IN THE SUPREME COURT OF FLORIDA



DARCUS WRIGHT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 85,070

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR ST. LUCIE COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

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

## STATEMENT OF THE CASE AND FACTS

Appellant's statement of the case and facts is incomplete, often factually inaccurate, misleading, and sometimes incoherent. For example, he completely neglects to mention the guilt-phase testimony of Howard Siegal, from whom Appellant tried to borrow a gun the night before the murder. (T 1891-1901). Nevertheless, because of the page limitation, Appellee cannot present its own statement of facts. Appellant has raised 26 issues in a 100-page brief. To put the issues in factual context and to make all of the necessary arguments in response to them, Appellee has reached its page limit. Thus, the State will rely on its statement of facts set forth in the respective arguments.

## SUMMARY OF ARGUMENT

Issue I - Appellant waited until the end of the State's case to complain that he could not see the exhibits as the witnesses testified from them. Given the tardiness of his request, he has failed to preserve this issue for review. Any error, however, in not suggesting that Appellant move from his seat was harmless beyond a reasonable doubt.

Issue II - Appellant's absence from a bench conference during jury selection, to which he would not have had any input, was not error. Even if it were, however, it was harmless.

Issue III - There was no reason for the trial court to hold an evidentiary hearing during jury selection when Appellant saw a hangman's noose drawn on one of the prosecutor's tablets. Even should it have held a hearing, its remedy was not a mistrial.

Issue IV - Appellant's absence from a bench conference during the guilt phase, and again during the penalty phase, to which he would not have had any input, was not error. Even if it were, however, it was harmless.

Issue V - Appellant's absence during bench conferences during jury selection was not error, given

that the parties were discussing hardship challenges, rather than peremptory challenges. Any error, however, was harmless.

Issue VI - The facts supported an instruction on stealthy entry. Even if they did not, such an instruction was harmless, given other evidence of intent to commit burglary.

Issue VII - Appellant failed to preserve his objection to the peremptory challenge of an African American juror where he failed to renew his objection when the panel was sworn. Regardless, the State gave a race- and gender-neutral reason for striking the juror which was not merely pretextual.

Issue VIII - Appellant's special guilt-phase instructions were not an accurate statement of the law, and they were confusing and misleading. Any error in failing to give them, however, was harmless.

Issue IX - No attorney-client privilege attached to Appellant's research request slips to jail personnel; they were, in fact, public records. Regardless, defense counsel gave them to the State as part of discovery; thus, any privilege was waived.

Issue X - This Court has previously upheld the standard instruction on premeditation. It should do so here.

Issue XI - To the extent Appellant has properly pled an issue, he failed to preserve his motion to suppress because no objection was made at the time Appellant's statement to the police was introduced. Regardless, the motion to suppress was properly denied. Even were it not, the admission of Appellant's statement was harmless beyond a reasonable doubt.

Issue XII - This Court has previously held that the State need not allege felony murder in the indictment in order to argue it and instruct the jury on it. Thus, the indictment was not constructively amended.

Issue XIII - The trial court did not err in allowing the State to argue, and in instructing the jury on, felony murder where the indictment only alleged premeditated murder.

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

Issue XV - The trial court did not abuse its discretion in denying Appellant's motion for continuance where Appellant had no commitment from any witness that they would be there.

Issue XVI - Appellant's absence from a bench conference during the penalty phase wherein the parties discussed the availability of witnesses for scheduling was not error. Even if it were, however, it was harmless.

Issue XVII - The trial court properly inquired into Appellant's desire to waive the introduction of several depositions in lieu of live testimony, and properly found that Appellant voluntarily, knowingly, and intelligently waived the presentation of such evidence before the jury. Any error, however, was harmless, given that Appellant presented the depositions for the trial court's consideration.

Issue XVIII - The record supports the trial court's rejection of the "capacity to appreciate" mitigating factor.

Issue XIX - The record supports the trial court's rejection of the "extreme duress" mitigating factor.

Issue XX - Appellant never requested another attorney or self-representation. Thus, there was no need for a Nelson inquiry when Appellant complained about his attorney during the penalty phase. Regardless, the trial court conducted an adequate inquiry and determined that there was no reasonable basis to discharge counsel.

Issue XXI - Until the elocution hearing prior to sentencing, Appellant never requested another attorney or self-representation. Thus, there was no need for Nelson inquiries when Appellant complained about his attorney during the guilt and penalty phases. Regardless, the trial court conducted adequate inquiries and determined that there was no reasonable basis to discharge counsel.

Issue XXII - This Court has previously upheld the constitutionality of the "felony murder" aggravating factor.

Issue XXIII - This Court has previously held that the standard instruction on nonstatutory mitigating factors is adequate; thus, the trial court is not required to give instructions on each individual nonstatutory factor.

Issue XXIV - This Court has previously upheld the constitutionality of the statutory mental mitigating factors even though they contain the modifiers "extreme," "substantial," and "substantially."

Issue XXV - This Court has previously held that the State can present evidence relating to the facts of a prior violent felony. Here, the facts supported the offense for which Appellant was convicted--aggravated battery--even though he was originally charged with attempted first degree murder.

Issue XXVI - Appellant is not deprived of meaningful appellate review because he cannot supplement the record with the record from Appellant's prior violent felony conviction. The time for using such record was during the cross-examination of the State's witness relating to this prior offense.

## ARGUMENT

### ISSUE I

WHETHER APPELLANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY HIS INABILITY TO VIEW EXHIBITS USED BY THE WITNESSES DURING THEIR TESTIMONY (Restated).

There is no question that Appellant was present in the courtroom during every witness' testimony. Although several witnesses used demonstrative and photographic exhibits to explain their testimony to the jury, not once did Appellant or his attorney request permission for Appellant to move so that he could see the exhibit while a witness was testifying. Rather, at the end of the State's case, Appellant himself complained to the court that he had not been able to see the exhibits during the witnesses' testimony and that counsel had neglected to ask the trial court for permission to move, even though Appellant had asked counsel to do so. (T 2163-64). Upon inquiry by the trial court, defense counsel indicated that there could be tactical reasons for Appellant not to move to see the exhibits, and that he would explain them to Appellant, but defense counsel agreed that Appellant should be allowed to move if he wanted to do so during any forthcoming testimony. (T 2164-65). There was, however, no more testimony presented during the guilt phase of the trial.

On appeal, Appellant now claims that his inability to see the exhibits was "fundamentally unfair," and deprived him of his rights to confrontation, due process, effective assistance of counsel, and a fair trial. **Brief of Appellant** at 28-31. To support his contentions, Appellant relies principally on Waters v. State, 486 So. 2d 614, 615 (Fla. 5th DCA), rev. denied, 494 So. 2d 1153 (Fla. 1986). In Waters, defense counsel had twice objected to the defendant's inability to see the exhibits being used by the State's witnesses during the trial. On both occasions, the trial court allowed the defendant, who was shackled, to view the exhibit out of the presence of the jury. When a crime scene technician returned to the witness stand, defense counsel's objection that the defendant could not see the exhibit was overruled. On appeal, the

Fifth District held that the trial court committed reversible error by not allowing the defendant to view the exhibit during the witness' testimony.

Unlike in Waters, Appellant did not indicate to the trial court his desire to see the exhibit during the witnesses' testimony until after the State had rested its case. By that time, Appellant's request was too late. Repeatedly throughout his trial, Appellant raised complaints and objections through his attorney. (T 1256-59, 1378, 1380-81, 1808). Had Appellant felt strongly enough about his inability to see the exhibits, he could have convinced his attorney to seek permission, or he could have raised the issue to the court outside the presence of the jury before the end of the trial. After all, he ultimately raised the issue. There is no reason he could not have done it sooner. Instead, he sat on his hands and waited until the close of the State's case before making his desires known.

As this Court has held so many times,

> [t]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

This maxim is exemplified in Howard v. State, 484 So. 2d 1319, 1321 (Fla. 3d DCA), rev. denied, 492 So. 2d 1332 (Fla. 1986). In Howard, defense counsel requested the defendant's presence at the charge conference, which was denied. Although the district court held that the charge conference was not a critical stage of the trial mandating a defendant's presence, it nevertheless held that,

> as a general rule, a request for the defendant's presence at any stage of the trial should be honored. Where, as here, however, it is untimely and is made at a noncritical stage of trial, the trial court does not err in denying the request. By allowing the charge conference to proceed without raising the issue of his client's presence effectively waived any objection that could have been made concerning Howard's absence.

Id. at 1321 (emphasis added).

Although witnesses' testimony, unlike a charge conference, constitutes a critical stage of the proceedings, Appellant nevertheless waived any right he had to see the exhibits during the witnesses' testimony. He could have made a timely request, but did not do so. By waiting until the end of the State's case, he precluded any remedy and established a classic "gotcha." Under these circumstances, he should be precluded from raising the issue.

Appellant premises his argument, however, on the doctrine of fundamental error, the application of which requires no contemporaneous objection. It is well-established that "[t]he doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." Smith v. State, 521 So. 2d 106, 108 (Fla. 1988). Here, Appellant has made no showing that he was prejudiced by his inability to see the exhibits. Having the ability to view the exhibits and read the transcripts of the witnesses' testimony in this appeal, Appellant has pointed to nothing in the witnesses' testimony about which he could have counseled his attorney. Rather, he has merely stated in conclusory terms that his rights to confront the witnesses and prepare his defense were violated. Such a statement hardly satisfies his burden of showing fundamental error. Cf. Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995) (finding that defendants have a constitutional right to be present during the exercise of pretrial juror challenges, but finding that "the record shows no prejudice to Coney."); Vileenor v. State, 500 So. 2d 713 (Fla. 4th DCA 1987) (finding judge's charge to jury in defense counsel's absence harmless even though defendant's right to counsel at every critical stage of the proceedings is a fundamental right: "The possibility that the appellant may have been prejudiced by the absence of counsel under the facts of this case is purely speculative and unsubstantiated.").

Even were this Court to agree, however, that the trial court reversibly erred by failing to invite Appellant *sua sponte* to move to view exhibits, the State submits that such error, even if fundamental, was

harmless beyond a reasonable doubt. Florida Statutes § 924.33 (1995) provides that

> [n]o judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

In State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), this Court acknowledged that section 924.33 made harmless error analysis applicable to all judgments, regardless of the type of error involved, and provided that there shall be no presumption that errors are reversible unless it can be shown that they are harmful. Id. at 1134.

In State v. Clark, 614 So. 2d 453 (Fla. 1992), this Court reaffirmed that the use of a pretrial deposition as substantive evidence by the State at trial where the defendant was not present for the deposition and was not informed of its possible use at trial "'created fundamental error by depriving [the defendant] of his constitutional right to confront and cross-examine the witnesses against him.'" Id. at 454 (quoting Brown v. State, 471 So. 2d 6, 7 (Fla. 1985)). However, citing to DiGuilio and several United States Supreme Court cases, this Court held that harmless error analysis should be applied to the constitutional violation: "'The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.'" Clark, 614 So. 2d at 454 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

As this Court stated many years ago, "the modern trend in criminal cases 'is to excuse technical defects which have no bearing upon the substantial rights of the parties. When procedural irregularities occur, the emphasis is on determining whether anyone was prejudiced by the departure. A defendant is entitled to a fair trial, not a perfect trial.'" Hoffman v. State, 397 So. 2d 288, 290 (Fla. 1981) (emphasis

added) (quoting Lackos v. State, 339 So. 2d 217, 219 (Fla. 1976)). See also Grossman v. State, 525 So. 2d 833, 844 (Fla. 1988) ("It is clear then, that with the exceptions noted, there is a strong presumption that constitutional errors are subject to harmless error analysis."), cert. denied, 489 U.S. 1071 (1989).

Based on the record in this case, it cannot be said that error was committed which injuriously affected the substantial rights of Appellant. Thus, given the mandate of section 924.33, given this Court's analysis in DiGuilio, and given this Court's application of harmless error principles to other violations of fundamental constitutional rights, this Court should affirm Appellant's conviction for the first-degree murder of Allison Prescod.

## ISSUES II AND III[1]

WHETHER APPELLANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY HIS ABSENCE DURING A GUILT-PHASE BENCH CONFERENCE AND WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO CONDUCT AN EVIDENTIARY HEARING RELATING TO APPELLANT'S CLAIM THAT THE PROSECUTOR DISPLAYED TO APPELLANT DURING JURY SELECTION A DRAWING OF A HANGMAN'S NOOSE (Restated).

During jury selection, the State objected to one of the questions posed to the venire by defense counsel, and the parties had a conference at the bench with the trial court. (T 1048-51). Immediately following this bench conference, defense counsel asked the trial court if they could approach the bench again. (T 1052). At the bench, the following colloquy occurred:

> MR. LAMOS: Your Honor, I am informed by my client that the prosecutor Ms. Denton has drawn a hangman's noose upon a legal pad and shown it to this defendant during the course of these proceedings and it may have terrorized him, and I'm inquiring as to whether or not that did occur.
>
> * * * *

[1] Because the factual basis for these two issues are identical, they are combined for the sake of brevity and clarity.

MS. DENTON: I've not shown my pad to anyone.

MR. LAMOS: Your Honor, I would like to see that pad. I would like to see if there's a hangman's noose on it, and then I would like for her to explain, if that's true, how he would know.

MS. DENTON: Judge, I think my pad is work product, and I'm swearing to this Court I have not shown my pad to that defendant at all.

THE COURT: Let me ask this: If this were a situation where your client was about to take the witness stand it would present different issues. We're doing voir dire here. In looking at your client, he does not appear to be changed in demeanor at all. Without making a factual finding, let me ask that that type of artwork not occur in this courtroom. If it doesn't occur, it can't be seen by anyone, whether intentional or otherwise; but it has no place in the courtroom.

Again, I'm not making a factual determination it has occurred because I don't think it's necessary here, but let's leave it out of the courtroom as a general proposition.

MR. LAMOS: Your Honor, just -- please, Your Honor, my client has specifically requested that I request an evidentiary hearing on that, and the basis for that is that it would be an ethical violation and a possible basis for recusal of an individual prosecutor. He has specifically requested that of me, and I think that it is appropriate. And although it's distasteful, I think that to deny that is to bring an issue in the case.

THE COURT: If I hold an evidentiary hearing and if it turned out it was correct -- at this stage of the proceedings if it turned out it was correct, is there any prejudice here? Not from your client's perspective, from you as a lawyer. Again, Mr. Lamos, I recognize that you're in a very difficult position here because you're dealing with I guess what can be accurately described as a difficult client, and I'm taking that into account.

But as an officer of the Court, assuming for the moment that Ms. Denton is a wonderful artist and drew it and showed it to your client; okay? At this stage of the proceedings where there is no visible reaction from your client that would taint him in the eyes of the jury, and in fact no visible reaction from your client, would any remedy be necessary other than the one that I just mentioned?

MR. LAMOS: What was that remedy, please?

THE COURT: Just saying, folks, if it's occurring, don't do it. Artwork can be done other than in the courtroom. Is there any other remedy?

MR. LAMOS: No, I cannot envision another remedy; however, I think that it is, if true, a very sad and pathetic commentary, simply because it's a total lack of humanity.

THE COURT: Now, again I don't need to make the factual determination --

MR. LAMOS: I know.

THE COURT: -- because I don't think any remedy other than what I have just mentioned is necessary. I have complete confidence that at this point no one is going to be doing art work in here. If you folks want to draw cubes, that's fine; but beyond that, if anybody needs to express their artistic ability, it will be done outside the courtroom. And I'm completely comfortable with the fact that it will not be a difficulty during the proceedings.

As far as your client's request is concerned, the request for an evidentiary hearing is denied. As far as the overall general admonition to all parties involved in this case, the admonition has been given.

(T 1052-55) (emphasis added).

In Issue II, Appellant claims that his absence from the bench conference violated his rights to confrontation, due process, effective assistance of counsel, and a fair trial. **Brief of Appellant** at 31-33. As noted by Appellant, "[a] defendant has a due process right to be present at any stage of the proceeding that is critical to its outcome, if his presence would contribute to the fairness of the proceedings," but "[a] defendant has no right to be present when his presence would be useless or the benefit of a shadow." Rose v. State, 617 So. 2d 291, 296 (Fla. 1993), cert. denied, 114 S. Ct. 279, 126 L. Ed. 2d 230 (1994). Moreover, "[t]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record." Id.

Defense counsel requested this bench conference during jury selection outside of his client's

presence. At no time did Appellant object to the bench conference or request to participate in it. Nor did defense counsel seek to include Appellant in the conference. Under these circumstances, there was no error. Shriner v. State, 452 So. 2d 929, 930 (Fla. 1984).

Even if objections by Appellant and/or requests to participate were not necessary, there was still no error. In Rose, the defendant complained about the effectiveness of his attorney, and the trial court conducted a hearing, but refused to dismiss defense counsel. When defense counsel moved to withdraw because of an "ethical conflict," the trial court held an *in camera* discussion with defense counsel outside the presence of Rose. During this discussion, defense counsel indicated that there was a difference of opinion between he and Rose as to theories of strategy, that he had doubts about Rose's innocence, and that he was beginning to lose confidence in his abilities to represent Rose. The trial court ultimately denied defense counsel's motion to withdraw. Id. at 295.

On appeal, Rose claimed that his rights to confrontation and due process were violated by the *in camera* discussion between the trial court and defense counsel. This Court, however, found that the discussion could not have had an effect on the fairness of the proceedings. The trial court and defense counsel did not discuss evidence or anything else that would bear on the court's ultimate sentencing decision, Rose could not have added anything of import to the conversation, and by the time of sentencing Rose's guilt had already been decided. Id. at 296.

In the present case, defense counsel related a factual allegation from Appellant to the trial court, but the trial court declined to hold an evidentiary hearing or make factual findings regarding the allegation. Thus, Appellant could have added nothing of import to the discussion. Assuming the allegation to be true, the trial court instead determined that Appellant was not prejudiced in any way by the event. By the trial court's own observations, Appellant made no outward showing that he was upset by the drawing. Thus, the jury was not tainted or otherwise influenced by Appellant's observation of the drawing. The fact that

Appellant was inwardly disturbed by it would not have affected the fairness of the trial, his right to confront the witnesses against him, or his right to due process. No evidence relating to Appellant's guilt was presented or discussed at the bench conference. Moreover, the issue arose in jury selection, and thus no evidence had been educed at the trial. Finally, the allegation bore no connection to the trial court's ultimate sentencing decision in this case. Therefore, Appellant's absence at the bench conference regarding the prosecutor's alleged display of a drawing depicting a hangman's noose did not fundamentally prejudice Appellant's rights. See Roberts v. State, 510 So. 2d 885, 890-91 (Fla. 1987), cert. denied, 485 U.S. 943 (1988).

Even if it were error to engage in such a conference in Appellant's absence, however, such error was harmless beyond a reasonable doubt. See Gethers v. State, 620 So. 2d 201, 202 (Fla. 4th DCA 1993) (finding harmless defendant's absence from hearing on admissibility of previously undisclosed statement); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As noted above, Appellant could not have added to the proceeding given the trial court's refusal to hold an evidentiary hearing or make factual findings. The conference occurred during jury selection, there was no discussion of evidence, and Appellant displayed no emotion which would have affected the venire members' ability to be fair and impartial jurors. Thus, Appellant's absence, if error, was harmless.

In Issue III, Appellant claims that "[o]nce a claim of prosecutorial misconduct or prejudice is made, the trial court must hold an inquiry into the matter." **Brief of Appellant** at 33-35. To support his contention, Appellant cites to Alfonso v. State, 443 So. 2d 176 (Fla. 3d DCA 1983), and Duque v. State, 498 So. 2d 1334 (Fla. 2d DCA 1986), both of which mandate an inquiry when there has been "an impermissible contact with the jury or when the jury may have had access to potentially prejudicial material (such as a television or newspaper report) regarding the case." Alfonso, 443 So. 2d at 177. See also Duque, 498 So. 2d at 1337 (finding reversible error in trial court's refusal to inquire whether jurors

had read prejudicial news article). But see State v. Hamilton, 574 So. 2d 124, 130 (Fla. 1991) (emphasis in original) (finding that an evidentiary hearing into a jury's exposure to potentially prejudicial material "need not be conducted when an *unreasonable* allegation of juror misconduct is made."); Amazon v. State, 487 So. 2d 8, 11 (Fla.) (holding that a defendant must at least allege facts establishing a prima facie argument for prejudice when alleging juror misconduct), cert. denied, 479 U.S. 917 (1986).

Appellant also cites to Bello v. State, 547 So. 2d 914 (Fla. 1989), wherein the trial court reversibly erred in shackling the defendant during trial without inquiring into the necessity for shackling. Such circumstances do not apply here. Next, Appellant cites to Smith v. State, 500 So. 2d 125 (Fla. 1986), wherein the district court applied the then-existing per se rule of reversal where the trial court failed to conduct a Richardson hearing. Appellant fails to note, however, that this Court expressly overruled Smith in State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995), and held that a trial court's failure to conduct a Richardson inquiry is subject to harmless error analysis.

In this case, although the trial court did not make any factual findings, it assumed the allegation to be true and determined that Appellant was not prejudiced by his exposure to the prosecutor's drawing. Appellant had no outward emotional reaction, and the venire was totally unaware of the event. Even defense counsel could not envision a remedy beyond admonishing the parties not to draw in the courtroom. Under these circumstances, no further inquiry was necessary, much less mandated.

