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IN THE SUPREME COURT OF FLORIDA

LARRY D. RICHARDSON,

Appellant,

v.

CASE NO. 86,011

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT IN
AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State accepts Richardson's rendition of the Case as put forth in his brief, except as to those portions which were argumentative, omitted or necessitate clarification.[1] Richardson was tried 3 times, the first two trials ended in mistrials. Initially, prior to the first trial, this cause was before Judge Graziano. (R.1-401; T.1-1046) She conducted a hearing on Richardson's Motion to Suppress on May 22 and May 29, 1992 (R.90-131; T.185-500). Her Order as to said motion, dated July 9, 1992, reads in pertinent part as follows: "...[T]he Court having held a hearing on the 29th of May, 1992, and argument having been heard, it is therefore the finding of this Court as follows:

> 1) Defense counsel's Motion to Suppress is GRANTED as to the February 14, 1992 statement made at the Daytona Beach Police Department, as it was obtained in violation of defendant's fifth, sixth and fourteenth Amendment Rights.[2]

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[1]Appellant was the Defendant in the trial court below. Appellee, THE STATE OF FLORIDA, was the prosecution. Henceforth, Appellant will be identified as "Richardson" or Defendant. Appellee will be identified as the "State". "R" will designate the Record on Appeal. "T" will designate the Trial and Penalty Phase Transcripts, including Sentencing Hearings. "SR" represents the supplemental record. "D" represents the records depositions. "p" designates pages of Richardson's brief. All emphasis is supplied unless otherwise indicated.

[2]Originally, Richardson was represented by Assistant Public Defender, George Burden.

2) Defense counsel's Motion to Suppress is GRANTED as to all statements made at the Volusia County Jail *prior* to November 21, 1991 as they were obtained in violation of defendant's fifth, sixth and fourteenth Amendment Rights and inadmissible under Florida Statutes 90.410 and Rule 3.172(h) of Florida Rules of Criminal Procedure.

3) Defense Counsel's Motion to Suppress is DENIED as to statements made November 22, 1991 as the defendant freely and voluntarily waived his fifth and sixth Amendment rights and spoke to Detective Ladwig as he is allowed to under McNeil v. *Wisconsin,* 501 U.S.. ___, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), *Traylor* v. *State,* 17 F.L.W. 42 (Fla. Jan 16, 1992 and *State v. Lints*, 17 F.L.W. D862 (5DCA, April 3, 1992).[3] (R.209-210)

Judge Graziano also issued an Order, after conducting a hearing on June 10, 1992 (T.608-43), regarding the admissibility of ***Williams*** Rule Evidence on July 28, 1992, in which she found "such evidence should not be allowed because such evidence is irrelevant to prove any material fact in issue. F.S. 90.404(2)." The State appealed her ruling to the District Court of Appeal of Florida, Fifth District (SR). ***State v. Richardson, 621 So.*** 2d 752 (Fla. 5th DCA 1993).

The Fifth District agreed that Judge Graziano properly held that Richardson's possession of a firearm on February 11 (State's

[3]The trial court issued an Amended Order on July 15, 1992, which comports with the original order.

item 1) and use of a small-caliber handgun in the February 14 murder of Carolyn Lee were not so similar or unique as to prove identity or common scheme (R.180-83, 248, 253)." It also concluded that Judge Graziano "correctly held that the state failed to show a sufficient connection between the missing handgun from the home of Richardson's aunt (State's item 4) and the unrecovered handgun used in the murder of Lee (R.180-83, 253-54)." (Citation omitted.) However, the appellate court disagreed with her ruling as to State items 2, 3, 5, and 6 (R.256-57).[4]

On September 16, 1994, a hearing was conducted before Judge Graziano on new appointed counsel's motion to withdraw.[5] The following exchange transpired at said hearing:

> MR. DUBBELD: I'm sorry, the letter of Mr. Richardson.
>
> THE COURT: You are referring to the letter of September 11th?
>
> MR. DUBBELD: Yes, ma'am. We had faxed Mr. Politis a copy of the motion today. Simply what we are dealing with today is a motion to withdraw. I'm doing this pursuant to Mr. Richardson's request.

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[4]The substance of the Fifth District's opinion regarding these items will be related in the State's argument on Point V in this brief.

[5]At this juncture, Richardson was represented by current appellate counsel, Paul Dubbeld.

THE COURT: Mr. Richardson, you now wish to represent yourself?

MR. RICHARDSON: Yes, ma'am.

THE COURT: Your motion is denied, Mr. Richardson. **I'm not going *to* continue *with* these *dilatory* tactics on your *part.*** I found --

MR. RICHARDSON: I'm not asking for --

THE COURT: ***--*** your ***motion* to *represent yourself is not filed in good faith.*** Any other? (T.1037-38)

On September 29, 1994, Judge Graziano issued an Order of Reassignment designating Judge Hammond as the new trier of Richardson's cause (R.401).

As regards ***Williams*** Rule evidence, Judge Hammond in Richardson's first trial, addressed Mr. Dubbeld, who served as standby counsel, and ruled in accordance with the Fifth District's opinion regarding the same:

THE COURT: Here's what I'll do. I think you probably know better than anyone at what point the state may go into the issues that were -- have been previously raised, appealed, and ruled on by the Fifth. But I think it's helpful before we get to those witnesses to let us know that they're coming.

And I would expect of counsel a statement -- if you wish some specific instruction that you think is curative or important, that you submit that to me in anticipation of the state going into those matters, that instruction that you're going to request, so that the state likewise can consider it. And likewise, if the state has some objection to it or concern about it, that would give you a chance to pose that objection and us discuss it before we get into it. (T. 1719)

Judge Hammond denied Richardson's motion to suppress his confessions given to Detective Ladwig on November 21 and 22, 1992, in his first trial and adhered to this ruling in his third trial (T.1960-62, 4670-73, 4846-54). This matter will be discussed in more depth during the State's argument to Richardson's third point on appeal.

Another evidentiary ruling deemed significant by Richardson in the first trial concerned an audio tape of a phone conversation he had with his father, who resided in Massachusetts. Richardson, pro se, entered into a stipulation with the State regarding this conversation, which demonstrated a motive for murdering Ms. Lee -- money to get out of town because he had murdered Kevin "Peanut" Floyd (T.1709-18, 1895-97).[6] Richardson entered the stipulation because he wanted to spare his father, who was in ill health, the discomfort of traveling to Florida to testify against him (T.1897). Richardson sought to withdraw his stipulation based upon what Mr. Dubbeld claimed was coercion and naivety of the law on Richardson's part (T.1709-18, 1895-97). After visiting the matter twice, the

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[6]In fact, the entire audio tape was introduced in Richardson's trial for the murder of Floyd, for which he was convicted. (T.1897).

trial court ordered the State and Mr. Dubbeld to review the tape and redact irrelevant material so the State could read those portions of the tape which were not deleted. (T. 1915) .

The stipulation was addressed for a final time before its introduction into evidence in the first trial (T.2085-2109, 2113-16). The prosecutor announced that "three pages of extractions [of] defendant's statements only" had been constructed pursuant to the court's order (T.2086). Mr. Dubbeld voiced his objection 'to everything in the statement (T.2086)." The trial court framed the matter as follows:

> THE COURT: All right. First off, is there -- do I understand correctly there's no dispute of the existence of this stipulation as to it occurring back on July 12th of '94, that the stipulation was made concerning permitting this testimony in, in lieu of summoning Mr. Richardson, Senior?
>
> Your [Mr. Dubbeld'sl contention is, however, you feel it was brought about by duress, as I believe you stated, and that you didn't think it was a voluntary stipulation or something. But at the time, apparently Mr. Richardson was representing himself and entered into this stipulation, if you will, with the state back in July. (T.2086-87)

The trial court ultimately ruled regarding the stipulation as follows:

> THE COURT: I note the stipulation entered into by Mr. Richardson and Mr. Politis back in July of 1994 and filed with the court at that time said that the cassette tape containing the voice of the

defendant's father, J.M. Richardson, was to be admitted into evidence in its entirety without any objection at trial.[7]

> I will not permit it in its entirety, but I'll permit in those things that I have indicated are relevant. And there shall be admitted into the evidence -- and I think I need to tell the jury that by stipulation, these comments which are presented and put into evidence for their consideration. (T.2107-08)

All of the previously discussed evidentiary rulings remained for Richardson's second and third trials (T.3136-72, 4605-17). In Richardson's second trial, the State stipulated as to hairs found clutched in Ms. Lee's hands not being his (T.3172-73).[8] However, despite Mr. Dubbeld's representation to the contrary, the State did not stipulate as to fingernail scrapings (T.3172-77).[9] In fact, the prosecutor noted for the record: "There was no human tissue discovered on the fingernail scrapings (T.3173)." At his third trial Richardson filed a Motion for DNA Testing regarding the hair and scrapings, which he argued himself (T.4621-26). The trial

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[7]There is another critical fact that should be noted. By the time of Richardson's second trial, his father had died. (T.3142)

[8]This evidence was elicited during the cross-examination of the Medical Examiner, Dr. Botting, in Richardson's first trial (T.1887-89, 3171-72).

[9]The fingernail scrapings also came out during Dr. Botting's cross in the first trial (T.1887-89, 3173-77).

court ruled:

> THE COURT: I think it's an untimely motion for me to require what the defense has requested at this time. And I feel it's inappropriate and would deny the motion.
>
> But I understand the state is still bound by its stipulation. And if there was evidence obtained and not identified as associated with any particular person, then I guess that theoretically would come out and I think it did come out in the last trial. That there were such nail materials taken and they were not associated with the accused in this case. (T.4625)[10]

As regards Richardson's representations as to his proceeding pro se in his rendition of the Case as set forth at p.10 of his brief, a complete and ***accurate*** rendition of the circumstances surrounding said status will be presented in the State's argument ***as*** to his eighth point on appeal.

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[10]Richardson in his rendition of the Case at p.8 relates, without record citation, that 'Dr. Botting had testified at trial number one that significant hair particles were retrieved from the victim's hands." In fact, Dr. Botting testified under cross-examination: "There ***was*** hair attached to both hands, clutched in both hands (T.1888)." At Richardson's second trial Mr. Dubbeld, while cross-examining Dr. Botting, divulged contents of the autopsy report as follows: "The hands on both sides are bloodstained, and there are strands of hair clutched in the fingers on each hand (T.3363)."

On redirect at the second trial, Dr. Botting testified that he had received no information on whether there were positive results from the fingernail scrapings (T.3365). He further testified that he did not identify any human tissue when he did the scrapings, and if he had he would have noted it in his autopsy report (T.3366).

Mr. Dubbeld broached the subject of an anonymous letter which Henry Christian received and turned over to Chief Paul Crow of the Daytona Beach Police Department (T.4667). The factual circumstance surrounding this matter will be presented in the State's argument for Richardson's second claim on appeal.

On December 16, 1994, before Richardson's second trial, Mr. Dubbeld filed a Motion to Dismiss Indictment and an Amended Challenge to Panel, which contrasted the percentage of black registered voters with the black population of Volusia County (R.445-450). These motions were argued before the second trial and denied by the trial court (T.2835-49). When they were renewed for his third trial, they were again denied (T.4050-52).

When Mr. Dubbeld took over Richardson's defense he requested that jury selection be reopened since he only advised Richardson, did not ask questions, and desired to ask additional questions to ensure a fair jury (T.4669). He then conceded that Richardson adopted the questions he asked during voir dire in the previous trials (T.4670). No mention of the racial composition of the venire was made (T.4669-70).

In his rendition of the Case, at p.11, Richardson refers to his "timely Motion for Judgment of Acquittal as to all three counts," but fails to provide a record cite. The court's rulings can be found at T.5037-41. On the same page of his brief, Richardson alleges: 'The court did not conduct an adequate inquiry when the Appellant announced that he was going to proceed in pro se during his death penalty phase." Again, there **was** no record citation. A review of the record indicates **a** thorough *Faretta* inquiry was in fact conducted (T.5335-56).[11]

The jury found Richardson guilty of all counts charged by the indictment: Count I- Murder in the First Degree; Count II- Armed Robbery with a Firearm; Count III- Burglary of **a** Dwelling with a Firearm (R.538-40; T.5311-14). He was adjudicated on all counts (R.541-42; T.5362-63).

The jury recommended the death penalty by a vote of 10 to 2 (T.5502). The trial court found three aggravating circumstances:

> **(1) The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of use of violence to a person.**
>
> **(2) The capital felony was committed for pecuniary gain.**
>
> **(3) The capital felony was heinous, atrocious or**

[11]*Faretta* v. California, 422 U.S. 806, 807 (1975). The court noted that the consequences of self-representation were 'fully explained before (T.5351)." As previously delineated, Richardson **was** afforded a detailed inquiry before voir dire at the third trial, and an inquiry after the jury **was** chosen (T.3883-98, 4640-61).

cruel. (R.544-46)[12]

Although Richardson offered nothing in mitigation, the trial court did "find the non-statutory mitigating circumstance of the Defendant's remorse," but afforded this non-statutory mitigator "little weight" (R.546; T.5568-69).

STATEMENT OF THE FACTS[13]

I. Guilt Phase

Paul Brackman, FDLE crime analyst testified that a bloody handprint on a comforter was consistent "with the left handprint of the victim [Carolyn Lee] (T.4762-63)." Detective Flynt testified he knew Ms. Lee in a personal capacity, and identified a diagram of the area where she lived (T.4765-66).

Dr. Ronald Reeves, Medical Examiner for Volusia County,

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[12]While the trial court was reading its sentencing order, Richardson became so disruptive that the trial court was forced to order him bound and gagged (T.5564-65). This **was** not the first occasion of disruptive behavior either. Early on in the guilt phase, the trial court informed Richardson he would be gagged if he did not comport with courtroom decorum (T.4822).

[13]***Richardson's Statement of the Facts is found* at *pp.13-16* of *his brief. The only record cites are found in the middle* of *p.14. This portion of his brief is in violation of* Fla. *R. App. P. 9.210(b)(3), and is grounds for* a *motion to strike. In the interest of judicial economy the State has refrained from so moving, but would note this* discrepancy *for the record.***

testified that Ms. Lee had 10 to 12 blunt force type injuries and 3 to 5 sharp force injuries to her head (T.4784). The cause of death "was primarily blunt force trauma to the head, which resulted in death (T.4783)." The sharp force injuries were consistent with being caused by a knife (T.4784). The blunt force injuries were consistent with being caused by a hammer, and caused multiple fractures to her skull (T.4784-85). The victim also had a gunshot wound to the left ear (T.4784).

