IN THE SUPREME COURT OF FLORIDA

OMAR SHAREEF JONES,

Appellant,

v. CASE NO. 84,840

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The record of pleadings is referred to by the letter "R" followed by the appropriate page number. The supplemental record will be referred to by the letters "SR" followed by the appropriate page number. The transcript will be referred to by the letters "TR" followed by the appropriate page number.

STATEMENT OF THE CASE

Although argumentative, Jones' statement of the case is generally acceptable. Any necessary elaboration relevant to specific issues will be provided in the State's argument.

STATEMENT OF THE FACTS

The State cannot accept Jones' statement of the facts, which contains numerous incorrect, unsupported and/or misleading factual assertions. The State will offer its own statement of the facts.

On the evening of November 4, 1993, Jeff Mitchell (the victim) and his friend Billy Fagan attended a sporting event at Terry Parker High School (TR 1012). Billy's mom had given them a ride to the school. At the conclusion of the event, they called Jeff's father to come pick them up (TR 1013). While they waited -- Billy standing and Jeff sitting -- four men came up and surrounded the

two (TR 1014). The tallest of the four asked Jeff if he had any money. When Jeff answered that he did not, the questioner reached into a pocket, withdrew a gun and shot Jeff in the side (TR 1014, 1020, 1022). According to Billy, when Jeff bent over in reaction to this first shot (TR 1027), the shooter then leaned over, took aim, and shot Jeff in the head (TR 1023, 1025). Billy testified that the shooter acted neither surprised nor shocked after the first shot (TR 1024).

Billy described the two shots as being two or three seconds apart (1028). Other persons hearing the shots described them as being one to three seconds apart; there was a definite pause between the shots (TR 1009-10, 1143).

Billy Mitchell was 14 years old when he died (TR 1244). The medical examiner identified two gunshot wounds: a "through and through" wound to the right thigh which would not have been life threatening (TR 1248), and a wound which entered the left upper back of the head and exited in the right cheek (TR 1249). The latter wound caused immediate unconsciousness and, within a matter of hours, death (TR 1244, 1252-53).

Ellis Curry testified that he was 16 years old the night of the murder (TR 1082). Omar Shareef Jones was 19 (TR 1112). The two were good friends (TR 1089), but Curry generally followed

Jones' lead (TR 1093). On the afternoon of November 4, 1993, they began drinking malt liquor and wine. Curry and Jones each had a quart of malt liquor, and they shared two bottles of wine with one other person (TR 1085-86). Curry testified that he and Jones had drunk together in the past (TR 1087). They had been much more intoxicated on previous occasions than they were that day (TR 1088-89). Curry testified that neither he nor Jones were drunk on November 4, 1993; Jones showed no signs of intoxication except that he laughed "a little more" (TR 1088-89). Curry did not see any marijuana at the apartments where they lived the evening of the murder, nor did he see Jones smoking any marijuana that evening (TR 1121-22, 1132).

Curry testified that, at some point in the evening of November 4, Marilyn Wilcox drove up with Jerome Goodman and Marlon Hawkins (TR 1089). Jones talked to Goodman and Hawkins, and then told Curry to "get in the car, we got to do something" (TR 1090). Jones told him that someone owed Goodman money and that if he did not pay, he **was** going to have to suffer the consequences (TR 1090-91). On the way, Hawkins pulled out a gun. Curry testified that everybody "was like, 'give it to me, give it to me.'" But the discussion ended when Jones said, 'Give me the gun before one of us might do something crazy." Jones got the gun (TR 1092).

Marilyn Wilcox testified that when the four got into her car, one of the four might have had one beer, and they miaht have been passing around one joint. However, Jones was not drinking and did not appear to be high (TR 1035-38). No one told her why they were going to the school; she assumed it was to buy marijuana (TR 1078).

Curry identified Jones as the person who shot Jeff Mitchell (TR 1094-95). Curry claimed he had not pulled his ski mask over his face, but Jones did (TR 1102).

Richard Fraley, a 16-year-old student waiting a short distance from the scene of the shooting for a ride home, testified that after the shooting two men ran by him from the direction of the shooting, one of whom pulled off his mask, asked him "what happened," and then kept running (TR 1001).

Jones and Curry went to the car which had brought them to the school (TR 1045). Marilyn Wilcox testified that Jones seemed to be "distraught or hysterical," while Curry seemed calm, 'like maybe fear was struck in him." She asked them what had happened, and they told her to just shut up and drive (TR 1046). She took them back to their apartments (TR 1047). After they got back to the apartments, Jones left with someone named Dwight (TR 1106). At this point, Jones still had the gun (TR 1105). However, the next day, Jones told Curry that he had thrown the gun into the river (TR

1107).

Hawkins and Goodman were arrested first (TR 1170). Arrest warrants were soon issued for Ellis Curry and Omar Jones (TR 1170). Jones was arrested in his home sometime after 3:00 a.m. (TR 1171) . The arresting officer testified that Jones was awake and alert and had no difficulty walking (TR 1174, 1176). The officer 'didn't have a clue that [Jones] was under the influence of anything" (TR 1182).

The two officers who interrogated Jones after he was brought to the station testified that his demeanor was normal and that he showed no signs of being intoxicated, or of having been intoxicated (TR 1193, 1200, 1214-15). Originally, Jones maintained that he had not even been to Terry Parker (TR 1216). However, when he learned that the victim had died, he admitted that he had shot him (TR 1197-98, 1216-17). He also admitted that he had thrown the murder weapon into the river (TR 1217-21). Jones stated that they had gone to Terry Parker because Goodman had said there was some money; they had only gone there to rob and not to hurt anyone (TR 1220). Jones claimed the gun had gone off accidentally, but **was** not asked to explain and did not explain how the gun could have gone off twice accidentally (TR 1198, 1207, 1221). Jones cried when he learned the victim was only 14 years old (TR 1206), and admitted,

"I killed a baby" (TR 1211). However, Jones refused to identify the person who had helped him dispose of the gun (TR 1221). The gun has not been recovered, but was identified as a .38 by examination of the two bullets recovered from the scene (TR 1262-64).

As for the claim that the shooting was an accident, the Appellant states in his brief that he had never fired the murder weapon before and that unknown to him the gun had been modified to have a very sensitive hair trigger. Initial Brief of Appellant (hereafter IBA) at 6. Jones does not provide any record citation for these assertions, and the State is unaware of any testimony one way or the other about Jones' familiarity with the gun or his knowledge of its trigger sensitivity. Ellis Curry did testify, however, that he (Curry) had fired the weapon before (TR 1096), and had 'dry fired" it within a couple of weeks of the killing (TR 1126). Curry testified that, if the gun was cocked, the trigger pull was very easy (TR 1127). It was a "little bit harder" if the hammer was not first pulled back (TR 1132). Curry testified that he had never seen the gun go off without someone pulling the trigger; even if it was cocked, you still had to pull the trigger (TR 1133). Tom Pulley, a firearms examiner with FDLE, testified that there are two common ways of lessening the trigger pull in a

[redacted] : filing the hammer and trigger to lessen the friction between the two, or decreasing the spring tension in the mechanism (TR 1270-71). The trigger pull can only be decreased up to a point, however. If the trigger pull is decreased too much, the hammer does not fall with enough force to fire the cartridge (TR 1271). In any event, no matter what the trigger pull, the trigger must be released after the first shot and then pulled again to fire again (TR 1272-73). And it is 'much easier" to pull the trigger if the hammer is first cocked or pulled back (TR 1280). There is "no way" for a .38 caliber revolver to go off accidentally two times (TR 1276). The State finds no support in the record for the Appellant's assertion (IBA at 9) that the firearms examiner testified that a gun can go off "unintentionally." In fact, the witness was not allowed to answer that question (See TR 1284, 1290). He did testify that the gun could not fire twice without a "second manipulation of the action" (TR 1291).

As for the claim that 'Jerome Goodman was the leader," IBA at 5, the State would note that Marilyn described Goodman as neither a follower nor a leader; he was "just a normal person" (TR 1077). Moreover, although Curry testified that Goodman typically possessed marijuana (TR 1122), Curry also testified that he did not see any the evening of the murder (TR 1132). While Curry did testify that

Goodman carries a beeper (TR 1125), and Marilyn testified that she has a beeper, too (TR 1058), there is no testimony that Goodman decided to go to Terry Parker as a consequence of receiving a beeper call, or that he decided to do so before he saw or spoke to Jones, as the Appellant contends. IBA at 5. On the contrary, Marilyn Wilcox testified that Goodman decided to go to Terry Parker only after talking to Jones (TR 1079). She testified that Jones was concerned or upset while he was talking to Goodman, Hawkins and Curry (TR 1038), but that when the conversation ended and Jones walked with the others toward the car, Jones was 'fine" and 'seemed to be calm" (TR 1039). As for her testimony that Jones did not tell anyone what to do, she acknowledged that she was not privy to the conversations between Jones and the others before they got into the car (TR 1079-80). Furthermore, it is undisputed that Jones demanded, and received, the murder weapon, even though Goodman and the others wanted it and argued for it (TR 1077, 1092, 1130).

The appellant states that he generally 'was not a heavy drinker or drug user." IBA at 3. He cites p. 1036 of the transcript for this assertion. There is nothing to support this assertion at this page of the transcript; however, Jones did present the testimony of 17-year-old 'Aaron" Zachary, who lived in the same apartment complex as Jones (TR 1304). "Aaron" testified

that she had never seen Jones under the influence of alcohol before the evening of November 4, 1993 (TR 1316).[1] The State assumes this is the testimony Jones meant to cite here, as it does provide some (inferential) support in the record for his assertion. The State would note, however, that any implication that Jones normally was a teetotaler is contradicted not only by the testimony of Ellis Curry, **as** noted above, but also by Jones' own penalty-phase witness, Dr. Harry Krop, who testified that Jones began drinking heavily on an intermittent basis in 1989 and that, in Dr. Krop's opinion, Jones is a chronic drinker (TR 1754).

Appellant claims that it is "unrebutted that [Jones] only functions at the mental level of a child between the age of 13 and **14 years** old." IBA at 11. The State acknowledges that Dr. Krop testified that Jones' IQ score "equates to a mental **age** of about 13 and-a-half, **14** years old" (TR 1735). That, however, is not the same **as** saying that Jones functions in all respects at the mental level of **a** 13-14 year old child. The State would note that Dr. Burling (whose test results, among other things, Dr. Krop relied

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[1]Although the court reporter transcribed this name as 'Aaron Zachary," in Jones' motion for continuance this person is identified as "Erin Zachary" (R 247). Since the witness is female, the State assumes that "Erin" probably is the correct name, but will follow the transcript.

upon in making his evaluation, TR 1736), testified at the hearing on Jones' motion to suppress that age equivalents are derived from multiplying a test score, or a factor thereof, by a chronological age to derive **age** equivalencies (TR 176). An **age** equivalency does not mean that the person is functioning in all respects as if he were that age (TR 164, 176-77). Nor do these tests measure a person's 'street smarts" or his ability to react within a criminal environment (TR 173-74). Furthermore, factors like economic disadvantages and poor school attendance can adversely affect test scores and the accuracy of their measure of a person's true intellectual abilities (TR 174-75). Significantly, although he now believes his initial impression to have been a "mistake," Dr. Krop initially had believed Jones to be 'a fairly intelligent young man," based on a personal interview and preliminary mental examination (TR 1755-56).

The State would note that although Jones' verbal IQ was quite low (8th to 9th percentile), his performance IQ is in the low average range (TR 161). Achievement testing showed similar variation: Jones' reading and writing skills are "poor (TR 166-67), but his "comprehensive knowledge" and his mathematical ability are both in the low average range (TR 165, 167). Furthermore, his artistic skills were good enough to win first prize in a city-wide

high school art competition in Newark, New Jersey (TR 1722). His art has been displayed in the foyer of the Prudential Building and in the Federal Courthouse in Newark (TR 1725). Jones also has displayed the ability to handle significant responsibilities around the house (including babysitting, cooking for the family, running errands, nursing the sick, washing dishes and mopping floors) (TR 1639-40, 1652-53, 1658, 1664, 1670-72, 1676, 1681, 1686-87, 1712-13, 1717), to participate in church activities (including singing in the church choir, helping with car washes, helping with arts and crafts, serving on the Youth Usher Board, and participating in youth-group activities)(TR 1636, 1672, 1677, 1687-88, 1715), to provide effective counsel and guidance to others (TR 1642-43, 1646-47, 1659, 1663, 1673, 1682, 1686, 1713-14) and to cut hair (TR 1642, 1660).

