IN THE SUPREME COURT OF FLORIDA



CASE NO. 86,134

**TIVAN JOHNSON,**

Appellant,

vs.

**THE STATE OF FLORIDA,**

Appellee.

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

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# BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Defendant and codefendant Albert Cooper 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 and voir dire 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 with 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). 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). All three were young black men. The "real dark" one was standing by the counter. (T. 1390). 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. Brown found out a week later from Latta that Barker had been murdered. (T. 1395). Brown was informed that the police wanted to speak to him and he contacted them that day. Brown identified the man at the counter as Defendant Cooper. (T. 1397-1400).

Prior to June 1991, Timothy Thanos and his girlfriend lived at the same apartment complex and socialized with the defendants and

with Defendant'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 Defendant about a pawnshop. (T. 1539). Defendant told him that he had robbed a pawnshop and "unloaded a pistol on" a man there. (T. 1540). Defendant told Thanos that he had gotten some guns from the robbery. Thanos thought Defendant 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). Defendant 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 Cooper and a black female were in the truck. Cooper, 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. Defendant was driving. He then took Defendant to police headquarters. (T. 1570). The vehicle was impounded. (T. 1571). Defendant'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 Cooper about two months at that time. (T. 1576). She started going out with Cooper, 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. Cooper was doing most of the talking. Defendant said "I'm down," meaning he would go along with it. (T. 1580-81). Cooper also said to make sure that they hit the cash register. Defendant then asked if Cooper wanted the money from the register also. (T. 1582). Cooper said he would hold the guy because he was stronger, so Defendant could shoot him. Defendant then told Cooper to make sure Blount kept quiet. Blount then asked, "You all are not going to kill anybody?" She asked that after Cooper said they were going to "splat" the guy. (T. 1584). Later on, she asked Cooper if they had killed the guy at the pawnshop and he said yes, although she did not believe him at the time. (T. 1585). Cooper 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 Cooper on June 15, 1991. (T. 1748-51) In his sworn statement Cooper stated that on May 25, 1991, he and Defendant 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).

Cooper and Defendant went back two or three times. They had no other accomplices. They drove there in Defendant'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. Cooper had a chrome .380 semiautomatic. (T. 1772). Defendant 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. Defendant 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 Defendant looked at, and when Barker turned back, Cooper shot him in the chest. Cooper fired a second shot, and then Defendant began firing, too. Altogether, they shot him thirteen times, Cooper, seven, and Defendant, five. Barker tried to draw his weapon. (T. 1776). But after a couple of shots, Barker fell to the ground, screaming. Then Cooper and Defendant each fired their last shots. Defendant's .38 was a five-shot. Defendant 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 Cooper retrieved from their car after the shooting. The door was buzzer-operated, but they could not find the button, so Cooper unbolted the second door and swung them open. (T. 1778). Defendant 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 Defendant went for some long rifles. Defendant had to go behind the counter to get the weapons. Defendant took the .45 from the owner's body and gave it to Cooper. 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). Cooper'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 Defendant's statement. In his statement, Defendant stated that prior to May 25, 1991, Cooper had planned to rob the pawnshop at 8795 N.W. 27th Avenue. (T. 1819). They decided on Monday to rob the shop on

Saturday. Cooper, Defendant and another individual named Eric were going to participate. 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). Defendant participated in the planning of the robbery. On the 25th, Defendant and Cooper took Defendant's wife to work at Winn-Dixie, and then drove to Liberty City in the 1990 silver Ford Probe. Defendant "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. Cooper 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). Defendant went in first to look over the place and Cooper joined him later. He had to be buzzed in. Defendant 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). Defendant yelled freeze, and as Barker reached for his weapon, Cooper began firing. Then Defendant began shooting also. (T. 1826). After Defendant 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. Cooper had blood on his clothes, and some of Barker's flesh on his pants. (T. 1829). Cooper put the clothes in a gym bag and gave them to Defendant to throw away. Defendant threw the bag into a dumpster behind a Pizza Hut. Defendant's gun was in the back of the U-Haul. Cooper'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 Defendant 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 Cooper. (T. 1879). The form indicated that at 11:45 a.m. on May 30, 1991, Cooper sold the shop a Mossberg 12-gauge shotgun for $50.00. (T. 1881-83).

Fingerprint technician James Hinds of the Metro Police identified Cooper'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 Defendant and Cooper 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 Defendant, 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).

The relevant facts and proceedings regarding the penalty phase will be presented in the course of the argument. 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 one statutory mitigating circumstance, extreme mental or emotional distress, based upon Defendant's history of depression, and minimal nonstatutory mitigation, which the court "took into consideration": illness as a baby, contact with father only once a month, taunting by siblings, learning disabilities, well-behaved as a child, devoted to his mother, community involvement through Boy Scouts. The court concluded that the aggravation outweighed the mitigation and sentenced Defendant to death. (R. 626-41).

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. By accepting the jury without objection and affirmatively waiving his prior motions to strike the panel, Defendant waived any Neil claim he may have had. Further, he has not demonstrated that the court committed clear error, in denying his peremptory strike of a female juror, where he was unable to articulate record-supported, non-pretextual reasons for the strike.

3. 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.

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 was not entitled to a special verdict regarding

felony versus premeditated murder, and in any event the issue was not preserved by raising it below.

6. & 8. The presentation of his codefendant's mitigation evidence was not a critical stage where Defendant had a right to interfere in the proceedings, and therefore, his and his counsels' absence during same was not error. Further, where the alleged issue Defendant claims he would have challenged was thoroughly litigated consistent with his interests by the State, and subsequently by his counsel during his own sentencing proceeding, any purported error was harmless.

7. As there was no danger of the confusion of the jury, Defendant was not entitled to a severance of the penalty phase of his trial.

9. Defendant's sentence is proportional.

10. Defendant's attempt to raise the issue of alleged judicial bias is improper where the issue was not properly raised below. Further, the comments of the judge do not constitute evidence of bias.

11. Defendant's claim that the death penalty is unconstitutional is procedurally barred and without merit.

## 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 warning did in fact "track" Miranda, nearly verbatim. Miranda

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[1] As Defendant notes in his brief, he raised a claim identical to that presented here in the Walker murder appeal. The contention was rejected by the district court, sub. nom. Cooper v. State, 638 So. 2d 200, 201 (Fla. 3d DCA 1994). The claim has also been rejected by the magistrate in his federal habeas proceeding regarding that conviction. Report and Recommendation of Magistrate Judge at 6, Johnson v. Singletary, No. 95-2646-CIV-UNGARO-BENAGES (S.D. Fla. June 25, 1996).

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 asserts that

question 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 (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).

Additionally, to the extent that Defendant is claiming that his confession was otherwise involuntary, the State presented ample evidence to the contrary, (T. 199-200, 226, 229-36, 272-74, 280-84, 345-46), which the court below found believable. (T. 354-55).

That ruling should not be disturbed, as Defendant has failed to offer any basis for overcoming the presumption of correctness that attaches to trial court determinations of suppression issues. See Jones v. State, 612 So. 2d 1370, 1373 (Fla. 1992); Stone v. State, 378 So. 2d 765 (Fla. 1979).[3]

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 Defendant's or Cooper's formal confessions, tied Defendant

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[3] Defendant's inflammatory reference to a "'tag-team' interrogation" is without basis and must also be disregarded. The reason two detectives interviewed Defendant was because two separate police teams were investigating the two separate murders that Defendant had committed at opposite ends of the county. Furthermore, counsel below repeatedly disavowed any claim of impropriety based on the number of detectives who spoke with Defendant or the length of time he was in custody. (E.g., T. 633, 1183-84, 1523). The sole issue was the sufficiency of the warning; any attempt to inject other issues now must be seen as spurious. 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).

Finally, the allegation of pre-warning interrogation, (B. 34), is also baseless. The so-called "agreement" was explained as follows: the detective's standard procedure was to ask a suspect whether he wished to talk. If the suspect said yes, he would be Mirandized; if he said no, the interview would be terminated. (T. 346).

to the murder of Charles Barker. Defendant told Tim Thanos, whom he stayed with after he was evicted from his own apartment, that he had robbed a pawnshop and "unloaded a pistol on" a man there. (T. 1540). Defendant also told Thanos that they had gotten some guns from the robbery, and Thanos had seen both Defendant and Cooper with several different types of guns. (T. 1540-41). Cooper's former girlfriend was present when Cooper discussed robbing a pawnshop, taking some guns, and "splatting" the owner. (T. 1580-84). Defendant agreed to the plan. Id. 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 Cooper's name. (T. 1642-44, 1669, 2036). Thanos specifically testified that Defendant had a .38. (T. 1545). Finally, Defendant's and Cooper'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). 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).