Detective Ladwig, lead investigator in Ms. Lee's murder, testified that on November 21, 1991, Richardson invited him to come down and see him in the jail (T.4859).[14] He, and his superior, Lieutenant [Lt.] Evans, went to talk with Richardson, who "unofficially" confessed to Ms. Lee's murder (T.4859). Lt. Evans asked Richardson what that meant, and the two of them argued, which culminated in Lt. Evans leaving the room (T.4859-60). Detective Ladwig asked him again what he meant, "[h]e said, I confess. I did it (T.4860)." Richardson refused to put this in writing or be tape recorded, and shortly thereafter was transported back to the county jail (T.4860). Before he left, Richardson indicated he would call

[14]Richardson had just been sentenced for the second degree murder of Kevin 'Peanut" Floyd (T.194-96, 200, 213-19). It should also be noted that Richardson represented himself in that trial (T.200).

Detective Ladwig, which he did, collect (T.4860). The next day, November 22nd, Detective Ladwig visited Richardson and learned the grisly details of Ms. Lee's demise (T.4859-60).

Richardson observed Ms. Lee walking home, and arrived at her home approximately the same time she did. Ms. Lee invited him in and they visited on her front porch for a few minutes (T.4871). She offered him a soda, which he accepted (T.4871). She went inside to tend to chicken cooking on the stove and he followed her in (T.4871). He noticed her jacket hanging on a chair, and her wallet sticking out of a pocket (T.4871). He removed the wallet from the jacket, and took the money it contained (T.4871). However, Ms. Lee caught him in the act as she approached him from behind (T.4871).

He turned around, she slapped him, and asked him "Why he did this (T.4872)?" She told him if he needed the money all he had to do was ask (T.4872). He hit her back and they fought from the living room to the kitchen (T.4871). In the kitchen he hit her with a skillet, but she kept fighting (T.4872). He shot her in the head (T.4872). She fell, he stared at her for a couple of minutes, but realized she wasn't dead (T.4872). He dragged her to the bedroom, tried to put her up onto the bed, but couldn't (T.4872). At this point, by his own admission, he "did some gruesome things

(T.4872)."

When Detective Ladwig asked what gruesome things, Richardson indicated he did not want to talk about it (T.4872). Detective Ladwig told him he had been at the murder scene and saw what happened, so there was nothing Richardson could say that he "hadn't already seen (T.4872)." Richardson then related he 'hit her in ***the head with a hammer*** (T.4872)." When asked why, Richardson responded, "***so people*** wouldn't ***not [sic] I killed her, to what I had done*** (T.4872)." When asked if he was referring to the gunshot, Richardson responded, ***"yeah, the gunshot and the stab wounds*** (T.4872)."

Richardson further related he took money from the safe before he left (T.4873). He went from the victim's home to his apartment and left his LA Gears [shoes] outside (T.4873). He took his clothes off and took a shower (T.4873). He said, ***"it seemed like forever to get the blood off me . . . it soaked through to my ass*** (T.4873)." When Detective Ladwig said maybe that was his guilty conscience, Richardson said: 'No, ***I don't have a guilty [conscience] like you would. I just couldn't get the blood off*** (T.4873)."

He buried the gun and shoes, but refused to tell Detective Ladwig where (T.4873). When asked why, he responded: "I just don't want to tell you. Maybe I'll tell you later."[15] Richardson went to a pawn shop, bought a ring, ate lunch at Pizza Hut, and bought a new pair of tennis shoes (T.4873). Detective Ladwig asked him if he had called his father and told him about murdering Ms. Lee (T.4874). Richardson said he had called his father, but told him he had killed somebody else (T.4874). The hammer and knife which he used to kill her were obtained from her house (T.4874).

Lt. Evans testified as to his encounter with Richardson on November 21st, when he accompanied Detective Ladwig to speak with him (T.4956-57). Lt. Evans testified he left because his presence caused turmoil (T.4957). Officer Linda Gnau, Identification Technician for the Daytona Beach Police, testified as to what Richardson said to Detective Ladwig when she drew samples from him on April 6, 1992 (T.4969-70). She heard Richardson tell Detective Ladwig: "You would not have anything on me, unless I told you (T.4970)." He also asked Detective Ladwig: "You haven't found the sneakers yet, have you (T.4957)?" Richardson was upset with Detective Ladwig over a newspaper article (T.4970).

Matthew Lee Simmons, Jr., testified he was incarcerated with Richardson at Charlotte Correctional Institution from November 2,

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[15] Of course, he never did.

1994, until April, 1995 (T.4982-83). In December of 1994, Richardson admitted murdering his landlady (T.4983). Richardson said he was behind in his rent and needed money to return to Boston (T.4983-84). He asked her for money to return to Boston, she refused, and he shot her (T.4984). Richardson admitted confessing, but the police ***"didn't have anything on tape* or *in writing to prove he confessed. It was just his word against theirs (T.4984) ."*** He murdered Ms. Lee for money (T.4984). He took money bags from her safe and 2 mink coats (T.4984).[16]

The prosecutor read the redacted statement of Richardson's father (T.5002-05). Richardson called his father on February 13, 1992, around 9 or 9:30 p.m. (T.5002-03). Richardson instructed his father to send him $100.00 (T.5003). He said he had murdered somebody, and wanted to get out of town (T.5003). Richardson requested the money be sent by Western Union (T.5004). He told his father not to send the money to Rosa Lee,[17] because he couldn't go there (T.5004). The State rested its case-in-chief (T.5005).

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[16]Detective Ladwig was recalled to testify that the first time he became aware of the stolen minks was when Mr. Dubbeld informed him that the victim's family had filed an insurance claim for them (T.5000). The next time he heard about them was from Simmons (T.5000-01).

[17]It is not clear whether Mr. Richardson, Sr., was referring to his son's aunt, Rosa Lane, or to Ms. Lee.

The Defense case consisted entirely of Richardson taking the stand on his own behalf (T.5043-5126). Under cross-examination he admitted he spoke with his father in Boston by phone on February 13, 1991, and attempted to call him again four (4) times commencing at around 5:30 a.m. February 14th (T.5099). He also admitted that he had called the airport and made flight arrangements to fly out of Daytona around this time (T.5099, 5123). When the police took him to the station he was packing his bags (T.5122).

II. **Penalty** Phase

After Richardson had been found guilty as charged on all 3 counts, Mr. Dubbeld announced:

> MR. DUBBELD: I have been under instructions from Mr. Richardson to neither investigate, research, or conduct any other efforts to attempt to block or persuade the jury in this death penalty phase. I will not be allowed to present any argument. I will not be allowed to present any matters in mitigation. Mr. Richardson has informed me that he wants to go immediately into the next phase of this trial. And I'm relaying that to the Court.[18] (T.5322)

When the trial court expressed its desire 'to have the benefit of a recommendation from the jury," Richardson expressed his desire to

[18]Actually, Mr. Dubbeld had been instructed 'since he first accepted this undertaking, back in September, . . . of 1994, . . . not to investigate, research, or participate in the death penalty phase (T.5335) ."

waive the Penalty Phase (T.5326-27). Ultimately, Richardson was allowed to represent himself, after the trial court conducted a thorough *Faretta* inquiry (T.5335-52).

The State called Carolyn Sawyer, Captain MacEachern, Scott Butler, Deputy White and David Damore, to testify as to Richardson's "11 certified, felony convictions of violent acts (T. 5384, 5387-5447)." Ms. Sawyer was the records custodian for Richardson's Massachusetts felonies (T.5385-5403). These included the assault with intent to rob Tony Lee with a dangerous weapon of, the assault and armed robbery of Laura Tillman with a knife, the assault of Officer Burke, and the assault of Irene Busick (ph) while stealing her handbag (T.5389-99)

Captain MacEachern testified to Richardson's assaults and batteries of an inmate, himself and Officer Bill Burke with a baseball bat, while Richardson was serving a sentence in Walpole, a maximum security prison in Massachusetts (T.5403-06).

Scott Butler, who was battered by Richardson with a lock in a sock, pled the 5th Amendment, and would not testify against him (T.5411-13). Judge Graziano's bailiff, Deputy Bill White, testified he was present when Richardson was convicted and sentenced in 1991 for armed robbery with a firearm or deadly weapon (T.5415). He was also present when Richardson was convicted and sentenced for battery in jail [Scott Butler] (T.5416).

David Damore testified as to the prosecution of Richardson for the armed robbery of 72-year-old Mr. Bracht, in which Richardson placed a 'dark-colored, small-caliber handgun up to Mr. Bracht's head" and demanded his wallet.[19] On February 12, 1991, Richardson was prosecuted for the second degree murder of Kevin Floyd with a firearm (T.5436). Richardson went to purchase drugs from Floyd, received the drugs, but did not pay him (T.5436). When Floyd demanded his money, Richardson turned around and shot him in the chest with a small .22 caliber handgun (T.5436-37). The State rested its case for aggravation.

Richardson took the stand on his own behalf, admitted he robbed Mr. Bracht, but denied both the murder of Floyd and Ms. Lee (T.5451-54). He admitted whoever killed Ms. Lee 'should be killed" (T.5454). Richardson recalled Scott Butler, who testified that

[19]Richardson's possession of this weapon during the Bracht robbery was ***Williams*** Rule evidence the State sought to introduce in his trial for the murder of Ms. Lee. It was suppressed by Judge Craziano, which was upheld by the 5th DCA (R.180-83, 217-18, 247-257). ***State v. Richardson, supra,*** at 753, 756. Richardson murdered Kevin Floyd with a small-caliber, dark-colored handgun, which the 5th DCA determined was proper ***Williams*** Rule evidence. ***Id.,*** at 756-758. Richardson's aunt, Rosa Lane, discovered that a small-caliber, dark-colored handgun was missing from her home. The 5th DCA upheld Judge Graziano's suppression of this evidence. ***Id.,*** at 756.

Detective Ladwig was very ‘persistent" about and "obsessed" with Ms. Lee's murder (T.5468).

SUMMARY OF THE ARGUMENT

I.

The trial court correctly exercised its discretion regarding the testimony of the Medical Examiner, Dr. Reeves. There was no discovery violation. If there was, it was inadvertent, and the matter is waived for purposes of this appeal, because Richardson failed to object and request an inquiry. Said failure constitutes invited error. Error, if any, was harmless beyond a reasonable doubt.

II.

The majority of the alleged instances of prosecutorial misconduct were not preserved by proper objections. If they were preserved, there either was no error, or it was harmless beyond a reasonable doubt.

III.

The trial court correctly exercised its wide discretion in matters pertaining to the admission of evidence, where it allowed the admission of Richardson's statements. It found that negotiations had ceased, and were not, therefore, pursuant to plea negotiations,

IV.

The trial court correctly exercised its discretion in denying Richardson's racial challenge to the venire and his related motion to dismiss. This Court has ruled that voter registration lists are a permissible means of selecting venirepersons.

V.

The District Court of Appeal of Florida, Fifth District, correctly accepted jurisdiction regarding a pre-trial order excluding evidence. The Fifth District correctly exercised jurisdiction over the cause, and correctly applied the law. Its opinion is "law of the case."

VI,

Richardson's reasonable doubt instruction claim is procedurally barred, and has been decided adversely to him on the merits time and again.

VII.

Florida's death penalty statute has repeatedly withstood constitutional muster on the issues Richardson makes under this boilerplate claim. Death is a proportionate sentence in this cause when compared to other cases.

VIII.

Richardson's pro se request was a delaying tactic. The trial court correctly exercised its discretion in appointing his standby counsel as counsel for the duration of the guilt phase when he refused to comport with its orders.

IX.

Richardson was manipulating the proceedings. The trial court correctly exercised its discretion in denying his motion for continuance.

X.

The trial court properly conducted a ***Faretta*** inquiry prior to Richardson's self-representation during the penalty phase.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION REGARDING THE TESTIMONY OF DR. REEVES, WHERE HE WAS REPEATEDLY DISCLOSED DURING VOIR DIRE, AND DEFENDANT DID NOT REQUEST A ***RICHARDSON*** HEARING UNTIL BOTH SIDES HAD RESTED, LONG AFTER DR. REEVES HAD TESTIFIED.

If there was a discovery violation, it was inadvertent, and the matter is waived for purposes of this appeal, because Defendant failed to object **and** request a *Richardson*[20] inquiry. **Said failure** constitutes invited error, and error, if any, was harmless beyond a reasonable doubt.

For one to adequately address Richardson's first point on appeal, it is essential to understand the factual circumstances in which it **arose.** Initially, during the voir dire of prospective jurors, Richardson was pro se, with Mr. Dubbeld serving in the **capacity** of standby counsel (T.3906-4603). The prosecutor **read off** a list of potential witnesses to the various venires at least three times (T.3921, 4286, 4491). Both Dr. Botting **and** Dr. Reeves were listed (T.3921, 4286, 4491). At these same three instances, Richardson read off his list of witnesses, which included ***Dr. Botting*** (T.3922-23, ***4286-87, 4492-93).*** At no time during voir dire did either Richardson or Mr. Dubbeld exclaim they were not properly notified as to Dr. Reeve's status as a potential witness; nor did either individual request a ***Richardson*** hearing be conducted (T.3921, 4286, 4491).

Before the jury was sworn, Richardson, still pro se, expressed his desire to raise **various** motions (T.4604-4630). At no time did he or Mr. Dubbeld allege **a** discovery violation regarding Dr.

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[20]*Richardson* ***v. State,*** 246 So. 2d 771 (Fla. 1971).

Reeves, or request a *Richardson* inquiry be conducted (T.4604-4630). The next day, April 20, 1995, before trial was to commence, Richardson requested a continuance (T.4652-66).

Mr. Dubbeld attempted to gain a continuance based upon his alleged unpreparedness, but the record exhibits he argued several motions extensively prior to the commencement of trial (T.4666-87). ***Interestingly, at this juncture, Mr. Dubbeld alleged a discovery violation regarding Matthew Simmons, and requested a Richardson inquiry*** (T.4677-87). In keeping with the request, the trial court conducted the requisite hearing, and determined Mr. Simmons would be allowed to testify (T.4679-87). ***No discovery violation was alleged regarding Dr. Reeves, and no Richardson inquiry was requested*** (T.4666-87).

Before Dr. Reeves was called as a witness, the record exhibits the following matters occurred:

> MR. POLITIS: Your Honor, the next witness is the doctor. And he's forthcoming. He had an emergency matter to take care of. He should be here any minute now. May I be afforded five, ten minutes to take a recess.
>
> MR. DUBBELD: Which one?[21]

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[21]Richardson's first claim is that the trial court erred in allowing a *non-disclosed* witness, Dr. Reeves, to testify. Yet, he admits at p.21 of his brief: "At jury selection, the prosecutor read Dr. Reeves' name and disclosed him as a witness

MR. POLITIS: Dr. Reeves.

THE COURT: Dr. Reeves.

MR. POLITIS: Yes. The medical examiner for Volusia County.