Were the trial court in error, however, for failing to inquire into the factual circumstances and make factual findings, such error was harmless on this record. The trial court made a finding that Appellant was not prejudiced. Thus, even if it had questioned the parties as to the facts surrounding the allegation and had learned that the prosecutor had drawn a hangman's noose and had shown it to Appellant, the fact remains that Appellant was not prejudiced. As a result, no other corrective actions would have been warranted. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Appellant cites to Ingraham v. State, 502 So. 2d 987 (Fla. 3d DCA), rev. denied, 511 So. 2d 999 (Fla. 1987), to support his contention that the error cannot be deemed harmless "[b]ecause of [his] absence from a hearing in which prejudice might have been shown had he been present." **Brief of Appellant** at 35. In Ingraham, the trial court individually questioned each juror in the defendant's absence as to whether anyone saw the defendant being escorted in handcuffs and, if so, whether they could remain fair and impartial. On appeal, the district court held that Ingraham's presence during the inquiry was essential to assist his counsel in questioning the jurors. Without his presence a finding of prejudice or lack thereof could not be made.

Appellant's analogy, however, begs the question. There was no inquiry in this case; thus, Appellant's presence or absence was nonessential, or, at most, harmless error. Moreover, the jurors in the present case were not exposed to anything potentially prejudicial; thus, no findings in that respect had to be made. Finally, unlike in Ingraham, prejudice could be determined without a factual inquiry and factual findings; thus, Appellant's presence or absence had no effect. As noted, even assuming that any factual findings supported Appellant's allegation, no constitutional right was violated. Thus, a lack of factual findings is harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Consequently, this Court should affirm Appellant's conviction for the first-degree murder of Allison Prescod.

## ISSUE IV

WHETHER APPELLANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY HIS ABSENCE DURING TWO BENCH CONFERENCES--ONE DURING THE GUILT PHASE AND ONE DURING THE PENALTY PHASE (Restated).

Throughout the guilt phase of this case, defense counsel made objections at Appellant's request. On several of those occasions, the trial court noted that defense counsel was working with a "difficult"

client, but that he needed to use his judgment in presenting objections. (T 1592-94, 1808-16). At the close of the State's case, the trial court asked defense counsel if he was going to present witnesses on Appellant's behalf, and counsel asked to confer with his client. (T 2145). After the recess, defense counsel asked to approach the bench and noted that he was "furious" and "not in the proper state of mind to go forward." (T 2146). He informed the court that his client wanted a Nelson inquiry, but he asked the court to recess for the day so that he could compose himself. (T 2147). Again, the trial court recognized that defense counsel was working under "adverse circumstances" and was the fourth attorney assigned to represent Appellant. (T 2148). However, the trial court told defense counsel that unless a client seeks the attorney to act illegally or unethically, "the client controls their own fate." (T 2149). Thereafter, the trial court recessed for the evening. (T 2152). It conducted a Nelson inquiry as the first order of business the following day. (T 2157-66).

Just prior to the penalty phase, defense counsel moved for a continuance because several out-of-state witnesses were not available to testify. The trial court took the motion under advisement while defense counsel pursued the witnesses' attendance. (T 2397-2404). The following day (Wednesday), the State presented its penalty-phase case, and the defense partially presented the testimony of Dr. McKinley Cheshire. The next day (Thursday), before the conclusion of Dr. Cheshire's testimony, the trial court inquired into the availability of other witnesses for scheduling purposes. Defense counsel indicated that he had no definite commitments as to when any of the out-of-state witnesses could attend. (T 2540-43). Appellant stated, however, that he had given his attorney the names of local witnesses with whom he had not made contact. (T 2544). Defense counsel stated that he had investigated those witnesses and had either gotten no response or had decided not to use them. (T 2545-46). When defense counsel requested a continuance until Monday, the trial court recessed briefly for defense counsel to try to make contact with the out-of-state witnesses. (T 2555-59). After the recess, defense counsel indicated that he had no new

information, but that Appellant's aunt, Tina Hodge-Bowles, had committed to being there. He had no information about any other witness. (T 2560). The parties discussed the issue again at the end of Dr. Cheshire's testimony, and the trial court decided to convene the following day (Friday). (T 2648-51).

On Friday, the parties engaged in a lengthy conversation about the availability of defense witnesses and the potential use of depositions in lieu of their testimony. Ultimately, the trial court dismissed the jury for the day and decided to reconvene on Monday. (T 2663-2704).

On Monday, defense counsel informed the trial court that no witnesses had shown up, and he detailed his efforts at obtaining their appearance. (T 2751-52). Appellant, however, complained that it was defense counsel's fault that the out-of-state witnesses were not there, that he could have secured the attendence of local witnesses, and that defense counsel had not made sufficient effort to confer with him regarding mitigating evidence. (T 2752-61). Ultimately, the trial court recessed for Appellant to confer with counsel. (T 2761-64).

After the recess, defense counsel asked to approach the bench and told the trial court that communication between himself and his client was breaking down. He related generally his frustration with Appellant and stated that he had no clear idea what Appellant wanted to present because Appellant would not talk to him. His impression was that Appellant wanted to introduce records and materials and relitigate the guilt phase, but he was not sure. (T 2768-76).

After the bench conference, Appellant complained again that defense counsel was responsible for the unavailability of his witnesses. The trial court told Appellant to communicate with his attorney, but Appellant complained that counsel had not provided him with discovery materials and records he needed to make decisions about presenting mitigation. The trial court recessed again to allow Appellant and his attorney to talk. (T 2776-84).

After the recess, defense counsel indicated that Appellant refused to speak to him. Upon inquiry

by the trial court, Appellant waived his right to use witnesses' depositions in lieu of their testimony and waived his right to testify. (T 2784-86). After defense counsel's motion for continuance was denied, the defense rested. (T 2787-91).

In this appeal, Appellant complains that his absence from the two bench conferences deprived him of his right to confrontation, due process, effective assistance of counsel, and a fair trial. **Brief of Appellant** at 36-38. Initially, Appellant claims that "it was totally improper to spill out attorney-client conversations to the prosecution." Id. at 37. The record, however, speaks for itself. At all times, both the trial court and defense counsel were cognizant of the attorney-client privilege and counsel was very careful not to divulge any privileged information. For example, at the bench conference during the guilt-phase, the trial court asked defense counsel, "Are you having difficulty -- I don't want to know the specifics unless your client opens the door to it. Does this deal with the issue of whether you will or not present a case, or is that something we can nail down now?" Defense counsel responded, "It absolutely has to do with that issue." (T 2149) (emphasis added).

In addition, Appellant complains that "the defense attorney's act of informing the trial court that Appellant's ideas of penalty phase mitigation . . . was without merit is clearly improper and prejudicial." **Brief of Appellant** at 37. Again, the record speaks for itself. Counsel was clearly frustrated with Appellant because Appellant refused to speak to him. In fact, according to counsel, their relationship had "broken down to total and complete accusations." (T 2769). Moreover, Appellant had openly accused defense counsel of failing to investigate and secure the attendance of witnesses, of failing to confer with him regarding mitigation, and of failing to provide him with material/records. (T 2666-67, 2672-63, 2752-53, 2757-59). According to defense counsel, Appellant was not allowing him to exercise his discretion in representing Appellant. As a result, defense counsel was "totally blind . . . as to where [the trial was] going." (T 2771). Appellant wanted him to "go get other records and bring them in" (T 2771), but since

he did not know what Appellant wanted to present, and since Appellant would not talk to him, counsel could not give him legal advice regarding the evidence Appellant wanted to present. He was not, contrary to Appellant's assertion, commenting on the nature of Appellant's mitigation. Rather, he was informing the trial court that Appellant potentially wanted to present evidence from the guilt phase that was not admissible during the penalty phase, but he did not know because Appellant would not talk to him.

As for Appellant's absence at these two bench conferences, the circumstances of this case are very similar to those in Rose v. State, 617 So. 2d 291 (Fla. 1993), cert. denied, 114 S. Ct. 279, 126 L. Ed. 2d 230 (1994). As discussed previously in Issue II, the defendant in Rose complained about the effectiveness of his attorney on the second day of trial, and the trial court conducted a hearing, but refused to dismiss defense counsel. When defense counsel moved to withdraw because of an "ethical conflict," the trial court held an *in camera* discussion with defense counsel outside the presence of Rose. During this discussion, defense counsel indicated that there was a difference of opinion between he and Rose as to theories of strategy, that he had doubts about Rose's innocence, and that he was beginning to lose confidence in his abilities to represent Rose. The trial court ultimately denied defense counsel's motion to withdraw. Id. at 295.

On appeal, Rose claimed that his rights to confrontation and due process were violated by the *in camera* discussion between the trial court and defense counsel. This Court, however, found that the discussion could not have had an effect on the fairness of the proceedings.

> No evidence was presented or discussed during the in camera discussion. There was no discussion of anything that would bear on the judge's ultimate sentencing decision in this case. The conversation focused on the problems between Rousen and Rose and on Rousen's concern about his ability to provide a proper defense given those problems. Rose could not have added anything of benefit to this discussion. The judge was well aware of Rose's complaints about Rousen. Further, the judge was fully aware of the history of problems between Rose and his previous attorneys.

> We do not find the fact that counsel expressed his personal doubts about the guilt or innocence of his client to have prejudiced Rose. Counsel's personal qualms about Rose's guilt or innocence were not relevant to any sentencing issue. Indeed, by the time of sentencing Rose's guilt had been established. We see no way that this ex parte discussion could have influenced the judge's sentencing decision.

Id. at 296 (footnote omitted).

As in Rose, no evidence was presented or discussed during either bench conference. Nor was anything discussed that would affect the trial court's ultimate sentencing decision. Rather, the discussions focused on counsel's and Appellant's differences of opinion regarding defense strategies, and counsel's frustrations in representing Appellant given the breakdown in communication. The trial court, however, was well aware that Appellant had been, and was continuing to be, a difficult client. Appellant had had three other attorneys who withdrew because of their inability to work with Appellant. The trial court acknowledged several times during the trial that defense counsel was having to perform under "difficult circumstances" with a "difficult client." Finally, as in Rose, nothing was discussed at either bench conference which would have affected the trial court's ultimate sentencing decision. In fact, the trial court bent over backwards to accommodate Appellant and to make sure that Appellant received a fair trial. Again, the record speaks for itself. Appellant's absence at the bench conferences did not fundamentally prejudice Appellant's rights. Cf. Roberts v. State, 510 So. 2d 885, 890-91 (Fla. 1987), cert. denied, 485 U.S. 943 (1988).

Even if it were error to engage in such a conference in Appellant's absence, however, such error was harmless beyond a reasonable doubt. See Gethers v. State, 620 So. 2d 201, 202 (Fla. 4th DCA 1993) (finding harmless defendant's absence from hearing on admissibility of previously undisclosed statement); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As noted above, there was no discussion regarding the substance of any evidence or anything that would bear on the court's ultimate sentencing decision. Given

the trial court's awareness of difficulties between Appellant and defense counsel, and Appellant's history of disagreements with prior counsel, any error in failing to include Appellant in these discussions at the bench was harmless. Therefore, this Court should affirm Appellant's conviction and sentence for the first-degree murder of Allison Prescod.

## ISSUE V

WHETHER APPELLANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY HIS ABSENCE DURING BENCH CONFERENCES WHEN JURORS WERE EXCUSED FOR HARDSHIP OR EXTREME INCONVENIENCE (Restated).

Jury selection in this case commenced on November 7, 1994--two and a half weeks before Thanksgiving. During the initial remarks to the venire, the trial court indicated that the trial would last approximately 14 days, and that the court would convene through the Labor Day holiday and on Saturdays and Sundays until it was completed. (T 731). It then asked the panel whether there was "anything about the schedule which would cause anybody here any undue hardship or difficulties in accommodating [the parties]." (T 731). The following jurors responded affirmatively: Ms. Bertolini had a trip to Georgia planned for the coming weekend (T 731); Mr. Miller had been subpoenaed by the State in another case for the following day (T 732); Ms. Freeman would have difficulty arranging transportation for her daughter after school (T 732-33); Mr. Deegan had had back surgery and could not sit for long periods of time (T 733); Ms. Moore had relatives coming in from out of town and had committed to babysitting one of their children for three days while the guests go to Orlando (T 734); Mr. Lewis was a foster parent to some emotionally handicapped children whom he took to counseling every day (T 734); Ms. Vaneron had preexisting plans to leave town for the week of Thanksgiving (T 735); Ms. Hutyanszki would suffer income deprivation during a lengthy trial (T 735-36); Mr. Grose, who was in the trucking business, had a large commercial move scheduled for the upcoming weekend that he needed to supervise (T 736); Ms.

Carroll had medical tests scheduled the following week (T 737); Ms. Abbott had preexisting plans to go to New York on November 17 for Thanksgiving (T 737-38); Ms. Tarach was on medication and might not be able to endure a lengthy trial (T 738-39); Mr. Baechle had preexisting plans through his employer to attend school in Tampa the following week (T 739); Ms. Blakney had airline reservations to Ohio for November 16-20 (T 739); Mr. Villafane was on medical disability and had no transportation to and from court (T 740); Ms. Robinson had a project due for her master's program which could not be completed on time without working weekends (T 742-43).

Prior to tendering the panel to the State for questioning, the trial court requested a bench conference to discuss persons "that qualify either for hardship or for cause that are in a position not to be rehabilitated." (T 764) (emphasis added). The trial court told the parties, "[I]f there is anybody . . . in the group that you want to inquire of, I won't excuse them at this point unless it is clear they need a hardship excuse or otherwise. But some of these folks, clearly, if they were downstairs before they came up would qualify as hardship excusals because of the duration of the trial." (T 765). During the parties' discussions, the trial court indicated that it would only excuse those persons to which the parties agreed since neither side had had an opportunity to question them. (T 768, 769, 774). Of those persons previously listed, neither party objected to the excusal for hardship or cause[2] of Mr. Deegan, Ms. Freeman, Mr. Vaneron, Mr. Lewis, Ms. Moore, Ms. Abbott, Ms. Carroll, Ms. Tarach, Ms. Blakney, Mr. Villafane, and Ms. Robinson. (T 765-78).[3]

Later in the afternoon, Mr. Grose asked to use the telephone before 5:00 p.m. to call work. (T 822-

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[2] The trial court seemed to use these bases interchangeably.

[3] Appellant challenges his absence only during the excusal for hardship of Ms. Vaneron, Ms. Abbot, and Ms. Robinson. He does not challenge his absence during the excusal of anyone for cause, nor does he challenge the propriety of the hardship excusals themselves. **Brief of Appellant** at 39.

23). At the bench, the trial court stated to the parties, "I'm inclined to let him go on a hardship basis. He's outlined a hardship basis." (T 823). Neither party objected, and Mr. Grose was excused. (T 823-24).

After the trial court excused the venire for lunch the following day, Mr. Fitch remained and told the court that he needed to be at work at 6:00 p.m. and that it took him between two and three hours to get to work. (T 936-37). At the bench, the State agreed but defense counsel initially objected to his excusal for hardship. Nevertheless, the trial court excused Mr. Fitch for hardship. (T 938).

At the end of that day, the trial court called the attorneys to the bench and asked, "Is there any reason that I should not excuse Ms. Bertolini? No one has discussed with her her trip to Georgia. She's been sitting through this for two days. Is there any reason I should not excuse her?" (T 1085). The attorneys raised no objection, and the trial court excused Ms. Bertolini for hardship. (T 1085).

Near the end of the following day, a new panel of jurors was brought to court. Again, the trial court indicated the possible length of the trial and the proposed schedule of working through the holiday and weekends. It then asked the new panel if the schedule would cause any undue hardship. The following people responded affirmatively: Mr. Born was a sole proprietor who would suffer economic hardship (T 1287); Mr. Floyd needed to care for his injured wife at home (T 1287); Mr. O'Brien had preexisting plans to travel to Pittsburgh on November 16 for his mother's surgery (T 1287-88); Ms. Parks would suffer economic deprivation because she is paid on a commission basis (T 1288); Mr. Eplin would suffer economic deprivation without being able to work (T 1289). Mr. Sprague later indicated that he had a hearing impediment (T 1303-04), and Mr. Maratea indicated that he was a diabetic and had a doctor's appointment scheduled for the following week for a slow heart rate (T 1305-06).

As before, the trial court called the attorneys to the bench to discuss obvious hardship excusals before tendering the panel to the State. (T 1308-09). Without objection from the parties, the trial court thereafter excused for hardship or medical reasons Mr. Maratea, Ms. Parks, Mr. O'Brien, Mr. Floyd, and

Mr. Born.[4,5] (T 1309-12, 1317-19).

In this appeal, Appellant claims that his absence at the bench conferences where jurors were excused for hardship deprived him of his right to confrontation, due process, effective assistance of counsel, and a fair trial. **Brief of Appellant** at 38-46. For the following reasons, the State submits that Appellant's rights were not violated or that, if they were, such error was harmless beyond a reasonable doubt.

Florida Statutes § 40.013 (1993) lists persons who are automatically disqualified from service on a jury, or who may be excused by the trial court. Subsection 40.013(6) specifically states: "A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity." In North v. State, 65 So. 2d 77 (Fla. 1952), aff'd, 346 U.S. 932 (1953), a capital case, a jury venire of 150 persons was drawn randomly as prescribed by law. Prior to the trial, the trial court excused some of those jurors without the parties' knowledge and consent. The defendant objected and raised the issue before this Court, relying on a statutory provision that mandated the defendant's presence "[a]t the calling, examination, challenging, impaneling and swearing of the jury."[6] Id. at 79. In rejecting the defendant's complaint, this Court held:

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[4] The parties agreed to question Mr. Sprague further, and he later indicated that his impediment would not affect his ability to sit on the case. (T 1310-11, 1341-42). Mr. Eplin changed his mind about his hardship and remained with the panel. (T 1319). Appellant's brief is factually incorrect regarding Mr. Sprague's and Mr. Eplin's excusal for hardship. **Brief of Appellant** at 39.

[5] The following day, Appellant objected, through defense counsel, that he was not being included in the bench conferences. (T 1378). The trial court made the following ruling: "As far as your client not personally being at the bench, that request is denied. He is not co-counsel in this case. He is not proceeding pro se in this case. Mr. Lamos, he can ask you questions, you can tell him what happened at the bench, and that is absolutely satisfactory for him to be fully advised of the nature of these proceedings." (T 1380).

[6] This statutory provision is now encompassed in Florida Rule of Criminal Procedure 3.180(a)(4).

> The trial Judge has a broad discretion in excusing prospective jurors for reasons personal to such persons. A defendant in a criminal case is not entitled to any particular juror or jury. . . . Excusing jurors is no part of the calling, examination, challenging, impaneling or swearing of the jury; therefore, it is not necessary that the defendant be present when prospective jurors are excused by the trial Judge.

Id. (emphasis added; citations omitted).

Similarly, in Calloway v. State, 189 So. 2d 617 (Fla. 1966), rev'd on other grounds, 409 F.2d 59 (5th Cir. 1969) (on reh'g), a capital case, the trial court initially questioned the jury panel "about any hardship they would undergo because of service on the trial jury." It then questioned the panel about any conscientious scruples the jurors might have regarding the death penalty. Id. at 620. Based on the jurors' responses, the trial court excused several jurors without allowing the parties to question them. The defendant challenged the procedure based on a statutory provision that permitted counsel to question jurors after examination by the court.[7] Id. In rejecting the defendant's challenge, this Court held the following:

> The trial judge has, and should have, wide latitude in excusing jurors because of sacrifice that would result from service on the jury and he has a duty, as we have said, to excuse a juror from service in a capital case, if the juror represents that he could not find a verdict of guilty knowing that it would result, his fellows agreeing, in imposition of the death penalty. We find no error in the procedure followed by the judge with reference to excusing at the outset jurors who because of hardship should not be required to serve and jurors who because of scruples could not.

Id. at 621 (emphasis added).

Similarly, in Hall v. State, 420 So. 2d 872 (Fla. 1982), a capital case, the defendant claimed that he was absent during some of the jury selection. In rejecting his argument, this Court noted: "Hall was not present at the roll call of prospective jurors or at the general qualification of prospective jurors. He was, however, present at all critical stages of the proceedings and available to consult with his counsel."

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[7] Florida Statutes § 913.02 was repealed in 1970. The substance of this provision is now contained in Florida Rule of Criminal Procedure 3.300(b).

Id. at 873.

Likewise, in Robinson v. State, 520 So. 2d 1 (Fla. 1988), a capital case, the trial court questioned a panel of prospective jurors as to their general qualifications pursuant to Florida Statutes §§ 40.01 and 40.013(1) & (2) in the defendant's absence. On appeal, this Court stated,

> We do not reach the question of whether appellant validly waived his presence during the prior general qualification process because we do not find that process to be a critical stage of the proceedings requiring the defendant's presence. We see no reason why fundamental fairness might be thwarted by defendant's absence during this routine procedure.

Id. at 4.

