IN THE SUPREME COURT OF FLORIDA

LORAN COLE,
Appellant,

v. CASE NO. 87,337

STATE OF FLORIDA,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State accepts the Statement of the Case and Facts set-out by Appellant subject to the following additions and corrections.

GUILT PHASE

Pamela Edwards flagged down Dan Jackson, who had been camping with his family at Hopkins Prairie (R 555). Pam told him that she had been tied up and raped and was looking for her brother whom she thought had been hurt (R 550). She cried as she spoke to the authorities by phone (R 560). The day before Mr. Jackson had come upon a small two-man pup tent pitched away from everything. He thought it a weird place to pitch a tent unless the occupants were hiding. He saw a man by a campfire, and he said "Hello." The man looked at him as though he should not have been there. There were two males, and they gave him a weird feeling. Pam had told him two men had her in a tent, and she mentioned a backpack that she could not find. Mr. Jackson walked by the area again and found that the tent had been taken down, although parts of it had been left. The site was in disarray, and it appeared that the men had left quickly. He saw the backpack in the weeds next to where the tent had been (R 565). He took the deputies to the area (R 566).

Cole suggests in footnote 12, page 12, of his Initial Brief that Pam made "reports" to Lake County Deputy Tammy Jicha that she

had been raped by both Cole and Paul. No such reports were made (R 572-582). In explaining the events and the sexual assault to Dan Jackson, Pam used the word "they;" Mr. Jackson mistakenly assumed that she had been assaulted by both men (R 567-570).

Deputy Jicha responded to the convenience store in Altoona (R 572). She described Pam as frantic about her brother (R 573).

Pam was transported to the Munroe Regional Medical Center. Marion County Sheriff's Detective Bill Sowder took a taped statement from her (R 586). Photos were taken of a laceration to her head and ligature-type marks on her wrist. Detective Sowder took Pam with him to direct him to the campsite where the attack occurred (R 590). Pam gave descriptions of the persons involved, and the detective transmitted an update to an earlier BOLO (R 591). They turned onto Forest Road 86, then on 86-F (R 593). A perimeter was set up on the roads, and people were questioned (R 594). Paul White and Lieutenant Jim Wisniewski gave the detective and Pam directions to the scene of a fight, telling them to follow the trail (R 597). As they drove into the campsite, Pam recognized her 1991 Nissan, which was backed into a wooded area to the right (R 598). The vehicle was impounded (R 606). She pointed out their campsite, the bathrooms, and the defendant's campsite (R 598). The defendant's campsite was 200 to 300 feet from hers, on the outer

perimeter. There they found a backpack, a pair of boots, twine, and an arrow shaft for stabbing fish in water (R 603). Efforts were made to locate John Edwards' car - a 1991 blue convertible Geo with a black top. The tag was missing from Pam's Nissan. The detective assumed it had been placed on the Geo which did not have a tag. The tag number was dispatched in the BOLO (R 607-608).

Pam was returned to the hospital for a rape examination. A blood specimen, pubic hair combings, hair standards, and her clothing were taken (State's Ex. 31-34) into evidence (R 608-09,707,712-14). She was treated for a laceration to her head (R 716). She spoke to her mother in Japan, and sobbing and crying, she recounted the events (R 718). Serological testing revealed the presence of semen on vaginal smears and swabs (R 1074). Semen was also found on Pam's panties and sweatpants (R 1076-77). Fibers were found in the pubic hair combings consistent with fibers in State Exhibit 87 - a blue and black check shirt, later found in a backpack in the trunk of John's abandoned Geo (R 1053).

At approximately 2:00 p.m., Detective Sowder went to the scene where John's body was found (R 610). Jim Wisniewski had found the body (R 659). He walked down the trail and saw an area where the ground and leaves were disturbed, indicating a struggle of some sort had occurred (R 661). He heard flies buzzing. Paul White of

the U.S. Forest Service saw a spot that looked like someone had gone through the brush. Jim approached the area from the backside and located the body (R 660,664). It was found a quarter of a mile from the campsite, down a foot trail, off an intersection, to the left (R 612). The scene of a fight was nearby. The sugar sand had been turned up and was twisted with little holes. In the middle of the path, there was a wet spot, twelve to fourteen inches in diameter, which appeared to be blood (R 613). Dirt had been mounded over it as if someone had tried to cover the spot (R 662). The body was about 100 feet from the mound in a northeasterly direction. North of that was another disturbed area with another blood spot. The body had been placed off the trail and covered with pine needles, sand, debris, and fresh-cut small palm fronds. It was face-down (R 614). At the time of his death, John was wearing a sweatshirt and jeans (R 614). Both of his hands were in an upward fetal position. His left wrist had a shoestring ligature around it. A shoestring was partially wrapped around the right wrist, but not tied (R 618). A tremendous amount of blood had soaked through the sweatshirt and a T-shirt underneath. The belt to John's jeans was unbuckled, the snap open, the zipper partially down and the pockets partially turned out in the front (R 619). Only a Swiss Army pocketknife and camera lens cover were found in the pockets (R

619). No wallet, money, car keys, jewelry, or shoes were found on his body (R 620, 622). Another shoestring and a lens cover were found near John's body. One black Nike tennis shoe had been thrown into the brush, and the other was found on the ground ten to fifteen feet away (R 622). Neither shoe had laces (R 623). John's body appeared to have been moved from the large bloodspot to where it had been covered. John's white socks bagged at the end of his feet as though they had been pulled through the dirt. His jeans were filthy, and there appeared to be blood near the waist (R 623). There were drag marks around the body. A black Nikon with a large telephoto lens was found on the opposite side of the trail, some fifteen feet from the main trail. There appeared to be blood in the lens. Part of the flash had been broken off and was missing (R 624). John's body was removed from the scene (R 618).

Pam went back to Hopkins Prairie and showed police where she had been tied between two pine trees on a trail south from Forest Road 86 (R 625-26). There were nails bent over in the tree with twine tied to them (R 626). Items such as a tape cassette and documents from the glove compartment of Pam's car were scattered on the ground where the car had been found. It appeared that Cole and Paul, had gone through the car (R 627).

