IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,133

ALBERT COOPER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Defendant and codefendant Tivan Johnson were charged, by indictment filed on July 3, 1991, in the Eleventh Judicial Circuit, Dade County, case number 91-21601, with (1) the first degree premeditated or felony murder of Charles Barker, (2) the armed burglary of the Outpost Pawnshop, (3) the armed robbery of Barker and/or the pawnshop and (4) the unlawful possession of a firearm while engaged in a criminal offense. (R. 1-3).

The relevant facts and proceedings relating to the pretrial motions will be presented in the body of the argument.

Charles Barker's widow, Debra Barker, testified that her husband usually got home from work at 5:30 p.m. On May 25, 1991, she had a phone conversation with him at 4:30 p.m. (T. 1217). He stated he would be home a little late, because he had to stop and pick up some balloons for their son's fifth birthday party. When Barker had not arrived by 6:00 p.m., she began to become concerned. (T. 1218). After 6:00 p.m. she received a call from the alarm company. (T. 1219). Debra then called her friend, Marjorie Bower, who came over. Bower agreed to go down and check the Outpost pawn shop for Barker. (T. 1220). Later Bower's husband returned and

told her that Barker had been killed. (T. 1221).

Debra Barker called Marjorie Bower on the day of the murder; she sounded hysterical. Bower then went to the Barker house with her 22-year-old daughter. (T. 1232). Debra came out of the house with her small son, Chucky, when Bower arrived. She was still hysterical, and wanted to go down to the pawnshop. Bower told Debra she was in no condition to go, and that Bower and her daughter would go and check on the shop. (T. 1233).

When Bower arrived at the business, after 7:00 p.m., the front door was open. (T. 1235, 1238). There was music playing in the shop, loud enough to be heard from the parking lot. She went in and noticed Barker's keys on top of a pile of tires. She recognized the key chain, an anchor. She picked up the keys and called for Barker. (T. 1236-37). She heard no response, and went through the doorway into the smaller room. (T. 1238). Both halves of the Dutch door between the rooms were open. Then she saw blood on the floor of the back room and immediately backed out of the shop went to her car. (T. 1239). She found a police officer, who returned with her to the shop. The officer had called for assistance, and by the time they got back, several police units

were converging on the scene. She waited in her car. (T. 1240).

Officer Buckner was a patrol officer at the time of the murder. The Outpost was generally closed at 5:00 p.m. A county ordinance required them to close at that hour. (T. 1255). The shop had a metal Rolladen shutter which was usually pulled down when it was closed. Buckner had met Barker before and was aware that he was a former police officer. (T. 1256). On the night of the murder, Buckner was working a private security job at Chivas Hall, at Northwest 93rd Street and 27th Avenue. (T. 1257). He was in his uniform and had his police cruiser. A woman came up to him and asked him to come to the pawnshop. He proceeded to the shop. When he arrived, there was one car in front, the door was open and very loud music was playing. (T. 1258). Before entering, Buckner radioed the station and had them call the pawnshop. The dispatcher informed him, around 7:00 or 7:15 p.m., that there was no answer. Buckner called for backup, and Lieutenant Butler and Sergeant Holsey arrived shortly. (T. 1259). All three went into the shop and found Barker's body lying on the floor with several gunshot wounds. (T. 1260).

Robert Latta worked part-time at the Outpost for about six months. (T. 1280). He last worked regularly in the shop about six

weeks prior to Barker's murder. (T. 1281). He had known Barker for about eight years. (T. 1282). The store hours were 8:00 a.m. to 5:00 p.m. Barker complied with the shop-closure law "at all times." Latta was familiar with the alarm system. (T. 1283). It was tied into a central monitoring system, with code-operated keypad. If the alarm was not set in the evening, the alarm monitoring company would call the shop to find out why. If that was unsuccessful, they would contact the police.(T. 1284). Barker kept the money in a cash drawer, which was in a counter 10-12 feet from the Dutch door. (T. 1287, 1342). At the end of the day, Barker would count the money from the cash drawer, laying the bills in paper-clipped, face-up groups of twenty-five on the stool. (T. 1290). Barker kept a gun hanging on the inside bottom of the Dutch door where he dealt with the customers. He also kept a shotgun in a rack, a gun in the safe, one in a hip holster, and a .22 semi-automatic in his rear pocket. (T. 1291). When Latta visited the shop after the murder, he noticed that a Mossberg pistol-grip pump shotgun was missing from the wall. It was similar to a gun produced at trial. (T. 1298). There were also a Cobray 9mm assault pistol and a Mac-10 semiautomatic missing. (T. 1296).

The day before Barker was murdered, Latta worked the whole day

in the shop for Barker, who was off selling some guns and diamonds. (T. 1299). That evening, Barker returned to the store and they left together, after Barker followed his usual routine with the money and the alarm. (T. 1302). A mid-sized late model Ford with two young black males in it pulled up as they were leaving. (T. 1303-04). When Barker pulled his car back into his parking space, the men in the Ford got back in their car and left. (T. 1304). The next day Latta went to the VFW flea market to sell some tools for Barker. Between 12:30 and 1:00 p.m., Latta returned to the shop to get more inventory to take to another flea market the next day. Barker seemed tired, but everything was all right, and Barker was wearing the .45 in the hip holster. (T. 1305). Barker did not feel like "pulling" more tools, so they decided to wait until the following weekend. Latta then left. (T. 1306).

Latta explained that the bottom of the Dutch door could not be opened from the outside. It had a lock on the inside that was hidden under the counter top and that was not visible from the other side. (T. 1306, 1319). The front door to the shop was buzzer-operated. (T. 1306). There were double doors; one had the buzzer, the other had sliding bolts at top and bottom, on the inside. If no one was there to operate the buzzer, a person could

get out by sliding the bolts on the second door, and both doors could then be opened. (T. 1307-08).

Latta also explained that for every item pawned, a record was kept describing the item and the amount of money loaned on it. (T. 1309). They also required two ID's, one with a picture for each transaction. (T. 1310). The county required that a form be filled out, which included the customer's full name, address and description, the numbers from the ID's. It also required a description of the items pawned, the amount loaned, and the signature and thumbprint of the customer. (T. 1311). At the top of the form, the date and time of the transaction was noted. (T. 1314).

Latta operated the shop for Barker's family for approximately six months after his death. (T. 1313). The records indicated that on the day of the murder, the last transaction took place at 4:42 p.m. (T. 1314). Ben Brown, a regular customer, made the final pawn that day. (T. 1313, 1315). Latta saw Brown within a few days of the reopening, and talked to him about it. Latta also informed the police of the information. (T. 1315). The police returned an Iver-Johnson .22 which had been found under Barker's body. This

was the type of gun which he kept in his back pocket. The police also returned the paperwork which Barker had been working on. (T. 1317). Barker usually did the paperwork on the counter top attached to the Dutch door. He kept the papers stacked there, along with a daily log. (T. 1317).

Ben Brown had been a regular customer of the Outpost for about thirteen years. (T. 1379). Brown, who was a self-employed mechanic, occasionally did odd jobs at the shop for Barker. (T. 1380). On the day of the murder, Brown pawned a come-along at 4:42 p.m. (T. 1384). He rang the bell to get buzzed in, but instead of the buzzer, a man let him in, which was unusual. No one had ever done that before. (T. 1386). The man who let him in told another man, who was at the counter, to let Brown go first because the object he was carrying looked heavy. (T. 1387). The man by the counter stepped aside and told Barker to take care of Brown. (T. 1388). Barker usually joked with Brown when he came in. That day, however, Barker looked "weird," and did not joke with him. (T. 1392). They had known each other for about 13 years and were normally very friendly. On that day, Barker did not say a word. (T. 1393). Brown was in a hurry, so he just took his money and left. (T. 1392, 1394). Usually Barker would walk over to the cash

drawer to get the money, but this time he just reached behind him without moving and gave Brown the money. Brown got a good look at the man standing next to the counter, and identified him as Defendant. (T. 1395-1400).

Prior to June 1991, Timothy Thanos and his girlfriend lived at the same apartment complex and socialized with the defendants and with Johnson's wife. (T. 1533-35). About ten days prior to their arrest, the defendants were evicted for playing their stereo too loud. (T. 1536). Thanos allowed them (and their baby) to stay at his apartment until they could find a place to live after they were evicted. (T. 1537). They stored their belongings in a U-Haul truck while they were staying with Thanos. They ended up staying about ten days at Thanos's apartment. They also had a silver Ford Probe hatchback. (T. 1538). They eventually moved out of Thanos's apartment two days before they were arrested. About two weeks before Thanos was interviewed by the police, he had had a conversation with Johnson about a pawnshop. (T. 1539). Johnson told him that he had robbed a pawnshop and "unloaded a pistol on" a man there. (T. 1540). Johnson told Thanos that he had gotten some guns from the robbery. Thanos thought Johnson was making it up. Thanos had seen both defendants with guns. (T. 1540). They

had several different types of guns in their apartment. When they stayed with Thanos they each had one gun, plus the police found a rifle under his couch. Thanos did not own any firearms. (T. 1541). Johnson had a .38. (T. 1545).

Detective Salvatore Garafalo was asked by Detective Saladrigas to try to locate the defendants. He went to their apartment complex at 14500 SW 88th Avenue. (T. 1560-61). He spoke to the apartment manager, Mike Villa, who took him to view the defendants' apartment, which was empty. A U-Haul truck located at the adjacent Quality Inn was pointed out to him. (T. 1561). The truck was just beginning to move when he first saw it. (T. 1562). He and other officers followed and stopped the truck. (T. 1563). Defendant and a black female were in the truck. Defendant, who was driving, was taken to the police station. (T. 1564). The truck was towed to an impound lot.

Metro-Dade Sergeant John Methrin was also asked by Saladrigas to help locate the defendants. He was informed they might be in a silver Ford Probe with a certain tag number. (T. 1568). He located the car at South Dixie Highway and SW 144th Street. (T. 1569). With the assistance of a uniformed officer, Methrin stopped

the Probe. Johnson was driving. He then took Johnson to police headquarters. (T. 1570). The vehicle was impounded. (T. 1571). Johnson's wife, Renee, was the passenger. She was also taken in for questioning. (T. 1572).

