IN THE SUPREME COURT OF FLORIDA

ERIC SCOTT BRANCH,

Appellant,

v. Case No. 83,805

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
Chief, Capital Appeals
Florida Bar #300179

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee cannot accept Appellant Branch's Statement of Facts, which, it must be noted, is derived almost exclusively from the testimony of Eric Branch at trial. Such testimony, of course, was rejected by the jury, given their conviction of Appellant on all counts, and in reviewing the sufficiency of the evidence, which is raised as a separate point on appeal, it will be necessary for this Court to consider the voluminous evidence presented by the State. Accordingly, the State supplements Appellant's statement of the facts as follows:

The victim, Susan Morris, was a student at the University of West Florida in Pensacola. Her boyfriend, Mark Rivard, saw her on the morning of January 11, 1993 at a 9:30 class and then later at lunch (T 715).[1] He stated that at this time she was wearing a blue and white sweater which she had resently received for Christmas (T 718). Craig Hutchinson testified that Ms. Morris had attended an evening class, which had broken up at around 8:20 p.m. that night (T 690). He stated that he and the victim had walked together towards the parking area, and that he had last seen her walking toward her car in the back parking lot (T 690-1).

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[1] As in the Initial Brief, (T __) denotes a citation to the transcript of Appellant's trial, whereas (R ___) denotes a citation to the formal record on appeal.

When Ms. Morris did not return home that night, her parents began calling several of her friends. Mr. Rivard scoured the campus the next morning looking for Ms. Morris or her vehicle, a red Toyota Celica (T 715-16). No trace of Ms. Morris was found until January 13, 1993, when a sheriff's deputy with a dog uncovered the victim's body in a densely wooded area near the wooden walkway to the parking lot (T 423-431). The body was covered with vegetation, leaves and sticks (T 430). When the vegetation was removed, it was determined that the body was completely nude, and the victim's clothing, including her sweater, pants, bra, underwear, were found nearby (T 722; T 431-2); additional clothing, including a pair of boots, some jewelry and one sock were found at another location (T 431). The pathologist testified that Ms. Morris was lying "in a shallow grave", and stated that a sock was around her neck like a ligature (T 723); he later said that the sock or ligature could have contributed to the victim's death, but that such had not been solely responsible for the injuries to her neck. (T 745).

Dr. Cumberland testified in some detail concerning the victim's injuries (T 727-747). He identified the cause of death as the combination of beating and strangling, consisting of blunt force injuries to the head, neck and chest combined with

strangulation or throttling (T 736). The doctor identified a number of wounds to the face, including contusions to the soft tissue area around the eyes, laceration of the undersurface of the left eye, bruises to the bridge of the nose consistent with blunt force administered while the victim was wearing glasses, bruising of the upper lips and injury of the lips again consistent with blunt force trauma, and pin-point hemorrhages in the eyes, consistent with strangulation (T 726-729). The autopsy also revealed bleeding into the surface of the brain, likewise consistent with blunt trauma (T 733). Dr. Cumberland testified that there were contusions and abrasions to the neck, and a combination of bruising and scarring where the ligature had been placed (T 729). During the autopsy, he likewise noted bruising on the inside muscles of the neck, specifically testifying that the voice box or larynx was hemorrhaged and that the voice box was fractured and torn (T 733-4); the hyoid bone was likewise fractured and there was injury to the tongue (T 735-6).

The witness stated that there were bruises on the breasts, as if the brassiere had been pulled very tightly up against the skin "in a backward direction" (T 730). There were also abrasions on the thigh and knees, and a contusion on the upper left arm (T 730-1). Dr. Cumberland specifically testified that the bruises on the

arms and wrists were consistent with defensive wounds, or "an attempt to ward off blows to the head and face region" (T 747-8), and that one mark on the arm was consistent with being dragged (T 748). The victim likewise had a fractured wrist, and, at the small of the back, an abrasion or "pattern-type injury" consistent with the sole of a shoe (T 736, 732). Dr. Cumberland testified that there had been bruising below the entrance to the vagina, and that the autopsy revealed that a 2 ½ inch wooden stick had been inserted 4 inches into the vagina (T 730, 737-9). Insertion of the stick had apparently not caused any specific tearing, and the external wounds to the vagina were likewise inconsistent with having been caused by the stick (T 741-5); the doctor stated that these wounds were consistent with blunt trauma, and were "consistent with injuries impacting with an erect penis, piece of pipe [or] a broom handle" (T 744). Vaginal swabs failed to indicate the presence of sperm (T 485).

At the penalty phase, Dr. Cumberland offered additional testimony (T 947-960). At this time, the witness stated that, even after over ten years of doing autopsies, the degree of physical brutality in Susan Morris' death "will always be in my mind" (T 9567). Dr. Cumberland testified that both of the victim's eyes had been swollen shut and that there had been bruising along the right

temple "that continued all the way down the right cheek on the lower part" (T 952); there was likewise bruising around the left eye and abrasions on the undersurface of the chin (T 952). The doctor stated that the victim's blunt force injuries were "consistent with someone having been kicked" (T 953). Dr. Cumberland also expanded upon his conclusion that the ligature had not caused strangulation, stating that injuries to the hyoid bone and larynx were consistent with either manual compression (where the hands were placed on either side of the neck) or a "stomp-type injury" to the neck (T 954). The doctor stated that, although the sock had not been used for strangulation per se, it had been used "as a means of control", so that the perpetrator could manipulate the victim - "that sock could be tightened up, which would cause the person to feel their wind being cut off and a constriction around their neck and panic and would be more likely to comply with what the perpetrator would like them to do" (T 955).

Meanwhile, on January 12, 1993 (the day after the murder and the day before discovery of the body), Appellant Branch had been seen in Panama City, where he had recently resided with his cousin. At this time, he was driving a small red Toyota, which, according to Appellant's cousin, had a black antenna on the back and a broken left turn signal (T 565, 585-6). Appellant told both his brother

and his cousin that he had "borrowed" this vehicle from a girl in Pensacola, who attended the University of West Florida (T 566, 577); earlier that day, Branch had been seen driving this car in Destin, and had told a friend that the Pontiac Bonneville which he usually drove was at the Pensacola airport (T 655-6). Appellant's brother testified that he encouraged Branch to go back to Indiana to "take care of a situation" (T 569), and David Branch stated that Appellant wanted to return to Indiana to "turn himself in" (T 577-8).

Indeed, on the morning of January 13, 1993, Appellant was seen in Bowling Green, Kentucky, which is two hours away from Branch's home in Indiana (T 569-570; 663-8). At this time, Branch appeared on the campus of Western Reserve University, where he asked a student the location of the nearest Western Union office (T 665). Branch was directed to a nearby shopping center, and, the next day, the victim's Toyota was recovered from the parking lot at such location (T 671-2). A bloodstain was found on the back of the passenger seat, which was consistent with the blood of Susan Morris. Although both Branch and the victim had type A blood, hers, like 17% of the population, contained the enzyme EAP-B, which his did not (T 680-1; 692-3). This bloodstain was likewise subjected to a DNA testing, which indicated that it was consistent

with that of the victim, and inconsistent with having come from Branch (T 696-7). Branch was taken into custody shortly afterwards in Indiana. At this time, it was noted that he had a cut on the knuckle on his right hand (T 676); likewise at this time, a pair of black and white checkered shorts were recovered from Appellant, and tests later indicated that the clothing was stained with Branch's own blood (T 697).

Branch's car was retrieved from the airport parking lot in Pensacola and a number of incriminating items were found inside (T 661-2). On the floor of the front passenger seat were found a pair of brown boots, with tan-colored socks inside of them (T 450). These items were subjected to a number of chemical tests. Bloodstains were found on both boots and both socks. Blood containing the EAP-B enzyme, particular to the victim, was found on the left boot and the sock from the right boot (T 471). Additionally, these samples were the subject of two different DNA analyses. According to the PCR test, and factoring in the victim's enzyme type, the victim was among only one-half of one percent of the Caucasian population which could have produced the bloodstain (T 709). Under the RFLP analysis, a sample of the victim's blood was compared with one of the bloodstains on the right sock, and the two "matched"; the probability of such a match within the Caucasian

population was one in nine million (T 516-520). A blood spatter analysis also examined the bloodstains on the boots, and testified that the patterns were consistent with "medium velocity spatter", such that the victim had been on the ground and the wearer of the boots had been "straddling her" (T 546).

The State also presented the testimony of Melissa Cowden, a student at the University of West Florida (T 590-625). Ms. Cowden testified that she met Appellant in early January of 1993 at the Rathskellar on campus (T 590). At this time, Branch told her that he was from Indiana, and had previously been staying in Panama City, although he planned to start at UWF as a pre-med student. Cowden spent the night with Appellant in his motel room at the Red Roof Inn, and, at such time, noted that he had a "large American car" (T 591-2). The next morning, Branch called his grandparents and asked them to wire money to him through Western Union, under Cowden's name (T 592). The two spent Sunday night (the night of January 10, 1993) in Ms. Cowden's dorm room, and Branch was still there on Monday, when Ms. Cowden went to class (T 592-3); Branch told her that he was going to register (T 593). The two saw each other periodically during the day and, after dinner, were to meet at the library after Ms. Cowden finished studying. When the witness went to find Branch at around 7:30 on the evening of

January 11, 1993, she could not find him at any of the pre-designated locations, until she called her own room for messages between 10:30 and 11 p.m. that night, and Appellant answered the phone (T 598).

When Ms. Cowden encountered Appellant, he was dressed differently than when she had seen him previously, and, at this time, Branch was wearing brown boots and pair of black and white checkered shorts. She stated that the boots, and socks, looked "wet", and noted that Appellant had a cut on his hand; Branch told her that he had gotten into a bar fight (T 599). Appellant stated that he would be going back to Panama City the next day, and he left the next morning (T 601). Another student testified that he had seen Branch, on the night of January 11, 1993, packing "something" into a "smallish red vehicle" outside of the dorms (T 640). The State also called a cab driver who remembered picking up Branch at the Pensacola airport and taking him to the West Florida campus, presumably after he had abandoned the Bonneville in the airport parking lot (T 626-637).

As noted in the Initial Brief, Branch took the stand and testified on his own behalf (T 770-852). Branch testified that he left Indiana in late 1992 to live with his cousin in Panama City and to attend college; he stated that at such time, he was driving

a brown Bonneville which his grandfather had lent to him (T 771-3). Appellant stated that, in early January of 1993, his grandfather advised that "there might be bench warrant" out for him from Indiana (T 774). Branch became concerned that the authorities might seize his vehicle or that it could be used to located him (T 774-5). Accordingly, Branch got into the car and set out for Pensacola, where he went to an all-night nightclub called the Warehouse and met someone named "Eric St. Pierre" (T 777-780). After playing pool for several hours, Appellant checked into the Red Roof Inn and spent the night. The next day, Branch went over to the campus of the University of West Florida, where he met Melissa Cowden.

