (8) that, during his escape, Appellant "helped care and provide for his girlfriend and her two younger children."

As for the first mental mitigating factor, Appellant claims that the trial court

> ignored the evidence demonstrating that Mr. Murray was under the influence of extreme mental or emotional disturbance as a result of his wife's sudden, unexpected death only ten days after delivering their second child and a short time, approximately one month, prior to the homicide in this case, as well as the impact of Mr. Murray regressing to alcohol dependency and the undue influence of Steve Taylor following the death of his wife.

Brief of Appellant at 80. In its written sentencing order, the trial court made the following findings regarding this mitigating factor:

> FACTS:
>
> 1. The defendant's wife had died a short time before this murder. She had delivered their second child and then died about 10 days later.
>
> 2. Following his wife's death, the defendant started to drink again and associate with Steve Taylor.

3. He may have felt some "peer pressure" where-in he needed to seek approval of Taylor.

CONCLUSION: this is not a mitigating circumstance since there is no showing at all that these crimes were associated with any mental instability or with any alcohol dependency or involvement. Though the defendant was seen by a psychiatrist about 30 days after this crime, unrelated to it, for an alleged suicide attempt, the doctor reported that there was no evidence of any legitimate attempt to take his own life. The report was that he had taken pills and tried to slash his wrists. The doctor reported that there were no marks on the defendant's wrists and defendant reported taking only a single pill. Where the association with Steve Taylor is concerned, the question is who led whom. This defendant was the older and while he had been in trouble with Taylor before, he had also committed numerous crimes when Taylor was not present.
On the night in question, the clear, undisputed, testimony was that this defendant went to a distant part of Jacksonville to get Taylor, not the other way around.

(R 472-74).

Appellant complains that the trial court "fail[ed] to accord any significance to Mental Health Resource Center records of Dr. Henry Lepley regarding Mr. Murray's admission, diagnosis and treatment at that facility shortly after Ms. Vest was killed." Id. at 78. As this Court stated in Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (emphasis added), "[w]hen addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." Moreover, "[t]he decision as to whether a particular mitigating circumstance is established lies with the judge. Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991). Further, "[t]he resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as the appellate court, [this Court has] no authority to reweigh that evidence." Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991). See also Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990) ("We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. Because

each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion.").

The record supports the trial court's rejection of this mitigating factor. Appellant presented no mental health expert. Rather, he relied on the testimony of his brother who claimed that Steven Taylor got Appellant into trouble and was responsible for Appellant's drinking. (T 2242-53). However, on cross-examination, Harry admitted that Taylor was not with Appellant in 1988, prior to Appellant's wife's death and prior to the murder, when Appellant chased a girl down, threw her into a car and threatened her with a bottle before the police pulled him over. Nor was Taylor present four months after the murder when Appellant and two others beat someone up and crashed a glass over his head. Nor was Taylor present a year later when Appellant drove through the parking lot of a bar and fired a gun out the window at a crowd of people. (T 2255-61).

Appellant also relied on the written progress notes of Dr. Lepley who treated Appellant approximately one month after the murder in a psychiatric facility. The doctor noted that, although Appellant was admitted for attempting suicide by allegedly taking an overdose and slitting his wrists, Appellant reported that he only took one pill and there were no marks on Appellant's wrists. (T 2277-78, 2280-81). Moreover, Dr. Lepley noted no evidence of alcohol withdrawal symptoms. (T 2277, 2280-81). "There is no evidence of thought or perceptual disorders." (T 2278). And although Appellant was not tested, Dr. Lepley believed that Appellant's I.Q. was average. (T 2278). Appellant was removed from a suicide watch the day after his arrival because there was no indication of self-destructive behavior. (T 2279). On the third day, Appellant was presented for possible discharge but reported suicidal ideations. (T 2279). He was released on the following Monday, three days later. Dr. Lepley noted that "[h]is judgment and reasoning seemed to be correcting and he shows increasing insight into his distressful life circumstances." (T 2282).

As noted previously, the trial court has the sole responsibility to resolve factual conflicts and to determine what, in fact, is mitigating in nature. Given the unavailing nature of Appellant's evidence to support this mitigating factor, and the fact that there was no evidence to establish that Appellant committed the crime while under the influence of an extreme mental or emotional disturbance, the trial court properly rejected this mitigating factor. See Johnson v. State, 660 So. 2d 636, 646-47 (Fla. 1995) (upholding rejection of extreme mental or emotional disturbance where no mental health expert testified on the defendant's behalf and where evidence "came largely from anecdotal lay testimony poorly correlated to the actual offense at issue"); Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991) (upholding rejection of intoxication at time of crime where only evidence was defendant's self-report to mental health expert); Wyatt v. State, 641 So. 2d 355, 359 (Fla. 1994); Parker v. State, 641 So. 2d 369, 377 (Fla. 1994).