Admonia Blount, who was 18 at the time of trial, was the passenger in the U-Haul at the time it was pulled over by the police. She had known Defendant about two months at that time. (T. 1576). She started going out with Defendant, who was aware that she was only 14 at the time. They dated occasionally. (T. 1577). Blount overheard the defendants talking about going in and robbing a pawnshop and taking some guns. Defendant was doing most of the talking. Johnson said "I'm down," meaning he would go along with it. (T. 1580-81). Defendant also said to make sure that they hit the cash register. Johnson then asked if Defendant wanted the money from the register also. (T. 1582). Defendant said he would hold the guy because he was stronger, so Johnson could shoot him. Johnson then told Defendant to make sure Blount kept quiet. Blount then asked, "You all are not going to kill anybody?" She asked that after Defendant said they were going to "splat" the guy. (T. 1584). Later on, she asked Defendant if they had killed the guy at the pawnshop and he said yes, although she did not believe him at

the time. (T. 1585). Defendant said it took a lot of shots because he was big. He said they took some guns. (T. 1586).

Officer Stoker testified regarding the processing of two vehicles, a 1990 gray Ford Probe, and a U-Haul van. (T. 1629, 1638). They found a pistol in the midst of some clothing in the back of the truck. (T. 1642). They also recovered a knapsack. (T. 1642). The pistol was a .38 five-shot revolver. (T. 1644). They also found some .38 Federal and .38 special Plus-P cartridges in the van. (T. 1648).

Medical examiner Jay Barnhart testified that Barker died as a result of multiple gunshot wounds. Twelve wounds were located. Wound "A" was located on the right side of Barker's face. The bullet entered his right cheek near the lip and exited beside his right eye. (T. 1692). A small fragment of the bullet causing this injury was recovered. (T. 1694-95).

Bullet "B" went through Barker's chin on the right side, then through his ribs, through his heart, through the aorta, and then through his left lung, lodging between his ribs on the back left side. The bullet's trajectory indicated that Barker would have

been leaning forward toward the shooter when the bullet was fired. (T. 1693). Wound "B" was fatal. (T. 1694). There was stippling present on wound "B", indicating that the gun was fired at close range. (T. 1709).

Wound "C" was located slightly to the right and above the navel. (T. 1695). Wounds "D" & "E" were even with, and to the left of, the navel. (T. 1695). Wounds "F" & "G" were below and to the left of the navel. (T. 1696). Wound "H" was centrally located below the navel. (T. 1696). The paths of bullets "C" through "H" were all to the left, from front to back, and upward. (T. 1696). Not all of these bullets were recovered from the body. The bullets recovered were "short non-exits," that is, they were prevented from exiting the body by contact with a hard surface, here, the floor. (T. 1697). The wounds suggested that Barker was shot from by someone standing outside the Dutch door, while Barker was lying on his back on the floor. (T. 1702, 1712).

Wound "I" was on the right side of Barker's body. (T. 1704). The bullet pierced the liver, a potentially fatal wound. (T. 1705).

Bullet "J" entered Barker's left arm near the wrist and "K" entered in the middle of the left forearm. Both came out just above Barker's left elbow. (T. 1706). These wounds appeared to be defensive. Bullet L passed through Barker's upper right arm. (T. 1707).

The evidence was consistent with bullet "B" being fired first, at close range, with Barker falling over after being shot through the heart, and bullets "C" through "H" being fired as he lay on the floor. (T. 1712).

Metro-Dade Homicide Detective Michael Jones met and Mirandized Defendant on June 15, 1991. (T. 1748-51) In his sworn statement Defendant stated that on May 25, 1991, he and Johnson went to the pawnshop at NW 27th Avenue and 87th Street and a killing took place. They had previously gone there to "check things out," to determine what the security was and to figure out "how to go about doing this job." They were looking for guns and money. (T. 1770). Defendant and Johnson went back two or three times. They had no other accomplices. They drove there in Johnson's wife's car, a silver-gray Ford Probe. They arrived at the shop at 4:50. (T. 1771). They backed the car in near the entrance. They backed in

to make it easier to load, and so no one would see the tag number. Defendant had a chrome .380 semiautomatic. (T. 1772). Johnson was armed with a .38. When they arrived at the pawnshop there was another male already present. (T. 1773). He was a black male, approximately 32 years old. He bought a gun and left. Then another guy showed up, a black male about 30 years old. Then he left also. (T. 1774). They checked to make sure no one else was coming, and then they took out their guns. Johnson asked to see a 30-30. He looked at it and then asked to see a similar model. Barker was wearing a chrome Colt .45. (T. 1775). Barker turned around to replace the second gun that Johnson looked at, and when Barker turned back, Defendant shot him in the chest. Defendant fired a second shot, and then Johnson began firing, too. Altogether, they shot him thirteen times, Defendant, seven, and Johnson, five. Barker tried to draw his weapon. (T. 1776). But after a couple of shots, Barker fell to the ground, screaming. Then Defendant and Johnson each fired their last shots. Johnson's .38 was a five-shot. Johnson then put the empty casings in his pocket, put one more round in the revolver, and shot him in the face. (T. 1777). They "knew by that time that the guy was dead," so they began loading guns and money into a gray and black duffel bag Defendant retrieved from their car after the shooting. The

door was buzzer-operated, but they could not find the button, so Defendant unbolted the second door and swung them open. (T. 1778). Johnson loaded the money and some small guns into the bag. The money was not in the drawer, but on a high stool nearby. They took the full bag out to the car, and then Johnson went for some long rifles. Johnson had to go behind the counter to get the weapons. Johnson took the .45 from the owner's body and gave it to Defendant. After wrapping the rifles in a spread from the car, they loaded them into the car and left. (T. 1779). They headed south, and went to pick up Renee Johnson from work at a Winn-Dixie around 5:10. (T. 1781). Defendant's clothes were splattered with Barker's blood, but he hid the stains from Renee with his jacket. (T. 1782). They paid bills with the money and sold most of the guns. (T. 1782).

Detective Pascual Diaz testified regarding Johnson's statement. In his statement, Johnson stated that prior to May 25, 1991, Defendant had planned to rob the pawnshop at 8795 N.W. 27th Avenue. (T. 1819). They decided on Monday to rob the shop on Saturday. They picked the Outpost because there were no video cameras and only one person working there. They planned to obtain guns and money through the robbery. (T. 1820). Johnson

participated in the planning of the robbery. On the 25th, Johnson and Cooper took Johnson's wife to work at Winn-Dixie, and then drove to Liberty City in the 1990 silver Ford Probe. Johnson "made an exchange" at N.W. 18th Avenue and 49th Street, trading a .22 rifle for a snub-nose .38 revolver. (T. 1822). The revolver, which was black, was loaded with five bullets when he received it. Defendant had a small silver .380 automatic. (T. 1822). They decided the robbery would take place at 5:00 p.m. They arrived at the shop at around 4:45. They backed the car up to the building and got out with their loaded guns in their pockets. (T. 1823). Johnson went in first to look over the place and Defendant joined him later. He had to be buzzed in. Johnson talked to the owner about buying a 30-30 long rifle. (T. 1824). The man eventually left. A black man came into the store and then left in a Chevy pick-up. At around 5:00, they pulled out their weapons. (T. 1825). Johnson yelled freeze, and as Barker reached for his weapon, Defendant began firing. Then Johnson began shooting also. (T. 1826). After Johnson shot five times, he jumped over the counter and went for the guns and money. He stopped and emptied the shells from his gun, putting them in his pocket, so as not to leave fingerprints behind. He loaded one more cartridge, and aimed towards Barker's head as he lay on the floor. However, the shot

missed, hitting the toolbox instead. (T. 1827). Then he got about $1600 from the cash drawer, and proceeded to take the following guns: a M-11, a Tech-9, a small five-shot .38, another .380 nine-shot shotgun, a Kel-Co .22 long rifle, a .22 long rifle, a 30-30 long rifle, and Barker's .45 automatic from his hip holster. They left the building by releasing the top and bottom latches on the door. They tried to use Barker's keys, which they took from his person, but it did not work. (T. 1828). They load the guns into the car, and then went to pick up Renee from work. They arrived at the Winn-Dixie around 5:30-5:45 p.m. Defendant had blood on his clothes, and some of Barker's flesh on his pants. (T. 1829). Defendant put the clothes in a gym bag and gave them to Johnson to throw away. Johnson threw the bag into a dumpster behind a Pizza Hut. Johnson's gun was in the back of the U-Haul. Defendant's had been sold. They also sold a number of the weapons taken from the shop. (T. 1830-31). The police recovered a 12-gauge Mossberg shotgun from a pawn shop in South Dade where Johnson said they had sold it. (T. 1834).

Fred Troike was the manager of South Dade Gun and Pawnshop. (T. 1875). Troike identified a pawnshop police report signed by Defendant. (T. 1879). The form indicated that at 11:45 a.m. on

May 30, 1991, Defendant sold the shop a Mossberg 12-gauge shotgun for $50.00. (T. 1881-83).

Fingerprint technician James Hinds of the Metro Police identified Defendant's fingerprint on the police report for the sale of the Mossberg shotgun at the South Dade pawnshop. (T. 1922). The palm and fingerprints of both Johnson and Defendant appeared on the papers which were recovered from the counter top at the Outpost. (T. 1933-34).

Metro-Dade Criminalist Thomas Quirk testified that the recovered projectiles were of two calibers, a .38 special ("B" & "D"), and a .380 automatic ("C", "E", "F" & "G"). (T. 1994). The two .38's were fired from the same gun. Likewise, the four .380's were all fired from the same gun. (T. 1997). "H", "I" and probably "J" were all .38's fired from the same gun as "B" and "D". "K" was fired by the same .380 auto as "C", "E", "F" and "G". (T. 2003). Casings "N", "O", "Q", and probably "M" were all fired in the same .380 automatic. (T. 2008). Casings "P" and "R" were also fired in the same .380. Because "P" and "R" were of a different metal and manufacture, Quirk was unable to determine whether they were fired from the same gun as "N", "O", "Q" and "M". (T. 2010).

Quirk also examined Barker's shirt and determined, from the quantity of particulate lead present, that Barker was shot from four to six feet away several times. (T. 2018).

Criminalist Robert Kennington, of the Metro-Dade Police Department examined the .38 recovered from the U-Haul, and determined that projectiles "B", "D", "H", "I" and "J" were fired from it, to the exclusion of all other weapons. (T. 2036). Kennington perform gunpowder dispersal testing with the .38 revolver, and determined, with the brand of bullets fired at Barker, that no stippling would occur beyond three feet. (T. 2049-51).