Finally, in Remeta v. State, 522 So. 2d 825 (Fla.), cert. denied, 488 U.S. 871 (1988), a capital case, the defendant claimed that the trial court erred in not obtaining his express waiver of his presence during the general qualification of the jury. In rejecting this claim, this Court held:

> It is important to understand the distinction between the general qualification of the jury by the court and the qualification of a jury to try a specific case. In the former, the court determines whether prospective jurors meet the statutory qualification standards or whether they will not qualify because of physical disabilities, positions they hold, or other personal reasons. The general qualification process is often conducted by one judge, who will qualify a panel for use by two, three, or more judges in multiple trials. Counsel or a defendant does not ordinarily participate in this type of qualification process, although neither is excluded from doing so. In many instances, counsel and the defendant are not present because this preliminary qualification process occurs days prior to trial.
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> * * * *
>
> It is uncontroverted that Remeta was present during the qualification of the specific jury to try this case, the entire individual *voir dire*, and the exercise of his peremptory challenges. We find no error in the general jury qualification process.

Id. at 828 (emphasis added). See also Henderson v. Dugger, 925 F.2d 1309, 1316 (11th Cir. 1991) (emphasis added; footnote omitted) ("Even if Henderson was absent, a general qualification of the jury is

not a 'critical stage' in the proceedings. The court was merely deciding which jurors were to be excused for age, hardship, etc. It is difficult to see what the defendant could have added to this proceeding."), modified on other grounds, 968 F.2d 1070 (11th Cir.), cert. denied, 113 S. Ct. 21, 121 L. Ed. 2d 554 (1992); United States v. Barnette, 800 F.2d 1558, 1566-68 (11th Cir. 1986) (finding that district court's excusal pretrial of 249 out of 400 prospective jurors for hardship did not violate Jury Selection and Service Act), cert. denied, 480 U.S. 935 (1987).

Based on the above line of cases, the State submits that Appellant's absence from the bench conferences during which the trial court excused several jurors for hardship did not deprive him of any constitutional right. The trial court could have excused these persons pursuant to section 40.013(6) prior to trial and without any input from counsel since general qualifications are not a "critical stage" of the proceedings. The fact that it entertained hardship excuses during the trial is of no moment. Nor does it matter that the trial court sought the parties' input and/or agreement to the excusals. It would have acted well within its discretion to determine on its own that the jurors had presented a legitimate reason for hardship excusal. The fact that it sought the parties' input and/or agreement does not negate its overriding discretion to excuse the jurors even over objection.[8]

To support his position that his absence was fundamentally unfair, Appellant cites to numerous cases which are both factually and legally inapposite.[9] In all of the cases cited to by Appellant, the

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[8] In fact, the trial court refrained from excusing Ms. Bertolini until the parties had an opportunity to question her, but later excused her for hardship when the parties failed to inquire into her reason for hardship excusal. (T 766, 1085). Similarly, the trial court excused Mr. Fitch for hardship even over defense counsel's objection. (T 938).

[9] In fact, Appellant spends two and a half pages in his brief contending that Coney v. State, 653 So. 2d 1009 (Fla. 1995), which issued after Appellant was tried and sentenced, should be applied to this case. **Brief of Appellant** at 42-46. Besides the fact that the rule of law in Coney is inapposite to the present case, this Court specifically stated in the opinion that its "ruling today clarifying this issue is prospective only." 653 So. 2d at 1013.

principle of law announced is that a defendant has a right to be physically present when potential jurors are questioned, challenged, impanelled, and sworn. E.g., Coney, 653 So. 2d at 1013 (emphasis added) ("We conclude that the rule means what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised.")[10]; Turner v. State, 530 So. 2d 45, 47-49 (Fla. 1987) (emphasis added) ("We cannot agree that Turner waived his right to be present during the exercise of challenges or that he constructively ratified or affirmed counsel's actions."), cert. denied, 489 U.S. 1040 (1989); Francis v. State, 413 So. 2d 1175 (Fla. 1983) (emphasis added) ("[W]e are unable to assess the

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Apparently misunderstanding the standard regarding which decisions should be applied retroactively and which should not, Appellant vehemently asserts that this Court's ruling "broke no new ground," **brief of appellant** at 42, and did not announce a "new rule," id. at 42-44, but should be applied retrospectively. This Court stated in Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991) (quoting Witt v. State, 387 So. 2d 922, 929 (Fla. 1980)), however, that "only 'fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding'--in effect, 'jurisprudential upheavals'--require retroactive application; 'evolutionary refinements' do not." Then, in Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992), this Court held that "any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final." In Wuornos v. State, 644 So. 2d 1000, 1007 n.4 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995), however, this Court clarified its holding in Smith as follows: "We read Smith to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise." See also Lett v. State, 21 Fla. L. Weekly D271 (Fla. 1st DCA Jan. 23, 1996) (finding Coney not applicable to "pipeline" cases); Ogden v. State, 658 So. 2d 621, 622 (Fla. 3d DCA 1995).

As Appellant concedes, Coney was not a "new rule of law" equivalent to a "jurisprudential upheaval." Rather, it was an evolutionary refinement in the law. Moreover, as in this case, where the decision sought to be applied retrospectively specifically provides that it is prospective only, Smith would not mandate retrospective application. Thus, Coney should not be applied to this case.

[10] The State would note that Appellant's quoted excerpt of this Court's holding adds the following sentence which does not appear in the final published opinion: "Obviously, no contemporaneous objection by the defendant is required to preserve this issue for review, since the defendant cannot be imputed with a lawyer's knowledge of the rules of criminal procedure." **Brief of Appellant** at 41-42. This Court's opinion was later revised to exclude this sentence. Coney v. State, 20 Fla. L. Weekly S204 (Fla. Apr. 27, 1995).

extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised."); Salcedo v. State, 497 So. 2d 1294, 1295 (Fla. 1st DCA 1986) (emphasis added) ("The challenges of jurors is one of the essential stages of a criminal trial where the defendant's presence is required."), rev. denied, 506 So. 2d 1043 (Fla. 1987). No "challenges," however, were made at the bench conferences in this case. Rather, jurors were excused or disqualified from service based on hardship or extreme inconvenience. As this Court's decision in North provides, "[e]xcusing jurors is no part of the calling, examination, challenging, impaneling or swearing of the jury; therefore, it is not necessary that the defendant be present when prospective jurors are excused by the trial Judge." 65 So. 2d at 79. Thus, Appellant's cases are both factually and legally inapposite.

Even should Appellant have been included in the bench conferences, however, his absence was harmless beyond a reasonable doubt. Appellant was present in the courtroom during the general qualification process, and was at all times accessible to his attorney, and vice versa. Moreover, Appellant was present in the courtroom during the qualification of the specific jury to try his case, the entire individual *voir dire*, and the exercise of all peremptory challenges. Contrary to his assertion on appeal, it is difficult to imagine what Appellant's presence could have added to the hardship excusal conferences. Regardless, the trial court could have excused the jurors for hardship over Appellant's objection. Thus, Appellant's absence from the bench conferences, even if error, did not prejudice his ability to select a fair and impartial jury. Consequently, this Court should affirm Appellant's conviction for the first-degree murder of Allison Prescod.

## ISSUE VI

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY GIVING AN INSTRUCTION ON STEALTHY ENTRY (Restated).

During the guilt-phase charge conference, the trial court asked the State whether the stealthy entry instruction relating to burglary was applicable. The State responded, "Well, it could, Your Honor. I mean, he goes around. It's the back entrance." (T 2205). The trial court then remarked, "Let's see. From that aspect, Mr. Lamos, coming in from the back?" Defense counsel replied, "I guess." The trial court ruled, "I'll go ahead and give that." (T 2205). No other objections or comments were made about this instruction.

Nevertheless, Appellant claims in this appeal that the facts did not support this instruction, and thus the trial court committed fundamental error by giving it. **Brief of Appellant** at 46-49. Appellant rests his claim on fundamental error because counsel failed to object. The lack of objection, of course, renders this claim unpreserved, and thus procedurally barred, unless Appellant can show fundamental error. Golden v. State, 497 So. 2d 914, 915 (Fla. 3d DCA 1986) (finding challenge to stealthy entry instruction not preserved and finding no fundamental error in giving instruction under facts). However, "[f]or an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process." Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978) (citation omitted). The State submits that the facts supported the stealthy instruction in this case; thus, the trial court committed no error, much less fundamental error.

In Baker v. State, 636 So. 2d 1342 (Fla. 1994), a case inexplicably not acknowledged by Appellant, the defendant entered the back yard of a home and broke out a window in the back. The home was enclosed by a fence. When a burglar alarm rang, the defendant fled. He was apprehended and charged with burglary of a dwelling. At trial, the court instructed the jury that "structure" included "'the enclosed

space of ground and outbuildings immediately surrounding that structure'" and that intent could be inferred from stealthy entry. Id. at 1343 (quoting Fla. Stand. Jury Instr. (Crim.) 135, 135-36). The district court affirmed the conviction, finding that "there was ample evidence of Baker's stealthy entry onto the curtilage which, by definition, was part of the dwelling." Id.

On a certified question, this Court found that, "for the purposes of the burglary statute, it would not matter whether Baker was in Wilson's secluded back yard or back bedroom; in either circumstance, the courts must consider him to have been within Wilson's dwelling." Id. at 1344. This Court also stated that

> the curtilage is not a separate location wherein a burglary can occur. Rather, it is an integral part of the structure or dwelling that it surrounds. Entry onto the curtilage is, for the purposes of the burglary statute, entry into the structure or dwelling. Baker entered Wilson's yard which was protected by a fence and shrubbery where the owner had an expectation of privacy. Even though he did not enter Wilson's house, he did enter Wilson's dwelling.

Id.

In the present case, Detective Fitch, one of the crime scene investigators, testified that the sides and back of the Prescod home are enclosed by a wooden fence with gates on each side. (T 1614). He further testified that there is an enclosed patio on the back side of the house within which there are sliding glass doors leading into the house. (T 1614). These sliding glass doors were Appellant's point of entry into the home. (T 1616-17). The owner of the home, Carmelita Prescod, testified that Appellant did not have permission to be in her home. (T 1961).

Not only did Appellant enter the back yard which was protected by a fence, but he also entered an enclosed patio before entering the home through the sliding glass doors. Thus, as in Baker, there is no question that Appellant entered or remained in a structure owned by another without permission.

As for Appellant's stealth in doing so, "[s]tealth is not an element of burglary. Stealthy entry, together with the absence of owner or occupant consent, is an evidentiary tool with which to establish

prima facie proof of intent to commit an offense." Baker, 636 So. 2d at 1344. Instead of approaching the front door and gaining entry by consent, Appellant parked in front of the empty lot next door (T 1955), transgressed the gate to the fence, and the door to the patio, before shooting through the sliding glass doors. Since the burglary was complete upon entering the curtilage to the yard, the fact that Appellant shot out the glass doors does not negate his previous stealthy entry. Thus, under these facts, which are almost identical to those in Baker, the trial court properly instructed the jury on stealthy entry. See also Baker v. State, 622 So. 2d 1333, 1336 (Fla. 1st DCA 1993), aff'd, 636 So. 2d 1342 (Fla. 1994); Florida v. State, 522 So. 2d 1039, 1041-42 (Fla. 4th DCA) (finding stealthy entry instruction proper where defendant split screen and entered covered patio of condominium), rev. denied, 531 So. 2d 1355 (Fla. 1988).[11]

Appellant also contends that the stealthy entry instruction "served to relieve the state from proving Appellant intended to commit a crime when he crashed through the door." **Brief of Appellant** at 48-49. In Waters v. State, 436 So. 2d 66, 70 n.4 (Fla. 1983), this Court specifically rejected this argument, finding that "[t]he establishment of such a prima facie case of intent [by proving the elements of the stealthy entry instruction] . . . does not take away the defendant's presumption of innocence." Therefore, this argument must fail.

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[11] Appellant cites to several cases to the contrary, none of which are even remotely applicable. For example, in Vinson v. State, 575 So. 2d 1371 (Fla. 4th DCA 1991), no facts are given in the opinion; thus, it is impossible to make any kind of analogy to this case. In Van Teamer v. State, 417 So. 2d 1129 (Fla. 5th DCA 1982), the instruction was approved of, but no facts were recited in the opinion to support the instruction. In Peters v. State, 76 So. 2d 147 (Fla. 1954), the defendant rang the victim's doorbell repeatedly, knowing that she was inside, then kicked out a screen and crawled in a kitchen door or window when she would not let him in. Similarly, in Harrell v. State, 647 So. 2d 1016 (Fla. 4th DCA 1994), the victim was stopped at a red light when the defendant "tried unsuccessfully to open her locked car door[,] threw a rock through a window and dove in through the shattered window. Finally, In Frazier v. State, 664 So. 2d 985, 986 (Fla. 4th DCA 1995), the opinion only states that "the appellant smashed through the glass door of the home in broad daylight and in the presence of the victims." It does not say whether the door was in front or in back, or whether the defendant entered the house's curtilage by transgressing a fence and a covered patio as in the present case. None of these cases support Appellant's claim.

Even were this Court to find, however, that the facts did not support this instruction, any error in giving it was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The State did not rely exclusively on the presumption provided in the instruction to prove the intent element of burglary. The information alleged that Appellant entered the home of Carmelita Prescod without consent with the intent to commit an aggravated assault or assault therein. (R 1-3). The State proved Appellant's intent by his statement to Officer Winn that he wanted to turn himself in because he just shot his wife for trying to take his kids; by his statement to Detective Beck, "That's what she gets for trying to take away my children;" by the fact that he entered the premises with a loaded weapon; and by the fact that he, in fact, assaulted both Allison Prescod and Carmelita Prescod. Thus, even were the stealthy entry instruction not given, there is no reasonable possibility that Appellant's conviction for burglary would have been different. Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Allison Prescod.

## ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTION TO THE STATE'S PEREMPTORY CHALLENGE OF A PROSPECTIVE ALTERNATE JUROR (Restated).

In this appeal, Appellant claims that the trial court failed to critically evaluate the State's reasons for striking a prospective African American juror (Ms. Cooper), and that the State's reasons were pretextual. **Brief of Appellant** at 49-53. Ms. Cooper, however, was being considered as an alternate juror. (T 1539). The panel of 12 jurors had already been selected. (T 1537-38). Moreover, neither of the two alternates became a member of the panel deciding Appellant's guilt or sentence. Thus, "under these circumstances no error is demonstrated affecting appellant's right to a fair trial before an impartial jury. As the challenged juror [did not serve], the state's use of the peremptory challenge did not encroach on

appellant's constitutional guarantee." Rector v. State, 605 So. 2d 559 (Fla. 4th DCA 1992), rev. denied, 613 So. 2d 8 (Fla. 1993).

Moreover, Appellant accepted the final jury of twelve and the two alternates without any objections, or reservation of his prior objection.[12] In Joiner v. State, 618 So. 2d 174 (Fla. 1993), this Court agreed with the district court that

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

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

Even if he has raised a justiciable issue, and has preserved his objections, his claims are wholly without merit. Ms. Cooper made numerous inconsistent statements regarding the standard to which she would hold the State in proving their case against Appellant. For example, when asked about her feelings

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[12] Appellant had made an earlier objection to the lack of a cross-representation of the community in the jury pool. (T 722). He renewed his objection before the jury was sworn and moved to strike the entire panel, but he did not renew his objection to the State's peremptory strike of Ms. Cooper. (T 1545-46).

toward the death penalty, she stated,

> But for me to say, yes, this -- this person deserves the death penalty, it would have to be proven to me. I mean, totally. I just couldn't have no type of doubt that that person could be innocent, . . . With any type of doubt in my mind that that person could possibly be innocent, I couldn't send them. . . . I have got to be totally convinced without any type of shadow of any type of doubt that that person is guilty.

(T 1428-29) (emphasis added). In response, the State asked, "But are you going to have to be convinced beyond a shadow of doubt as you just said, beyond all doubt like you just said?" (T 1430). Ms. Cooper responded, "At this point, yes." (T 1430).

Later, when asked if her beliefs would interfere with or substantially impair her ability to vote for death when the facts and the law would call for it," Ms. Cooper said that they would not. (T 1451-52). And when asked if she could sign the verdict form recommending a sentence of death, she responded, "I feel like I could, yes; but, like I say, I'm going to have to be -- I would have to be convinced that under -- it just -- it would have to weigh a lot that he's guilty for me to sign it." (T 1452). Then when the State sought to clarify whether she would hold the State to a higher burden during the guilt phase knowing that Appellant might be subject to the death penalty, Ms. Cooper responded,

> Yes. I don't feel like -- I don't feel like I will hold the State, as you are saying, more, but I just want to make sure that the evidence is there that he did commit this crime. That's all I'm saying. For a person to go and say that a person is guilty of a crime, the evidence should be there saying that this person did do that particular crime.

(T 1455-56).

After the parties completed selecting the panel of 12 jurors, and began selecting alternates, the State moved to excuse Ms. Cooper for cause based on her answers. (T 1539). Defense counsel objected and claimed that it was a race- and gender-based strike. The trial court denied the State's motion for cause, and the State struck the juror peremptorily. (T 1539). Defense counsel renewed his objection, and the

State relied on its same reasons for striking Ms. Cooper. (T 1539-40). The trial court ruled as follows:

> Okay. Again stressing what I mentioned earlier, in my ability to observe her as well as listen to her, I made some notes here, as with a number of other jurors, concerning some of her responses. Although she doesn't rise to the level of a cause challenge, I do think that her responses are such that there is a race neutral basis and a gender neutral basis here. At one point on capital punishment she talked about how the case must be proven without any doubt. She then fluctuated and, quite frankly, I couldn't identify what standard she would apply. In observing her she appeared to be very troubled on the issue of Phase, II, and had a difficulty in responding to some of the questions and hesitated in responding to a number of questions.

(T 1541). The trial court then went through the factors for evaluating whether the stated reasons were pretextual, and found that they were not. (T 1541-43). Finally, it concluded:

> So based on that I do think that there are very serious concerns that certainly a lawyer would have on the prosecution side of the aisle with regard to what standard this juror was going to apply. And I think that it is race neutral, and I think that it is gender neutral. So I will overrule the objection, and I will allow the State to exercise its peremptory.

(T 1543).

As for the propriety of the trial court's finding that the State's reasons were gender- and race-neutral, this Court has previously stated that, "[i]n Florida, there is a presumption that peremptories will be exercised in a nondiscriminatory manner." State v. Johans, 613 So. 2d 1319, 1321 & 1322 (Fla. 1993). "[T]he trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. Only one who is present at the trial can discern the nuances of the spoken word and the demeanor of those involved." Reed v. State, 560 So. 2d 203, 206 (Fla.), cert. denied, 498 U.S. 881 (1990). In reviewing such determinations on appeal, reviewing courts "must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process." Id. "Substituting an appellate court's judgment for that of the trial judge on the basis of a cold record is not a solution because it would provide an

automatic appeal in every case where a prospective minority juror was challenged." Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992).

The trial court's evaluation of the State's reasons, and its ruling on this issue, encompasses three and a half pages of the transcripts. (T 1540-43). It read this Court's decision in State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988), cert. denied, 487 U.S. 1219 (1989), and applied the factors therein for evaluating a challenge such as this. (T 1540-42). It also relied on its own evaluation of the juror's demeanor and attitude and determined that her answers to certain questions, although not rising to the level for a cause challenge, were sufficient on which to base a race- and gender-neutral peremptory challenge. Thus, Appellant's claim that the trial court did not critically evaluate the State's reasons is wholly without merit. See Alexander v. State, 643 So. 2d 1151, 1152 (Fla. 3d DCA 1994) (finding state's challenge facially race-neutral given juror's responses during voir dire that he "might not be able to follow a specific jury instruction"); Green v. State, 583 So. 2d 647, 651-52 (Fla. 1991) (finding state's challenge facially race-neutral given juror's dissatisfaction with death penalty even though juror could follow the law), cert. denied, 112 S. Ct. 1191, 117 L. Ed. 2d 432 (1992).

Similarly, his claim that the State's reasons were pretextual is also without merit. In Slappy, this Court held that the presence of one or more of the following factors would tend to show that the stated reasons for striking a minority juror were pretextual in nature:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.

522 So. 2d at 22.

In applying these factors, the trial court found that the first and second ones were not applicable.

(T 1542). As for the third one, the trial court stated that, "while there was some questioning of this juror and some additional questioning of the juror, I do not find that the juror was singled out in order to evoke a certain response. I think that the questions that were asked of her were relevant and necessary . . . ." (T 1542). It also found that the prosecutor's stated reasons were related to the facts of the case. (T 1542). Finally, regarding the last factor, the trial court stated, "Thus far there's been no one else, at least that has been identified to me, that had the same problem that has not been challenged by the State." (T 1542-43).

In this appeal, but not in the trial court, Appellant claims that Ms. Blouin "shared the exact same opinion as [sic] in reference to the burden of proof." **Brief of Appellant** at 53. However, the excerpt of her comments provided by Appellant belie this assertion. As noted, Ms. Blouin stated,

> I would just like to say that I wouldn't have a problem signing the verdict form; but as I think Ms. Cooper has been trying to say, I understand that a human life has been lost, and that's very important, but it would be beyond a reasonable doubt because this is also a human life that has been placed in the Court's hands. So it would have to be proved beyond a reasonable doubt in my mind as well.

(T 1545) (emphasis added). Obviously, she would not hold the State to any higher burden of proof as Ms. Cooper suggested she would. Therefore, the record supports the trial court's determination that the State's reasons for excusing Ms. Cooper were race- and gender-neutral and not a pretext. As a result, this Court should affirm Appellant's conviction for the first-degree murder of Allison Prescod.