A couple of days later, Detective Sowder went out to Hopkins

Prairie with a search and rescue unit (R 627). The officers found a large, oak walking stick on the trail near where John's body was found. It was four-and-a half feet high and about two-and-a-half to three-and-a-half inches in diameter (R 628). A stump was found that matched the cut-off stick. The flash attachment to the Nikon was found north of where the body had been found (R 629). On March 27, 1995, the detective returned and walked the same path walked by Pam, John, Paul, and the defendant on the night of the murder. He videotaped as he walked, and the videotape was introduced into evidence, without objection, as State's Exhibit 6 (R 642-644). It was published to the jury (R 651).

About five o'clock Sunday afternoon, John Tilley, a forensic artist, met with Pam and completed sketches of the suspects. State's Exhibit 111 is a sketch of Loran Cole, and 112 is a sketch of William Paul. These sketches were released to the media (R 652). Investigators Thomas Bibb and Carmen DeFalco also met with Pam on Sunday evening, and she gave them new descriptive information - that one of the suspects had a chipped tooth and an earring in one of his ears (R 958). State Exhibits 36 and 37 are booking photos that reflect the way William Paul and Loran Cole looked upon their arrests (R 956).

Marion County Sheriff's Department crime scene technician

William M. Lynam, Jr. went to the campsite of the two victims (R 675). The tent and sleeping mats were taken into evidence (R 675). He next went to the camping area of Cole and Paul. The grass was matted down, and it was still dry. One, possibly two, tents had been set up in that space, and a firepit had been dug. Mr. Lyman found a backpack and a pair of black hiking boots. The backpack contained Pam's clothing, a letter to her, and a 35 millimeter camera (R 676). A Coleman fuel can, a couple of empty milk-type jugs, and a package of styrofoam plates were processed for prints (R 697). He took photos and a video of the area (R 676). Then, he went to where John's body had been found. Part of the red stain (State's Ex. 10) was collected and later found to be blood. The test did not reveal if it was human blood. A second stain was found northeast of the first (R 698). Mr. Lyman took a wad of black shoestrings (State's Ex. 8) found ten feet from the body, a lens cap (State's Ex. 11), the shoes without strings (that had been tossed up into a scrub oak to the side of the body) (State's Ex. 7), a 35 millimeter camera (State's Ex. 13), and an empty can (State's Ex. 13) into evidence (R 678). Pictures of the various exhibits were admitted into evidence at trial without objection (R 680). Mr. Lyman also went to an area a mile-and-a-half west of the main entrance. He found audio cassette tapes, letters and maps,

which had been thrown from Pam's car, and took them into custody (R 680). He then went to a two-rut trail leading south off of the road, then east back into the woods to the location where Pam had been tied to the trees (R 681). He found two pine trees with several nails driven into them and black and white string or nylon rope tied to the nails. The nails had been bent over to secure the rope to the tree (R 681). Photos of the nails and rope were admitted into evidence, without objection, as State's Exhibits 23A-D; they were published to the jury (R 682). State's Exhibit 9, the black shoestrings, and the camera found across from John's body were admitted into evidence, as State's Exhibit 16, without objection (R 683, 685-686). A small triangular piece of black plastic was wedged underneath the shoe of the camera, but there was no flash attachment on it (R 685). The nails removed from the pine trees, with twine still tied to one, were admitted into evidence, without objection, as State's Exhibit 24 (R 686). Four days later, on February 24th, Mr. Lyman went out to the crime scene with Investigator Sowder (R 687). Slightly northeast of where John's body was found, the men found the flash attachment with a piece of black plastic broken off (R 688). State's Exhibit 13, a photograph of the flash and area where it was found, was admitted into evidence without objection (R 689). They also found an oak stick or

club, forty-seven inches in diameter, about thirty feet south of where John's body was found (R 699). State's Exhibit 14, a picture of the club, Exhibit 18, the club itself, and Exhibit 17, the flash attachment, were admitted, subject to being tied up (R 690, 691, 692). The officer testified that he found and collected State's Exhibit 19, a freshly cut tree, in front of a deer stand not far from the body (R 693). It was not deer hunting season, and the tree was not blocking the stand (R 694). It was similar in size and cut to the club (R 694). State's Exhibit 25, which was admitted without objection, is the bulk of the twine that was connected to the nails on the two trees (R 696).

Forensic pathologist Dr. Janet Pillow performed an autopsy on the body of John Edwards on February 21, 1994 (R 736). John was 6'2" and weighed 175 pounds. (R 738). Dirt was found in his mouth. His throat had been cut. There was a single cut running across his neck, cutting through the muscles and into the airway (R 739). The outside of the right ear was lacerated and abraded, as was the skin behind the ear. There was a laceration on the right side of the back of his head from one side to the other, extending down to the skull bone. Farther down toward his neck was an area of small abrasions and bruises. He had a small laceration on the back of his right hand and a bruise on the right ring finger. There were

also small abrasions at the base of the right little finger and ring finger (R 740). There was an abrasion on the back of his left shoulder and two very small abrasions underneath the left knee area. The injuries to the throat, the right ear, and the right back of the head were inflicted while he was alive. An internal examination revealed skull fractures on the right side of the base of the skull. There was a fracture line in the bone that sits on top of the left eyeball. There was bruising underneath the scalp. The cut in the neck went between the Adam's apple and the hyoid bone at the base of the tongue. Blood was present in the internal airways into the lungs (R 742). Based upon the injury to his neck, the blood found in his lungs, and the extent of bruising and blood around the brain, Dr. Pillow concluded that John was alive when these injuries were inflicted. Subdural blood, contusions to the surface of the brain, hemorrhaging in the soft tissues of the neck, and blood in the airways, indicated that he was alive when he received the injuries to his head and when his throat was cut (R 741). There was no way of knowing whether his throat was cut first or his head traumatized first (R 744). John received at least three separate blows to the head. It could not be determined the order in which the blows were rendered. The wounds to the head were caused by blunt trauma. The blunt striking object had at