The State rested. (T. 2055).

The defendants presented, through the testimony of Johnson, a theory of self defense in which they shot Barker after he allegedly shot at them during the course of an illegal gun transaction gone awry. (T. 2062-77).

The defense rested. (T. 2160).

Both defendants were found guilty as charged as to all counts. (T. 2429-30).

At the penalty phase the State presented Defendant's conviction for the murder of Thomas Walker during the robbery of a Rudy's restaurant 19 days after the Barker murder. The State also introduced Defendant's confession in that case in which Defendant admitted to the shooting of Walker in the back of the head at the completion of the robbery. (T. 2524-59). The medical examiner testified that the forensic evidence showed that Walker was on his knees when shot. (T. 2643-58).

The State rested.

Defendant presented the testimony of Dr. Eisenstein, who opined that because of "cognitive brain impairment" associated with head trauma, Defendant had impulsivity and judgment deficits. He stated that his mother was his "surrogate frontal lobe" and that when he moved out of her house Johnson became his "frontal lobes." He further stated that Defendant told him he was under the influence of narcotics at the time of the murder, which Eisenstein believed because "patients do not lie." As a result he concluded

that Defendant was under the substantial domination of Johnson at the time of the murder, and that Defendant was unable to conform his conduct to the requirements of the law. On cross-examination Eisenstein conceded that the EEG and CAT scan conducted at the time of Defendant's head injury did not indicate abnormality. He also conceded that Defendant's IQ was in the low normal range, and was such that Defendant could function normally and hold a job, which in fact Defendant had done in the past. (T. 2676-2713).

Defendant also presented the testimony of Dr. Schwartz, who opined that Defendant had borderline intelligence. He stated that Defendant told him that he consumed five beers two regular marijuana joints, and two joints laced with cocaine the night of the murder. Defendant stated that he did the drugs to give him the confidence to carry out the crimes. Schwartz did not, however, believe that any of the statutory mitigating factors applied to Defendant. He felt that Defendant's intelligence level and family history were the "major areas" that he found mitigating. On cross, Schwartz conceded that Defendant's intelligence scores could be "deflated." He also conceded that there was a "great possibility" that Defendant was making up his claims to drug abuse. (T. 2921-64).

In rebuttal, the state called Dr. Levy who testified that he did not believe any of the statutory mitigating circumstances applied to Defendant in that he displayed no sign of any mental impairment, and evidenced "street smarts" much greater than his test scores reflected, and further testified that he did not believe Defendant's claims of drug use because the evidence in the case did not comport with what would be expected if Defendant had been impaired at the time of the crime. (T. 2814-88).

The State also called Dr. Aguila-Puentes, who testified that her test results did not conform with those obtained by Dr. Eisenstein. She felt that Defendant was malingering with Eisenstein. She further concluded that Defendant did not suffer from any brain injury or mental disorder, and that he performed in the average range. Her testing was corroborated by the detail found in Defendant's statements to the police. Further, Defendant's test results were inconsistent with a history of substance abuse. She concluded that his judgment was not in any way impaired. She concluded that Defendant was not under the influence of any emotional disturbance at the time of the crime and that he was fully able to conform his conduct to the requirements of the law. (T. 3017-47).

Defendant also presented the testimony of various friends and relatives who testified that Defendant's father had been abusive, but that he had left when Defendant was six, and that thereafter Defendant had been raised in a wholesome, church-going environment surrounded by loving and caring family and friends and that Defendant had never gotten into trouble growing up. Many of the witnesses also stated that they thought they had on one occasion believed Defendant to be on drugs. Defendant, however had never told any of them he used drugs, and none had ever actually seen Defendant in possession of or using drugs. (T. 2730-67, 2779-2808, 2974-3010).

In rebuttal to these witnesses, the State called Admonia Blount and Renee Carey, and cross-examined high-school friend Derek LeBron, who all testified that they had never seen Defendant do drugs or appear to be on drugs. Also called were various police personnel who had searched Defendant's vehicles, possessions, and motel room and who had uncovered no evidence of drug use whatsoever. (T. 2899-2918, 2964-80).

At the conclusion the penalty phase, the jury recommended, by an 8 to 4 vote, that Defendant be sentenced to death. The trial

court found three aggravating factors to exist: (1) prior convictions for capital and violent felonies; (2) murder committed during the course of a burglary and robbery, merged with murder committed for pecuniary gain; and (3) cold, calculated, and premeditated. The court found two statutory mitigating circumstances, lack of significant prior criminal activity and age, but concluded they were entitled to little weight. The court additionally found as mitigation that Defendant had an abused childhood and low intelligence. The court concluded that the aggravation "overwhelmingly" outweighed the mitigation and sentenced Defendant to death. (R. 488-501).

This appeal followed.

SUMMARY OF THE ARGUMENT

1. The Metro-Dade Miranda warning form adequately advised Defendant that he had the right to consult with an attorney during his interview with the police. As such, the trial court properly refused to suppress his statement.

2. No error occurred where a police witness was allowed to briefly explain that the reason that Defendant was in custody for 12 hours before giving his statement was that the police were busy interviewing him and other witnesses regarding an "unrelated matter" during that period, where there was no suggestion that Defendant was charged or suspected of the other matter and its nature was not even mentioned.

3. Defendant was not entitled to severance because his own statement was introduced in rebuttal to codefendant Johnson's guilt-phase testimony where the statements would have been fully admissible against Defendant in a separate trial regardless of whether Johnson had testified.

4. The brief sight by the jury of Defendant in shackles while being transported to the courtroom was not reversible error

where Defendant was not tried in restraints.

5. Defendant's claim that the trial court erroneously instructed the jury during voir dire that they had to recommend death if they found the aggravating circumstances outweighed the mitigating circumstances was not preserved for review by a timely objection and is without merit where the court's statement was an accurate reflection of the law and the jury was properly given the standard jury instructions at the conclusion of the penalty phase.

6. Defendant's statements before the day of the murder that he was going to rob the pawn shop and "splat" its owner as well as other evidence of planning and coolly carrying out the crime fully support the trial court's finding that the murder was cold, calculated, and premeditated.

7. The trial court properly found that Defendant's age was entitled to little weight where there was no evidence that Defendant, who was not a minor at the time of the murder, lacked maturity. Further, no error occurred in failing to instruct the jury on age where Defendant never requested such an instruction, and defense counsel argued the factor as nonstatutory mitigation

and the standard "catch-all" instruction was given.

8. The trial court properly admitted evidence of Defendant's prior post-murder statement that he never used drugs where he presented claims through his experts that he was under the influence of drugs at the time of the crime.

9. Defendant's evidence of drug use was speculative at best, and as such could properly have been rejected by the trial court. The trial court's finding that Defendant was in no way impaired at the time of the crime, combined with its extensive discussion of the aggravating and mitigating circumstances provide a basis for meaningful appellate review.

10. The trial court should not have imposed consecutive three-year firearm minimum mandatory sentences.

11. Defendant's sentence is proportional.

ARGUMENT

I.

THE METRO-DADE MIRANDA WARNING FORM ADEQUATELY INFORMED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO AN ATTORNEY.

Defendant's first claim is that the trial court erred in failing to suppress his confession because the Miranda warning given him was inadequate. As the trial court properly found, the standard Metro-Dade Miranda form meets the requirements of that case. Further, even if it did not, any error would be harmless beyond a reasonable doubt.

Defendant's premise is that the "third" warning, regarding the right to have counsel present was deficient because it failed to "track" Miranda, (B. 32), in that it allegedly failed to apprise Defendant that he had a right to counsel before questioning as well as during.[1] Unfortunately for Defendant's argument, however, the

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[1] Defendant raised a claim identical to that presented here in the Walker murder appeal. The contention was rejected by the district court. Cooper v. State, 638 So. 2d 200, 201 (Fla. 3d DCA 1994). Defendant has raised the issue in a federal habeas action regarding that conviction which is presently pending. Cooper v. Singletary, No. 96-2422-CIV-KING (S.D. Fla.). Codefendant Johnson's identical claim has already been rejected by the magistrate. Report and Recommendation of Magistrate Judge at 6, Johnson v. Singletary, No. 95-2646-CIV-UNGARO-BENAGES (S.D. Fla. June 25, 1996).

warning did in fact "track" Miranda, nearly verbatim. Miranda holds as follows:

> To summarize, ... the following measures are required. [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 479 (emphasis supplied). The warning here provided:

> 3. If you want a lawyer to be present during questioning, at this time or anytime [sic] hereafter, you are entitled to have the lawyer present.

(R. 219)(emphasis supplied).

Despite Defendant's assertions, none of the authority he cites has reversed a conviction where a warning such as Metro-Dade's was used. Furthermore, so long as the substance of the rights delineated in Miranda is conveyed to the suspect, no one particular formulation is required. California v. Prysock, 435 U.S. 355, 359, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981). In Prysock the Supreme Court explained that it had "never indicated that the 'rigidity' of Miranda extends to the precise formulation of the warnings given a

criminal defendant. ... Miranda itself indicated that no talismanic incantation was required to satisfy its strictures." Id. Moreover, reviewing courts should not examine Miranda warnings "as if construing a will or defining the terms of an easement." Duckworth v. Eagan, 492 U.S. 195, 203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989). The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by Miranda. Id.

The cases, including those cited by the Defendant, uniformly hold that the critical facts that must be conveyed to the suspect regarding his right to counsel are the right to have counsel present, the right to appointed counsel if indigent, and the explanation that such counsel will be made available prior to the commencement of questioning if desired. See, Prysock, 453 U.S. at 361 (noting that cases in which warnings were held inadequate involved misinformation as to when counsel would be available); Duckworth 492 U.S. at 205 (same). Here, the warning informed Defendant that he had the right to have counsel present during questioning. It further advised him that he was "entitled" "at this time" to have a lawyer present. As questioning had not yet commenced when this advice was given to Defendant, the warning

plainly satisfied the dictates of Miranda. Defendant relies for support of his position on case law finding that the right to prior consultation does not necessarily include the right to the attorney's presence. However, even accepting the conclusion that the right to prior consultation would not necessarily include the right to the attorney's presence during questioning, the converse is not true. There simply would be little point to having a lawyer present but for consultation. Even accepting Defendant's averments, (B. 36 n.9), regarding his lack of experience with the criminal justice system, the warning given must be presumed to have conveyed to him the right to consult with an attorney.[2] See State v. Delgado-Armenta, 429 So. 2d 328 (Fla. 3d DCA 1983)("If you want an attorney to represent you at this time or at any time during questioning you are entitled to such counsel" held sufficient); U.S. v. Adams, 484 F.2d 357, 361 (7th Cir. 1973)("right to counsel" with no more held sufficient); U.S. v. Burns, 684 F.2d 1066, 1074

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[2] As to his purportedly limited mental abilities, (B. 36 n.9), such argument was not presented below and may not now be raised. Robinson v. State, 487 So. 2d 1040, 1041 (Fla. 1986)(claims regarding the admission of confession will not be considered on appeal where they differed from grounds raised below); Henry v. State, 586 So. 2d 1033, 1035, n. 3 (Fla. 1991)(same). Furthermore, the evidence presented at the suppression hearing refutes any such claim. For example, when given his transcribed statement to review, Defendant corrected not only inaccuracies, but even spelling and punctuation. (T. 174-75).