## ISSUE VIII

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S PROPOSED INSTRUCTIONS ON "GOOD FAITH BELIEF" (Restated).

During the guilt-phase charge conference, defense counsel requested several special instructions relating to the charge of burglary. (T 2221-23). The first two, in particular, related to a "good faith belief" and a "mistake of fact" defense. (R 770, 773, 774). Defense counsel contended that the element of

burglary of "intent to commit an offense therein" could be negated if Appellant had a good faith belief, though mistaken, based on his attorney's advice, that he had a right to enter the home and remove his children.

After a lengthy discussion and a break for lunch during which the trial court read defense counsel's authority for such an instruction (T 2222-32), the trial court proposed an amalgam of the various instructions proposed by defense counsel (T 2254). It then decided that it was going to give either its own or defense counsel's version. (T 2250). Without waiving its objection to any such instruction, the State chose the trial court's version, but requested several modifications which were denied. (T 2255-57). Defense counsel then objected to a portion of the court's instruction, and the trial court indicated that it would give its own version or none at all because it did not believe that defense counsel's instructions were an accurate statement of the law. (T 2257-59). Defense counsel accepted the trial court's instruction. (T 2259).

At the beginning of the next day's session, the trial court made the following comments:

> Folks, as far as the requested special jury instructions are concerned, as I'm sure it was apparent when we were talking about them before and after lunch, I was really wrestling with the idea of the propriety of those instructions. And, quite frankly, it was based really almost entirely on State versus Eric Johnson, trying to glean from that opinion the lengths to which -- or I should say the scope of the law as interpreted by the appellate courts for the requirement of instructing on a theory of defense instruction. And the circumstances in the Johnson case were rather extreme.
>
> I thought about it all through lunch yesterday, all afternoon yesterday, all evening last night. And looking at both the instruction that I typed up and also the ones that defense typed up, the one that I typed up is confusing. I think the defendant's requested instructions are confusing. I'm not at all convinced that this is even a defense in a criminal case.
>
> I guess the thing that makes the starkest -- brings that issue into clearest focus is if Mr. Milner had said, "'You have a right to your children. You can go down to Mrs. Prescod's house, kick in the door, barge in, grab your children and leave." I have a very hard time fathoming that, from a

> policy point of view, the appellate courts would craft that as a legal defense in Florida, rather than something that the legislature would need to create.
>
> Again, in looking at the language of both the defense requests and the one that I typed up, there's no definition of reasonable reliance or what is reasonable reliance, what is good faith on the part of an individual, and the whole issue here is intent. Intent is an element of burglary. It's covered by the standard jury instructions.
>
> Both parties may fully and completely argue the intent element on the burglary instruction. The defense is free to argue whether or not the defendant possessed the intent to commit an offense or was traveling there because of what he heard from his attorney. What I'm -- but I'm going to deny the special requested instructions.

(T 2285-87). Defense counsel renewed his objection to the trial court's rejection of his requested instructions after the jury was instructed. (T 2370-71).

In this appeal, Appellant claims that the trial court abused its discretion in rejecting his requested instructions on "good faith belief." **Brief of Appellant** at 53-56. He contends that "there was evidence, and inferences from the evidence, which could support a theory that Appellant entered the house to retrieve his children on reliance of his attorney's advice that he had a legal right to his children." Id. at 54. He further contends that "[a]dvice of counsel can be a valid legal defense to a specific intent crime." Id. at 55.

It is well-settled that "a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence supporting the instruction." Bedoya v. State, 634 So. 2d 203, 204 (Fla. 3d DCA 1994) (emphasis added). Here, as the trial court found, Appellant's special instructions did not relate a "rule of law" which was applicable to his defense. Whether based on the advice of an attorney, or on a mistake of fact, it is inconsistent with the concept of ordered liberty to allow a person to break into another person's home by force and take a child by violence, even if the child was born to the taker.

> [T]he proposition not only is lacking in sound reason and logic, but it is utterly incompatible with and has no place in an ordered and orderly society such as ours, which eschews self-help through violence. Adoption of the proposition would be but one step short of accepting lawless reprisal as an appropriate means of redressing grievances, real or fancied.

State v. Ortiz, 124 N.J.Super. 189, 192, 305 A.2d 800, 802, 596 P.2d 1088, 1090 (1973) (citations omitted) (quoted in Thomas v. State, 584 So. 2d 1022, 1024 (Fla. 1st DCA), cause dism., 587 So. 2d 1331 (Fla. 1991). Cf. Youngblood v. State, 515 So. 2d 402, 404 (Fla. 1st DCA 1987) (affirming rejection of special instruction on duress/necessity where instruction might support defense against trespass, but not against burglary), rev. denied, 520 So. 2d 587 (Fla. 1988).

Defense counsel wanted to negate the element of intent to burglary, i.e., Appellant's intent to commit an offense once inside the Prescod home, without consent, by theorizing that Appellant mistakenly believed that he had a legal right to possess his children. Appellant analogizes his case to cases which hold that a person may take property by force, violence, or putting in fear where the person has a good faith belief that he or she is the owner or is entitled to possess specific property. Compare Thomas v. State, 526 So. 2d 183 (Fla. 3d DCA) (holding that defendant's good faith belief that he owned bicycle in possession of victim negated intent element of armed robbery charge), rev. denied, 536 So. 2d 245 (Fla. 1988), with Thomas v. State, 584 So. 2d 1022 (Fla. 1st DCA) (holding that defendant's good faith belief that victim owed him money did not negate intent element of armed robbery charge because defendant had no ownership rights in specific coins and bills in victim's possession), cause dism., 587 So. 2d 1331 (Fla. 1991). Such cases, however, cannot possibly justify a defendant's armed burglary of someone's residence to take by violence children to whom the defendant is not exclusively entitled. Appellant's wife had physical custody of their children. Even though Appellant had shared parental rights, and thus had the legal right to see his children, Appellant had no legal right to take physical custody of them by violence.

Even if such an analogy could be made, Appellant's instructions are confusing and misleading, and

thus do not accurately state the law. While a defendant is entitled to a jury instruction on a legal defense that is supported by the evidence, "the trial court should not give instructions which are confusing, contradictory or misleading." Bedoya, 634 So. 2d at 204. See also Maynard v. State, 660 So. 2d 293, 297 (Fla. 4th DCA 1995); Blitch v. State, 427 So. 2d 785, 787 (Fla. 2d DCA 1883). The following instruction proposed by Appellant does not, by itself, express his defense; rather, it merely indicates that a defense may be based on a mistake of fact:

> An issue in this case is whether Darcus Wright unlawfully entered or remained in a dwelling with the intent to commit an offense. Where it appears that the actions of the Defendant are based on an erroneous good faith belief that he had a right to enter the property he cannot be convicted of burglary even though he may have been mistaken because of his good faith belief.

(R 774) (emphasis added). The second instruction expresses his defense, but is misleading:

> If you find that Darcus Wright had discussed this matter with a competent attorney and that he acted pursuant to that advice, then you must find that the Defendant did not enter or remain in a dwelling with intent to commit an offense, and you should bring in a verdict of not guilty.

(R 773) (emphasis added).

Together, these instructions are confusing and misleading. To what does "this matter" relate--Appellant's "right to enter the property"? What defines a "competent attorney"? What does "that advice" encompass? Appellant's attorney testified that he told Appellant the morning of the murder that there must have been a misunderstanding about his visitation the day before. He assured Appellant that he would call his wife's attorney and try to get some visitation that afternoon or the next day since visitation had not been an "issue" between Appellant and his wife. (T 1916-17, 1919, 1925). Contrary to Appellant's assertion, he was not "in effect" told "that he could have the children that afternoon." **Brief of Appellant** at 55. Nor do Mr. Milner's statements to Appellant logically infer that "Appellant would have the right to enter the house to get the children which he believed he had a legal right to." Id. Mr. Milner did not in any way

state or imply to Appellant that he could enter the Prescod home by force and take the children out of the home by force, violence, or putting someone in fear. Thus, Appellant's instructions are confusing and misleading, and the trial court properly rejected them. See Bedoya, 634 So. 2d at 204-05; cf. Holley v. State, 423 So. 2d 562, 564-65 (Fla. 1st DCA 1982); Perkins v. State, 463 So. 2d 481, 482-83 (Fla. 2d DCA 1985) (affirming rejection of specialized instruction which required comment on the evidence).

Even if they should have been given, however, the court's failure to do so was harmless since there was sufficient evidence to support a conviction for premeditated murder. Appellant had tried to borrow a gun the night before from a friend. (T 1891-94). Although the friend did not give him one, he obtained one somewhere else. With that weapon, he went to his in-laws' home where his wife and children were staying and parked his car in front of the vacant lot next door. (T 1955). He went through the fenced backyard and into the covered patio in the back where he shot out one of the sliding glass doors into the house. (T 1616-21). He followed his wife and two children into her bedroom and shot her at point blank range in front of her children, killing her. (T 1721, 1950, 2029, 2031-32). He then grabbed his kids, kicked open his mother-in-law's bedroom door, pointed the gun at her and said, "I'll kill you," and left with the kids after saying, "She is dead." (T 1953). Shortly thereafter, he approached Officer Winn and told him that he wanted to turn himself in because he "just shot [his] wife for taking [his] kids." (T 1777). Then, at the police station, when Detective Beck remarked rhetorically, "Man, what a messed up scene," Appellant remarked very calmly, "That's what she gets for trying to take away my children." (T 1865-66). Given this evidence, even if the trial court erred in rejecting Appellant's proposed instructions, there is no reasonable possibility that the verdict of guilty to first-degree murder would have been different. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Allison Prescod.

## ISSUE IX

WHETHER THE STATE IMPROPERLY OBTAINED RECORDS FROM THE JAIL WHICH CONTAINED APPELLANT'S REQUESTS FOR RESEARCH MATERIALS FROM THE LAW LIBRARY (Restated).

At a pretrial conference several weeks before the trial, defense counsel sought expanded law library privileges for Appellant. This request was based on Appellant's representation in a letter to the judge that the State had obtained Appellant's records from the St. Lucie County Jail which contained his requests for research material from the law library. At that point, the trial court made no findings of fact and took defense counsel's request under advisement. (T 553-67).

Several days later, defense counsel moved to dismiss the indictment based on prosecutorial misconduct regarding the State's procurement of Appellant's research requests. (R 459-61). At the hearing on the motion, defense counsel admitted that he provided Appellant's jail records to the State as part of reciprocal discovery, and that the records he provided contained Appellant's research request slips. (T 608-09). However, he indicated that he ignored the research slips because they were not relevant to him; thus, his inadvertent disclosure of them should not be considered a waiver. (T 634-35).

The prosecutor then presented the testimony of her secretary who stated that she received a supplemental answer to discovery from defense counsel on October 10, 1994, which indicated that jail records were available to be inspected. (T 624-25). Three days later, the secretary obtained 233 pages of records from defense counsel. (T 625-27). According to her, the prosecutor had already obtained 213 pages of documents directly from the jail. (T 628).

Defense counsel then presented the testimony of Michael Kessler, a private attorney who had represented approximately 12 capital defendants. Mr. Kessler testified that it was common for capital litigators to obtain all types of records for mitigation purposes and to scan through them for pertinent information. (T 640-45). On cross-examination, however, Mr. Kessler agreed that the State could not be

charged with intercepting information if the defense provided the information to the State. (T 647).

Following this testimony, defense counsel contended that a Sixth Amendment violation had occurred. He also claimed that he had not waived the issue because he "didn't see any significance in those records which would cause [him] to consider a Sixth Amendment violation." (T 657). Finally, he claimed that a Sixth Amendment right must be personally waived by the defendant and cannot be waived by an attorney. (T 651).

After significant argument by both parties, the trial court took the motion under advisement. (T 658). Shortly thereafter, it issued a nine-page order denying Appellant's motion. Its legal conclusion was as follows:

> At the times relevant to this motion, the Defendant's right to counsel had attached. Traylor v. State, 596 So. 2d 957 (Fla. 1992). He was under arrest and in custody for this homicide, and eventually indicted for it. The Defendant had clearly asserted his right to counsel. The State has not argued to the contrary.
>
> This Court finds that there has been no showing of any attorney-client confidences, communications, or conferences breached by the State. The items contained in Defense Exhibit #1 were provided to the State without any governmental misconduct or impropriety. This is not a situation of the State making use of data they obtained illegally and knew they shouldn't have.
>
> Further, there has been no showing that the data contained within the papers in question falls within the umbrella of Sixth Amendment protection. The Defense did not produce any evidence to show that Defendant's Exhibit #1 falls within Sixth Amendment protection. Thus, unless the connection is obvious on the face of the materials, there is no relief needed. This court has reviewed Defendant's Exhibit #1 and State's Exhibit #2 several times. How the library request forms impact on the Defendant's right to counsel is not apparent from the face of the materials.
>
> Even if the materials fell within Sixth Amendment protection, this Court does find a waiver due to the fact that the Defense presented most of the items contained in Defendant's Exhibit #1 to the State in the form of a discovery response. (See State's Exhibit #2.) Further, as is apparent above (see § I), the items contained in Defendant's Exhibit #1, that were not

> presented to the State in State's Exhibit #2, add nothing to the State's case, or their ability to prepare for trial.
>
> Even had this writer found a Sixth Amendment violation, the next issue would be the appropriate remedy. The Defense invited this court to dismiss the Indictment. Had a violation been established, this Court would not impose that remedy unless there was [sic] no means to cure the violation. The remedy sought is not an automatic one . . . . The cases where dismissal has been ordered involve extreme facts not present in this case.

(R 505-07) (citations and footnotes omitted).

In this appeal, Appellant renews his claim that the State acted improperly by obtaining his records from the jail which contained several requests by Appellant for cases and statutes from the jail's law library. **Brief of Appellant** at 56-57. Despite the fact, which he concedes, that his own attorney provided these request slips to the State as part of reciprocal discovery, he maintains that the "inadvertent disclosure of these materials by counsel did not waive any privilege Appellant had not to disclose the materials to the prosecution." Id. Thus, the real harm, according to Appellant, lies in the State's additional procurement of these materials directly from the jail. Id.

As the trial court found, the State did not illegally intercept any privileged information from Appellant or his attorney. Appellant requested research material from jail personnel, not his attorney; thus, no attorney-client privilege attached to the request slips. In fact, such documents constitute public records. §§ 119.07(1) & 945.10, Fla. Stat. (1995). Even were they somehow "privileged" or exempt from disclosure, defense counsel provided the research request slips as part of penalty-phase discovery. Thus, any such "privilege" or exemption was waived. Appellant's assertion that his attorney could not waive such a privilege is not entirely correct. As Professor Ehrhardt discusses in his treatise, the "[i]nadvertent disclosure of a privileged document during discovery may result in waiver. Generally, an attorney has the implied authority to make disclosure in the course of litigation that will result in a waiver of the attorney-

client protection for the matters disclosed." Ehrhardt, Florida Evidence § 502.8 at 272-73 (1995 Edition) (footnote omitted). See also James M. Grippando, Attorney-Client Privilege: Implied Waiver Through Inadvertent Disclosure of Documents, 39 U. Miami L. Rev. 511 (1985). Here, defense counsel's disclosure of Appellant's research request slips, even if inadvertent, waived any privilege that may have attached to them. Thus, no prosecutorial misconduct occurred, and the trial court's order denying Appellant's motion to dismiss the indictment is supported by the record. As a result, this Court should affirm Appellant's conviction for the first-degree murder of Allison Prescod.

## ISSUE X

WHETHER THE STANDARD INSTRUCTION ON PREMEDITATION DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL (Restated).

Although Appellant filed a written special instruction on premeditated murder (R 422-23), he did not in any way seek to have his instruction given to the jury. Neither the standard instruction nor his special instruction was discussed in any way. Yet, on appeal, Appellant claims that he was denied due process and a fair trial because the trial court gave the standard instruction. **Brief of Appellant** at 58-60. Given the lack of an objection to the standard instruction and a request that the special instruction be given in its stead, Appellant has failed to preserve this issue for appeal. Pietri v. State, 644 So. 2d 1347, 1355 n.10 (Fla. 1994).

Even had it been preserved, however, it is wholly without merit. This Court has repeatedly rejected attacks on the standard instruction--a fact Appellant fails even to acknowledge. E.g., Spencer v. State, 645 So. 2d 377, 382 (Fla. 1994); Pietri, 644 So. 2d at 1355 n.10 (Fla. 1994); Reaves v. State, 639 So. 2d 1, 6 (Fla. 1994), cert. denied, 115 S. Ct. 488, 130 L. Ed. 2d 400 (1995). Accordingly, Appellant's conviction for the first-degree murder of Allison Prescod should be affirmed.

## ISSUE XI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT TO DETECTIVE BECK (Restated).

Prior to trial, defense counsel filed a motion to suppress statements Appellant made to various officers of the Port St. Lucie Police Department. (R 191-93). At the hearing on the motion, Officer Winn testified that he was parked at an intersection in his patrol car writing a report when a grey car matching the description of an earlier BOLO report passed through the intersection. (T 238-39). The car returned to the intersection and drove over to where Officer Winn was parked. The driver, who Officer Winn identified as Appellant, got out and approached the officer who was sitting in his car. Appellant stated that he wanted to turn himself in. When Officer Winn asked him why, Appellant stated, "[B]ecause I shot my wife for trying to take my kids." (T 239). Two small children were in Appellant's car. (T 240). Officer Winn then called for backup, handcuffed Appellant, and put him in his patrol car. (T 241).

Sergeant Wilson responded to the scene and read Appellant his rights. (T 243-44). Appellant acknowledged that he understood them, but Sergeant Wilson did not seek a waiver because he had no intention of questioning Appellant. (T 256-57). Appellant gave Officer Wilson the name and number of a friend to take custody of the children. (T 258). Officer Winn then transported Appellant to the station and seated him on a bench until Detective Beck arrived. (T 245). On the way to the station, Appellant gave Officer Winn his father's number so that his father could come get the children. Appellant also volunteered that he turned himself in because his kids were with him and he did not want them to get hurt. (T 244).

Detective Beck testified that he went to the police station from the murder scene to interview Appellant. He conferred briefly with Officer Winn and then introduced himself to Appellant. He sat down on the bench next to Appellant, sighed, and said rhetorically, "Man, what a messed up scene," referring

to the murder scene. (T 271-72). Appellant responded, "That's what she gets for trying to take away my children." (T 272). Detective Beck believed he moved Appellant's handcuffs to the front of his body at this point and then removed his rights card from his pocket. Before reading Appellant his rights, Detective Beck asked Appellant if he wanted to make a statement, and Appellant invoked his right to an attorney. As a result, Detective Beck left. (T 272-73).

During arguments on the motion, defense counsel indicated that he was only challenging the statement Appellant made to Detective Beck. (T 291). Regarding this statement, defense counsel claimed that, although Appellant had been read his rights, he never explicitly waived them, and that Detective Beck's statement was designed to elicit an incriminating response. (T 286-88, 291-92). The trial court took the motion under advisement and later denied the motion by written order. (T 292; R 366-70).

In its five-page written order, the trial court made the following findings:

> The Defendant was clearly afforded full Miranda warnings. The Defendant fully understood all of his rights. The only statement by the Defendant subject to this motion is his response to Det. Beck's comment in the holding area of the Port St. Lucie Police Department. The comment by Det. Beck was not one that was "reasonable likely to elicit an incriminating response". See: Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. CT. 1682, 1689-1690, 64 L. ED. 2D 297 (1980). The comment was made by the Detective in the open room, in the presence of both Officer Winn and the Defendant. It was not directed to the Defendant, nor was there any testimony presented by the Defendant for this Court to find that the Defendant, subjectively, felt it was intended to elicit a response. As a result, there was no "interrogation" leading to the Defendant's comment. See: Innis, supra.
>
> Even assuming that Det. Beck's comment constituted "interrogation", it is not necessary that a Defendant verbalize an explicit waiver of Miranda rights. North Carolina v. Butler, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); . . .
>
> It was not until after making the comment that is the subject of this motion that the Defendant stated a desire to invoke his rights. On the contrary, the Defendant volunteered information and comments until that time. There was no coercion, threats or promises against, or in the presence

> of the Defendant. The Defendant was completely calm, understood his rights, and elected to speak freely and voluntarily until after he made the comment that is the subject of this motion.
>
> The record here also satisfies the State constitutional standard. Traylor v. State, 596 So. 2d 957 (Fla. 1992).

(R 368-70) (citations omitted; emphasis in original).

After the jury was sworn, but before opening statements, defense counsel renewed his motion to suppress. (T 1553). Two days later, when Detective Beck testified, and when the evidentiary foundation for the statement had been laid, defense counsel made no objection. (T 1856-66).

In this appeal, Appellant makes a two-paragraph argument, without any citation to case law, claiming that the trial court erred in admitting his statement to Detective Beck. In his first paragraph and a half, Appellant relates the testimony and argument at the motion hearing. His final three sentences are as follows:

> Obviously, where Appellant was in custody, and where Officer Beck made a statement that could reasonably be expected to draw an incriminating response, the statement was obtained in violation of Miranda. Thus, it was error to deny Appellant's motion to suppress. This cause must be remanded for a new trial.