As for the "minor participation" mitigating factor, Appellant claims that the trial court "disregard[ed] ample evidence presented in support of this mitigator." **Brief of Appellant** at 80. In support of this contention, Appellant notes that none of his fingerprints, semen, or blood was found at the scene, that "[a] single hair at the scene constituted the sole evidence of Mr. Murray's presence," and that the only other evidence of Appellant's role was the testimony of inmates of "dubious credibility." Id. at 80-81. In the trial court's written sentencing order, it made the following findings regarding this aggravating factor:

> FACTS:
>
> 1. Other than the "peer pressure" comments noted in the first mitigating circumstance discussion, there was nothing to support this factor.
>
> CONCLUSION: This is not a mitigating circumstance. There is absolutely nothing to even remotely indicate that this defendant was not as active a participant as any other person.

(R 474).

Contrary to Appellant's assertion, the record supports the trial court's rejection of this mitigating

factor. Appellant told Ricky Proctor in jail that he and Taylor "broke into this lady's house, they beat her up, they tied her up, and they had sex with her and they killed her." (T 1524). Appellant told Charles Torak in jail that he was with a friend when they committed a "surprise burglary." The lady surprised his friend, and his friend told Appellant, "We have no choice, she knows our face, she'll recognize us." (T 1573). His friend stabbed her first, then Appellant stabbed her, then they strangled her. Finally, Appellant told Anthony Smith while he and Appellant were on escape status that his friend "Steve" came over and got him drunk. (T 1651). He and Steve left, and Steve wanted to rob a house. Appellant resisted for awhile, but relented after becoming more intoxicated. (T 1652). They broke into this house or house trailer and realized a woman was home. Appellant wanted to leave, but Steve "grabbed the woman with a knife." (T 1653). Steve told Appellant he wanted to have sex with the woman, so Appellant held the knife while Taylor raped her, and then Taylor held the knife while Appellant made her perform oral sex on him. (T 1653-55). Appellant then left Steve with the woman in the room and searched the house. He returned five or six minutes later and Steve had stabbed the woman 15 or 16 times. (T 1656). The victim was not dead, however, so they got an electrical cord and strangled the woman until she died. Then they gathered up valuables and left. (T 1656-57).

Moreover, contrary to Appellant's assertion, more than one hair was matched to Appellant. Special Agent Dizinno testified that a pubic hair found on the victim's body and several pubic hairs found on the white shirt in the bathroom sink were characteristically similar to Appellant's pubic hair. (T 1367). Daniel Nippes also testified that the DNA pattern of a hair found on the white shirt matched Appellant's DNA pattern. (T 1405, 1417-18). Thus, based on this evidence, the trial court properly rejected this mitigating factor. Stein v. State, 632 So. 2d 1361, 1366 (Fla. 1994) (upholding rejection of "minor participation" mitigator where no evidence was submitted to support finding); Wyatt, 641 So. 2d at 359.

As for the "substantial impairment" mitigating factor, the trial court made the following findings

in its written sentencing order:

> FACTS:
>
> 1. This must similarly bottom on the grief attributable to his wife's death.
>
> CONCLUSION: This is not a mitigating circumstance. It is clear from the entire case that the defendant did appreciate the criminality of his conduct; else, why cut the phone lines and why, as the evidence clearly showed, make the concerted effort to eliminate any evidence that could link him to the crime? If he did not appreciate the criminality of his conduct, why, while incarcerated, try to find some exculpatory explanation of the pubic hair which he left on the victim?

(R 475). Appellant claims that "the trial court flouted the evidence in finding that Mr. Murray appreciated the criminality of his conduct at issue." **Brief of Appellant** at 81. Appellant takes issue with the court's assumption that he cut the phone line and that he made a concerted effort to eliminate evidence. Appellant also complains that the trial court disregarded his "highly relevant mental health evidence." Id. at 81.

Contrary to Appellant's assertion, the record supports the trial court's rejection of this mitigating factor. Under the principal theory, whether he or Taylor cut the phone line is irrelevant. The fact that it was cut by one of the two indicates that they both appreciated the criminality of their conduct. As for Appellant's attempt to eliminate evidence, Appellant told Detective O'Steen that Taylor "told on himself" by "coming in her." Appellant told Detective O'Steen that he would not find his come in her. When Detective O'Steen asked him, "What about on the rag?", Appellant responded, "You didn't find my come on no rag." (T 1511). The "rag" referred to the white shirt in the victim's bathroom sink that was wet and had lotion all in it. Several of Appellant's pubic hairs were found on that shirt. A logical inference is that Appellant either ejaculated on the shirt or cleaned himself with the shirt and then attempted to wash it and mask any semen with the lotion. In determining whether mitigating circumstances have been proven, the trial court may apply a common-sense inference from the circumstances. See Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991). Based on these facts, the trial court properly rejected this mitigating factor. See

Wyatt, 641 So. 2d 359; Parker, 641 So. 2d at 377.

As for Appellant's nonstatutory mitigating factors, the trial court made the following findings in its written sentencing order:

> FACTS:
>
> 1. The brother and an HRS worker testified at the advisory hearing that the defendant had been in trouble with the juvenile authorities and the worker stated that her report, from over ten years before, indicated a desire to place the defendant in psychological treatment but that such was not available through hrs and the family could not or would not pay for private help.
> The brother stated that he felt all of the problems were the result of defendant being lead astray by Steve Taylor. A school board employee testified that defendant had attended public school where he was in SLD classes. He was retained twice and stopped going to public school after the seventh grade. He was placed in Jacksonville marine institute but was not acceptable to their program.
>
> CONCLUSION: This is not a mitigating circumstance. While defendant did not complete public school he was gainfully employed both before his arrest and, while on escape status, after. It is interesting to note that the co-defendant was reported to be mildly retarded and easily led. Many who are in SLD classes go on to lead normal productive lives.