Branch's testimony tracks that of Melissa Cowden until, of course, they separated in the early evening hours of Monday, January 11. According to Appellant, Ms. Cowden went to study at 6:30 that night, and Appellant met up with Eric from the Warehouse (T 794). The two drank beer and shot pool and Appellant confided in the other Eric about his "situation"; Appellant stated that he was so desperate to get back to Indiana that he thought about stealing a car (T 795). Branch said that he did not want to use the Bonneville to get back to Indiana because his brother wanted to use it (T 795). The two Erics then began discussing how to "hot-

wire" a vehicle, and went to Appellant's Bonneville, from which Branch obtained an old flyswatter to use to "jimmy open" a car door (T 798). As they searched through the parking lots, they came upon a car all by itself "sitting in the mist" (T 799). As Branch tried to pick the lock, he heard a noise, and then saw someone coming towards them. Accordingly, they backed away and went to sit on a nearby curb (T 800-1).

At this point, Susan Morris started to get into the car, and Appellant's companion approached her and asked her the time. As she turned around, he hit her in the head with his fist, and she fell to the ground, striking her head on the car door (T 801-2). Eric then directed Appellant to help pick up the victim, saying that they could tie her up and leave her in the woods, and then take her car (T 802). Accordingly, they carried her into the woods, and, after they set her down, she began to mumble or moan, and Eric hit her again; he hit her so hard that Branch dropped her (T 804). Appellant stated that he was "stunned" and that he told Eric he was going to sit in the car and wait until the victim was tied up (T 804). Branch then got into the car and drove off campus to a gas station, where he got something to drink. Afterwards, he drove back to campus where he met up with Eric, who jumped into the car, and told him that he had tied up the victim "real good" and

that Branch would "have plenty of time to leave to go to Panama City" (T 806). Appellant testified that he changed clothes after the incident, as his boots were "wet" from walking in the woods (T 808-9), and that he and Eric had then "cruised around" Pensacola (T 811). Branch decided that it did not make sense to leave for Panama City until the next day (because his paycheck from Subway would not be ready until 2:00 p.m.), and drove the car to the airport, where he left it for the night (T 810-813).

Appellant then returned to campus, by taxi, and retrieved various necessities from the Bonneville, such as his styling mousse (T 814). Branch returned to Melissa Cowden's room where he spent the night; he specifically contradicted her testimony to the effect that he had a cut on his hand at this time (T 836). The next morning, Appellant drove the Bonneville to the airport, where he "exchanged" it for the victim's Toyota (T 816). According to Branch, his plan was that he would leave the Bonneville at the Pensacola airport, drive to Panama City in the victim's car and then have his brother and cousin drive him back to the Pensacola airport (after they had picked up his Subway paycheck for him), so that Appellant could fly to Indiana and his brother could drive the Bonneville (T 816). Things, however, did not go according to plan, as, when Branch arrived in Panama City, he saw the police pull over

his brother and cousin, and he "kept on driving on by" (T 820). Branch then headed for Indiana by car, but ran out of gas in Bowling Green, Kentucky (T 821). He later turned himself in in Indiana when he heard that the victim's body had been discovered (T 824).

SUMMARY OF THE ARGUMENT

Branch presents nine points on appeal in regard to his convictions of first-degree murder and sexual battery, and to sentence of death; five relate to the guilt phase, with the remaining four relating to the penalty phase. Appellant's first point, in regard to the denial of motions to continue the guilt and/or penalty phases, is without merit. The defense received at least four prior continuances, and the State announced that it would not use a lately-disclosed witness, such that no basis existed for continuing the trial; likewise, the defense had more than adequate time to prepare for the penalty phase, and the alleged need for any mental health expert was both foreseeable and speculative. The next point, relating to the alleged need for a hearing on Branch's complaints regarding counsel, fails on two counts. First of all, there has been no showing that the judge received Appellant's pre-trial letter, which did not, in any event,

expressly allege that counsel was ineffective; most importantly, however, there was no need for any hearing or action by the court, given the fact that counsel was privately retained, and Branch could discharge him at any time. Reversible error has not been demonstrated in regard to the court's denial of Branch's request for a jury instruction on circumstantial evidence, and, further, denial of Appellant's motion for mistrial during the prosecutor's closing argument was likewise not error; the prosecutor's argument related to a change in the defense position during the course of the trial, in regard to certain blood evidence, and, even if construed as a "comment" of any kind, provides no basis for reversal. The final guilt phase issue - an attack upon the sufficiency of the evidence itself - is similarly unavailing. Although the State's case was circumstantial in nature, the "hypothesis" of innocence propounded by Branch was unreasonable and internally inconsistent; because the State presented evidence which contradicted Appellant's testimony, the jury was not required to accept the latter.

In sentencing Branch to death, Judge Nickinson found the existence of three aggravating factors, and further concluded that such outweighed the four specific items of nonstatutory mitigation considered. On appeal, Appellant does not directly attack the

sentencing findings, and any suggestion that the aggravating circumstance relating to prior conviction for a violent crime was insufficiently proven is without merit. Likewise, controlling precedent dictates that denial of Branch's requested instruction on nonstatutory mitigation was not error, and his challenge to the introduction of victim impact evidence, and to the statute itself, has already been rejected. It was not error for the court to have allowed the prosecutor to show the jury a photograph of the victim before the murder and, contrary to the representations in the Initial Brief, no attempt was made to "inflame" the jury either at trial or sentencing. Branch's convictions and sentence of death are, in all respects, reliable, and this Court should affirm in all respects.

ARGUMENT

POINT I

DENIAL OF APPELLANT'S "REPEATED" REQUESTS TO CONTINUE THE GUILT AND/OR PENALTY PHASE OF THIS CASE WAS NOT ERROR.

As his initial point on appeal, Branch contends that he is entitled to a new trial, because the court below denied his request to continue the trial and/or penalty proceedings in this case. Although recognizing that the law is not in his favor as to this claim, excepting perhaps Wike v. State, 596 So.2d 1020 (Fla. 1992), Appellant maintains that Judge Nickinson "rushed his case to trial" (Initial Brief at 16), and should have granted his request to postpone the sentencing proceedings for a "reasonable" time. The record in this case does not demonstrate an abuse of discretion in regard to the court's rulings at issue, and reversible error has not been demonstrated.

The record, in fact, reflects that Branch was indicted for this offense on February 23, 1993, and that he was formally arrested, while in the Bay County jail, on or about June 10, 1993, at which time he was apparently returned to Pensacola (R 4). The Office of the Public Defender was appointed to represent him, and, on October 11, 1993, counsel moved for a continuance on the grounds that additional time was needed to complete discovery and to

adequately prepare for trial; it was represented that the trial was then scheduled for November 8, 1993 (R 108). It would appear that this motion was granted, as the next pleading in the record is a motion to have Branch declared partially indigent, filed by Appellant's new attorney, John Allbritton, on November 1, 1993; this motion was granted on November 3, 1993 (R 109-110).

On January 24, 1994, Attorney Allbritton filed a motion to continue (R 115-116). In such pleading, Allbritton maintained that Branch had been represented by the Office of the Public Defender until approximately November 1, 1993, and that he had been substituted as counsel at such time. Allbritton stated that he had begun an expeditious review of the discovery materials already acquired, but suggested that additional time was needed; counsel specifically alleged that more time was necessary to prepare for the penalty phase, in that, such would require travel to Indiana "to conduct further interviews and obtain records and consult experts." (R 115-116). Apparently, this motion was granted, and trial was set for between February 28 and March 7 (R 145).

On March 1, 1994, counsel for Branch again moved for a continuance (R 158-161). As to the guilt phase, counsel suggested that such was necessary, given the fact that the State had only recently disclosed a potential expert witness, Dr. Levine. As to

the penalty phase, defense counsel stated that he had obtained the services of a "mitigation specialist" and that, as per that individual, the defense would need until of June 1994 to be ready (R 158-160). The same day, counsel also filed, in the alternative, a formal motion to postpone the penalty phase (R 162-4). In such pleading, counsel represented that, if an overall continuance of the trial was denied, the penalty proceeding should still be postponed, given the fact that, following any conviction, counsel would have to undertake such responsibilities as: (1) reviewing the evidence presented at the guilt phase; (2) having the defendant psychiatrically examined and (3) calling a number of out-of-town witnesses to testify.

These motions were heard at a hearing on March 1, 1994 (R 141-156). At such time, defense counsel acknowledged that this was the fifth "delay sought" (a representation with which the State agreed (R 152)), and briefly reviewed the history of the case (R 142-4). Counsel then argued that the trial needed to be continued, due to the lack of any report from Dr. Levine, and the need for the defense to procure a forensic dentist of its own (R 144-7). Counsel also argued that additional time was needed to prepare for the penalty phase, and pointed to a letter from the "mitigation specialist" (R 147-150). Counsel stated that "if Dr. Levine was

not an issue," he would only be requesting a continuance of the penalty phase (R 153). The court ruled that the motion to continue the penalty phase was denied, but directed the State to either elect to proceed without Dr. Levine or agree to a continuance of the trial (R 153-4). The State elected the former option, and the motion to continue was denied in all respects (R 154).

At a motion hearing on March 4, 1994, the motions for continuance were briefly reviewed and denied (R 290), and trial commenced on March 7, 1994, and lasted through March 10, 1994. At the commencement of the penalty phase on March 11, 1994, defense counsel again renewed the motion to postpone, suggesting that the defense needed "at least another four weeks to prepare," claiming that the "mitigation specialist" was still developing information (T 942). When pressed by the court, Attorney Allbritton stated that the specialist was trying to locate medical records pertaining to Branch's head injuries, so that the defense "could turn them offer to neuropsychologist to -- for at least for an evaluation" (T 943). Counsel also filed an affidavit from Saundra Morgan, the Indiana mitigation specialist, who described her function as "conducting a full social history investigation", "compiling all available school, medical, psychiatric, military and social service agency records", and then assisting the defense attorney and

determining "what, if any, mental health issues needed to be investigated further by competent mental health professionals" (R 335). In her affidavit, Ms. Morgan stated that she had been retained in this case on February 2, 1994, and that at such time, she had advised defense counsel that she would need a minimum of six months to prepare; she likewise stated that she had only completed "the initial phase" of her investigation, and offered her "professional opinion" that Attorney Allbritton was not prepared for the penalty phase (R 336). The judge denied counsel's motion to postpone the penalty phase (T 944).

During the penalty phase, defense counsel contended that the State had failed to prove that Branch's prior felony conviction had involved violence, and introduced a copy of the Indiana statute (T 973-982). When the defense then announced an intention to rest, Judge Nickinson excused the jury and held a colloquy with Attorney Allbritton and Branch to ensure that the defendant concurred with this strategy (T 982-3). At this time, counsel reiterated that the defense had not had an opportunity to fully develop "the matters we wished to present in mitigation" (T 983). Significantly, however, counsel then stated that the defense did have "matters that might be relevant at a sentencing hearing," but went on to state:

I have discussed with my client the danger of

> putting those matters and those witnesses on the stand at this point as to opening up some things in his past that the State may bring out on cross-examination that will possibly support the aggravators rather than enhancing or going toward any mitigating factors (T 983-4).

Attorney Allbritton then represented that he had discussed this matter with Branch, and that Appellant had agreed with him as to how to proceed (T 984).