MR. DUBBELD: I have to be heard on that.

THE COURT: Okay. I'm going to let the jury step out and see to refreshments or something outside of the courtroom So while we're waiting, I'm not going to put you in the back room. Get some refreshments. And we'll call you as soon as we're ready to go again.

The rest of you, stay with me.

(Whereupon the following proceedings were had out of the presence of the jury.)

MR. DUBBELD: Your Honor, I may be wrong. But I don't have today an independent recollection -- and, of course, I didn't go through the file for purposes of ascertaining this. Because I wasn't getting ready for trial. But I -- perhaps, the government can say yes or no and show me where they provided this witness's name to us.

MR. POLITIS: Be more than happy to, Judge. It's in the Court record. We disclosed Dr. Reeves back at the first trial. Because Dr. Botting was away on vacation at the time. But his vacation [was]

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for the first time. (R.3221)." At p.22 he alleges "Dr. Reeves' name was essentially buried in thirty names. (R.3921-22)." As previously delineated in this brief, Dr. Reeves was mentioned at least 3 times during voir dire (T.3921, 4286, 4491). Mr. Dubbeld remarked, ***"Which one?"*** It would seem, notwithstanding Mr. Dubbeld's contention that Dr. Reeves' name was buried, that he heard it or knew Dr. Reeves may testify.

canceled and ultimately [he] was here.

Dr. Reeves has been listed as a witness for several months, if not four to six months. So he's going to be testifying as to cause and manner of death.

THE COURT: How is he going to be doing that? Did he perform the autopsy?

MR. POLITIS: No. And he doesn't have to perform the autopsy in order to opine as to cause and manner. I have given him Dr. Botting's autopsy report and all the other materials with which to assist him to formulate his opinion. And under the law, he is allowed to formulate his opinion and give his opinion to the jury.[22]

THE COURT: Based upon the --

MR. POLITIS: Examination.

THE COURT: -- autopsy and examination performed by Dr. Botting in his association.

MR. POLITIS: That's correct, Your Honor.

THE COURT: I think if that's the case, that's probably going to be permissible, I believe. You want to check to make sure you have gotten that notice.

MR. DUBBELD: If Mr. Politis said he provided it, I will accept the word.

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[22] *See Capehart* v. State, 583 So. 2d 1009, 1012 (Fla. 1991). (Chief Medical Examiner could testify regarding cause of death of murder victim although she had not performed autopsy, by relying upon autopsy report, toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case.)

But getting back again to my lack of preparedness, I am not prepared to argue the predicate which is necessary for this kind of business records exception or --

THE COURT: Are you familiar with this doctor?

MR. DUBBELD: I know who he is by reading the newspaper.[23]

THE COURT: Okay. You've not had a chance to previously get his credentials.

MR. DUBBELD: Never talked to him at all.

THE COURT: He is the medical examiner for the Seventh Judicial Circuit.

MR. POLITIS: For Volusia County, Your Honor.

THE COURT: For Volusia County.

MR. POLITIS: Yes, Your Honor. And he has been previously qualified as an expert in forensic pathology in excess of 100 times, all the records and credentials. So he is the medical examiner.

THE COURT: ***Anything he is going to testify to inconsistent to what Dr. Botting testified to?***

MR. POLITIS: No, Your ***Honor.***

THE COURT: ***Doesn't have different conclusions?***

MR. POLITIS: No, ***Your Honor.*** And if he did, that would not be objectionable.

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[23]Mr. Dubbeld's coy remark is rather disingenuous in light of his long standing criminal defense practice in Volusia County, and further comments made during discussions related to Dr. Reeves.

> THE COURT: I know that. But might be a little bit of a surprise.
>
> MR. POLITIS: No ***surprises.***
>
> THE COURT: Okay.
>
> MR. DUBBELD: ***We have Dr. Botting under subpoena. And I guess we're going to have to put him on to*** *talk* ***about the hairs and things*** *of* ***that sort.***[24]
>
> THE COURT: You may or you may not. I guess we'll -- you'll have to evaluate this witness's testimony and then make your decision accordingly.
>
> MR. DUBBELD: Okay. (T.4767-71)

That was the extent of any discussion prior to Dr. Reeves testifying (T.4778-4818). Defendant never requested **a** Richardson inquiry before Dr. Reeves testified (T.4767-78).

Dr. Reeves came up again prior to Detective Ladwig testifying:

> MR. DUBBELD: I neglected to, in the course of all the other arguments. What we have is another difficult situation. Mr. Politis represented that he had previously given the name of Dr. Ron Reeves to us. We've been through the entire file. It's not there. I asked the clerk to check it this morning. I don't see it. I accepted his word as an officer of the Court.
>
> Now I'm asking that it be substantiated in some

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[24] Again, it would seem Richardson (or at least Mr. Dubbeld) not only knew about Dr. Reeves as discussed in the State's footnote 23, but he took the precaution of having **Dr. Botting *subpoenaed.*** However, he never called Dr. Botting.

> fashion. Because we might be in a mode of moving for a mistrial.[25]
>
> THE COURT: Well, do that after we get through this phase. We'll have you check the record and see what you can find.
>
> MR. POLITIS: Thank you, Judge. (T.4857)

The State rested its case-in-chief, and the Dr. Reeves matter was discussed again:

> MR. DUBBELD: Just so maybe we can start looking. I had a loose ends pad. And one of the loose ends is this issue regarding whether or not the defense was given notice as to Dr. Ron Reeves.
>
> THE COURT: Oh, yes.
>
> MR. DUBBELD: We've looked. I understand the clerk has looked and can't find it. I'm sure that somebody is mistaken.
>
> MR. POLITIS: Judge, I'm going to look. But I haven't found it. Because I was, basically, focusing my staff on getting the logs. But let me give you a brief argument here.
>
> First of all, he has waived any objection to Dr. Reeves. We announced it during voir dire as to what potential witnesses. And I will stake my word on it, that Dr. Reeves was announced.
>
> Secondly, and more importantly, when Dr. Reeves took the stand, defense counsel said no. That's okay. It's no problem. The Court even asked me, is there anything substantially different with Dr. Reeves' testimony as opposed to Dr. Botting['s] .

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[25]If it was not apparent before what the defense was about regarding Dr. Reeves it should be by now.

> And I said, no. And as my word was proven, Dr. Reeves established cause and manner of death. And that's it.[26]
>
> ***So defense counsel cannot now try and invite some type of error by saying, oh, there's a discovery violation. If the Court wants to entertain a Richardson inquiry, fine. Because defense counsel knew of Dr. Reeves on Monday.***
>
> ***Now,*** let's play devil's advocate. If I do . . . find that I inadvertently did not disclose Dr. Reeves in a timely fashion, in other words by paper, by verbally doing ***so, I provided him three days with which to depose the doctor, if he thought it* was *that instrumental.***
>
> ***But the doctor didn't have anything new to* say. *He looked at Dr. Botting's report* and *testified to that. So where is the prejudice.***
>
> THE COURT: Okay. I understand that. We'll take that matter up further on Monday. Give you an opportunity to look over your records. And we'll consider that when we have to. ***(T.5014)***

On Monday the matter was revisited for the final time (T.5020-34). In essence, the Richardson inquiry that Defendant should have requested prior to Dr. Reeves' testimony took place, and the trial court ruled as follows:

> THE COURT: Without knowing more or hearing more evidence on the matter, ***I cannot find that there is any apparent prejudice concerning the witness's testimony in light of the* fact *that the testimony principally went to cause* of death. . . .**

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[26]If it was not waived at voir dire, it certainly was when no ***Richardson*** inquiry was requested before Dr. Reeves testified.

> So, in sort of a retrospective ***Richardson*** sort of proceeding, I, ***if I had my druthers, I would elect to have had a*** chance ***to address all these things before we got to that testimony.*** But the way it unfolded, nevertheless, ***I think in a retrospective way, there's no evidence to me that there's improper prejudice to the defendant by the way the witness was summoned and preaented.***
>
> I think it could have, had he been offered for some other purposes or expanded in some way the testimony, that may have created some problems that would have caused the defense to be completely unprepared for his testimony. But I think it **was** evident that an expert in cause of death would be summoned. That expert's testimony **was** seemingly based in large part upon another expert who previously testified repeatedly and was known to everyone involved. Certainly known to the defendant prior, because of early testimony in earlier discovery. And ***I don't know that the doctor really contributed to anything more than*** **what was** ***essentially the medical exam, the original medical examiner's conclusions.***
>
> ***So,*** **for** ***that purpose,*** **if** ***there is error, I think I would conclude that it was harmless. But I'm not so sure of it in light of this situation that there's really an*** **error.** It just really didn't quite go the way I would have liked to have had it gone. It does create an issue that may well have to be reviewed. (T.5032-34)

First, and foremost, the State argues that these facts demonstrate there was ***no*** discovery violation regarding Dr. Reeves. See *Esty v.* State, 642 So. 2d 1074, 1079 (Fla. 1994) (State did not commit discovery violation by disclosing identity of rebuttal witness on Thursday before Monday commencement of trial, and defense counsel declined court's offer to depose witness prior to his testimony.); ***Smith v.*** State, 515 So. 2d 182, 183 (Fla. 1987) (No discovery violation where State submitted an additional witness list on the day of trial and defense counsel granted right to depose additional witnesses.).

In this cause, the prosecutor complied with its continuing obligation to disclose pursuant to Fla. R. Crim. P. 3.220(j) when ***he divulged Dr. Reeves name 3 times during voir* dire.** "A ***Richardson*** inquiry is necessary only when there is a discovery violation and an objection based on the alleged violation." ***Bush v. State,*** 461 So. 2d 936, 938 (Fla. 1985). Not only did Richardson fail to allege a discovery violation and request a hearing the three (3) times Dr. Reeves name **was** spoken during voir dire, he also failed to do the same before Dr. Reeves testified. Richardson's argument focuses on ***a*** failure of the State to provide him with a piece of paper listing Dr. Reeves as a witness, which the prosecutor assumed his secretary had done, but she inadvertently neglected to do (T.5026). Richardson's argument as to Dr. Reeves is mere form over substance. ***See Esty; Smith.***

Mr. Dubbeld conceded such notice was provided during his argument prior to the trial court's ruling on this matter:

> MR. DUBBELD: . . . As it turns out, the medical examiner's name never was provided to us. *It* **was** *provided during the reading* **of** *the* ***witness list.*** But if the Court would recall, I was not counsel at that time. And frankly, I wasn't paying as much attention as I perhaps might have, **had** I been responsible for the duties and obligations that are conducted in the trial. **(T. 5025)**

The record belies Mr. Dubbeld's representation that he wasn't paying as much attention as he should **have** been, as evidenced by his representation that the defense had Dr. Botting under subpoena, and Richardson's own listing of Dr. Botting **as one of his** witnesses.[27] However, even if that was the case, Richardson was *pro **se***, it was his responsibility to bring the matter to the trial court's attention if there **was a** discovery violation, and he did not, which leads to the State's next argument of *procedural default.* ***See Bush,*** at 938.

Not only did Richardson fail to object during voir dire, Mr. Dubbeld did not object and request a ***Richardson*** inquiry prior to Dr. Reeves testifying (T.4767-71). "[I]t **was** incumbent upon the appellant to raise a timely objection and thereby allow the trial court to specifically rule on the issue." ***Lucas v. State, 376 So.***

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[27]Richardson's representation at p.22 of his brief that his list of witnesses "mirrored all know witnesses available to the State" besides being self-serving, is disingenuous. One need only compare and contrast the prosecutor's list with his. (T.3921-23, 4286-88, 4491-93)

2d *1149, 1151-52* (Fla. 1979). If not during voir dire, the matter should most definitely have been raised before Dr. Reeves testified. "Because the rule places the burden upon the trial judge rather than the parties to initiate the *Richardson* hearing, the judge must be alerted to the necessity of doing so." *Brazell* v. *State,* 570 So. 2d 919, 921 (Fla. 1990). The judge in this cause was not afforded such an opportunity. This court has opined regarding alleged discovery violations and potential prejudice as follows:

> We have repeatedly stressed that possible prejudice resulting from discovery violations is best addressed and remedied at the trial level. (Citations omitted) Not only is the trial court better equipped to deal with discovery violations, if the trial court determines that a party has been prejudiced by the violation there are numerous remedial sanctions that can be imposed at that stage of the proceedings. See Fla.R.Crim.P. *3.220* (n) (1).

State v. Schopp, 653 So. 2d 1016, 1021 (Fla. 1995).

Voir dire in this cause covered three days. If Richardson had objected at this time and requested a *Richardson* inquiry, the trial court could have quite simply remedied any prejudice by ordering that Dr. Reeves be deposed. The same applies if he had objected before Dr. Reeves testified. If there **was** error, it was clearly invited by Richardson's failure to request a *Richardson* hearing until both sides had rested. His first point on appeal is waived. *See Suggs v. State, 644 So.* 2d 64, 67-68 (Fla. 1994).

If this Court should deem the trial court erred, which the State does not concede, the record is clearly sufficient to allow this Court to determine that the defense was not prejudiced by the State's failure to provide Richardson with Dr. Reeve's name on a piece of paper, **as** the trial court found (T.5034). As the trial **court** found, Dr. Reeve's testimony was the **same** as Dr. Botting's; ***there were no* surprises.**

Richardson's alleged prejudice in the State calling Dr. Reeves instead of Dr. Botting, was quite simply based upon the fact that Mr. Dubbeld had elicited in his cross-examination of Dr. Botting, in the first two trials, that there were strands of hair in the victim's clutched hands, and that he had done fingernail scrapings during the autopsy (T.1888, 3363, 3365-66). At his third trial, the State stipulated that the strands of hair were not Richardson's.

As regards the fingernail scrapings, Dr. Botting testified at the second trial that he did not identify any human tissue (T.3366). Even though the fingernail scrapings had no evidentiary value, and were obviously a nonsequitur, Mr. Dubbeld was able to place this before the jury during his cross-examination of Dr.

Reeves, and the fact that Dr. Botting "would have the best information" regarding this matter (T.4788-4791, 4806-07, 4814-17).