(R 476-77).

Appellant lists the following mitigating factors in his brief that he claims the trial court either failed to find or totally ignored: (1) "Appellant has or had a living relationship with his nephew, late wife and children," (2) Appellant "helped provide food to the poor," (3) Appellant was "emotionally devastated by his wife's unexpected death ten days after the birth of their second son and less than a month before the homicide of Ms. Vest," (4) Appellant was "unduly influenced by Steven Taylor to drink heavily and commit crime[s] except during his marriage," and (5) during his escape, Appellant "helped care and provide for his girlfriend and her two younger children." **Brief of Appellant** at 77-78. However, Appellant neither specifically argued these to the jury, nor argued them to the trial court during any of the post-recommendation hearings. As this Court held in Lucas v. State, 568 So. 2d 18, 23-24 (Fla. 1990),

"the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Having failed to do so, Appellant cannot fault the trial court for failing to reference them specifically in its sentencing order.

Even if the trial court did err in rejecting some or all of this mitigating evidence, Appellant's sentence of death should nevertheless be affirmed. The record supports four aggravating factors: Appellant had been convicted of three prior violent felony offenses prior to this murder, he committed this murder during the commission of a burglary and/or a sexual battery, he committed this murder for pecuniary gain, and he committed this murder in a heinous, atrocious or cruel manner. The victim, a 59-year-old grandmother, was beaten, bludgeoned, raped, stabbed, and strangled in her own home--all while she was still alive. Even were Appellant in such grief over his wife's death that he suffered from an extreme emotional or mental disturbance and could not appreciate the criminality of his conduct and conform his conduct to the requirement of the law, and even if Taylor played a more active role in the murder/burglary/sexual battery, and even if Appellant had some positive personality traits, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Therefore, this Court should affirm Appellant's sentence of death.

ISSUE XIII

WHETHER THE TRIAL COURT IMPROPERLY DOUBLED THE FELONY MURDER AND PECUNIARY GAIN AGGRAVATING FACTORS (Restated).

In this appeal, Appellant claims that the trial court "never instructed the jury in a manner to prevent the doubling of the aggravators of burglary and crime for financial gain, and the trial court itself considered the factors separately." **Brief of Appellant** at 82. At no point, however, did Appellant seek a doubling instruction or argue that the trial court should merge these two aggravating factors. Thus, his claim must fall. Jones v. State, 652 So. 2d 346, 350-51 (Fla. 1995). Regardless, this Court has previously held that the jury may be instructed on, and the trial court may consider, both the felony murder and the pecuniary gain aggravators separately where the felony murder aggravator is based on felonies other than robbery. Smith v. State, 424 So. 2d 726, 733 (Fla. 1982) (rejecting claim of improper doubling where murder committed during course of kidnaping and sexual battery, in addition to robbery); Bates v. State, 465 So. 2d 490, 492 (Fla. 1985) (rejecting claim of improper doubling where murder committed during course of kidnaping and attempted sexual battery, in addition to robbery); Brown v. State, 473 So. 2d 1260, 1267 (Fla. 1985) (rejecting claim of improper doubling where murder committed during course of sexual battery); Preston v. State, 607 So. 2d 404, 409 (Fla. 1992) (rejecting claim of improper doubling where murder committed during course of kidnaping as well as robbery). Here, Appellant was charged with and convicted of burglary with an assault and sexual battery. (R 1-2, 398-400). Thus, the felony murder and pecuniary gain aggravating factors were not based on the same facts, and were properly considered as separate aggravators. Consequently, this Court should affirm Appellant's sentence of death.

ISSUE XIV

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN (Restated).

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

> FACTS:
>
> 1. The evidence showed that defendant and another burglarized the victim's home, and after raping and murdering her, stole jewelry and other valuables.
>
> 2. Gerald Murray admitted to one cell mate that they killed the victim because she had seen them as they were committing the other crimes.
>
> CONCLUSION: This is an aggravating circumstance. The burglary of the victim's home was for financial gain.
>
> * * * *
>
> The defendant burglarized the victim's home knowing the victim was home. When caught he murdered her and then completed the burglary. The burglary was for financial gain and he killed to carry out the burglary. I give this aggravating circumstance great weight.

(R 469, 480).