Judge Nickinson questioned Appellant on this matter, and explained to him that matters pertaining to a defendant's character or family background and upbringing were typically admitted at penalty proceedings (T 985-6). The judge then verified from defense counsel that this type of information was available:

> That's your choice if you choose not to present those, but it is not my understanding that any of that sort of thing is not available today because of a denial of continuance. Is that accurate? For that I'm asking Mr. Allbritton.
>
> MR. ALLBRITTON: Yes, sir, that type of information, some is available.
>
> THE COURT: And you understand, Mr. Branch, that type of information could be presented, but you and your attorney chose not to?
>
> THE DEFENDANT: Yeah, I do.
>
> THE COURT: You've discussed that with Mr. Allbritton?

> THE DEFENDANT: In full.
>
> . . . . . .
>
> THE COURT: I need you to confirm that you have talked about it and throughly discussed it and this is a knowing and intelligent decision you and your attorney is (sic) making about this case.
>
> THE DEFENDANT: Right. Right now I think it's in my best interest (T 986-7).

After this colloquy, defense counsel requested more time to confer with his client, and then announced an intention to reopen the defense case (T 987). The defense then called Appellant's brother and grandfather, who testified in detail concerning Branch's early life, growing up and family background (T 988-1006). Although Appellant filed a pro se motion for new trial (which will be discussed in Point II), and which contained general complaint about the absence of witnesses, no specific testimony was ever identified or proffered from any lay or expert witness (R 353-8).

Although Branch contends that he is entitled to a new trial on this point, it is difficult to see how error can even be alleged in regard to the denial of the motion to continue the guilt phase. As defense counsel himself stated at the hearing of March 1, 1994, his motion was solely predicated upon the late disclosure of Dr. Levine (R 153). Once the State announced that it would not call Dr. Levine, any need for a continuance vanished. Clearly, no abuse of

discretion has been demonstrated in regard to this ruling. See, e.g., Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980); Lusk v. State, 446 So.2d 1038, 1040-1 (Fla. 1984); Sinclair v. State, 657 So.2d 1138, 1141 (Fla. 1995).

The trial court's denial of Branch's motion to continue the penalty phase was likewise not error. There had been, by counsel's own admission, five prior continuances (R 142-4), and it is clear that counsel had investigated Branch's family background for presentation in mitigation. Indeed, counsel presented two family members to testify at the penalty phase, and, from his statements on the record, apparently had strategic reasons for not calling more. The only matter which remains is whether counsel was entitled to delay the proceedings to pursue "mental mitigation," and, as Branch correctly concedes (Initial Brief at 12-13), he cannot prevail on this claim unless any abuse of discretion by the trial court resulted in undue prejudice to the defense. See, Bouie v. State, 559 So.2d 1113, 1114 (Fla. 1990); Fennie v. State, 648 So.2d 95, 97 (Fla. 1994). Appellant has failed to make such showing, and this claim of error is largely predicated upon speculation.

Defense counsel in this case had been appointed more than four months previously, and had already received at least one

continuance. The fact that this was a capital case was clear from the outset, and the need for any mental evaluation of Branch was likewise foreseeable, if, indeed, such were warranted. Unlike other capital cases, it is clear that Appellant's family was involved in his case, and in contact with defense counsel (whom they retained); accordingly, they were not only available as potential witnesses, but also as sources of information or leads. While it was no doubt commendable that defense counsel sought the additional assistance of a "mitigation specialist," it would not appear that this "specialist" had a very realistic view of circuit court timeframes or dockets. While Attorney Allbritton suggested that the defense needed only "four weeks" to prepare, the affidavit from his mitigation specialist, which he filed at the same time, asserted that additional months would be required (R 336). Accordingly, there was no reason for Judge Nickinson to believe that the defense would be any better prepared in four weeks time, and, during such interval, it would have been necessary to somehow sequester the jury from publicity or improper contact, a highly impractical alternative.

Under all of the circumstances of this case, denial of the penalty phase continuance was not error. See, e.g. Williams v. State, 438 So.2d 781, 785 (Fla. 1983) (denial of motion to continue

penalty phase not error, where counsel had been appointed eleven weeks previously, and had always on notice that death penalty would be sought); Woods v. State, 490 So.2d 24, 26 (Fla. 1986) (denial of motion to continue not error, where defense had previously received one continuance and counsel's contentions, concerning undiscovered evidence, "nothing more than conjecture and speculation"); Valdes v. State, 626 So.2d 1316, 1323 (Fla. 1993) (denial of motion to continue penalty phase not error, where, inter alia, defense wanted to further investigate possible mental mitigation); Gorby v. State, 630 So.2d 544, 546 (Fla. 1993) (denial of continuance not error where, inter alia, defense had already received one, and where no showing made that desired witnesses would ever be available). This case is much closer to Gorby or Woods, than to Wike, upon which Branch relies. In Wike, the defense sought a continuance of only a week's duration, in order to present specific named witnesses at the penalty phase, such witnesses than previously unavailable. In this case, defense counsel requested a continuance of at least four weeks simply to continue investigation into possible mental mitigation. Such was clearly an insufficient basis for delaying the penalty phase, and the instant conviction and sentence of death should be affirmed in all respects.

POINT II

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO THE COURT'S FAILURE TO HOLD A HEARING INTO APPELLANT'S ALLEGED COMPLAINTS REGARDING PRIVATELY-RETAINED COUNSEL.

As his next claim, Appellant contends that he is entitled to a new trial, because Judge Nickinson failed to conduct a hearing on his complaints regarding counsel. Branch maintains that such hearing was mandated under such precedents as Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), Hardwick v. State, 521 So.2d 1071 (Fla. 1988), and Smith v. State, 641 So.2d 1321 (Fla. 1994). Appellee would contend that these cases are inapplicable, and that no viable claim for relief has been presented. There has been no showing that the circuit judge ever received Branch's pretrial letter concerning counsel, but, even if he did, no action of the court was required. Given the fact that Attorney Allbritton was privately retained, as opposed to court-appointed, Appellant did not need leave of court to discharge him, if, in fact, such was his desire.

The record indicates, as noted in Point I, that Branch was originally represented by the Office of the Public Defender, but that, on November 2, 1993, Attorney Allbritton became Appellant's attorney; although Branch was declared partially indigent, such was

only for discovery or trial preparation purposes (R 109-110). At a hearing on March 1, 1994, Appellant's grandfather spoke up and stated that he wanted to talk to the court about an affidavit which he had sent in, and that he also wanted to talk about a letter which he had sent to Attorney Allbritton "that I've only had verbal answer." (R 155). Judge Nickinson replied that the court had not appointed Allbritton, and that this was a matter between the attorney and the Branchs (R 155). When Appellant's grandfather continued in this vein, the judge stated, "You're going to have to deal with Mr. Allbritton about that." (R 156).

The record includes an affidavit from Alfred Branch, dated February 17, 1994, in which Appellant's grandfather set forth his dissatisfaction with Attorney Allbritton, pointing out that he had mortgaged his home to pay his fees (R 338-340); after setting forth his complaints regarding counsel's alleged lack of interest, Mr. Branch requested that the court "call a hearing with John Allbritton to discuss his accountability of the fees remitted to him by Alfred N. Branch" (R 340). Judge Nickinson formally filed this affidavit in the record on April 15, 1994, along with the memorandum to the court file (R 341). In such memorandum, the judge recounted the events of the March 1, 1994 hearing, and stated:

> After that, the court heard nothing from the defendant or his counsel concerning any disputes between counsel and client, or any desire the client might have had to discharge his counsel (R 341).

Following Branch's conviction and sentence to death, Appellant filed a pro se motion for new trial on or about April 25, 1984 (R 353-4). In such pleading, Appellant, inter alia, accused Attorney Allbritton of ineffective assistance, and also contended that Judge Nickinson had failed to respond to a letter which Branch had sent him, concerning his complaints with counsel (R 353-4); apparently attached to the motion was a letter from Branch to the judge, dated February 17, 1994 (R 355-6). In such letter, Appellant complained that he had only met with Allbritton once and that he had been unable to contact him since (R 355). He also stated that he had "never seen a detective, psychologist, neuropathologist or any other expert", who might be of assistance (R 355). Appellant stated he was worried because Allbritton had not talked to him more, and asked the court to hold a hearing with Allbritton "to discuss his accountability for the services not rendered to me" (R 356).

It does not appear as if there was ever a ruling on this motion. At the hearing of May 3, 1994, Attorney Allbritton stated that he had discussed the pro se motion for new trial with Branch,

and that "Mr. Branch and I will proceed on that matter and other matters in our motion for new trial" (R 445). No subsequent motion for new trial was filed, and the notice of appeal was entered on June 1, 1994 (R 494).[2]

On appeal, Branch gives these facts a spin all his own. Thus, he asserts that Judge Nickinson received Branch's letter in February of 1994 and then proceeded to ignore it. Then, he chastisizes the judge for attaching undue prominence to the fact that Attorney Allbritton was privately retained, as opposed to court-appointed, pointing out that under Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the same standards of competence apply to retained and appointed counsel (Initial Brief at 23). Likewise, Appellant maintains that the rationale supporting the holding of such cases as Nelson and Hardwick applies "with equal strength regardless of how the defendant's lawyer came to represent the accused" (Initial Brief at 23), and contends that Branch should have been afforded a Nelson hearing as to his complaints about counsel.

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[2]Given the fact that no ruling was ever secured on the pro se motion for new trial, it is clear that no claim of error can be predicted in this regard. See Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994); State ex.rel. Faircloth v. District Court of Appeal, Third District, 187 So.2d 890 (Fla. 1966). Further, inasmuch as Branch was then represented by counsel, the pro se filing was a nullity. See Shepphard v. State, 391 So.2d 346 (Fla. 1966); State v. Tait, 387 So.2d 338 (Fla. 1980).

There are at least two fatal flaws in Branch's argument. First of all, there has been no showing that Judge Nickinson received his letter until April of 1994, when it was attached to the pro se motion for new trial. The judge filed the affidavit which he received from Appellant's uncle into the court file, and also filed a separate memorandum memorializing his receipt of it. The fact that he did not take comparable action in regard to Branch's letter strongly suggests that he never received it, and his memorandum to the file contains the assertion that he had not heard Appellant voice dissatisfaction with counsel (R 341). If Appellant was, in fact, dissatisfied with Allbritton's representation, he certainly had the perfect opportunity to so advise the judge during the colloquy at the penalty phase (T 982-7), and, to the contrary, at such time he indicated that he fully concurred with the strategy being employed. The most that can be said is that, prior to trial, Branch was concerned that his attorney might not have visited him often enough, and that, after his conviction and sentence of death, he felt that his attorney could have done more. This hardly distinguishes Branch from the vast majority of capital defendants, and, even if his letter had been timely received by the judge, it was insufficient to trigger the need for any sort of hearing or inquiry. Cf. Smith v. State,

641 So.2d 1319, 1321 (Fla. 1994) (inquiry only required where defendant specifically attacked attorney's competence, as opposed to merely expressing dissatisfaction); Parker v. State, 641 So.2d 369, 374-5 (Fla. 1994) (same); Windom v. State, 656 So.2d 432, 437 (Fla. 1995); Smelley v. State,486 So.2d 669 (Fla. 1st DCA 1986).