**Brief of Appellant** at 61.

Initially, the State submits that Appellant failed to preserve this issue for appeal. "To preserve an issue about evidence for appellate review, an appropriate objection must be made at trial when the evidence is offered." Terry v. State, 21 Fla. L. Weekly S9, 10 (Fla. Jan. 4, 1996); Lawrence v. State, 614 So. 2d 1092, 1094 (Fla. 1993), cert. denied, 114 S. Ct. 107, 126 L. Ed. 2d 73 (1994); Lindsey v. State, 636 So. 2d 1327, 1328 (Fla. 1994), cert. denied, 115 S. Ct. 444, 130 L. Ed. 2d 354 (1995); Correll v. State, 523 So. 2d 562, 566 (Fla.), cert. denied, 488 U.S. 871 (1988). Here, Appellant failed to renew his motion to suppress when the State sought to admit the evidence into the trial. Thus, Appellant has failed to preserve

this issue for review.

Even if he had preserved it, however, his argument on appeal lacks the requisite specificity for consideration. Florida Rule of Appellate Procedure 9.210(b)(5) specifically requires the appellant to provide "[a]rgument with regard to each issue." This rule has been interpreted to mean the following:

> It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy.

Polyglycoat Corporation v. Hirsch Distributors, Inc., 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (citations omitted), pet. for rev. dism., 451 So. 2d 848 (Fla. 1984). Based on Appellant's disregard for the rule and his superficial treatment of this issue, the State submits that he has waived this issue for review.

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

Appellant was read his rights and indicated that he understood them. He then gave Sergeant Wilson the name and number of a friend to take custody of his children. (T 258). Then, on the way to the police station, Appellant gave Officer Winn his father's number so that his father could come get his children. He also stated that he turned himself in because he had his children with him and he did not want them to get hurt. (T 244). At the police station, Detective Beck made a rhetorical statement about the murder scene. He did not ask Appellant a question. Nor, as the trial court found, did he intend to elicit

an incriminating response. That Appellant knew his rights is obvious by his immediate invocation of them after his statement to the detective. The record supports the trial court's ruling. See Kelley v. State, 486 So. 2d 578, 583-84 (Fla. 1986) (finding FBI agent's remark to defendant that other county would surely place detainer on him once they found out he had been arrested was "not a deliberate attempt to elicit an incriminating response"), cert. denied, 479 U.S. 871 (1987); Herron v. State, 404 So. 2d 823, 824 (Fla. 1st DCA 1981) (finding officer's question to defendant after invocation of rights merely "an off-hand remark or rhetorical admonition" not likely to elicit an incrimination response under circumstances); State v. Koltay, 659 So. 2d 1224, 1225-26 (Fla. 2d DCA 1995) (finding officer's question to defendant during ride to station regarding defendant's reason for leaving a mental hospital was not likely to elicit an incriminating response under circumstances); cf. Roman v. State, 475 So. 2d 1228, 1232-33 (Fla. 1985) (finding "Christian burial technique" insufficient to render otherwise voluntary statement inadmissible under totality of circumstances), cert. denied, 475 U.S. 1090 (1986), rev'd on other grounds, 528 So. 2d 1169 (Fla. 1988). Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Allison Prescod.

## ISSUES XII AND XIII

WHETHER THE INDICTMENT WAS CONSTRUCTIVELY AMENDED BY INSTRUCTION AND ARGUMENT ON FELONY MURDER AND WHETHER APPELLANT WAS DENIED DUE PROCESS AS A RESULT OF SUCH INSTRUCTION AND ARGUMENT (Restated).

Prior to trial, Appellant filed a "Motion to Prohibit Argument and/or Instructions Concerning First Degree Felony Murder," claiming that it would violate his Sixth Amendment right to be informed of the charges against him to allow the State to argue felony murder and to instruct the jury on felony murder when only premeditated murder had been charged in the indictment. (R 63-65). After a hearing on the motion, it was denied by written order. (T 91-100; R 195). Appellant did not move to dismiss the

indictment on these grounds.

In Issue XII, Appellant claims that "the Grand Jury Clause was violated in this case where the indictment by the Grand Jury charged only one method (premeditation in this case), for violation of a particular law, but there was a constructive amendment of the indictment by instructing the jury on a different method (felony-murder in this case) for violation of a particular law." **Brief of Appellant** at 63. In Issue XIII, he also claims that the "lack of notice denied [him] due process of law and the effective assistance of counsel." **Brief of Appellant** at 65.

As to the first claim, the State submits that Appellant failed to preserve this issue for review.

> An [indictment] that completely fails to charge a crime is fundamentally defective. However, where the charging allegations are merely incomplete or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives the defense, and it cannot be raised for the first time on appeal.

Carver v. State, 560 So. 2d 258, 260 (Fla. 1st DCA), rev. denied, 574 So. 2d 139 (Fla 1990). See also White v. State, 446 So. 2d 1031, 1035-36 (Fla. 1984); Huene v. State, 570 So. 2d 1031, 1031-32 (Fla. 1st DCA 1990), rev. denied, 581 So. 2d 1308 (Fla. 1991). Here, the pith of Appellant's complaint is that the indictment was incomplete because it did not allege felony murder as an alternative theory of prosecution. Thus, by instructing on felony murder, the trial court improperly amended the indictment.

Although Appellant filed a motion in the trial court relating to the absence of felony murder allegations in the indictment, he did not move to dismiss the indictment. Rather, he merely moved to prohibit the State from arguing, and the trial court from instructing on, this theory. (R 63-65). Based on the cases cited above, because Appellant never moved to dismiss the indictment, his motion did not preserve this issue for appeal.

Even were it preserved, however, it has no merit. Nor does Appellant's second claim have merit. In fact, Appellant fails to acknowledge that both of these claims have been repeatedly rejected. E.g.,

Knight v. State, 338 So. 2d 201, 204 (Fla. 1976), sentence vacated on other grounds, 863 F.2d 705 (11th Cir. 1988); O'Callaghan v. State, 429 So. 2d 691, 695 (Fla. 1983), sentence vacated on other grounds, 542 So. 2d 1324 (Fla. 1989); Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995). In Kearse, this Court recently reaffirmed the long-standing principle that "[t]he State need not charge felony murder in an indictment in order to prosecute a defendant under alternative theories of premeditated and felony murder when the indictment charges premeditated murder." 662 So. 2d at 682. The element of premeditation is presumed when a homicide is committed in the commission of one of the enumerated felonies. Knight, 338 So. 2d at 204. Since Appellant has failed to establish any valid reason why this Court should recede from its long line of precedent, his claim should be denied.

As for the ineffective assistance of counsel claim raised in Issue XIII, this Court has previously held that "[c]laims of ineffective assistance of counsel are generally not reviewable on direct appeal but are more properly raised in a motion for postconviction relief." McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991). Since the merits of such a claim do not appear on the face of the record, this Court should reject this allegation as inappropriately raised and affirm Appellant's conviction for the first-degree murder of Allison Prescod.

## ISSUE XIV

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATE (Restated).

In this appeal, Appellant claims that his death sentence is disproportionate because the murder of his wife was the result of "an impassioned domestic dispute over [his] being deprived of the right to see his children." **Brief of Appellant** at 66. To support this proposition, Appellant cites to numerous cases wherein this Court found a death sentence disproportionate because the murder was the result of a heated domestic confrontation. All of his cases, however, are factually dissimilar or legally inapposite.

For example, in Garron v. State, 528 So. 2d 353 (Fla. 1988), the defendant was at home drinking and in "a foul mood." He made an obscene remark to one of his stepdaughters just as his wife came home. The stepdaughter told her mother, and her mother "entered the house and began arguing with appellant, threatening to take the children away." Id. at 354 (emphasis added). The defendant got a gun and shot his wife in the chest. The stepdaughter ran to the phone, and the defendant followed her and shot her. A second stepdaughter ran from the house, and the defendant shot at her but missed. When the police arrived, the defendant had shot himself. Id. at 354-55. Although this Court struck all four aggravators, it also concluded that Garron's sentence was not proportionately warranted because "this is clearly a case of aroused emotions occurring during a domestic dispute." Id. at 361.

Similarly, in Blakely v. State, 561 So. 2d 560, 561 (Fla. 1990), the defendant bludgeoned his wife to death "as the result of a long-standing domestic dispute. . . . Their main area of conflict, however, appears to have been the children." His wife had a child by a previous marriage which she favored over his two children by a previous marriage. "This marital discord culminated in an argument the night of the attack." Id. (emphasis added). On appeal, this Court found Blakely's death sentence disproportionate because it was the result of a heated domestic confrontation. Id.[13]

Here, there was no heated confrontation or argument between Appellant and his wife. Appellant simply got tired of waiting on the legal process to determine his parental rights. Appellant had been

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[13] In all of the other cases cited to by Appellant, this Court did not find the defendants' sentences disproportionate based on domestic disputes. Rather, in Downs v. State, 574 So. 2d 1095 (Fla. 1991), and Wright v. State, 586 So. 2d 1024 (Fla. 1991), this Court reversed jury overrides, finding sufficient evidence in mitigation to support life recommendations. In Santos v. State, 591 So. 2d 160, 163 (Fla. 1991), this Court remanded for a new sentencing hearing after striking two of the three aggravators and finding evidence in the record to support two statutory mental mitigators and other nonstatutory mitigators. Id. at 162-64. Likewise, in Maulden v. State, 617 So. 2d 298 (Fla. 1993), the trial court stated that the death sentence was only warranted if the murder was cold, calculated, and premeditated. When this Court struck that aggravating factor, it vacated the sentence. Id. at 302-03.

staying/living with Bonnie Scagliarini for quite some time when his wife served him with divorce papers. (T 1990). For some reason not explained in the record, his wife had gotten a temporary injunction against him. (T 1908). Appellant hired an attorney, and had signed a stipulation and agreement four days before the murder setting forth the terms of the divorce and custody of the children. (T 1909-13). When his wife failed to bring their children for visitation on Sunday morning, Appellant called the police and attempted to use the stipulation and agreement to enforce visitation. (T 1818-19, 1937-38). He waited outside while the officer went in the Prescod home to confer with Appellant's wife. (T 1820, 1938). He did not have any contact with his wife or her family. The officer, however, would not allow Appellant to visit his children without a court order, and cited Appellant for a misdemeanor traffic violation, so Appellant had to get a ride home. (T 1821). Ms. Scagliarini testified that Appellant was upset and sad that day because he did not get to see his kids, and was "kind of depressed." (T 1993-94). Later that night, Appellant went to see his friend Howard Siegal to borrow a gun. (T 1892-94). Although his friend did not loan him one, he obviously obtained one elsewhere.

The following day, around 11:00 a.m., Appellant went to see his attorney. According to Mr. Milner, Appellant was upset, but not remarkably so. (T 1917). Mr. Milner told Appellant not to worry, that he would try to get visitation sometime that day or the next day to make up for the previous day. (T 1918). Appellant, however, could not wait. By noon, he drove to the Prescod home, parked in front of the vacant lot next door, and entered the gated backyard and the covered patio. (T 1943, 1955). Contrary to Appellant's representation of the record, **brief of appellant** at 67, there is no evidence that Appellant knocked on the door. Rather, when his wife saw him at the back door, she yelled to her mother that he was there, grabbed her two children, and fled to the bedroom. (T 1950). Mrs. Prescod immediately closed and locked her bedroom door and called 911. (T 1951). Appellant then shot the glass out of the door, followed his wife to the bedroom, and shot her. He grabbed his kids, kicked open Mrs. Prescod's door, threatened

to kill her, then left. (T 1953). Within minutes, he surrendered to the police. (T 1771-77). Officer Winn testified that he was calm when he approached the car, and remained calm throughout their ride to the police station. (T 1782-83). At the police station, Appellant told Detective Beck, "That's what she gets for trying to take away my children." (T 1865). He appeared very calm. (T 1866).

These facts establish that Appellant and his wife did not have a heated confrontation or dispute. "While [Appellant's] motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). Appellant called Howard Siegal during the day on Sunday, the day before the murder, and visited him later that night to borrow a gun. (T 1892-93). Although Mr. Siegal did not loan him a gun, Appellant obviously obtained one from somewhere. Moreover, there is no evidence that Appellant had any direct contact with his wife prior to the murder, much less any kind of argument or altercation. Appellant simply decided to eliminate his wife as the custodial parent. Thus, Appellant's cases do not even remotely support his position.

Even were these facts construed to be an ongoing domestic dispute, this Court has made a distinction in such cases where the defendant has a similar prior violent felony conviction. Appellant concedes as much, but misreads the law. Citing to Blakely, Appellant contends that the distinction exists only "where there is a prior violent felony unrelated to the domestic dispute." **Brief of Appellant** at 70 (emphasis added). In Blakely, however, this Court noted that it has affirmed death sentences under express proportionality review "where the defendant has been convicted of a prior 'similar violent offense.'" 561 So. 2d at 561 (emphasis added). This Court has made no distinction between related or unrelated crimes, nor should it. See Porter, 564 So. 2d at 1064-65 (death sentence affirmed for murder of former girlfriend and her current boyfriend based on contemporaneous conviction for aggravated assault and first-degree murder). The fact that Appellant shot and almost killed the present victim's sister five years previous to

this murder should not in any way mitigate the weight of the prior violent felony. Such a limitation would negate the effect of the distinction. Given the existence of two aggravating factors, one of which is based on a similar prior violent felony, and the unavailing nature of the mitigating evidence, Appellant's sentence of death is proportionate to other cases involving similar circumstances. See, e.g., Ferrell v. State, 21 Fla. L. Weekly S166,166 (Fla. April 11, 1996) (murder of live-in girlfriend, only aggravator was prior conviction for second-degree murder of female victim, several nonstatutory mitigators found); Henry v. State, 649 So. 2d 1366, 1369-70 (Fla. 1994) (murder of estranged wife, prior conviction for second-degree murder of first wife); Lindsey v. State, 636 So. 2d 1327, 1329 (Fla. 1994) (murder of girlfriend and her brother, prior conviction for second-degree murder), cert. denied, 115 S. Ct. 444, 130 L. Ed. 2d 354 (1995); Duncan v. State, 619 So. 2d 279, 284 (Fla.) (murder of fiancee, only aggravator was contemporaneous conviction for aggravated assault on victim's daughter and prior conviction for second-degree murder of fellow inmate in 1969, several nonstatutory mitigators found), cert. denied, 114 S. Ct. 453, 126 L. Ed. 2d 385 (1993); Porter, 564 So. 2d at 1064-65 (murder of former girlfriend and her current boyfriend, contemporaneous conviction for aggravated assault and first-degree murder); Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984) (murder of girlfriend by stabbing/strangulation, prior conviction for assault with intent to commit first-degree murder by stabbing on female victim, finding of "extreme mental or emotional disturbance" mitigator), cert. denied, 469 U.S. 1230 (1985); Williams v. State, 437 So. 2d 133, 137 (Fla. 1983) (murder of girlfriend, prior convictions for aggravated assaults with a firearm), cert. denied, 466 U.S. 909 (1984); King v. State, 436 So. 2d 50, 55 (Fla. 1983) (murder with firearm of girlfriend, prior conviction for manslaughter of common-law wife with axe in 1969), cert. denied, 466 U.S. 909 (1984). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Allison Prescod.

## ISSUES XV, XVI, XVII, XX AND XXI[14]

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTIONS TO CONTINUE THE PENALTY PHASE PROCEEDING; WHETHER APPELLANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY HIS ABSENCE DURING A PENALTY-PHASE BENCH CONFERENCE REGARDING THE STATUS OF DEFENSE WITNESSES; WHETHER THE TRIAL COURT CONDUCTED AN ADEQUATE INQUIRY INTO APPELLANT'S WAIVER OF CERTAIN PENALTY-PHASE EVIDENCE; WHETHER THE TRIAL COURT CONDUCTED ADEQUATE NELSON INQUIRIES DURING THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL (Restated).

Prior to trial, Appellant moved to dismiss his court-appointed attorney, Mark Harllee. At the hearing on the motion, Mr. Harllee indicated that Appellant could not or would not communicate with him about any matter relating to his trial. (T 173). According to Mr. Harllee, Appellant's previous attorney, Mark Hetherington, also withdrew because of a communication breakdown with Appellant. (T 178). Before ruling on the motion, the trial court conducted a Faretta hearing. Although the trial court specifically found that Mr. Harllee had not rendered ineffective assistance of counsel, it nevertheless dismissed him out of an abundance of caution and agreed to appoint a private attorney. (T 186-87). However, it told Appellant in no uncertain terms that it would not appoint another attorney after the new attorney "unless there is a showing that, in fact, there is ineffective representation of counsel with your new attorney." (T 186-88).

> If you create any difficulties with new counsel, I can tell you that I will not appoint new counsel. I've made a finding that you are literate, and competent, and have full understanding of your right to counsel, and the ability to waive counsel. If you create the difficulty, you will find yourself . . . making your own informed free choice in waiving your right to counsel,

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[14] The factual bases for these claims need to be recited in detail to put these claims into context. Because the facts are so interwoven and would require significant duplication if the issues were addressed separately, the facts and arguments are combined here for clarity and brevity. Legal argument relating to each claim will follow the facts and will be differentiated by subheadings.

and representing yourself in this case.

(T 188).

After the trial court informed Appellant that it would not tolerate any attempt by him to delay the proceedings unnecessarily, it asked Appellant, "Do you wish to represent yourself?" (T 188-91). Appellant responded, "No, sir, I wish to go co-counsel." (T 191). The trial court told him that that was not an option; either he could represent himself or be represented by counsel. (T 191-92). Appellant expressly chose to be represented by counsel. (T 192).

Once David Lamos was appointed, Appellant persisted in his attempts to become co-counsel in his case. (T 558-62, 683-91). Moreover, once the trial started, Appellant interjected numerous objections into the record through counsel. (T 1256-59, 1378, 1380-81, 1592, 1808-16). At least twice the trial court admonished counsel not to make frivolous objections. Unless he believed that he had a good faith basis upon which to raise Appellant's objections, he was not to do so. (T 1592-94, 1808-16).

During the guilt phase, the court took a recess to allow defense counsel to speak with Appellant about their defense case. After the recess, defense counsel asked to approach the bench and noted that he was "furious" and "not in the proper state of mind to go forward." (T 2146). He informed the court that his client wanted a Nelson inquiry, but he asked the court to recess for the day so that he could compose himself. (T 2147). The trial court acknowledged that defense counsel was working under "adverse circumstances" and was the fourth attorney assigned to represent Appellant. (T 2148). After informing Appellant that it would address his complaints first thing in the morning, the trial court recessed for the evening. (T 2153).

The following day, as promised, the trial court inquired into Appellant's complaints. Initially, Appellant complained that (1) defense counsel failed/refused to seek an evidentiary hearing relating to the chain of custody of the mattress, given juror Reisinger's statement during jury selection that he had contact

with the mattress in the evidence locker (T 2157-58); (2) defense counsel had been ignoring Appellant's complaints because of the trial court's admonitions that counsel advance only those objections to which he had a good faith basis (T 2158, 2161); and (3) defense counsel failed/refused to tell the Court that Appellant did not want to be in court on Sunday for religious reasons (T 2158-59).

Solely for the purpose of conducting a Nelson inquiry, the trial court questioned defense counsel in Appellant's presence about Appellant's accusations: "I'm dealing with these subjects specifically only because they may relate to a Nelson inquiry; otherwise, I wouldn't be dealing with them on the pro se basis." (T 2159). Although reluctant to respond for fear of creating further conflict, defense counsel stated that he was aware of the law regarding the chain of custody of evidence, that he did not see any evidence of probable tampering with that piece of evidence, and that he did not have a good faith basis upon which to seek an evidentiary hearing on the matter. (T 2159-60).

As for Appellant's second complaint, the trial court explained to Appellant that the defendant can steer the course of his defense. The attorney's duty is to counsel and advise the defendant on the pros and cons of his suggestions/decisions, but he or she must yield to the will of the client, so long as the client is not asking the attorney to do anything unlawful or unethical. As far as making objections and raising issues, however, the attorney is an officer of the court and must have a good faith basis for doing so. Thus, if Appellant asks counsel to raise an objection that counsel does not believe can be made in good faith, counsel has a duty not to raise the objection. (T 2161-63).

At that point, Appellant raised another complaint: That defense counsel failed/refused to ask the Court if he could move from his seat during the trial to see the exhibits as witnesses testified from them (T 2164). In response, the trial court asked defense counsel if he would like Appellant during the remainder of the trial to move with him to the side of the jury box to view exhibits. (T 2164). Defense counsel responded, "I have no objection to that. I think that there is -- as an advocate, there can be some

ramifications to that, but they are purely subjective, from an advocacy standpoint." (T 2165). Recognizing the tactical implications, the trial court again asked counsel if he had any problem with allowing Appellant to move. Counsel indicated that he would like to explain his thoughts to Appellant on the subject, but would yield to Appellant's desire. (T 2165). At that point, the trial court remarked, "Folks, I'm not hearing anything that seems to me to require a Nelson inquiry." (T 2165-66). The trial continued.

At the conclusion of the guilt phase, defense counsel moved for a continuance because several out-of-state witnesses were unavailable to testify because they were attending the funeral of Appellant's grandfather. The trial court took the motion under advisement while defense counsel pursued the witnesses' attendance. In the next day and a half, the State presented its penalty-phase case, and the defense presented its expert witness, Dr. McKinley Cheshire. (T 2397-2404).