In this appeal, Appellant claims that the evidence fails to prove that pecuniary gain was the dominant motive for the murder. **Brief of Appellant** at 83. In Taylor v. State, 630 So. 2d 1038 (Fla. 1993), this Court affirmed Taylor's sentence of death which was based in part on the pecuniary gain aggravating factor. Be that as it may, the record in this case also supports the pecuniary gain aggravating factor. Charles Torak testified that Appellant told him in jail that he was with a friend when they committed a "surprise burglary." The lady surprised his friend, and his friend told Appellant, "We have no choice, she knows our face, she'll recognize us." (T 1573). His friend stabbed her first, then Appellant stabbed her, then they strangled her. He said they stole jewelry, particularly a necklace with a unicorn and

a ruby on it. After the murder, they buried some bloody clothes and left town immediately. (T 1573-75). Anthony Smith also testified that, while he and Appellant were on escape status, Appellant told him that his friend "Steve" came over and Steve wanted to rob a house. Appellant resisted for awhile, but relented after becoming more intoxicated. They broke into this house or house trailer and realized a woman was home. Appellant wanted to leave, but Steve "grabbed the woman with a knife." Steve told Appellant that he wanted to have sex with the woman, so Appellant held the knife while Steve raped her, then Steve held the knife while Appellant made her perform oral sex on him. Appellant then left Steve with the woman in the room and searched the house. He returned five or six minutes later and Steve had stabbed the woman 15 or 16 times. The victim was not dead, however, so they got an electrical cord and strangled the woman until she died. Then they gathered up valuables and left. (T 1652-57). Based on these facts, the trial court properly found the existence of the pecuniary gain aggravating factor. Bates v. State, 465 So. 2d 490, 492 (Fla. 1985); Scott v. State, 411 So. 2d 866, 868-69 (Fla. 1982).

Even if the record does not support this factor, however, Appellant's sentence of death should nevertheless be affirmed. The record supports the trial court's findings of three other aggravating factors--prior violent felony, felony murder, and HAC--to which the trial court gave "great weight." Given that the record supports the trial court's rejection of mitigation, there is no reasonable probability that the jury's recommendation or the trial court's sentence would have been different absent this aggravating factor. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Therefore, this Court should affirm Appellant's sentence of death.

ISSUE XV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY EVIDENCE DURING THE PENALTY PHASE (Restated).

Prior to the penalty phase, Appellant filed a motion in limine seeking to prohibit, in pertinent part, any hearsay relating to his prior violent felony convictions. (R 410-11). At the hearing on the motion, the trial court indicated that it would rule on any objections as they were raised during the trial. (T 2119-21). On the morning of the penalty phase, however, the trial court denied Appellant's motions with the exception of two objections that the State agreed had merit. (T 2137-38).

As its first witness, the State called Detective Robert Amy, over Appellant's objection (T 2140), who testified to the facts surrounding a prior conviction for false imprisonment. (T 2140-44). As its second witness, the State called Officer Manwarren, who testified to the facts surrounding a prior conviction for aggravated battery. (T 2144-49). As its third witness, the State called Officer Feehley, who testified to the facts surrounding a prior conviction for aggravated assault. (T 2150-57). Certified copies of conviction were then admitted into evidence relating to those same offenses. (T 2158-62, 2163-67).

In this appeal, Appellant acknowledges that hearsay evidence is admissible in a penalty phase proceeding if the opposing party has a fair opportunity to rebut such hearsay. **Brief of Appellant** at 84-85. Appellant claims, however, that he was denied a fair opportunity to rebut the State's hearsay evidence because the trial court denied his motions for continuance prior to the trial and penalty phase. Id. at 84. The record reveals, however, that the State disclosed to the defense prior to the penalty phase the hearsay evidence upon which it was going to rely, including the names of the officers and of the victims. (T 2115-19). Based on that disclosure, penalty-phase counsel indicated at a hearing that he "went through those judgment and sentences and did some investigation as best I could given the time provided on those cases, and there are certain pitfalls that are there, Your Honor. Like there is hearsay within hearsay, [and] there's

hearsay about other offenses that he's not convicted of . . . ." (T 2121). Moreover, during the witnesses' testimony, defense counsel cross-examined each witness and elicited other facts which the State had not elicited. (T 2143-44, 2147-49, 2153-54). Finally, as discussed previously in Issue V, supra, the trial court properly denied defense counsels' motions to continue. Based on the record in this case, defense counsel had a fair opportunity to rebut the hearsay evidence presented by the State.

Even were the State improperly allowed to elicit hearsay regarding Appellant's prior violent felony convictions, such error was harmless. the certified copies of conviction would have been admissible regardless. Thus, given the existence of four aggravating factors and nothing in mitigation, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different absent the hearsay evidence. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's sentence of death.

ISSUE XVI

WHETHER THE STATE'S COMMENTS DURING ITS PENALTY PHASE CLOSING ARGUMENT DEPRIVED APPELLANT OF A FAIR TRIAL (Restated).

In this appeal, Appellant alleges that the State made improper remarks in his penalty phase closing argument which, individually and cumulatively, deprived him of a fair trial.[13] The first comment about which Appellant complains was made during the State's discussion of the HAC aggravating factor. After discussing the number and nature of the wounds, and the number of different instruments used to inflict pain, the prosecutor stated,

> Now, the defense is going to try to get up here and argue that she

[13] Appellant makes nothing more than conclusory allegations of error and then cites to pages in the record. Obliged to put the complained-of comments in context, at the risk of exceeding its page and time limitations, the State takes issue with Appellant's cavalier presentation of this entire issue. Perhaps it is reflective of its merit, or lack thereof.