Dr. Krop acknowledged that Jones is not emotionally disturbed and has no significant psychopathology or mental illness (TR 1755, 1757). Based on as assumption that Jones had consumed a large amount of alcohol shortly before the crime, Dr. Krop testified that, in light of Jones' mental abilities, such alcohol consumption would cause "significantly impaired judgment" (TR 1742-43). However, he did not feel that Jones' learning disability was a significant contributor to murder (TR 1757-58). Nor did he testify

that either of the mental-impairment statutory mitigators applied.

Jones' own mitigation witnesses were of the opinion that Jones is not emotionally disturbed, has never had any difficulty understanding the difference between right and wrong and has always been able to conform his conduct to the law (TR 1666-68, 1673-74, 1675, 1688-90). Finally, although the evidence showed that Jones had very little contact with his drug-addicted father, it also shows that he came from "an extremely close, warm and caring family environment" (R 398).

After addressing at length the mitigating circumstances specifically proposed by the defense, the trial court concluded:

> The court is aware that the death penalty is reserved for only the most aggravated and the least mitigated murders. There are two merged aggravating factors in this case [pecuniary gain/robbery] and mitigating factors which have been addressed herein. The mitigating factors, however, are given little or no weight as outlined by the court. The court finds, as did the jury [by a 7-5 vote], that the aggravating circumstances present in this case outweigh the mitigating circumstances. Furthermore either aggravating factor, standing alone, would still outweigh the mitigating factors. [R 4001

SUMMARY OF ARGUMENT

There are ten issues on appeal: (1) The evidence supports the conviction for first degree murder. Jones' claim that the shooting was an accident is countered by evidence that Jones aimed carefully when he shot the victim in the head and by expert testimony that a revolver cannot be fired accidentally twice. The State proved premeditated murder. Furthermore, the first degree murder conviction may be affirmed under a felony murder theory. (2) It was not error to deny Jones' motion for continuance to await the appearance of a witness whom the defense had known about for months. Defense counsel not only failed to serve the witness with a subpoena when they had the chance, they did not even attempt to serve the subpoena until the Thursday before the trial. Defense counsel could give the court no assurances that the witness could ever be located, or that if located he would be willing to testify. (3) There was no fundamentally unfair prosecutorial closing argument, and Jones' diatribe against the prosecutor's motives for seeking a death penalty in this case is irrelevant speculation. (4) As trial counsel acknowledged, there was no barrage of pretrial publicity in this case, and the voir dire examination did not establish actual prejudice. A majority of the jury, as selected, had not even heard about the case, and the ones who had heard

something did not have any opinion about the defendant's guilt. (5) Jones is not mentally retarded, and the evidence supports the trial court's determination that Jones knowingly, intelligently and voluntarily waived his Miranda rights, (6) The trial court did not err in denying Jones' Neil/Slappy challenge to the State's peremptory challenge of a prospective juror who had worked for years with the court system, and particularly with criminal defense counsel and criminal defendants. (7) A death sentence is not disproportionate for the intentional killing of an innocent 14 year old boy at school during the commission of a robbery. (8) There was no improper victim impact evidence or argument. (9) and (10) The trial court did not err in denying various jury instructions and pretrial motions of the kind that have repeatedly been rejected by this Court.

ARGUMENT

ISSUE I

THE TRIAL JUDGE DID NOT ERR BY DENYING JONES' MOTION FOR JUDGMENT OF ACQUITTAL; THE EVIDENCE SUPPORTS THE CONVICTION FOR FIRST DEGREE MURDER UNDER EITHER/BOTH A PREMEDITATED OR FELONY MURDER THEORY

Jones contends here that the trial court erred by denying his motion for judgment of acquittal because, Jones contends, premeditation was not proved. The trial court further erred, Jones contends, when it instructed the jury as to premeditated murder, and this error "tainted the first-degree murder verdict." IBA at 22. The State does not agree that there was insufficient evidence of premeditation, but would contend that, in any event, the first-degree murder conviction may be affirmed under either a premeditation theory or a felony-murder theory.

When reviewing a motion for judgment of acquittal:

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. [Cit.] The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. [Cit.] Once that threshold is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So.2d 187, 189 (Fla. 1989). Furthermore:

> "If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury."

Tavlor v. State, 583 So.2d 323, 328 (Fla. 1991).

Jones' theory of events is that the shooting was an accident. He contends that this case "is unusual in that there is actual, uncontroverted evidence that the gun was fired accidentally both times." IBA at 17. If this were truly the case, it would indeed be remarkable that the trial judge and the jury found to the contrary. In fact, however, the State introduced competent evidence which contradicted any theory that the shooting was an accident.

First of all, an eyewitness to the shooting, Billy Fagan, testified that Jones acted neither surprised nor shocked when the first shot went off (TR 1024). Furthermore, Fagan testified that when the victim bent over in reaction to being shot in the leg, Jones calmly leaned over, took aim, and shot the victim in the head (TR 1025).

The testimony of this witness alone is competent, substantial evidence which is inconsistent with Jones' claim of accidental

shooting. But in addition, the State presented the testimony of a ballistics expert about the operation of a revolver and the possibility that such a gun could go off twice by accident. Jones does not quote this witness accurately. The witness did not say that a revolver with a light trigger could not go off accidentally. In fact, he acknowledged that, <u>if</u> the hammer was first pulled back (that is, if the gun was cocked), then the gun could go off <u>one</u> time accidentally (TR 1283). But, he testified, it could not go off accidentally <u>twice</u> (TR 1273-76).

The witness also did not condition his opinion that the gun could not twice have gone off accidentally upon an assumption that it was in good working order, as Jones contends. Rather, his testimony about various safety features to prevent accidental firing related to the possibility that the gun could go off accidentally if the hammer is already pulled back (TR 1274-75). However, no matter what kind of working order a revolver is in, it simply cannot fire unless the hammer falls with sufficient force to fire the cartridge, and the hammer cannot fall unless it is first pulled back with enough effort to overcome the spring tension, which has to be strong enough to make the hammer strike the cartridge with enough force to fire it (TR 1270-71). No matter what kind of working order a revolver is in, and no matter what the

trigger pull, the trigger must be released after the first shot and then the shooter either must recock the gun and then pull the trigger, or pull the trigger in the double-action mode, which requires a greater trigger pull than if the gun is separately cocked first (TR 1272-73, 1280).

An undisputed fact in this case is that Jones fired the murder weapon not once, but twice. The State introduced competent, substantial evidence not only that Jones deliberately aimed at the victim's head before firing the second shot, but also that the murder weapon could not have been fired twice by accident. This competent, substantial evidence was inconsistent with the defendant's theory of an accidental shooting. Therefore, the case was properly submitted to the jury, and it became the jury's duty to evaluate the weight and credibility of conflicting evidence and to determine whether the State's evidence was sufficient to establish premeditation and to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. State v. Law, supra; Barwick v. State, 660 So.2d 685, 695 (Fla. 1995).

Because Jones contends error under the United States Constitution, the State would note that the Constitutional test for sufficiency of the evidence is not whether the reviewing court itself is convinced that the evidence presented at trial

establishes guilt beyond a reasonable doubt; it is instead "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original). This test, Jackson explains, "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Ibid.

This Court has held that a judgment of conviction comes to this Court with a presumption of correctness, and a defendant's claim of insufficiency of the evidence will not prevail where there is substantial, competent evidence to support the verdict and judgment. Ssinkellink v. Statg, 313 So.2d 666, 671 (Fla. 1975). Furthermore, this Court applied the Jackson v. Virginia standard in Melendez v, St-ate, 498 So.2d 1258 (Fla. 1986). Accord, Kaufman v. State, 429 So.2d 841 (Fla. 3d DCA 1983); D.M. v. State, 394 So.2d 520 (Fla. 3d DCA 1981) (1981). As in Melendez, the jury resolved any inconsistencies and conflicts in the evidence and made a decision that is supported by competent, substantial evidence. On appeal from that decision, this Court's concern must be the legal

sufficiency, not the weight, of the evidence. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd 457 U.S. 31, 102 S.Ct. 221, 72 L.Ed.2d 652 (1982). As this Court has recognized: "It is not the province of this court to reweigh conflicting testimony." Melendez, supra at 1261.

There is no issue in this case of the cold, calculated and premeditated aggravating circumstance, nor of heightened premeditation. First-degree, premeditated murder requires proof only of simple premeditation. Simple premeditation is a conscious purpose to kill "that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla. 1991). Here, as in Asay, there was sufficient evidence from which the jury could have concluded that, prior to discharging the fatal shot, Jones was conscious of the fact that he was going to shoot Billy Mitchell and that Mitchell would likely die as a result of being shot in the head. Unlike the cases cited by Jones in his brief, in this case someone did see the shooting.[2] Therefore, we know that the victim

[2]Jones cites Mungin v. State, 21 Fla. Law Weekly S459 (Fla. Sept. 1995). Mungin presently is pending on a motion for rehearing in which the State contends, inter alia, that there was sufficient evidence to support a finding of premeditated murder.

did not provoke the defendant, did nothing to resist, and did not struggle with the defendant. Furthermore, even if it is a reasonable hypothesis that Jones fired the first shot reflexively, or even accidentally, there is direct evidence from an eyewitness that Jones very calmly aimed his second shot right at the victim's head. And there is expert testimony, which the jury was entitled to credit, that the murder weapon could not have been fired twice by accident.[3] Although Jones does not mention his intoxication defense while arguing this issue, the State would also **add that** while there **was** some evidence to show that Jones had been drinking the evening of the murder, there **was also** evidence, which the jury was entitled to credit, that he was not so intoxicated as to be unable to form the requisite criminal intent.

A rational trier of fact could have concluded from the

However, even if this Court ultimately finds to the contrary, Munsin is distinguishable. Except for Mungin himself, who did not testify, there were no surviving witnesses in that case and therefore no direct testimony about the presence or absence of provocation. The prior robberies in Mungin were admitted to prove identity; premeditation was not a justification proffered by the State at trial for the admission of this Williams rule evidence, and Mungin argued on appeal that they could not be considered on the issue of the sufficiency of evidence to prove premeditation.

[3]Thus, Stokes v. State, 548 So.2d 188, 197 (Fla. 1989) on which Jones relies, is inapposite.

evidence presented in this case that Jones is guilty of premeditated murder. Pietri v. State, 644 So.2d 1347, 1353 (Fla. 1994) (victim shot in the heart from close distance); Peterka v. State, 640 So.2d 59, 68 (Fla. 1994) (victim shot in the head at contact range); Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994) (victims each died from single gunshot wounds to the head, inflicted from close range); Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984) (victim shot in the head, execution style).

Nevertheless, should this Court disagree with the foregoing, Jones' first-degree murder conviction may be affirmed on a felony murder theory, the underlying felony being robbery or attempted robbery. Jones does not even argue that the evidence does not support a conviction for felony murder, and by Jones' own admission, he and the others went to Terry Parker to commit a robbery (TR 1220). Jones' contention that it was harmful error to instruct the jury as to premeditated murder is without merit, even if he is correct that the evidence did not support premeditation. Where at least one theory of guilt presented to the jury is supported by legally sufficient evidence, the fact that an alternative theory of guilt does not have adequate evidentiary support does not provide an independent basis for reversing an otherwise valid conviction. If the trial judge's submission of

this case to the jury on a premeditated murder theory was error at all, it was at most a factual error, not a legal error. Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371, 382 (1991) ("legal error' means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence"). Under Griffin, while it might be "generally . . . preferable" for a trial court to eliminate from the jury's consideration "an alternative basis of liability that does not have adequate evidentiary support," the "refusal to do so, however, does not provide an independent basis for reversing an otherwise valid conviction." Id. at 383. This Court consistently has adhered to the Griffin rule in recent years. Finnev v State, 660 So.2d 674, 680 (Fla. 1995) (implicitly holding that murder conviction could be sustained under either premeditated or felony murder theory); Brown v. State, 644 So.2d 52, 53 (Fla. 1994) (this Court "need not reach" issue of sufficiency of evidence of premeditation 'because there was ample evidence supporting . . . felony-murder theory"); Atwater v. State, 626 So.2d 1325, n. 1 (Fla. 1993) (a reversal of robbery conviction would not affect murder conviction where evidence supported premeditation and jury returned general verdict of guilty of first degree murder); Jackson v. State, 575 So.2d 181 (Fla. 1991) (insufficient evidence of premeditation, but first-degree

murder conviction affirmed under felony-murder theory).

Jones' first degree murder conviction is supported sufficient evidence under a premeditation and/or a felony murder theory.