On Thursday, before the conclusion of Dr. Cheshire's testimony, the trial court inquired into the availability of other witnesses. Defense counsel indicated that he had no definite commitments as to when anybody could attend. (T 2540-43). Appellant remarked, however, that he had given his attorney the names of other witnesses within the state with whom counsel had not made contact. (T 2544). Upon questioning by the court, defense counsel stated,

> Your Honor, I have -- on some of those people I have fully documented through investigative things that have gone on, either those witnesses know nothing or are not willing to testify or don't have any sufficient basis that I cannot proceed along through other means that are available.
>
> I have attempted to contact several of those witnesses and have never heard back from them at all. I've have [sic] a lot of those things run down by investigators who also confirm that they are dead-ends.

(T 2545).

Thereafter, defense counsel detailed his attempts at contacting the out-of-state witnesses, and the parties discussed reading the depositions of Bill, Carla and Doris Jones in lieu of their live testimony. (T

2546-53). When the trial court remarked to the State that it was not going to continue the proceedings, defense counsel requested a continuance until Monday, given that the grandfather's funeral was scheduled for that Friday. (T 2554-55). Counsel conceded, however, that none of the witnesses had even committed to coming at all, much less on Monday. (T 2556). At that point, Appellant interjected that his aunt, Tina Hodge-Bowles, specifically said that she would come after the funeral. (T 2556). Appellant also complained again that, although defense counsel said he had contacted the in-state witnesses, they told Appellant that they had never heard from him. (T 2557). After a brief discussion about Ms. Bowles' personal circumstances, the trial court recessed briefly for defense counsel to try to make contact with the out-of-state witnesses. (T 2559). After the recess, defense counsel indicated that he was not able to gain any new information. He insisted, however, that Tina Hodge-Bowles had previously committed to being there, but he had no information about any other witness. (T 2560).

At the conclusion of Dr. Cheshire's testimony, the trial court called the attorneys to the bench. It informed them that it was going to break for the day, and asked the attorneys "where [are we] for scheduling tomorrow." (T 2648). Defense counsel stated that they were "[t]wo depositions away from closing." (T 2648). At that point, the trial court inquired, "Have you and your client determined not to seek a delay for the presentation of any of those four additional witnesses?" (T 2648). Defense counsel responded,

> Your Honor, just -- and I guess that it's going to put me [in] a box again between me and my client and the Court. The truth is that I have -- you know, and I -- just for the record, for the Supreme Court and the Fourth DCA or federal court down the line wants to know that -- I am telling the Court what I know. If my client has problems with it -- well, you know, that's -- that's unavoidable. But what I am saying is that I don't have any new information to tell you as the Court, so -- I wish they were here. I hoped they'd be here. This man's life might ride on them being here, but I also have a duty to tell you what I know, and I have told you what I know, so you have to make your decision based on what I told you.

(T 2648-49). The trial court then wanted to know if Tina Bowles or any other witness would be there if he continued the case to the Monday, but defense counsel could not give him an answer. (T 2650). When asked if there was any reasonable way he could find out, defense counsel responded, "I have called as early as lunchtime today, and, for the record, it's now five, and have gotten no calls back. So I don't know if they are on the road or whatever, but I have done everything I know to be reasonable." (T 2650-51). The trial court then dismissed the jury for the day, asked counsel to continue his efforts at contacting the witnesses, and continued the case to the following day. (T 2651-52).

On Friday morning, defense counsel indicated that he had spoken to Ms. Bowles, and that she had told him she and Wilbur Bowles would be in court on Monday morning. No other witnesses, however, were going to come. (T 2663-64). At that point, defense counsel indicated that he wanted to read into the record the depositions of Carla, Bill, and Doris Jones, who reside in New York, but that Appellant did not want him to. (T 2664). When the trial court inquired into Appellant's reasons, Appellant claimed that he had never seen the depositions before. Defense counsel, however, stated that he had copied his entire file for Appellant and had "pointed out to him the relevant portions" of the depositions. (T 2667). The trial court then recessed so that Appellant could read the depositions, and so it could read cases on the waiver of mitigation. (T 2670).

After the recess, the trial court questioned Appellant about his refusal to admit the depositions, and Appellant complained that defense counsel had not made their relevance known to him. (T 2672-73). Defense counsel disagreed. (T 2672). Regardless, the trial court recessed again for Appellant and counsel to discuss them, and Appellant's potential for testifying. (T 2680-81).

Following this recess, Appellant maintained his decision not to use the depositions. He complained that the discussion was had with the court reporter present, but he did not want another opportunity to talk to counsel about the depositions. (T 2682-83). He did, however, want to talk to counsel "quite

extensively" about his potential testimony. (T 2684). At that point, the trial court questioned Appellant in depth about his decision to waive the presentation of the depositions, in light of his reading of Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). (T 2684-87). When the trial court informed Appellant that by waiving his right to present them he would be precluded from raising a claim of ineffective assistance of counsel in the future, Appellant indicated that he had not, after all, had sufficient time to discuss the issue with counsel. (T 2687-90). In fact, he would need at least three or four hours. (T 2690-91). In order to resolve the issue of using the depositions, the trial court dismissed the jury until later that afternoon and allowed Appellant to talk to counsel. (T 2692, 2695). The court made it perfectly clear, however, that its patience was not unlimited, and that it was "not going to permit this proceeding to be dragged out indefinitely." (T 2696).

Following this recess, defense counsel indicated that "there's been no change since before lunch." (T 2698). Upon inquiry by the court, Appellant maintained that he did not want to admit the depositions. (T 2699). When asked if counsel had answered any questions he had about them, Appellant indicated that he had "in degrees." He refused, however, to explain what he meant. (T 2699-2700). At that point, the trial court commented that, through all of the hearings and trial since January, it was clear to him "that Mr. Hodge, in many of his answers, [was] attempting to build in issues into this record in a deliberate fashion." (T 2700). It then asked defense counsel whether he had discussed the depositions with Appellant, and whether Appellant understood his advice. Defense counsel indicated that he did. (T 2700-01). Despite Appellant's refusal to answer its questions, the trial court found that he had voluntarily, knowingly, and intelligently waived presentation of the depositions. (T 2702). Nevertheless, defense counsel proffered the depositions of Carla and Doris Jones by admitting them as exhibits. (T 2703).[15] At that point, the trial

[15] Defense counsel did not have a deposition of Bill Jones after all. (T 2704).

court excused the jury until Monday. (T 2704-07).

On Monday, defense counsel informed the trial court that no witnesses had shown up to testify. He had spoken to Appellant's sister, Janet Wright, that morning at 7:30 a.m., who confirmed that neither Tina Hodge-Bowles nor Wilbur Bowles would be coming. Ms. Wright, who was in West Palm Beach, also indicated that she did not have any transportation to Fort Pierce, but would check on renting a car when the mall opened at 9:00 or 10:00 a.m. (T 2751-52). Appellant remarked that it was defense counsel's fault that the witnesses were not there, that he could have secured the attendance of other witnesses, namely, Sally Billings, Joe Scott, Krista Scott, Maria Coachman, Patricia Hopp, and Queen McCormick, and that defense counsel had not made sufficient effort to confer with him regarding mitigating evidence. (T 2752-53). Defense counsel responded that these were the people Appellant had referred to the other day, and that "[t]o the extent that those leads have been able to be run down, they have been and have come to dead-ends." (T 2753). Defense counsel also indicated that he had gone to see Appellant on Friday and Sunday, that they had discussed whether he would testify, but that Appellant had not been receptive to communicating with him. (T 2754-57). Again, Appellant disagreed with defense counsel's representation. (T 2757-59). At that point, the trial court asked Appellant if he wanted to represent himself, and Appellant responded, "I told him he already fouled it up, so let him go continue it on." (T 2759). Defense counsel responded again that Appellant's sister wanted to know what time the mall opened, and indicated that she might have to go to the airport to rent a car, but she did not give him a definite time that she would be there. Moreover, she "expressed a reluctance to testify; not an unwillingness, but a reluctance." (T 2760).

At that point, the trial court stated that there was not a "necessity here for a Nelson inquiry as such since Mr. Hodge is not seeking to represent himself and is not seeking to discharge counsel." However, out of an abundance of caution, it found that there was no evidence of ineffective assistance of counsel.

(T 2760). In fact, it noted "what appears to be some significant lack of cooperation between Mr. Hodge and his Attorney No. 4, Mr. Lamos." (T 2760).

Relating to the unavailability of witnesses, the trial court noted that it had bent over backwards to accommodate the defense. It appeared, however, that the witnesses were not cooperating with defense counsel. Nor was Appellant cooperating with counsel in determining alternative ways to present mitigating evidence, e.g., through depositions. More importantly, the trial court expressed concern that it would not be able to maintain a jury of twelve for much longer given the upcoming Thanksgiving holiday. Ultimately, the trial court recessed for Appellant to confer with counsel. (T 2761-64).

After the recess, defense counsel asked to approach the bench and told the trial court that communication between himself and his client was breaking down. He related generally his frustration with Appellant and stated that he had no clear idea what Appellant wanted to present because Appellant would not talk to him. His impression was that Appellant wanted to introduce records and materials and relitigate the guilt phase, but he was not sure. "[I]f I were to proceed in the course of conduct that I am being requested to proceed, the proceedings are going to become a circus." (T 2769). Without discussing any specifics, the trial court admonished counsel to maintain communication with Appellant and to not allow his frustrations to exacerbate the problems. (T 2768-76).

After the bench conference, the trial court asked Appellant what was going on. Appellant complained again that defense counsel was responsible for the unavailability of his witnesses. (T 2776-77, 2781-82). The trial court told Appellant to communicate with his attorney, but Appellant complained that counsel had not provided him with discovery materials and records he needed to make decisions about presenting mitigation. (T 2777-81). Defense counsel responded, however, that he had copied his entire file and given it to Appellant prior to trial. He told Appellant that he would discuss anything in the file that Appellant wanted to discuss, but he told Appellant that he did not have to time "to sit down and read

with him line by line as a father would with a school child teaching someone to read." (T 2782-83). Because the defense needed to make a decision regarding its case, the trial court recessed again to allow Appellant and his attorney to talk. (T 2776-84).

After the recess, defense counsel indicated that Appellant refused to speak to him. Upon inquiry by the trial court, Appellant again waived his right to use the Jones' depositions in lieu of their testimony, and he waived his right to testify. (T 2784-86). At that point, defense counsel moved to continue the trial based on witness unavailability. (T 2787).

> THE COURT: You recognize that even at this point you can't tell me when or if they are going to appear?
>
> MR. LAMOS: I have made that statement. I just feel that at my client's request I would move to continue based on that.
>
> * * * *
>
> THE COURT: I will deny the request. . . . I think that I have recognized the extreme seriousness of this proceeding as it relates to the defense and the State and have made what I think to be beyond all reasonable efforts at accommodation here. I think I have adequately advised Mr. Hodge of his right to testify or not to do so. I believe that he understands the mitigation that he is waiving by his declining to testify. Also I've already discussed his declining to use the transcripts that Mr. Lamos feels are necessary.
>
> As I did in Phase I, I do find Mr. Hodge is freely and voluntarily giving up his known right to testify before this jury on any issues of mitigation.

(T 2787-88).

Thereafter, the defense rested its case. (T 2790-91). Following the State's rebuttal, the parties' closing arguments, and the jury instructions, the jury retired to deliberate at 12:14 p.m. (R 756). Appellant's sister, Janet Wright, appeared in court at 1:43 p.m. (T 2855). Neither he nor defense counsel made any motion or request to reopen the case for her testimony. The trial court reminded defense

counsel, however, that he could present evidence at any subsequent sentencing hearing, and that the county would pay for any witnesses' expenses to travel. (T 2857-58).

Following the jury's recommendation of death, the court held a hearing on December 2, 1994, for any other evidence or argument. At this hearing, defense counsel noted that Tina Hodge-Bowles was present, but indicated that he had no evidence to present to the court. (T 2879, 2886-87). Upon inquiry by the court, however, Appellant stated that he would not mind if the court considered the depositions of the Jones' depositions for mitigation. (T 2884-85). Appellant complained, however, that he had not been given the parties' memoranda of law in time for him to prepare his own remarks to the court, so the trial court recessed for Appellant to read the memos. (T 2888-89).

After the recess, Appellant wanted the trial court to consider his attorney's ineffective assistance in mitigation. (T 2890). The trial court asked Appellant if he wanted another attorney to represent him for sentencing, but Appellant did not answer. Rather, he complained again that he had not been given the parties' memoranda until that morning, and that defense counsel had not discussed them with him. He did, however, want to present a magazine article for the court's consideration on domestic violence cases, which the trial court accepted. (T 2891-93). When asked if he wanted an opportunity to talk to his attorney regarding any other evidence in mitigation, Appellant indicated that he did not want to do so unless counsel admitted that he had not spoken to Appellant about the State's memo. (T 2895). In addition, Appellant complained that he had not been given sufficient notice of the purpose of this hearing. (T 2896-97). The trial court took a recess.

After the recess, defense counsel indicated that Appellant declined to talk to him. (T 2901). Appellant remarked, however, that defense counsel would not talk to him. (T 2902-03). When asked if he wanted to submit anything to the court, Appellant indicated that he wanted to submit medical records from the jail that defense counsel neglected to introduce. (T 2903-06). Appellant also complained that

counsel had failed to object when the State introduced a photograph of the victim and one of their children. At that point, Appellant requested another attorney to represent him. (T 2906-07). When asked to detail his complaints about counsel, Appellant remarked that everyone, including counsel, worked for the court, that counsel was lying to the court about him refusing to discuss things, that he was being railroaded by an all-white justice system (jury, judge, prosecutor, defense counsel), and that he was prevented from researching his case because he was not allowed to go to the law library. (T 2909-11). Ultimately, the trial court found no evidence of ineffective assistance of counsel and informed Appellant that if he fired his attorney he would be representing himself. Until such time as Appellant made an unequivocal request to represent himself, the trial court would allow Appellant to act as co-counsel and present whatever it wanted in mitigation. It then recessed for several hours to allow Appellant to obtain his notes from the jail, to talk with counsel, and to look through the medical records. (T 2912-24). Following the recess, Appellant presented to the court for mitigation the deposition of Jacqueline Russakis, his wife's divorce attorney; the statement of David Blouin taken by Detective Beck; the testimony of his wife at Appellant's prior trial; a copy of the injunction and petition for dissolution of marriage; a medical record previously introduced into evidence by defense counsel; and the photograph of the victim. (T 2934-39).

### A. DENIAL OF THE MOTION FOR CONTINUANCE

In Issue XV, Appellant claims that the trial court abused its discretion in denying his motion for continuance made on Monday, November 21, so that his "family members" could rent a car and drive from West Palm Beach to Fort Pierce to testify. **Brief of Appellant** at 72-74. As this Court has previously held, "[t]he granting or denial of a motion for continuance is within a court's discretion and will not be overturned absent a palpable abuse of discretion." Lusk v. State, 446 So. 2d 1038, 1040 (Fla.), cert. denied, 469 U.S. 873 (1984). Moreover, "'[w]hile death penalty cases command [this 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 a continuance.'" Williams v. State, 438 So. 2d 781, 785 (Fla.) (emphasis in original) (quoting Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976), cert. denied, 431 U.S. 925 (1977)), cert. denied, 465 U.S. 1109 (1983).

Here, the record reveals that no one would give defense counsel a firm commitment to testify on Appellant's behalf. In trying to accommodate the defense, the trial court continued the case for several days. Although his aunt, Tina Hodge-Bowles, told defense counsel that she would be there on Monday morning, Appellant's sister, Janet Wright, confirmed that morning that neither Tina nor Wilbur Bowles would be there to testify. (T 2751-52). Appellant's sister, who defense counsel noted was reluctant to testify, indicated that she had no transportation to get there, but would try to rent a car either from the airport or the mall. Again, however, there was no definite commitment.[16]

The trial court bent over backwards to accommodate the defense, especially since Appellant's grandfather's funeral was Friday, November 18. Even though defense counsel had no definite commitments from anyone, the trial court nevertheless continued the trial until Monday. The witnesses simply decided not to come. Even Janet Wright, who had never been mentioned by defense counsel as a witness whose attendance he was trying to procure, did not commit to come, but would only say that she would try to rent a car. Meanwhile, the jury had reported for trial on Friday, but was dismissed without hearing any testimony. The trial court did not convene over the weekend as it had intended to do, and the jury had already reported for trial on Monday. Two jurors had also expressed problems if the trial were held on Tuesday and Wednesday. (T 2678). Thursday, of course, was Thanksgiving. Given that defense counsel had no definite commitments as to when anybody could come, and given the time constraints

[16] It should also be noted that Fort Pierce is only 54 miles from West Palm Beach; yet, Ms. Wright did not appear in court until 1:43 p.m.--six hours after defense counsel spoke to her on the phone.

posed by the holiday, it was not reasonable for the trial court to make everyone sit and wait to see if Ms. Wright showed up, or to continue the trial until after the holiday on the off-chance that a witness would decide to come. Under the circumstances, the trial court did not abuse its discretion in denying defense counsel's Monday request to continue to an unspecified time and day. See Wyatt v. State, 641 So. 2d 1336, 1340 (Fla. 1994) (finding no abuse of discretion in denying motion for continuance where defendant refused use of depositions and insisted on live testimony of witnesses after previously waiving evidence); Gorby v. State, 630 So. 2d 544, 546 (Fla. 1993) (finding no abuse of discretion in denying motion for continuance where, among other things, counsel did not allege that out-of-state penalty phase witnesses would ever be available), cert. denied, 115 S. Ct. 99, 130 L. Ed. 2d 48 (1994); Williams, 438 So. 2d at 785 (finding no abuse of discretion in denying motion for continuance where defense counsel sought a continuance at the end of the guilt phase because he was unprepared to present mitigating evidence); Goss v. State, 398 So. 2d 998, 999 (Fla. 5th DCA 1981) (finding no abuse of discretion in denying motion for continuance "when an out of state expert medical witness declined to appear and testify on [the defendant's] behalf").[17] Therefore, this Court should affirm Appellant's sentence for the first-degree murder of Allison Prescod.

### B. APPELLANT'S ABSENCE DURING A BENCH CONFERENCE

In Issue XVI, Appellant claims that he was deprived of his rights to confrontation, due process, and

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[17] To support his contention to the contrary, Appellant cites to Wike v. State, 596 So. 2d 1020 (Fla. 1992), which is factually inapposite. As emphasized by this Court, "Wike's request for a continuance was for a short period of time and for a specific purpose." Id. at 1025. Wike sought a continuance for one-week to secure the attendance of his cousin, "who was due to arrive in town that night," and his ex-wife, "who had just been located and could provide important family background information . . . ." Id. Presumably, these witnesses had agreed to testify. Here, on the other hand, defense counsel had no firm commitment from Janet Wright that she would be there, much less when. Tina and Wilbur Bowles had decided not to come. Defense counsel did not request a continuance of any particular duration, nor for any specific purpose. Thus, Wike is inapposite.

a fair sentencing proceeding by his absence from the bench conference at the close of Dr. Cheshire's testimony when the trial court inquired into the availability of defense witnesses for scheduling purposes. **Brief of Appellant** at 74-75. As discussed previously in Issues II and IV, "[a] defendant has a due process right to be present at any stage of the proceeding that is critical to its outcome, if his presence would contribute to the fairness of the proceedings," but "[a] defendant has no right to be present when his presence would be useless or the benefit of a shadow." Rose v. State, 617 So. 2d 291, 296 (Fla. 1993), cert. denied, 114 S. Ct. 279, 126 L. Ed. 2d 230 (1994). Moreover, "[t]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record." Id.

At the end of Dr. Cheshire's testimony, the trial court requested a bench conference outside of Appellant's presence. At no time did Appellant object to the bench conference or request to participate in it. Nor did defense counsel seek to include Appellant in the conference. Under these circumstances, there was no error. Shriner v. State, 452 So. 2d 929, 930 (Fla. 1984).

Even if objections by Appellant and/or requests to participate were not necessary, there was still no error. Before releasing the jury for the day, the trial court wanted to know if the defense was going to present any more evidence. Since the defense had previously requested a continuance, the trial court wanted to know whether it should call the jury back for the next day. No evidence was presented or discussed during this bench conference. Nor was anything discussed that would affect the trial court's ultimate sentencing decision. The trial court simply wanted to know where the parties were in relation to resting their respective case. Since defense counsel had a motion for continuance outstanding, the trial court also wanted to know whether he was still pursuing that. As the record bears out, the discussion focused primarily on counsel's present ability to obtain the attendance of several witnesses. In this regard, there was nothing for Appellant to add. The trial court was well aware that Appellant had a different opinion regarding defense counsel's diligence in procuring witnesses on his behalf. The trial court,

however, simply wanted an update on counsel's efforts. Under these circumstances, Appellant's presence would not have contributed to the fairness of the proceedings. Therefore, none of Appellant's constitutional rights were violated by his absence at this bench conference. See Rose, 617 So. 2d at 295-96; Roberts v. State, 510 So. 2d 885, 890-91 (Fla. 1987), cert. denied, 485 U.S. 943 (1988).

Even if it were error, however, to engage in such a conference in Appellant's absence, such error was harmless beyond a reasonable doubt. See Gethers v. State, 620 So. 2d 201, 202 (Fla. 4th DCA 1993) (finding defendant's absence from hearing on admissibility of previously undisclosed statement harmless error); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As noted above, Appellant could not have added to the proceeding, and there was no discussion of evidence or anything else that would have affected the trial court's ultimate sentencing decision. Thus, this Court should affirm Appellant's death sentence for the first-degree murder of Allison Prescod.