least one sharp edge (R 745). Dr. Pillow testified that a stick or club four feet long could have inflicted that type of head injury. The injuries to the ear with the abrasion surrounding it, and the bruising, laceration to the back of the head with a part of its margin abraded, indicated that whatever hit his head had a blunt surface to it, although the entire object may not have been blunt (R 746). The three blows to John's head fractured his skull and would have been enough to cause death if untreated. John could have received all three of those blows to his head and remained conscious. From the time that John's throat was cut, he remained alive for a few minutes (R 747). If he was conscious when his throat was cut, he would have remained conscious for a few moments and then lapsed into unconsciousness followed by death. The cause of death was blunt head trauma and a cut throat. John was alive at the time both of those injuries were inflicted (R 748). If John did not suffer the head injuries before his throat was cut, he received the head injuries within just a few minutes of that time (R 748). When John's throat was cut, he lost blood externally and internally, including bleeding into his airway. He experienced air hunger, which is the inability to take a breath, similar to being underwater and unable to breathe. Maggots and eggs were sent to an entomologist. Based on her approximate determination of the

time of death and the subsequent entomologist's report, which corroborated her estimate, Dr. Pillow determined that John died in the early morning hours of Saturday, February 19, 1994 (R 751). On cross-examination, Dr. Pillow testified that there was no way to tell whether John was conscious when he received any of those wounds (R 757). On redirect, she opined that John would not have been able to speak, talk, yell, or scream after the injury to his throat, although he could make agonal, gurgling, or gasping noises, trying to breathe as the blood rushed down his airway (R 760). It was possible that a 35 millimeter metal camera could have caused the head injuries (R 761).

The weekend of February 2, 1994, Allen Detwiler and his wife were at Hopkins Prairie (R 774). On Friday, Mr. Detwiler went to the store, taking a camper named "Kevin Cole" with him (R 775). Cole was camping with another young fellow who was introduced as "Chris." Mr. Detwiler identified the defendant as "Kevin Cole" (R 776). He also identified State Exhibit 36 as resembling "Chris" Paul (R 782). Cole asked for the ride, explaining that his girlfriend was supposed to take him, but she did not show up and he had no other transportation. He claimed to need groceries. Before getting into the car, Cole went to his tent and took off his hunting knife (R 777). Mr. Detwiler described it as a typical

hunting knife about six inches long. He took Cole and Paul to the store in the early afternoon (R 778,780,782). Cole purchased a 24-can case of beer, a pack of cigarettes and a bag of groceries (R 780). About four o'clock that afternoon, Cole invited Mr. and Mrs. Detwiler to his camp for dinner (R 780). Although Cole had a can of beer in his hand, he did not appear to be intoxicated (R 781). Cole had a camera and took pictures of the sunset and of the Detwilers (R 781). Mr. Detwiler had no further contact with Cole or Paul. Although he had seen them regularly throughout the week, he did not see them at all on Saturday (R 779).

Tommy Ray Davis and his son were squirrel hunting (R 785). They camped fifty or sixty feet in front of the permanent bathroom facility (R 786). Mr. Davis ran into "K.C." and "Chris" by the edge of a dried-up pond; they were talking to another man who was at the campground (R 787). K.C. and Chris came over to the Davis campsite and ate quite a bit. They all drank beer together in the evening after hunting (R 801). Cole and Paul did not appear to have transportation, so Mr. Davis took one of them to Salt Springs to get supplies. They appeared to be "roughing it" and did all their cooking in cans over their fire (R 788). K.C. had several knives, including one in a large sheath, a "street knife" with finger grips. At trial, Mr. Davis identified a knife which

appeared to be the one K.C. carried and used to open cans (R 789). Cole also carried a small pocket Buck knife. Mr. Davis identified State Composite 63, (Exhibit 67) a wood handle knife with brass on either end, as the pocket knife. He also thought that he saw the Swiss Army knife in Composite 63 come out of a backpack (R 791). He sharpened a knife Chris was using to whittle on a stick (R 790). Mr. Davis saw K.C. with a 35 millimeter camera with a lens. He took pictures of Mr. Davis' son with his Rottweiler in front of the campsite (R 792). He also saw K.C. with a flashlight or large Maglite, State's Exhibit 82 (R 793). K.C. was outgoing and would speak almost all the time. Mr. Davis left before sun up on Friday morning and came back in the afternoon. He did not see Cole or Chris, although their tent was still there (R 794, 795). After he returned home, Mr. Davis saw composite drawings on television and recognized Cole and Paul. His wife called Marion County deputies for him, and he met a deputy and went to the campsite (R 795). Although Cole had longer hair and a full beard at the campsite, Mr. Davis conclusively identified Loran Cole as "K.C." (R 796).

For nineteen years, Mallie Fulford lived in Ocala National Forest and managed her parents' mobile home rentals (R 802). Danielle Zimmerman, Mary Gamble, and their three children rented a trailer from her. John Thomson was Danielle's boyfriend and also

resided in the trailer (R 803). K.C. helped them move in, and Ms. Fulford saw him at the trailer on other occasions. She identified State Exhibit 37 as a photograph of K.C. and identified the defendant Loran Cole as K.C. (R 804-05). In February, she learned that K.C. had been arrested. She talked to Danielle, Mary, and John about it (R 805), and then called law enforcement. Deputies interviewed all of them (R 807). Mary Gamble and Danielle Zimmerman continued to live there for a short time (R 808).

John Thomson testified that he became unemployed and wound up at the Salvation Army for almost two months. While he was there, he met Danielle Zimmerman (R 810), and they decided to get a place together. He also met Mary Gamble, who was Danielle's best friend (R 811). K.C. or Kevin Cole was another Salvation Army resident that Mr. Tompson came to know. He identified Cole in the courtroom (R 812). He had seen Cole with a set of handcuffs and identified State Exhibit 78 as the same type of handcuffs (R 813). He met William Christopher Paul sometime in February. He and Danielle rented a trailer from Mallie in the Ocala National Forest. Mary and her daughter lived with them (R 814). K.C. told Danielle that he and Chris were camping in the Forest together. [She identified Chris from State Exhibit 2B (R 848)]. A few days after the incident, Mr. Tompson learned that K.C. and Paul had been arrested.