ISSUE II

THE TRIAL JUDGE DID NOT ERR BY DENYING JONES' MOTION FOR CONTINUANCE TO AWAIT THE APPEARANCE OF A WITNESS WHO WAS NOT UNDER SUBPOENA AND COULD NOT BE LOCATED

On Wednesday, October 12, 1994, Jones filed a motion for continuance in which he claimed that on September 28, 1994 (some two weeks previously), he had located a witness named Dwight Jones who had been with Jones shortly before the murder (R 245). Jones claimed that Dwight Jones could furnish testimony important in two respects: first, Dwight Jones reported that Omar Jones had been "very drunk" the evening of the murder; second, Dwight Jones reported that Marlon Hawkins (who owned the murder weapon) had told him that the gun had a "very easy" trigger pull, which contradicted Hawkins' testimony in his deposition that the gun did not have an easy trigger pull and had to be pulled 'real hard" to fire it (R 246). Jones alleged in his motion for continuance that Dwight Jones was now refusing to cooperate with the defense and that attempts to locate him through his girlfriend, Erin Zachary, were unsuccessful (R 247). Jones claimed he was "not asking for a lengthy continuance, just time to try to locate this witness who is

now avoiding service of process" (R 249).

On Thursday, October 13, 1994, the trial court conducted a hearing on this motion (TR 231 et seq). Defense counsel reported that they had talked to Dwight Jones and his girlfriend 'Aaron" Zachary on September 28, 1994.[4] Defense counsel acknowledged that Dwight Jones was not a lease holder in any apartment, but just "kind of drifts around in those apartments" (TR 233). Moreover, although Dwight Jones was the father of Ms. Zachary's child, she did not know where he might be located (TR 233). Defense counsel acknowledged that the State had been looking for Dwight Jones for approximately a year, that he was a suspect as an accessory after the fact in this case and that he might invoke his privilege against self-incrimination, which could be a problem (TR 234). But, defense counsel argued, Dwight Jones' testimony would be important not only to intoxication, but also to the credibility of Marlon Hawkins. Defense counsel contended that "we have to attack Mr. Hawkins' credibility" because he was the only witness to have heard Jones tell the victim "I'll kill your F ass" (TR 236).

The State responded that Dwight Jones' presence in the company of the defendant Omar Jones the evening of the murder has been

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[4]Regarding Aaron/Erin Zachary, who testified for the defense at trial, see footnote 1,

known to Jones himself ever since November 4, 1993, and to defense counsel at least since the deposition of police detective Edward Johnson, conducted apparently in April of 1994 (TR 243), when detective Johnson identified Dwight Jones as the person in whose car the defendant was sitting when Goodman and Hawkins showed up at the apartments the evening of the murder (TR 237-38). The State further noted that, when Dwight Jones showed up at the Public Defender's office on September 28, 1994, defense counsel failed to subpoena him when they had the opportunity (TR 238). When the trial court asked defense counsel why they had not subpoenaed Dwight Jones when he visited their office (after the State allegedly had been looking for him for almost a year), defense counsel responded: "I had no reason to think at that time that he was going to beat feet in this case" (TR 240).

The trial court expressed concern that the defense had "actual notice" at least since April of 1994 and that defense counsel had failed to serve Dwight Jones with a subpoena (TR 243-44). When defense counsel acknowledged that they had known of Dwight Jones since the previous April, the court denied the motion for continuance without prejudice for it to be renewed if counsel could make a further showing of due diligence (TR 244).

On Friday, October 14, 1994, defense counsel informed the

trial court that they would renew the motion for continuance on Monday (TR 371).

On Monday, October 17, 1994, the trial court conducted a hearing on the renewed motion for continuance. An investigator and a process server with the Public Defender's office testified. The investigator testified that, on the previous Thursday and Friday (October 13 and 14), he had talked to Aaron Zachary and **Toretta** Williams (Omar Jones' sister, TR 1696) in an attempt to locate Dwight Jones (TR 381, 385-86). They said they could get in touch with him and would have him call. Dwight Jones did call, and agreed to meet the investigator, but failed to show up (TR 382). The investigator then talked to Aaron Zachary's mother, who was very adamant that her daughter not be involved in any attempt to locate Dwight Jones (TR 383). The investigator obtained the tag number and description of Dwight Jones' car from the tag agency, plus a photograph from the Sheriff's office, and went to the apartment complex looking for him. He could find no one who admitted being familiar with the person or the car (TR 384) . He then turned his material over to the process server, who spent Saturday and Sunday trying to locate the witness, with no success (TR 386-88).

Following this testimony, defense counsel stated that, after

talking to Dwight Jones on September 28, counsel had run a criminal record check on him, and then decided to use him "regardless of his record" (TR 389). He asserted that he had a "subpoena cut for him" the next day, but had been unable to serve it (TR 389). Despite their continued inability to locate Dwight Jones for the past nearly three weeks, defense counsel felt "certain given 30 to 60 days we'll find him" (TR 390). The trial court again denied the motion for continuance, but agreed to issue a writ of attachment (TR 391).

A jury was selected, and the presentation of evidence commenced on October 19, 1994 (TR 969, 998). The State rested its case in the guilt phase of the trial at 2:15 p.m. on October 20, 1994 (TR 1293), without ever calling Marlon Hawkins as a witness. Defense counsel renewed the motion for continuance, claiming that they had continued to attempt to locate Dwight Jones, and that they had heard that he might be either in south Florida or in Georgia (TR 1301). The defense still was unable to locate Dwight Jones or to serve him, despite the fact that the trial court had issued a writ of attachment to assist the defense (TR 1301). After the defense rested later that afternoon, defense counsel renewed the motion for continuance a final time. The motion was denied (TR 1327).

In Geralds v. State, 21 Fla. L. Weekly S85, S85-86 (Fla. February 22, 1996), this Court held:

> . . . 'While death penalty cases command (the Court's) closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for continuance." Cooper v. , ate 336 So.2d 1133, 1138 (Fla. 1976); see also Rose v. State; 461 So.2d 84, 87 (Fla. 1984), cert. denied, 471 U.S. 1143, 105 S.Ct.2689, 86 L.Ed.2d 706 (1985). The denial of a motion for continuance should not be reversed unless there has been a palpable abuse of discretion; this abuse must clearly and affirmatively appear in the record. Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981).
>
> To prevail on his motion for continuance, the defendant was required to show: (1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance caused material prejudice.

Jones has not demonstrated compliance with these requirements. First of all, pretermitting for the moment any question of defense diligence or witness availability, any testimony by Dwight Jones that Omar Jones was drunk the evening the murder would have been cumulative to the testimony of Aaron Zachary, who did testify for the defense, and who probably was a more credible witness than Dwight Jones would have been.[5] Furthermore, his testimony would

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[5]She did not have a criminal record, nor was she an accessory after the fact in this case.

have been contradicted by numerous State's witnesses who testified that Omar Jones was not intoxicated before or after the murder, by Omar Jones' own statement to police that he had only been "drinking a beer or two" the evening of the murder (TR 1199), and by evidence demonstrating that the defendant had the presence of mind to leave the scene of the crime, go to his apartment and change clothes, and dispose of the murder weapon in the St. Johns river (TR 1221). Moreover, one of the two allegedly important reasons offered at trial in support of the motion for a continuance -- the necessity to discredit the testimony of Marlon Hawkins -- evaporated when the State did not call Marlon Hawkins as a witness. Thus, even assuming that Dwight Jones would have been willing to testify at all (and the defense acknowledged the possibility that he would have invoked the Fifth Amendment), Omar Jones has failed to demonstrate that substantially favorable testimony would have been forthcoming, or that the denial of continuance caused material prejudice.

Second, even if the defendant forgot to mention Dwight Jones' presence to defense counsel, the record clearly shows that by the time of trial they had known for at least five months (since the April 1994 deposition of detective Johnson) that Dwight Jones had been in the presence of the defendant the evening of the murder.

Furthermore, although Dwight Jones was present in their office on September 28, 1994 -- nearly three weeks before jury selection was scheduled to begin -- defense counsel failed to serve him with a subpoena. In addition, even though defense counsel obtained a subpoena on September 29, and even though Dwight Jones failed to appear for a deposition on October 10, the record shows defense counsel did not attempt to serve the subpoena until October 13 -- a mere four days before the scheduled beginning of trial, and one day after filing his motion for continuance. This is not the kind of due diligence contemplated in Geralds. Street, 636 So.2d 1297, 1300-01 (Fla. 1994) (denial of motion for one-day continuance not erroneous where defense had known of necessity for witness for at least two months).

Finally, the record does not show that the witness was available and willing to testify, or would become so within a reasonable time. Goree v. State, 411 So.2d 1352 (Fla. 3d DCA 1982) (no showing that witness probably could be located, subpoenaed, and his testimony procured with a reasonable time) United States v. O'Neill, 767 F.2d 780 (11th Cir. 1985) (witness not shown to be either available or willing to testify). In fact, the record strongly demonstrates the contrary. The defense last saw Dwight Jones on September 28 -- some 22 days before the defense

rested its case. Thus, the defense had over three weeks to locate Dwight Jones and apparently never came close. Moreover, it should be noted that the issue of intoxication would still have been relevant at the penalty phase." On November 14, 1994 -- 24 days after the jury returned its guilty verdict -- the advisory sentencing hearing began (TR 1562 et seq). This proceeding was followed a week later by a sentencing hearing before the judge on November 21, 1994 (TR 1802 et seq), after which sentence was imposed on November 23, 1994 (TR 1877 et seq). Dwight Jones testified at none of these proceedings. Either defense counsel decided that Dwight Jones' testimony was not so important after all, or else, even with the benefit of an additional month to locate Dwight Jones following the conviction, defense counsel never did locate him (despite his earlier representation to the court that an additional 30 to 60 days would suffice).

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[6]Jones points this out in his brief, when he argues that the "prejudice to Omar Jones at both phases of the trial was manifest" and that "Dwight Jones was a critical witness at both phases of the trial." IBA at 25. Jones never moved to continue the sentencing proceedings, however, and should not be heard to complain about any prejudice as to the sentencing phase of the proceedings below. Goree v. State supra (following denial of continuance, defendant not precluded from making subsequent effort to secure attendance of witness, or from making subsequent motion for continuance it he can make showing that probability of locating witness or procuring his testimony has improved).

At some point, even in a death penalty case, the proceedings must go forward. A defendant cannot obtain an indefinite continuance hoping that someday, somehow, a witness might turn up. See Robinson v. State, 561 So.2d 419, 421 (Fla. 1st DCA 1990) (where defendant did serve subpoena on witness at soonest practical moment, trial court should have made more of an effort to enforce same and secure attendance of witness; but, court did "not meant to suggest that the defendant was entitled to an indefinite delay in his trial regardless of how long it might take to execute the writ of attachment").

The trial court did not abuse its discretion in denying Jones' motion for continuance,

ISSUE III

THERE WERE NO "OVERWEENING AND FUNDAMENTALLY UNFAIR TRIAL TACTICS" BY THE STATE

In his argument on this issue, Jones offers a smorgasbord of barely-related allegations, accusations and complaints which he subsumes under the catch-all heading of prosecutorial misconduct. At issue are: the prosecutor's decision to seek a death sentence in what is alleged to be clearly a non-death-penalty case, his opening statements and closing arguments, his alleged racism, his refusal to accept the defense theory of the case, his alleged attempt to

whip the jury into a frenzy in which it would decide the case on sympathy and passion instead of on the facts, his introduction of improper evidence which the trial judge -- apparently acting in a frenzy of passion himself -- erroneously overruled; all of which led to a verdict of guilty in the impossibly short time of 45 minutes, which, it is alleged, hardly gave the jury enough time to use the bathroom and fix a cup of coffee, let alone deliberate upon the evidence. Further "steamroller" tactics (basically limited to the introduction of victim impact evidence and the closing argument) are alleged with respect to the sentencing phase.

This stew of allegations is difficult to respond to succinctly. However, the State will attempt to do so by making some preliminary observations and then addressing what apparently is the substantive issue here: the prosecutor's opening statement and closing arguments.

(a) The prosecutor's motives are irrelevant. Jones first complains about the prosecutor's decision even to seek a death penalty in this case. Jones implies that this is not even a first-degree murder case, even though on the very next page of his brief he acknowledges that he offered to plead guilty to first degree murder. IBA at pp. 26-27. (R 431-32, TR 1868). In any event, he argues, this so obviously is not a death-penalty case that the

prosecutor's decision to seek a death sentence must have been the result of a wave of community frenzy that the prosecutor, as an elected official, could not ignore. Despite the supposed community "frenzy" for a conviction and death sentence, however, the prosecutor allegedly could obtain a conviction for first degree murder and a death sentence only by resorting to "overweening and fundamentally unfair trial tactics." Since in Jones' view the prosecutor could not win his case based on the facts and the law, his "strategy" was to obtain the desired result by appealing to the jury's "sympathy and passion." IBA at 27.