Further, there was no necessity for a "Nelson inquiry," in that no action of the court was required if Branch wished to discharge his counsel. The rationale for a Nelson hearing only exists where a defendant wishes to exchange one court-appointed attorney for another, and an inquiry into the effectiveness of counsel is required, because such is not a defendant's right. See Hardwick, 521 So.2d at 1074. The inquiry is essential because, without establishing adequate grounds, a defendant does not have a constitutional right to obtain different court-appointed counsel, see, Capehart v. State, 583 So.2d 1009, 1014 (Fla. 1991); Jones v. State, 612 So.2d 1370, 1373 (Fla. 1992); if adequate grounds are not shown and the defendant insists upon discharging counsel, he must be advised that the State is not required to appoint a substitute. Nelson, 274 So.2d at 259.

Here, Branch, or his family, did not need leave of court to discharge Attorney Allbritton, because he was not court-appointed. Indeed, Branch had previously discharged the Office of the Public

Defender, without seeking the court's permission, and could have done so again, in regard to Attorney Allbriton. While a judge cannot allow a trial to proceed with obviously unprepared counsel, whether court-appointed or privately retained, it was not incumbent upon Judge Nickinson to mediate between Branch's family and Attorney Allbritton to see that they were satisfied that they were getting their money's worth (as such was their apparent desire). A simple reading of the transcript in the case indicates that no fundamental breakdown occurred in the adversarial system, so as to implicate United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Reversible error has not been demonstrated, and the instant convictions and sentence of death should be affirmed in all respects.

POINT III

DENIAL OF APPELLANT'S REQUESTED JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE WAS NOT ERROR

Appellant next contends that he is entitled to a new trial, because Judge Nickinson denied his request for a jury instruction on circumstantial evidence; the record does, indeed, reflect that the instruction was requested and denied (T 861-4, 869-870, 913-914; R 317), the judge offering the view that the instruction was unnecessary and could be seen as an improper comment upon the

evidence. On appeal, Branch, again concedes that the weight of the law is against him, but maintains that this case, as opposed to all others in which this issue has been raised and rejected, constitutes the one instance in which this instruction was constitutionally mandated. The State disagrees.

This Court found the standard jury instruction on circumstantial evidence to be unnecessary in 1981, noting that the federal courts had previously eliminated such, and holding that the giving of the standard instructions on reasonable doubt and burden of proof sufficiently covered the matter. See In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 595 (Fla. 1981). Since that time, this Court has consistently rejected claims of error such as that sub judice, when presented in capital appeals. See, e.g., Williams v. State, 437 So.2d 133, 135-6 (Fla. 1983); Rembert v. State, 445 So.2d 337, 339 (Fla. 1984); White v. State, 446 So.2d 1031, 1035 (Fla. 1984); Trepal v. State, 621 So.2d 1361, 1366 (Fla. 1993); Pietri v. State, 644 So.2d 1347, 1353, n.9 (Fla. 1994). In Rembert, this Court reviewed the circuit court's ruling under the abuse of discretion standard. Id. Branch has failed to demonstrate any abuse of discretion sub judice.

In this case, as in all of the above, the jury was fully instructed on reasonable doubt and burden of proof (T 925-6).

There is no reason to believe that these instructions were insufficient to guide the jury in their deliberations, and this case was no more "circumstantial" than any other capital case, which lacked an eyewitness or a full confession. As will be discussed in more detail in Point IV, infra, the State introduced a great deal of physical evidence linking Branch to the crime, most particularly the presence of the victim's blood on his clothing, and Branch's possession of the victim's vehicle in close proximity to her death. Although Branch took the stand and offered an exculpatory version seeking to explain much of this evidence, the jury was not compelled to accept such, and needed no special instruction on how to weigh these matters. The judge below felt that a special instruction on circumstantial evidence might do more harm than good, and Branch has failed to demonstrate that such ruling constitutes a palpable abuse of discretion, such that he has suffered undue prejudice thereby. The instant convictions and sentence of death should be affirmed in all respects.

POINT IV

SUBSTANTIAL AND COMPETENT EVIDENCE EXISTS TO SUPPORT BRANCH'S CONVICTIONS OF FIRST-DEGREE MURDER AND SEXUAL BATTERY

As his next claim, Branch asks this Court to discharge him from custody in regard to his convictions of first-degree murder

and sexual battery, in that, allegedly, insufficient evidence exists to support them; Appellant apparently concedes the sufficiency of the evidence in regard to his conviction of grand theft of a motor vehicle. Although defense counsel below did not move for a judgment of acquittal, this Court, pursuant to Fla.R.App.P. 9.140(f), reviews the sufficiency of the evidence in every capital appeal to determine whether the interest of justice requires a new trial. In this case, the State adduced substantial, competent evidence to support all of Branch's convictions. Although Branch took the stand, and offered an allegedly exculpatory version of events, the jury was not required to accept such, especially given the fact that the State offered conflicting evidence.

This Court has had occasion to discuss the standard of review applicable to cases involving circumstantial evidence relatively frequently. Recently, this Court observed that when a case against a defendant is circumstantial, the burden is on the State to introduce evidence which excludes every reasonable hypothesis except guilt; the State, however, is not required to conclusively rebut every possible variation of events which can be inferred from the evidence, but only to introduce competent evidence which is

inconsistent with the defendant's theory of events. See Washington v. State, 653 So.2d 362, 365-6 (Fla. 1994); Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993). Further, as appellee, the State is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. See Cochran v. State, 547 So.2d 928, 930 (Fla. 1989); Peterka v. State, 640 So.2d 59, 68 (Fla. 1994). Finally, in Songer v. State, 322 So.2d 481, 483 (Fla. 1975), this Court specifically rejected a contention that a defendant's interpretation of circumstantial evidence should be accepted completely unless it is specifically contradicted, and this Court has likewise held that the jury is not required to accept a defendant's "clearly unreasonable" hypothesis of innocence. See Williams, 437 So.2d at 135; Huff v. State, 495 So.2d 145, 150 (Fla. 1986).

As in Huff, Branch's story was "untruthful and unreasonable", and contradicted by the State's evidence. At trial, the prosecutor adduced substantial evidence linking Appellant to the crime. Appellant was seen driving the victim's vehicle in close proximity to her death, and her blood was found on his boots and socks. Although Appellant sought to explain these events, his story fell flat on several counts, and was specifically contradicted on a number of fronts. Thus, according to Branch, he resolved to turn

himself in to the authorities in Indiana, due to the existence of a pending warrant, but decided he did not want to continue to use the vehicle which his grandfather had lent him, due to fear of detection. Branch's solution to this dilemma was to drive from Panama City to Pensacola, and, in conjunction with "the other Eric," steal another vehicle; it is unclear why Branch assumed that the theft of this vehicle would not be reported to the police, resulting in yet another warrant issued for his arrest. Under Branch's hypothesis, the "other Eric" told him that the owner of the stolen car had been tied up and been left in the woods; again, the victim's eventual discovery would seem to logically suggest that this crime would be discovered on short notice.

After having gone to such great lengths to secure this new vehicle, Branch then proceeded neither towards Indiana nor Panama City, where his relatives reside. Rather, Appellant testified that he left the car at the Pensacola airport for the night because his all-important paycheck from Subway would not be ready until the afternoon of the next day. Having secured a vehicle which might be untraceable, at least in the short term, Branch's "plan" was to drive the vehicle back to Panama City to pick up his brother and cousin, so that they could, in turn, all drive back to Pensacola, and Appellant could fly to Indiana, his brother taking the brown

Pontiac Bonneville conveniently left behind at the airport parking lot. Of course, it would seem that Appellant could simply have summoned his brother to the Pensacola airport with a phone call, (thus, obviating the need to drive a stolen car further on Florida highways), and, if Appellant were truly resolved to fly back to Indiana, his need for the stolen vehicle is unfathomable. The jury's rejection of this tale was more than reasonable. Cf. Huff, supra.

Branch's testimony was specifically contradicted by that of Joshua Flaum, who testified that he had seen Appellant loading something into "a smallish red car" at around 11:00 p.m. on the night of January 11, 1993 (T 640-2); according to Branch, the car was at the Pensacola airport at this time (T 813-815). Further, Melissa Cowden testified that when she had encountered Appellant that night, apparently at around 11:00 p.m., she had noticed a cut on his hand, and that Appellant had told her that he had gotten such in a bar fight (T 599); when Appellant was fingerprinted in Indiana, following his surrender, the Florida officer noticed a cut on the knuckle of his right hand (T 676). During his testimony, Branch specifically denied having a cut on his hand, or telling Ms. Cowden that he had been in a bar fight (T 835-6); further, Appellant offered no explanation for the presence of his own blood

on the pair of black and white checkered shorts which he had been wearing after the murder (T 598-9; 697). Finally, although Appellant claimed that he had seen the other Eric strike Ms. Morris, he never expressly stated that he had seen such a blow draw blood (something, which, presumably, he would have noticed) (T 804). Accordingly, Branch failed to provide a reasonable explanation for the presence of blood on his boots and socks, such blood the product of "medium velocity splatter", which meant that the wearer of the boots had been "straddling" the victim when the blow was administered (T 546); Branch likewise failed to explain the presence of blood consistent with the victim on the back seat of her car (T 680-1; 692-7).

The State, as noted above, is entitled to the most favorable interpretation of this conflicting evidence. Such favorable interpretation indicates that, contrary to his own testimony, Branch was in a fight that night, but not at a bar. Rather, he was in a fight with Susan Morris, as he beat, strangled and sexually battered her; the medical examiner specifically testified that the victim had defensive wounds (T 747-8). Likewise, Branch's possession of the car at a time inconsistent with this story gave the jury good cause to disbelieve his entire tale. Rather than driving around Pensacola with the mythical other Eric, Branch,

after securing the victim's vehicle, drove it to the parking lot of the dorm, where he began to load it with his own possessions. Finally, the presence of what must be regarded as the victim's blood upon Branch's boots and socks clearly indicates that he was no "passive observer" of her beating, as his own story suggested. In order for the blood to have been administered in the manner consistent with the testimony of the blood spatter expert, Branch had to have been "straddling" or "standing over" the victim, as she was brutally, and consistently, beaten. Given these conflicts, this cause was properly allowed to go to the jury. See, e.g., Finney v. State, 660 So.2d 674, 679-680 (Fla. 1995); Barwick v. State, 660 So.2d 685, 694-5 (Fla. 1995); Washington, supra; Peterka, supra.

Further, this case is distinguishable from Cox v. State, 555 So.2d 352 (Fla. 1989), or Scott v. State, 581 So.2d 587 (Fla. 1991), both of which relied upon by Appellant. In both cases, there was truly no evidence linking the defendant to the victim or to the crime. Here, Branch had possession of the victim's vehicle, and her blood was found on his boots and socks. The most that could be said in Cox was that the defendant had stayed at a motel near the crime scene, and that hair consistent with his, as well as a bootmark, was found at the scene; although type O blood was also

found (which was Cox's blood type), the blood was not analyzed further, and forty-five percent of the world's population could have left it. Here, inter alia, the blood which was found on Branch's boots and socks "matched" the victim's DNA profile, such that only one half of one percent of the Caucasian population or one person in nine million could have left this blood behind; of course, Susan Morris, whose blood just happened to have all of these characteristics, also owned the vehicle which the defendant stole. Likewise, in Scott, the State primarily relied upon hair samples and a shell fragment to link the defendant to the crime; these items were not adjudged sufficiently unique to link Scott to the case, especially after the passage of a great deal of time. Here, the State's case was much more substantial, and, additionally, Branch took the stand and offered a most unreasonable hypothesis of innocence. The instant conviction should be affirmed. See, Washington, supra (DNA evidence, as well as defendant's possession of victim's property and proximity to her home sufficient circumstantial evidence to justify conviction); Finney, supra (evidence that defendant pawned victim's belongings and presence of fingerprints in her apartment, sufficient to support convictions, especially where State disputed defendant's theory of innocence).