### C. APPELLANT'S WAIVER OF MITIGATION

In Issue XVII, Appellant claims that the trial court failed to inquire into the specific substantive content of the mitigating evidence Appellant sought to waive and "failed to ascertain Appellant's understanding of what mitigating evidence was available and his understanding of counsel's reasons for wishing to introduce such evidence." **Brief of Appellant** at 75-77. The record clearly reveals, however, that Appellant initially sought to waive presentation of the depositions of Bill, Carla and Doris Jones. Appellant's desire to waive such evidence was discussed at length. (T 2546-53, 2664-2703, 2784-86). Ultimately, however, Appellant decided at the elocution hearing to allow the trial court to consider the depositions for sentencing, which it did. (T 2884-85; R 807 n.3, 813). Thus, there was no waiver. Since there was no waiver, there can be no claim that the trial court "erred in failing to adequately inquire into the waiver of mitigating evidence." **Brief of Appellant** at 75 (issue heading).

Were his waiver of such evidence before the jury an issue, however, the State submits that the trial

court's Koon inquiry was more than adequate. The court's discussion of this issue with the parties spans fifty pages of the transcripts, over three separate days. (T 2546-53, 2664-2703, 2784-86). Defense counsel made it painfully clear that he wanted to introduce the depositions of Carla, Bill, and Doris Jones, who "were more or less surrogate parents of [Appellant] in formative years." (T 2548-49).

As for Appellant's awareness of their mitigating nature, defense counsel repeatedly stated that he had explained their mitigating nature to Appellant. (T 2672, 2682, 2700-01). Appellant initially indicated that he understood what he was waiving (T 2684-85), but later refused to answer the court's questions regarding his waiver (T 2699-2700). After further inquiry of counsel, the trial court determined that Appellant was making a voluntary, knowing, and intelligent waiver of the depositions. (T 2700-02). Defense counsel then proffered the three depositions and filed them as exhibits. (T 2703). On Monday, the last day of the penalty phase, the trial court gave Appellant one last opportunity to present the depositions to the jury; as before, he refused. (T 2785). Once again the trial court determined that Appellant was voluntarily, knowingly, and intelligently waiving his right to present the depositions: "I believe that he understands the mitigation that he is waiving by his declining to testify." (T 2787). Under the circumstances of this case, the trial court's Koon inquiry was more than adequate for the trial court to determine whether Appellant's waiver was voluntary, knowing, and intelligent. See Wyatt v. State, 641 So. 2d 1336, 1340 (Fla. 1994). Were the inquiry inadequate, however, any error was harmless in light of the fact that Appellant ultimately submitted the depositions for the trial court's consideration. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

### D. ADEQUACY OF NELSON INQUIRY AT SEVERAL POINTS DURING THE TRIAL (ISSUES XX AND XXI)

In Issues XX and XXI, Appellant complains that the trial failed to conduct an adequate Nelson inquiry at the following four points in the trial: (1) at the conclusion of the State's case during the guilt

phase when defense counsel, after a short recess, indicated that Appellant wanted a Nelson inquiry (T 2146), (2) during the penalty phase when Appellant twice complained that his attorney had failed to contact and subpoena in-state witnesses for mitigation purposes (T 2556-57, 2753), (3) during the penalty phase when Appellant complained that it was his attorney's fault for the nonappearance of several out-of-state witnesses (T 2776-77), and (4) during the elocution hearing prior to sentencing when Appellant requested another attorney (T 2907). **Brief of Appellant** at 83-85, 85-88.

Appellant presumes that a Nelson inquiry is required when a defendant merely "complains" to the court. Such is not the case. Rather, before an inquiry is required, a defendant must "make[] it appear to the trial judge that he desires to discharge his court appointed counsel." Nelson v. State, 274 So. 2d 256, 258 (Fla. 4th DCA 1973), approved Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988).

Here, Appellant made no such request, either equivocally or unequivocally, until the elocution hearing prior to sentencing. At the close of the State's case during the guilt phase, although defense counsel told the trial court that Appellant wanted a Nelson hearing, which by its nature suggests that the defendant wants to discharge counsel, neither he nor Appellant made such a representation. When Appellant next complained during the penalty phase, he interrupted a discussion between defense counsel and the trial court and claimed that his attorney had failed to contact and subpoena in-state witnesses. When defense counsel responded to the allegation upon inquiry by the court, Appellant disagreed with counsel's representation, but did not ask to discharge him. (T 2544-2557). Then, on Monday, Appellant reiterated his complaint, and counsel responded again, but at no time did Appellant request the discharge of Mr. Lamos or the opportunity to represent himself. (T 2752-54). In fact, when asked if he wanted to represent himself, Appellant responded, "I told him he already fouled it up, so let him go continue it on." (T 2759). At that point, the trial court ruled that there was not a "necessity here for a Nelson inquiry as such since Mr. Hodge is not seeking to represent himself and is not seeking to discharge counsel." Shortly

thereafter, defense counsel indicated that communication between him and Appellant was breaking down, and Appellant accused defense counsel of being responsible for the nonappearance of his out-of-state witnesses, but Appellant still made no request to discharge counsel or to represent himself. (T 2768-86). Thus, no Nelson inquiries were necessary. See Parker v. State, 641 So. 2d 369, 374-75 (Fla. 1994) (finding no merit to claim that trial court ignored defendant's complaints about his attorney where defendant did not request substitute counsel), cert. denied, 115 S. Ct. 944, 130 L. Ed. 2d 888 (1995).

Moreover, not only must a defendant request to discharge his counsel before an inquiry is required, but he or she must voice a seemingly substantial complaint about defense counsel's competence. "General loss of confidence or trust standing alone will not support withdrawal of counsel." Johnston v. State, 497 So. 2d 863 (Fla. 1986). Here, Appellant voiced only general allegations, which indicated a lack of trust or a conflict between him and counsel, rather than proof of ineffectiveness. For example, during the guilt phase, Appellant complained that counsel failed to seek an evidentiary hearing regarding the mattress, that counsel ignored Appellant's evidentiary objections and failed to raise them, that counsel failed to inform the court that Appellant did not want to be in court on Sundays, and that counsel failed to ask the court if Appellant could move to see the exhibits during witnesses' testimony. (T 2157-59, 2164). Defense counsel responded that he had no good-faith basis to seek an evidentiary hearing regarding the mattress, and that there could be a tactical reason for discouraging Appellant to move to the jury box to view exhibits used by witnesses. (T 2159-60, 2165). Appellant simply did not agree with counsel's assessment of Appellant's requests/objections.[18]

Similarly, regarding Appellant's complaint that defense counsel failed to contact and subpoena in-

[18] Regarding Appellant's complaint about being in court on Sunday, the trial court had previously asked the parties in Appellant's presence if they would like to convene later in the morning so that they could attend church services. Even the bailiff indicated his preference for starting later. Appellant, however, made no comment. (T 1801-03).

state witnesses, Appellant simply disagreed with counsel's representation that he had tried to, or had in fact, contacted the witnesses, but determined that they were not helpful. (T 2544-45, 2557). Likewise, Appellant disagreed that counsel had used due diligence to obtain the appearance of the out-of-state witnesses. (T 2557, 2752-53). Finally, during the elocution hearing when Appellant had requested different counsel, Appellant had claimed that defense counsel failed to introduce medical records which supported Dr. Cheshire's testimony regarding head injuries. (T 2903-05). After he was given a chance to look through them himself, however, he admitted that what he wanted to present had already been admitted into evidence by defense counsel. (T 2938). Thus, given the nature of Appellant's complaints, i.e., conflict rather than incompetence, the trial court was not required to conduct Nelson inquiries. Smith v. State, 641 So. 2d 1319, 1321 (Fla. 1994) ("A trial court must conduct an inquiry only if a defendant questions an attorney's competence."), cert. denied, 115 S. Ct. 1129 (1995); Johnson v. State, 560 So. 2d 1239, 1240 (Fla. 1st DCA 1990) ("[A]ppellant's motion to discharge alleged conflict rather than incompetency of counsel and, therefore, . . . the trial court was not obligated to conduct the inquiry set out in Nelson.").

Were this Court to find, however, that Appellant's complaints were sufficient to invoke a Nelson inquiry, the State submits that the trial court made proper inquiries and determined that Appellant had presented no reasonable bases for a finding of ineffective assistance of counsel such as to warrant the dismissal of counsel. At each instance, the trial court heard Appellant's complaints and defense counsel's responses. During the guilt phase, it implicitly determined that Appellant's complaints were not adequate to discharge counsel. Although it did not explicitly state so on the record, or inform Appellant that if he persisted in discharging counsel he would be representing himself, any error was harmless beyond a reasonable doubt. Given the trial court's admonitions when Mr. Lamos was appointed, and throughout the trial, Appellant should have been acutely aware of the consequences of his actions. See Capehart v.

State, 583 So. 2d 1009, 1014 (Fla. 1991) ("While the better course would have been for the trial court to inform Capehart of the option of representing himself, we do not find it erred in denying Capehart's request for new counsel."), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992).

Similarly, when Appellant complained about his attorney's failure to contact witnesses from Hollywood, Ft. Lauderdale, and Port St. Lucie, the trial court asked defense counsel if he had obtained those names previously, if he had evaluated their potential testimony, if he had made a determination whether they had any relevant information regarding mitigation or to impeach aggravating factors, and if he felt that it was appropriate to present their testimony. (T 2544-45). In response, defense counsel indicated that either he or his investigator had contacted them, or had been unable to contact them, and that they either did not have any information, were not willing to testify, or that their testimony was better presented by other means. (T 2545). Then, on Monday, when Appellant reiterated his complaint that defense counsel could have gotten Sally Billings, Krista Scott, Maria Coachman, Patricia Hopp, and Queen McCormick to testify, defense counsel indicated upon inquiry by the court that "[t]o the extent that those leads have been able to be run down, they have been and have come up dead-ends." (T 2752-53). Thus, the trial court heard Appellant's complaints regarding the in-state witnesses and heard counsel's response. Based on his response, the trial court correctly determined that there was no reasonable basis upon which to discharge defense counsel. See Smith, 641 So. 2d at 1320-21 (finding that defendant's letter to judge expressed dissatisfaction with counsel, but did not question competence); Sanborn v. State, 474 So. 2d 309 (Fla. 3d DCA 1985) ("The power to decide questions of trial strategy and tactics ultimately rests with counsel. One such tactical, strategic decision concerns counsel's determination of what witnesses to call and what evidence to present.").

Shortly thereafter, the trial court asked Appellant if he wanted to represent himself, and Appellant said that he did not. (T 2759). As a result, the trial court ruled that there was not a "necessity here for a

Nelson inquiry as such since Mr. Hodge is not seeking to represent himself and is not seeking to discharge counsel." However, out of an abundance of caution, it found that there was no evidence of ineffective assistance of counsel. (T 2760). In fact, it noted "what appears to be some significant lack of cooperation between Mr. Hodge and his Attorney No. 4, Mr. Lamos." (T 2760).

When defense counsel indicated that communication between him and Appellant was breaking down, the trial court heard Appellant's complaint that defense counsel was responsible for the unavailability of his witnesses. For three days, however, it had heard defense counsel recount his efforts at securing the attendance of Appellant's out-of-state witnesses. It was satisfied that counsel had done everything he could to get them there. The bottom line was that the witnesses were not cooperating with counsel. (T 2760-63). For whatever reason, they simply did not come to court. Again, under these circumstances, the trial court properly determined that counsel had not been ineffective. Sanborn.

Finally, during the elocution hearing, when the trial court asked Appellant if there was anything he wanted to present to the court in mitigation, Appellant complained that defense counsel had not introduced certain medical records which would have corroborated Dr. Cheshire's testimony that Appellant had sustained head injuries. (T 2903-04). He also complained that defense counsel allowed the State to introduce a picture of his wife that contained one of his children. At that point, he requested another attorney for sentencing purposes. (T 2906-07). The trial court heard his complaints, but ultimately found no evidence of ineffective assistance of counsel and informed Appellant that if he fired his attorney he would be representing himself. (T 2909-15). Since Appellant had not made an unequivocal request to represent himself, the trial court allowed Appellant to act as co-counsel and present whatever it wanted in mitigation. It then recessed for several hours to allow Appellant to obtain his notes from the jail, to talk with counsel, and to look through the medical records. (T 2912-24). Following the recess, Appellant presented several things to the court for mitigation, including part of the medical records that defense

counsel had previously introduced into evidence. (T 2934-39). Again, the trial court's inquiry was sufficient to determine that Appellant's complaints did not warrant the discharge of counsel.

In considering Appellant's complaints, the trial court properly considered Appellant's history of conflict with his attorneys. In determining whether to discharge counsel, the trial court "must balance the need for the orderly administration of justice with the fact that an irreconcilable conflict exists between counsel and the accused." Sanborn, 474 So. 2d at 314. In doing so, the court must consider the timing of the request, any inconvenience to witnesses, the elapsed time between the crime and the trial, and "the possibility that any new counsel will be confronted with the same conflict." Id. Here, the parties were in the middle of the guilt phase at one point, and later in the middle of the penalty phase. Although no witnesses would have been inconvenienced by the substitution of counsel, the jury certainly would have been. Moreover, a year had elapsed since the date of the offense. Finally, Appellant had already had three attorneys withdraw because of a conflict with him. Thus, under these circumstances as well, the trial court would have acted well within its discretion to reject Appellant's complaints. See Bowden v. State, 588 So. 2d 225, 230 (Fla. 1991) ("It is apparent from the record that any problems with the representation were caused by Bowden's refusal to cooperate with counsel."), cert. denied, 112 S. Ct. 596, 118 L. Ed. 2d 311 (1992); Koon v. State, 513 So. 2d 1253, 1255 (Fla. 1987), cert. denied, 485 U.S. 943 (1988).

Even assuming for argument's sake, however, that the trial court did not conduct sufficient Nelson inquiries, such error was harmless beyond a reasonable doubt. As the First District has held:

> [T]he trial court's failure to make a thorough inquiry and thereafter deny the motion for substitution of counsel is . . . not in and of itself a Sixth Amendment violation. In determining whether an abuse of discretion warranting reversal has occurred, an appellate court must consider several factors, in addition to the adequacy of the trial court's inquiry regarding the defendant's complaint, including as well whether the motion was timely made, and if the conflict was so great as to result in a total lack of communication preventing an adequate defense.

Kott v. State, 518 So. 2d 957, 958 (Fla. 1st DCA 1988).

Here, Appellant's complaints were raised in the middle of the guilt phase and again in the middle of the penalty phase. "To allow appellant to discharge his counsel at this late date in the proceedings without adequate ground would thwart the orderly administration of justice." Beatty v. State, 606 So. 2d 453, 453-54 (Fla. 1992). Moreover, Appellant's allegations did not present a conflict "so great as to result in a total lack of communication preventing an adequate defense." Id. Under these circumstances, there is no reasonable possibility that the jury's recommendation or the trial court's ultimate sentence would have been different even if the trial court's Nelson inquiry had been more extensive. See Parker v. State, 570 So. 2d 1053, 1055 (Fla. 1st DCA 1990) ("In light of the overwhelming evidence of guilt, the legal insufficiency of the motion, the defendant's failure to pursue the motion although having the opportunity to do so, and a record which reveals no evidence of incompetence, we find that the failure to conduct an inquiry was harmless error."), rev. denied, 581 So. 2d 1309 (Fla. 1991). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Allison Prescod.

## ISSUES XVIII AND XIX[19]

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF THE "CAPACITY TO APPRECIATE" AND THE "EXTREME DURESS" MITIGATING FACTORS (Restated).

Before relating its findings regarding the mitigating factors of "capacity to appreciate" and "extreme duress," the trial court discussed in its written sentencing order its assessment of Dr. Cheshire, the defense expert witness. Noting that it had the opportunity to evaluate the witness' demeanor and credibility during his testimony, which it believed the cold record may not convey, the trial court found that "the doctor was testifying with a considerable bias for the Defendant." (R 806) (footnote omitted).

[19] For clarity's sake, the State will address these two issues simultaneously.

Although it found and accepted many of the facts related by the witness, the court could not accept the opinions he drew because they lacked "support and credibility." (T 806).

As an example, the trial court noted that the doctor related numerous head injuries which Appellant allegedly suffered, beginning at the age of four and continuing throughout his service in the military. However, these injuries were related only by Appellant, and were not corroborated by Appellant's military records. Only the scar on Appellant's forehead corroborated Appellant's self-report of injuries. (T 805). The doctor did not do any testing and did not seek to corroborate Appellant's information even though the doctor testified that he assumed that all defendants lie. (T 805).

As another example, the trial court noted that Dr. Cheshire believed Appellant suffered from a mild form of epilepsy, likely caused by the head injuries, which affected Appellant's ability to understand what was happening around him. However, the doctor admitted that he could neither confirm nor deny his diagnosis of epilepsy, and did no testing in that regard. Nor did the testimony of the Jones', Appellant's surrogate parents in his formative years, "reveal any indication of the types of behavior or symptoms Dr. Cheshire believes would exist as a result of the alleged head injuries during [Appellant's] youth." As a result, the trial court found Dr. Cheshire's opinion that Appellant suffered from epilepsy "shear speculation." (T 806-07).

Finally, the trial court noted that Dr. Cheshire described Appellant's memory regarding the events with his wife in the bedroom as "quite defective." Yet, the doctor relied largely on Appellant's self-report of other facts. The trial court believed that Appellant's defective memory regarding the events of the shooting "calls into question the validity and accuracy of the other 'facts' provided to the doctor by his patient." (T 807).

Regarding the "capacity to appreciate" mitigating factor, the trial court specifically found the following:

Dr. Cheshire opined that the Defendant's capacity to appreciate the criminality of his conduct was substantially impaired. The basis for that opinion was the doctor's feeling that it was not reasonable to take a gun to go to get one's children; that the Defendant filed an action seeking child custody, and that the Defendant obtained information from his attorney that was contradicted by a police officer. Dr. Cheshire felt that this caused the Defendant frustration and thus the *inability* to act cooley and rationally. In fact, Dr. Cheshire did not know what Mr. Milner had actually advised the Defendant. In point of fact, Mr. Milner's testimony did not establish what he told the Defendant prior to the homicide, because even Mr. Milner was unclear on that point.

Dr. Cheshire's opinion on this factor is not accepted by the Court. It is not credible and lacks any factual basis. To the contrary, the evidence revealed that at all other times in September and October, 1993, the Defendant was seeking to work within the court system, through an attorney, to resolve his marital and child visitation difficulties. He obviously recognized what he had done since he located a police officer and surrendered to him shortly after the homicide. Further, his comment to the police clearly shows the Defendant's specified motive for his actions. While the Defendant undoubtedly permitted his emotions to get the best of him, this mitigating circumstance was not established.

(R 808-09).

Regarding the "extreme duress" mitigating factor, the trial court made the following findings:

The Defense pursuit of this factor rests on Dr. Cheshire's testimony. The doctor felt the Defendant was on the border of sanity and insanity due to the loss of custody of his children. The factors the doctor considered in reaching this opinion were: the Defendant had a strong need to be with his children; he spoke to an attorney about it; he went to the victim's house with the police to see his children; the officer advised the Defendant that the visitation order was not effective; the Defendant was instead cited for a driver's license misdemeanor; he went back to his attorney; the attorney told him he could see his children[5]; he went back to the house; saw the children, and shot his way in.

Duress is defined as follows: "'Duress' is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats." Toole v. State, 479 So. 2d 731, 734 (Fla. 1985).

While most of the *facts* relied on by Dr. Cheshire to arrive at his opinion on this mitigating circumstance were established by the evidence,

> the *opinion* drawn from those facts by the doctor was not credibly shown to flow from the facts. Further, this type of factual scenario does not meet the legal definition of duress. This mitigating circumstance was not established.
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> [5] The evidence in this case did not establish that Mr. Milner told the Defendant on October 11, 1993 that he could go right back to the victim's home to see his children.

(R 809-10).

In Issues XVIII and XIX, Appellant concedes that the trial court has discretion as to the weight it gives mitigating factors, but complains that it cannot totally reject Dr. Cheshire's opinions which Appellant claims are based on uncontroverted facts. **Brief of Appellant** at 77-82. To support this contention, Appellant cites to Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995), wherein this Court approved the trial court's rejection of the "extreme mental or emotional disturbance" mitigator. In Johnson, this Court explained that "opinion testimony *unsupported by* factual evidence can be rejected, but that uncontroverted and believable factual evidence supported by opinion testimony cannot be ignored." 660 So. 2d at 647 (italics in original; underscoring added).

Here, the bases for Dr. Cheshire's opinions that the "capacity to appreciate" and the "extreme duress" mitigators were applicable rested on Appellant's obsessive/compulsive behavior and his loss of contact with reality due to his inability to visit his children. (T 2515-20, 2562-63). Such behavior, he believed, was supported by Appellant's self-report and defense counsel's synopsis of the events leading up to the murder. (T 2618-19). By their accounts, Appellant relied on his attorney, Roy Milner, to establish visitation. When Appellant was unable to visit his kids, despite having come to an agreement with his wife regarding visitation as part of the dissolution of marriage, Appellant became increasingly frustrated, even seeking police assistance. (T 2513-14). When neither his wife nor the police would honor

the newly drafted agreement, Appellant returned to his attorney the morning of the murder.[20] According to Dr. Cheshire, Appellant believed, based on Mr. Milner's advice, that he had a right to go get his children. (T 2513). "He goes there with a full feeling and expectation and delight at being able to see his kids, and he is then frustrated by her not opening the door and not letting him go in. And it is at that time he was overwhelmed, that his ego function could not maintain his behaving in a rational, normal way." (T 2513-14).