Defendant's claim regarding the admission of his confession to the Walker murder during the penalty phase is likewise without merit. That confession was simply admitted as part of the evidence underlying Defendant's prior violent felony conviction. It is well settled that the State is permitted to introduce such underlying evidence to assist the jury in weighing the aggravating circumstances. Stano v. State, 473 So. 2d 1282, 1289 (Fla. 1985); Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1987). As Defendant's conviction for the Walker murder is (and was at the time of trial) final, he may not now relitigate issues that should have been, and in fact were, raised (and decided adversely to him) on the appeal from that conviction. Furthermore, that that conviction is presently on collateral review is not a basis for raising the issue here. Bundy v. State, 538 So. 2d 445, 447 (Fla. 1989); Roberts v. State, 21 Fla. L. Weekly S245 (Fla. June 6, 1996).

Even were the issue properly before the court, it would be without merit, as discussed above with regard to Defendant's confession in this case. Finally, any error would be harmless beyond a reasonable doubt. Regardless of whether the confession

were admitted in this case, the basis for the prior violent felony aggravator, Defendant's first-degree murder and armed robbery convictions relating to the robbery of Rudy's restaurant and the murder of Thomas Walker still remain. As noted that conviction is long final. Furthermore, in addition to the judgment, and apart from the confession, the State would still have been entitled to present the evidence showing that in that case two men were seen in Defendant's vehicle fleeing from the Rudy's restaurant around the same time Defendant's former boss was shot to death by a single bullet to the back of the head while he was in a kneeling position in the walk-in freezer, and that the office window had been smashed in and the safe cleaned out. Stano; Tompkins. There is simply no basis to conclude that the jury's recommendation would have been any different without the statement. Henderson v. Singletary, 617 So. 2d 313, 316 (Fla.1993)(no basis for vacation of death sentence where basis for prior violent felony aggravator remained). This claim should be rejected.

## II.

**DEFENDANT'S CLAIM REGARDING THE DISALLOWANCE OF HIS PEREMPTORY STRIKE OF JUROR DARIAS WAS NOT PRESERVED FOR REVIEW AND NO ERROR OCCURRED, IN ANY EVENT.**

Defendant's second claim is that the trial court erred in disallowing his attempted strike of juror Darias following a Neil[4] inquiry. However, this claim was not properly preserved by the defense, and as such may not now be presented on appeal. Further, even assuming that the claim were properly before the court, the record reflects that the trial court properly denied the strike, after Defendant was unable to proffer neutral, nonpretextual reasons.

At the conclusion of jury selection, the defense interposed no objection to the constitution of the jury prior to the panel being sworn. As such Defendant has waived any Neil issue. Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993)(acceptance of jury without reservation of objection waives Neil issue). Defendant asserts that Joiner should not apply in the context of the denial of a

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[4] State v. Neil, 457 So. 2d 481 (Fla. 1984).

peremptory as opposed to the granting of one. (B. 45).[5] The courts that have addressed this issue have rejected Defendant's contention. Schummer v. State, 654 So. 2d 1215, 1217 (Fla. 1st DCA 1995); Blackmon v. State, 655 So. 2d 1315 (Fla. 3d DCA 1995); Roberts v. State, 665 So. 2d 333, 334 (Fla. 5th DCA 1995).

In Joiner and its progeny the basis for the preservation rule is that a change of circumstances may cause a party, by the end of the voir dire process, to change his mind as to the desirability of the juror in question. 618 So. 2d at 176. Joiner also erects a bulwark against error sown as "insurance" for an adverse verdict. Id., at 176 n.2. These concerns are equally valid where a peremptory is disallowed as where a challenge is allowed.

Here, an entirely new venire panel (consuming 185 pages of transcript) was examined between the denial of the Darias challenge and the swearing of the jury. The record reflects that the venire had been exhausted. None of the parties wished to spend a fourth day on jury selection. Indeed, each side "unstruck" a juror so

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[5] Defendant's argument that Joiner should be overruled is also without merit. This court reaffirmed Joiner very recently in Melbourne v. State, No. 86,029 slip op. at 10 (Fla. September 5, 1996).

that two alternates could be seated from the then-present venire. (T. 1170-75). Furthermore, both defense counsel, after consultation with the defendants, specifically withdrew their previous motion to strike the venire and for mistrial, and affirmatively accepted the panel as constituted without reservation. (T. 1171). Given this state of affairs, it is abundantly clear that counsel, and Defendant, no longer wished to strike Darias. Defendant's attempt to now use the issue to obtain a second trial after suffering adverse jury verdicts is just the sort of gamesmanship and abuse of scarce judicial resources that Joiner was designed to curtail.

Nor does the purported exception to Joiner enunciated in Langdon v. State, 636 So. 2d 578 (Fla. 4th DCA 1994), assuming it is valid,[6] support Defendant's position. The issue presented in Langdon was purely legal, i.e., whether Neil even applied to gender. The issue here, and in the usual case, is primarily factual. In Langdon the trial court acknowledged the defense claim, but rejected it (erroneously), declining to conduct an inquiry as a matter of law. Here, however, the court made a

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[6] Langdon has not been followed in another case.

factual determination as to Defendant's motives in attempting to strike Darias, which, despite the depiction presented in Defendant's brief, was not considered by trial counsel to be a closed issue. Indeed counsel promised to "try [to strike Darias] again before we're done." (T. 995). That counsel thereafter never again broached the issue bespeaks of an intent to waive it. Under such circumstances, the rationale of Joiner, not Landon applies.

Finally, Defendant's argument regarding the per se reversibility of the improper denial of a peremptory confuses the issues of presumptively harmful error and fundamental error. It does not follow that merely because error is per se reversible, the rules of preservation do not apply. Indeed, precisely because the alleged error is per se reversible, the reasons behind the preservation rule, primarily the avoidance of unnecessary retrials and the intentional sowing of reversible error, apply. See Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). For example, although an improperly denied challenge for cause is per se reversible, the claim must be preserved to be cognizable on appeal. Trotter v. State, 576 So. 2d 691 (Fla. 1991). Likewise, until very recently

the failure to conduct a Richardson[7] inquiry was held to be per se reversible error. Smith v. State 500 So. 2d 125 (Fla. 1987), overruled, State v. Schopp, 653 So. 2d 1016 (Fla. 1995). Yet at no time could a party raise the issue without having properly preserved it below. Lucas v. State, 376 So. 2d 1149 (Fla. 1979); Brazell v. State, 570 So. 2d 919 (Fla. 1990); Simon v. State, 615 So. 2d 236 (Fla. 3d DCA 1993). See also Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995)(per se reversible error to limit party's ability to backstrike, but claim must be preserved at trial); Wike v. State, 648 So. 2d 683, 687 (Fla.1994)(failure to give defendant final argument in penalty phase always deemed harmful and reversible, but issue must be preserved for review); Pope v. State, 569 So. 2d 1241, 1244 (Fla. 1990)(per se reversible error to allow capital jury to separate during deliberations, provided the defense objected).

Assuming, arguendo, that this claim were preserved for review, Defendant has not shown reversible error. In Melbourne v. State, No. 86,029 (Fla. September 5, 1996), this court recently reiterated and clarified the procedure to be followed when a party raises a

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

Neil/Slappy[8] challenge to the exercise of a peremptory strike. If a party makes a timely objection, indicating the protected class to which the juror belongs, the court must conduct an inquiry of the other party's reasons for the strike. Melbourne, slip op. at 7. That is precisely what occurred below with regard to juror Darias:

> [PROSECUTOR]: The State will challenge that. She's a female and may be hispanic.
>
> THE COURT: What grounds?

(T. 994). Contrary to Defendant's suggestions, the court properly conducted a Neil inquiry under the circumstances.[9] Defense counsel then offered the following reasons:

> She has been on a prior civil jury. She has been the victim of a car theft. She has -- I got the impression she had a problem with -- from her responses with a presumption of innocence, as well as this is my impression. I can't necessarily give any more than that, and I tend to think that she would be too intelligent for the case.

(T. 994). The trial court rejected the reasons. Id.

The Court explained in Melbourne, slip op. at 8-9, that the

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[8] State v. Slappy, 522 So. 2d 18 (Fla. 1988).

[9] Regardless of whether Darias was hispanic, (B. 43 n.24), she was clearly a woman, which the state articulated as the basis for its objection.

focus of the court's determination is not the reasonableness of the reason, but its genuineness. Further, because the trial court's determination turns primarily on assessments of credibility, they will be affirmed on appeal unless clearly erroneous. Id. at 9-10.