To the extent that further argument is necessary, the State would contend that sufficient evidence existed as to both premeditated murder and felony murder, with sexual battery as the felony; Branch was convicted of first degree murder, under a general verdict, and (also) separately convicted of sexual battery (R 318-320). The victim in this case died from a combination of beating and strangling, and had defensive wounds on her hands; the pathologist testified that, at least at one point, she had been manually strangled, and a ligature had also been used. These facts provide sufficient evidence of premeditation, so as to support a conviction for first degree murder. See, e.g., Holton v. State, 573 So.2d 284-289-290 (Fla. 1990) (premeditation established in case where, inter alia, victim strangled with ligature, after struggle); Deangelo v. State, 616 So.2d 440, 441 (Fla. 1983) (same, where victim manually strangled and choked with ligature). Likewise, there were wounds to the entrance of the victim's vagina, consistent with having been caused by an erect penis, and a stick was found inserted into her vagina; this is sufficient to prove sexual battery, and, accordingly, felony murder. Cf. Thompson v. State, 389 So.2d 197 (Fla. 1980). Appellant merits no relief as to this claim, and his belief that the State's case against him was "not much" (Initial Brief at 31), would seem to be nothing more

than bravado.

POINT V

DENIAL OF APPELLANT'S MOTION FOR MISTRIAL, DURING THE PROSECUTOR'S CLOSING ARGUMENT AT THE GUILT PHASE, WAS NOT ERROR

As his final guilt phase issue, Branch contends that the trial court should have granted his motion for mistrial, made during the prosecutor's closing argument at the guilt phase. Appellant maintains that, at such time, the prosecutor impermissibly commented upon his right to silence, and that reversal is required. The State disagrees, and would contend that a careful reading of the record and the pertinent case law dictates that reversible error has not been demonstrated.

The record in this case indicates that Eric Branch testified in his own defense, and offered an extensive, if unreasonable (see Point IV), infra, theory of innocence (T 770-852). During his direct examination, Branch testified that he had not killed Susan Morris, and that he had turned himself in to authorities after consulting with his attorney in Indiana (T 823-4); during his testimony, Branch was shown one of the State's photographic exhibits and asked to explain it (T 790-1), and he likewise testified that he had had an opportunity to see other photographs admitted into evidence by the State (T 773). When asked on cross-

examination as to why his brown Bonneville had been impounded, Branch answered based upon "the reports he'd read" (T 825). Subsequently, Branch testified, without objection, that prior to his testimony, he had read the police reports and depositions in this case, and had been present during the testimony of the other witnesses (T 834-5). He also testified, without objection, that he had not said anything about "the other Eric" previously (T 844).[3]

During cross-examination, the prosecutor pressed Branch a number of timers as to the issue of the bloody boots. Thus, the prosecutor asked Appellant if he had ever stood over the victim or "straddled" her, such that his feet had been on either side of her head; Branch responded that this did not occur "until she fell" (T 833). The following exchange took place:

> Q. That's fine, not until she fell. So the forceful bloodshed that puts those shoes at the same level as the blow, and the blood splattered expert, they're just incorrect about this other Eric?
>
> A. I would not know. I'm not an expert in that field. (T 834).

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[3] In his brief, Branch points out that his counsel objected to the prosecutor's question to Branch concerning what he had done to help catch the other Eric (T 829-830) (Initial Brief at 42). Because Branch's objection to this question was sustained, and no motion for mistrial was made, no claim of error has been preserved for review. See, e.g., Clark v. State, 363 So.2d 331, 335 (Fla. 1978); Wilson v. State, 436 So.2d 908, 910 (Fla. 1983); Riechmann v. State, 581 So.2d 133, 138-9 (Fla. 1991).

Subsequently, the prosecutor returned to the subject, asking Appellant if the blood on his shoes had been Susan Morris's; Appellant responded, "That's what the experts say" (T 841). When asked if the blood was "from forceful bloodshed," Branch stated, "I don't know" (T 842).

The defense had opening and closing final arguments. During the initial argument, Branch's counsel contended that Appellant's possession of the victim's car was "a nonissue", as the defendant had admitted stealing it (T 881-2). Attorney Allbritton then continued:

> Next the State brings in several experts, several experts who tell us that they find blood on the shoe and sock of Eric Branch. By Eric's own testimony, he tells you that he does not deny that. If the experts say that's what it is, then the experts say that's what it is, and that circumstantial evidence does not tell us who killed Susan Morris on January 11th at the University of West Florida. It certainly does not rise to the level of proof beyond a reasonable doubt that Eric Branch killed Susan Morris (T 882).

It was in response to this argument that the prosecutor delivered the argument now at issue. Thus, the prosecutor, after briefly discussing reasonable doubt, stated:

> Mr. Allbritton said that several of the items of evidence that the State put in are not in issue now. They were at issue when we started this trial. The defendant, after carefully

> reviewing the police report and the statements of the witnesses, after listening carefully to all the testimony and the exhibits that the State presented, has concocted a story for you, and now the blood on the boots is Susan Morris's blood. During the trial, before we had this first-time revelation about another Eric, there was no admission about the blood on the boots (T 887) (emphasis supplied).

At this juncture, defense counsel moved for a mistrial, contending that the improper comment concerning Branch's "admission" had related to his absolute right to remain silent; the motion for mistrial was denied, although the judge cautioned the prosecutor (T 887-880).[4]

On appeal, Branch contends that this ruling constitutes reversible error, in that, as argued below, the prosecutor's argument allegedly constituted a comment upon Appellant's right to remain silent, under such precedents as Lowry v. State, 468 So.2d 298 (Fla. 4th DCA 1985) and United States v. Shue, 766 F.2d 1122 (7th Cir. 1985). Appellee disagrees, and would contend that, when read in context, the prosecutor's argument was simply a comment upon the evolving defense position during trial regarding the

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[4] In the Initial Brief, Branch's appellate counsel identifies other portions of the State's closing argument which he deems objectionable (Initial Brief at 43). As no objection was interposed in regard to any of these remarks, (or, for that matter, as to any other portion of the prosecutor's closing argument), no claim of error has been preserved. See Rose v. State, 461 So.2d 84, 86 (Fla. 1984); Garcia v. State, 644 So.2d 59, 62 (Fla. 1994).

presence of blood on Branch's boots. The State is entitled to comment upon the evidence as it exists before the jury, see White v. State, 377 So.2d 1149, 1150 (Fla. 1979), and likewise can "fairly reply" to a prior defense argument. See State v. Mathis, 278 So.2d 280 (Fla. 1973). A reasonable juror would simply have understood the comment at issue as referring to the fact that the defense, after initially contesting whether the blood on Branch's boots had in fact been that of the victim, had effectively conceded such in its own closing argument.

The record, in fact, reflects that during the cross-examination of James Pollock, the forensic serologist at FDLE, defense counsel repeatedly pressed this witness as to the significance of any DNA match:

> Q. ... Does that match mean that there is -- that that blood, that sample, came from Susan Morris?
>
> A. I'm not willing to state that in those terms.
>
> Q. It does not mean that? As a matter of fact, it does not mean that, does it?
>
> A. Not to that degree of certainty.
>
> Q. Right.
>
> A. Not with the exclusion of all others.
>
> Q. As a matter of fact, if you have Susan

> Morris's fingerprint and a known latent that you compare, the fingerprints, you could definitely say that that fingerprint belonged to Susan Morris, couldn't you?
>
> A. That's an entirely different test.
>
> Q. I understand that. So you're not suggesting to the jury that this DNA test that you performed carries that type of weight, are you?
>
> A. No. . . .
>
> . . . . . .
>
> Q. But you're not saying with certainty that that's Susan Morris's -- that it's a match with Susan Morris, are you?
>
> A. No.
>
> Q. Okay. What I want you to explain to the jury and get clear to the jury, we're not talking with specificity of a fingerprint, are we?
>
> A. It's not the same kind of test (T 520-1).

As noted above, Branch's own testimony was in an entirely different light, as, during cross-examination, Branch seemed to acquiesce to the expert's opinion in this regard. The defense position evolved even further when, in initial closing argument, defense counsel affirmatively stated that Branch "did not deny" the expert's testimony.

Thus, the prosecutor was on solid ground when he contended that the matter of the blood on the defendant's boots had been "in

issue" earlier in the trial, but that the situation had changed subsequently (T 886); certainly, had the defense "promised" the jury an alibi defense, and failed to follow through, the State would have been entitled to point out such fact to the jury. See Jackson v. State, 575 So.2d 181, 188 (Fla. 1991). Contrary to the arguments in the Initial Brief, the prosecutor was not seeking to "penalize" Branch for not "admitting" something earlier. Rather, he was focusing upon a defense position taken at trial. While it would have been better form for the prosecutor to have referred to "the defense," as opposed to "the defendant," cf. State v. Bolton, 383 So.2d 924, 927 (Fla. 2nd DCA 1980), any imprecision in this regard did not prejudice Branch to the extent that a new trial was warranted. Cf. DuFour v. State, 495 So.2d 154, 160-1 (Fla. 1986) (not improper for prosecutor to argue that jury had not heard any evidence that DuFour possessed certain legal papers, where defense had suggested that such had occurred); Occhicione v. State, 570 So.2d 902, 904-5 (Fla. 1990) (mistrial not required where prosecutor commented upon defendant's refusal to submit to atomic absorption test, where such matter raised to rebut defendant's claim of diminished capacity and not to demonstrate guilt).

Although this claim involves an alleged comment upon a defendant's right to silent, the true issue before this Court is

the trial court's denial of Branch's motion for mistrial. This Court has consistently held that the control of a prosecutor's comments is a matter within the trial court's discretion, and that a court's ruling upon a motion for mistrial will not be overturned unless a palpable use of discretion is shown. See, e.g., Watson v. State, 651 So.2d 1159,1163 (Fla. 1994); Esty v. State, 642 So.2d 1074, 1079 (Fla. 1994). The trial court is in the best position to monitor the conduct of the attorneys in its presence, see Jackson v. State, 498 So.2d 406, 411 (Fla. 1986), and this Court will consider each case "within the totality of its own special circumstances." Wilson, 651 So.2d at 1663. A mistrial is only appropriate where any error committed was so prejudicial as to vitiate the entire proceeding, see Duest v. State, 462 So.2d 446, 448 (Fla. 1985), and prosecutorial error alone cannot warrant reversal of a conviction, unless the error committed is so basic to a fair trial that such can never be treated as harmless. See Murray v. State, 443 So.2d 955, 956 (Fla. 1984).