Most of Jones' comments about the prosecutor's motivation and strategy are no more than the sheerest speculation, without any record support. The State does not agree that the pretrial publicity in this case was so pervasive and inflammatory that a "wave of frenzy" was generated, but even if it **was,** Jones has no basis for attributing the State's decision to seek a death sentence to the influence of community hysteria. Furthermore, the issue of the extent of pretrial publicity and the necessity of a change of venue is raised separately in Issue IV. Either the trial court acted properly in denying the change of venue, or it did not. The prosecutor's motive in seeking a first degree murder conviction and death sentence is irrelevant to that determination.

The prosecutor's motives are equally irrelevant to the question of the sufficiency of the evidence to support the conviction for first degree murder, which is raised as Jones' Issue 1. If, as the State contends, the evidence is sufficient to support the conviction for first degree murder, it is difficult to see how the prosecutor acted unethically by deciding to seek a conviction in a case where the evidence warranted such conviction; but if this Court determines that the evidence is not sufficient, the conviction will be reversed regardless of the prosecutor's motives.

Finally, the State would contend that reasonable people, including not only the prosecutor, but also the majority of the jury and, as well, the trial judge, are capable of believing that the death penalty is appropriate in a case in which a masked gunman goes to school to commit a robbery and, without any provocation or resistance whatever from the robbery victim, shoots an innocent 14 year old boy in the head. But any issue of the proportionality of Jones' death sentence is raised in Issue VII. Whether or not the death sentence imposed in this case will be affirmed is a matter this Court ultimately will decide, based on the evidence presented. Speculation about why the prosecutor sought a death sentence in this case will neither resolve nor contribute to the resolution of

any question of proportionality.

(b) Rulings by the trial court do not demonstrate prosecutorial misconduct. At page 30 of his brief, Jones complains that he made objections to improper evidence which were overruled. The State is at a loss to understand why such an allegation belongs in argument concerning an issue of alleged prosecutorial misconduct. Objections to evidence are a common feature of any trial. The trial court's rulings on such objections are a legitimate subject of appeal. However, Jones does not even bother to state what the "improper" evidence was or what kind of objections he raised. Absent prosecutorial suppression of evidence, or subornation of perjury, or perhaps a violation of a prior order to avoid testimony on a particular subject, it is difficult to see how the mere attempt to elicit evidence can amount to prosecutorial misconduct.

In any event, Jones' relevancy objections to Ellis Curry's testimony about receiving Miranda warnings and being told that Jones had already confessed (TR 1108-10) are too general to preserve any issue of prosecutorial conduct for appeal. Rodriguez v. State, 609 So.2d 493, 499 (Fla. 1992) (relevancy objection made at trial not sufficient to preserve claim that identification testimony was inherently inflammatory). As for the other objection

made during this portion of Curry's testimony -- improper bolstering -- besides being insufficient to preserve for appeal any issue of prosecutorial misconduct, the trial court ruled that such objection was premature, and Jones never renewed the objection. In fact, the improper bolstering the defense was concerned about never occurred (TR 1109). Evidentiary rulings are within the broad realm of judicial discretion and the trial court did not err reversibly in overruling the relevancy and improper bolstering objections at issue here.

As for defense counsel's anticipatory objection to possible testimony from the first police officer on the scene that the victim was gurgling and having trouble breathing (TR 1145-47) -- even if the court erred in concluding that such testimony would not be overly inflammatory, any error was completely harmless, since such testimony was never presented. All the officer told the jury was that the witness was unable to communicate (TR 1150). Thus, the concern expressed in defense counsel's objection never materialized.

(c) The length of the jury deliberations is not evidence of grosecutorial misconduct. As evidence that the prosecutor's "improper tactics . . . paid off," Jones points to the fact that the jury deliberated "only" 45 minutes at the guilt phase of the

trial. The jury, he contends, hardly had time 'to use the bathroom, fix **a** cup of coffee and choose a foreperson." IBA at. 35. Of course, there is no indication in the record that any juror needed to use the bathroom or to fix a cup of coffee.[7] Moreover, it is well settled that a verdict cannot be impeached by conduct which inheres in the verdict and relates to the jury's deliberations. Johnson v. State, 593 So.2d 206, 208 (Fla. 1992). Jones cites no authority whatever to support a proposition that the length of a jury's deliberations can demonstrate prosecutorial misconduct, or for that matter, the harmfulness or harmlessness of any error. Even if it could, forty-five minutes is not an unusually short time to deliberate, and nothing in this **case** demanded lengthy deliberations. There was no question in this case about who shot Billy Mitchell -- Omar Jones did. There also is no question that Jones shot the boy twice, without provocation. The only genuinely contested issues were whether Jones shot the boy twice by accident and whether he was too intoxicated to be able to form the requisite intent. Forty-five minutes was not too short a time to have reasonably and reliably deliberated on these issues.

(e) The opening statement. The prosecutor's opening statement

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[7]The record indicates that the jury had returned from lunch only 45 minutes before beginning deliberations (TR 1455, 1481).

set out at pp. 984-994 of the transcript. In his first complaint about the opening statement, Jones claims the State improperly told the jury that the State personally stood by the evidence. IBA at 28. There was no objection at trial to the portion of the State's opening statement referred to here (TR 984-85). It is well settled that the contemporaneous objection requirement applies to prosecutorial comment. E.g., Pangburn v. State, 661 So.2d **1182** ((1995); Suggs v. State, 644 So.2d 64, 68 (Fla. 1994); Wyatt v. State, 641 So.2d 355, 359 (Fla. 1994). Absent fundamental error, Jones is procedurally barred from complaining about the statements at issue here. Freeman v. State, 563 So.2d 73, 76 (Fla. 1990). Jones fails to put these statements in context. The prosecutor was attempting to explain the manner in which the evidence would be presented, from diverse witnesses of varying experience and expertise, some of whom observed matters as they occurred, and some of whom would testify to the results of investigations and tests conducted afterwards, The result of this diversity, the prosecutor predicted, would be "some disagreement and minor discrepancy" (TR 985). Overall, however, he "believe[d]" it would be relevant, material and consistent (TR 984). Although a prosecutor's personal beliefs generally are irrelevant, Brooks v. Kemp, 762 F.2d 1383, **1408** (11th Cir. 1985), the statements in this case were not the

kind of expression of personal belief relative to an ultimate issue in the case as have been condemned as improper. Moreover, immediately after making the foregoing statement, the prosecutor cautioned the jury that "nothing I say during the opening statement nor the final argument . . . is evidence" (TR 985). His next comment, 'We will never try to mislead you, and for that matter I'm sure that that's true with Mr. Higbee and Ms. Finnell [Jones' attorneys]" is portrayed by Jones (IBA at 28) as a sinister attempt by the prosecutor to assure the jury that the State would present only true evidence. If so, one wonders why he would make the same assurance about the defense attorneys. In context, however, it is obvious that the prosecutor was simply trying to explain the limited nature of an opening statement, and to caution the jury not to ascribe more significance to it than it deserved. This comment was preceded by the caution that nothing in the prosecutor's opening statement was evidence, and followed by the explanation: "The opening statement is a little like a table of contents in a book, it's not the evidence itself, but it's done for the purpose of trial to prepare you for the evidence that you will receive in the manner in which the evidence will be presented" (TR 985). The thrust of these comments is not, as Jones contends for the first time on appeal, that the prosecutor was attempting to personally

vouch for the evidence; he **was** simply trying to explain the mechanics of the trial and the limited purpose of an opening statement. The fact that trial counsel did not object to these statements is a strong indication that they, at least, did not interpret these remarks as improper vouching. See, Williams v. Kemp, 846 F.2d 1276, 1288 (11th Cir. 1988) (fact that no objection was made at trial is relevant indication that argument was not fundamentally unfair); Donnelly v. De Christoforo, 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

In the next portion of the opening statement complained about on appeal, the prosecutor stated: 'The first witness will be **a** young man by the name of Richard Fraley. You will hear from this young Terry Parker honor student that he was sitting outside the main office --" (TR 985). Jones now characterizes this statement as a prejudicial "us against them" theme. The only argument at trial, however, was relevance (TR 985-86). Thus, "the specific grounds raised here were not argued below and must be considered waived." Jones v. State, 652 So.2d 346, 352 (Fla. 1995). Assuming

that the reference to Richard Fraley as an 'honor student" was objectionable, it did not amount to such fundamental error as would require reversal even absent a proper objection.

There was no objection to the reference to the defendant as 'this man, the murderer" (TR 987). This reference, the State would note, was part of this sentence: "Two of the four, but not this man, the murderer, are arrested fleeing" (TR 987). Whether or not any kind of objection might properly have been lodged to the reference to the defendant as "the murderer," it is hard to see what the reference had to do with the defendant's race. Donnelly v. De Christoforo, supra. As for the reference to the victim as "a young boy" (TR 991), the evidence shows that he was just that. (Even Jones referred to the victim as a 'baby" (TR 1211).) This comment was not fundamental error.

In a general attack on the entire opening statement, Jones contends that the opening statement was factually incorrect and misleading. IBA at 29. This complaint, however, is premised on acceptance of the defense theory of the case. The prosecutor, however, was not obliged to accept the defense view of the evidence. There was, in fact, evidence to support the prosecutor's prediction that the evidence would show that Jones and his three codefendants went to Terry Parker to rob someone, that Jones was

the leader, and that they went around the corner and saw a young boy, whom Jones subsequently shot (TR 991). Hartley v. State, No. 83,021, slip opinion at 11 (Fla. September 19, 1996) ("Because evidence was admitted to support the comments made by the State in opening, we do not find that the comments entitle Hartley to a new trial.") .

Jones further contends the prosecutor's opening statement was argumentative. IBA at 29. The State acknowledges that on two occasions, the trial judge sustained defense objections on the ground that the prosecutorial comment was argumentative (TR 992, 994) . However, the defense failed to move for a mistrial after the trial judge gave the defense the relief it sought by sustaining its objections. These objections, therefore, have not been preserved for appeal. Fersuson v. State, 417 So.2d 639, 641 (Fla. 1982); Palmer v. State, 486 So.2d 22, 23 (Fla. 1st DCA 1986); Oliva v. State, 346 So.2d 1066, 1068 (Fla. 3d DCA 1977).

Virtually none of Jones' complaints about the prosecutor's opening statement have been preserved for appeal. Moreover, while portions of the opening statement might have been objectionable, the record does not demonstrate that the prosecutor 'blatantly violated the purpose of opening statement," or that his opening statement was "outrageous," as Jones contends. IBA at 30. No

reversible error occurred here.

(f) Jones first objected to the prosecutor's closing argument when the prosecutor began to address the defense claim that the gun might have been defective and could have gone off by accident: "Now the defendant wants you to speculate, he wants you to imagine, he wants you to fabricate on what could have been wrong -- " (TR 1392). Jones' only objection to this statement concerned the use of the word 'fabricate." The trial court sustained the objection and instructed the jury to disregard "that comment of counsel." However, the trial court denied the motion for mistrial (TR 1392). Although "fabricate" was a poor choice of words, it was only one word. Bonifav v. State, 21 Fla. L. Weekly S301, S302 (Fla. July 11, 1996). There was no abuse of discretion in the trial court's denial of the motion for mistrial. Watson v. State, 651 So.2d 1159, 1163 (Fla. 1994).

Next, the prosecutor discussed the testimony of the ballistics expert. Then, addressing the absence of the gun (the ballistics expert had not examined the actual gun, a fact which the defense had brought out on cross-examination, TR 1279-80), the prosecutor stated: 'Do not let yourself speculate on this gun. There is only one person in this courtroom who knows exactly how that gun operates, and he saw fit to deny you the opportunity -- " (TR

1394). Defense counsel interrupted to object on the ground that this argument was a "comment on my client's right to remain silent," and moved for a mistrial (TR 1394-95). During the bench conference to discuss the objection, counsel acknowledged that one interpretation of the comment might be that Jones had denied the jury the opportunity to inspect the gun by throwing it into the river. He insisted, however, that it also could be construed as a comment on Jones' failure to testify (TR 1395-96). The prosecutor insisted that the comment referred to the disposal of the gun and nothing else (TR 1395). The judge stated he did not interpret the comment as referring the Jones' failure to testify, and denied the motion for mistrial (TR 1396). Defense counsel declined the court's offer of a cautionary instruction (TR 1397). When argument resumed, the prosecutor completed his comment: "Let me make it clear, the defendant saw fit to deny you the opportunity to examine that gun by throwing it away, by disposing of it, by concealing it, by dumping it in the river" (TR 1398).