If Dr. Botting was such a crucial witness to the defense, then why didn't they call him? Not only did Richardson have Dr. Botting listed as his witness, Mr. Dubbeld represented: ***"We have Dr. Botting under subpoena. And I guess we're going to have to put him*** on ***to*** talk **about** ***the hairs and things of that sort."*** (T.4771) But, Dr. Botting was never called by the defense. Error, if any, regarding the testimony of Dr. Reeves, **was** both invited and harmless beyond a reasonable doubt. ***State v. Schopp, supra.***

POINT II

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN CONDUCTING THE TRIAL AS REGARDS ALLEGED PROSECUTORIAL MISCONDUCT, PARTICULARLY IN VIEW OF RICHARDSON'S FAILURE TO OBJECT.[28]

'The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." ***Duest v. State, 462 So.*** 2d 446, 447 (Fla. 1985); ***citing Ferguson v. State,*** 417 So. 2d 639 (Fla. 1982). "To preserve an allegedly improper prosecutorial comment for review, a defendant must object to the comment and move for a

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[28]The State will address each alleged act of misconduct as they appear at pp.29-45 of his brief.

mistrial," *Allen* v. State, *662 So.* 2d *323, 328* (Fla. *1995); citing Parker v. State,* 456 So. 2d 436, 443 (Fla. 1984). Where prosecutorial misconduct is alleged, a failure to object, request curative instructions, or move for a mistrial, constitutes a procedural bar to raising such on appeal. Wyatt v. State, 641 So. 2d *355, 358-59* (Fla. 1994); *Street* v. State, 636 So. 2d 1297, 1303 (Fla. 1994); *Walton* v. State, 547 So. 2d 622, 625 (Fla. 1989); *Smith* v. State, 515 So. 2d 182, 183 (Fla. 1987). "Moreover, a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial." *Duest* v. State, *supra,* at 448; *citing Cobb v. State, 376 so.* 2d 230 (Fla. 1979).

A. Communications on Stipulation Not of Record

Richardson's first issue concerns a stipulation entered into between himself and the prosecutor regarding an audio recorded statement made by his father, James Richardson (R.321-22). First, his argument at p.30 of his brief that the State engaged 'in critical communications with the Appellant which were not of record," regarding the stipulation, is waived for purposes of this appeal. Although this specific argument was made before his first trial, it was not made at either his second or third trials (T.3139-55, T.4607-4617).

Second, Richardson relies upon Fla. R. Crim. P. 3.171 as authority for his position that communications with him regarding the stipulation had to be on the record. However, Rule 3.171 concerns 'Plea Discussions and Agreements." When Richardson entered into this stipulation, he had requested to represent himself, a proper Faretta inquiry had been conducted, and he was in fact ***pro se*** (R.279, 301-06, 308-18, 321-30).[29]

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. ***And although he may conduct his***

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[29]Richardson was ***pro*** se at the time he entered the stipulation, ***as*** evidenced by myriad pleadings filed after his motion to proceed ***pro se*** dated December 14, 1993, and ***filed in open court*** the same day. On December 8, 1993, Paul Dubbeld, who ***was*** court appointed on September 20, 1993, after the Public Defender moved to withdraw, filed a 'Motion for Clarification of Status of Counsel." (R.258-278)

As undersigned counsel was preparing this brief, he realized there was a hearing on December 14, 1993, which had not been transcribed and immediately contacted Reba Carter with the Volusia County Clerk's Office. She discovered a Circuit Court Action Form for that day, which indicated Richardson's motion to represent himself was granted, and that Mr. Dubbeld was discharged. With this information, she immediately contacted the official court reporter. George Vouvakis personally telephoned undersigned counsel to inform him that a hearing did in fact occur on December 14, 1993, but the notes were not available because the reporter for that day disappeared. An affidavit from him to that affect is in the supplemental record, as is the Circuit Court Action Form.

Given Judge Graziano's care regarding ***Faretta*** inquiries each time Richardson requested to proceed ***pro se,*** the State will presume that such an inquiry took place on December 14, 1993.

> *own defense ultimately to his own detriment, his choice must be honored out of "that respect fox the individual which is the lifeblood of the law."* (Citation omitted.)

Faretta *v. California, supra,* at 834. The stipulation was not entered during the course of plea negotiations while he was unrepresented, rather it occurred while Richardson was representing himself and preparing for trial. Besides, Richardson's own correspondence to the prosecutor, dated June 17, 1994, records the substance of communications regarding the stipulation (R.305-06).

Because of Richardson's factual representations, the State is compelled to include the following matters for purposes of context. On August 1 and August 2, 1994, jury selection commenced for Richardson's first trial (T.665-1033). At the outset, the trial court conducted a ***Faretta*** inquiry, and allowed Richardson to continue to proceed **pro** se (T.665-66). At the conclusion of the first day of voir dire, the prosecutor announced for the record:

> MR. POLITIS: Your Honor, there's only one matter I just wanted to bring briefly to put on the record. Mr. Richardson and I had a brief conversation this afternoon,
>
> I previously filed a stipulation not to call his father as a witness in lieu of introducing a cassette tape, and we have reinforced and confirmed that that stipulation is still honorable.
>
> So I just wanted to bring that to your attention. No objection, Mr. Richardson.

> MR. RICHARDSON: No objection, Your Honor. (T.1015)

When the trial court queried whether Richardson wanted his father present, Richardson began to complain that he entered the stipulation under duress because his father was ill (T.1016-17). The trial court stated:

> THE COURT: If you want to withdraw that stipulation, I'll allow you to withdraw the stipulation and Mr. ***Politis can seek to have*** your ***father brought* down *here.***
>
> MR. RICHARDSON: You just didn't hear nothing I just said. (T. 1017)

The trial court responded that it had heard him, and repeated the offer for him to withdraw the stipulation (T.1017). Richardson responded: 'The strain and stress would kill him (T.1018)." The prosecutor explained the circumstances surrounding the stipulation as follows:

> MR. POLITIS: Judge, let me explain the circumstances. As an officer of the Court, we entertained these negotiations the latter part of June, early part of July.
>
> ***I gave him possible scenarios where we could either do, one,*** a ***videotape deposition,* or *bring his father*** down ***here and do a videotape deposition and perpetuate testimony.*** (T.1018)

Richardson interrupted with comments relating to his father's health:

> MR. RICHARDSON: And you told me if I didn't sign it, you was going to bring my father down here whether it was going to kill him or not.
>
> MR. POLITIS: That's right.
>
> MR. RICHARDSON: Thank you.
>
> MR. POLITIS: He is correct -- no, 3 didn't say *whether it would kill him or not.*
>
> MR. RICHARDSON: You know it's going to kill him, so that's what you said.
>
> THE COURT: Mr. Richardson, just be quiet.
>
> MR. POLITIS: I told the defendant that based on his representations, I would not take any steps to perfect the state's ability to secure his father's testimony.
>
> And based on those representations, he agreed and completely understood that I would be allowed to introduce the cassette tape, because that's all I wanted his father for. (T.1019)

Argument continued with Richardson ultimately saying: "I don't want to pull my stipulation back (T.101020-22)." Mr. Dubbeld entered his two cents as follows:

> MR. DUBBELD: I think this is a good example of why we have a rule that requires that any communications from the office of the state attorney to somebody who is unrepresented need be of record.
>
> And I would ask the Court to instruct Mr. Politis to conduct himself accordingly. I think we do have that problem going on here.
>
> THE COURT: I'm just going to say this --

> MR. RICHARDSON: ***I signed it. Don't tell me to shut up. I'm my own lawyer.*** **Mr. Politis didn't** ***do nothing wrong.***
>
> The only thing he did wrong is -- what they **call** that -- character, when h -- his character right now on that issue.
>
> That's the only thing that's wrong with you, Mr. Politis. I have no disrespect for you. It's just the character of the way you want to put that document and that tape into this trial.
>
> That's all. Other than that, I got no problem with you, Mr. Politis. If I didn't have no respect for you, I'd call you Michael something else.
>
> But, Your Honor, I done made my ruling. He's my advisor. I done made my ruling to you.
>
> THE COURT: I understand, Mr. Richardson, but I'm also advising Mr. Politis that he pursues whatever action he pursues with you on an individual basis off the record at his own risk, and whatever the consequences may be, so be it.[30]

Argument was concluded on this matter with Richardson wishing Mr. Politis "a nice day" (T.1023-24). The next morning Richardson announced he wanted Mr. Dubbeld to represent him, and the trial court continued the trial until the middle of September (T.1030-33). Judge Graziano ultimately recused herself from the case, and

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[30]Again, Richardson was his own counsel. What the prosecutor engaged in with him regarding the stipulation is common practice with defense counsel. There was nothing inappropriate about it. Richardson was the man to speak to about it.

Judge Hammond took over (R.401).

Mr. Dubbeld argued the withdrawal of stipulation before Judge Hammond at least three times before it was introduced at Richardson's first trial (T.1709-18, 1895-97, 1915, 2085-2109, 2113-16). In keeping with the State's procedural bar argument, nowhere did Mr. Dubbeld raise the issue of failure to record communications to Judge Hammond. Judge Hammond ruled as follows:

> THE COURT: I note the stipulation entered into by Mr. Richardson and Mr. Politis back in July of 1994 and filed with the court at that time said that the cassette tape containing the voice of the defendant's father, J.M. Richardson, was to be admitted into evidence in its entirety without any objection at trial.
>
> I will not permit it in its entirety, but I'll permit in those things that I have indicated are relevant. And there shall be admitted into the evidence -- and I think I need to tell the jury that by stipulation, these comments which are presented and put into evidence for their consideration. (T.2107-08)

The record exhibits that as late as January of 1995, only a few weeks before his second trial, Richardson stipulated as follows:

> I ***do hereby stipulate that the prior statement*** **read** ***into the record during the State's*** **case** ***in*** **chief** ***which purportedly came from my father, James Richardson, will yet again be read into the record.*** (R.462)

This stipulation was signed by both Richardson and Mr. Dubbeld.

Prior to the second trial, which commenced on February 13, 1995, Mr. Dubbeld represented to the trial court:

> Regarding the question of whether or not we have engaged in a stipulation with the state regarding the words issued to ***the father who is now deceased*** -- now, that is Mr. Richardson's father, we took the position then, as we take now, we have withdrawn from the stipulation. (T. 3139)

The prosecutor rejoined:

> MR. POLITIS: Well, Your Honor, first of all, we ***gathered information that Mr. Richardson is now deceased just recently.*** I, all along, told them that if you are going to withdraw it-- and I even sent the letter to Mr. Dubbeld a long time ago when the defendant entered into the written stipulation, which is part of the court record. If you are withdrawing from the stipulation, let me know immediately so I may make arrangements to take the deposition or do a motion to perpetuate testimony. And, as the Court was very well familiar, we were prepared to do that during the trial. However, at the previous trial, we were in agreement that this redacted version would be read to the jury, and that's . . . exactly what was done, pursuant to the stipulation. The defense counsel did not lose his final rebuttal closing as a result of that. So we're to go forward again with the same stipulation.
>
> ***They never communicated to us that Mr. Richardson was deceased. They never communicated to us that they were going to withdraw the stipulation.*** And now to say that the Court is not going to honor the stipulation that we had before would seriously prejudice the state, because ***we*** were ***ready, willing and able to do*** a ***motion to perpetuate testimony*** and, in fact, filed that motion with the Court a long, long time ago. (T.3142-43)

Again, at the second trial, Richardson did not raise the argument he now raises regarding recording communications (T.3139-3153). The trial court's ruling from the first trial regarding the stipulation remained for the second trial (T.3154-55).

At the third trial, Richardson, initially *pro se*, argued he was coerced into signing the stipulation, because his father was ill (T.4607-17). He did not argue that his communications with the prosecutor regarding the stipulation were not of record (T.4607-17). The trial court stood on its earlier rulings (T.4617). Prior to his father's redacted statement being introduced, Mr. Dubbeld, who had resumed representing Richardson, merely voiced a continuing objection, without challenging the lack of communications on record (T.5002).

At the risk of being redundant, Richardson's argument here is *waived.* Even if it were not, given the factual circumstances, there was no prosecutorial misconduct. Richardson could have withdrawn the stipulation, and allowed the State the opportunity to perpetuate his father's testimony. He did not, and invited error in so doing. His father died, and the State had no choice but to rely on Richardson's original stipulation.

Error, if any, was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1139 (Fla. 1986). His father's statement was redacted, and irrelevant, prejudicial portions were deleted. The relevant portion, concerning his needing money to get out of town because he had murdered someone, was cumulative to his own confession, submitted prior to his father's statement, in which he admitted murdering someone besides Ms. Lee (T.4874).[31]

B. Detective John Ladwig

The State takes exception to Richardson's conclusion at p.32 of his brief that this Court's "opinion on that same case reflects that Ladwig has no regard for his obligations to the oath."[32] Terry *v.* State, ***668 so.*** 2d 954 (Fla. 1996). First, the State moves to strike this portion of his argument on the authority of ***Johnson v. State, 660*** So. 2d ***648, 653*** (Fla. 1995). Second, there was no finding by the trial judge in Terry that Detective Ladwig intentionally lied about his knowledge of Butler. Third, Detective Ladwig's credibility in this cause is supported by the trial court's rulings on Richardson's motion to suppress his confessions. Richardson's argument here is procedurally barred.

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[31] Kevin Floyd

[32] Richardson attempted to make this an issue in this cause by moving to relinquish, with an attached order issued by Judge Briese in the cause of ***State v. Terry,*** Cir. Case No. 92-33929. (Judicial Notice own files.) This Court denied his motion. He is now attempting to bring in through the back door what he could not through the front door.

Further, Detective Ladwig's credibility was implicitly upheld by the trial court's rulings, and this determination comes to this court clothed with a presumption of correctness. *Wasko* v. State, 505 So. 2d 1314 (Fla. 1987).

C. **Anonymous Letter to Henry Christian**.

The Court established the parameters of this matter, as far as potential comments in opening statements, as follows:

> THE COURT: As I understood it, there were some concerns by the state that some reference would be made to the content of a letter that is either known at this time to exist or its content is certainly in question even the author of the letter is unknown and is unsubstantiated.
>
> I don't think I would have any problem referencing, by counsel, that a letter of some kind pertaining presumably to this case had been received or lost or something on the discussion that there was some lack of diligence on somebody's part.
>
> But to suggest the content of the letter and what was represented in the letter, who authored the letter, accuracy of the letter, none of those things. If there is no evidence, as I understand, to support those discussions that would be admissible. And they should not be referenced.
>
> But if you wish to comment upon losing of evidence or something of that nature, I think -- or, something that might be evidence in the case, I think that would be, perhaps, appropriate.
>
> But not reference to the content of something that would not be admissible, would be at best hearsay. Probably not even that. Maybe those

> [don't] even rise to the level of hearsay. Then I don't think that would be appropriate. I'll limit you in regard to that. (T.4667-68)

Richardson called Chief Crow, who proffered that he received a letter from Mr. Christian, read the letter, determined it did not make much sense, and gave the letter back to Mr. Christian (T.5132). However, Chief Crow added that he turned both the letter and Mr. Christian over to his subordinate, Lt. Evans, who was instructed to check the evidence (T.5132). Under cross-examination, Chief Crow said the letter contained the names of 2 individuals who were suspected of committing numerous robberies and burglaries in the area (T.5133). Chief Crow further proffered "***...there is absolutely no evidence whatsoever that this letter had named 2 other individuals who might have murdered Miss Lee*** (T.5134)."