Judge Nickinson did not abuse his discretion in denying Branch's motion for mistrial, as the prosecutorial argument at issue did not irretrievably taint the proceedings or deprive Appellant of a fair trial. The court below was not insensitive to the consequences of any misstatement in this regard, and the

court's admonition to the prosecutor that he "was on very thin ice" was not inappropriate. However, contrary to opposing counsel's colorful hyperbole, the fairness of the trial did not "crack" under the weight of this remark (Initial Brief at 43), in that it cannot reasonably be said that this remark became the focus of the proceedings or was likely to play a determinative factor in the jury's verdict. As discussed in Point IV, the State presented extensive evidence linking Branch to the crime, and the hypothesis of innocence which he presented was unreasonable, illogical and internally inconsistent. The prosecutor was entitled to point out that the defense, during trial, had changed its position as to the blood evidence, and no new trial is warranted on this point.

Because the statement at issue referred to an admission by the defense made at trial, as opposed to any prior silence on the part of Branch, Appellant's reliance upon Lowry or Shue would seem misplaced; defense counsel's motion for mistrial was predicated upon the prosecutor's reference to the admission, and no other claim of error has been preserved in this regard. See Craig v. State, 510 So.2d 857, 864 (Fla. 1987) ("A motion for mistrial based on certain grounds cannot operate to preserve for appellate review other issues not raised by specific objection at trial."); Finney, 660 So.2d at 683. To the extent that further argument is required,

neither Lowry nor Shue dictate that relief is appropriate, and, indeed, the law in this area is not as "simple" as opposing counsel suggests (Initial Brief at 43).

Lowry itself is a good example of this. Thus, in the original opinion, the Fourth District reversed the conviction at issue, because the prosecutor, in response to the prior defense argument, had pointed out that, prior to the defendant's testimony, he had had no idea what the defendant was going to say. The panel agreed that this comment was directed toward the defendant's credibility, but found itself constrained to reverse under Bennett v. State, 316 So.2d 41, (Fla. 1975); in a concurring opinion, Chief Justice Anstead wrote that he would have found any error harmless.

The State sought this Court's review, and certiorari was granted, and the cause reversed and remanded on the authority of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), see State v. Lowry, 498 so.2d 427 (Fla. 1986); on remand, however, the Fourth District again reversed the conviction, but in doing so, predicated its ruling in large part upon certain trial testimony (not discussed in the original opinion) which related to Lowry's silence in the face of accusation. Lowry v. State, 510 So.2d 1196 (Fla. 4th DCA 1987). The most interesting thing about this case, however, is the dissenting opinion by Justices Boyd and Ehrlich, who held that no

error of any kind had occurred. The dissenting justices found that the prosecutor's argument was not a comment upon Lowry's failure to testify (given the fact that he did) nor a comment upon Lowry's silence during interrogation. Rather, the dissenting justices concluded that the comment "was merely a permissible comment on the credibility of the defendant's testimony"; they likewise held:

> It is only by piling inference on inference that one can conclude that the comment had the effect of informing the jury that the defendant had refused to give the State any information or statement prior to trial. Lowry, 498 So.2d at 428.

The State would respectfully contend that the approach taken by the dissenting justices was the best reasoned approach of all.

There are, however, other Florida cases which have found reversible error under circumstances comparable to Lowry. See State v. Smith, 573 So.2d 306, 316-18 (Fla. 1990); Burgess v. State, 644 So.2d 589 (Fla. 4th DCA 1994); Hosper v. State, 513 So.2d 234 (Fla. 3rd DCA 1987); Lee v. State, 422 So.2d 928 (Fla. 3rd DCA 1982), cert. denied, 431 So.2d 989 (Fla. 1983). Nevertheless, there are also Flcrida cases which specifically approve impeachment of a testifying defendant with, and/or prosecutorial comment upon, a defendant's failure to volunteer exculpatory information. See e.g., Reaser v. State, 356 So.2d 891

(Fla. 3rd DCA), cert. denied, 366 So.2d 884 (Fla. 1978) (not improper for prosecutor to comment upon fact that the defendant had failed to voluntarily go to the police and offer the defense which he later asserted at trial, i.e., that someone else had committed the crime; defendant could be impeached with prearrest silence); Rodriguez v. State, 619 So.2d 1031 (Fla. 3rd DCA), cert. denied, 629 So.2d 135 (Fla. 1993) (defendant who testified that shooting was accidental could be impeached with prearrest silence; such specifically found not to violate defendant's right to remain silent under Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980)); Parker v. State, 641 So.2d 483, 485 (Fla. 5th DCA 1994) (once defendant took stand, State could properly prove that his pre-arrest silence was inconsistent with his trial testimony); State v. Thorpe, 653 So.2d 393 (Fla. 5th DCA), cert. denied, 661 So.2d 826 (Fla. 1995) (granting of a new trial reversed, in that defendant could properly be impeached with the fact that he failed to tell his girlfriend exculpatory story which he offered at trial; defendant had invited attack upon credibility by taking the stand.) It is difficult, if not impossible, to square these cases with the blanket holding of Hosper, to the effect that a defendant's failure to offer an exculpatory statement prior to trial can never be the subject of inquiry or comment. Id.

at 235.[5]

Although the State would contend that the Reaser line of cases is the better reasoned, it would not appear necessary for this Court to resolve any conflict, in that, under the particular facts and circumstances of this case, reversible error has not been demonstrated. To the extent that the remarks of the prosecutor now at issue can be read to constitute a "comment" that Branch had not come forward with his exculpatory account earlier, it must be noted that, on cross-examination, Branch had already testified to such fact without objection (T 844). Accordingly, the minimal reference to such matter in the prosecutor's argument, such reference largely by inference, cannot serve as a basis for a new trial. See Wyatt v. State, 578 So.2d 811 (Fla. 3d DCA), cert. denied, 587 So.2d 1331 (Fla. 1991) (where defendant had testified on cross-examination, without objection, to the effect that he had not told others the same story he was presenting at trial, prosecutorial comment upon

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[5] Further, it would appear that the various jurisdictions throughout the country are split on this question, see Annotation, Impeachment of Defendant in Criminal Case By Showing Defendant's Prearrest Silence-State Cases, 35 ALR 4th 731 (1985). While the Supreme Court of the United States specifically approved impeachment of a defendant with pre-arrest silence in Jenkins, and with pre-Miranda silence in Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Court found it to be improper, but harmless error, for the State to have referred generally to a defendant's failure to come forward with his version of events prior to trial, in Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The Shue case relied upon by Branch is similarly not illustrative on this point.

such testimony in closing argument, at most, harmless error under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)); Whitton v. State, 649 So.2d 861, 865 (Fla. 1994) (same). This case is indistinguishable from Wyatt or Whitton, and no reasonable possibility exists that the comment at issue contributed to Branch's conviction.

Further, in assessing any prejudice, it must be noted that, in contrast to Dailey v. State, 594 So.2d 254, 257-8 (Fla. 1991), this case did not involve a situation in which the State drew the jury's attention to the fact that the defendant did not testify at trial; any error was found to be harmless in Dailey. Likewise, in contrast to Heath v. State, 648 So.2d 660, 663 (Fla. 1994), this case did not involve a situation in which the State, in opening statement, virtually promised that the defendant would testify; any error was found to be harmless in Heath. Rather, this case represents a situation in which the defendant did testify, and, such being the case, the State was entitled to legitimately comment upon the testimony which he actually presented. Cf. Parker, 641 So.2d at 485 (in closing argument, prosecutor could properly comment upon defendant's lack of zeal in denying guilt, while testifying).

Given the fact that Branch's jury heard nothing of his arrest

(other than the fact that he had voluntarily surrendered), and likewise were never advised as to whether or not he had in fact been advised of his rights under Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) (or any reaction of his thereto), it would be patently unreasonable to presume that the prosecutorial argument at issue was reasonably susceptible to constituting a comment of any kind upon Branch's exercise of his constitutional rights. Further, there is no reasonable possibility that the jury would have construed the prosecutor's argument as "penalizing" Branch for any exercise thereof, and in light of, inter alia, the substantial "permissible" evidence of Branch's guilt, discussed in Point IV, infra, any error in this case was harmless beyond a reasonable doubt under State v. DiGuilio. See Whitton, supra; Palmes v. State, 397 So.2d 648, 653-4 (Fla. 1981); Perri v. State, 441 So.2d 666, 607 (Fla. 1983) (principle of law set form in § 924.33, to the effect that no judgment shall be reversed unless any error committed injuriously affected the substantial rights of the appellant, applicable in capital cases). The instant convictions and sentence of death should be affirmed in all respects.

POINT VI

ADMISSION INTO EVIDENCE, AT THE PENALTY PHASE, OF A PHOTOGRAPH OF THE VICTIM WAS NOT ERROR.

As his first attack upon his sentence of death, Branch contends that it was reversible error for the court to have allowed the admission into evidence, at the penalty phase, of a particular photograph of the victim. Appellant maintains that this photograph "served only to inflame the jury and arouse their animosity towards the defendant" (Initial Brief at 47), and suggests that § 921.141(7), Fla.Stat. (1992) should have governed the admission of this evidence.

It must immediately be noted that, in contrast to traditional claims involving photographs in capital cases, the photograph at issue is not alleged to be unduly gruesome, and does not relate to an autopsy or blood-soaked murder scene. Cf.. Larkins v. State, 655 So.2d 95 (Fla. 1995); Henderson v. State, 463 So.2d 196, 200 (Fla. 1985). In dealing with claims of error of that nature, this Court had traditionally upheld the admission of such photographs, and, indeed, in Henderson observed, "Those whose work products are murdered human beings should expect to be confronted with photographs of their accomplishments." Rather, in this case, Branch complains of the admission into evidence of a photograph of

the victim, in life, which simply shows her with the sweater which she wore at the time of the murder. While the State fully agrees that a verdict is "an intellectual task to be performed on the basis of the applicable law and facts," Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990), Appellee cannot see why a defendant such as Branch, who has already been convicted of murder, should not expect to be confronted with at least some evidence of what his victim was like, before she had the fatal misfortune to encounter him, and become the "work product" depicted in other photographs.

The record in this case indicates that, at the penalty phase, the State called both of the victim's parents, who testified about Susan Morris, such testimony the subject of Point IX, infra (T 962-9). While it was apparently the State's original intention to introduce this photograph through the testimony of David Morris, this was not done. Further, contrary to the representation in the Initial Brief (Initial Brief at 49), the photograph was not admitted immediately after the testimony of this witness, but rather at the conclusion of the State's case, and, at such time, was not shown to the jury (T 977-1016). During his closing argument, the prosecutor showed this photograph to the jury, and defense counsel objected (T 1016-19). Although the objection was overruled (T 1019), the prosecutor made no other reference to the

photograph, and, indeed, specifically cautioned the jury not to make their decision "based on bias or sympathy for anyone." (T 1019).