(2d Cir. 1982)(same); U.S. v. Lamia, 429 F.2d 373, 375 (2d Cir. 1970)(same); U.S. v. Cusumano, 429 F.2d 378, 379 (2d Cir. 1970)(informing suspects that "[t]hey are entitled to an attorney to be present while they make any statements" adequate); Evans v. Swenson, 455 F.2d 291, 295 (8th Cir. 1972)("you have the right to make a phone call and the right to an attorney" sufficient); U.S. v. Caldwell, 954 F.2d 496, 498 (8th Cir. 1992)("You have the right for an attorney" held sufficient); State v. Quinn, 831 P. 2d 48 (Ore. App. 1992)("You have the right to an attorney" effectively informed the defendant that his right to counsel attached immediately and unconditionally); Guam v. Snaer, 758 F.2d 1341, 1342 (9th Cir. 1985)(warning sufficient where advised of right to lawyer's presence despite failure to explicitly state that could consult with attorney "before" questioning).

Even assuming, arguendo, that Defendant's confession should have been suppressed, any error was harmless beyond a reasonable doubt. Strong physical evidence and other statements, unrelated to either Johnson's or Defendant's formal confessions, tied Defendant to the murder of Charles Barker. Defendant's former girlfriend was present when Defendant discussed robbing a pawnshop, taking some guns, and "splatting" the owner. (T. 1580-84). Afterwards,

Defendant told her that they had killed the man at the pawnshop, and that it had taken a lot of shots because he was big. He also told her they had taken some guns. (T. 1585-86). The police found the .38 revolver that was conclusively demonstrated to have fired many of the (12) bullets that were recovered from Barker's body in the rear of the U-Haul Truck rented in Defendant's name. (T. 1642-44, 1669, 2036). Thanos had seen both Johnson and Defendant with several different types of guns. (T. 1540-41). Johnson's and Defendant's fingerprints were found on the papers resting on the counter top separating the public areas of the Outpost from the back room where the guns and money were kept. (T. 1463, 1933-34). Finally, Defendant was shown to have pawned one of the guns stolen in the robbery of the Outpost at another pawnshop in South Dade. (T. 1875-83, 1927, 1933-34). There simply is no possibility that the outcome of the proceedings would have been different without Defendant's confession to the police. As such, there is no basis for reversal. Brown v. State, 565 So. 2d 304 (Fla. 1990); Thompson v. State, 595 So. 2d 16 (Fla. 1992); Caso v. State, 524 So. 2d 422 (Fla. 1988); Kight v. State, 512 So. 2d 922 (Fla. 1987). This claim must be rejected.

II.

THE TRIAL COURT DID NOT ERR IN ALLOWING A STATE WITNESS TO EXPLAIN WHY THE DEFENDANTS WERE IN CUSTODY FOR 12 HOURS BEFORE THEY GAVE THEIR CONFESSIONS TO THE POLICE.

Defendant's second claim is that his convictions should be reversed because a police witness briefly explained, after a cautionary instruction was given, why 12 hours had elapsed between Defendant's arrest and the giving of his statement was that police were interviewing witnesses, including Defendant, regarding another, unrelated matter. The comment was proper under the circumstances, and even if error, was harmless beyond a reasonable doubt.

Before Detective Saladrigas testified, the jury was given the following cautionary instruction:

> This detective is going to testify as to how he came in contact with the defendants in this case.
>
> Now, for the purposes of establishing time, I have ruled that I am going to allow them to talk about this, but it's a totally unrelated matter that first came to the attention of the police.
>
> Now, I want you to make sure that you realize that that unrelated matter has nothing at all to do with this case, nothing, not a [sic] fact, not a [sic] law, nothing.

It just was an unrelated matter unimportant as to why, when, where or how, but that it was being done so that there is a logical sequence of how the detective came in contact with the defendants.

(T. 1524). The detective's testimony then proceeded as follows:

Q. Did there come a time, Sergeant Saladrigas, back in June, June 14, 15, 16 of 1991, in that time frame, where you were investigating a matter having nothing to do with the murder of Charles Barker?

A. Yes, sir, there was.

Q. In the course of your investigation, did you and your team members -- by the way, did you utilize a lead detective team method also to investigate your matters?

A. Yes. The department, as a rule, uses that, yes.

Q. Did you and your team members have occasion to interview some people at the Hidden Gardens Apartment complex down in South Dade?

A. Yes, we did.

Q. And did you also have an occasion to interview certain friends and/or acquaintances of Tivan Johnson and Albert Cooper?

A. Yes, sir, we did.

Q. Based upon these various interviews that had been conducted, did you find it necessary to also interview Mr. Cooper and Mr. Johnson?

A. Yes, sir.

Q. Did you ask other members of your team to locate Mr. Cooper and Johnson and bring them in to be interviewed?

A. Yes, sir, I did.

Q. Were they interviewed by your team members?

A. Yes.

Q. In addition to Mr. Cooper and Mr. Johnson being interviewed, did this other matter have other witnesses that also had to be interviewed?

A. Yes.

Q. Was your unit using stenographers back then?

A. Yes.

Q. You recall off the top of your head how many people had to be interviewed?

A. On this particular day, in the neighborhood of --

[A defense objection was interjected and a discussion ensued. (T. 1526).]

Q. About how many people did your team have to interview during this other investigation?

A. During this specific time frame on June 14th, in the neighborhood of half a dozen.

Q. Were stenographers used to take down their testimony?

A. Yes.

Q. By the way who does the typing?

A. The same stenographers that take the statement.

Q. Does it take them time to interview everybody, have it recorded stenographically, have it typed up, and then have it read back to the six or seven other people?

A. Yes.

Q. After you concluded your investigation, did there come a time when you advised Detective Pat Diaz [the lead detective on the Barker murder case] that he might want to interview Mr. Cooper and Mr. Johnson on his matter?

A. Yes.

Q. Was this some time later? Was this a short time, a long time? I mean how long did your matter take?

A. Ten to 12 hours.

[PROSECUTOR]: No further questions, your honor.

(T. 1524-29).

The foregoing refutes Defendant's contention that the jury was informed or led to believe that Defendant had prior convictions or adverse contact with law enforcement. There was no reference to what the matter being investigated was. The detective at no point mentioned the bureau for which he worked or the nature of the

"other matter." Contrary to Defendant's assertions, the fact that he had a team did not indicate the nature of the matter; rather, the detective testified that working in teams was standard department practice. There was no indication as to whether Johnson and Defendant were suspects or merely, like the others interviewed, witnesses. There was no mention of any charges or of the fact that Defendant had been convicted of the "other matter." In short it is simply unreasonable, particularly in view of the court's cautionary instruction, to conclude that the detective's testimony led the jury to believe Defendant had other convictions.[3]

In any event, assuming arguendo that the detective's testimony could lead to the conclusion in the jurors' minds that Defendant posits, he himself notes that collateral crimes evidence is inadmissible "where its sole relevance" is to attack the defendant's character or show propensity. (B. 38)(emphasis supplied). Here, the evidence was relevant to explain why 12 hours had elapsed between the time of arrest and the commencement of Defendant's formal stenographically recorded statement. It is the

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[3] On the contrary, at least one juror was "flabbergasted" when he inadvertently learned, during the hiatus between the guilty verdict and the penalty phase, that the defendants had previously been convicted of another murder. (T. 2501).

State's burden to prove to the jury that the defendant's statement was voluntary. The jury was given the standard instruction to that effect:

> Defendants' statements. Statements claimed to have been made by the defendants outside of court has [sic] been placed before you. Such statements should always be considered with caution and be weighed with great care to make certain it was [sic] freely and voluntarily made.
>
> Therefore, you must determine from the evidence that the defendants' alleged statements were knowingly, voluntarily and freely made.
>
> In making this determination, you should consider the total circumstances, including, but not limited to, whether, when the defendants made the statements, they had been threatened in order to get them to make them; and two, whether anyone had promised them anything in order to get them to make them.
>
> If you conclude the defendants' out-of-court statements were not freely and voluntarily made, you should disregard them.

(T. 2396)(emphasis supplied).

Thus, regardless of the defense's willingness to avoid the issue, it cannot be assumed, especially in this day of media

attention given to alleged police misconduct,[4] that the jury would not speculate as to just what had occurred during the 12 unexplained hours that the defendants were in police custody before confessing. Further, although the defense did not argue that the confessions were improper because of the time lag, Johnson did take the stand and claim other police impropriety, namely that they threatened his wife and step-child, and that as a result, he merely parroted what the police told him to. As such the State was fully justified in explaining why 12 hours elapsed between arrest and formal statement. See, Henry v. State, 649 So. 2d 1361, 1365 (Fla.1994)(evidence of other criminal activity admissible if necessary to avoid confusion or misapprehension of the relevant facts); Hunter v. State, 660 So. 2d 244, 251 (Fla. 1995)(admission of other crimes evidence proper to place matters in context); Griffin v. State, 639 So. 2d 966, 969 (Fla. 1994)(same); see also, Straight v. State, 397 So. 2d 903, 906-07 (Fla. 1981)(test for admissibility of evidence is relevance, not necessity -- therefore defense's willingness to stipulate to issue does not render evidence inadmissible).

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[4] A certain trial of some notoriety, in which vast police impropriety was alleged, was under way in California at the same time as the trial below.

Finally, even if the testimony should not have been admitted, any error was harmless beyond a reasonable doubt. It would simply be unreasonable to conclude that this brief testimony, consuming less than 4 full pages of transcript out of a six-day trial, could have affected the verdict. As noted above, no explicit comment that Defendant was actually involved in any other crimes was even made.