Here, the trial court plainly did not believe that defense counsel's reasons were genuine. Defendant has failed to show that the judge's determination was clearly erroneous.[10] A review of the record shows that the proffered reasons were either wholly unsupported by the record, or in light of the factors set forth in Slappy, plainly pretextual.

**Darias's alleged problem with the presumption of innocence.**

This "reason" is wholly without record support. Although counsel inquired extensively about the presumption of innocence, (T. 883-892, 894-901, 981), Darias was never asked any question on the subject. The only statement Darias ever made even tangentially relating to the presumption of innocence was her response to a question about the State's burden of proof. Darias stated that she

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[10] Indeed, Defendant has failed to offer any fact- or record-specific basis for his contention that the court erred, devoting instead all but one paragraph of his 4½-page argument to the preservation issue.

had no problem with holding the State to its burden, and that if the State failed to prove even one element of any of the crimes charged, "[t]here will be a reasonable doubt." (T. 893).

**Darias's prior civil jury service.**

Although the record reflects that Darias did, in fact serve on a civil jury, (T. 792), the trial court properly determined this basis to be pretextual. Among the factors cited in Slappy supporting this conclusion were the complete absence of any questioning of Darias on the issue, despite discussing prior jury service with other jurors. (T. 902, 913, 935, 1143). Furthermore, five of the remaining jurors or alternates who served on the jury without objection had prior jury service, (T. 788, 790, 791, 998), and one juror with prior experience was stricken by the State over defense objection. (T. 791, 993). Nor is there any apparent relationship between prior civil jury service and the crimes charged. As such the trial court properly concluded that this basis for striking Darias was pretextual. Slappy; Melbourne.

**Darias's status as the victim of a car theft.**

As with the prior jury service, the car-theft claim also manifests many of the Slappy indicia of pretext. Ten others seated

as jurors or alternates all had been the victims of crime, (T. 793-95, 1005-07, 1009, 1012), several of crimes more serious than car theft, e.g., armed robbery and car theft, (T. 1009), armed robbery and burglary. (T. 795). Additionally, the defense opposed a State peremptory of a juror who had been mugged. (T. 797, 993). Plainly these personal crimes bear more of a relationship to the murder and robbery for which the defendants were on trial than does an auto theft. Finally, despite extensively questioning other jurors about their experiences as victims of crime, (T. 911-13, 926-28, 936, 948-49, 1120, 1128-35, 1150, 1153), Darias was again not inquired of regarding this alleged reason for striking her. The trial court's conclusion of pretext is well-supported. Slappy, Melbourne.

**Darias's allegedly being too intelligent for the case.**

Accepting this as a valid neutral basis for a strike, the record also shows this reason for striking Darias to be pretextual. Perhaps the strongest indication of the pretextual nature of this reason was counsel's own basis for opposing a State motion to challenge juror Garwood, a college professor, for cause based upon scheduling conflicts:

> She's a bright and intelligent juror. I want

to keep her here.

(T. 647). Further, in addition to appearing to be an afterthought, intelligence, at least if judged by the evidence of education or accomplishment, was shared with jurors who served. Several jurors had either baccalaureate or masters degrees, (T. 801, 904, 1152), in such diverse fields as music, computer science and international business. Id. One was the director of an institute for advanced industry. (T. 1014). In view of the foregoing, the trial court properly determined that the reasons advanced by defense counsel were pretextual. As Defendant failed to preserve his second issue for review, and further has failed to show clear error, even if the claim were properly before the court, this contention must be rejected.

## III.

**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 third 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. 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 Defendant and Cooper 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.[11]

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 relevancy" is to attack the defendant's character or show propensity. (B. 49, quoting Vasquez v. State, 405 So. 2d 177 (Fla. 3d DCA 1981))(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

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[11] 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).

formal stenographically recorded statement. It is the 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).

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,[12] 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, Defendant 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).

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

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[12] 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.

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. On the other hand, virtually the first thing out of Defendant's mouth upon assuming the stand was that he had previously been convicted of a crime, "four counts." (T. 2063). 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 Defendant himself claimed he was involved in some sort of illegal firearms trafficking with his 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.

## 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 discussed supra.

## V.

**NO ERROR, FUNDAMENTAL OR OTHERWISE, OCCURRED AS A RESULT OF THE TRIAL COURT'S FAILURE TO GIVE A SPECIAL VERDICT FORM TO THE JURY REGARDING WHETHER DEFENDANT WAS GUILTY OF FELONY OR PREMEDITATED MURDER.**

Defendant's fifth claim is that the trial court committed fundamental error in failing to give a special verdict form to the jury regarding whether defendant was guilty of felony or premeditated murder. This claim does not present fundamental error, is not preserved for review, and is wholly without merit.

It is well established that instructional issues must be preserved by timely objection at trial to be raised on appeal. Here no objection was raised to any instruction given to the jury in either phase of the trial. As such this claim may not now be considered. Henry v. State, 586 So. 2d 1033, 1036 (Fla. 1991); Armstrong v. State, 642 So. 2d 730 (Fla. 1994); Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994); Archer v. State, 673 So. 2d 17, 19 (Fla. 1996); Sochor v. Florida, 504 U.S. 527, 535 n.*, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992). In a convoluted argument, he maintains that because if the jury had acquitted him of premeditated murder, then he could have raised a collateral

estoppel claim on appeal despite his lack of preservation.[13]

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[13] Defendant apparently bases this claim on Shiro v. Farley, 510 U.S. 222, 114 S. Ct. 783, 127 L. Ed. 2d 47 (1994), which is curious because that court left the issue Defendant asserts as reviewable despite a lack of preservation open for the very reason that there was no justiciable issue, because the petitioner there had not been acquitted. Although Defendant discusses "double jeopardy" he presumably means "collateral estoppel," as Shiro did hold double jeopardy principles inapplicable to the sentencing phase of a capital trial, declining to rule on the collateral estoppel issue.

The issue the Shiro court declined to pass on was whether the determination of an issue during the guilt phase of a capital murder trial precludes the finding of an aggravating circumstance in the penalty phase based upon the same issue of ultimate fact.

In any event, the State would submit that the claim is without merit and should not be a basis for avoiding the procedural bar. First, it should be noted that the plain language of Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), to which Defendant adverts, counsels against the application of collateral estoppel in the present context. There, the court defined the collateral estoppel doctrine as providing that:

> [W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Ashe, 397 U.S. at 443 (emphasis supplied); see also Dowling v. United States, 493 U.S. 342, 347, 110 S. Ct. 668, 25 L. Ed. 2d 469 (1990)(same). Plainly the penalty phase proceedings, which are ordinarily conducted before the same judge and jury, shortly after the verdict, do not constitute a "future" lawsuit, but on the contrary, are part and parcel of the same prosecution. See Poland v. Arizona, 476 U.S. 147, 156, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986)(aggravating factors are "not separate penalties or offenses, but are 'standards to guide the making of the choice' between the alternative verdicts of death and life imprisonment); Ohio v. Johnson, 467 U.S. 493, 500, n. 9, 104 S. Ct. 2536, 81 L. Ed. 2d 425

However, regardless of whether that were the case or not, the jury did not acquit Defendant of premeditated murder. Furthermore, the evidence, that a week before the robbery he had agreed to participate in the robbery of the Outpost and the "splatting" of Barker, along with the steps taken in planning the robbery, which Defendant described, was more than sufficient to convict him of premeditated murder as well as of the CCP aggravator, points which Defendant does not contest. See Cruse v. State, 588 So. 2d 983, 992 (Fla. 1992); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990);

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(1984)(rejecting the application of Ashe: "in a case such as this where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable.").

Further, for the same reasons that Schiro found double jeopardy principles to be inapplicable to the sentencing phase of the same trial, so should the extension of the doctrine of collateral estoppel be rejected. As noted in Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981), and Arizona v. Rumsey, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984), bifurcated capital sentencing proceedings such as Florida's bear certain hallmarks of a trial, and as such the double jeopardy considerations bar the state from seeking to impose the death penalty in a second penalty phase proceeding following the imposition of a life sentence. The underlying principles of those cases and the Double Jeopardy Clause do not, however, suggest that the collateral estoppel doctrine should be applied from the guilt to penalty phases of the same trial.

It should be noted that this same issue was raised recently in a petition for certiorari to this court, which petition was denied. Allen v. Florida, ___ U.S. ___, 116 S. Ct. 1326, ___ L. Ed. 2d ___ (1996).