Under the facts and circumstances of this case, it is clear that no basis exists to reverse Branch's sentence. As this Court observed in Teffeteller v. State, 495 So.2d 744, 745 (Fla. 1986), jurors empaneled for capital sentencing proceedings should not be expected "to make wise and reasonable decisions in a vacuum," and when the United States Supreme Court reversed its prior decision, Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), in Payne v. Tennessee, 501 U.S. 808, 826, 111 S.Ct. 2597, 113 L.Ed.2d 720, 735 (1991), the Court rejected the view that the victim of a capital crime should be turned into a "faceless stranger" at the penalty proceeding. While it cannot be denied that, in certain prosecutions, victim impact evidence may be afforded undue prominence, it cannot be said that the prosecutor's brief usage of the victim's photograph during closing argument in this case deprived Branch of a fair penalty proceeding.

The jury was entitled to know something of the life which Appellant chose to snuff out, and, in order for them to make a reasoned moral judgment as to the sentence to recommend, it was not inappropriate for them to fully appreciate the gravity of Branch's

offense. Even if error is perceived, such is harmless, and the instant sentence of death should be affirmed in all respects. Cf. Allen v. State, 662 So.2d 323, 327-8 (Fla. 1995) (admission of photograph of victim with grandchild no basis for reversal; victim impact evidence properly admitted); Windom, 656 So.2d at 438 (erroneous admission of victim impact evidence harmless error); Stein v. State, 632 So.2d 1361, 1367 (Fla. 1984) (prosecutor's brief humanizing remarks concerning victim, during penalty phase closing argument, no basis for reversal).

POINT VII

DENIAL OF BRANCH'S REQUESTED PENALTY PHASE INSTRUCTION, CONCERNING MITIGATION, WAS NOT ERROR.

Appellant next contends that reversible error occurred in the denial of his special requested penalty phase jury instruction on mitigation. The record, in fact, reflects that the defense proposed an instruction "defining mitigation," which was denied (R 328, T 1011); such requested instruction reads in its entirety:

> If you do not find that an alleged aggravating circumstance was proved, that does not automatically or necessarily mean that you should sentence ERIC BRANCH to death by electrocution. Instead, such a finding only means that you must consider other factors -- more specifically, mitigating circumstances -- before deciding whether a sentence of life in prison or death by electrocution is

appropriate.

> A mitigating circumstance is anything about Mr. Branch or the crime which, in fairness and mercy, should be taken into account in deciding punishment. Even where there is no excuse or justification for the crime, our law requires consideration of more than just the bare facts of the crime; therefore, a mitigating circumstance may stem from any of the diverse frailties of human kind:
>
> Mitigating circumstances are any facts relating to Mr. Branch's age, character, environment, mentality, life and background or any aspect of the crime itself which may be considered extenuating or reducing his moral culpability or making his less deserving, of the extreme punishment of death. You may consider as a mitigating circumstance any circumstance which tends to justify the penalty of life imprisonment.
>
> You must consider all evidence of mitigation. The weight which you give to a particular mitigating circumstance is a matter for your moral, factual, and legal judgment. However, you may not refuse to consider any evidence of mitigation and thereby give it no weight.

(R 328)

On appeal, Branch earnestly contends that Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), dictates that this instruction should have been given.

Appellee disagrees, and would suggest that this Court has consistently rejected comparable claims of error. Branch's jury was specifically instructed on two mitigating circumstances - those

involving age and the defendant being a "minor actor" in an offense committed by another - and was additionally told to consider in mitigation "any other aspect of the defendant's character or record or any other circumstance of the offense" (T 1028-9). This Court has repeatedly held that the "catch-all" standard jury instruction on nonstatutory mitigation sufficiently affords the jury guidance in this field, and that more specific or detailed instruction is not required. See, e.g., Jackson v. State, 530 So.2d 269, 273 (Fla. 1988) (not error, under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), for court to decline to instruct jury on written list of nonstatutory mitigation prepared by defendant); Robinson v. State, 574 So.2d 108, 111 (Fla. 1991) (no reason to believe that standard jury instruction prevents jury "from considering and weighing any constitutionally relevant evidence"); Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992) (standard jury instruction on nonstatutory mitigators is sufficient, and there is no need to give separate instructions on individual items of nonstatutory mitigation); Walls v. State, 641 So.2d 381, 389 (Fla. 1994) (standard instructions "clearly tell jury that they may consider anything relevant"); Ferrell v. State, 653 So.2d 367, 370 (Fla. 1995) (not error to deny defense instruction which, inter alia, "adequately define the mitigating

circumstances and how they should be considered"); Gamble v. State, 659 So.2d 242, 246 (Fla. 1995) (same). Because, to the extent that Branch's requested instruction was a correct statement of the law, it was already subsumed within the standard instructions, reversible error has not been demonstrated. See, e.g., Bertolotti v. State, 476 So.2d 130, 132 (Fla. 1985). The instant sentence of death should be affirmed in all respects.

POINT VIII

ADMISSION INTO EVIDENCE, AT THE PENALTY PHASE OF AN ABSTRACT OF JUDGMENT RELATING TO BRANCH'S INDIANA CONVICTION OF SEXUAL BATTERY WAS NOT ERROR; THE AGGRAVATING CIRCUMSTANCE, UNDER SECTION 921.141(5)(b), WAS SUFFICIENTLY PROVEN SUB JUDICE.

Branch next complains that the court below erred in admitting into evidence, at the penalty phase, an abstract of judgment pertaining to his prior conviction for sexual battery in Indiana. Appellant maintains that such was error, in that the State failed to adduce sufficient evidence to the effect that this had been a crime of violence, and further states that it was the State's burden to show that a statutory exception did not apply in his particular case. Branch's argument is not well taken, and no basis exists for striking this aggravating circumstance or for vacation of the underlying death sentence.

The record indicates that, at the penalty phase before the jury, the State proffered the testimony of Bruce Fairburn of FDLE, and, through him, offered an abstract of judgment from Indiana, which had been certified in his presence, as Exhibit H-1 (T 972). The court asked defense counsel if there would be any objection to admission of this evidence, and counsel answered, "No" (T 973). Defense counsel then stated, however, that this conviction did not qualify as a prior violent felony, under § 921.141(5)(b), Fla.Stat. (1991), in that, under applicable Indiana statute, the crime could be committed without violence, if the victim were "so mentally disturbed or deficient that consent could not be given" (T 973-4); attorney Albritton noted that the judgment did not indicate whether the victim in this case had fallen into that category, and contended that, on its face, the judgment "does not conform to that particular aggravating circumstance." (T 974). The court overruled the objection, and the State then called Fairburn to testify before the jury concerning this abstract of judgment (T 975-6); the defense offered into evidence a copy of the Indiana statute (T 981-2). During the charge conference, defense counsel objected to any jury instruction on the prior conviction aggravating circumstance, on the grounds that such had not been proven, and such objection was overruled (T 1008-1011).

Although, from the Initial Brief, one might assume that this is where things ended, such was not the case. Following the jury's return of its advisory verdict, Judge Nickinson directed both counsel to submit sentencing memoranda, and deferred sentencing for at least a month and a half (T 1036-7). Accordingly, proceedings reconvened on April 26, 1994 (R 417-437). At this time, the judge offered both parties the opportunity to present any further evidence (T 418). When the prosecutor announced that he intended to introduce "the certified copy of the entire record with regard to the prior felony that was admitted before the jury," defense counsel objected, and contended that the State should have done that earlier (R 418-19). Appellant's objection was overruled, and Bruce Fairburn was once again called to testify (R 423); through this witness, the State introduced a composite exhibit from the circuit court file in Indiana (R 424-6; R 359-416). Judge Nickinson announced that the exhibit would be admitted at that time, but further stated that he was not ruling as to how the material would be used, and would defer such ruling until later (R 428). The defense then called several family members, who addressed the court on Appellant's behalf, and Branch himself also spoke (R 429-431). Following the arguments of counsel, the court announced that formal sentencing would be deferred pending the

receipt of a presentence investigation report; this immediately provoked a statement from both Branch's counsel and Branch personally, to the effect that the defendant wished to waive such (R 435-6). Proceedings were recessed until May 3, 1994 (R 437).

On such date, proceedings, indeed, reconvened, and the defense reiterated its desire to waive a presentence investigation report (R 440). Such waiver was apparently accepted, and the court announced that it had decided to consider some of the materials presented by the State at the last hearing, to-wit: the charging document, and any other official records; Judge Nickinson, however, expressly stated that he had not considered the witness statements or the other materials (R 441). At that time, Branch was formally sentenced to death, and, in the sentencing order, the judge found the aggravating circumstance pertaining to prior conviction for a violent felony; the court's findings read as follows:

> The defendant was previously convicted of a felony involving the use or threat of violence to the person.
>
> The state produced evidence that the defendant was convicted of sexual battery in the state of Indiana in 1992. This aggravating factor is the subject of much argument. At the penalty phase of this proceeding before the jury, the state presented evidence only that the defendant had been convicted of sexual battery under a particular Indiana statute. The defense placed in evidence the Indiana

statute in question, arguing that the definition of sexual battery under that statute included both forcible rape and sexual conduct with a person of impaired mental capacity. The defendant's argument was that because it was possible that defendant had been convicted under the latter definition in the statute, the state had not proved beyond a reasonable doubt that the defendant was convicted of a felony involving the threat or use of violence to a person. No restrictions were placed on defendant's right to argue this position to the jury.

At the April 26, 1994 hearing, the state was granted leave to supplement the record with certified copies of records from the Circuit Court for the County of Vandenberg, Indiana, demonstrating that the defendant's conviction was, in fact, a conviction of forcible rape. Defendant argues that this information is hearsay and that the Court should not be permitted to consider any information not presented to the jury at the time of the penalty phase of the jury's consideration of the case. First, certified copies of court records are clearly admissible as an exception to the hearsay rule. Section 90.803(8), Florida Statutes. Furthermore, the Court concludes that consideration of this material is not inappropriate. Under Florida law, evidence of which the jury was unaware may properly enter into the trial judge's sentencing considerations in a capital case. Porter v. Dugger, 805 F.Supp. 941 (M.D. Fla. 1992). Although no presentence report was requested or ordered in this case, the material from the court in Indiana is exactly the kind of information which would be contained in a proper presentence report. Use of such material has been allowed. Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79

> L.Ed.2d 753 (1984). See Reed v. State, 560 So.2d 203 (Fla. 1990). The court has considered only the record of conviction and the information (i.e., the charging document) from the court, containing the clerk's certificate, and has not considered the accompanying materials. This aggravating circumstance was proved beyond a reasonable doubt.

(R 450-1).

Given the above, it is difficult to discern the precise nature of Appellant's claim. The "traditional" claim in regard to the prosecutor's presentation of evidence concerning a defendant's prior conviction is that the State presented too much evidence, and essentially "inflamed" the jury. Cf. Finney, 660 So.2d at 683; Lockhart v. State, 655 So.2d 69, 72-3 (Fla. 1995); Coney v. State, 653 So.2d 1009, 1013-15 (Fla. 1995); Wyatt v. State, 641 So.2d 355, 360 (Fla. 1995); Rhodes v. State, 638 So.2d 920, 924-6 (Fla. 1994). Here, Branch essentially takes the opposite position, contending that his jury heard insufficient evidence of the violence related to his prior conviction. If Appellant is arguing that his Indiana sexual battery was not in fact a violent crime, the record refutes that. As the sentencing judge correctly found in his order, Branch was charged with, and convicted of, forcible rape (R 450-1). The documents introduced at the proceeding of April 24, 1994 clearly indicated that Branch compelled the victim, Tiffany Pierce, to

submit by force (R 361).[6] Thus, in contrast in Mann v. State, 422 So.2d 578 (Fla. 1982), relied upon by Branch, evidence in this record, and before this Court, clearly demonstrates that Branch's prior conviction involved violence, and the finding of the aggravating circumstance under § 921.141(5)(b), should be affirmed. See, e.g., Rose v. State, 461 So.2d 84, 87 (Fla. 1984) (aggravating factor relating to prior conviction properly found, where State introduced charging document and judgment demonstrating that prior conviction had involved violence); Mann v. State, 453 So.2d 784 (Fla. 1984) (State remedied prior omission when it introduced charging document concerning violence in prior burglary).