Further, as previously noted, in addition to Defendant's detailed recorded confession and statements to non-police witnesses regarding his involvement in Barker's murder, there was forensic evidence, including ballistics and fingerprints tying him to the crime. The only defense raised was a cockamamie story of self-defense, in which Johnson testified that they were involved in some sort of illegal firearms trafficking with the victim. There is no reasonable probability that the exclusion of Saladrigas's testimony would have affected the verdict. See, Haliburton v. State, 561 So. 2d 248, 251 (Fla. 1990)(improper testimony by witness that defendant had raped her harmless in light of strength of State's case); Craig v. State, 585 So. 2d 278, 280 (Fla. 1991)(irrelevant evidence that defendant obtained and used cocaine on night of murder harmless in light of substantial evidence of guilt); Lawrence v. State, 614 So. 2d 1092, 1095 (Fla. 1993)(improper

testimony regarding defendant's cocaine use and "jiggling" of old ladies for money harmless were reference was brief and did not become a feature of the trial); Mordenti v. State, 630 So. 2d 1080, 1084-85 (Fla. 1994)(reference to defendant's purported "mob" association harmless where not emphasized). Under the circumstances, this claim must be rejected.

III.

NO SEVERANCE WAS REQUIRED BASED UPON THE ADMISSION OF DEFENDANT'S OWN STATEMENTS IN REBUTTAL TO JOHNSON'S TESTIMONY.

Defendant's third claim is that the trial court erred in admitting, after the State elicited, in rebuttal to Johnson's testimony, a statement Defendant made to Johnson's ex-wife, Renee Carey. As Defendant's statements to Carey would have plainly been independently admissible against Defendant in a separate trial, and further, because any purported error would be harmless beyond a reasonable doubt, this claim is wholly without merit.

The granting or denial of a motion for severance is a matter within the discretion of the trial court; the trial court's decision will thus not be reversed absent a showing of abuse of discretion. Espinosa v. State, 589 So. 2d 887, 891 (Fla. 1991); Menendez v. State, 368 So. 2d 1278, 1280 (Fla. 1979). A defendant is not entitled to severance merely because his codefendant might blame him for the crime or because severance will give him a strategic advantage. Coleman v. State, 610 So. 2d 1283, 1285 (Fla. 1992); Dean v. State, 478 So. 2d 38, 44 (Fla. 1985); O'Callaghan v. State, 429 So. 2d 691, 695 (Fla. 1983); McCray v. State, 416 So. 2d 804,806 (Fla. 1982).

Here, the thrust of Defendant's argument is that if he had not been tried with Johnson, the State would not have introduced Defendant's statements in rebuttal after Johnson testified. However, the effects of a codefendant testifying are exactly the sort of strategic matters this court has held are not grounds for severance. Espinosa, 589 So. 2d at 892. Furthermore, the testimony concerned Defendant's own statements to a lay witness about the crime for which he was on trial, and would thus plainly have been admissible against Defendant had he been tried separately. Under such circumstances, the trial court did not abuse its discretion in declining to grant a severance. Id. That the evidence was admitted in rebuttal does not alter the propriety of the trial court's action. The trial court is possessed of broad discretion in determining the order of proof and so long as the evidence was admissible in the State's case in chief, no error occurs where evidence is admitted in rebuttal. Britton v. State, 414 So. 2d 638, 639 (Fla. 5th DCA 1982); Williamson v. State, 92 Fla. 980, 111 So. 124, 126 (1926).[5]

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[5] The cases upon which Defendant relies are thus clearly distinguishable, in that the evidence in those cases would not have otherwise been admissible in a joint trial or in the State's case-in-chief. See, e.g., Hernandez v. State, 570 So. 2d 404, 406 (Fla. 2d DCA 1990)("It is significant that this evidence would not have been admissible in a separate trial"); Donaldson v. State, 369 So.

Finally, even if the denial of the severance were error, it would be harmless beyond a reasonable doubt. Defendant's own confession, as well as his statements, both before and after the fact, to Admonia Blount regarding the planning of the robbery and the "splatting" of Barker were admitted. Defendant was identified by the Outpost's final customer on the day of the murder as being in the shop shortly before closing time. Further, as noted above, the ballistics and fingerprint evidence, along with the sale receipt from the South Dade pawnshop corroborated Defendant's statements. In short, had the trials been severed, and had Carey not testified[6] there is no reasonable possibility that Defendant would have been acquitted. Any purported error was therefore harmless. See Grossman v. State, 525 So. 2d 833 (Fla. 1988)(erroneous failure to sever codefendants subject to harmless error analysis). As such this claim must be rejected.

2d 691, 695 (Fla. 1st DCA 1979)(error to admit as rebuttal "bad character" evidence where defendant's character not in issue); Garcia v. State, 359 So. 2d 17, 18 (Fla. 2d DCA 1978)(same); Dornau v. State, 306 So. 2d 167, 168-69 (Fla. 2d DCA 1975)(evidence suppressed as a result of illegal seizure not subject to "rebuttal exception" of exclusionary rule where not serve to rebut any evidence put on by defense).

[6] As noted, her testimony could have been elicited by the State in its case-in-chief in a trial of Defendant alone.

IV.

ANY INADVERTENT VIEWING BY THE JURY OF DEFENDANT IN SHACKLES WHILE BEING TRANSPORTED TO THE COURTROOM WAS NOT REVERSIBLE ERROR.

Defendant's fourth claim is that the trial court should have granted a mistrial after the jury allegedly saw him in the court house hallway in shackles. This claim is without merit.

Defendant relies upon cases that hold it is improper to make a defendant stand trial while shackled or in prison garb. However, Defendant here was not shackled before the jury during trial. The jury merely was alleged to have briefly seen Defendant on one or two occasions while he was being transported to the court room. Such does not present a basis for reversal. Neary v. State, 384 So. 2d 881, 885 (Fla. 1980)(viewing of defendant in restraints while being transported to court room not grounds for mistrial where not restrained at trial); Heiney v. State, 447 So. 2d 210, 214 (Fla. 1984)(same); Hildwin v. Dugger, 531 So. 2d 124, 126 (Fla. 1988)(same); Jackson v. State, 545 So. 2d 260, 265 (Fla. 1989)(same); Allen v. Montgomery, 728 F.2d 1409, 1413-14 (11th Cir. 1984)(same). Furthermore, even if error occurred, it was

harmless beyond a reasonable doubt in light of the strength of the State's case, as repeatedly discussed supra.[7]

[7] The claim regarding the necessity of a curative, (B. 52 n.13), was not raised below and is thus unpreserved for review.

V.

DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN EXPLAINING THE PENALTY PHASE PROCESS TO THE JURY DURING VOIR DIRE IS UNPRESERVED AND WITHOUT MERIT.

Defendant's fifth claim is that the trial court's comments to the jury regarding the penalty phase constituted reversible error. This claim is not preserved for review. Furthermore, the court accurately stated the law, and any purported error would be harmless where the jury was properly instructed before deliberation.

The judge made the comments of which Defendant now complains during voir dire. Defense counsel had been attempting to rehabilitate certain anti-death penalty jurors. The State had objected that defense counsel's statements regarding the jurors' duty at the penalty phase was misleading in that it suggested that the jury had only to "listen to," as opposed to "follow," the court's instructions. (T. 687). The court then paraphrased the standard instructions regarding the jury's duty if it concluded that the aggravating circumstances outweighed the mitigation

proven.[8] (T. 687).

Thereafter, a sidebar was held at which, as noted by Defendant, (B. 55), defense counsel objected. Defendant's brief does not, however, present the whole story. After the initial objection a discussion ensued, with the court explaining what it was attempting to convey to the jurors. After the explanation, counsel asserted that he had no objection to what the court was attempting to do, only its wording, after which the court agreed to reinstruct the panel:

> [DEFENSE COUNSEL]: The way you put it at side-bar is fine, but not the way you explained it to them is that they must or they must not.
>
> THE COURT: Well, let me -- well, I'll make that correction if you want me to. I was quite clear that everybody is talking about the discussion and in the jury room and all that. I will tell them that.

(T. 689). The court then gave the second instruction partially quoted in Defendant's brief. (T. 689-90). No further objection was raised by the defense.

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[8] Defendant omits from his brief the passage in which the court also informed the jury that if the mitigating circumstances outweighed the aggravating, they were to return a life recommendation. (T. 687).

In view of the foregoing, this claim has not been preserved for appeal. The court made the comment, the defense objected and explained its reservation, the court agreed to address the defense's objection, and there was no objection to the subsequent instruction. As such, the trial court could only have concluded that Defendant was satisfied with the latter instruction. Having failed to bring the allegedly erroneous comment to the court's attention below, Defendant may not now raise the issue on appeal. Pope v. Wainwright, 496 So. 2d 798, 801 (Fla. 1986)(failure to object to comments of trial court during voir dire which were allegedly contrary to standard jury instructions waived issue for appeal); Carter v. State, 576 So. 2d 1291, 1293 (Fla. 1989)(failure to object to comments of court allegedly diminishing jury's sense of responsibility at penalty phase waived issue on appeal); Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988)(same); Esty v. State, 642 So. 2d 1074, 1080 (Fla. 1994)(merely raising objection to instruction of court not sufficient to preserve issue for appeal; objecting party must propose alternative).[9]

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[9] As discussed infra, even assuming that the issue were preserved, and the comments were error, any error would be harmless beyond a reasonable doubt. For the same reasons, it follows that no fundamental error obviating the necessity of adequate contemporaneous objection occurred.

Even assuming that this claim were properly before the court, it would be without merit, as the judge's comments were an accurate statement of the law. Defendant contends that the court erred in informing the jurors that in the event that they concluded that the aggravating factors proven outweighed the mitigating factors, they "must" recommend a sentence of death.[10] In essence Defendant is complaining that the jurors were not informed of their right to grant a jury pardon. Although the jury has the discretion to grant a jury pardon on the issue of guilt or innocence, a capital sentencing jury is not endowed with such unfettered discretion. Dougan v. State, 595 So. 2d 1, 4 (Fla. 1992). Defendant therefore had no right to such an instruction, even if requested, and as such, the judge's comments were not error:

> [The defendant]'s claim that the jury should be allowed to disregard the statutory directions and guidance would engender arbitrariness and capriciousness in jury recommendations. This is improper because
>
> > [i]t is no doubt constitutionally permissible, if not constitutionally required, for the State to insist

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[10] Notably, Defendant does not appear to have any quarrel with the trial court's contemporaneous instruction that if the jurors found that the mitigating circumstances outweighed those proven in aggravation, they "must" recommend a life sentence.