Mr. Christian proffered that Ms. Lee was his next-door neighbor (T.5135).[33] He received an unsigned letter, and did not recall the names of the individuals who were mentioned (T.5135-36). After reading the letter, Chief Crow allegedly said something to the effect of "we already have these 2 boys (T.5136)." Under cross-examination Mr. Christian explained that Chief Crow said the

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[33]Mr. Christian testified he was 89-years-old (T.5141).

police already had the 2 boys in custody (T.5139-40).

Mr. Dubbeld argued the missing letter constituted ***a Brady*** violation (T.5150-56).[34] The trial court ruled as follows:

> THE COURT: Okay. In reviewing the information you've provided concerning ***Brady,*** it strikes me -- and also in light of the proffer that has been made, **I** don't believe there is any basis to conclude that the State or the Government possessed evidence favorable to the defendant that has been failed to be proffered or presented or made to defense counsel.
>
> ***The best I think one CM reach is that somebody, I guess that could have been anybody, wrote some kind of letter expressing some kind*** **of** ***concern to law enforcement.*** In light of what Chief Crow and Mr. [Christian] suggested, it would appear to have had no evidentiary value. I can hardly fathom that such information would be, in any way constitute evidence in this case. Nor do I perceive that any of it would have affected the outcome of this case. (T.5156-57)

Mr. Dubbeld further argued that Mr. Christian's deposition 'inescapably leads the Court to the conclusion that that is favorable evidence that was destroyed (T.5158)." The trial court disagreed:

> THE COURT: And if there is some inconsistencies in it, I guess I'm at liberty to discern what I think is most appropriate, I think borne out by what both of the witnesses say as to content. ***I think at best*** **one can** ***speculate on*** **what** ***this letter*** **was or** ***was not about. But I don't think it's in any way***

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[34]*Brady* ***v. Maryland, 373*** U.S. 83 (1963).

> ***considered appropriately material or evidence that had been willfully withheld or treated. or that had really* any bearing on this case *whatsoever.***
>
> I do not find, from what's been said, that it does appear to have or in any **way** would be appropriate to even necessarily consider in this case. I don't think it would even be evidence, from what they've suggested.
>
> ***People make accusations in letters. People make accusations in the press. That's not evidence, nor is it even in any* way *credible or reliable to lead to suspicion. It's even less, even if there were accusations made* against *specific individuals, the* fact *that it was not signed is -- you know, whenever police officers or individuals suspicion [sic] or believe* as a *result of street rumor or whatever, it just does not make it evidence subject of proper Brady challenge. And I just don't find* that *the defense's position on that issue has merit.***
>
> I appreciate your argument. And I've considered it and find it without merit. I think I'm ready to proceed with the argument. You get to go first. (T.5159)

The trial court's ruling on this matter is presumed to be correct, and is in fact correct. *Wasko* v. State, ***supra.***

Richardson, at p.36 of his brief, correctly cites what he must show to prove a ***Brady*** violation existed regarding this letter, and the facts demonstrate he fails to make it pass the first prong:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution

> suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So. 2d 170 (Fla. 1991), *quoting United States* v. ***Meros, 866*** F.2d 1304, 1308 (11th Cir. 1989)(In ***Hegwood,*** the prosecutor decided not to call a witness. The state did not know her testimony would be favorable to defendant, defendant had equal access to her testimony, the prosecution did not suppress favorable evidence, and due to discrepancies between testimony and evidence produced at trial, no reasonable probability that the outcome would have been different.); *See also, Sims v. State, 602 So.* 2d 1253 (Fla. 1992)(Evidence of another suspect speculative and document not material.)

Richardson's editorializing argument regarding an alleged ***Brady*** violation is devoid of merit. There was none. Even if there was such an anonymous letter, it would not have been admissible.[35] Further, from the facts, it would have not have exonerated

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[35]The State would note the following statement made by Richardson at p.37 of his brief: ***"Mr. Richardson could not possibly have delivered the letter in that he has been incarcerated since February 14, 1991 on*** an ***unrelated case."*** First, why would he even argue this if it wasn't a possibility? Second, not to belabor the obvious, it was a possibility. Merely because Richardson was incarcerated, does not mean he could not have mailed an anonymous letter to Mr. Christian.

Richardson. Therefore, there is not a reasonable probability the outcome would have been different. Error, if any, was harmless beyond a reasonable doubt. *Smith v. State, 500 So.* 2d 125 (Fla. 1989).

D. **Strands of Hair in the Victim's Hands**

Richardson's claim, concerning the prosecutor's comment regarding strands of hair found clutched in Ms. Lee's hands, is ***procedurally barred.*** Although he objected, he did not move for a mistrial (T.5204-06). *Spencer v.* State, 645 So. 2d 377, 382-383 (Fla. 1994); *Walton v. State, 547* so. 2d 622, 625 (Fla. 1989).

Any error was harmless beyond a reasonable doubt. *Spencer v. State, supra*, at 382-383 (Prosecutor's statement during closing argument of first-degree murder trial, that victim "answered the door with the rifle in her hand" when friend visited her on night before she was killed, improperly referred to facts not in evidence but did not require mistrial.); Watts *v. State, 593 So.* 2d 198, 203 (Fla. 1992) (Prosecutor's statement during guilt-phase closing argument that "we are also here today because [victim's wife's1 life will never be the same" was improper, as it only served to improperly inflame jury's emotions, but any error was harmless because, on the record, there was no reasonable possibility that comment affected verdict.). It would have been different if the prosecutor had argued the hairs were Richardson's, after he stipulated they were not.[36]

E. Alleged Vouching for Credibility.

Richardson alleges at pp.40-41 of his brief that the "prosecutor improperly vouched for the credibility of the officers that testified in the proceedings below (T.5240)." There was no contemporaneous objection, request for a curative instruction, or motion for mistrial (T.5240). This claim is procedurally barred for failure to object. Error, if any, was harmless beyond a reasonable doubt. *State v. DiGuilio, supra.*

F. Fair Reply.

At p.42 of his brief, Richardson complains of the prosecutor's comments in closing argument, made in rebuttal to his closing

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[36]Mr. Dubbeld also went outside the record when he argued: 'No, the autopsy report reflects that clumps of black hair were in her dead hands. Clumps of hair (T.5249)."

For this Court's edification, the deposition of Marta Strawser, FDLE Crime Analyst, who did the hair analysis, indicates this matter is nothing more than a red herring (D.215-216). She testified there were 6 Negroid head hairs and fragments found in Carolyn Lee's right hand, which were microscopically like her known hair sample (D.215). There were also some other Negroid head hairs and fragments which were not suitable for comparison purposes (D.215). She ***could*** not ***rule them out as belonging to Richardson*** or Ms. Lee (T.215). In the victim's left hand was 1 Caucasian body hair fragment, a peripheral Caucasian head hair and 4 Negroid head hair fragments not suitable for comparison purposes (D.216).

argument, where he questioned the State's failure to play a videotape of the crime scene (T.5169-72, 5200-01).[37] Richardson further argues at p. 42 that he made a timely objection. However, his objection was merely a general one of "improper argument," to which the State rejoined that he opened the door (T.5201-02). The trial court noted the objection, and allowed the prosecutor to proceed.

Richardson also complains at p.42, "the State attempted to shift the burden of proof numerous times." He cites the prosecutor's remarks regarding the video, and comments about Dr. Botting as examples (T.5200-02, 5209, 5245). Yet, at no time did he voice an objection that the State was attempting to shift the burden of proof. At p.43 of his brief he concedes his failure to object.

The prosecutor's comments regarding the videotape and Dr. Botting were "*fair* reply." *Barwick* ***v. State, 660 So.*** 2d 685 (Fla. ***1995)*** *;* ***Wuornos*** *v.* ***State,*** 644 So. 2d 1012 (Fla. 1994); Garcia *v.* ***State,*** 644 So, 2d 59 (Fla. 1994); Street v. State, 636 So. 2d 1297 (Fla. 1994); ***Ferguson*** v. State, 417 So. 2d 639, 641-42 (Fla. 1982).

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[37]The State objected at one point, arguing Mr. Dubbeld "cannot comment on what item of evidence could show if it hasn't been introduced in evidence (T.5170)." The trial court gave the defense wide latitude in closing argument.

Even if the prosecutor's comments were objectionable on some obvious ground, Richardson failed to follow the proper procedure. *Id.* In none of the complained of instances did he request a curative instruction, or move for a mistrial. Id. Error, if any, was harmless beyond a reasonable doubt. State *v. DiGuilio, supra.*

POINT 111

THE- TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN MATTERS PERTAINING TO THE ADMISSION OF EVIDENCE, WHERE IT ALLOWED THE ADMISSION OF RICHARDSON'S STATEMENTS.

Rather than presenting the State's rendition of the factual circumstances surrounding Richardson's confessions, it will present the trial court's findings of fact regarding this matter, which of course are afforded a presumption of correctness.[38] *Henry v.* State, 613 So. 2d 429 (Fla. 1991).

After allowing extensive argument at Richardson's first trial on his confessions to Detective Ladwig on November 21 and 22, 1991, Judge Hammond took the matter under advisement the evening of October 5, 1994, entertained further argument the morning of October 6th (T.1937-60), and commented to Mr. Dubbeld as follows:

> THE COURT: Let me save you some breath there. I can't find anywhere in the record that would lead

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[38]Detective Ladwig's testimony at the Suppression Hearing can be found at T.5-116.

> me to the conclusion she [Judge Graziano] addressed this problem and this issue precisely.[39] ***This statement* was a subject *of* a *motion to suppress but on a different basis*.** And it looks to me like that was the motion. I don't think she could have ruled on it on another basis other than what **was** raised in the motion. I don't think the DCA could have ruled on more than what she ruled on or addressed more than what the issues were before her.
>
> So I'm reasonable [sic] satisfied that this issue is a particularly new one to this. Now, it may be that they all knew that this problem existed. I don't know. ***But it's not on the record* and *I'm inclined to say that* I cannot *conclude that this has* been *properly addressed before, if* that spares *you anything.* (T. *1958)***

Judge Hammond entertained further argument and ruled accordingly:

> THE COURT: I have reflected on this problem and I've looked it over and thought about it at length. It is a peculiar problem. One I think that springs from any situation where a **lay** person represents themselves [sic] in the case.
>
> We remind people who choose to represent themselves of the following fact of the peculiar problems that may occur, that it's unwise to do such a thing as Faretta has taught us to do. And yetI we still have people who believe it's in their interest and they have the right under certain circumstances to be their own attorneys.
>
> The testimony that's before me is from the police officer who describes his recollection as best he can of the incident and how it came to be. And it's my interpretation of that testimony that what he's saying is that there **was** no negotiations. ***I***

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[39]That Richardson's confessions were allegedly pursuant to plea negotiations.

> ***guess*** as ***a detective maybe he wasn't really in a position to negotiate a plea, anyway.*** But even if he were, it's undisputed at this point that he was there. ***The negotiations ceased.*** And for some reason, perhaps known only to the accused, he decided to make an oral statement.
>
> And it well may be he thought that that had some benefit or some relief to him. The reason for that maybe escapes me. It seemed to be the big issue as to whether it was recorded or not. Maybe the defendant didn't understand that -- didn't matter whether it was recorded or not as to whether it could be used against him.
>
> ***But*** at ***any*** rate, ***it appears he knowingly made this statement of his own volition.*** And at this time, under the rule, ***I don't believe it was -- and under the testimony presented, it was not*** a ***violation of four ten to admit such a rule --*** or ***such a confession or*** statement. And so I'm going to deny the motion. (T.1960-62)

At Richardson's third trial, the trial court adhered to its original ruling in the first trial as follows:

> THE COURT: I would say this, that there probably should be no testimony offered through Officer Ladwig in the direct as to the content of any offer or plea bargain.
>
> As I understand, the state's position is that there never was an agreement, that it was rejected, but that there was a confession, verbally, offered, notwithstanding any plea bargains or negotiations -- extra negotiations.
>
> The offer to negotiate the terms of that settlement or negotiations should not be offered or proffered by the state in its case-in-chief. It may eventually come up. but in light of the objection to it, I would say it should not.

> Those things that the state says were -- and can present evidence and were not a part of the negotiations but occurred as a result of the volition of the accused to give a statement or to make a statement, that is not precluded.
>
> But any negotiations or terms -- I think the fact that there may have been negotiations is not, maybe, a big issue. But the terms of any negotiations should not be offered by the state. If the defense wishes to go into them, I would say that this may, perhaps, be permissible. (T.4851-52)

This Court has applied the federal courts' narrow construction of Rule 11(e)(6) to Fla. R. Crim. P. 3.172(h) by adopting the two tiered analysis from *United States v. Robertson, 582* F.2d 1356 (5th Cir. 1978), for determining whether a statement should be excluded because it was made during plea negotiations. *Groover v. State,* 458 So. 2d 226, 228 (Fla. 1984). That two tiered analysis was presented by this Court as follows:

> [W]e agree that any statement made in connection with a plea or an offer to plead is inadmissible. Section 90.410, Fla. Stat. (1981). However, we do not believe that unsolicited, unilateral statements are under the aegis of this evidentiary statute. In construing the similarly worded Federal Rule of Criminal Procedure 11(e)(6), the federal courts have held that before excluding statements made during a plea negotiation a "trial court must apply a two-tiered analysis and determine, first, whether the accused exhibits an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable give the totality of the

objective circumstances." (Citations omitted.)

Bottoson v. *State,* 443 So. 2d 962, 965 (Fla. 1983) (Appellant's expectation that he was involved in a plea negotiation was not reasonable.); See ***also, Stevens v. State, 419 So.*** 2d 1058, 1061-62 (Fla. 1982).

Richardson, of course, argues he had a subjective expectation to negotiate a plea at the time of the confession. However, in light of the trial court's factual finding that ***"the negotiations ceased,"*** **(T.1961)** his expectation was unreasonable. Further, it is questionable whether he had a subjective expectation to begin with. Richardson, with 18 prior felony convictions, was well versed in our criminal justice system. One need only review the record in this cause to understand his manipulative capabilities.

Judge Hammond commented: "And for some reason, perhaps known only to the accused, he decided to make an oral statement(T.1961)." He refused to tape **record or write down his confession** regarding the heinous murder of Ms. Lee, because he knew when push came to shove it would become a swearing match between him and Detective Ladwig. He called Detective Ladwig a "liar" throughout all 3 trials, and continues to do so on appeal.[40] This was in fact the

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[40]pp.32, 39, 51 of his brief. Call one something long enough and someone may come to believe it. This may explain why

cornerstone of his defense.