> was unconscious when all this happened, she really wasn't aware of it happening. Well, she's not putting up a fight if she's not conscious. If she's just there, why stab her so many times? What do they do? Stab her and then say, hold on, turn around and let me stab you again? No, she was putting up a fight. Why inflict so many superficial wounds? Because the defendant is an evil person.

(T 2316). Defense counsel objected "to that characterization," and the trial court instructed the prosecutor to "move on to something else." (T 2316-17). The prosecutor then stated,

> The instruction about heinous, atrocious and cruel talks about wicked, outrageously wicked, to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. Extremely wicked or shockingly evil.

(T 2317). Initially, the State submits that Appellant failed to secure a ruling to his objection which renders it unpreserved for review. See State v. Kelley, 588 So. 2d 595, 599-600 (Fla. 1st DCA 1991) (on motion for rehearing); Armstrong v. State, 642 So. 2d 730, 740 (Fla. 1994); Snead v. State, 415 So. 2d 887, 889-90 (Fla. 5th DCA 1982). In any event, in the context in which the comments were made, and in light of the HAC instruction,[14] the prosecutor's comments were not improper. See Breedlove v. State, 413 So. 2d 1, 7-8 (Fla. 1982) ("Each case must be considered on its own merits . . . and within the circumstances surrounding the complained-of remarks."). Even if the State's characterization of Appellant as "an evil person" was improper, it was not so prejudicial as to vitiate the entire penalty-phase proceedings. Breedlove, 413 So. 2d at 8; Darden v. Wainwright, 477 U.S. 168, 178-83 (1986) (finding that prosecutor's characterization of defendant as "animal" did not deprive his of a fair trial).

Appellant's second conclusory claim of error relates to the State's attempt to devalue his mitigating evidence. Initially, in discussing the inapplicability of the "extreme mental or emotional disturbance" mitigating factor, the State commented:

> Now, they've attempted to get that in by way of a doctor's notes on October the 9th, 1990 when they attempt to say that he tried to commit suicide, even

[14] "Heinous means extremely wicked or shockingly evil." (T 2359).

> though if you read it -- it's in evidence, I didn't object to it. It's come into evidence. It clearly in here says, he shows no evidence of alcohol withdrawal symptoms and has no marks on his wrists, like if he really attempted suicide you would find marks on the wrists. They didn't exist. And here's a person who's going to overdose and takes one pill to overdose? Does that make sense, or is it an attempt to get sympathy?

(T 2317-18). The trial court overruled defense counsel's objection. (T 2318).

Later, in discussing the testimony of Appellant's brother,[15] the prosecutor stated,

> You heard from his brother and basically I submit to you his testimony was there to attempt to elicit sympathy for him.

(T 2322). Defense counsel objected "to that improper argument," and the trial court instructed the jury as follows:

> Ladies and gentlemen, sympathy does not play any part in your decision, either sympathy for the victim or sympathy for the defendant, so you will ignore references to sympathy.

(T 2322). At that point, the prosecutor continued,

> As the Court quite accurately stated, sympathy cannot be a part of your decision so don't fall for it.

(T 2322-23). Defense counsel objected again and moved for a mistrial, alleging that it was improper to tell the jury "that the very intent of the defense presentation was to attempt to elicit sympathy from them . . . ." (T 2323). The trial court overruled the objection and denied the motion for mistrial and commented that it had instructed the jury on the law regarding sympathy. It believed that the prosecutor's statements were fair comment. (T 2323-24).

Again, in the context in which the comments were made, they were a fair comment on the evidence. "Wide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed

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[15] Appellant's brother, Harry, testified that Appellant met Stephen Taylor when he was 10 or 12 and that Taylor got Appellant in trouble. (T 2242). Taylor was the leader and Appellant was the follower. (T 2245). In fact, Appellant did not drink unless he was with Taylor. (T 2245). After Appellant's wife died following the birth of their second son, Appellant became very depressed and began drinking heavily. (T 2250-52). He also began spending time with Taylor again. (T 2253).

to advance all legitimate arguments." Breedlove, 413 So. 2d at 8. Moreover, "[t]he state may properly argue that the defense has failed to establish a mitigating factor and may also argue that the jury should not be swayed by sympathy." Valle v. State, 581 So. 2d 40, 46-47 (Fla. 1991). Here, the State was attempting to argue the inapplicability of a mental mitigating factor and was entreating the jury not to be swayed by sympathy. Even were the State's comments improper, however, they were harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Appellant's third conclusory complaint is that the State minimized the role of the jury in determining the appropriate penalty. Although not cited to as error by Appellant, the prosecutor made the following comments, without objection, at the beginning of his closing argument:

> And you remember Judge Brooke decides the penalty. You all are making a recommendation to Judge Brooke. Your recommendation carries great weight but you are making a recommendation. Judge Brooke is the one that imposes the penalty in this case.