> that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary. At the very least, nothing ... prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a "reasoned moral response," rather than an emotional one. The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice.
>
> Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 1262-63, 108 L. Ed. 2d 415 (1990) (citations omitted). Thus, we find no error in the trial court's directing the jury to follow the mandate of subsection 921.141(2).

Dougan, 595 So. 2d at 4. See also, Dufour v. State, 495 So. 2d 154, 163 (Fla. 1986)(no error in refusing to instruct jury that it

could recommend life sentence in the absence of any mitigating circumstances); Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984)(same).

Finally, even if the judge's comments during voir dire were erroneous, there is absolutely no possibility that they could have affected the outcome of the sentencing proceedings. The comment was brief and made two months[11] before the jury's sentencing deliberations began. Furthermore, the standard penalty phase jury instructions were given at that time, without defense objection. (T. 3139-3145). Any purported error is thus harmless. Wyatt v. State, 641 So. 2d 1336, 1339 (Fla. 1994)(improper judicial comment during voir dire harmless where jury subsequently properly instructed); Provence v. State, 337 So. 2d 783, 785 (Fla. 1976)(same); Roberts v. State, 164 So. 2d 817, 821 (Fla. 1964)(same). This claim should be denied.

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[11] The comment was made on February 23, 1994, and the jury was given the penalty phase instructions on April 26, 1994. (T. 690, 3139).

VI.

THE EVIDENCE SUPPORTED THE TRIAL COURT'S CONCLUSION THAT THE MURDER OF BARKER WAS COLD, CALCULATED, AND PREMEDITATED.

Defendant's sixth contention is that the evidence was insufficient to support the trial court's finding of the cold, calculated, and premeditated (CCP) aggravating factor. This contention is without merit, and even if it were, any error would be harmless beyond a reasonable doubt.

Admonia Blount testified that Defendant stated, one week before the robbery of the Outpost, that he and Johnson were going to "splat," i.e. kill, the owner during the robbery. (T. 1584). Defendant additionally stated that he would hold the man so Johnson could shoot him, because Defendant was the stronger of the two. Id. This evidence plainly supports the finding of the CCP factor. Griffin v. State, 639 So. 2d 966, 971 (Fla. 1994)(previously expressed intention to kill victim sufficed to support CCP aggravator); Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983)(same). Blount's impression that Defendant's statements were just "talk" is wholly belied by the defendants subsequent actions, which showed that they were (literally) deadly serious. Her impression therefore has little bearing the issue. Dufour v.

State, 495 So. 2d 154, 164 (Fla. 1986)(prior statement of intent to kill, and subsequent killing supported CCP).

Furthermore, the statements were not the only evidence supporting the conclusion of heightened premeditation. The defendants had previously "cased" the shop and must have been aware that the owner had numerous guns. The defendants armed themselves prior to entering the store, and brought additional ammunition with them. They calmly waited while Barker waited on Brown and Brown left. Johnson pretended to "shop" for guns, inspecting several. They then opened fire, apparently without warning.[12] Barker did not shoot at them. Many of the shots were fired after Barker was lying on his back on the floor. Finally, Johnson reloaded his weapon and fired again, having the presence of mind to take the empty shells with him, so as to avoid leaving fingerprints. They stated that they did not begin removing the guns and money until they were satisfied that Barker was dead. The CCP factor clearly applies here. See, Cruse v. State, 588 So. 2d 983, 992 (Fla. 1991)(prior acquisition of weapon, statement of intent to kill victim, emptying

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[12] The contention that Defendant "freaked out" and began firing, (B. 65), was found in Johnson's statement, not Defendant's own. As noted elsewhere, the defendants' other robbery victim was also shot without provocation.

gun and reloading, and calm demeanor supported CCP); Trepal v. State, 621 So. 2d 1361, 1367 (Fla. 1993)(CCP properly found where evidence showed advance procurement of weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)(prior voicing of intent to kill victim, prior procurement of weapon supported CCP); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)(prior statement of intent to kill, surveillance of premises, and prior procurement of weapon supported CCP); Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988)(CCP properly found where evidence showed advance procurement of weapon, lack of resistance or provocation, reloading of gun, and the appearance of a killing carried out as a matter of course); Remeta v. State, 522 So. 2d 825, 829 (Fla. 1988)(CCP proper where evidence established advance planning including intent to eliminate witness); Turner v. State, 530 So. 2d 45, 51 (Fla. 1987)(prior statement of intent, prior arming, and holding of plan in abeyance until witness had left supported CCP).

Finally, even, assuming arguendo that the evidence did not support the finding of CCP, any error would be harmless beyond a reasonable doubt. In addition to the CCP factor, the trial court

also found that Defendant had prior violent felonies: the instant robbery and burglary as well as the prior robbery, burglary, and execution-style murder of Thomas Walker in the Rudy's incident. (R. 488-89). The court also found the aggravators of commission during a burglary and robbery and commission for pecuniary gain, which factors it merged. (R. 489-91). The court found no significant statutory mitigating circumstances,[13] and minimal nonstatutory mitigation.[14] The court further found that the aggravation "overwhelmingly outweigh[ed]" any mitigating circumstances present. (R. 501). As such even without the finding of CCP there is no reasonable probability that the outcome of the sentencing proceeding would have been different. See, Hill v. State, 643 So. 2d 1071, 1074 (Fla. 1994)(erroneous finding of CCP harmless where remaining aggravation outweighed mitigation); Young v. State, 579 So. 2d 721, 724 (Fla. 1991)(same). Defendant's sentence should be affirmed.

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[13] The court found that the age mitigator was entitled to "little weight." (R. 499). It also found that Defendant had a lack of prior criminal history, but noted that 19 days after this crime, he committed another murder/robbery. (R. 494).

[14] The court's findings regarding the mitigation are proper. See Points VII & IX, infra.

VII.

THE TRIAL COURT PROPERLY FOUND THAT THE AGE MITIGATION FACTOR WAS ENTITLED TO LITTLE WEIGHT; ANY FAILURE TO GIVE AN INSTRUCTION ON AGE IS NOT PRESERVED.

Defendant's seventh claim is that the trial court erred in giving the mitigating circumstance of age little weight. The trial court did not abuse its discretion. Defendant also asserts that the trial court erred in not giving an instruction to the jury on age. This latter claim is not preserved for review. Further, any error was harmless.

First, it should be noted that the defense barely argued that age was a proper mitigating factor below. Indeed its entire oral argument on the subject was presented during closing to the jury as follows:

> Besides the statutory mitigating factors, you are allowed to consider non-statutory mitigating factors. I have listed some I think you should take into consideration and deliberate: The dysfunctional family; the age of Albert Cooper. No one has made much ado about that. He was barely eighteen years old when this happened.

(T. 3137)(emphasis supplied). The State's memorandum, filed on May 9, 1995, vigorously argued that there was no evidence that Defendant lacked maturity and that the factor thus should not

apply. (R. 443). Defendant's subsequently-filed written memorandum submitted to the court stated only that "the defendant was eighteen (18) years old at the time of the crime," (R. 456), and thereafter quoted only the statutory language of §921.141(6)(g)[15] in its conclusion. (R. 460). Nor was the question of age broached at the sentencing hearing before the court on May 17, 1995. (T. 3417-31). As Defendant himself plainly attached little weight to this circumstance, it is no surprise that the trial court did as well.

Furthermore, the record fully supports the trial court's exercise of discretion. The weight to be ascribed to a particular mitigating factor is a matter for the jury and judge to determine. Jones v. State, 648 So. 2d 669, 680 (Fla. 1994); Slawson v. State, 619 So. 2d 255, 260 (Fla. 1993). Here, the lower court rejected Defendant's alleged evidence of mental difficulties, finding that the testimony of Defendant's experts contradicted each other and was not credible in light of the State's experts' testimony that the Defendant's behavior and the objective testing such as the CAT scan and EEG belied the defense experts' conclusions of mental

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[15] "The age of the defendant at the time of the crime."

impairment. See R. 494-498 for the court's extensive discussion of the testimony of the various experts and rejection of Defendant's proffered statutory mental health mitigation as not established by the record. The trial court's rejection of these factors was proper. See, Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990)(trial court is only obligated to find, as mitigating circumstances, those proposed factors which are mitigating in nature and have been reasonably established by the greater weight of the evidence); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1992)("when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains 'competent substantial evidence to support the trial court's rejection of these mitigating circumstances'"); Walls v. State, 641 So. 2d 381, 390-91 (Fla. 1994)("certain kinds of opinion testimony ... are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most,

that a question exists for judge and jury to resolve"). In any event, Defendant does not now challenge the court's rejection of the statutory mental health mitigation.

The court, thus, based upon evidence of Defendant's intelligence including the assistance of others with homework, the lack of relevant mental impairment, as well as evidence of the high level of planning which he contributed to the present and prior offenses, could properly conclude that age was entitled to little weight as a mitigating factor. Jones; Slawson.

The evidence cited in Defendant's brief was either contradicted by the State or is simply not relevant to the question of Defendant's maturity. Contrary to Defendant's argument there was absolutely no testimony from any witness who had ever actually seen Defendant use drugs. The only "evidence" of drug use was Defendant's own alleged statements to his expert, which were contradicted by his own earlier denials of drug use. Johnson and Renee Carey, who lived with Defendant during the months preceding the murder denied ever seeing Defendant use drugs, as did Defendant's girlfriend. Finally, whether Defendant used drugs or not had little bearing on whether his maturity level was such that

age should be a mitigating factor, particularly where the alleged "evidence" of drug usage did not occur until Defendant had reached the age of majority.[16] Likewise, the evidence of Defendant's abuse by his father also bears little relationship to his maturity level, particularly where the evidence showed that the rest of his family were all loving and devoted and provided a strong supportive community throughout Defendant's childhood. And again, Defendant fails to explain how such abuse translates into a lack of maturity which would rise to the level of mitigation for the extremely planned and cold-blooded murder which Defendant committed. Finally, Defendant's alleged mental deficits fail to support this mitigating circumstance for the same reasons the trial court properly rejected the proffered mental health mitigation.