However, the trial court, who had the opportunity to observe both Richardson and Detective Ladwig testify, found Richardson's credibility wanting, ***not*** Detective Ladwig's. The United States Supreme Court has opined:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for ***only the trial judge can be* aware *of the variations in demeanor and tone* of *voice that* *bear* *so heavily on the listener's understanding of* and *belief in what is said.*** (Citation omitted.)
> . . .
> But when ***a*** trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, ***can virtually never be clear error.*** (Citation omitted.)

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

For purposes of clarification, Richardson's statements given to Detective Ladwig on November 21 and 22, 1991, were found to be admissible by **Judge** Graziano, but she suppressed his statement given the day of the murder, February 14, 1991 (R.209-210). As Judge Hammond noted, the November 21st and 22nd statements were not

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there were 2 hung juries. This fact is of no consequence to this cause, because those trials are nullities.

challenged before Judge Graziano on the same basis that they were before him. The Fifth District reversed Judge Graziano's suppression of Richardson's statement given February 14, 1991, and Judge Hammond adhered to that ruling. However, the Fifth District did not entertain a challenge to Richardson's statements given November 21 and 22, 1991, because Judge Graziano found them to be admissible, and Richardson did not cross-appeal her ruling when the State challenged that which she did suppress (R.247-257; SR). *State v. Richardson, supra.* In light of the aforementioned authorities, the trial judge correctly adhered to the law of the case concerning Richardson's February 14, 1991, statement, and correctly exercised its discretion regarding his November 21 and 22 1991, statements.

POINT IV

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING RICHARDSON'S CHALLENGE TO THE VENIRE AND RELATED MOTIONS TO DISMISS.

Hendrix v. State, 637 So. 2d 916, 920 (Fla. 1994), is dispositive of Richardson's third claim:

> Hendrix next claims that African-Americans were under represented in the pool from which the jury was selected. *Lake County selects prospective jurors from* **voter *registration*** *lists,* and Hendrix presented statistical evidence prior to trial showing **a** disparity between the percentage of African-American residents in Lake County and the

> percentage of African-American registered voters. Hendrix's conclusions, however, are based in part on estimates and projections, and ***this Court has previously ruled that voter registration lists are a permissible means* of *selecting venirepersons, even where minor variations* between *the number of residents and registered voters exist.*** ***Bryant v. State,*** 386 So. 2d 237 (Fla. 1980). We find no error.

See also, ***Johnson v.*** State, 660 So. 2d 648, 661 (Fla. **1995).**

On December 16, 1994, before Richardson's second trial, Mr. Dubbeld filed a Motion to Dismiss Indictment and an Amended Challenge to Panel, which contrasted the percentage of black registered voters with the black population of Volusia County (R.445-450). These motions were argued before the second trial and denied by the trial court, and when they were renewed at the third trial, the court stood on its ruling (T.2835-49, 4050-52). Therefore, for purposes of this claim, it is necessary to review the ruling prior to the second trial (T.2834-2850).

Although Richardson does not divulge at p.55 of his brief the source for his percentages regarding the African-American community residing in Volusia County, **as** contrasted to the registered voters, the transcript of the second trial exhibits:

> MR. DUBBELD: . . . And the motion that **I** filed had with it the **latest *census statistic,*** but we're not even close to the composition of the **black** community as it applies to the **panel that we are** attempting to select this jury from. So I'm going

> to move to strike the panel and I'm just wondering when you want me to do that. (T. 2835)

The trial court's view on the motions is seen as follows:

> THE COURT: I think my understanding of how the venire is chosen and how all citizens that are licensed or are residents fulfill the requirements of serving on a jury, which, to my understanding, does not preclude anyone because of race, creed, national origin or any other reason, but is purely a computer selection on the people who are permitted to serve on jurors in the state. And I don't know of anything that would refute that. I can understand, in any particular panel, there may seem to be a lack of representatives of certain groups of our society. Like, I'm not sure about it, but it doesn't seem to me that we've had anybody of Latin nationality or ancestry on the panel. I'm not sure about that. I imagine we've got a significant number of people of that background and ancestry in our community, but the existence of that, from time to time, of panels coming out that way doesn't strike me as, that it creates a problem.
>
> Under the law, and in logic and reason, not every single panel is going to have some proportionate representation of some cross-section of our community. I see, in other areas of the circuit, that black citizens are of a lesser proportions than white, because they are in a smaller sized group of people in the community. But they play a very active role in many of our grand jurors, they play an active role in our juries when they serve. And I know of no reason why they've been -- why there has been minority exclusion or they've been not fairly chosen or given an opportunity to participate. And I don't know of any situation that may exist here.
>
> I appreciate your concern about the lack of this perceived disproportionate representation that you

> referenced, but I know of no reason that I can discern that this is improperly done or results to some selective process or exclusionary process that would preclude various members of our community from participating and serving. It just happens to fall like that from time to time and we don't have quite the number that seem to be represented in the community, to my knowledge. (T.2836-37)

The trial court allowed Mr. Dubbeld to create his record regarding this claim, and denied the challenge (T.2837-48).

When it was raised by Richardson, pro se, at his third trial, the trial court stood on its ruling (T.4050-52). The trial court correctly exercised its discretion on this matter. There was no error.

POINT V

> THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT, CORRECTLY ACCEPTED JURISDICTION REGARDING A PRE-TRIAL ORDER EXCLUDING EVIDENCE, AND ITS DECISION IS THE LAW OF THE CASE.

The Fifth District ruled accordingly, concerning its jurisdiction over a pre-trial order excluding evidence:

> Pursuant to rule 9.140(c)(1)(B), we conclude that the state may appeal the trial court's order to the extent that the order suppress the admissions of Richardson made to his father (item 3) and to the police (item 6). See State v. Brea, 530 So.2d 924 (Fla. 1988); State v. Palmore, 495 So.2d 1170 (Fla. 1986). See also State v. Hale, 505 So.2d 1109 (Fla. 5th DCA 1986); State v. Evans, 462 So.2d 596 (Fla. 5th DCA 1985). We also conclude that, because the murder of Floyd (item 2) is intertwined with the admission of Richardson to his father that

> he needed money to leave town because he had killed a man (item 3), the state may appeal the suppression of item 2 under rule 9.140(c) (1) (B). The murder of Floyd clarifies and explains Richardson's admission to his father the next day.
>
> Alternatively, even assuming that the trial court's order suppressing evidence of the Floyd murder is not appealable as matter of right, we recognize that the state may seek common law certiorari review of the trial court's order regarding this evidence as well as the evidence contained in items 1, 4, and 5. State v. Pettis, *520* So.2d 250, 253 (Fla. 1988). <u>See also</u> State v. Brea, *530* So.2d 924, 926 (Fla. 1988); State v. Smith, *586 So.* 2d 1237, 1238 n.3 (Fla. 2d DCA 1991). Accordingly, consistent with the principles pronounced in Pettis, we grant common law certiorari in this case in order to afford the state a full review of the trial court's order regarding items 1, 4, and 5.

State v. Richardson, 621 So. 2d 752, 754-55 (Fla. 5th DCA 1993). Pursuant to *Preston v. State,* 44 So. 2d 939, 942 (Fla. 1984), all points of law adjudicated in the Fifth District's opinion supra constitute 'law **of *the* case."**

Richardson's position in his fifth claim, found at pp.58-66 of his brief, is contrary to this Court's precedent, which was correctly cited by the Fifth District as authority above. In *State v. Pettis, supra,* at 252-53, this Court opined:

> Respondent argues that there is no authority for certiorari review of a pre-trial ruling excluding evidence. We disagree. Rule 9.140(c) of the Florida Rules of Appellate Procedure does limit matters which may be appealed by the state before

> trial as of right. However, this limitation as to appeals is not a bar to this Court's power of discretionary review . . .
>
> We believe, therefore, that the correct interpretation of Florida law is that if the requirements permitting certiorari jurisdiction otherwise exist, a pre-trial order excluding evidence which has the effect of substantially impairing the ability of the state to prosecute its case is subject to certiorari review.

See also, State v. Brea, supra. Richardson incorrectly relies on case law which **was** directly addressed in *State v. Pettis, supra,* at ***253,*** as follows:

> Our statements in State v. C.C.. State v. G.P., and Jones v. State that no right of review by certiorari exists in criminal cases if no right of appeal exists are limited to order of final dismissal. (Footnote omitted.) ***These cases shall not be construed to prohibit district courts of appeal from entertaining state petitions for certiorari from pretrial orders in criminal cases.***

The Fifth District agreed that Judge Graziano properly held that Richardson's possession of a firearm on February 11 (State's item 1) and use of a small-caliber handgun in the February 14 murder of Carolyn Lee were not so similar or unique **as** to prove identity or common scheme (R.180-83, 248, 253)." It also concluded that Judge Graziano "correctly held that the state failed to show a sufficient connection between the missing handgun from the home of Richardson's aunt (State's item 4) and the unrecovered handgun used in the murder of Lee (R.180-83, 253-54)." (Citation omitted.)

However, the appellate court disagreed with her ruling as to State items 2, 3, 5, and 6 as follows:

> In this case, ***evidence of Floyd's murder on Febxuary 12 was relevant and admissible to show Richardson's motive for the subsequent murder of Lee.*** On February 13, Richardson called his father, explaining that he needed money so that he could leave town because he had "just killed a man." On February 14, Richardson allegedly broke into Lee's home and robbed and murdered her. Thus, despite its prejudicial nature, the evidence of Floyd's murder **was** admissible to show that Richardson's desire to avoid apprehension motivated him to commit the robbery and murder of Lee so that he could obtain money to leave Florida. (Citation omitted.) In presenting evidence of the February 12 murder of Floyd, however, the state may not transcend the bounds of relevancy to the February 14 murder of Lee or make the collateral offense a feature of its case against Richardson.
>
> We additionally conclude that on remand the trial court should allow the state to show that the bullets which killed Floyd and Lee came from a .22 caliber firearm, were consistent in class characteristics, and could have come from the same firearm (item 5). In contrast to the evidence concerning the handgun missing from Richardson's aunt's home and the firearm in Richardson's possession on February 11, this evidence establishes a connection between the firearm used to murder Floyd and that used to rob and murder Lee. (Citation omitted.) ***We recognize that the state cannot show conclusively that the bullets came from the same*** **firearm,** ***but this fact goes to the weight and not the admissibility*** **of** ***such evidence.***
>
> Finally, we conclude that ***the statements***

> Richardson **made** to the police on *February 14, 1991* ***(item* 6) axe admissible *in evidence because such statements qualify as admissions against interest*** under section 90.803(18), Florida Statutes (1991) , and are relevant. (Citation omitted, footnote omitted.)
>
> We affirm the trial court's order denying the state's motion for pretrial ruling regarding *Williams* rule testimony as to items 1 and 4, reverse the order as to items 2 and 3, quash the order as to items 5 and 6, and remand this cause for further proceedings consistent with this opinion. (R.256-57)

State v. Richardson, supra, at 757-58.

Richardson's argument as to jurisdiction in his fifth claim is erroneous, and he incorrectly relied upon authority which this Court clearly addressed in *State v. Pettis, supra.* Not only did the Fifth District correctly accept jurisdiction over this cause, but its opinion correctly cites the law on the same. Said opinion is the ***"law of the case,"*** and the admission of the complained of **Williams** Rule evidence at trial, based upon its ruling, was correct.

Richardson's argument at pp.59-65 of his brief that the trial court correctly suppressed 'irrelevant evidence" is also erroneous. In his argument, at p.65, he incorrectly asserts "there is no showing that the killing was motivated by sudden need to escape town . . . ." Yet, he also argued: 'The State attempted to show that the Appellant did need money prior to the Lee killing by the introduction of statements purportedly issued to appellant's father." The State respectfully submits that this was not the only evidence to support this theory. Richardson, himself, admitted to Detective Ladwig that he called his father and told him he had killed someone besides Ms. Lee (T.4874).

The Fifth District correctly determined that ***"evidence of Floyd's murder on February 12 was relevant and admissible to show Richardson's motive for the subsequent murder of Lee."*** *State v. Richardson, supra*, at 757-58. It correctly found that on February 13, he had called his father asking for money so he could leave town because he had 'just killed a man." *Id.* It correctly found that "the evidence of Floyd's murder was admissible to show that Richardson's desire to avoid apprehension motivated him to commit the robbery and murder of Lee so that he could obtain money to leave Florida." *Id.* The Fifth District correctly determined that the fact "the bullets which killed Floyd and Lee came from a .22 caliber firearm," was relevant and admissible. It correctly determined ***"the statements Richardson made to the police on February 14, 1991 (item 6)*** **are** ***admissible in evidence because such statements qualify as admissions against interest*** under section 90.803(18), Florida Statutes (1991), and are relevant." *Id.*

POINT VI

RICHARDSON'S SIXTH CLAIM REGARDING THE REASONABLE DOUBT INSTRUCTION HAS NOT BEEN PRESERVED, AND HAS BEEN DECIDED ON THE MERITS BY THIS COURT ADVERSELY TO HIM.

Richardson did not object to the reading of the standard reasonable doubt jury instruction either before or after the Guilt Phase instructions were given (T.5269-5310). Nor did he propose an alternate instruction. His sixth claim is ***procedurally barred.*** *Etsy* v. State, 642 So. 2d 1074, 1079-80 (Fla. 1994). On the merits: "'[T]aken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury.' There is no reasonable likelihood that the jurors who determined [Richardson's] guilt applied the instructions in ***a*** way that violated the Constitution." Esty at 1080; ***citing Victor v. Nebraska,*** 511 U.S. ___, 114 S.Ct. 1239, 1251, 127 L.Ed.2d 547 (1994); quoting ***Holland v. United States, 348*** U.S. 121, 140, 75 S.Ct. 127, 138, 99 L.Ed.2d 547 (1954).

POINT VII

FLORIDA'S DEATH PENALTY IS CONSTITUTIONAL.

By now, this Court has become well versed in the ***boilerplate argument*** Richardson presents as his seventh claim at pp.66-83 of his brief, despite its repeated rejection. ***See e.g., Hunter v.***

State, 660 So. 2d 244 (Fla. 1995); *Fotopolous* v. *State, 608 So.* 2d 784, *794* n.7 (Fla. 1992), *cert. denied, 113* S.Ct. 2377 (1993). He makes ***no*** reference to the record. Each claim and sub-claim he lists has already been decided adversely to his position. In addition, all of these "claims" are procedurally barred because they were not preserved at trial. The State would respectfully request this Court to expressly deny those claims which are procedurally barred on procedural bar grounds. *See e.g., Hunter,* at *252-54; Ventura v. State,* 560 So. 2d 217 (Fla.), cert. denied, 498 U.S. 855 (1990); *Swafford* v. *State,* 533 So. 2d 270 (Fla. 1988), cert. *denied,* 103 L.Ed.2d 944 (1989); *Eutzy* v. State, 458 So. 2d 755 (Fla. 1984), *cert. denied, 471* U.S. 1045 (1985). Each claim will be addressed as they appear in Richardson's brief, and the State will include an additional argument as to Proportionality as such was not addressed in Richardson's brief.