Further, if Appellant is arguing that it was "too late" for the State to have introduced further documentation concerning his prior convictions at the proceeding of April 24, 1994, he is simply

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[6] Although the judge stated that he only considered the charging document and judgment, the State would contend that he would have been justified in relying upon all the documents introduced. These documents include various police reports, which indicate that the victim related that Branch had forced himself upon her and that she had suffered a number of injuries, including a knot on the head and a "busted" lip (R 388); the victim specifically stated that Branch had threatened to hurt her if she had not cooperated during the assault (R 389). A medical report indicated that the victim had a scratch on her left eyebrow, several hemorrhages in her eyes, and bruises consistent with her neck being squeezed (R 415-16). The victim was a fourteen year-old runaway whom Branch invited to a college party at the University of Southern Indiana; after transporting her to a remote location, he attacked her. The sentencing judge could properly have considered all this information. See Taylor v. State, 638 So.2d 30, 33 (Fla. 1994); Cochran v. State, 547 So.2d 928, 931 (Fla. 1989) (sentencing judge could consider defendant's prior conviction, even though such unknown to the sentencing jury).

incorrect. It is well-established that a sentencing judge may consider matters which the jury did not hear. See, e.g., White v. State, 403 So.2d 331, 339-340 (Fla. 1981) (jury override approved, where judge relied upon information in presentence investigation report and information presented at sentencing, such matters providing the basis for the prior conviction aggravating circumstance, unknown to the jury); Engle v. State, 438 So.2d 803, 813 (Fla. 1983) (trial judge not limited in sentencing to consideration of only material put before the jury, and may consider information which is not before the jury during its sentencing deliberation); Taylor v. State, 583 So.2d 30, 33 (Fla. 1994) (judge could consider, at sentencing, evidence concerning defendant's attack upon deputy following jury proceedings, in that, inter alia, defendant "could not have been prejudiced by the jury's failure to hear this unfavorable testimony.").

These cases clearly control, and, as in Taylor, Branch can not be said to have been prejudiced by the jury's failure to learn more about his prior conviction. Branch had more than ample opportunity to put forward any rebuttal, or clarification, which he desired in regard to the evidence introduced at the April 26th hearing, (especially given the fact that formal sentence was not imposed until May 3, 1994), and no error had been demonstrated in

this regard. See, Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985) (not error for court to consider circumstances of defendant's prior conviction contained in a presentence investigation report, where defendant had opportunity to explain, rebut or deny such, but failed to do so). Given Branch's vehement attempts to waive a presentence investigation report, and acknowledgment by Branch's attorney, during the penalty phase, to the effect that some of the unpresented potential mitigating evidence regarding Branch's past came close to being aggravation (T 983-4), the defense no doubt had good strategic cause to leave this matter alone. Reversible error has not been demonstrated, and the instant sentence of death should be affirmed in respects.

To the extent that any error is perceived, such was harmless beyond a reasonable doubt, under State v. DiGuilio, supra, and Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), given, inter alia, the other valid statutory aggravating circumstances, and the minimal nonstatutory mitigation; further, reversal based upon a technical flaw in the State's offer of proof below, would simply be a waste of judicial resources, in light of the fact that the present record contains sufficient evidence to prove this aggravating circumstance beyond a reasonable doubt. Although not expressly asserted on appeal, the State would also contend that the

instant sentence of death is proportionate, in that this Court has affirmed the death penalty under the comparable circumstances, see, e.g., Taylor, supra, Carroll v. State, 636 So.2d 1316 (Fla. 1994), Sochor v. State, 619 So.2d 285 (Fla. 1993), and, indeed, has approved such sentence in cases with fewer aggravating circumstances, and more arguable mitigation. See, e.g., Henry v. State, 649 So.2d 1366 (Fla. 1994); Brown v. State, 644 So.2d 52 (Fla. 1994); Rhodes v. State, supra; Duncan v. State, 619 So.2d 279 (Fla. 1993); Deangelo, supra. This is truly one of the most aggravated and least mitigated of capital cases, in that the victim paid a terrible price for the simple mistake of parking her car in the wrong section of the university lot. Branch merits no relief on this, or any other, claim.

POINT IX

ADMISSION OF VICTIM IMPACT EVIDENCE WAS NOT ERROR, ASSUMING THAT ANY CLAIM IN THIS REGARD HAS BEEN PRESERVED FOR REVIEW

The record in this case indicates that, prior to trial, Branch's counsel filed a Motion to Exclude Evidence or Argument Designed to Create Sympathy For the Deceased, in which, inter alia, it was contended that § 921.141(7) (Fla. Stat. 1992), was unconstitutional, because: (1) the legislature lacked the authority to pass it; (2) it was vague; (3) it left the jury without guidance

as to how to evaluate the evidence and (4) admission of the evidence would violate due process and equal protection (R 91-107). When the motion was called up for hearing on March 4, 1994, the judge announced that he would deny it at that time, but stated that he had not yet made up his mind as to how much, if any, victim impact evidence would be allowed at the penalty phase, stating that he would make such decision at that time (R 286-7). During the penalty phase, defense counsel made a "pre-emptive" objection when the State announced that it would call the victim's mother, Marsha Morris, as a witness; defense counsel requested a proffer of such testimony, stating that it was his view that victim impact evidence was only proper at the sentencing proceeding rather than the penalty phase before the jury, and that the State was limited to only proving statutory aggravating factors (T 960-1). Judge Nickinson overruled the objection, but cautioned counsel for both sides that there were "very strict limits" about the admission of victim impact evidence, and stated that he would not hesitate to bring things to a halt "if it gets out of bounds". (T 962).

The State then called Marsha Morris, whose testimony comprises less than four (4) pages, such four pages including a colloquy at the bench (T 962-6). Mrs. Morris testified that she had had two children, and was specifically asked to discuss Susan's

"uniqueness" (T 964). She stated that her daughter had been very dedicated to her job and to school, and had looked forward to going into television production (T 965). The witness stated that her daughter had had a lot of friends, and that her death had affected them; the community has expressed sympathy for her loss by dedicating a scholarship fund to Susan's memory and placing a memorial bench at the university (T 965-6). The State then called David Morris, whose testimony comprises three (3) pages (T 966-9). The victim's father testified that his younger daughter has been something of a "tomboy", had been dedicated to her education and her job, and had been responsible, considerate and "very loving" (T 968); he likewise stated that she had loved the beach and that he would miss her (T 969). No further objection was interposed in regard to this testimony, although, as noted in Point VI, defense counsel did object to the prosecutor showing the jury a photograph during closing argument (T 1016); although the objection was overruled, the State made no further argument in this vein, and, indeed, urged the jury not to base its decision upon "sympathy for anyone" (T 1019).

On appeal, Branch contends that the court below erred in admitting any victim impact evidence, because the State failed to show that the victim was sufficiently "unique" under § 921.141(7)

(Initial Brief at 58-61). Opposing counsel maintains that, although the State proved that Susan Morris was "a good and decent young woman," it had been required to show that she was "one of a kind and there were no others in the world like her" (Initial Brief at 61). Opposing counsel goes on to complain that Ms. Morris showed "no special intellectual talents, no outstanding athletic ability, no high level of compassion for others, or anything else that would have displayed her 'uniqueness.' (Id). In addition to discussing snowflakes, John Donne and Albert Einstein (Initial Brief at 67-9), Branch seems to contend that victim impact evidence does not limit the type of persons eligible for the death penalty, and also actually increases the chance that the death penalty will be arbitrarily opposed.

Initially, to the extent that Branch's attacks upon the statute were not raised below, they are procedurally barred now. See, e.g., Ventura v. State, 560 So.2d 217, 221 (Fla. 1990); Swafford v. State, 533 So.2d 270, 278 (Fla. 1988); Rodriguez v. State, 609 So.2d 493, 499 (Fla. 1992) ("It is well settled that the specific legal ground upon which a claim is based must be raised at trial and a claim different than that raised below will not be heard on appeal"). Further, it is questionable the extent to which Branch ever received a ruling on his pretrial motion to exclude

victim impact evidence, see Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994), or interposed a specific contemporaneous objection at the time that the evidence was actually introduced, so as to preserve the issue. Cf., Lawrence v. State, 614 So.2d 1092, 1094 (Fla. 1993); Correll v. State, 523 So.2d 562, 565 (Fla. 1988). It is undeniable that claims of this nature must be preserved for review. See Windom, 656 So.2d at 438. Assuming, however, that Branch's claims, regarding the "arbitrariness" of this type of evidence or its alleged failure to limit application of the death penalty are preserved, it would appear that these matters were resolved by this Court in Windom and Allen; no basis exists to now revisit those issues.

Appellant's primary claim is that the State below failed to demonstrate that Susan Morris was sufficiently "unique", so as to authorize admission of her parents' testimony under the statute. It is apparently opposing counsel's view that only the first man to walk on the moon or the discoverer of uranium would qualify as sufficiently "unique" so as to allow the admission of victim impact evidence. Branch's interpretation of the statute is plainly

unrealistic.[7] The brief humanizing testimony presented by the victim's parents simply demonstrate that Susan Morris was Susan Morris. She was the younger daughter of Marsha and David Morris of Pensacola, and a student at the University of West Florida; she worked part-time, loved the beach, had many friends, and wanted to be a television producer. Other individuals may have shared some of these, or similar, traits, but only she possessed them in her own "unique" persona. The victim impact testimony presented sub judice was in all respects in accord with Payne v. Tennessee, Windom and § 921.141(7); to the extent that any error is perceived, such would be unquestionably harmless, given the relatively minor role played by this evidence at the proceeding below. Cf., Stein, supra (prosecutor's brief humanizing remarks concerning victim, harmless error at best in penalty phase). The instant sentence of death should be affirmed in all respects.

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[7] Opposing counsel has also picked the wrong case in which to make this argument. As part of the testimony of the DNA results below, it was established that only one person in nine million possessed the same blood genotypes as did Susan Morris (T 519), and that only one half of one percent of the Caucasian population matched her blood (T 709). Undersigned counsel would respectfully submit that such scientific evidence would seem to satisfy even the exacting standards for "uniqueness" set forth in the Initial Brief.

CONCLUSION

WHEREFORE, for the aforementioned reasons, Branch's convictions and sentence of death should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
Chief, Capital Appeals
Florida Bar #300179

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe St., Tallahasee, Florida 32301, this 5 day of February, 1996.

RICHARD B. MARTELL
Chief, Capital Appeals