Rutherford v. State, 545 So. 2d 853, 856 (Fla. 1989); Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988); Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983). His alleged collateral estoppel claim is thus nothing more than speculation, and will not serve to bootstrap his baseless fundamental error argument.

Furthermore, as has been repeatedly held, Defendant was not entitled to a special verdict form. Young v. State, 579 So. 2d 721 (Fla. 1991); Haliburton v. State, 561 So. 2d 248 (Fla. 1990); Parker v. State, 641 So. 2d 369 (Fla. 1994). Thus even had the issue been preserved, it would be without merit.

## VI. & VIII.

**THE ALLEGED ABSENCE OF DEFENDANT AND HIS ATTORNEYS DURING PRESENTATION OF COOPER'S EVIDENCE IN MITIGATION, DOES NOT WARRANT REVERSAL OF DEFENDANT'S SENTENCE.**

Defendant's sixth claim is that the voluntary absence of his attorneys during a portion of the penalty phase where codefendant Cooper presented mitigation evidence requires that he be granted a new sentencing proceeding. His eighth claim is that his own absence during the same period also compels reversal. These claims are intertwined, factually, procedurally, and legally. The State will therefore address them jointly. As will be shown, these claims are substantively without merit, and in any event, even if error occurred, it was harmless beyond a reasonable doubt.

On March 8, 1995, after the jury returned its verdicts in the guilt phase, the court announced that it would hold Cooper's sentencing hearing before the jury on April 20, 1995, and Johnson's the following week, on April 27, 1995. (T. 2435). Cooper was set to go first because he was the "A" defendant. (T. 2433). Defendant's counsel posed no objection at that time to the order: "All right, Your Honor." (T. 2435).

A preliminary hearing was held on April 17, 1995. (T. 2447). At that time, the State noted that in the Walker murder case, which the State intended to introduce as proof of the prior capital and violent felony conviction aggravators, Cooper claimed that Johnson told him to shoot. The State therefore suggested that Defendant's penalty phase should be done first. (T. 2451). The court then inquired whether there would be any problem with Defendant proceeding first. Both of Defendant's counsel responded that they did not want to go first because their experts would not be ready until the following week. (T. 2452). The State then proposed presenting everything but Cooper's confession in the Walker case to the jury on April 20, 1995. (T. 2453). Cooper's counsel then objected that they were ready to go, and wanted to go on April 20, as originally scheduled. (T. 2454). After continued discussion Defendant's counsel specifically rejected the State's concerns:

> MR. VONZAMFT: We have no objection proceeding the way the Court originally scheduled it. We have no objection if the State seeks to put in Mr. Cooper's confession and they hear him say that.
>
> * * *
>
> MR. VONZAMFT: I have no problem with you going first on Cooper, but [sic] on Cooper's confession and us taking our shot with the jury next week --

(T. 2456-57).

On April 20, 1995, the day the sentencing hearing for Cooper was scheduled to begin, the State announced that the parties had agreed to stipulate that Cooper would go first, and that the evidence regarding the Walker murder would be presented to the jury only once, during the first proceeding. (T. 2472-73). Defendant's counsel responded that although he agreed, Defendant did not. (T. 2473). Counsel indicated he would revisit the issue with Defendant. Id. Cooper's counsel then stated that he would object to Johnson going first on the grounds that the State was attempting to "forum shop" by raising the issue in the first place. (T. 2474). Defendant's counsel then stated that they did "not want to reverse the order." Id. However, their client did not wish to "waive," whatever that means. (T. 2475).

At this point, the State expressed concern that the defense was attempting to manipulate the proceedings by not objecting to the procedure the court was following and at the same time indicating that Defendant refused to "waive":

> [PROSECUTOR]: The State still intends to introduce both confessions.

> If the defense does not want to object to it, fine. If they object to it you can rule on that.
>
> We can argue about that on a Rule 3 later on, which is obviously what they are setting up. They are setting up a Rule 3, we all see that. The writing is on the wall.
>
> As far as the State is concerned, we are going to go ahead. We are going to put the confessions in, in their entirety. We have Mr. Vonzamft's willingness to go ahead and waive it.
>
> If his client does not agree with it, we will worry about that later on.
>
> * * *
>
> MS. GARCIA: ... Mr. Vonzamft and I discussed the way we would proceed in this case. We agreed that it would not be a problem. However our client does not have to agree with us.
>
> I have practiced before this Court for a very long time.
>
> I, for one am not trying to set up a Rule 3. We cannot force Mr. Johnson to do something that we agree on, but that he does not agree to do.

(T. 2476). Counsel then for the first time interposed an objection to the procedure that had been decided on. (T. 2476). The court declined to alter the procedure at that late date. (T. 2477). After discussion of various motions in limine, defense counsel made their final U-turn and moved orally for severance on the basis of

Cooper's confession in the Walker case. (T. 2488). The court denied the motion. Id.

Thereafter, the penalty phase proceedings commenced, with the court explaining to the jury that when Defendant and his attorneys left they would only be concerned with Cooper's sentence. (T. 2520). In the presence of Defendant and his counsel the State introduced evidence regarding the circumstances of the Walker murder. This evidence consisted primarily of the confessions of Defendant and Cooper.

Defendant's confession, testified to by Detective Romagni, detailed the extensive planning and carrying out of the robbery of the Rudy's restaurant where Walker was the night manager. Defendant had worked at the Rudy's for about two months, from October through November of 1990. (T. 2606). Defendant first began contemplating the robbery of Rudy's on Monday, June 10, 1991. (T. 2607). They picked the Rudy's because Defendant knew the layout and thought he could get in and out without being seen. He also was familiar with the employees' schedule. (T. 2608). Defendant felt that Walker was sarcastic and prejudiced. He would often make insulting remarks to Defendant about blacks. (T. 2609).

Walker also made Defendant scrub the baseboards all the time, which he never made anyone else do. This bothered him. (T. 2610). On the day of the robbery, Defendant had a .38 snubnose revolver. (T. 2612). Cooper had a 9mm automatic. They drove to Rudy's in Defendant's wife's silver Ford Probe. They first arrived between 10:00 and 10:30 p.m. (T. 1613). Defendant went over to the restaurant and counted the number of the employees. Then he went across the street to a pay phone. He called the Rudy's, gave a false name and said that he had lost an expensive earing there. He spoke with Walker on the phone. (T. 2611). When Defendant spoke with Walker on the phone, Walker went and looked for the earing. When he returned, Defendant told him that it was very expensive, and asked if he could come over and look for it. Walker told him that he would only be there for 20-30 minutes. (T. 2616). He told Walker he would be there in 15 to 20 minutes, to allow time for the rest of the employees to leave. After some time, they drove across the street and parked near the dumpster. (T. 2617). Cooper, posing as the person who lost his earing, approached the back door of the restaurant, as Walker had told Defendant to do. Defendant next saw Cooper at the side door with a gun to Walker's head. (T. 2618). Cooper signaled him to come in. Walker let him in the back door. (T. 2619). When the door opened the alarm went off.

Defendant told Walker to shut the alarm off, which he did. (T. 2620). Defendant had estimated that there would be about $10,000 in the office safe. When Defendant tried to open the office door, it was locked. Walker told him he had locked the keys inside. (T. 2621). Walker sounded scared. Defendant tried to kick the door down, but could not, so he shot out the window. Defendant went into the office and saw that the safe was open and the keys were on the desk. (T. 2622). Defendant then took all the money from the safe and put it in a gym bag he had brought. Defendant told Cooper to put Walker in the freezer. (T. 2623). Defendant wanted to lock him in the freezer. He had made Walker unlock the freezer for him. (T. 2624). Cooper had his gun to Walker's head as he put him in the freezer. (T. 2625). Defendant had the freezer padlock and the money bag. (T. 2626). Defendant stated that he told Cooper he was going to lock Walker in the freezer and turn off the electric. (T. 2627). Defendant stated that he told Cooper to take the lock, because he was going to turn off the electric. (T. 2627). Then Defendant heard the gunshot, and saw Walker hit the ground. Cooper had shot him point-blank. (T. 2628). Then they left. (T. 2629). They went back to the apartment and counted the money. (T. 2631). They received $2600 or $2700 a piece. (T. 2635). Defense counsel cross-examined the detective, and emphasized the fact that Cooper

was the shooter, and that Defendant had allegedly told him simply to lock Walker in the freezer and turn off the electricity.[14] (T. 2639-42).