Moreover, even assuming arguendo, that the trial court wholly rejected age as a mitigating factor, the finding of age as a mitigating factor is a decision which rests within the discretion of the trial court, and numerous decisions have upheld the refusal to treat ages of 18 or more as mitigating. See e.g., Cooper v. State, 492 So. 2d 1059, 1063 (Fla. 1986) (trial judge acted within

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[16] The lack of evidence in support of Defendant's claim of drug use is more thoroughly discussed at Point IX, infra.

discretion in rejecting age of 18 as mitigating factor); Garcia v. State, 492 So. 2d 360 (Fla. 1986) ("The fact that a murderer is twenty years of age, without more, is not significant, and the trial court did not err in not finding it as mitigating"). Here, the trial court would have been well within its discretion in rejecting Defendant's age as mitigating, for the same reasons that it was entitled to give the factor little weight. Defendant's contention that Ellis v. State, 622 So. 2d 991 (Fla. 1993), which requires that age be considered by the trial court if the defendant was a minor at the time of the murder, should be expanded to include young murderers over the age of majority has already been rejected by this court. Merck v. State, 664 So. 2d 939, 942 (Fla. 1995)(Ellis not apply to 19-year-old).

Further, even assuming, arguendo, that the trial court either did not find or adequately weigh the age factor, any error would be harmless beyond a reasonable doubt. The trial court found three strong aggravating factors: that the murder was cold, calculated and premeditated, that Defendant had prior violent felonies -- the instant robbery and burglary as well as the prior robbery, burglary, and execution-style murder of Thomas Walker in the Rudy's incident, and that the murder was committed during a burglary and

robbery and for pecuniary gain, which factors it merged. (R. 489-91). The court found no significant statutory mitigating circumstances,[17] and minimal nonstatutory mitigation.[18] The court further found that the aggravation "overwhelmingly outweigh[ed]" any mitigating circumstances present. Under the circumstances any error would be harmless. Wickham v. State, 593 So. 2d 191 (Fla. 1991)(in light of very strong case of aggravation any error in weighing of mitigators was harmless beyond a reasonable doubt).

Defendant's claim regarding the failure to give an age instruction to the jury is not preserved for review. At no time did Defendant ever request an instruction on age. As noted above, counsel argued to the jury that age was a nonstatutory factor. Finally, no objection was made after the trial court read the instructions to the jury. Although the State did, during the charge conference, indicate that it felt the "rest of them ... apply," (T. 3064), the record is completely devoid of any indication whether "the rest" referred to the statute or to the

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[17] The court found that Defendant had a lack of prior criminal history, but noted that 19 days after this crime, he committed another murder/robbery. (R. 494).

[18] The court's findings regarding the nonstatutory mitigation are proper. See Point IX, infra.

printed document the parties were obviously working with. Further, there is no evidence as to whether age was amongst the instructions printed out. The paucity of argument on the subject, Defendant's reference to age as a nonstatutory mitigator, and the total absence of any request for an age instruction or objection to the instructions as read leads to the conclusion that Defendant did not desire such an instruction. In any event the issue clearly is not preserved for review:

> [T]he settled rule in Florida procedure is that, in order to preserve an objection to a jury instruction, a party must object after the trial judge has instructed the jury. While the rule is subject to a limited exception for an advance request for a specific jury instruction that is explicitly denied, Sochor gets no benefit from this exception, because he never asked for a specific instruction.

Sochor v. Florida, 504 U.S. 527, 534 n.**, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992)(citations omitted).

Even assuming arguendo that the issue were preserved, the court did instruct that the jury could consider "any other aspect of the defendant's character or record and any other circumstance of the offense." (T. 3142). Thus, defense counsel was free to argue age as a mitigating factor under that instruction. Defense

counsel, however, must have also realized that Defendant's age was of little mitigating significance here: he did not argue the factor as a statutory mitigator, and devoted only two sentences of his summation to age as mitigation at all. Insofar as age was barely argued as mitigation to the jurors, despite their being given an instruction which would have enabled them to consider it if they chose to do so, and insofar as Defendant's age is clearly of de minimis significance at best, given the propriety of the court's rejection of this factor, it must further be concluded that there was no error in failing to give an express instruction on age. Cave v. State, 476 So. 2d 180, 187 (Fla. 1985). Finally, assuming, arguendo, that there were any error regarding giving the instruction, it would be harmless beyond a reasonable doubt in light of (a) the catchall instruction permitting the jury to consider the factor; (b) the strength of the aggravators herein; and (c) the de minimis evidence of mitigation in this case. Kight v. Dugger, 574 So. 2d 1066, 1069 (Fla. 1990). Defendant's sentence should be affirmed.

VIII.

EVIDENCE REBUTTING DEFENDANT'S CLAIM OF DRUG USE WAS PROPERLY ADMITTED.

Defendant's eighth claim is the trial court erred in allowing the State to present, on rebuttal during the penalty phase, a jail intake sheet on which Defendant denied that he used drugs. The sheet was relevant to refute Defendant's claims through his experts that he was a drug user and as such was properly admitted. Furthermore, any purported error would be harmless.

Defendant presented claims through his experts, and also asserted to the State's experts that he was a drug abuser and was under the influence of drugs at the time of the murder. Among other evidence, the State introduced a jail intake sheet dated June 1, 1991, on which Defendant denied any use of drugs or alcohol. The murder occurred one week earlier, on May 25, 1991. The form was therefore highly relevant to rebut Defendant's (uncross-examined) statements that he was high on drugs and alcohol at the time of the murder. The reason for the Defendant's admission to the jail were not mentioned, and indeed the record herein is silent as the reason. The focus of both the testimony accompanying the admission of the sheet, as well as the prosecutor's argument during

closing was not the Defendant's incarceration or arrest, but that Defendant had denied prior drug or alcohol use a week after the murder he later claimed to have committed while under the influence of drugs and alcohol. Such prior inconsistent statements are clearly valid rebuttal. Wuornos v. State, 644 So. 2d 1000, 1010, (Fla. 1994)(prior inconsistent statements made with regard to collateral murders properly admitted in rebuttal); Wuornos v. State, 644 So. 2d 1012, 1017 (Fla. 1994)(evidence of defendant's threatening comments unrelated to crime charged relevant to rebut claim defendant never attacked unless provoked); Bryan v. State, 533 So. 2d 744, 746-47 (Fla. 1988)("Even if the evidence in question tends to reveal the commission of a collateral crime, it is admissible if found to be relevant for any purpose save that of showing bad character or propensity").

The cases cited by Defendant simply are not on point. In both Hildwin v. State, 531 So. 2d 124 (Fla. 1988), and Geralds v. State, 601 So. 2d 1157 (Fla. 1992), the issue was whether the admission of evidence of a prior conviction per se was proper rebuttal evidence. Here, no convictions were admitted and no mention was made of any crime with which Defendant was even charged. On the contrary, the sheet was admitted for the sole

purpose of demonstrating Defendant's prior inconsistent statements. Argument of the State was limited to the purpose for which the sheet was admitted. No error occurred. Wuornos, 644 So. 2d at 1010; Wuornos, 644 So. 2d at 1017; Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995)(evidence that Defendant was violent toward woman with whom he lived he was not improper evidence of nonstatutory aggravator, but rather proper rebuttal to testimony by her that he was loving and a good father figure to her children); Bryan, 533 So. 2d at 750 (trial court not abuse discretion where other crimes evidence raised in rebuttal to defendant's statements during penalty phase where other crimes not made the focus of the proceedings).

Finally, even assuming arguendo that the sheet should not have been admitted, any error would be harmless beyond a reasonable doubt. The jury properly heard that a week or so before the Barker murder, Defendant told his girlfriend that he was going to rob a pawnshop and "splat" the owner. They heard that he made several reconnaissance runs to determine the store's layout and security. They heard how Defendant and his partner patiently waited while Brown pawned his come-along. They heard how the defendants pretended to inspect Barker's merchandise, and drew their guns when

he had his back turned. They heard how the defendants put 12 bullets in his body when he turned around and then calmly loaded the guns and money into their car. They also heard how, following their preconceived plan, the defendants tricked Johnson's former boss into letting them into the Rudy's restaurant. How Walker fully cooperated with them and gave them all the store's money. The jury heard how the defendants then escorted Walker into his walk-in freezer while he pleaded for his life. And they heard how Defendant executed Walker by a shot to the back of the head while he was on his knees in the freezer. Yet Defendant maintains that the reason the jury recommended that he be sentenced to death was because they were exposed to a sheet of paper which indicated he was in jail for unspecified reasons two weeks before his arrest for the Walker and Barker murders. The proposition is preposterous. There simply is no reasonable probability that the admission of the record could have affected the outcome of the proceedings. Peterka v. State, 640 So. 2d 59, 70 (Fla. 1994)(erroneous admission of evidence of prior juvenile crimes during penalty phase harmless). Defendant's sentence should be affirmed.

IX.

THE TRIAL COURT PROPERLY EVALUATED DEFENDANT'S PROPOSED MITIGATION.

Defendant's final claim with regard to his death sentence is that the trial court's sentencing order was insufficient because it failed to address his contention that he was under the influence of drugs at the time of the murder. This claim is without merit. Defendant's evidence of intoxication was wholly without credibility, and the trial court specifically found that he was not in any way impaired at the time of the crime.

Defendant presented evidence through his mental health experts that he claimed that he had been using drugs at the time of the crime. Defendant also made a similar claim to the State's expert, Dr. Levy. Dr. Levy, however, found that the Defendant's claims of drug use were probably made up because they were wholly contrary to the evidence presented by Defendant's behavior, including the degree of planning of the crime -- several visits to the store, the backing of the car to avoid detection of the tag number, the waiting for Brown to leave before executing the robbery, etc. (T. 2839-41). Other factors supporting Levy's conclusion were the clarity of Defendant's statements to the police, including the

detailed description of Brown, down to his eye color, Defendant's own prior denial of drug use, and the absence of any physical evidence of drug use among Defendant's possession. (T. 2830-36, 2841, 2888).