(T 2298). Then, at the end of his closing argument, to which Appellant does claim error, but to which he also made no objection, the prosecutor states,

> In conclusion, you know, the death penalty is the law in the State of Florida. It's a just law and you all have to vote. Mr. Weinbaum will now get an opportunity to speak and then Judge Brooke will instruct you and you'll all get to vote. You know, it's an unnatural thing. It's not something that's done everyday by people in the sense of voting. Obviously most people don't even participate in terms of jury duty and it's something that, as I recall, any of you had ever done before. But, recall, you're making a recommendation to Judge Brooke. He decides the final penalty. You shouldn't feel bad for being here or for having to do this. If your vote is death, which I submit is the appropriate vote in this case, you should feel that you're upholding the law in the State of Florida. You're holding the defendant accountable for his actions on September 16, 1990. I urge you to be convicted, I urge you to do justice in this case and justice in this case dictates a vote of death.

(T 2327-28). Initially, by failing to object to these comments, Appellant has failed to preserve his complaints for appeal. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). Nevertheless, the State's

comments were not improper. Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995); Sochor v. State, 619 So. 2d 285, 291-92 (Fla. 1993).. Even if they were somehow misleading, the trial court's instructions which followed the arguments cured any error.

Appellant's last conclusory complaint is that the State "grossly distorted the evidence presented regarding Mr. Murray's prior record." **Brief of Appellant** at 86. In discussing the first of three prior violent felony convictions, the State notes that Appellant was with two other people, neither of whom was Stephen Taylor. As an aside, the prosecutor commented, "[S]o who's leading who here, who's getting who to go along with them?" (T 2305). At that point, defense counsel objected to arguing facts not in evidence, and the trial court instructed the jury,

> Ladies and gentlemen of the jury, you are the sole determiners of what the facts are. The attorneys are making arguments based on their recollection of the facts. Both attorney[s] have the opportunity to do that but you are the sole determiner of the facts.

(T 2305). Thereafter, the State discussed another prior violent felony, and defense counsel objected again to arguing facts not in evidence. The trial court overruled the objection and made it perfectly clear that the attorneys were allowed to argue the facts, but that the jury was the sole decider of the facts. (T 2306-09). The trial court's rulings are correct. As discussed previously, "[w]ide latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove, 413 So. 2d at 8. Thus, the State committed no error. Even if its argument were somehow misleading, however, Appellant had the opportunity to cure it during his closing argument. Thus, given that the State's individual comments were not erroneous, or if erroneous were harmless error, this Court should affirm Appellant's sentence of death.

ISSUE XVII

WHETHER FLORIDA STATUTES § 921.141(7) (SUPP. 1992), PERTAINING TO THE ADMISSION OF VICTIM-IMPACT EVIDENCE, IS CONSTITUTIONAL (Restated).

Prior to trial, Appellant filed a "Motion to Prohibit Application of Section 921.141(7) Florida Statutes." (R 230-40). Appellant alleged that the application of this statute would violate the ex post facto clause of the Florida and federal constitutions because the offense was committed in 1990 and the statute became effective on July 1, 1992. (R 230-33). The trial court denied the motion at a later hearing. (T 214-18). A written statement from the victim's only child was presented to the trial court for its consideration in sentencing. (R 491-98).

In this appeal, Appellant renews his ex post facto claim, **brief of Appellant** at 92-93. However, Appellant also argues that the statute (1) renders a death sentence arbitrary and capricious, id. at 88-89, (2) is vague and overbroad and violative of equal protection, id. at 89-91, and (3) constitutes "a legislative encroachment of this Court's sole authority to regulate practice and procedure in Florida courts," id. at 91-92. Since these latter arguments were not made in the trial court, they may not be made for the first time on appeal. Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Regardless, all of Appellant's claims have already been rejected by this Court. E.g. Windom v. State, 20 Fla. L. Weekly S200, 202 (Fla. Apr. 27, 1995); Maxwell v. State, 20 Fla. L. Weekly S427 (Fla. July 20, 1995), aff'g 647 So. 2d 871 (Fla. 4th DCA 1995); Allen v. State, 20 Fla. L. Weekly S397, 399 (Fla. July 20, 1995).[16] Therefore, this Court should affirm the trial court's finding that this statute is constitutional, and affirm Appellant's sentence of death.

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[16] The appellants in Windom and Maxwell both challenged the constitutionality of this statute on vagueness grounds. However, in neither opinion did this Court address that particular issue in upholding the statute's validity. Nevertheless, the State submits that in rejecting those appellants' challenges, this Court has implicitly rejected the vagueness challenge as well. In any event, the vagueness issue is currently pending before this Court in Consalvo v. State, Fla. Sup. Ct. case no. 82,780.

ISSUE XVIII

WHETHER THE TRIAL COURT'S USE OF APPELLANT'S CONTEMPORANEOUS CONVICTIONS FOR BURGLARY AND SEXUAL BATTERY TO SUPPORT THE FELONY MURDER AGGRAVATING FACTOR CONSTITUTED A DOUBLE JEOPARDY VIOLATION (Restated).

In this appeal, Appellant claims that the trial court's use of his contemporaneous convictions for burglary and sexual battery to support the felony murder aggravating factor constituted a double jeopardy violation. **Brief of Appellant** at 93. This argument has been rejected numerous times, and Appellant has presented no valid reason why this Court should recede from those prior precedents. E.g., Taylor v. State, 638 So. 2d 30, 32 (Fla. 1994) (rejecting claim that "jury should not have been allowed to consider sexual battery as an aggravating circumstance because it unconstitutionally repeats an element of first-degree murder), and cases cited therein; Brown v. State, 473 So. 2d 1260, 1267 (Fla. 1985) (finding use of burglary for conviction and aggravating factor proper).