Cooper's statement was related by Detective Garafalo, and was largely the same, although the details as to the planning stages were far sketchier, and he claimed that Defendant had instructed him to shoot Walker. (T. 2524-59). Defendant's counsel cross-examined this detective regarding Cooper's statement, heavily emphasizing the fact the Cooper was the shooter, and that the forensic evidence confirmed that fact. (T. 258-79).[15]

Medical examiner Roger Mittleman testified that he was called to the Rudy's at around noon the day after Walker's murder. Walker's body was seated on the floor of the walk-in freezer. (T. 2646). Based on the injuries and blood spatter, Mittleman opined

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[14] Defendant originally said "kill the lights" but amended his statement after it was typed to read kill the electricity. (T. 2642).

[15] Before cross-examining the detective Defendant renewed the motion to sever, based solely on comments allegedly contained in Cooper's confession that purportedly suggested that Defendant was involved in other robberies. (T. 2578). The basis of this objection is not readily discernible from the detective's testimony.

that the evidence was consistent with Walker having been shot in the back of the head and immediately falling backwards. (T. 2652). Mittleman further concluded that Walker was crouching at the time he was shot. (T. 2652). The stippling also indicated that it was a very close-range gunshot. (T. 2654). The x-rays showed that the bullet passed directly through the brain, meaning that Walker would have immediately lost consciousness. (T. 2656). Walker would have died within hours if he had been locked in the freezer. (T. 2658). Defense counsel also cross-examined this witness, pointing out that Walker probably would not have frozen in a freezer if the electricity was off. (T. 2659-60).

Thereafter, counsel informed the court that he could be present for the remainder of Cooper's case, if the court so ordered, but that he would rather not be. (T. 2661). The State indicated that it had no further witnesses regarding aggravation. (T. 2661-62).[16]

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[16] The State had planned on calling Ms. Blount regarding the CCP factor, but the court ruled that because she had already testified regarding the planning and premeditation at the guilt-phase, it would not allow her to testify again on that subject. (T. 2661-62).

Thereafter the court instructed the jury that Defendant and his counsel had left, and that the remaining proceedings related only to Cooper. (T. 2667). Cooper then presented most of his case during the afternoon of April 20, 1995.

The next morning, in response to the opinion of one of Defendant's experts, Dr. Eisenstein, (T. 2683), the State called Dr. Levy, who testified that there was absolutely no evidence that Cooper acted under the substantial domination of Defendant. (T. 2837).

Defendant and his counsel were then present for the afternoon session on April 21, 1995. The State called Admonia Blount, Cooper's former girlfriend, in rebuttal. She stated that she had never seen Johnson dominate Cooper. (T. 2900). She testified how it was Cooper who asked Johnson to rob the pawnshop; that Cooper was the one who said they should "splat the guy;" that Cooper said, "make sure we get the cash register." (T. 2902). Cooper's counsel had no questions for Blount. Defendant's attorneys emphasized on cross that Cooper did all the talking about the robbery & "splatting." (T. 2906-07).

Cooper's other expert, Dr. Gary Schwartz, on cross examination opined that Cooper was not under the domination of Defendant and that there had been no indication of such by Cooper. (T. 2963).

The State called Johnson's ex-wife, Renee Carey, who testified that she never saw Johnson dominate Cooper. (T. 2966). "They were equals." (T. 2967). Carey characterized Johnson as "average" in terms of whether he was a follower or a leader. (T. 2967).

The State called neuropsychologist Gisela Aguila-Puentes who opined that Cooper's actions were wholly self-volitional and that there was no indication that he was dominated by Johnson. (T. 3046). No further evidence was presented to the jury regarding Cooper.

During the closing argument, the State addressed the claim of Defendant's alleged domination of Cooper:

> Albert Cooper acted under the extreme duress or under substantial domination of another person. That is another mitigating factor, which Dr. Eizenstein [sic], the only one of the doctors, even their other doctor found applied. Upon what did he base that?
>
> He says that the defendant [Cooper] is missing the part of his brain, the frontal

> lobe that determines judgment. I suggest to you, when he first started testifying he said he had no judgment, his mother was his frontal lobe. Toward the end of his testimony he kind of changed it.
>
> He said, Well [sic], he can exercise some judgment. He does not exercise judgment all the time.
>
> There is nothing in this record that is presented to you, no evidence whatsoever, that Albert Cooper acted under the duress or domination of Tivan Johnson.
>
> Tivan Johnson tells you it was Albert Cooper's idea to rob the pawn shop.
>
> Edmonia told you that it was Albert who was talking about doing it and Tivan said, I am down with it.
>
> Rene Carey came in here and told you that the two of them were friends.
>
> The family members came in and told you that Albert Cooper was a very nice, likable guy who had friends. They did not happen to like Tivan, but nobody ever said that Albert allowed himself to be dominated by anybody.
>
> Again, I suggest to you I do not know what Dr. Eizenstein's motives were. I do not know why he testified that way because there certainly is not any evidence to support that opinion, but I suggest that you disregard that as a mitigating factor.

(T. 3088-90). The jury then retired and deliberated on its recommendation as to Cooper. The jury's recommendation was sealed until the conclusion of Defendant's proceedings. (T. 3145, 3154).

The State presented no further evidence to the jury during the proceedings on April 26, 1995.

During Defendant's case, one of Defendant's teachers stated that she would not have characterized him as a leader. (T. 3182). Defendant's expert, Dr. Christian Del Rio, related that Defendant had told him that Cooper had planned the Outpost robbery, and that Defendant had just gone along with it. (T. 3318). At no point did the State argue that Defendant was more culpable than Cooper or that he was the "ringleader."

After deliberation the jury recommended that Defendant be sentenced to death by a vote of 8 to 4 (T. 3408). By the same margin, they also voted that Cooper be sentenced to death. (T. 3410).

In its sentencing order, the trial court rejected Cooper's contention that he had been dominated by Cooper, finding the defendants equally culpable:

> C. The defendant acted under extreme duress or under the substantial domination of another person.

To support this mitigating circumstance, the defendant again relied on the testimony of Dr. Eisenstein.

Dr. Eisenstein opined that because of the defendant's brain impairment, coupled with the physical and psychological abuse he suffered from his father, and his drug abuse, the defendant was a person easily influenced by others to engage in behavior that was not socially acceptable.

Dr. Eisenstein opined that because of the problems with his frontal lobe functioning, the defendant had used his mother as his surrogate lobe, and when he moved out of his mother's house, his co-defendant, Tivan Johnson, became his frontal lobe.

Dr. Eisenstein's opinion was again contradicted by the defendant's other expert Dr. Schwartz, as well as the State's experts, Dr. Levy and Dr. Puentes and various other witnesses.

Dr. Schwartz did not find this mitigating circumstance.

Dr. Levy stated that there was nothing to suggest that the defendant that the defendant [sic] acted under the domination of Johnson.

He testified that the defendant never told him that he committed the murder because Johnson told him to do it.

Dr. Puentes, who found no frontal lobe impairment, testified that there is nothing to suggest that the defendant was under the domination of another.

Renee Carey testified thta [sic], when the defendant lived with her and Tivan

> Johnson, they were on equal footing. She stated that Tivan Johnson was not a leader. Darlene Cooper, the defendant's sister, testified that he was the type of person who had his own mind.
>
> * * *
>
> There was no evidence that established the defendant was under duress by any other person.
>
> The Court rules that Dr. Eisenstein's testimony on this mitigating circumstance was not credible, and thus there was no credible evidence to show that the defendant was under the substantial domination of Tivan Johnson, or any other person at the time of the homicide of Charles Barker.

(T. 3445-47).

The threshold issue with regard to claims VI and VIII is whether the codefendant's presentation of mitigation during the penalty phase is a "critical stage." Obviously, if such a presentation is not, any claim based on the absence of Defendant or his counsel during a critical stage is groundless. Defendant cites to cases which hold that a capital sentencing proceeding is a critical stage. Defendant cites no case, however, that holds that a codefendant's sentencing hearing is.

The State would submit that a sentencing hearing, the sole

purpose of which is to submit evidence in support of the mitigation of the codefendant's sentence, is not a "critical stage." As has been repeatedly held, the defendant in a capital case is entitled to an individualized determination of his sentence. That being the case, the State would submit that a defendant's codefendant would simply not have the right to inject himself into a proceeding which has the sole purpose of presenting the defendant's mitigation evidence. Indeed, in this case the jury had already been informed that the evidence it was receiving was to pertain solely to its determination of Cooper's sentence. The information presented would simply not be relevant to the defendant's sentence. As such, the right to presence and to the assistance of counsel, which arise from the defendant's interest in the proceeding, simply do not arise. See, e.g., Parker v. State, 641 So. 2d 369, 376 (Fla. 1994)(proceeding in which defendant would have no control of matters presented not a critical stage).[17] Here, because the sole issue before the jury was whether mitigation of Cooper's actions existed, an issue wholly without legal consequence for defendant,

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[17] Contrary to Defendant's argument, the focus of Cooper's mitigation evidence was not on Defendant's alleged domination of him; even one of Cooper's own experts rejected the existence of the mitigator. Indeed as the trial court noted, while some of Cooper's relatives expressed dislike for Defendant, there was simply no credible evidence that Defendant dominated Cooper.

the proceeding was not a critical stage. Consequently, Defendant's arguments based upon his and counsels' absence must fail.