The State would note, first, that even though defense counsel interrupted the prosecutor's comment in mid sentence, it is clear from the context of the argument that the prosecutor was referring to the absence of the gun due to Jones' own actions, rather than to his failure to testify at trial. Although this Court has "adopted

a very liberal rule for determining whether a comment constitutes a comment on silence," Jackson v, State, 522 So.2d 802, 807 (Fla. 1988), the comment, especially after the prosecutor was allowed to complete his sentence, was not "fairly susceptible" as a comment on Jones' failure to testify. Barwick v. State, 660 So.2d 685, 694 (Fla. 1995). The evidence showed that the defendant did just what the prosecutor said he did, and this was fair comment on the evidence.

Next, defense counsel objected to the characterization of the shooting as "target practice" (TR 1398). The court overruled the objection. In light of testimony that Jones was calm after the first shot went off, and aimed the second shot, this was fair comment on the evidence. Jones v. State, 652 So.2d 346, 351 (Fla. 1995) ("assassination" was reasonable characterization of first degree murder, but even if was not, use of term was not so prejudicial as to warrant mistrial).[8]

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[8]Here, as at trial, Jones notes that the trial court had sustained an objection to Billy Fagan's testimony, in response to the question whether the gunman had acted surprised after the first shot went off, that Jones had "acted like it was target practice" (TR 1024). The defense objection was that the answer was unresponsive. The judge apparently did not hear the answer, but, after the question was repeated, stated that the answer "may be answered with a yes or no to be responsive." He did not formally sustain the objection (TR 1024). The State would question whether the responsiveness of an answer is a legitimate

The final objection to the initial closing argument by the State occurred when the State asked the jury to 'do justice" in this case and find the defendant guilty (TR 1406). Jones cites no authority for the proposition that it is improper argument for the prosecutor to ask the jury to "do justice," and the State is **aware** of none.

There **was** only one objection to the State's rebuttal argument. The State had referred to intoxication as a 'contrived" excuse. Defense counsel's objection to "denigrating" the defense was sustained (TR 1441). Thereafter, the prosecutor explained -- without objection -- that the 'defense is an acceptable defense," but the evidence did not support it in this case; the evidence showed it to be **a** contrived excuse. There was no objection to this comment, nor to any other portion of the rebuttal argument (TR 1440-54). Because trial counsel did not move for a mistrial after the trial court sustained the only objection raised, and because

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basis of objection for any party but the questioner. Moreover, the trial court never clearly ruled the answer to be unresponsive and did not clearly sustain the objection. Moreover, contrary to the representation of defense counsel at trial (TR 1400) and on appeal, IBA at 32, the judge did not instruct the jury to disregard the answer. In any event, as the State contended in response to the objection to the argument, the State did not say the witness said it was target practice, but only that 'this **was** what happened" (TR 1400).

there was no objection to any other portion of the State's rebuttal argument, nothing has been preserved for review here.

Although no other portions of the rebuttal argument were objected to at trial, Jones nevertheless complains that the prosecutor misstated the evidence during closing argument. However, attorneys are allowed "wide latitude" when making arguments to the jury, and are entitled to argue logical inferences from the evidence, even if they are contrary to the inferences that the defense would like the jury to draw. Crump v. State, 622 So.2d 963, 969-70 (Fla. 1993); Breedlove v. St-ate, 413 So.2d 1, 8 (Fla. 1982). So long as the prosecutor's argument is based on the evidence and any logical inferences from the evidence, any difference of opinion about what the evidence shows is a matter for counter argument, not objection. The alleged factual misrepresentations Jones complains about, IBA 34, are being raised for the first time on appeal.[9] Therefore, absent fundamental error, they are procedurally barred. Pangburn v. State, supra;

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[9]The State would note that it was defense counsel who first mentioned "knee walking drunk" (TR 1418). He argued that you did not have to be knee walking drunk in order to be found not guilty; the prosecutor responded that you could be guilty even if you were knee walking drunk (TR 1448). Not only was there no objection to the state's argument, but it was legitimate "rebuttal" to defense argument. Street v. State, 636 So.2d 1297 (Fla. 1994).

Suggs v. State, supra; Wyatt v. State, supra. There was no fundamental error. The prosecutor in this case had a legitimate basis for arguing that Jones went to the school to commit a robbery, that he was the leader of the group, that he intentionally shot the victim in the back of the head, and that he was not so intoxicated that he was incapable of forming the specific intent to commit first degree murder. Although any or all of these facts may have been in dispute, it was not improper for the prosecutor to urge the jury to accept the State's theory of the case.

(g) There was no objection whatever to any of the State's closing argument at the sentencing phase. The two comments he quotes were fair comment on the defense mitigation evidence. See Tucker v. Kemp, 762 F.2d 1496, 1505 (11th Cir. 1985) ("If an argument focuses on a subject appropriately within the jury's concern, it ordinarily will not be improper."). Jones does not bother to provide citations to the record for the other allegations he makes about the prosecutor's sentencing-phase closing argument. IBA at 36, and the State would dispute the validity of these allegations. But even if any portion of the prosecutor's sentencing-phase closing argument might have been objectionable, there were no objections, and any complaints about this argument are procedurally barred.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT THE MOTION FOR CHANGE OF VENUE

Jones contends that the media coverage of this trial was so sensationalized and distorted that the voir dire examination of the jurors was not sufficient to ensure a trial by an impartial jury. If Jones is arguing that there was such a prejudicial media saturation of the community that prejudice must be presumed, see Coleman v. Kemp, 778 F.2d 1487, 1489 (11th Cir. 1985), the State would note that the principle of presumed prejudice is "rarely applicable and reserved for extreme situations." Bundy v. Dugger, 850 F.2d 1402, 1424 (11th Cir. 1988). It is significant that Duval County is a large, metropolitan area, which is inherently more difficult to saturate with publicity than a small rural community. See Manning v. State, 378 So.2d 274 (Fla. 1979)(size of the community is a factor to be considered in determining the prejudicial impact of intense publicity). Furthermore, although this case certainly received some publicity, it is a gross exaggeration to say that the case was "sensationalized in every way conceivable," IBA at 37, to "fuel general hostility and fear." IBA at 38. In fact, although Jones' appellate counsel passionately complains about the pretrial publicity, his trial counsel

entertained a different view, stating: 'I'm not worried about the publicity. I realize that we may have some, but, gosh, I have been through so many cases that had more publicity than this one, frankly" (TR 369).

Jones refers to nine newspaper articles attached to the motion for change of venue (R 150-161). Nine newspaper articles hardly amounts to a "barrage" of publicity. Moreover, although they are undated, it is apparent that most of these articles were written soon after the shooting.[10] The trial began almost a year later. Even if the nine articles cited could be considered a 'barrage" of publicity, there was no 'barrage of inflammatory publicity immediately prior to trial." Murphy v. Florida, 421 U.S. 794, 798, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1975). Jones clearly has failed to demonstrate a trial atmosphere "utterly corrupted by press coverage." Dobbert v. Florida, 432 U.S. 282, 303 (1977).[11] There

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[10]The sixth of these articles referred to the instant shooting as having occurred "Earlier this month" (R 158). Moreover, the voir dire examination suggests that the publicity did not last long: i.e., after "a week, week and-a-half, ... it sort of disappeared" (TR 496); "It's been a good while, I don't have any recent history" (TR 576).

[11]The State would add that it is unable to discern any racial theme in these newspaper articles. In fact, the race of neither the defendants nor the victim is even mentioned, much less exploited. The State would note that trial counsel stated during the voir dire examination that race "is not an issue in

is no presumptive prejudice.

Absent presumptive prejudice, the defendant has the burden to show actual prejudice from the voir dire examination and selection of jurors. Pietri v. State, 644 So.2d 1347, 1352 (Fla. 1994). An "application for a change of venue is addressed to the sound discretion of the trial court and that ruling will not be overturned absent a palpable abuse of discretion." Esty v. State, 642 So.2d 1074, 1077 (Fla. 1994).

Initially, the state would question whether Jones has preserved any issue of actual prejudice. The day after Jones filed his motion for change of venue, defense counsel brought the issue up during motion hearing, even though he knew 'the State is not prepared to argue it at this time" (TR 224). Jones quotes portions of the discussion, IBA at 37, and notes, correctly, that the court reserved ruling, commenting that an inquiry of the prospective jurors would be required (TR 225). Jones fails to cite any subsequent portion of the record where the motion for change of venue was brought up again, or where the trial court ruled upon the issue. Defense counsel did renew the motion for change of venue before the voir dire examination began (TR 395), but, of course,

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this case" (TR 877).

the motion was still premature and the trial court still did not rule on it (TR 395). The State is unable to locate any further reference to the change of venue, or a ruling upon the motion. Following the exercise of challenges for cause, defense counsel expressed no dissatisfaction with the jury panel as qualified, and did not renew his motion for change of venue. And although defense counsel did ask for additional peremptory challenges following the exhaustion of defense peremptories (TR 962, 979), counsel never suggested to the court that the panel, as qualified, was prejudiced as the result of pretrial publicity, or that a fair and impartial jury could not be selected from the panel, or that the jury as selected was incapable of fairly and impartially deciding the case. See Provenzano v. State, 497 So.2d 1177, 1181-82 (Fla. 1986) (where defendant did not file written motion for change of venue, and trial court did not rule on oral motion for same, issue not preserved for appellate review).

But even if an actual-prejudice issue has been preserved, it is without merit, The voir dire examination does not establish prejudice. Jones acknowledges (IBA at 40) that fewer than half of the initial panel of potential jurors responded that they had even

heard of the case (TR 459).[12] Those who had any knowledge of the case at all underwent an individual, sequestered voir dire examination (TR 460). Jones quotes voir dire answers from prospective jurors who had heard about the case, some of whom had expressed opinions about the case. IBA at 40-41. He fails to note that none of the prospective juror whose answers he quotes served on the jury, or to acknowledge that he was not forced to expend preemptory challenges on any of them.[13] The record shows that less

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[12]Jones asserts that 'several more" had their memory jogged after they were given more information about the case, citing TR 557. However, these jurors were members of a new panel of 25 prospective jurors, not "more" of the initial panel (TR 548).

Jones also complains that some prospective jurors became aware of media coverage during an overnight recess (TR 637). It is apparent from the follow-up questioning by the court to all prospective jurors present in court at that time (not half, as Jones asserts), that none had heard anything of significance (TR 637-42).

[13]Addressing them in the same order listed in Jones' brief, these prospective jurors are: Freeman (TR 465), excused for cause (TR 926); Brown (TR 477), excused for cause (TR 481); Demetropoulos (TR 625), excused for cause (TR 626); Lee (TR 481, 482, 484), excused for cause (TR 928-29); Green (TR 531-33), excused for cause (TR 929); Jennings (TR 492), excused for cause (TR 494); Baker (TR 503), excused for cause (TR 505); Williams (TR 507), excused (TR 709);Cornaire (TR 515), excused for cause (TR 517); Doris (TR 520, 522), excused for cause (TR 939); Houlihan (TR 580-81), excused for cause (TR 941); Samuelson (TR 584, 585), excused for cause (TR 590); and Brinson (TR 596), excused for cause (TR 599).

than half of the jury, **as selected,** had **even** heard about the case.[14] The ones that had heard something remembered little about the case, and had no opinion about Jones' innocence or guilt. All of them stated unequivocally that they could decide the case solely on the evidence presented at trial and the court's instructions. Wuornos v. State, 644 So.2d 1000, 1007 (Fla. 1994). "Thus, the pretrial knowledge of the jurors who served did not preclude a fair and impartial jury." Pietri v. State, supra.

The trial court did not err in failing to grant Jones' motion for change of venue.

ISSUE V

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT THE MOTION TO SUPPRESS JONES' CONFESSION

Jones contends the trial court erred in denying his motion to suppress his confession, apparently on three grounds: (1) he was mentally incapable of understanding and waiving his rights; (2) police officers failed to record the interview; and (3) the written waiver of rights form has been lost. As is the case elsewhere in

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[14]The jury included Mr. Chojn, Ms. Houser, Mr. Gilmore, Ms. Beranek, Mr. Richter, Mr. Woods, Ms. Hoff, Ms. Moore, Ms. Stokes, Mr. Maxwell, Mr. Hansen and Mr. **Wallace (TR 961, 976-78). Of these**, only Richter (TR 494-501), Moore (TR 511-13), Maxwell (TR 575-77), Hansen (TR 577-79) and **Wallace** (TR 590-91) knew anything about the case.