He had seen them the previous Saturday evening when they came to his trailer (R 815). They brought a case or two of beer and offered it. K.C. drank beer and seemed normal; he was smiling (R 851). Chris had a swollen hand which was quite large. He was visibly in pain and also complained about his head (R 816, 855). The two explained that four men jumped them; Chris was getting beat up, so Cole jumped in and helped out; they gave the four "a whooping" (R 818). They brought a bag of marijuana with them, and they smoked a few joints (R 831). Cole drove a black Nissan Sentra to the trailer. Mr. Tompson had never seen Cole driving that vehicle before (R 818,851). He identified State Exhibit 100 as the vehicle (R 819). K.C. gave John and Danielle a ride in the Nissan; Paul stayed and took a shower (R 819, 855). K.C. told Danielle that the Nissan belonged to a guy he was working for (R 852). K.C. drove off the road and damaged a tire. John and Danielle got into an argument, and she walked back to the trailer (R 820). Cole felt the argument might have been his fault, so he gave John a piece of jewelry from a pouch (R 822). John gave the jewelry, a gold bracelet, to Danielle (R 857). K.C. later showed Danielle rope chains and a ring that she wanted, but he would not give them to her. He said he got the jewelry for a quarter bag and was going to sell it (R 859). When they returned from the ride, they checked

out the damage to the car. Cole told Paul they would have to go back and get the other car (R 822). They put camping gear from the trunk on the kitchen table and went to get their "boss's" other car (R 854). They returned in a blue Geo; Cole said that on the way back, he had hit a deer (R 825). When they left, they put the gear in the second vehicle (R 860). However, Cole left some fishing poles, a large red Coleman cooler (State Exhibit 97), a bicycle rack, a Mag flashlight (State Exhibit 98), a Nissan hubcap, and a couple of miscellaneous items (R 822828;860). Only K.C. drove the vehicles (R 833). Cole and Paul spent the night at the trailer (R 825). Mary and Cole had a conversation about a piece of paper with the name "Edwards" on it (R 826). Cole said "Edwards" was his new business name. They left in the afternoon while Mr. Tompson was building a barbecue fire (R 827). After Mr. Thomson learned of their arrest, he took Mary to the Marion County Jail because she wanted to see K.C. (R 828). Danielle was mad at Mary for writing letters to K.C. Danielle had written K.C. a nasty six-page letter. Cole mentioned it in a letter to Mary, indicating that he was mad (R 861-63). In court, Mary identified Cole (R 863).

When Mr. Thomson returned to Florida to testify, there was a warrant regarding a trespassing citation that he had failed to pay, and the prosecutor told him that while he was there for trial, he

would not be arrested. Mr. Tompson indicated that the warrant did not cause him to testify to anything that was not the truth (R 829). Danielle had an outstanding order to serve time in county jail for failing to pay a fine on a citation for not having a driver's license. The prosecutor told her that she would not be served while she was here to testify. That assurance did not change or affect her testimony in any way (R 869).

Vicki Heim also camped at Hopkins Prairie (R 835). She arrived on Friday night. There was a campsite to the right of hers (R 836). On Saturday, Cole talked to her about her husband's truck (R 837-38). She saw a car (State Exhibit 100) at the campsite next to hers, but she did not see the boy or girl that day (R 839, 840). On Sunday, she saw the girl standing by a police car (R 840).

Mary Gamble testified that K.C. carried a pair of police standard-issue silver handcuffs on the back loop of his pants, down in his jeans. She also saw him with a hunting-type knife and a folding-blade knife with brass handles. He used the pocket knife to cut rope or scrape his fingernails (R 879). The night K.C. helped unload the truck to move into the trailer, he stayed the night for "a one-night stand" (R 880). Later, he attended a party with someone named "Steve." (R 880). She saw him between three to five times at the Salvation Army parking lot, but did not speak to

him. On the night of the murder, he showed up at the mobile home with Chris in the Nissan. She had never seen him drive that car before. K.C. told her he just wanted to drop by and apologize (R 882). Friends of Danielle's, as well as Danielle's sister, were also at the trailer that night. Everyone but Mary had one beer, and it was gone (R 883). Chris' hand was swollen, and he could hardly move it. He had a severe cut on his head and used the shower while the others rode in the car (R 884). When they got back, she got a light, and K.C. checked the damage underneath the front driver's wheel of the car (R 885). The hubcap was removed. K.C. and Chris unloaded bed padding, backpacks, a Mag flashlight, cigarette rolling stuff, a harmonica, flannel plaid shirts, and a little black camera bag. They left and returned in a blue Geo. Chris did not drive either of the cars (R 886-87). She observed K.C. showing Danielle jewelry in the back bedroom, gold chains, rings, and bracelets. It was in a little black leather pouch with drawstrings that looked like State Exhibit 62A (R 888). Underneath the driver's side door, Mary discovered a piece of paper with a name on it (R 889;893). It was a receipt for a sleeping bag from the "University of Florida" in the name of "John Edwards." She had never heard that name (R 893). She brought the paper inside and asked if anybody knew who John Edwards was. K.C. said, "Yes," but

said nothing further. After K.C. and Chris left that afternoon, she picked up a black garbage bag which she had given to Cole and Paul to use in cleaning out the car (R 894). Inside, she found a parking ticket with the name "John Edwards" on it (R 895). She gave the papers to the authorities. Cole and Paul also left a cooler with a tent or sleeping bag inside, a jack, a hubcap, a blanket, fishing poles, and a Mag flashlight; she turned these over to the authorities (R 895).

Deputy Bibb reported taking custody of, and logging into evidence, a large black Maglite, a military type olive pouch with straps with no contents, a red nylon tote bag with white trim, a scissors car jack, a Nissan wheel cover, a cash receipt from Florida State University with John Edwards name, a City of Tallahassee parking summons made out to a blue and black Geo, a red bicycle rack, a metal rod which was part of a tire tool to screw a jack up with, a broken Zebco fishing rod, several fishing rods, a yellow-striped stadium blanket, a small gold bracelet, a large red Igloo cooler with "Florida State University" on it, a large blue sleeping bag inside a red nylon draw bag with "FSU" on it, and a white plastic tray with "FSU" on it (R 948-49).