Finally, assuming, arguendo, that any error occurred, it was harmless beyond a reasonable doubt. Contrary to Defendant's assertions, the absence of counsel from a critical stage proceeding is not per se reversible error unless the absence amounts to a total deprivation of counsel throughout the entire proceeding or is such that it affects and contaminates the entire proceeding. Otherwise, harmless error analysis applies, even in capital sentencing proceedings. Satterwhite v. Texas, 486 U.S. 249, 256-58, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988); Vileenor v. State, 500 So. 2d 713, 714 (Fla. 4th DCA 1987)(partial absence of attorney subject to harmless error analysis). Likewise, the absence of the Defendant is also subject to harmless error analysis. See Turner v. State, 530 So. 2d 45, 50 (Fla. 1987)(defendant's involuntary absence from critical stage harmless where he could not have offered further assistance were he present).

Despite the picture painted in Defendant's brief, no ultimate prejudice resulted from counsels' or Defendant's absence. They were present during the presentation of all of the State's

evidence, including Cooper's confession from the Walker murder case, Further, they were present on the afternoon of the second day of the Cooper sentencing proceeding when the State presented rebuttal and Cooper presented additional testimony. Finally, they were present for Cooper's closing argument, which took place before their case even began. As such they were fully able to call any witnesses in rebuttal to Cooper's allegations or to recall any of his witnesses and further examine them if they desired. Furthermore, three strong factors were found in aggravation by the court, which are supported by the record and unchallenged by the defense on appeal. None of them rest upon the defendants' relative culpability. Likewise, Defendant raised only one mitigating circumstance remotely related to Defendant's fault vis-a-vis Cooper's: duress or substantial domination. But as the trial court noted in rejecting it, there simply was no evidence that Defendant's participation in this crime was in any way affected by anyone else's domination over him. (R.636). That would have remained true even had Defendant or counsel been present to cross-examine Cooper's witnesses. Furthermore, as pointed out above, the State vigorously attacked Cooper's claim of domination by Defendant, cross-examining his witnesses, presenting rebuttal to show that the murder of Barker was the result of an equal

partnership, and arguing, accurately, that there simply was no credible evidence that Defendant in any way dominated Cooper. The trial court rejected Cooper's claim, also finding no credible evidence to support it. Finally, given the identical 8 to 4 votes, it must be presumed that the jury rejected the claim as well, properly finding that the defendants were equal partners, equal participants and equally at fault. Nothing Defendant or counsel could have done had they been present on the afternoon of April 20th would have changed that outcome. This claim must be rejected.

## VII.

## THE TRIAL COURT PROPERLY REFUSED TO SEVER THE DEFENDANTS' PENALTY PHASE TRIALS.

Defendant's seventh contention is that despite an agreed-to joint guilt-phase trial, severance of the defendants' respective penalty-phase proceedings was required because of Cooper's allegedly antagonistic mitigation theory.[18] This claim is without merit. Even if the proceedings should have been severed, any error is harmless beyond a reasonable doubt.

The trial court found three aggravating circumstances applied: (1) prior capital and violent felony convictions, relating to the Walker murder/robbery; (2) murder committed in the course of a burglary and robbery merged with murder committed for pecuniary gain; and (3) murder cold, calculated, and premeditated, all of which are well supported by the evidence.[19] (R. 628-32). By comparison, established only one statutory mitigator: that he was under the influence of extreme emotional distress, based upon his being depressed. (T. 634-35). His nonstatutory mitigating evidence

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[18] The relevant facts and procedure regarding the sentencing proceedings have been set out supra at Points VI & VIII.

[19] Defendant has not challenged these aggravators.

consisted primarily of evidence of illness as a baby, that he had contact with his father only once a month, was taunted by siblings, had learning disabilities, was well-behaved as a child and devoted to his mother, and had community involvement through Boy Scouts. (R. 626-41). It is arguable that many of these facts, rather than mitigating Defendant's conduct, tend to show that he really had no excuse for his behavior.[20]

Defendant also argued that the mitigators of victim participation, duress or substantial domination, inability to conform his conduct to the law and age applied. The claim of victim participation was based upon the allegation that Barker went for his gun before the defendants did. The trial court was unable to locate any evidence to support this claim in the record, further noted that Barker in no way consented to being robbed or killed, and rejected this claim. (R. 635-36).

The duress claim was based upon testimony by Defendant's teacher and mother that Defendant was not a leader. The court

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[20] The trial court nevertheless found that these facts established mitigation, but did not outweigh the aggravation. (640). Defendant does not challenge any of the court's findings regarding mitigation.

noted, however, that there was no evidence in the record that Cooper or anyone else in any way dominated Defendant. It further noted that the State's expert opined that Defendant was of average intelligence, and rejected this factor as well. (T. 636).

Defendant's expert, Dr. Del Rio, testified that although Defendant could appreciate the difference between right and wrong, his depression prevented him from being able to conform his conduct to the requirements of the law. Dr. Garcia refuted this contention, and the court found Dr. Garcia more credible and rejected this mitigator. (R. 636-37).

Finally, as to age, the court observed that there was nothing linking Defendant's age to some other characteristic such as immaturity. On the contrary, the court noted that Defendant was of average intelligence, a good worker, and an Eagle Scout. The court therefore gave the mitigator little or no weight. (R. 637).

Of particular note, the vast majority of Defendant's proffered mitigation had nothing to do with the relative culpability of Defendant and his partner in crime. The only factor that did, duress, was not strongly pursued by Defendant, and would have been

without evidentiary support, even without the evidence adduced during Cooper's sentencing proceeding. Finally, it must be recalled, as discussed with regard to Points VI & VIII, supra, that the court found Cooper's claims of duress even less credible. In short, when Defendant's proffered mitigation was weighed against the substantial aggravation, the jury's recommendation was inevitable.

Furthermore, severance may be granted only when failure to do so would deny the defendant a "fair determination" of the issues by the jury. McCray v. State, 416 So. 2d 804, 806 (Fla. 1982); Espinosa v. State, 589 So. 2d 887, 891 (Fla. 1991). No severance is necessary when the circumstances are such that the jury will not become confused:

> This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's [sentence].

Espinosa, 589 So. 2d at 891, quoting McCray, 416 So. 2d at 806.

The Court further explained that in the non-Bruton context[21] certain "general rules" apply. These "rules" provide that a better chance of acquittal, strategic advantage, or hostility among defendants are not valid bases for severance. Id. Yet plainly such factors are the very basis of Defendant's claim.

The record reflects that there was no chance that the jury was unable to provide Defendant with a "fair determination" of his sentence. As noted above, Defendant's problem was not a comparison of his mitigation with his Cooper's, but with his deeds. Further, the record reflects that the State in no way attempted to use any of Cooper's claims of domination against Defendant. Rather, the prosecutor presented evidence and argument to the contrary, showing that Cooper was in no way dominated by Defendant. Further, the court on several occasions reminded the jury that the proceedings involving Cooper related only to Cooper. Ultimately, the jury's

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[21] The State submits that this claim cannot be regarded as a Bruton issue. The issue is not the presentation of the defendants' respective confessions to the murder for which they were being sentenced, to which Defendant interposed no objection, but the introduction of underlying evidence regarding a crime for which Defendant had already been convicted. In any event, even if Bruton were implicated, and violated, any error would be subject to harmless error analysis, Grossman v. State, 525 So. 2d 833 (Fla. 1988), which will be addressed, infra.

recommendation of death by a vote of 8 to 4 for both Cooper and Defendant makes it abundantly clear that they found the defendants to be equally responsible for the death of Charles Walker.