Jones' brief, the recitation of fact in his argument on this issue contains numerous incorrect, unsupported and/or misleading assertions.

Jones was arrested at his home between 5 and 5:30 a.m. the morning after the murder (TR 120-24). Although the arresting officer did not intend to interrogate Jones himself, but merely to escort him to the patrol car which would transport him to the station, as a precaution, he advised Jones of his Miranda rights as he escorted him to the patrol car (TR 120-21, 124). As the officer acknowledged both on direct and cross-examination, Jones did not say anything or acknowledge that he had been given his rights (TR 122, 125).

At the station, Jones was interrogated by detectives Hickson and Johnson (TR 122). Detective Hickson removed Jones' handcuffs and directed Jones to read the first line of an advise-of-rights form. Hickson then read the rest of the form to Jones (TR 131). He asked Jones if he understood his rights. Jones answered that he did and signed the form (TR 133). Jones stated that he had been drinking beer the previous evening -- several hours earlier -- and that he was not under the influence of any drugs or medication (TR 134). Detective Hickson did not recall what Jones said about his educational background (TR 134), and the form itself has been lost

(TR 131-32, 144). Nevertheless, Detective Hickson saw no indication that Jones was mentally incapacitated in any way (TR 135).

Jones' initial story was that he was at the apartment complex with some friends sitting in a car and drinking beer. He claimed he never left the apartment complex (TR 139). However, when Jones was informed 40-45 minutes into the interview that the victim had died and that he would be charged with a homicide, Jones cried, admitting he had "killed the baby" (TR 139). Jones then told the police what had happened. According to Jones, Goodman came by the apartments and told the rest of them that there was a crowd at Terry Parker and there **was** a "lot of money up there." They were going there with the intention of robbing to make money. Marilyn Wilcox, who had attended Terry Parker School with him, drove them there. When they walked around where the victim was, Jones had the gun. He claimed it was cocked, and when he asked the victim did he have any money, 'the gun went off unintentionally twice" (TR 140). He "did not mean to hurt the boy but the gun went off" (TR 143).[15]

Jones also stated that after the shooting, he went back to the

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[15]Contrary to Jones' contention, IBA at 47, Jones' self-serving claim that the shooting was an accident was neither omitted by the detective nor lost.

apartments, changed his clothes, and caught a ride with someone he refused to name who took him to the St. Johns River, where Jones threw the gun into the water (TR 143). Jones' statement was reduced to writing by Detective Johnson (TR 141). Jones signed it.

James E. Burling, a school psychologist, testified for the defense at the hearing on the motion to suppress (TR 154). He has a master's degree in school psychometry (TR 155). He tested Jones in October 1991 **(a** little over two years prior to the murder) (TR 156), when Jones was not quite 18 years old. According to these tests, Jones' verbal IQ is low (8-9th percentile), but his performance IQ is in the low average range (TR 161). His full-scale IQ was measured at 78 (TR 162). Testing showed that Jones' skills were mixed; his short term memory and auditory processing were poor (TR 163-64), but his comprehensive knowledge and visual-motor integration skills were in the low average range (TR 165-66). His reading skills were poor (second-grade level), but his math skills were, **again,** in the low average range (TR 166-67). Burling acknowledged that with sufficient motivation, persons with abilities comparable to Jones had the mental ability to improve their reading skills significantly (to perhaps the fifth or sixth grade level) (TR 172).

On cross-examination, Burling acknowledged that these tests do

not measure "street smarts" or a person's ability to react 'within a criminal environment" (TR 173-74). He also acknowledged that there was a correlation between economic disadvantage and low test scores, and that a history of absences from school and lack of 'book learning" could adversely affect test results (TR 174-75, 178). Burling had no idea what kind of advances in skills Jones might have made in the two years between the time he was tested and the present (TR 177), and would defer to Jones' English teacher at Terry Parker regarding his level of reading ability subsequent to October 1991 (TR 178). Burling acknowledged he has never worked with adult criminals or juvenile delinquents, has never studied the psychology surrounding police interviews, and has no specialized knowledge regarding any correlation between a person's IQ and his ability to cope within a custodial interrogation setting (TR 179-80).

Susan Lavene was Jones' English teacher at Terry Parker (TR 194). She has a Master's degree in special education with an emphasis on emotionally handicapped and learning disabled. She has been teaching special education classes for 18 years (TR 195). The students in her class have learning disabilities or emotional handicaps, and some of them are mildly mentally handicapped (TR 195). She taught Jones for about six weeks in 1991 and for about

two weeks in 1992 (TR 196-97). Jones was very mature compared to her other students (TR 198). Most of her students range from fourth to sixth grade in reading ability. She described Jones level of English comprehension as "Excellent" compared to others in his class (TR 198-99, 208). In her opinion, Jones would have been able to understand the terms used in the Miranda rights form (TR 207).

In addition to the foregoing, FBI agent Vogt testified by deposition conducted September 28, 1994 (TR 218-19, R 104-126), concerning his interrogation of Omar Jones concerning a theft on December 6, 1991 (R 110). Vogt testified that Jones read the first three lines of the advise-of-rights form aloud, "slowly and hesitantly at first," but Vogt thought "it was quite clear, during the advice of rights, that he understood his rights" (TR 112).

In addition, to "show prior significant contact with the criminal justice system," (TR 217), the State offered pleas and judgments in a New Jersey case, entered on May 28th, 1993 (TR 214, R 102-03) and the plea dialogue from a Florida case, dated January 31, 1992 (TR 210, R 93-101). These exhibits were admitted (TR 212, 218).

After consideration of memoranda filed by both parties (R 170-75, 209-11), the trial court denied the motion to suppress (TR

365).

"A trial court's ruling on a motion to suppress is presumed correct." Henry v. State, 613 So.2d 429, 431 (Fla. 1992). A reviewing court should defer to the fact-finding authority of the trial court and not substitute its judgment for that of the trial court. DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983). In this case, the trial court's denial of the motion to suppress is amply supported by the record.

Jones contends that he was too mentally impaired and/or intoxicated to knowingly, intelligently and voluntarily waive his rights. It should be noted that except for Jones' statement that he had been drinking beer the previous evening, no evidence was presented at the hearing on the motion to suppress that might even tend to support, much less establish, a claim that he was intoxicated at the time he confessed. In fact, an examination of the transcript and of Jones' memorandum in support of his motion to suppress (R 170-75) shows that no such claim was even made at trial. Jones should be procedurally barred from contending for the first time on appeal that he was too intoxicated to be able to waive his rights. Steinhorst v. State, 412 So. 332 (Fla. 1982). Furthermore, although in conflict, the evidence at trial supports a conclusion that Jones was not intoxicated the evening before he

confessed, and there is no evidence that he was intoxicated when he confessed the next morning. As for mental impairment, the evidence shows that, even if he has some impairments, he is not so impaired that he was unable to communicate or to understand the meaning of the Miranda warnings.[16] His English teacher, in fact, considered Jones' English skills to be excellent relative to those of her other students. Moreover, Jones was not inexperienced with the criminal justice system. State v. Crosby, 599 So.2d 138, 142 (Fla. 5th DCA 1992) (experience with criminal justice system is relevant to question whether confession is knowing and intelligent). Therefore, the trial court did not err in denying the motion to suppress on the grounds of mental impairment or intoxication. Thomson v. State, 548 So.2d 198, 203 (Fla. 1989)("The fact of mental subnormality or impairment alone does not render a confession involuntary, [Cit.], except in those rare cases involving subnormality or impairment so severe as to render the defendant unable to communicate intelligibly or understand the meaning of Miranda warnings even when presented in simplified form."). See also Kiaht v. State, 512 So.2d 922, 926 (Fla.

[16]At page 48 of his brief, Jones' appellate counsel refers to him as a "retarded boy." Under no reasonable interpretation of the evidence is Jones mentally retarded.

1987) (defendant with IQ of 67 had capacity to understand and assert his rights).

As for the fact that the police did not tape record the interrogation, and lost the waiver of rights form, Jones' allegation that, for "obvious reasons" this was "deliberate strategy" to deprive the defense of an accurate record, IBA at 45, is slanderous speculation with no record support. The officers in this case testified that they advised Jones of his rights from an advice-of-rights form that Jones understood and signed. The trial court was authorized to credit this testimony even though the form subsequently was lost, Furthermore, Jones cites no authority for the proposition that a confession is inadmissible unless the interrogation is tape-recorded, and the State is aware of none. See W.M. v. State, 585 So.2d 979 (Fla. 4th DCA 1991), rev. denied, 593 So.2d 1054 (trial court did not err in determining that 10-year-old child with I.Q. of 69-70 understood and waived Miranda rights although no written acknowledgment of Miranda warnings was obtained and no audio or video taped recordings were made).

An appellate court should interpret the evidence and all reasonable deductions which may be drawn therefrom in the light most favorable to the trial judge's conclusions. Shapiro v. State, 390 So.2d 344, 346 (Fla. 1980). The trial court's ruling on Jones'

motion to suppress should be affirmed.

ISSUE VI

JONES WAS NOT DENIED A FAIR TRIAL OR A FAIR AND IMPARTIAL JURY BY ANY RULING OF THE COURT

In this issue, Jones first contends that the trial court allowed the prosecutor to exercise a peremptory strike against an African-American prospective juror without sufficient non-racial justification. As Jones points out, the trial judge disallowed the State's first peremptory challenge, ruling that the prosecutor's discomfort with the amount of gold jewelry this juror wore and the fact that he was nearly the **same** age as the defendant was "not sufficient" (TR 946). As for Mr. Gilmore, the second African-American prospective juror, the prosecutor explained that the juror knew everyone at the court, had worked with defendants and counseled defendants for years, and the prosecutor was concerned that someone who had that close a relationship with his office, with the public defender's office and with the court system might have "undisclosed feelings of ill will towards any of us" (TR 947-48). Notwithstanding that, as defense counsel pointed out, the juror had been away from the court system for several years, the trial court found the prosecutor's explanation sufficient because 'even though his involvement might have been in the past, the fact

remains that he was heavily involved" (TR 948).

As in Joiner v. State, 618 So.2d 174, 176 (Fla. 1993), defense counsel "accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection." Defense counsel did not reserve his earlier objection, move to strike the panel or move to seat juror Gilmore (TR 962). Therefore, the State would first contend that whether or not the trial court erred in overruling the defense objection to the State's peremptory challenge to this juror has not been preserved for review. Joiner v. State, supra; Phillips v. State, 673 So.2d 188, 188-89 (Fla. 3d DCA 1996).

Even if preserved, however, there was no error. The prosecutor's challenge was presumptively valid. State v. Johans, 613 So.2d 1319 (Fla. 1993). On its face, the prosecutor's proffered explanation was not racially based, and nothing offered by the defense contradicted the race-neutral nature of the explanation. Purkett v. Elem, U.S. , 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). In Files v. State, 613 So.2d 1301, 1303 (Fla. 1992), this Court reaffirmed that the proper standard of review of a determination whether a peremptory challenges was racially motivated is that set out in Reed v. State, 560 So.2d 203, 206 (Fla. 1990):

> Within the limitations imposed by State v. Neil [457 So.2d 481 (Fla. 1984),] the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved . . . .
>
> ... In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process.

In fact, this trial judge clearly took his responsibility seriously; he disallowed one of the State's peremptory challenges. Jones argues, however, that the trial judge erred by concluding that the prosecutor had a valid, non-racial basis for peremptorily challenging a prospective juror who 'worked with the court system eight years earlier." IBA at 52-53. But this prospective juror did not just work with the court system, he was "heavily involved in the criminal justice system" (TR 948), and his involvement was working with defendants and counseling defendants (TR 947). [17] The trial court committed no abuse of discretion in concluding that the prosecutor had legitimate, non-racial reasons to question the

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[17]Had the prospective juror formerly been, say, heavily involved with the prosecutor's office and with crime victims, it is doubtful that defense counsel would have believed they had no sufficient basis to exercise a peremptory challenge against the juror.

impartiality of this prospective juror.

Next, Jones complains of the excusal for cause of ten prospective jurors "solely on the basis that they were opposed to the death penalty." IBA at 53. He does not identify these ten jurors; however, the record does show that nine prospective jurors were excused for cause as a result of their inability to impose a death sentence (TR 931). The only objection interposed to most of these excusals was a general objection to the excusal of any juror because of their views on the death penalty, based on a pretrial motion to prevent the death-qualification of the jury (TR 926 et seq., SR 161 et seq.). This objection was without merit, as it is entirely proper to death-qualify the jury and to excuse any prospective juror whose views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Jones' specific objections to certain jurors on the ground that they did not express the requisite impairment under Witt (TR 928, 929) are also without merit. The trial court applied the proper standard, and deference must be paid to his findings. Castro v. Stat-e, 644 So.2d 987, 990 (Fla. 1994); Reed v. State, supra; Green v. State, 583 So.2d 647, 652 (Fla. 1991).