Later, when watching T.V., Mary heard the name "John Edwards" and saw a law enforcement officer escorting K.C. into the Marion

County jail. She recognized the name as the same one on the paper she had found. She obtained a newspaper and read of the details of the crimes. Ms. Gamble went to the jail alone the first time. John Thomson gave her a ride on another visit. She obtained the mailing address for K.C. (R 896). She wrote him letters, and he wrote her back. She had face-to-face visits with him in the jail four to six times (R 897). She asked him about the details of the crimes. Once, when no guards were present, he told her of his involvement. She asked who raped Pam, and he said that he did (R 89). She asked who had killed John, and he said that he did not know which one had actually done it, but he was the one that slit John's throat. He said that he did not kill Pam Edwards because he had more sympathy for women than he did for men. Ms. Gamble identified Cole in the courtroom (R 900). On cross-examination, she testified that Cole had indicated to her that he no longer wanted to have a relationship with her, and that she became very bitter toward him and expressed hatred of him because of that (R 903). She said that Cole had indicated that John was unconscious when his throat was cut (R 908). On redirect, Ms. Gamble said that she still visited Cole after he made those statements. She continued to write him, and they exchanged about fourteen letters (R 909). In order to visit Cole, she claimed that she was his

fiancee (R 910). The first person she told about Cole's statements was "Karen from the State Attorney's Office" (R 912). Investigator Karen Combs testified that on February 23, 1995, she called the police department in Arizona to have Ms. Gamble located (R 915). Ms. Gamble called the next day, and for the first time, Ms. Combs learned that Cole had confessed to Ms. Gamble. That was over a year later (R 916). Under questioning by the defense, John Thomson testified that during the time he was with Mary Gamble, she never told him that Loran Cole had confessed to her that he had cut John Edwards' throat (R 1013). Mr. Tompson lived at the trailer for only one or two months after the arrest, however, and only had contact with Ms. Gamble twice after he moved to Orlando (R 1014).

Trooper Robert C. Roux, Jr. found John Edwards' blue Geo in front of the NAPA on 14th street on February 21, 1994. There was a note on the dash that said: "We'll be back for our car later. It broke down." (R 918). Only the fingerprints of William Paul were found on the exterior passenger-side window near the top front of the car (R 1028). A bill of sale and a power of attorney to John Edwards, another power of attorney, a Florida vehicle registration to Zack or Susie Shamsi, and a Hewlett Packard computer calculator with the name "John Edwards" on the back were found in the glove compartment and introduced as State Exhibit 93 (R 1003). A hatchet

and two backpacks were recovered from the trunk (R 1001). A pair of silver handcuffs, large size Maglite, Amitron quartz pocket watch with a handcuff key attached to a leather thong, multi-blade pocketknife, woodgrain and brass two-blade pocketknife, single-blade simulated bone handle pocketknife, brown Amity tri-fold wallet containing an Express Temporary Service weekly time card, HRS food stamp program identification card, social security card in the name of Loran Cole, a black flashlight with yellow trim, and a blue and black checked Kingsbridge man's extra large shirt were found inside the red and black backpack (R 1004-1009). Inside the purple backpack, found in the trunk, was a two-blade simulated bone knife and a one-blade wood and brass knife (R 1009).

Tim Rogers, who worked at NAPA auto parts, was at the store Sunday morning when it opened (R 929). He did not see the blue Geo. He later went back to the store around 4:20 and saw the vehicle (R 930).

On the way to work that Monday, Molly Feathers, a delivery driver for NAPA, heard a report on the radio that the car had been left at NAPA. She also heard a description of the two men who had murdered the camper in the Forest. She arrived at work and found the car had been towed (R 933). She went about her duties and was in the alley, about to make a delivery, when she saw two men

walking through, wearing camouflage clothing and a hat. One had a goatee, and one had a belt buckle that had "K.C." on it. She had heard that description of them over the radio. She waited until they walked by, and then she ran to the front of the store and had Tim call the police. She then went out on her deliveries. On the way back, she saw them again, going down the road (R 934). Within three or four minutes, she was able to stop an unmarked police car and told Sheriff's officer Thomas Bibb, where the suspects were (R 935,941,943). Deputy Bibb turned left on Ninth Street. The railroad tracks were down, and a train was passing through. He saw two individuals on his side of the tracks, just inside the railroad gates (R 943). They were wearing camouflage hats, jackets and blue jeans. One of them was wearing brown moccasins with leggings. With weapons drawn, Detective DeFalco hollered: "Police, freeze." They hit the ground (R 944). Other uniformed Ocala police officers arrived to assist them (R 945). The individuals taken into custody were Cole and Paul, who Deputy Bibb identified in court (R 946). Detective DeFalco patted-down Cole and found a sheathed Buck knife in the small of his back and a small mini-Maglite in his rear pocket. The items were admitted as State Composite Exhibit 67A and B, without objection (R 959-960).

State Composite Exhibit 61 contains the driver's license of

John T. Edwards, John's checkbook, Pam's checkbook, along with checkbook registers and several other items, such as a cigarette lighter and photographs (R 962). Exhibit 62 contains a black bag with Oakley sunglasses, a Sony Walkman radio and earphones, a Timex digital watch without a strap, a blue Scripto cigarette lighter, a Zippo lighter, a Selective Service card in the name of William C. Paul, a black wallet with miscellaneous papers and cards of Paul, a black leather bag (Exhibit 62A) containing a plain gold necklace, a second plain gold necklace with a pendant, a plain gold bracelet, and a gold ring with a flower on it (R 965,971). Pam Edwards identified the pendant necklace and bracelet as hers and the larger chain and ring as John's (R 1181). Exhibit 63 contains a red handled, Swiss-type knife and a wood and brass-handled lock-blade knife. These items were found in Paul's possession (R 964,966). Human blood, consistent with having come from John Edwards, was found on the brown wood and brass knife (R 1081, 1082). Numerous items belonging to the victims were found in Cole's possession, including: John Edwards' university identification card, five Red Cross cards, a Barnett Super ATM Card, a Barnett Bank identification card, a social security card, a Visa card, a Suncoast Schools Federal Credit Union card, a Barnett telebanking card, and a State Farm Insurance Company card

in the names of Timothy and Pam Edwards (R 975). State Exhibit 66.

On February 21, 1994, the afternoon that Cole was arrested, Pam Edwards was shown a photographic lineup. She identified Loran Cole and William Paul as the persons who committed the crimes (R 980).

Upon his arrest, Cole's clothing was taken into custody (R 983-84). On September 8, 1994, handwriting samples were obtained from Cole (R 981). A handwriting analysis expert determined that State Exhibit 76, the note found in the abandoned Geo, was written by Loran Cole (R 991).