1. <u>The Jury</u>

a. Standard Jury Instructions

At pp. 67-68 of his brief, Richardson states:

> The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

Without specific reference to which instructions he is now in fact challenging, and no record support for his allegations, his argumentative and unsupported conclusion quite simply constitutes insufficient briefing of an issue for appellate review. Even if he were to argue with specificity, any potential argument raised would be waived because he accepted the penalty phase jury instructions as given (T.5474-76, 5494-5501).[41] See e.g., *Ponticelli v. State,* 618 so. 2d 154 (1993), *cert. denied, 114* S.Ct. 352; *Harris v.* State, 438 So. 2d 787 (Fla..1983), cert. denied, 104 S.Ct. 2181. This nebulous claim is procedurally barred.

b. **Majority Verdicts**

On p. 68 of his brief, Richardson argues Florida's "sentencing scheme is also infirm because it places great weight on margins for death as slim **as** a bare majority." If Richardson raised this claim below, the State could not locate it and his failure to provide a record cite, clearly implies that this claim is procedurally barred. *Hunter,* at 252-53; *Fotopolous,* at 792, 794 n.7. This claim was expressly rejected in *Hunter,* at 252-53. See also, *James v. State, 453 So.* 2d 786, 792 (Fla.. 1994).

c. **Aggravators as an Element of the Crime.**

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[41]The State herein raises his failure to object to the penalty phase jury instructions as given **as** a procedural bar to any subsequent jury instruction challenge Richardson made in his boilerplate constitutional claim.

On p. 69 of his brief, Richardson argues "[o]ur law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible." This claim **was** not raised below and is procedurally barred. *Hunter,* at *252-53; Fotopolous,* at 792, 794. Even if not barred, this claim is foreclosed by binding precedent. See e.g., Jones *v. State,* 569 So. 2d 1234 (Fla. 1990); *See also, Hildwin v. Florida, 490* U.S. 639 (1989).

d. **The *Caldwell* Claim.**

On p. 69 Richardson argues "[t]he standard instructions do not inform the jury of the great importance of its penalty verdict." He asserts the jury is told its "recommendation" is just "advisory" in violation of the holding in *Caldwell v. Mississippi, 472* U.S. 320 (1985). This claim **was** not raised below and is procedurally barred. *Hunter,* at *252-53; Fotopolous,* at 792, 794 n.7. Even if preserved, it has been rejected on the merits. *Id.*

2. *T h e*

On p. 69, Richardson argues "the trial court has an ambiguous role in our capital punishment system." This claim was not raised below, is procedurally barred, and is meritless. *Hunter,* at 252-53; *Fotopolous,* at 792, 794 n.7.

3. <u>The Florida Judicial System</u>

At pp. 70-74 of his brief, Richardson argues he "was sentenced by a judge selected by a racially discriminatory system." Nowhere in the record below does this argument appear, rendering it procedurally barred. ***Hunter,*** at ***253; Fotopolous,*** at 792, 794. Even if it were properly preserved, this claim was raised in ***Hunter,*** and rejected as devoid of merit. ***Id.***

4. <u>**Appellate Review**</u>

a. Proffitt

Richardson argues on p. 74, that this Court has not followed the requirements of ***Proffitt v. Florida, 428*** U.S. 242 (1976). This claim was not preserved below, is procedurally barred, and is meritless. ***Hunter,*** at 252-53; ***Fotopolous,*** at 792, 794 n.7.

b. **Aggravating Circumstances**

On pp. 74-77, Richardson argues that the aggravators are applied inconsistently at the appellate level. This claim **was** not preserved below, is procedurally barred, and is meritless. ***Hunter, at 252-53; Fotopolous, at 792, 794*** n.7.

c. **Appellate Reweighing**

On p. 77, Richardson argues that Florida's Death Penalty Statute "does not have the independent appellate reweighing of aggravating and mitigating circumstances required by ***Proffitt, 428 U.S.*** at 252-53." This claim was not preserved below, is procedurally barred, and is meritless. ***Hunter,*** at 252-53;

Fotopolous, at 792, 794 n.7.

d. Procedural Technicalities

Also on pp 77-78, Richardson argues that the contemporaneous objection rule "has institutionalized disparate application of the law in capital sentencing." This claim was not preserved below, is procedurally barred, and is meritless. ***Hunter,*** at 252-53; ***Fotopolous,*** at 792, 794 n.7.

e. ***Tedder***

On pp. 78-79 of his brief, Richardson complains that "[t]he failure of the Florida Appellate Review Process" is demonstrated by the inability of this Court to apply the *Tedder*[42] Rule consistently. This claim was not preserved below, is procedurally barred, and is meritless. ***Hunter,*** at 252-53; ***Fotopolous,*** at 792, 794 n.7.

6. <u>Other Problems With the Statute</u>

a. Lack of Special Verdicts

At pp. 79-80, Richardson argues the death penalty statute is invalid because it does not provide for special verdicts. Again, Richardson has provided no record cites, and the State's review of the record concerning either aggravation/mitigation or felony murder/premeditated murder special verdicts, finds this claim

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[42]*Tedder **v. State, 322 So.*** 2d 908, 910 (Fla. 1975).

unpreserved and procedurally barred. *Hunter,* at *252-53; Fotopolous,* at 792, 794 n.7. Both the aggravation/mitigation component and the felony murder/premeditated murder component are foreclosed by binding precedent. Id.; *Patten* v. State, 598 So. 2d 60 (Fla.. 1992); Jones v. State, 569 So. 2d 1234 (Fla.. 1990).

b. No Power to Mitigate.

On p. 80, Richardson argues that Fla. R. Crim. P. 3.800(b), "forbids the mitigation of a death sentence," which he alleges violates the "constitutional presumption against capital punishment." This claim was not preserved below, is procedurally barred, and is meritless. *Hunter,* at 252-53; *Fotopofous,* at 792, 794 n.7.

c. **Florida Creates a Presumption of Death.**

At pp. 80-82 of his brief, Richardson argues that "every felony murder case . . . and every premeditated murder case..." create a presumption of death. Additionally, he argues the same applies to the heinous, atrocious, or cruel aggravator. These claims are procedurally barred. *Hunter,* at *252-53; Fotopolous,* at 792, 794 n.7. Even if this claim was properly preserved, this Court has rejected it on the merits. Id.

d. **Florida Instructs Juries** Not **to Consider Sympathy.**

On p. 82, Richardson argues that the anti-sympathy jury instruction is unconstitutional. Besides being procedurally barred, this claim has been expressly rejected by this Court and the United States Supreme Court. ***Hunter,*** at 253; *Saffle* ***v. Parks,*** ***494*** U.S. 484 (1990).[43]

e. Electrocution **is Cruel and Unusual Punishment.**

Richardson's final boilerplate claim at p. 83, asserts that death by electrocution is cruel and unusual punishment. It is not preserved, and foreclosed by binding precedent. ***Hunter,*** at 252-53; ***Fotopolous,*** at 792, 794 n.7.

7. **Proportionality**

The jury recommended a sentence of death by a vote of 10 to 2 (T.5502). The trial court found three aggravating circumstances **as** follows:

> **(1) The Defendant was previously** convicted **of** another **capital felony or of a felony involving the use or threat of use [of] violence to a person.**
>
> ***The defendant*** **was** ***convicted on June*** **19,** ***1991, of Second Degree Murder. On that same date the Defendant was convicted of using*** **a** ***firearm while committing or attempting to commit a felony.***[44]

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[43]Richardson relies on the Circuit Court of Appeals opinion that preceded the United States Supreme Court decision in ***Parks.*** Despite Richardson's claim, ***Parks directly rejected the anti-sympathy claim.***

[44]Kevin "Peanut" Floyd

The Defendant was convicted of Battery in County Jail, in violation of Florida Statutes section 951.075, on November 21, 1991. On that same date, the Defendant was convicted of Armed Robbery with **a** Firearm or Deadly Weapon in violation of **Fla.** Stat. sec. *12.13(1) & (2) (a).

On November **11**, 1985, the Defendant **was** convicted in the Commonwealth of Massachusetts of Assault and Battery of a Correctional Employee at Walpole Prison.

The Defendant was convicted of Robbery on January 19, 1978 in Massachusetts.

The Defendant **was** convicted of Armed Robbery on May 27, 1981 in Massachusetts. This aggravating circumstance has been proven beyond **a** reasonable doubt.

(2) The capital felony was committed for pecuniary gain.

The Defendant **was** charged and convicted of Armed **Robbery** with a Firearm and of Burglary of a Dwelling.[45] The facts of the case demonstrate that the Defendant entered the victim's house with the intent to steal and that he did steal cash and valuables. Therefore, the capital felony was committed for pecuniary gain. This aggravating circumstance has been proven beyond a reasonable doubt.

(3) The capital felony was **especially heinous, atrocious, or cruel.**

The victim in this case was the Defendant's landlord, who **was 70 years old.** The Defendant knew

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[45]Richardson was in fact convicted of burglary of a dwelling with **a** firearm, as charged in the indictment **(R.2, 540-42;** T.5312).

> the victim received cash from her tenants. He became desperate for money he needed to leave town because he had committed the ***murder of Kevin Floyd.*** Unable to secure funds from his father, the Defendant entered the victim's home. The victim refused him money, and the Defendant proceeded to ***strike her with an iron skillet, shoot her with* a *firearm, repeatedly* stab *her with* a *knife, and bludgeon her with a claw hammer.*** The victim struggled desperately during the attack. The affray crossed several rooms in the house and ended in the bedroom, where a safe was opened and its contents removed.
>
> According to the evidence, the victim received as many as ***twelve blows to the head caused by* a *claw hammer and four incision wounds consistent with a knife stabbing, as well as blunt* force *trauma wounds consistent with being struck* by *an iron skillet. The victim endured a frightening and brutal assault until being* rendered *unconscious. The struggle resulted in blood being splattered throughout several* rooms. *Judging from the struggle, the victim consciously resisted the Defendant as she fought for her life.***
>
> The murder **was** a conscienceless and pitiless crime, which **was** unnecessarily torturous to the victim. Many of the facts were admitted by the Defendant and testified to by Investigator Ludwig [sic] . The evidence fully supported these admissions. This aggravating factor has been proven beyond a reasonable doubt. (R.545-45)

Richardson expressed his sentiments on presenting evidence of mitigation immediately after the jury found him guilty of the crimes charged in the indictment:

> ... They're [the jury1 going to recommend it

> anyway, Why make me suffer more?[46] Don't you understand? When they say guilty to death, you're going to give it to me, so why wait until Thursday. Why you think I'm not going to have people coming saying he was this and he was that when he was young, he fell off this and he felt his dad was abusive. I didn't have none of those things. ***I had a good life.*** I wasn't an abusive [abused] child. So, I don't need to put people on to be lying about me. He' going to ask for the death penalty. ***This was a heinous crime. Whoever did it deserves the death penalty. They said I did it, so that's what I deserve. . . .*** (T.5326-27)

Although Richardson offered nothing in mitigation, the trial court did "find the non-statutory mitigating circumstance of the Defendant's remorse," but afforded this non-statutory mitigator "little weight" (R.546; T.5568-69).

Given the three strong aggravators, including the murder of Kevin Floyd, and the heinous circumstances surrounding the murder of the victim, when juxtaposed with the dearth of mitigation,[47] it is not difficult to discern that death is warranted in this cause. ***See e.g.,*** Gamble v. *State,* 659 So. 2d 242 (Fla. 1995) (Death proportionate where defendant struck landlord in head, got on top of him and held him down as co-defendant repeatedly struck

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[46]Interesting comment in view of the heinous murder of Ms. Lee.

[47]The State respectfully submits that Ms. Lee's brutal murder of and in itself, in the absence of mitigation, is sufficient to warrant the death penalty in this cause.

landlord's head, ultimately strangling him with a cord.); *Colina v. State,* 634 So. 2d 1077 (Fla. 1994) (Defendant dealt several more blows with tire iron to one victim when she began to moan and to other victim when he started to get up, and he dealt fatal blows to both victims while they were lying on ground.); *Lucas v. State, 613* So. 2d 408 (Fla. 1992), *cert. denied* 114 S.Ct. 136, 126 L.Ed.2d 99 (1993) (Death proportionate where defendant shot victim, pursued her into house, struggled with her, hit her, dragged her from house, and finally shot her to death while she begged for her life.); *Cherry v. State,* 544 So. 2d 184 (Fla.), *cert. denied,* 108 L.Ed.2d 963 (1989) (Defendant burglarized a small two-bedroom house owned by elderly couple, and literally beat to death the wife.); *Kokal* v. *State, 492 so.* 2d 1317 (Fla. 1986) (Imposition of death penalty appropriate where murder was preceded by violent robbery, a march at gunpoint to the murder site, and a vicious and painful beating during which the victim unsuccessfully pleaded for his life.).

POINT VIII

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO PERMIT RICHARDSON TO DELAY THE PROCEEDINGS FURTHER WHEN HIS REQUEST TO PROCEED PRO SE WAS ACCOMPANIED BY A MOTION FOR CONTINUANCE FOR FOUR TO SIX MONTHS.

As regards Richardson's representations as to proceeding pro *se* in his eighth claim found at pp.84-86 of his brief, an accurate rendition of the circumstances surrounding said status follows. Richardson's third trial commenced with Mr. Dubbeld filing **a** Motion to Withdraw because Richardson had filed a Motion to Proceed Pro Se (T.3883-84). ***In keeping with Richardson's request, the trial* court *conducted* a** detailed **Faretta *inquiry*** (T.3884-98). The trial court found Richardson "has the ability to represent himself as counsel. But [he] think[s] he needs and we need and this Court need[s] the services of Mr. Dubbeld as stand-by counsel (T.3898)." Richardson informed the court he wanted 4-6 months to prepare (T.3904). The State announced it was ready for trial (T.3904-05). The court denied Richardson's motion for a continuance (T.3905).

Voir Dire was conducted and the third jury **was** chosen (T.3906-4603). Richardson renewed motions raised in his second trial (T.4605-26). Richardson moved for **a** continuance again so he could "put boxes in order" (T.4627-28). The court denied the motion, indicating for the record that there was "...no basis for continuance at this time (T.4630)." It further noted that Richardson had 'sat through 2 complete trials . .." (T.4630). Finally, it commented: "There has been too much time delay in this case (T.4630)." In an abundance of caution, ***the court renewed its prior Faretta warnings,*** informing Richardson it **was** wise to be represented by counsel, to which he replied that he was 110% sure he wanted to be pro se (T.4640-61). All of these matters transpired April 17 through and including April 19, 1995.