In addition to the mental health testimony Defendant presented the testimony of various friends and family who testified that at one point or another they thought Defendant was using drugs. None of these witnesses, however, ever actually saw Defendant use or possess any actual drugs. Further, none of them reported Defendant ever admitting the use of drugs. In contrast, Renee Carey, with whom Defendant lived for the several months prior to and during the time of the Barker murder testified that she had never seen or heard of either Defendant or Johnson using drugs. Defendant's girlfriend, Admonia Blount likewise never observed Defendant using or claiming to use drugs. Defendant's friend Derek LaBron stated that he had never known Defendant to do drugs and that he did not appear to be under the influence when he last saw him before the murder. The police officers who searched the Ford Probe, U-Haul truck, the defendants' belongings in the truck,[19] and the motel room

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[19] By all accounts, all the defendants' worldly possessions were in the U-Haul or the car. Among the items recovered from the

where the defendants stayed reported that they found no drugs and no evidence whatsoever of narcotics use such as paraphernalia, containers, or remains such as "roaches."[20] (T. 2900, 2917-18, 2966, 2972, 2980).

Finally, Defendant himself, in his statements to the police as well as in jail intake records, denied that he ever used drugs. He stated that he occasionally had a beer. Dr. Levy noted that it was highly unlikely that Defendant would confess to two murders but be embarrassed to mention that he used drugs.

In its lengthy sentencing order, the trial court specifically found that Dr. Eisenstein's conclusions regarding Defendant's ability to conform his conduct to the requirements of the law, and that Defendant was under the influence of the substantial domination of another, which the trial court noted were predicated in part upon Defendant's alleged drug use, were not credible. (R. 496-97). Likewise, the trial court extensively discussed

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truck were one of the murder weapons and part of the money gained in the robberies.

[20] Defendant's claim was that he consumed a large number of so-called "geek joints" or marijuana cigarettes laced with cocaine. (R. 455).

Defendant's claims of impairment and concluded that the there "was no credible evidence to show that the defendant was impaired in any manner." (R. 498)(emphasis supplied). As such the trial court could properly find that Defendant's purported drug use was not established as mitigation. Sochor v. State, 619 So. 2d 285, 293 (Fla. 1993)(whether intoxication establishes a mitigating circumstance is within the trial court's discretion); Duncan v. State, 619 So. 2d 279, 283-84 (Fla. 1993)(intoxication not established as mitigation where no witnesses observed defendant to be intoxicated at time of crime; defendant's own self-serving statements insufficient); Johnson v. State, 608 So. 2d 4, 12 (Fla. 1992)(drug use on night of crime properly rejected as not mitigating where evidence showed careful and purposeful conduct on part of defendant); Preston v. State, 607 So. 2d 404, 412 (Fla. 1992)(trial court properly rejected drug use as nonstatutory mitigation where no evidence defendant used drugs on night of murder); Ponticelli v. State, 593 So. 2d 483, 491 (Fla. 1991)(claims of drug use properly rejected as mitigating where there was no evidence of drug use on night of murder and Defendant's action were inconsistent with impairment).

Additionally, the court fully discussed all the statutory

mitigating circumstances proposed by Defendant, (R. 494-500), finding two to exist, but entitled to little weight. (R. 494, 498-99). The court further found two nonstatutory mitigating circumstances to exist: that Defendant had low intelligence, and an abusive childhood. (R. 500). Having previously discussed the aggravating circumstances, (R. 488-93), and the facts of the case, the jury's recommendation, and the evidence proffered at the post-recommendation hearing,[21] (R. 486-87), the court then weighed the aggravation and mitigation, concluding that the aggravation "overwhelmingly" outweighed the mitigation. (R. 501-02).

In view of the foregoing it can not be said that the trial court's 17-page sentencing order provides an inadequate basis for review. Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995)(no error despite failure of court to mention child abuse as mitigating where court stated that it had weighed the mitigation established); Lowe v. State, 650 So. 2d 969, 977 (Fla. 1994)(contention that trial court failed to adequately address proposed mitigation invalid where trial court stated it had considered mitigation and found it

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[21] The court noted that it had taken into consideration the "profuse" apologies by Defendant and his mother to Barker's family at the hearing. (R. 487).

outweighed by aggravation); Thompson v. State, 648 So. 2d 692, 697 (Fla. 1994)("While a trial judge must consider all mitigating evidence that is supported by the record, it is not error for the judge to fail to delineate all such evidence in the sentencing order"); Jones v. State, 648 So. 2d 669, 679 (Fla. 1994)(claim that trial court failed to consider intoxication as mitigation meritless where court addressed intoxication in context of discussion of statutory mitigation); Green v. State, 641 So. 2d 391, 396 (Fla. 1994)(no error where order did not "not strictly comply with the requirements of Campbell,[22] [where] the trial judge clearly gave careful consideration to the mitigating factors"); Johnson, 608 So. 2d at 12 (consideration of drug abuse in context of statutory mitigation adequate); Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992)(defendant contended "that the trial judge failed to consider nonstatutory mitigation. The sentencing order itself [did] not mention the word 'nonstatutory.' We conclude, however, that by his treatment of Pettit's physical condition and by allowing the testimony of the grandfather, the judge fully understood the requirement of considering, and did consider

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[22] Campbell v. State, 571 So. 2d 415 (Fla. 1990)(holding that trial court must expressly consider mitigating circumstances established by the evidence).

nonstatutory mitigating evidence"); Krawczuk v. State, 634 So. 2d 1070, 1073 (Fla. 1994)(no error in trial court's failure to find nonstatutory mitigation where order reflected that trial court carefully considered evidence presented in mitigation). Cf., Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995)(court's one paragraph sentencing order insufficient to provide basis for meaningful review); Larkins v. State, 655 So. 2d 95, 100 (Fla. 1995)(brief page-and-one-half sentencing order that did not address any mitigating factors proposed by defendant inadequate basis for appellate review).

Finally, as noted above, the evidence of intoxication at the time of the offense was speculative at best. On the other hand, as previously noted in this brief, the State proved three strong aggravating circumstances and there was little mitigation of consequence established.[23] With the exception of his meritless claim regarding CCP,[24] Defendant does not challenge these findings. Under the circumstances any deficiency on the part the trial court with regard to finding or weighing intoxication as mitigation would

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[23] See Point VII, supra.

[24] See Point VI, supra.

be harmless beyond a reasonable doubt. Wuornos v. State, 644 So. 2d 1000, 1011 (Fla. 1994)(erroneous failure to find alcohol abuse as mitigation harmless where it would be given slight weight in comparison with aggravation); Barwick, 660 So. 2d at 696 (any error in articulating particular mitigating circumstance harmless where trial court weighed aggravation and mitigation); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991)(any error in failing to find or weigh mitigating circumstance harmless in light of strength of aggravation). Defendant's sentence should be affirmed.

X.

THE TRIAL COURT SHOULD NOT HAVE IMPOSED CONSECUTIVE THREE-YEAR FIREARM MINIMUM MANDATORY SENTENCES. (Concession of Error).

Defendant's tenth assertion is that the trial court improperly imposed consecutive three-year minimum mandatory sentences for use of a firearm on each count. This assertion appears to be correct. Palmer v. State, 438 So. 2d 1 (Fla. 1983). On remand the sentence should be amended so that the three-year minimum mandatory sentences run concurrently. In all other respects Defendant's sentences should be affirmed.

XI.

DEFENDANT'S SENTENCE IS PROPORTIONAL

Although not raised by Defendant, because this court addresses proportionality in all cases in which the death penalty is imposed, the State will address the issue. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." State v. Henry, 456 So. 2d 466, 469 (Fla. 1984).

The aggravating factors found below were: (1) prior convictions for capital and violent felonies, including another execution-style murder; (2) murder committed during the course of a robbery, merged with murder committed for pecuniary gain; and (3) the murder was cold, calculated, and premeditated. (R. 488-92).

The court found as statutory mitigation that the Defendant had no significant prior history of criminality and his age. The court however gave little weight to these factors in view the highly planned nature of the crime, the fact that he participated in another murder-robbery just 19 days after the instant crime, and the absence of any evidence that he lacked maturity. (R. 494, 498-99). As non statutory mitigation the court noted that Defendant had low intelligence (a low-average IQ), and his abusive childhood.[25] (R. 500). The trial court concluded that the aggravation overwhelming outweighed the mitigation, and followed the jury's 8-4 recommendation of death.

Numerous cases have affirmed death sentences where the murder was committed during the course of a robbery and mitigation similar to that found here was presented. See, e.g., Lowe v. State, 650 So. 2d 969 (Fla. 1994)(prior conviction of a violent felony and murder committed during the attempted robbery; mitigation evidence that defendant was 20 years old at time of crime, functioned well

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[25] This factor was based upon non-sexual physical abuse by his alcoholic father. However, it should be noted that his parents divorced when he was six, and once the father left, Defendant was surrounded by caring, responsible, church-going and loving relatives for the remainder of his upbringing.

in controlled environment, was a responsible employee, and participated in Bible studies); Heath v. State, 648 So. 2d 660 (Fla. 1994)(commission of murder during the course of an armed robbery and prior conviction for second-degree murder; substantial mitigating factors, including extreme mental or emotional disturbance, and minimal nonstatutory mitigation); Smith v. State, 641 So. 2d 1319 (Fla. 1994)(murder committed during an attempted robbery and a previous conviction for a violent felony versus no significant history of criminal activity and several nonstatutory mitigating circumstances relating to Smith's background, character and record); Watts v. State, 593 So. 2d 198 (Fla. 1992)(aggravators: prior violent felonies; murder during course of sexual battery; murder committed for pecuniary gain; mitigation: low IQ reduced judgmental abilities; defendant 22 at time of offense); Riechmann v. State, 581 So. 2d 133 (Fla. 1991)(aggravating factors of murder committed for pecuniary gain and cold calculated and premeditated; minimal nonstatutory mitigation); Cook v. State, 581 So. 2d 141 (Fla. 1991)(murder committed for pecuniary gain and robbery merged into one factor; defendant previously convicted of another capital felony; mitigation included absence of significant prior criminal activity); Freeman v. State, 563 So. 2d 73 (Fla. 1990)(murder

committed for pecuniary gain and during burglary merged into one factor; previous violent felony convictions; nonstatutory mitigation including low intelligence and abuse by stepfather); Hudson v. State, 538 So. 2d 829 (Fla. 1989)(previous conviction of violent felony; murder committed during armed robbery; minimal weight given to statutory mitigating factors of extreme mental or emotional disturbance, impaired capacity to conform conduct to requirements of law, and age of defendant). In view of the foregoing, the imposition of the death sentence here is clearly proportionate with death sentences approved in other cases.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed, except as noted at Point X.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **SCOTT W. SAKIN**, Esq., 1411 Northwest North River Drive, Miami, Florida, 33125, this 15th day of October, 1996.

RANDALL SUTTON
Assistant Attorney General