A forensic microanalyst, certified in fracture matches and fiber analysis, testified that the large oak stick and the stump, State Exhibits 18 and 19, were once the same object. She also determined that State Exhibit 16, a small piece of black plastic, fit into the flash seating of the camera in Exhibit 17 (R 1044,1048). She found that fiber found in debris from John Edward's sweatshirt was consistent with the black cotton fibers in William Paul's jeans (R 1055). On cross-examination, the analyst, Ms. Sauer, testified that she did not specifically look for blood (R 1059). On redirect, she indicated that if the oak stick had laid out in the rain for several days, you would not expect to find trace evidence or material like hair or clothing fiber (R

1059-1060). Blood could also have been washed away (R 1085). A serologist testified that human blood consistent with both John and Pam Edwards' blood was found on the strap of the Nikon camera. There were chemical indications for blood on the end of the zoom lens, but there was not enough for testing (R 1083). Timothy Edwards, John's father, identified State Exhibits 16 and 17 as the camera and lens and flash attachment he had bought for John in the summer of 1993 (R 1091).

Pam testified that when they first encountered Cole, he told them he was camping with his brother (R 1107). Cole was wearing a blue and black shirt which he had removed by the time of the assault (R 1177-78). State Exhibit 18 looked familiar to Pam, and it is the same length, width, and circumference as, and is similar in color to, the large walking stick that Paul carried (R 1107-08). As the four later talked around the campfire, Cole indicated that he had a wife and kids and that his wife would be upset because he was spending a couple of weeks there without the kids (R 1108). Cole and Paul told Pam and John that they had been drinking, but she did not see any liquor (R 1185). Neither one of them appeared to be under the influence of alcohol (R 1191). The night pictures they were going to take were of crocodiles (R 1112). When Paul first began to carry his walking stick on his shoulder (on the way

to take pictures), they were walking single file: Cole first, Pam second, John third, and Paul in the back. Cole or Paul made a comment about what would happen if an animal got them. Cole said "The third one in line always gets it." John was the third in line (R 1118-19). After Paul's hand was injured in the physical confrontation with John Edwards, he said that he thought his hand was broken, and he was moaning (R 1124). The back of his head was bleeding (R 1138). Cole went back down the trail to subdue John. Paul claimed to have a gun and was going to shoot her, if she turned around (R 1126). As Pam and John laid on their stomachs side-by-side, Pam asked: "How are we going to get out of this?" John told her that he was sorry, because she had not wanted to go on the hike (R 1125-26). When Paul told them they wanted their cars so they could get out of state, Pam and John told them about their money, checking accounts, and credit cards (R 1126). Cole did not just take $20.00 from Pam's pocket. He also took her Doritos coupon (R 1125). Cole took Pam's gold rope bracelet and gold rope necklace with a black and gold charm. John had a gold rope chain and a little gold ring (R 1127). Cole expressed anger at John's having injured Paul. Cole asked John a couple of times: "Why did you hurt my brother?" (R 1128). Cole implied that John was "vomiting" after he had supposedly moved him off the trail and

Pam heard gagging sounds, saying: "He's having trouble with his dinner." (R 1130). After they had returned to the Edwards' campsite, Cole went into the victims' cars (R 1113). When Pam was informed she would have to sleep naked, she asked: "Are you going to do anything to me?" Cole replied: "If I feel like it." He asked her how old she was. She responded: "I'm twenty-one." Cole said: "Well then, I guess you've pretty much seen life, haven't you?" (R 1134). Cole and Paul had only one three-man tent (R 1137). Pam saw a lot of empty beer cans at their campsite (R 1186). Cole said they were going to drive to Georgia. She would drop them off. They would let her come back and get John as long as they did not tell the police (R 1146). Cole told Pam that John's head was hurt about as badly as Curt's (Paul). He said John would pitch again, that he just needed a few stitches. Cole said: "I only hurt people when I have to." (R 1147). When Cole left the campsite to get marijuana, Pam was alone with Paul. She could not hit him with the walking stick to escape because it had been left in the woods. Paul packed his things into a backpack (R 1148-49). After the second sexual act Cole performed on Pam, and before she blacked out, he asked: "Has anybody ever gone down on you?" When she came back to consciousness, Cole was sitting on his knees between her legs looking for a towel (R 1153). Cole also offered

her to Paul, asking: "You want some?" Paul refused; he seemed uncomfortable with what had happened (R 1171). Cole put his things in a red backpack (R 1175). Pam carried a blue camera bag and a backpack that was not hers across the prairie (R 1156). When they tied Pam to the trees in the woods, Cole told her that John was tied up the same way. Cole took twine out of his pockets and wrapped it around her ankles, around one tree, and then had her lean up against another tree and wrapped it around her body and the tree and nailed it to the tree with a hatchet. They tied her hands together and tied them to her legs (R 1157-59). They said if she heard gunshots, she was supposed to untie herself and go find John (R 1159). When she had untied herself, she went to look for John and found her Doritos coupon in the area where the fight had occurred (R 1163). Pam identified State Exhibit 71 as the belt with the initials "K.C." that Cole had worn. She identified Cole in the courtroom (R 1183-84). After Cole had wrecked Pam's Nissan, he put the license plate from her car on John's blue Geo, because it did not have one. Afterwards, he drove the Geo (R 1177).

PENALTY PHASE

A proffer revealed that on February 14, 1992, Cole was sentenced to five-and-a-half years in prison. He was released on June 15, 1993, under the Control Release Authority because of

overcrowding (R 1349). A prisoner is considered to be serving a sentence while on control release (R 1349). Cole was to be supervised from June 15 through December 14, 1993. He did not comply with supervision requirements, and a warrant issued for his arrest for violating conditions of control release (R 1350). He could have been returned to D.O.C. to serve the remainder of his sentence (R 1351).