Finally, Jones complains about the denial of defense challenges for cause to three prospective jurors: Rogers-Cooper, Moore and Gavin. IBA at 54. In order to preserve such issue for appellate review, a defendant must exhaust all of his peremptory challenges and seek an additional challenge which is denied. Kearse v. State, 662 So.2d 677, 683 (Fla. 1995). In addition, the defendant must at the same time also "identify a specific juror whom he otherwise would have struck peremptorily" and this juror must have "actually sat on the jury." Furthermore, the defendant must have challenged the juror for cause, have attempted to challenge the juror peremptorily, or otherwise have objected to the juror after the defendant's peremptory challenges had been exhausted. Ibid. (quoting Trotter v. State, 576 So.2d 691, 693 (Fla. 1990).

Neither Rogers-Cooper nor Gavin sat on the jury. See footnote 14, supra. Therefore, Jones may not now complain about the trial court's refusal to excuse them for cause. Kearse v. State, supra. As for juror Moore, Jones' trial counsel did exhaust all their peremptory challenges and did request additional peremptory challenges (TR 962). However, at that time counsel did not identify any juror they would have challenged if additional peremptories had been granted. Pietri v. State, 644 So.2d 1347,

1353 (Fla. 1994) (issue not preserved when counsel failed to identify juror whom he would have struck peremptorily when he sought additional peremptories) . All veniremen except those selected as jurors were excused shortly thereafter (TR 963). The next day, one of the jurors was excused because of a death in the family the previous evening (TR 976). The first alternate juror became a member of the jury (TR 978). Defense counsel renewed their request for additional challenges, identifying for the first time a juror whom they allegedly would have struck -- Ms. Moore (TR 978). By this time, of course, it was too late to exercise any additional peremptories and still get a jury -- all the prospective jurors had already been excused. Defense counsel's belated identification of a juror against whom they would have exercised an additional peremptory challenge was insufficient to preserve any issue concerning Jones' challenge of Ms. Moore for cause. Cf. Pietri v. State, supra (fact that defendant again challenged juror for cause before penalty phase does not preserve the issue).

This claim is not preserved for another reason. Trial counsel challenged Ms. Moore for cause because of her views on alcohol, not because she knew anything significant about the case or had an opinion about guilt (TR 937). Jones is complaining about the denial of a challenge for cause on a ground that was not raised at

trial. Even worse, his complaint is based on testimony that was not not Ms. Moore's. Ms. Moore is not the prospective juror who thought that Omar Jones committed the crime for a few dollars, as Jones contends in his brief, IBA at 54. That prospective juror was Ms. Cornaire (TR 515), who was excused for cause (TR 516). As for the real Ms. Moore, although she expressed the opinion that the abuse of alcohol **was** morally and religiously wrong for herself and others (TR 839), she stated that she could set aside her personal beliefs and follow the law, without reservation (TR 870). Jones does not even argue on appeal that these answers disqualified her, or that the trial court should have granted the challenge for cause that actually was made at trial. In any event, she was qualified to serve.

Nothing presented in this issue presents any valid **reason** for **reversal.**

ISSUE VII

A DEATH SENTENCE IS APPROPRIATE IN THIS CASE

Jones contends that death is not an appropriate sentence for the execution-style murder of an innocent 14 year old boy during the course of an robbery **at a** school. Much of Jones' argument depends upon factual assertions that not only were not "unrebutted," as he contends, IBA at 66, but were rejected by the

jury and by the trial court. For example, Jones has repeatedly characterized this murder as an "accident" -- a characterization obviously rejected by the jury when it convicted Jones of first-degree murder, and specifically rejected by the trial judge in his sentencing order (R 394) (evidence shows that, after shooting victim in hip, Omar Jones "stepped forward, took precise aim and shot Jefferson Mitchell once more in the back of the head"); (R 399) (Jones' "suggestion that the killing was an accident is absurd"). In addition, Jones' disproportionality argument depends upon a characterization of the mitigation evidence as 'extensive," IBA at 56, and "compelling," IBA at 57, when the trial court found little or nothing to mitigate this offense. The State agrees neither with the claim that the aggravating evidence was weak nor with the claim that the mitigating evidence was strong. The State would contend that the jury and the trial court properly determined that death is an appropriate sentence in this case.

(a) Jones contends that the combined robbery/pecuniary gain aggravator found in this case is a "lesser" aggravator. The State would note that robbery with a firearm is itself a first degree felony, punishable by up to life imprisonment. §§ 812.13, 775.082, 775.083, 775.084, Fla. Laws (1992). An offender who has committed murder during the commission of a robbery therefore has committed

two very serious offenses.[18] Defendants who commit multiple crimes tend to be more culpable than those who commit only one.[19]

The commission of an additional serious offense in addition to murder is a factor which narrows the class of persons eligible for the death penalty. Furthermore, the fact that this murder involved the contemporaneous commission of the serious offense of robbery, in addition to murder, reasonably justifies a more severe penalty for the murder. The contemporaneous felony aggravator fully meets the test of a valid aggravator. Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) ("To avoid this constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); Lowenfield v. Phelps, 484 U.S.

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[18]By contrast, the CCP aggravator, which Jones' describes as a 'more serious" aggravator, merely describes the murder itself, and may be established in a case in which the defendant has committed only one serious crime.

[19]The State would note that if Jones had committed the robbery prior to the murder, the prior violent felony aggravator would have applied. Jones acknowledges that the prior violent felony aggravator is a 'more serious aggravating factor." IBA at 56. The State does not understand the logic of saying that a prior robbery is a serious aggravator, while a contemporaneous robbery is only a 'weak" aggravator.

231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (by finding "at least one aggravating circumstance" before imposing death sentence, sentencer "narrows the class of persons eligible for the death penalty according to an objective legislative definition;" fact that 'the aggravating circumstance duplicate[s] one of the elements of the crime" does not make death sentence constitutionally infirm).

Armed robbery is a seriously antisocial act. Murders committed during armed robberies by their nature tend to be some of the most cold-blooded murders, because they are committed against someone the defendant does not even know, and who has given the defendant not even a pretense of moral or legal justification to kill. Moreover, "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves." Tison v. Arizona, 481 U.S. 137, 151, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). The legislature was amply justified in providing that the contemporaneous commission of robbery can justify a death sentence for murder.[20] The State rejects any

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[20]The State would add this observation from Tison, 481 U.S. supra at 157: 'A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all -- those who act in self-

characterization of the robbery aggravator as inherently 'weak."

The weight properly accorded to an aggravator will depend upon a consideration of "the totality of circumstances in a case." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). This is not a case in which no one saw the actual shooting. Thompson v. State, 647 So.2d 824 (Fla. 1994); Sinclair v. State, 657 So.2d 1138 (Fla. 1995); Terry v. State, 21 Fla. L. Weekly S9, S12 (Fla., decided January 4, 1996). In this case, we know that the victim did nothing to provoke the defendant, that he did nothing to threaten the defendant, and that he did not attempt in any manner to physically resist the defendant. Moreover, this case is not one in which a defendant has been found guilty of felony murder merely on the basis of the commission of a felony, without any additional act

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defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty -- those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all -- the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' Indeed, it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders."

on his part to effect the death of the victim (as, for example, the defendant who confronts an intended robbery victim who then keels over dead with a heart attack). Nor is this case one in which a death sentence **was** given to a defendant who merely aided and abetted in the most limited way a felony during the course of which a murder was committed by others but who did not himself kill, attempt to kill, intend to kill, or contemplate that a life would be taken. Enmund v. Florida, 458 U.S. 782, 102 S.Ct.3368, 73 L.Ed.2d 1140 (1982) (holding that a death sentence in such a case was disproportionate in light of fact that juries nationwide have overwhelmingly rejected death sentence for felony murder where defendant had no intent to kill and **was** not the triggerman). Compare Tison v. Arizona, supra (holding that even where defendant did not kill or even intend to kill, death penalty for felony murder is not disproportionate so long as state proved that defendant had major personal involvement in felony and was recklessly indifferent to human life). Unlike Enmund, and unlike even Tison (whose death sentence was affirmed), Jones himself killed the victim, Furthermore, this is not even **a** case in which the defendant himself killed, but without any intent to do so. The evidence shows, and the trial court found, that Jones intentionally killed the victim (R 394). It is inaccurate to characterize the

contemporaneous commission of a felony and a murder as being always a "felony murder." Jones was not given a death sentence for "felony murder simpliciter," Tison, 481 U.S. supra at 155; he was given a death sentence on the basis of an intentional killing during the commission of an armed robbery.

Finally, the "totality of the circumstances" of this particular robbery include the fact that it occurred at a school and the fact that the victim was only fourteen years old. In light of all the circumstances of this case, the trial court did err in giving the combined pecuniary gain/robbery aggravator great weight.

(b) Jones contends that he presented a "compelling case of mitigation." IBA at 57. The trial court, however, found little or nothing in mitigation, and the record supports the court's findings. This claim essentially is a plea for this Court to reweigh mitigation, and should be rejected. Hudson v. State, 538 So.2d 829, 831 (Fla. 1989).

The trial court did not 'refuse to consider any relevant mitigating evidence." Spencer v. State, 21 Fla. L. Weekly S366, 367 (Fla. decided September 12, 1996). The trial court carefully considered and evaluated each statutory and nonstatutory mitigating circumstance proposed by the defense, as required by this Court's decisions.

Jones complains about the court's rejection of the age mitigator. However, Jones was not a minor, Ellis v. State, 622 So.2d 991, 1001 (Fla. 1993), and his age of 19, in and of itself, was not mitigating. Cooper v. State, 492 So.2d 1059, 1062-63 (Fla. 1986) (trial judge acted within discretion in rejecting age of 18 as mitigating); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986) (age of 20 properly rejected as mitigating). The allegation that Jones' mental age was between 13 and 14 does not compel a finding of the age mitigator. In Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), Justice O'Connor cautioned that the "mental age" concept is "problematic in several respects," Id. at 339, explaining:

> As the AAMR acknowledges, "(t)he equivalence between nonretarded children and retarded adults is, of course, imprecise." Amici Brief for AAMR et al. 14, n.6. The "mental age" concept may underestimate the life experiences of retarded adults, while it may overestimate the ability of retarded adults to use logic and foresight to solve problems. Ibid. The mental age concept has other limitations as well. Beyond the chronological age of 15 or 16, the mean scores on most intelligence tests cease to increase significantly with age. Wechsler, supra, at 26. As a result, "(t)he average mental age of the average 20 year old is not 20 but 15 years." Id., at 27. See also In re Ramon M., 22 Cal 3d 419, 429, 584 P.2d 524, 531 (1978) ("(T)he 'mental age' of the average adult under present norms is approximately 16 years and 8 months.").
>
> Not surprisingly, courts have long been reluctant to rely on the concept of mental age as a basis for

exculpating a defendant from criminal responsibility.

Jones also argues that the trial court's rejection of the age mitigator was improper because Jones' evidence established that he has been "mentally disabled by brain damage and retardation since birth." IBA at 69-70. The State would disagree that any reasonable interpretation of the evidence would allow the conclusion that Jones is mentally retarded. The evidence quite plainly shows that he is not mentally retarded, and the trial court found that the evidence did not establish any brain damage, stating: "The suggestion that the defendant suffers from organic brain damage is just that, a suggestion without any proof" (R 396). Jones attacks this statement, but the only evidence he can point to is Dr. Krop's testimony that Jones' medical records contain a "reference" to an abnormal EEG when Jones was two months old (TR 1739). Just what the abnormality might have been we do not know. Whether any abnormality was permanent, we do not know. Whether brain damage, if any, caused or contributed in any way to any learning disability Jones might have, we do not know (TR 1739-40). We do know that when Dr. Krop initially interviewed the defendant, he thought him to be an "intelligent young man" (TR 1755). We also know that even though he now considers that opinion a 'mistake" (TR 1756), he does not even now consider Jones to be mentally ill, or

psychopathological, or emotionally disturbed, or psychotic (TR 1755, 1757). Jones lived on his own, and his demonstrable criminal maturity and criminal history of theft and gun possession offenses, in both New Jersey and Florida, support the trial court's rejection of this mitigator.