ISSUE XIX

WHETHER THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY REGARDING ITS ROLE IN THE SENTENCING PROCESS (Restated).

In this appeal, Appellant claims that "the trial court failed to convey to the jury any meaningful sense of the gravity with which the trial court was bound by law to consider the recommendation of the jury" in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). **Brief of Appellant** at 93-95. Appellant made no objection to the instructions in this case. Therefore, his argument is not preserved. Hunter v. State, 660 So. 2d 244, 253 (Fla. 1995); Sochor v. State, 619 So. 2d 285, 291-92 (Fla. 1993). Regardless, this Court has repeatedly rejected this claim, and Appellant has presented no valid argument for this Court to recede from its prior precedent. E.g., Sochor, 619 So. 2d at 291 ("Florida's standard jury

instructions fully advise the jury of the importance of its role and do not violate Caldwell."); Hunter, 660 So. 2d at 253; Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995).

ISSUE XX

WHETHER THE RECORD SUPPORTS A SENTENCE OF DEATH (Restated).

In this issue, Appellant claims that his sentence should be reversed because, "[a]s set forth elsewhere in [his] brief, the HAC determination was improper, other aggravators were erroneously found or applied, the mitigating circumstances presented by the defendant were improperly found to be established, and the remaining asserted aggravating circumstances are insufficient to outweigh the mitigating evidence presented." **Brief of Appellant** at 95. As related in other issues, the State submits that the record supports the HAC and pecuniary gain aggravator, and the trial court's rejection of Appellant's mitigating evidence. To the extent Appellant claims that his sentence is disproportionate, the State would rely on its arguments made in Issue XXII, infra.

ISSUE XXI

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT (Restated).

Prior to trial, Appellant filed a motion to declare section 922.10, Florida Statutes (1991), unconstitutional, claiming that electrocution is cruel and unusual punishment under the state and federal constitution. (R 143-56). The trial court denied the motion. (R 309; T 240-41). Appellant renews his claim on appeal, **Brief of appellant** at 96-97, but fails to even acknowledge that this Court has repeatedly rejected identical claims. E.g. Hunter v. State, 660 So. 2d 244, 252-53 (Fla. 1995); Fotopoulos v. State, 608 So. 2d 784, 794 n.7 (Fla. 1992), cert. denied, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993). Since

Appellant has failed to present any new argument which would warrant reconsideration of this issue, this Court should deny his claim and affirm his sentence of death.

ISSUE XXII

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATE (Restated).

Without presenting any legal argument, Appellant claims that his death sentence is not proportionately warranted. **Brief of Appellant** at 97-98. To support his contention, Appellant relies principally on Kramer v. State, 619 So. 2d 274 (Fla. 1993); Livingston v. State, 565 So. 2d 1288 (Fla. 1988); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); and Jackson v. State, 575 So. 2d 181 (Fla. 1991), all of which are easily distinguishable. In Kramer, this Court found that "[t]he evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk." Such was hardly the case here.

In Livingston, which involved the murder of a convenience store clerk, this Court found that

> Livingston's childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him. Livingston's youth [seventeen years of age], inexperience, and immaturity also significantly mitigate his offense. Furthermore, there is evidence that after these severe beatings Livingston's intellectual functioning can best be described as marginal. These circumstances, together with the evidence of Livingston's extensive use of cocaine and marijuana, counterbalance the effect of the factors found in aggravation [prior violent felony and felony murder].

565 So. 2d 1292. Here, in contrast, Appellant was 22 years old, with no evidence of drug or alcohol abuse, or physical abuse as a child.

Similarly, in Fitzpatrick, which involved the murder of a police officer after the defendant took several persons in a real estate office hostage, this Court found the death penalty unwarranted where there was substantial evidence by a "panel of experts" that Fitzpatrick had extensive brain damage and that his

emotional age was between nine and twelve years of age. Such evidence established both statutory mental mitigators and the statutory mental mitigator of age: "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." 527 So. 2d at 811-12. Given that the trial court found no evidence in mitigation in Appellant's case, Appellant can hardly compare himself to Fitzpatrick.

Finally, and equally distinguishable, is Jackson, which involved the murder of a hardware store owner by Jackson and his brother, wherein this Court found that Jackson's death sentence was not proportional to his culpability because there was insufficient evidence that he was a major participant and that he actually killed, intended to kill, or attempted to kill the victim. 575 So. 2d at 189-93. Here, Appellant told three people that he participated in the murder of Alice Vest. Appellant told Ricky Proctor that he and Taylor "broke into this lady's house, they beat her up, they tied her up, and they had sex with her and they killed her." (T 1524). Appellant told Charles Torak that he was with a friend during a "surprise burglary." The lady surprised his friend, and his friend told Appellant, "We have no choice, she knows our face, she'll recognize us." (T 1572-73). That is when Taylor stabbed her and then Appellant stabbed her, and then they strangled her. (T 1573). Finally, Appellant told Anthony Smith that his friend "Steve" came over, left to get beer, came back, and got Appellant drunk. (T 1651). He and Steve left, and Steve wanted to rob a house. Appellant resisted for awhile, but relented after becoming more intoxicated. (T 1652). They broke into this house or house trailer and realized a woman was home. Appellant wanted to leave, but Steve "grabbed the woman with a knife." (T 1653). Steve told Appellant he wanted to have sex with the woman, so Appellant held the knife while Taylor raped her. Appellant commented that the victim "acted like she enjoyed the sex." (T 1654-55). Appellant then handed the knife to Taylor and made the victim perform oral sex on him. (T 1655). Appellant then left Steve with the woman in the room and searched the house. He returned five or six minutes later and Steve had stabbed the woman 15 or 16 times.