On Thursday, April 20, 1995, Richardson moved to dismiss all charges pending against him surrounding the Lee murder (T.4652-53). The court took the matter under advisement (T.4653). Next, Richardson again asked for a continuance, which the court denied, reasoning as follows:

> THE COURT: Okay. I'm going to deny the motion for continuance.
>
> ***We've been through two complete** trials **in this case. You've been through hours and hours of work in preparation, much of it you participated in actively. You have had -- in fact,** part **of the proceedings you were the attorney for yourself.***
>
> ***You know this case** better **than, probably, anyone. Probably far better than Mr. Dubbeld in some respects.*** You certainly have disagreements about how you wish to proceed with the case in comparison with his views. So you're as well prepared as I think you can hope to be.
>
> You had more than adequate time. In fact, you had an excessive amount of time to expend in preparation of your case. You're well prepared. You know the situation. You know the facts and circumstances. There's really no surprises I can foresee. Or that you are not prepared for. You need to proceed and handle your case, if that's your desire to do that.
>
> However, I understand that Mr. Dubbeld suggested that maybe you wish not to continue to represent yourself but have him step back in the case? (T.4657-58)

Despite the denial, Richardson continued to argue for a continuance, accusing the court of denying his right to represent himself by refusing to continue the cause (T.4658-62). The court inquired whether Richardson wanted Mr. Dubbeld to represent him, which he refused to answer (T.4660-63). The following exchange then transpired:

> THE COURT: All right, sir. If you refuse to answer this question, sir, I'm telling you that I have no alternative but to appoint Mr. Dubbeld to represent you. Is that what you wish me to do?
>
> Note for the record, the defendant, Mr. Larry Richardson, has refused to answer the inquiry by the Court concerning whether or not he wishes to have Mr. Dubbeld appointed to represent him. I conclude from what he says that Mr. Richardson does not wish to represent himself for reasons that he seems to feel are personal to him and that I, apparently, do not appreciate and --
>
> MR. RICHARDSON: I don't appreciate it, either.
>
> THE COURT: Don't [interrupt] me, sir. And in light of that, ***I'm going to*** have ***to appoint Mr. Dubbeld to represent*** Mr. ***Richardson. Because he will not follow the Court's instructions.***
>
> MR. RICHARDSON: Over my protest.
>
> THE COURT: ***And he will not follow my admonitions concerning his conduct and repeatedly interrupted the*** Court. ***And he's delaying these proceeding unnecessarily. So we have no alternative but to ask Mr. Dubbeld and direct Mr. Dubbeld to come back into the case.*** And we need to proceed with the opening statements. (T.4663-64)

Mr. Dubbeld, in turn, declined the appointment (T.4664). The trial court denied his "declining to represent Mr. Richardson (T.4665)." Mr. Dubbeld knew that he had to abide by the trial court's order, so he moved for a mistrial, arguing he was not prepared, and then argued for a continuance of two days to review his notes (T.4665-66). The court denied both motions as follows:

> THE COURT: Okay. I'm going to deny the motion[s]. We will proceed to trial. Mr. Dubbeld, I'm confident that -- you have tried this case twice and done a very substantial amount of work and put the evidence that you put in the case and are well and able to try this case. And I'm confident of that.
>
> And I know, as I recall, just before we went into the last trial, you were anxious about it. And I understand that. But I think you did a yeoman's job in that case. And I expect you to do the same in representing Mr. Richardson in this case. (T.4666)

This Court has opined:

> The guaranty of the Declaration of Rights of the Florida Constitution, that "(i)n all criminal prosecutions the accused . . . shall have the right ... to be heard in person, by counsel, or both ...," ***has been interpreted to include a qualified, not an absolute, right to self-representation.***

State v. Tait, 387 So. 2d 338, 340 (Fla. 1980).

Of course, the quintessential case on the Sixth Amendment right to self-representation, *Faretta,* determined that such was a qualified, not an absolute right:

> ***The right to self-representation is not a license to*** abuse ***the* dignity *of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.*** Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."

Faretta, 422 U.S. at 835 n.46, 95 S.Ct. at 2541 n.46. Later, the United States Supreme Court would reaffirm this axiom:

> ... [W]e make explicit today what is already implicit in Faretta: A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel -- even over the defendant's objection -- to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the **way** of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense.

McKaskle v. ***Wiggins, 465*** U.S. ***168, 104*** S.Ct. 944, 954, 79 L.Ed.2d ***122 (1984).***

Jones v. State, 449 So. 2d 253, (Fla.), ***cert. denied, 469*** U.S. 893 (1984), is analogous in many ways to the factual circumstances in this cause. In that cause, this court opined, that **a** defendant's right to self representation ***'is not a license to abuse***

the dignity of the court or to ***frustrate orderly proceedings, and a defendant may not manipulate the proceedings*** *by* ***willy-nilly leaping*** **back** ***and forth between the choices." Id.,*** at 259; See **also**, Valdes v. State, **626 So.** 2d 1316, 1319-20 (Fla. 1993); *Waterhouse v. State, 596 So.* 2d 1008, 1014 (Fla. 1992). In this cause, Richardson appears to recognize his behavior was just such manipulation of the proceedings by the following concession found on p. 85 of his brief: ***"Appellant*** **does** ***raise this*** **as an** ***issue even in view of the recent opionion [sic] of this court,*** **See <u>State v. Roberts</u>**, 21 Fla. L. Weekly S220, S221, (Fla. May 23, 1996)." Indeed, he acknowledges in the footnote following this concession: "Defendant had repeatedly requested self-representation and, reluctantly accepted counsel. The record is repleat [sic] with said action . . . ."

Richardson correctly concedes the record is replete with such behavior, and his adamant insistence upon a continuance if he was to proceed *pro* se in his third trial, despite repeated denials by the trial court, was a blatant attempt to frustrate the orderly proceeding of his trial. As in Jones, *supra,* at 257, the trial court in this cause faced the following dilemma:

> The record clearly shows that the court was faced with an obstreperous defendant who might well attempt to disrupt and obstruct the trial

> proceedings. **Under *these circumstances,* it was *prudent* of *the court to appoint standby counsel, even over defendant's objection,*** to observe the trial in order to be prepared, as well as possible, to represent defendant in the event it became necessary to restrict or terminate self-representation by shackling and gagging defendant or by removing him from the courtroom.[48] ***We do not view the appointaent of standby counsel over defendant's objection* as *interposing*** counsel ***between defendant and his sixth amendment right to self-representation.***

Clearly, the trial court prudently exercised its discretion in ordering standby counsel, Mr. Dubbeld, to represent the obstreperous Richardson, whose insistence on *a* continuance, "was abusing the system in an effort to delay his trial." ***Valdes v. State, supra,*** at 1320. One aspect of the *Faretta* inquiry is that the ***pro*** se defendant ***'would be required to follow all the 'ground rules'* of *trial procedure*."** ***Id.,*** 45 L.Ed.2d 582. One obvious ground rule is to abide by a trial judge's rulings. Richardson refused to abide by the trial court's denial of his request for a four to six month continuance. His request to represent himself was not unequivocal, it was based upon his gaining a continuance. The trial court had no choice but to order standby counsel to

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[48]Such was ultimately Richardson's fate during his sentencing, when he refused to adhere to the trial court's repeated admonishments to cease his disruptive behavior (T.5563-***65).***

represent him, so that the trial could proceed in an orderly fashion.[49]

Given Richardson's repeated attempts to manipulate the proceedings below, the trial court correctly exercised its discretion regarding this matter. In fact, a review of the complete record clearly demonstrates that Mr. Dubbeld, in the capacity of standby counsel in Richardson's first two trials, almost entirely conducted his client's defense, just as he did in his third trial, demonstrating his argument before this Court is once again form over substance. These circumstances also negate Richardson's contention at p.85 of his brief that the 'lower tribunal did not go forward with a full Faretta Inquiry."[50]

POINT IX

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING RICHARDSON'S MOTION TO CONTINUE, WHERE IT WAS CLEARLY A DELAYING TACTIC.

The State incorporates by reference the facts and argument related in its previous argument. Those factual circumstances

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[49]The jury had already been sworn. (T.4630-32)

[50]The record indicates numerous *Faretta* inquiries were conducted during the course of Richardson's third trial (T.3884-98, 4640-41, 5335-53, 5373-75). He **was pro se** during Voir Dire, and during the Penalty Phase. The State would note, that these inquiries were in addition to those occurring before the first trial, during it, before the second trial and during it.

clearly demonstrate that Richardson was manipulating the proceedings. The trial court correctly exercised its discretion in denying his motion for continuance.

POINT X

THE TRIAL COURT PROPERLY CONDUCTED A *FARETTA* INQUIRY PRIOR TO RICHARDSON'S **SELF-REPRESENTATION** DURING THE PENALTY PHASE OF HIS TRIAL.

After the jury had returned its verdicts and been polled, it was excused while the trial court discussed logistics regarding the Penalty Phase of Richardson's trial (T.5319-34). Mr. Dubbeld indicated that Richardson wanted to proceed to the Penalty Phase "[i]mmediately" (T.5321). The prosecutor indicated that he needed until Thursday so that he could make arrangements to fly his out-of-state witnesses into Daytona (T.5321). Mr. Dubbeld announced:

> I have been under instructions from Mr. Richardson to neither investigate, research, or conduct any other efforts to attempt to block or persuade the jury in this death penalty phase. . . .
> (T.5322)

As previously delineated in the State's argument on proportionality, Richardson, himself, expressed his desire to waive the Penalty Phase (T.5326-27).

The trial court correctly declined Richardson' s invitation to forego the Penalty Phase (T.5327-31). A lunch recess was taken, and when the cause recommenced, Mr. Dubbeld announced that

Richardson wished 'to represent himself for the sentencing phase and have him act as advisory counsel for that purpose (T.5335)."

The trial court observed:

> [W]e've already tried the representation. And not only did we have some problems, I think Mr. Richardson demonstrated he was unable to comply with Court orders at the time. And was persistent in that. ... (T.5336)

Richardson argued with the bench over his compliance with the trial court's rulings, which the bench required assurance of after the debacle that occurred prior to Richardson's Guilt Phase (T.5337-42). That discussion constituted a lengthy portion of the *Faretta* inquiry conducted prior to his proceeding pro se during the Penalty phase and concluded as follows:

> THE COURT: It's a decision. That's why I sit here. This is not your Court. This is the People's Court. And I'm the Judge. And it's my responsibility to make rulings of law. And I make a ruling, you got to stand by it. Your attorney has to stand by it. The State has to stand by it -
>
> THE DEFENDANT: And --
>
> THE COURT: When I tell them to stop, he must stop and you must stop.
>
> THE DEFENDANT: Agreed.
>
> THE COURT: You think you can do that?
>
> THE DEFENDANT: I know I'm going to do it.
>
> THE COURT: I drop the gavel and say order in the

> Court, or if I tell you to stop, or if I tell you to sit down, if I tell you to be quiet, you'll abide by that?
>
> THE DEFENDANT: You will not be using the gavel not once. (T.5342-43)

The *Faretta* inquiry continued, with a caution from the trial court that it was unwise for him to represent himself (T.5343). Richardson was instructed he would not be 'afforded any special privileges," and that he was expected to conduct himself 'like an attorney," which included following the rulings of the court (T.5343-44). The trial court next inquired as to Richardson's understanding of aggravating and mitigating factors (T.5344-45). Richardson's response was: "Mr. Dubbeld taught me very well. And what I learned myself in prison (T.5345-46)."

The trial court inquired as to Richardson's previous experience representing himself in criminal proceedings (T.5346). He responded that he represented himself from beginning to end in his trial for the Floyd murder, for which he received a life sentence (T.5346). He further remarked regarding his experience: "I believe I represented myself every time I stepped into a court of law (T.5346)." Argument was heard from counsel on the matter, and the trial court found as follows:

> THE COURT: Well, Mr. Richardson, I don't know that you've ever warranted without reservation and an

expression of condition your willingness to fully abide by Court orders and to represent, if you were permitted to represent yourself. I'm probably disposed to try once that you stated you would do. The consequences I think have been fully explained before. I've kind of gone back over them again. That is, you're expected, what would be expected of you and that there's no special considerations will be made to you. That you'll be expected to comply and comport yourself appropriately.

I will, however, require that Mr. Dubbeld stand by and advise you on legal matters, as he did before. And I caution you that if you elect to become obstreperous or unduly and improperly argumentative or fail to follow the Court's order, then -- or express such frustration with the system that you just refuse to do anything in your own behalf, expressly so, then I may be obliged to appoint Mr. Dubbeld back on to the case.

But for the time being, I'll let you proceed in your own behalf, in your own defense. I think that you've demonstrated, from your experience, that you possess a fairly good working knowledge of the system and you have a good understanding, I think, of what's at stake. It's been discussed repeatedly. You've evidenced that you understand that fully. And I believe that I'll afford you further an attempt to represent yourself.

But this is a very important stage of the proceeding, as far as you're concerned. I presume you understand that.

THE DEFENDANT: ***Yes, sir.*** (T.5350-52)

In his argument as to his last claim at p.87 of his brief, Richardson cites ***Jones*** v. State, ***supra,*** "for the proposition that failure to renew offer of counsel at sentencing stage to the defendant was not reversible err [sic]." First, not to belabor the obvious, Jones clearly cuts against him on this point. Second, this cause is distinguishable from *Jones* as to that particular factual circumstance, since the aforementioned inquiry of Richardson, conducted prior to the Penalty Phase, comports with *Faretta,* and its progeny. *See Hamblen* v. State, 527 So. 2d 800, 801 (Fla. 1988). The offer of counsel was renewed prior to the Penalty Phase, and in light of the trial court's repeated renewals of the Faretta inquiry during the course of Richardson's trial (T.3884-98, 4640-41, 5335-53, 5373-75), there was no error. *State v. Roberts, supra; Waterhouse v. State, supra; Jones* v. State, *supra.*

Richardson received what he wanted, self-representation during the Penalty Phase. Even if the trial court did conduct an inadequate *Faretta* inquiry as he alleges, which the State does not concede, in the absence of his assertion that he did not want to proceed *pro* se during this juncture of his trial, there was no error. The trial court correctly comported with *Faretta* in allowing Richardson to proceed *pro* se during the Penalty Phase.

CONCLUSION

Based upon the foregoing facts, authorities, and reasoning, the State respectfully requests that Richardson's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ANSWER BRIEF has been delivered by U.S. MAIL to PAUL J. DUBBELD, ESQ., 444 Seabreeze Boulevard, Ste. 720, Daytona Beach, FL, 32118, this 29th day of October, 1996.

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