Finally, as discussed with regard to Claims VI and VIII, supra, and above as to this point, there is simply no reasonable possibility that the omission of the evidence adduced with regard to Cooper would have affected the outcome of the proceedings. This is particularly true of the evidence regarding Cooper's confession to the Walker murder. Although Cooper alleged in his confession that Defendant told him to shoot Walker, Defendant's claim in his own confession that he did not intend that Walker die is simply unworthy of belief. Defendant was in fact convicted of first degree murder in that case by a jury which did not hear the Cooper confession. Further all the facts suggest an intent to kill him. Defendant stated that Cooper was pointing the gun at Walker's head as he was entering the freezer when he shot him. However, the medical examiner testified that based on Walker's position and the blood spatter evidence, Walker was kneeling at the time he was shot in the back of the head. Moreover, Walker knew Defendant, and could therefore identify him, and Defendant disliked Walker, because of Walker's racist attitude toward Defendant when he worked

for him. Finally, the Walker murder, although tried first, actually occurred several weeks after the Barker murder and the robbery of the Outpost. At the very least Defendant knew that the undertaking of a robbery could result in the death of the victim. At most the evidence evinces a conscious modus operandi of taking the money and leaving no witnesses behind. This claim should be rejected.

## IX.

## DEFENDANT'S SENTENCE IS PROPORTIONAL

Defendant's ninth claim is that his sentence is disproportionate. This claim is wholly without merit.

"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; (2) murder committed during the course of a robbery, merged with murder committed for pecuniary gain; and (3) cold, calculated, and premeditated. The

court found one statutory mitigating circumstance, extreme mental or emotional distress, based upon Defendant's history of depression, and minimal nonstatutory mitigation, which the court "took into consideration": illness as a baby, contact with father only once a month, taunting by siblings, learning disabilities, well-behaved as a child, devoted to his mother, community involvement through Boy Scouts. (R. 626-41).

Numerous cases have affirmed death sentences where the murder was committed during the course of a robbery. See, e.g., Smith v. State, 641 So. 2d 1319 (Fla. 1994); Heath v. State, 648 So. 2d 660 (Fla. 1994); Carter v. State, 576 So. 2d 1291 (Fla. 1989); Cook v. State, 581 So. 2d 141 (Fla. 1991); Lowe v. State, 650 So. 2d 969 (Fla. 1994); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (murder during course of burglary/for pecuniary gain); Wickham v. State, 593 So. 2d 191 (Fla. 1992) (murder committed during an armed robbery).

Many of the foregoing cases also present a combination of aggravating and mitigating circumstances comparable to the instant case. In Smith, the defendant received the death sentence for the killing of a cab driver. Id., at 1319. The trial court found

the existence of two aggravating circumstances: (1) the murder was committed during an attempted robbery; and (2) the defendant had a previous conviction for a violent felony. If anything, the aggravation in Smith is less than here, where the additional factor of killing a policeman/witness elimination was found. In Smith, the court also found one statutory mitigating circumstance -- no significant history of criminal activity -- and several nonstatutory mitigating circumstances relating to Smith's background, character and record. This court rejected Smith's claim of disproportionality. Here, with considerably more aggravation and less mitigation -- as there were no statutory factors found -- and a basically similar situation of a murder during armed robbery, the case is more compelling for the imposition of the death sentence.

In Heath, the two aggravating circumstances were the commission of the murder during the course of an armed robbery, and the existence of a prior conviction for second-degree murder. As in Smith, the murder was not accompanied by the additional aggravating factor. The court found substantial mitigating factors, including the influence of extreme mental or emotional disturbance, based upon consumption of alcohol and marijuana, as

well as minimal nonstatutory mitigation. In Heath, as here, although the defendant was not determined to be the actual shooter, he was at least a co-equal participant in the underlying crime. This court determined that the death sentence was appropriate.

In Lowe, the defendant was convicted of the murder of a convenience store clerk during the course of an attempted armed robbery. Two aggravating factors existed: (1) prior conviction of a violent felony; and (2) murder committed during the attempted robbery. Once again, the sentence was affirmed in a case virtually identical to the instant one, minus Defendant's additional witness elimination/law enforcement officer factor. The Lowe trial judge's sentencing order was somewhat ambiguous as to whether he was rejecting all of the mitigation or whether he was treating it as established but outweighed by the aggravation. This court, on appeal, assumed that the various mitigating factors were established (defendant 20 years old at time of crime; defendant functions well in controlled environment; defendant a responsible employee; family background; participation in Bible studies) and nevertheless proceeded to find that the death sentence was warranted.

Other cases similarly support the conclusion that the death sentence was proper in the instant case. 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); Freeman (aggravators: prior violent felony; murder during course of burglary/committed for pecuniary gain; mitigation: low intelligence; abuse by stepfather; artistic ability; enjoyed playing with children); Cook (aggravators: murder during course of robbery; prior violent felony; mitigation: no significant history of criminal activity and minor nonstatutory mitigation). In view of the foregoing, the imposition of the death sentence here is clearly proportionate with death sentences approved in other cases.

## X.

**DEFENDANT'S ATTEMPT TO RAISE THE ISSUE OF ALLEGED JUDICIAL BIAS FOR THE FIRST TIME ON APPEAL IS IMPROPER, AND IN ANY EVENT, THE BASIS HE ALLEGES WOULD BE LEGALLY INSUFFICIENT TO WARRANT DISQUALIFICATION OF THE JUDGE.**

Defendant's tenth assertion is that brief comments made by the court to the families of the victims after the jury returned its sentencing recommendation evinced judicial bias warranting reversal. This claim was not raised below, and in any event is without merit.

The provisions for the disqualification of a trial judge for alleged bias are very specific:

> A motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting grounds for the motion ... Any motion ... shall also be filed in writing ...

Fla. R. Jud. Admin. 2.160(d); see also, §§38.02 & 38.10, Fla. Stat. The facts that Defendant now alleges demonstrated judicial bias occurred at the conclusion of the sentencing proceedings before the jury on April 28, 1995. At no time before the sentencing hearing before the court on May 17, 1995, or the pronouncement of sentence on June 1, 1995, did Defendant ever raise the issue, much less comply with the explicit requirements that the

motion be in writing and be supported by affidavit. Fla. R. Jud. Admin 2.160(c); §38.10, Fla. Stat. This court has held that these requirements are a predicate to consideration of the issue:

> [A]ll motions for disqualification of a trial judge must be in writing and otherwise in conformity with this Court's rules of procedure. The writing requirement cannot be waived ...

Rogers v. State, 630 So. 2d 513, 515 (Fla. 1993).[22] Because Defendant at no time within the 10-day period, or at all, raised the issue of the judge's alleged bias in writing, or even orally, he may not circumvent the procedures set forth and attempt to have the question reviewed for the first time on appeal.

Furthermore, even had the issue properly been broached below,

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[22] Compliance with these requirements is not merely a procedural requirement, but is designed to protect the integrity of the judiciary. Attempting to raise the issue of judicial bias in a manner other than that provided for in the rule is thus improper:

> The procedure for questioning a judge's fairness is clearly set out in Florida Rule of Criminal Procedure 3.230 [now Fla. R. Jud. Admin. 2.160]. I believe that the procedure was designed to protect the entire judicial system, rather than to protect an individual judge. Thus, the failure of counsel to follow the procedure significantly impacts the integrity of the system.

Rogers, 630 So. 2d at 520 (Harding, J., concurring).

the unsworn allegations now advanced would be legally insufficient to have warranted the recusal of the judge.[23] Upon the filing of a timely, written motion, the trial court may only review the motion for whether it and the affidavit present legally sufficient reasons for disqualification. The court may not delve into the truth or falsity of the factual allegations. Dragovich v. State, 492 So. 2d 350, 352 (Fla. 1986). If the motion is legally sufficient, i.e., if the moving party "has a well-grounded fear that he will not receive a fair trial at the hands of the judge," the court must recuse itself. Id.

The essence of the claim here is that the judge had already decided to sentence Defendant to death, i.e., that the court already had a "fixed opinion of guilt" with regard to the propriety of the death penalty in Defendant's case. In Nickels v. State, 86 Fla. 208, 98 So. 497 (1923), this court specifically rejected the notion that the trial judge's formation prior to the end of trial of a "fixed opinion of a defendant's guilt" was a legally sufficient basis for recusal. Although "guilt" or "innocence" of

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[23] That counsel, who plainly demonstrated no shyness in raising objections, many over repeated denial by the court, never raised the issue below strongly suggests that neither counsel nor Defendant perceived any bias by the court.

the death penalty is not a perfect analogy, it is one frequently made by the defense bar, and sufficiently analogous for present purposes, as this court held in Dragovich. There the Court applied Nickels to a claim that the trial court felt that the death penalty was appropriate in Dragovich's case. Dragovich, 492 So. 2d at 352. The Court rejected the defendant's attempt to distinguish Nickels on the basis that in a capital sentencing proceeding, the court is the ultimate trier of fact, a role limited to the jury in a guilt-phase trial.