(T 1656). The victim was not dead, however, so they got an electrical cord and strangled the woman until she died. Then they gathered up valuables and left. (T 1656-57). From this testimony, it could hardly be said that the evidence was insufficient to prove that Appellant was a major participant and that he actually killed, intended to kill, or attempted to kill the victim. Thus, Jackson is inapplicable.

To support its argument that Appellant's sentence is proportionately warranted, the State relies principally on Stephen Taylor's case. Taylor v. State, 630 So. 2d 1038 (Fla. 1993). The trial court found the existence of three aggravating factors--felony murder, pecuniary gain, and HAC--and one nonstatutory mitigating factor--mild retardation. This Court affirmed all of the trial court's findings and Taylor's sentence of death. Id. at 1042-43. Appellant has four aggravating factors--prior violent felony, felony murder, pecuniary gain, and HAC--and nothing in mitigation. Thus, if Taylor's sentence is proportionately warranted, then Appellant's is even more so. See also Wright v. State, 473 So. 2d 1277 (Fla. 1985) (finding sentence proportionally warranted in light of three aggravating factors--"felony murder," "avoid arrest," and HAC--and no mitigation, where defendant broke into elderly woman's home to steal money, and when confronted by woman, stabbed her to death); Johnston v. State, 497 So. 2d 863, 872 (Fla. 1986) (finding death sentence proportionally warranted in light of three aggravating factors--"prior violent felony," "felony murder," and HAC--and no mitigation, where defendant broke into elderly woman's home to commit theft, and when woman awoke, stabbed and strangled her to death).

As this Court has repeatedly held "it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to 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). This was a brutal, senseless murder of a woman in her own home which was committed during the course of a burglary and a sexual battery. Although Appellant and Taylor could have easily subdued Ms. Vest without killing her, they nevertheless beat, stabbed, and

strangled her to death. "If a proportionality analysis leads to any conclusion, it is that death was a penalty the jury properly could recommend and the trial court properly could impose" in this case. Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991). Therefore, this Court should affirm Appellant's sentence of death.

ISSUE XXIII

WHETHER APPELLANT'S SENTENCES FOR BURGLARY AND SEXUAL BATTERY WERE IMPROPERLY ENHANCED (Restated).

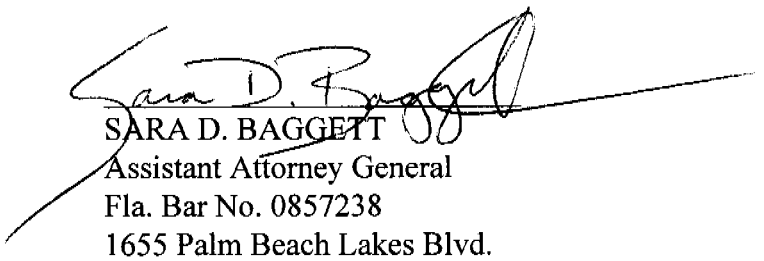
Regarding the burglary offense, the trial court declared Appellant to be a habitual felony offender, which enhanced his sentence, and then sentenced him to a life sentence consecutive to the sentence of death. Regarding the sexual battery offense, the trial court sentenced Appellant to a guidelines sentence of life imprisonment, consecutive to the burglary sentence. (T 2413-14). Given that the three offenses were committed in a single criminal episode, the State acknowledges that the sentence for the burglary must be imposed to run concurrently with the death sentence. Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995). However, the sentence for the sexual battery may properly be imposed consecutively to the death sentence.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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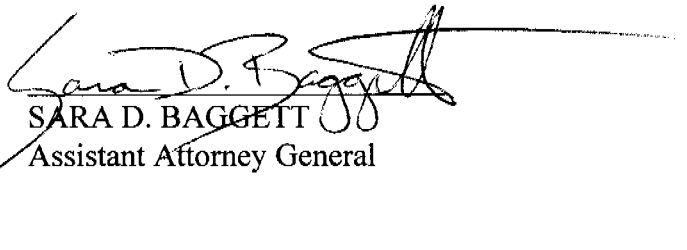
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Fletcher N. Baldwin, Esquire, University of Florida College of Law, P.O. Box 117625, Gainesville, Florida 32611; William J. Sheppard, Richard W. Smith, and D. Gray Thomas of Sheppard and White, P.A., 215 Washington Street, Jacksonville, Florida 32202, this 16th day of February, 1995.



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