Cole's half-sister, Andrea Headlee, described the household Cole grew up in as fairly normal, except for the mother and Don Cole fighting while they were married. She recounted an incident where Don Cole broke into the house after he and his wife were separated and beat her mother (R 1368). She remembered her mother and Don Cole drinking, but did not remember it being excessive (R 1368). Neither did she consider her mother an excessive drinker (R 1371). Cole's half-sister, Ann Powers, remembered her mother drinking, but did not know if she was an alcoholic (R 1380). Don Cole testified that his wife drank during the time she was pregnant with Loran (R 1393). Cole was not exposed to much of the marital fighting because when he was only three years old his father, Don Cole, left the household (R 1374,1393). There was enough food to eat, and the children attended school regularly (R 1373). Ms. Headlee testified that, aside from normal spankings, Loran Cole was

never abused (R 1374). Neither did Ms. Powers ever see any of the children physically abused. She indicated that their mother pushed them to amount to something (R 1385). The only person to testify to physical abuse of the children by the mother was Don Cole, who beat the mother himself and was described as a "mean drunk." (R 1379). Ms. Headlee never observed any abnormal behavior or indication of mental illness in Loran Cole (R 1374). She could not recall any severe illnesses or head injuries (R 1375). Cole's mother was in prison once, evidently for embezzlement (R 1378,1382). Cole was twelve years old when his mother went to prison. He and Andrea stayed with their sister, Ann Powers, and her husband. Loran Cole admitted to Ms. Powers that he had problems with marijuana, but she did not believe what Cole told her (R 1382,1386). After Don Cole left the family, he saw Loran twice, once when he was six or seven years old, and once when he was eighteen or nineteen. He offered Cole a place to stay, but Loran did not take him up on it (R 1400). Loran never cut his ties with his mother and kept in contact with her. He always seemed to know what she was doing (R 1383). Cole's sister, Ann Powers, overcame her problems from childhood, married, had two children; she worked and lived in a nice place (R 1384).

Cole only stayed in Beverly Jean Halm's treatment home for

four months (R 1402). He had just been released from juvenile detention and had gone to a halfway house (R 1403). She understood that he had a long-term marijuana problem (R 1410). He still had problems with marijuana and alcohol (R 1407). Ms. Halm noticed no abnormal behavior or evidence of mental illness in Cole while he was there (R 1412). Ms. Halm had had no face-to-face contact with Cole for ten years (R 1410). Cole's mother did not pressure her son to leave home and get a job when he was fifteen or sixteen years old. Cole was already seventeen when he lived with Ms. Halm, and thereafter, he returned to his mother. Cole was taken out of school because of problems and was too young for the G.E.D. program; work would have been a viable alternative (1409,1405).

Dr. Berland administered two MMPI's to Cole. The first was done in February, 1994, and the second was done on September 9, 1995 (R 1453). During the first MMPI, Cole was dishonest, indicating that he had problems which he did not have (R 1451). Dr. Berland could not say how serious the psychotic mood disturbance was (R 1452-53). Because Cole had lied on the first test, he might have toned down his lies on the second test, and the doctor would not fully rely on its results. He could not say that the profile was bona fide. He had doubts about the truthfulness of most of it (R 1454). All the later test reflected was an

indication of delusional paranoid thinking. No faith could be put in the rest of the test (R 1455). In an initial interview, Cole gave Dr. Berland a history of incidents which might have contributed to brain injury and admitted to a series of symptoms that would indicate the presence of a psychotic disturbance. Dr. Berland confronted Cole not only about dishonesty on the testing and asked about the interview as well. Cole acknowledged that he had not been entirely truthful in the interview either. Some things were true and some were not. The doctor could not tell which was accurate (R 1459-60). The WAIS test can also be faked (R 1476). Dr. Berland said he could not know whether Cole faked the WAIS as well (R 1477). Dr. Berland further indicated that he had no evidence that delusions or hallucinations controlled the bulk of Cole's daily responses (R 1473). On cross-examination, Dr. Berland testified that psychosis results only from brain injury or heredity and is not the product of one's background (R 1479). People with moderate psychosis can function in life. The vast majority of the mentally ill are unidentified. Only a small portion are in institutions. Mental illness does not make one a criminal (R 1480). Mental illness does not drive the behavior of those mild to moderately ill. An adverse background influences their decision-making and judgment. They can still make decisions based

on an evaluation of the consequences and benefits, although they tend to make judgments not in their best interest (R 1481). They have substantial control of their behavior as a result of understanding consequences of their actions (R 1482). The February 1994 MMPI on which Cole lied was administered only a week after his arrest for first-degree murder, kidnaping, robbery, and rape (R 1482-83). He would have an incentive to fake a mental illness to get out of trouble (R 1483). Dr. Berland saw no indication of mental illness in the large packet of information from Ohio State Prison (R 1484-85). The "L" and "K" scores indicate Cole was both over-exaggerating and under-exaggerating his problems (R 1486). The ability to determine how mild or severe his illness is was completely lost because Cole so grossly exaggerated everything that was wrong with him (R 1487). In 1987, Cole testified in a first-degree murder trial to get his sentence reduced and be released, and later he claimed to have perjured himself. Dr. Berland indicated that the fact that Cole was a manipulator and a "con," while salient does not prevent him from being, independent of that, mentally ill (R 1488). On the WAIS, Cole scored a full scale intelligence level almost dead average. Any brain damage that served to affect his intelligence lowered it (R 1493-94). Cole is of normal intelligence all the time. Dr. Berland has no

independent evidence that Cole ever sustained an injury outside of what Cole told him, on which he cannot rely. Therefore, the only evidence of such injury is the test (R 1494). There was no evidence of fetal alcohol syndrome (R 1494). No one Dr. Berland talked to had confirmed any diagnosis of mental illness (R 1495). Scale Four, the psychopathic deviant scale, reflects anti-social thinking and criminal activity (R 1495). Cole scored in the top two percent of the country. You can not medicate psychopathic personality (R 1496). Cole's history shows a great deal of sociopathic activity. Dr. Berland did not hesitate to acknowledge that Cole could be a sociopath, but indicated that people can have more than one thing wrong with them (R 1497). Dr. Berland opined that Cole's psychosis was a background influence throughout the period in which John Edwards was beaten and his throat was cut. The doctor did not have enough information to try to directly connect the influence of mental illness on those specific actions (R 1498).