The application of this rule is more compelling here than it was in Dragovich. In that case the basis of the defendant's concern was that the same judge had previously sentenced Dragovich's accomplice to death over a jury recommendation of life. Here, on the other hand, any "bias" purportedly attributed the trial court was clearly based upon the evidence the court had heard at Defendant's trial.[24] Thus even if the comments could be construed as evincing a "fixed opinion" as to Defendant's guilt,

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[24] The judge below was not the same judge who had tried Defendant for the murder of Thomas Walker. Further, the statements regarding Defendant's trial being the last capital case the judge would try was based upon the fact that the judge reached retirement age during the pendency of the proceedings below.

such opinion was based upon the evidence adduced showing Defendant's guilt, not upon any improper prejudging or personal animosity toward Defendant. In short, the allegations made on appeal, in addition to being untimely and improper in form are legally insufficient to form a basis for recusal and would have thus been properly denied had they been presented below. Dragovich; Nickels; Jones v. State, 411 So. 2d 165, 167 (Fla. 1982)(motion to disqualify judge from penalty phase based upon fact that judge had previously sentenced defendant to death properly denied as untimely where no good cause was shown for not having raised it within ten days, and as legally insufficient); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992)(motion to disqualify judge who had tried and sentenced defendant to death three times previously on basis that court had formed a fixed opinion of defendant's guilt and had communicated same to others properly denied as legally insufficient); Parnell v. State, 627 So. 2d 1246, 1247 (Fla. 3d DCA 1993)(untimely motion to disqualify alleging ex parte communication between State and judge properly denied where no good cause shown for untimeliness).[25]

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[25] Here, as the comment was made in the presence of both Defendant and counsel, there is no basis to excuse the failure to file a timely motion.

Finally, the comments made by the court below, in view of their timing and the totality of the circumstances do not amount to any deprivation of due process warranting relief in spite of Defendant's procedural default. At the time the comment was made, the jury had already returned its sentencing recommendation. The judge was addressing the comments to the victim's relatives, and was merely offering his sympathies for their loss. Furthermore, the jury recommended by a vote of 8 to 4 that Defendant be sentenced to death. Under Florida law, the jury's recommendation is entitled to great weight, and unless "the facts suggesting a sentence [differing from the jury's recommendation] be so clear and convincing that virtually no reasonable person could differ," it should be followed by the trial judge. Tedder v. State, 322 So. 2d 908 at 910 (Fla. 1975); Grossman v. State, 525 So. 2d 833, 840 n.1 (Fla. 1988)(jury's death recommendation, like life recommendation, entitled to great weight); Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980)(same); LeDuc v. State, 365 So. 2d 149, 151 (Fla. 1978)(same).

The court's comments, as alluded to above, do not evince any

personal bias or animosity[26] on the part of the court. Rather, if the judge's statements reflected any disposition to sentence Defendant to death, it was based wholly on the evidence presented at trial. See Liteky v. U.S., ___ U.S. ___, 114 S. Ct. 1147, 1155, 127 L. Ed. 2d 474 (1994) ("The judge who presides at trial, may upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to the completion of the judge's task. ... If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."). As discussed elsewhere, the evidence fully supported the finding of three aggravating circumstances including another robbery/murder. Notably, Defendant has not challenged the trial court's findings as to the aggravating and mitigating circumstances. Further, after the comments in question, the court held a sentencing hearing before the court at which time the court stated that it would "listen to anything" the

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[26] Indeed, the record reflects that the court addressed both defendants with the utmost of respect throughout the proceedings.

defense wished to present. (T. 3423). The judge then watched a video of Defendant acting as a sportscaster on the jail television system, which was proffered to show Defendant could adjust to a prison environment.[27] Id. After defense counsel presented argument in favor of life, the court inquired whether there was "[a]nything further from either Mr. Cooper or Mr. Johnson?" (T. 3425). The court then allowed Cooper's mother to speak. (T. 3428). The court again asked if there was anything further from the defense. Finding nothing, the court concluded the hearing:

> Okay. Now I have to prepare a sentencing order which is not easy in these types of cases. As I said, the sentencing memorandums are excellent, but I seem to have misplaced the State's memorandum. I wonder if you might send another copy to me please.
>
> I have the ones for Johnson and Cooper. I will set the sentencing order for June the 1st which is I believe two weeks from Tuesday -- Thursday, rather, ten o'clock.

(T. 3430). Finally, the court's sentencing order, which was read and filed at a hearing two weeks later, reflects that it carefully considered Defendant's proposed mitigation, accepting the existence of one statutory mitigating circumstance, "considering" all of the

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[27] This was the only additional evidence presented by Defendant after the jury recommendation. In view of the substantial aggravation, it did not present any reasoned basis for overturning the jury's recommendation.

non-statutory mitigating circumstances proffered and concluding that although Defendant had established "significant" mitigation, it simply did not overcome the aggravation proven by the State:

> The jury recommended to this Court that it impose the death penalty upon the defendant for the First Degree Murder of Charles Barker. There are aggravating factors present. There are also statutory and non-statutory mitigating circumstances, in particular, that when the capital felony was committed, the Defendant was under the influence of extreme mental or emotional disturbance. The Court takes notice of the extreme devotion of the Defendant to his mother and his mothers [sic] absolute devotion to her son. The Court also takes into consideration the Defendant's surprising and inspirational success as an Eagle Scout. The Court can relate to this being as the Court is also an Eagle scout. The Court sincerely wishes it did not have the responsibility of sentencing this particular Defendant. However, we have all agreed to abide by the law and the law appears to be quite clear.
>
> After independently reviewing and weighing the evidence the Court finds that more than sufficient aggravating circumstances were proven beyond and to the exclusion of every reasonable doubt to justify the imposition of the sentence of death. The mitigating circumstances which exist are significant but not to the degree which would cause them to mitigate the crime or the sentence. There are sufficient aggravating circumstances that exist to justify a sentence of death, which outweigh any mitigating circumstances that are present. This Court independently finds and concurs with the advisory sentence and recommendation entered

> by the jury. Therefore, the Court sentences Tivan Johnson, as to Count 1, for the First Degree Murder of Charles Barker, to death.

(T. 640-41). Plainly any intimation as to the judge's impression of the appropriate sentence in his brief comments to the victim's survivors did not prejudice Defendant. See Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994)(failure to follow procedures mandated by Spencer[28] not reversible error due to absence of prejudice to defendant where "almost all of the arguments and evidence presented at the sentencing hearing had previously been heard by the trial judge ... Moreover, the record reflects that the trial judge allowed Armstrong an opportunity to present evidence at the sentencing hearing."). This claim, which is untimely, which was not properly presented below, and which is substantively without merit, should be rejected.

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[28] Spencer v. State, 615 So. 2d 688 (Fla. 1988), requires that the court file its written sentencing order contemporaneously with the passing of sentence, after having allowed the parties to present any evidence that they desired to the court.

## XI.

## THE DEATH PENALTY IS NOT UNCONSTITUTIONAL.

Defendant's final claim is that the death penalty is unconstitutional. This claim is both unpreserved and without merit.

Defendant raises a myriad of claims regarding the constitutionality of the death penalty, none of which were raised below. See, Taylor v. State, 601 So. 2d 540 (Fla. 1992) (sentencing errors requiring resolution of factual matters not contained in record cannot generally be raised for first time on appeal). As such they may not now be raised. Furthermore, they are without merit. Foster v. State, 614 So. 2d 455, 463-65 (Fla. 1992); McClesky v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed. 2d 262 (1987); Roberts v. State, 510 So. 2d 885, 895 (Fla. 1987); King v. State, 514 So. 2d 354, 359 (Fla. 1987); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). Thompson v. State, 619 So. 2d 261, 267 (Fla. 1993); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983); Raulerson v. State, 358 So. 2d 826 (Fla. 1978); Profitt v. Florida, 428 U.S. 242, 98 S.Ct. 2980, 49 L.Ed. 2d 913 (1976).

## CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,
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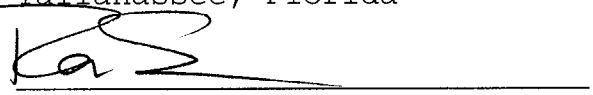

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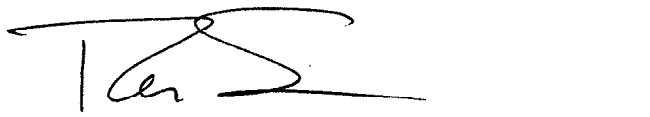
## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Brent E. Newton and Christina A. Spaulding, Assistant Public Defender, 1320 Northwest 14th Street, Miami, Florida 33125, this 17th day of September, 1996.



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