As for the substantial impairment mitigator, Jones contends that the trial court relied upon the "technicality" that Dr. Krop referred to Jones' impairments as "significant" instead of "substantial." IBA at 70. However, although Dr. Krop said that Jones' intoxication the evening of the crime coupled with his low intelligence could have caused "significantly impaired judgment" (TR 1742-43), he never testified that any impairment in Jones' ability to conform his conduct to the requirements of the law would be "significant" or "substantial" (TR 1743, 1749). Moreover, Dr. Krop acknowledged that his information about Jones' degree of intoxication came, at least in part, from Jones himself (TR 1749). The State presented considerable evidence, however, establishing that, although Jones had been drinking the evening of the murder, he **was** not intoxicated. The record supports the trial court's conclusion that Jones was not substantially impaired. As the trial court found, "the evidence demonstrated that this defendant was in control of his faculties as he planned and executed a robbery, shot

the intended robbery victim, escaped from the scene of the crime and had the presence of mind to dispose of the murder weapon" (R 396). The rejection of intoxication as a mitigator was not error. Garcia v. State, 644 So.2d 59, 63 (Fla. 1994)("the trial judge could properly find from the evidence that there was insufficient evidence of intoxication to establish that as a mitigating factor"); Johnson v. State, 608 So.2d 4, 13 (Fla. 1992)("While voluntary intoxication or drug use might be a mitigator, whether is actually is depends upon the particular facts of a case.").

As for Jones' low IQ, although Jones has peppered his brief with numerous suggestions that he is mentally retarded, it is clear that he is not. Moreover, while some of his abilities, as measured in IQ and achievement testing, are very low, others are in the low average range (TR 161, 165, 167). His artistic abilities apparently are above average (TR 1722). None of these tests, however, measure a person's street smarts (TR 173-74). Furthermore, it is widely known that factors like economic disadvantages and poor school attendance, along with a lack of motivation, can adversely affect test scores and their accuracy in measuring a person's true intellectual abilities (TR 174-75). Jones' own witnesses demonstrated that he was capable of handling responsibility, maintaining relationships with family and friends,

counseling others, and participating in social activities (TR 1639-1717). His own witnesses were of the opinion that Jones has never had any difficulty understanding the difference between right and wrong, or in conforming his conduct to the requirements of the law (TR 1666-68, 1673-74, 1675, 1688-90). Even Dr. Krop could not testify that Jones' mental abilities contributed significantly to this crime (TR 1757-58). The trial court did not err in rejecting the proposed mental mitigation.

As for the family history, although his mother was on welfare for a short period of time, she was employed most of the time, even working two jobs if she had to (TR 1632). She and her children always lived close to her mother (and sometimes with her) (TR 1628, 1633). Jones had little contact with his father while he was growing up, but, as the trial court found, Jones had the advantage of "an extremely close, warm and caring family environment" (R 398). In addition, despite the lack of excess money, Jones' artistic talent was encouraged and facilitated by the church and his school. Jones was not obstructed in his ability to obtain art supplies; he simply rejected the opportunity to excel in art 'in favor of a life of crime" (R 398). The trial court did not err in concluding that the "purported disadvantaged childhood of the defendant is a mere excuse and subterfuge" (R 398). Jones v.

State, 652 So.2d 346, 351 (Fla. 1995) (where defendant's mother was unable to care for him but left him in the care of relatives who could, "court did not abuse its discretion by refusing to find in mitigation that Jones was abandoned by an alcoholic mother"); Sochor v. State, 619 So.2d 285, 293 (Fla. 1993)("Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion."); Valle v. State, 581 So.2d 40, 48-49 (Fla. 1991) (trial court properly weighed and rejected evidence of dysfunctional family and abusive childhood as mitigating factors).

Jones also complains about the rejection of his good character evidence. The trial court described his conduct as "not extraordinary" or 'remarkable," but only what one would expect of a family member, and therefore not entitled to mitigating weight (R 398). This finding was not error. Zeisler v. State, 580 So.2d 127, 130 (Fla. 1991) (not error to conclude that defendant's character was 'no more good or compassionate than society expects of the average individual") . The evidence, moreover, primarily related to Jones' behavior as a child. His prior criminal record belies any claim that he has demonstrated good character as an adult, and it is within the court's discretion to determine that a defendant's good behavior as a child does not mitigate an

aggravated murder. **Francis v. State, 529** So.2d 670, 673 (Fla. 1988).

As for the claim of remorse, the trial noted that Jones initially denied any involvement in the murder and that, even when he admitted killing the victim, he refused to name the person who assisted him in disposing of the murder weapon and made the "absurd" claim that the killing was an accident (R 399). Based on these factors, the court found that Jones' "purported remorse was not genuine" (R 399). Furthermore, his offer to plead guilty to first degree murder in exchange for a life sentence was viewed by the court as a pragmatic attempt to escape the ultimate sanction for his conduct, and therefore was not entitled to mitigating weight (R 399-400).

After specifically addressing each of the proposed mitigators, the trial court summed up its findings:

> The court is aware that the death penalty is reserved for only the most aggravated and least mitigated murders. There are two merged aggravating factors in this case and mitigating factors which have been addressed herein. The mitigating factors, however, are given little or no weight as outlined by the court. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances. Furthermore either aggravating factor, standing alone, would still outweigh the mitigating factors. [R 4001

As this Court has noted, there are 'no hard and fast rules

about what must be found in mitigation in any particular case . . . . Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain with the trial court's discretion." Lucas v. State, 568 So.2d 18 (Fla. 1990). Accord, Atkins v. Singletary, 965 F.2d 952, 962 (11th Cir. 1992) ("Acceptance of nonstatutory mitigating factors is not constitutionally required; the Constitution only requires that the sentencer consider the factors.") .[21] The trial court carefully considered all the evidence presented in mitigation, along with all of the nonstatutory mitigation proposed by the defense (R 425-32). The decision as to whether a mitigating circumstance has been established, and the weight to be given to it if it is established, are matters within the trial court's discretion. Bonifay v. State, 21 Fla. L. Weekly S301 (Fla. July 11, 1996). So long as the trial court considers all of the evidence, its "determination of lack of mitigation will stand absent a palpable abuse of discretion." Foster v. State, 21 Fla. L. Weekly S324, 2327 (Fla. July 18, 1996).

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[21] See, also, Burger v. Kemp, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (quoting with approval 11th Circuit's observation that "mitigation may be in the eye of the beholder"); Tuilaepa v. California, U.S. - , - S.Ct. , 129 L.Ed.2d 750, 767 (1994) (Souter, J., concurring) ("refusing to characterize ambiguous evidence as mitigating or aggravating is . . . constitutionally permissible").

Accord, Cook v. State, 542 So.2d 964, 971 (Fla. 1984); Hudson v. State, 538 So.2d 829 (Fla. 1989); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). This Court is 'able to conduct an appropriate proportionality review" in this case 'because the order specifies which statutory **and** nonstatutory mitigating circumstances the trial judge found and the weight he attributed to these circumstances in determining whether to impose a death sentence." Sims v. State, 21 Fla. L. Weekly S320, S323 (Fla. July 18, 1996).

(c) The evidence demonstrates that Jones is not mentally retarded, is not emotionally disturbed, has no significant psychopathology or mental illness, has never been sexually or physically abused, and did not have a genuinely deprived childhood. Jones armed himself, went to a school to commit a robbery, and while there murdered an innocent, unresisting 14 year old boy by a deliberate and carefully aimed shot to the head. The circumstances include a single, weighty aggravator, balanced against little or nothing in mitigation. The death penalty is neither excessive nor disproportionate for this offense, considering both the crime and the defendant.

ISSUE VIII

THERE WAS NO IMPROPER VICTIM IMPACT EVIDENCE OR ARGUMENT

Although Jones' caption to this issue seems to complain about

the introduction of victim impact evidence, his argument only addresses the prosecutor's penalty phase argument. The real thrust of Jones' argument on appeal seems to be a lack of acceptance of precedents by this Court and the United States Supreme Court recognizing the admissibility of victim impact evidence. If this is the basis of his contention, it is without merit. Of course, even if victim impact evidence is admissible to some limited extent, a particular proffer might violate the statute. However, Jones does not argue that some identifiable portion of the victim impact testimony in this case was admitted improperly under the statute. Absent any clue as to just what portion of the victim impact testimony, if any, Jones is complaining about, the State will simply contend that victim impact evidence was improperly admitted in accordance with § 921.141 (7), Fla. Stat. 1995, and this Court's decisions approving the introduction of victim impact evidence in accordance with the statute. State Archer v. 673 So.2d 17, 21 (Fla. 1996); Windom v. State, 656 So.2d 432 (Fla. 1995). The evidence was limited properly to evidence demonstrating the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. As this Court said in Bonifay v. State, 21 Fla. L. Weekly 5301, S303 (Fla. July 11, 1996):

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. Therefore, we find this testimony relevant.

As for the prosecutor's closing argument, the State has noted previously that there was no objection to any portion of the prosecutor's closing argument, other than that Jones renewed his previous objection to the introduction of victim impact evidence (TR 1522 et seq.). If Jones is contending that, having introduced victim impact evidence, the prosecutor may not argue it at all, then the State would respond that § 921.141 (7) specifically authorizes argument on victim impact evidence: '"the prosecution may introduce, and *subsequently argue,* victim impact evidence" (emphasis supplied) . See also, Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)(in light of latitude given to defense counsel to argue mitigating evidence reflecting on the defendant's personality, Court rejected view "that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted"). If Jones is complaining about specific portions of an otherwise permissible argument on the subject of victim impact, the State would respond that, since trial counsel failed to object to any

portion of the prosecutor's sentencing phase closing argument, Jones is procedurally barred from complaining now.

This issue is procedurally barred and also without merit.

ISSUE IX

THE TRIAL COURT DID NOT ERR IN DENYING CERTAIN JURY INSTRUCTIONS REQUESTED BY DEFENSE COUNSEL; THESE REQUESTS EITHER WERE NOT PROPER, OR WERE COVERED BY THE STANDARD INSTRUCTIONS THE COURT DID GIVE

Citing no authority whatever, Jones complains about the failure to give various jury instructions. These instructions were properly denied. The State will respond briefly.

As Jones' own written request acknowledged, under precedents from this Court and the United States Supreme Court, he was not entitled to a jury instruction that the jury must agree unanimously on one theory of first degree murder (R 294).

Jones' trial counsel also acknowledge at the sentencing phase charge conference that "there is no question that what we're asking you to do is in some cases contrary to the law" (TR 1496). The instructions delivered by the trial court (TR 1791- 95) correctly and properly instructed the jury on the law. The State would note that the trial court did instruct the jury that the court would give "great weight" to the jury's recommendation (TR 1791), that the aggravating circumstances the jury could consider were limited

to pecuniary gain and robbery, and that, if the jury found both, the aggravators would merge and be considered as "only one aggravating circumstance rather than two" (TR 1792).

Furthermore, at the request of defense counsel, the Court also specifically instructed the jury, before the victim impact witnesses testified and then again as a part of the court's final jury instructions, that the victim impact testimony it heard about Jeff Mitchell 'is not an aggravating circumstance and cannot be considered by you as such in advising the court as to what punishment should be imposed upon Omar Jones" (TR 1593, 1598, 1792).

The instructions requested by the defense either were not proper or were covered adequately by the instructions the trial court gave to the jury. There was no error.

ISSUE X

THE PRETRIAL MOTIONS AT ISSUE HERE WERE DENIED PROPERLY

Here, Jones complains of the denial of a laundry list of pretrial motions. These motions raise various constitutional attacks on Florida's death penalty statutes and procedures (some of which, i.e., the constitutionality of the CCP and HAC aggravators, have no bearing whatever on this case), and are the kind that repeatedly have been found meritless. As for the request for

individual and sequestered voir dire, the State has noted previously that this request was granted with respect to any and all jurors who had any knowledge about the case, As for the motion to prohibit impeachment of the defendant by prior criminal convictions, the record shows that no evidence of Jones' prior criminal convictions was presented to the jury. Nor was any Williams rule evidence presented in this case. Finally, as defense counsel acknowledged, the notice of waiver of the mitigating circumstance of no prior criminal history required no ruling by the trial court (TR 307).

The State already has addressed Jones' allegations of prosecutorial misconduct and bad faith, as well as the issue of the proportionality of Jones' death sentence. There is no need to repeat these arguments.

This issue presents nothing of merit.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the State respectfully asks this Court to affirm the judgment below in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Judith Dougherty, 2172 Timberwood Circle S., Tallahassee, Florida 32301, this 24th day of September, 1996.

CURTIS M. FRENCH
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