The evidence at trial, however, contradicted Dr. Cheshire's factual scenario. For example, Mr. Milner testified that he told Appellant he would try to get visitation that afternoon or the next day. (T 1918). He did not tell Appellant that he had a right to go to the Prescod home and take his children by force and violence. Moreover, the evidence established that Appellant tried to borrow a gun from a friend the day before the murder, but his friend would not loan him one. (T 1893-94). He obviously managed to find one. After visiting his attorney that morning, Appellant immediately drove, with the gun, to the Prescod home where his wife and children were staying, parked next door, and stealthily entered the backyard and the covered patio. He did not knock on the door and request to see his children. Nor did his wife, as Dr. Cheshire believed, refuse to let him in. Rather, when she saw Appellant at the back door with the gun, she grabbed her kids and fled the room. Appellant simultaneously shot out the glass door, followed his wife to the bedroom and shot her in front of the children. He then grabbed them up, kicked in his mother-in-law's bedroom door, and threatened her life before leaving with two of his four children. Having wrested custody of his children from his wife, he then immediately and calmly surrendered.

If these facts suggest anything, they suggest that Appellant was intent on killing his wife, not visiting with his children. After all, his two older children were in school where he could have paid them

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[20] Mr. Milner testified that Appellant was upset, but not remarkably so. (T 1917).

a visit, and his attorney indicated that he would soon have visitation with all of them. He was not, however, interested in seeing his children; he was interested in killing his wife.

As indicated in its sentencing order, the trial court simply did not believe that the opinions rendered by Dr. Cheshire were credible: "Dr. Cheshire's opinion on [the "capacity to appreciate"] factor is not . . . credible and lacks any factual basis." (R 808). "While most of the *facts* relied on by Dr. Cheshire to arrive at his opinion on [the "extreme duress"] mitigating circumstance were established by the evidence, the *opinion* drawn from those facts by the doctor was not credibly shown to flow from the facts." (R 810). Moreover, the trial court did not believe that the "extreme duress" mitigating factor was even applicable under the facts of this case given that there was no external provocation for the murder.

As this Court has previously held, "[t]he trial court has broad discretion in determining the applicability of mitigating circumstances and may accept or reject the testimony of an expert witness." Rose v. State, 617 So. 2d 291, 293 (Fla. 1993), cert. denied, 114 S. Ct. 279, 126 L. Ed. 2d 230 (1994). See also Roberts v. State, 510 So. 2d 885, 894 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). Because the resolution of factual conflicts is solely the responsibility and duty of the trial judge, this Court has no authority to reweigh that evidence. Gunsby v. State, 574 So. 2d 1085, 1090 (Fla.), cert. denied, 502 U.S. 843 (1991), rev'd on other grounds, 21 Fla. L. Weekly S20 (Fla. Jan. 11, 1996). See also Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990), cert. denied, 112 S. Ct. 1500, 117 L. Ed. 2d 639 (1992). "Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991). Moreover, as this Court recently reaffirmed,

> Certain kinds of opinion testimony clearly are admissible--and especially qualified expert opinion testimony--but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve.

Walls v. State, 641 So. 2d 381, 390-91 (Fla. 1994) (emphasis added; citations omitted), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995). See also Farr v. State, 656 So. 2d 448, 449-50 (Fla. 1995) ("It is within the trial court's discretion to reject either opinion or factual evidence in mitigation where there is record support for the conclusion that it is untrustworthy.").

Such a debatable link between the facts and Dr. Cheshire's opinions existed in this case. Thus, the trial court did not abuse its discretion in rejecting either of these mitigating factors. See Toole v. State, 479 So. 2d 731, 734 (Fla. 1985) (upholding rejection of "extreme duress" mitigator where there was no evidence of external provocation); Rivera v. State, 561 So. 2d 536, 540-41 (Fla. 1990) (upholding rejection of "extreme duress" and "capacity to appreciate" mitigators); Sireci, 587 So. 2d at 453-54 (upholding rejection of "extreme duress," "capacity to appreciate," "extreme mental or emotional disturbance," and age mitigators); Preston v. State, 607 So. 2d 404, 411-12 (Fla. 1992) (upholding rejection of "capacity to appreciate" and "extreme mental or emotional disturbance" mitigator), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993).[21]

Were the trial court in error, however, in rejecting either or both of these mitigators, Appellant's sentence should nevertheless be affirmed. Appellant committed this murder during an armed burglary with

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[21] To support his contention to the contrary, Appellant cites to several cases, none of which are even remotely applicable. Regarding the "capacity to appreciate" mitigator, Appellant cites to Irizarry v. State, 496 So. 2d 822, 824 (Fla. 1986), and Kampff v. State, 371 So. 2d 1007 (Fla. 1979). **Brief of Appellant** at 78. In Irizarry, this Court reversed a jury override based on the existence of the "no significant criminal history" statutory mitigator and other nonstatutory mitigators, including the fact "that appellant's crimes resulted from passionate obsession." 496 So. 2d at 825. In Kampff, this Court struck both aggravators and stated that the "no significant criminal history" and "extreme mental or emotional disturbance" mitigators should have been found. 371 So. 2d at 1009-10. Neither case mentions the "capacity to appreciate" mitigator. Regarding the "extreme duress" mitigator, Appellant cites to Fead v. State, 512 So. 2d 176 (Fla. 1987), receded from on other grounds, Pentecost v. State, 545 So. 2d 861, 863 n.3 (Fla. 1989); yet, Fead makes no mention of this mitigator. Rather, in reversing a jury override, this Court held that, among other things, the "extreme mental or emotional disturbance" mitigator could have been relied on by the jury. Id. at 179.

an assault on another person. He had also been convicted of a prior violent felony during which he ran his wife, their two children, his sister-in-law, and her two children off the road, shot his sister-in-law, and then kicked her several times after the gun he put to her head misfired. This Court has previously found such an aggravating factor "especially weighty." E.g., Ferrell v. State, 21 Fla. L. Weekly S166, 166 (Fla. April 11, 1996) (finding sentence proportionate based on single aggravator of "prior violent felony" despite existence of "a number of mitigating circumstances"); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994) (finding "under sentence of imprisonment" and "prior violent felony" factors "strong aggravators"), cert. denied, 131 L. Ed. 2d 227 (1995); Henderson v. Singletary, 617 So. 2d 313, 315 (Fla. 1993) (finding "prior violent felony" constituted "weighty aggravating factor"); Parker v. Dugger, 537 So. 2d 969, 972 (Fla. 1988) (same). Moreover, in its written sentencing order, the trial court specifically stated that its independent weighing process "resulted in the aggravating circumstances being given great weight. The mitigating circumstances, individually and collectively, are found to be of minimal weight. The weight of the aggravating circumstances far exceeds the minimal weight of the mitigating circumstances." (R 817). In a footnote, the trial court also stated that "even had the evidence established *every one* of the mitigating circumstances proposed by the Defense, the additional minimal weight they would add would not change the balance or the sentence imposed." (R 817-18 n.10).[22] In light of the two aggravating factors, one of which is "especially weighty," and the unavailing nature of Appellant's mitigating evidence,

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[22] Citing to a sentencing departure case, Appellant claims that "such boilerplate language cannot be used to judge the error harmless." **Brief of Appellant** at 80-81. However, this Court has used such statements by the trial court in other cases in analyzing harmless error. E.g., Lowe v. State, 650 So. 2d 969, 976 (Fla. 1994) (relating to rejection of mitigation); Maqueira v. State, 588 So. 2d 221, 224 (Fla. 1991) (relating to consideration of invalid aggravator), cert. denied, 112 S. Ct. 1961, 118 L. Ed. 2d 563 (1992); Brown v. State, 565 So. 2d 304, 309 n.10 (Fla.) (relating to consideration of invalid aggravator), cert. denied, 498 U.S. 992 (1990); Young v. State, 579 So. 2d 721, 724 (Fla. 1991) (relating to consideration of invalid aggravator), cert. denied, 112 S. Ct. 1198, 117 L. Ed. 2d 438 (1992).

there is no reasonable possibility that the trial court's sentence would have been different had it given more weight to either or both of these mitigating factors. Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Allison Prescod.

## ISSUE XXII

WHETHER THE FELONY MURDER AGGRAVATING FACTOR IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED (Restated).

Prior to trial, Appellant moved the trial court to declare the felony murder aggravating factor unconstitutional because it constitutes an automatic aggravator. (R 72-79). After a hearing on the motion, the trial court took it under advisement, but later denied it by written order. (R 364; T 104-09). Appellant renews his argument in this appeal, but fails to even acknowledge that this claim has been repeatedly rejected by this Court. E.g. Johnson v. State, 660 So. 2d 637, 647-48 (Fla. 1995) (citing Lowenfeld v. Phelps, 484 U.S. 231 (1988)); Hunter v. State, 660 So. 2d 244, 253 & n.11 (Fla. 1995) (same). Since Appellant has failed to present any new argument which would warrant reconsideration of this issue, this Court should deny his claim and affirm his sentence of death.

## ISSUE XXIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING APPELLANT'S ORAL REQUEST TO INSTRUCT ON EACH NONSTATUTORY AGGRAVATING FACTOR INDIVIDUALLY (Restated).

During the penalty-phase charge conference, defense counsel orally sought individual instructions on each nonstatutory mitigating factor. The trial court denied his request. (T 2738-42). Appellant renews his claim in this appeal, **brief of appellant** at 91-93, but once again fails to acknowledge that this Court has repeatedly rejected identical claims. E.g. Finney v. State, 660 So. 2d 674, 684 (Fla. 1995); Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992) ("[T]he standard jury instruction on nonstatutory mitigators is sufficient, and there is no need to give separate instructions on individual items of nonstatutory

mitigation."), cert. denied, 114 S. Ct. 112, 126 L. Ed. 2d 78 (1993); Robinson v. State, 574 So. 2d 108 (Fla. 1991), cert. denied, 502 U.S. 841 (1992). Since Appellant has failed to present any new argument which would warrant reconsideration of this issue, this Court should deny his claim and affirm his sentence of death.

## ISSUE XXIV

WHETHER THE STATUTORY MENTAL MITIGATING FACTORS ARE UNCONSTITUTIONAL BECAUSE THEY CONTAIN THE MODIFIERS "EXTREME," "SUBSTANTIAL," AND "SUBSTANTIALLY" (Restated).

Prior to trial, defense counsel moved the trial court to declare Florida's death penalty statute unconstitutional, in part because subsections 921.141(6)(b),(e) & (f) are limited by the modifiers "extreme," "substantial," and "substantially." (R 84-85). After a hearing on the motion, the trial court denied it by written order. (R 386-87; T 115-16). In this appeal, Appellant claims that "[t]he defense objected to characterization of the mitigating circumstances of the offense being committed while under the influence of 'extreme' mental or emotional disturbance, and that his capacity to conform his conduct was 'substantially' impaired, arguing that the modifiers 'extreme' and 'substantially' would cause the jury to discount the mitigation because it did not reach the level of 'extreme' or 'substantial' . . . ." **Brief of Appellant** at 93. At no time, however, did Appellant make a corresponding challenge to the jury instructions. Appellant cites to pages 2738 and 2850 of the record to suggest otherwise, but these pages do not support his suggestion. Thus, to the extent Appellant is challenging the instructions to the jury, he has failed to preserve this issue for review. Espinosa v. State, 626 So. 2d 165, 167 (Fla. 1993), cert. denied, 114 S. Ct. 2148, 128 L. Ed. 2d 903 (1994).

Be that as it may, Appellant's claim has been repeatedly rejected by this Court. For example, in Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995), this Court recently found that this argument "rests on

a fundamental misconception of Florida law," because "[s]tatutory mental mitigators are distinct from those of a nonstatutory nature." Similarly, in Foster v. State, 614 So. 2d 455, 461 (Fla. 1992), cert. denied, 114 S. Ct. 398, 126 L. Ed. 2d 346 (1993), this Court found that the instructions as a whole adequately informed the jury that it could consider mental mitigating evidence even if it did not rise to the level of "extreme" or "substantial." Here, the jury was given the standard instructions for both mental mitigators, and the catch-all provision. Thus, as in Foster, there is "no reasonable likelihood that the jurors understood the instruction to preclude them from considering any relevant evidence." 614 So. 2d at 462. See also Lemon v. State, 456 So. 2d 885, 887 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985).

## ISSUE XXV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE RELATING TO A PRIOR VIOLENT FELONY WHEN APPELLANT WAS FOUND GUILTY OF A LESSER INCLUDED OFFENSE (Restated).

During the penalty phase, the State sought to introduce evidence of a prior violent felony offense wherein Appellant was charged with attempted first-degree murder, but was found guilty of the lesser-included offense of aggravated battery with a firearm. As proffered by the State, the testimony was going to show that in 1986 the victim in the present case, Allison Prescod, had left Appellant and moved back into her parents' home in Hollywood, Florida, with their two children. After visiting her aunt, the victim and her two children left her aunt's home with her sister, Carol Pate, and Pate's two children in Pate's automobile. Upon driving away, they were followed and later rammed by a pickup truck, which caused Ms. Pate to crash into a tree. Recognizing that it was Appellant, Allison got out to speak to him, but saw a gun in his hand and screamed to Ms. Pate, then fled with one of Ms. Pate's children whom she was holding. Ms. Pate also ran, but Appellant shot her in the arm, causing her to fall. Appellant then walked up to her, put the gun to her head, and pulled the trigger, but the gun misfired. At that point, Appellant

kicked her repeatedly in the ribs, chest, and groin, then left the scene. (T 2423-26).

Defense counsel objected to the introduction of the following facts: any statement by Allison to Ms. Pate that Appellant had a gun because it would be unrebuttable hearsay; any evidence of the children in the car, their screaming, and any effect this incident may have had on them because it would be more prejudicial than probative; evidence of ramming with a car because it would be more prejudicial than probative; evidence of putting a gun to Ms. Pate's head, pulling the trigger, the gun misfiring, and kicking Ms. Pate because Appellant had, in effect, been acquitted of attempted murder; any evidence that one of the children unbuckled themselves and ran from the car because it was more prejudicial than probative. (T 2426-29). Ultimately, the trial court made the following ruling:

> In evaluating the nature of the prior conviction and the alleged factual circumstances, and considering it specifically in light of the balancing approach of 90.403, just to reiterate the fact that the children are present, is fine, that is part of the circumstances of the offense and the actions taken by the individuals.
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> Statements made by the children are not admissible. Actions taken by the children are not admissible under the balance of 90.403. The ramming by the car is inextricably intertwined and forms the continuing factual basis for that particular crime. That is admissible.
>
> The placement of the gun to the head is certainly relevant on the issue of intent and aggravated battery. That's admissible. The kicking also is relevant on the lesser as found in that case, aggravated battery. The flight of the children under 90.403 is not admissible.
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> As far as any statements by Allison Prescod, that hearsay cross-examination issue is a problem. A scream is not cross-examinable under any circumstances in any event, so the scream is admissible. Any comments she may have made, I would sustain the objections to that under 90.403, and also under the general [n]otion of the scope to which hearsay is admissible in Phase II.

(T 2434-35).

In this appeal, Appellant claims that the trial court abused its discretion in allowing evidence that

Appellant put a gun to Ms. Pate's head and pulled the trigger, and that he kicked her. **Brief of Appellant** at 95-98. Citing to Burr v. State, 576 So. 2d 278 (Fla. 1991), he claims that "[i]t was error to present details of the attempted murder for which he was acquitted." The pith of his argument is that, "[a]s a matter of law, the prior verdict was a binding determination that these acts did not occur. Hence, the state in the instant case presented the jury with legally unreliable and false evidence contrary to Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988)." Id. at 96-97. In addition, Appellant contends that presenting evidence of a prior offense for which he has already been punished to support a sentence on the new offense constitutes double jeopardy. Id. at 97-98.

Initially, the State submits that Burr is not applicable to this case. In Burr, this Court vacated the defendant's death sentence because the trial court relied on collateral crimes for which the defendant had been totally acquitted to support two of the three aggravating factors. Here, Appellant was not totally acquitted of the prior attempted murder charge; rather, he was convicted of a lesser included offense. Since the facts complained of--putting the gun to the head, pulling the trigger, and kicking the victim--necessarily supported the lesser offense, they were admissible to show the violent nature of the prior felony conviction. Cf. Hall v. State, 420 So. 2d 872, 873-74 (Fla. 1982) (finding prior violent felony equally applicable where prior conviction for first-degree murder was reduced on appeal to second-degree murder); Palmes v. State, 397 So. 2d 648, 656 (Fla.) (upholding prior violent felony aggravator where prior offense was charged as first-degree murder, but defendant pled guilty to manslaughter), cert. denied, 454 U.S. 882 (1981).

Moreover, contrary to Appellant's assertion, the verdict of guilty to the lesser included offense of aggravated battery was not, as a matter of law, "a binding determination that these acts did not occur." **Brief of Appellant** at 97. The jury could have decided to render a verdict on a lesser included offense for any of a number of reasons. One cannot say absolutely that the facts did not support a conviction for attempted murder. Rather, one can only surmise that the jury did not find the complained-of facts proven

beyond a reasonable doubt. Equally likely, however, is the scenario that the jury could not unanimously agree on the charged offense and decided to compromise and return a verdict on a lesser included offense. The fact that it did so, for whatever reason, does not preclude the State from presenting the facts underlying the prior felony conviction to show that it was violent in nature.

This Court has consistently held that the underlying facts of a prior violent felony conviction can be elicited. Tompkins v. State, 502 So. 2d 415, 419-20 (Fla. 1986), cert. denied, 483 U.S. 1033 (1987); Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla. 1992), cert. denied, 113 S. Ct. 418, 121 L. Ed. 2d 341 (1993); Duncan v. State, 619 So. 2d 279, 281-82 (Fla.), cert. denied, 114 S. Ct. 453, 126 L. Ed. 2d 385 (1993). "Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989). It does not, as Appellant contends, "invite[] punishment" for the prior offenses.

As the trial court found, the testimony of Carol Pate was relevant and was not unduly prejudicial. Since it related the circumstances of the offense, the trial court did not abuse its discretion in admitting her testimony. Even if it were admitted in error, however, such error was harmless given Appellant's contemporaneous convictions for the armed burglary of Winston and/or Carmelita Prescod's home and his assault of Carmelita Prescod. Daugherty v. State, 533 So. 2d 287 (Fla. 1988), cert. denied, 488 U.S. 959 (1989); Jones v. State, 612 So. 2d 1370 (Fla. 1992), cert. denied, 114 S. Ct. 112, 126 L. Ed. 2d 78 (1993). Therefore, this Court should affirm Appellant's sentence of death.

## ISSUE XXVI

WHETHER THIS COURT'S DENIAL OF APPELLANT'S MOTION TO SUPPLEMENT THE RECORD WITH THE TRANSCRIPTS FROM HIS PRIOR VIOLENT FELONY CONVICTION DEPRIVES HIM OF A FULL AND FAIR APPELLATE REVIEW (Restated).

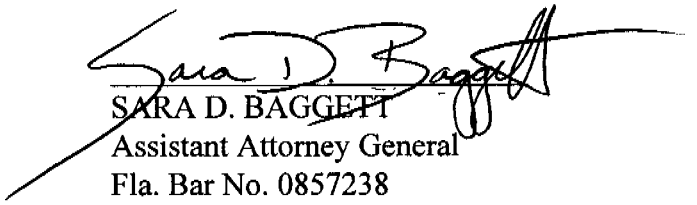
In this appeal, Appellant claims that this Court has an affirmative duty to review the transcripts from his prior felony conviction which was used to support the prior violent felony aggravator. He contends that the State argued to the jury in that case that Appellant stuck a gun to the head of the victim and pulled the trigger, despite his testimony that he did not do so. Claiming that the State made material misrepresentations in the present case regarding the facts of the former case, Appellant seeks to impeach the evidence presented in the present case with the transcripts. **Brief of Appellant** at 98-99. He had every opportunity to do so, however, at the trial. Had he believed that Ms. Pate's testimony was not accurate or not credible, he could have presented witnesses to contradict or impeach it, but he did not. Rather, he has sat on his hands, and now seeks to contradict the State's evidence after the fact. It is, however, too late. Thus, he has not been deprived of his right to a full and fair review of his trial. Consequently, this Court should affirm his sentence of death.

## CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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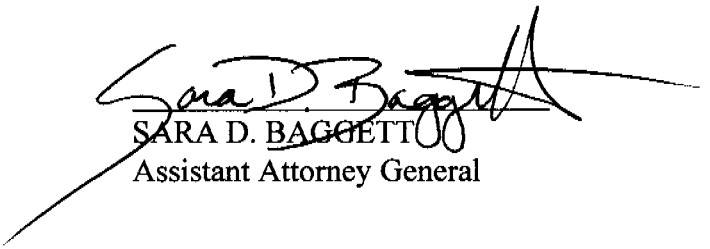
## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Jeffrey L. Anderson, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401, this 25th day of April, 1995.



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