SUMMARY OF ARGUMENTS

I. The trial court did not abuse its broad discretion in allowing portions of the testimony of Pamela Edwards to be re-read to the jury upon request, without accompanying cross-examination,

since there was no cross-examination on that testimony. The testimony read to the jury was responsive to the jury's request and was not misleading. Counsel failed to object to the reading of further testimony or request that further cross-examination be included. Thus, this new claim, raised on appeal, is waived.

II. The trial court did not err by conducting portions of the trial in the absence of the appellant. Appellant was present at the status conference when the motion to sever, in which he joined, was entertained and granted. The cases having been severed, the appellant had no right to be present for the co-defendant's separate motion to be moved to another jail. Appellant's possible absences from non-critical status and bench conferences did not frustrate the fairness of the proceedings where he was represented by his attorney. Further, any error was harmless. *Hardwick v. Dugger*, 648 So.2d 100 (Fla. 1994). Should error be found of the harmful variety, remand would be appropriate to determine from what hearings the appellant was absent, particularly since the appellant's claims that he was not present are speculative in many instances.

III. The testimony of the victim's former teacher came within the parameters of the decision in *Payne v. Tennessee*, 501 U.S. 808 (1991) and was permissible under F.S. § 921.141(7) as it

demonstrated the uniqueness of John Edwards as an individual. Appellant's argument that the teacher's brief reference to a nation with problems implies that the victim would have solved this country's racial problems or that his loss was nationwide is a far-stretch of the imagination.

IV.(A) The heinousness factor is properly applied where victims have been beaten to death or have drowned in their own blood after a stab wound. The victim in this case not only had his head bashed in, but had his throat slit and suffered air hunger. The sequence of events leading up to these savage assaults, which included binding the victim and rendering him helpless, caused the victim substantial mental anguish, which the appellant relished. The victim was conscious after the blows to his head. Appellant even indicated that he was waiting for him to pass out. He was still conscious for the final *coup de grâce,* a slash to the throat. Indeed, a nick near the gaping wound reveals an attempt to avoid the infliction of the wound. John Edwards had more than a clue that he would be killed. He had already been violently attacked, he knew he was the victim of a robbery, he had been subdued and rendered helpless, and he apologized to his sister for getting them into the dilemma. His sister was removed from view of what was to happen. John had already heard, "the third one always

gets it." Appellant clearly meant for John to suffer. He let him lie in agony, moaning after he had fractured his skull, until he was ready to slash his throat. After having done so, he made blithe references to the agonal noises, such as John was just, "having trouble with his dinner." Not only did he intend for John to suffer, he enjoyed it.

(B) The prior violent felony conviction was properly found where the appellant twice raped Pamela Edwards after handcuffing, threatening, robbing, and holding her captive. Unlike the case in *Terry v. State*, 668 So.2d 954 (Fla. 1996), where the contemporaneous conviction was committed by a codefendant, it was appellant who "subdued" John and forcibly returned him to where his sister was being held, tied and bound him, and forced him to lie on the ground, and then marched him to the site of the killing. The aggravator - that the felony murder was committed during the course of a kidnaping - was also properly applied. That the appellant found John's ability to overpower and wound Paul annoying is incidental to the fact that he lured the Edwards into the woods, away from help, on a bogus photo taking expedition, with the clear intent to take their property and vehicles. The pecuniary gain factor was properly applied.

(C) The trial court properly considered and rejected

unsupported mitigating evidence. The weight of the evidence did not support a finding that Cole had been abused as a child. It was within the province of the sentencing court to make credibility determinations and resolve any conflicts in the evidence. There was no evidence that the circumstances of Cole's childhood had any bearing on his adult behavior. Psychosis was offered in mitigation, and the appellant's expert testified that it was not the product of his background. The weight to be given to the appellant's mental illness was in the sentencing court's discretion and more weight was given than deserved where the appellant was dishonest on psychological tests, so that his mental health expert could not determine the degree of his illness. The influence of such illness could not even be connected to the events leading up to the murder. Cole perpetrated the murder himself, without aid or counsel from his wounded codefendant. A finding of disparate treatment of the codefendant is hardly mandated by the incongruous theory that this mitigator should always be found, but its weight diminished with equal or greater participation. Cole's behavior at trial was not argued as mitigation below. No evidence was presented that Cole was abusing drugs at the time of the murder.

V. The trial court did not err in denying the appellant's

motion for mistrial based on a witness' slip that she "knew some history on K.C." The defense should have accepted an offered curative instruction. The remark did not specifically reference a prior conviction, or even criminal activity, and was not so prejudicial as to require reversal.

VI. The general state of mind of the inhabitants of the community was not so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. The trial court did not err in failing to grant a change of venue.

VII. The trial court properly admitted relevant photographs of the victim into evidence. Some photos reflected the body as it was found. Other photos, introduced during the testimony of the medical examiner, were not duplicative, were relevant, and assisted her in demonstrating the nature of the wounds and the manner of death.

VIII. Appellant's motion to suppress was properly denied. Based upon the detailed description of the suspects and their close proximity to the site from which the deceased victim's car was recovered, law enforcement had probable cause to arrest Cole. Because the arrest was based on probable cause, the physical

evidence seized as a result of that arrest was properly admitted into evidence.

IX. The trial court did not err in admitting into evidence the oak walking stick used as a weapon by Paul against the murder victim. Pamela Edwards could match the attributes on the State's exhibit with the attributes of the stick she had seen Paul carry. There is no likelihood that a jury would not be satisfied that it was the same stick.

X. The trial court properly refused to instruct the jury on "independent acts" and "theft as an afterthought" where there was no evidence of same. Appropriate standard penalty phase instructions were given.

XI. The trial court properly permitted the state to proceed under both premeditation and felony murder theories. The decision to kill John Edwards was a conscious, premeditated one. If there was error in instructing the jury on both theories, it was harmless.

XII. The trial court did not err in entering a restitution order which included travel expenses for the parents of the murdered victim. Appellant has not demonstrated that he had no notice of the court's intent to impose restitution. The issue is not preserved because no objection was made below. In any event,

ability to pay is properly considered at the time of enforcement, not imposition. Further, the murder victim's parents are "victims" within the purview of the restitution statute. Travel expenses of a victim are properly awarded as restitution. Finally, amounts set-out in a PSI are sufficient support for a restitution order.

XIII. The twenty-five year minimum mandatory provisions appearing on Appellant's written sentences for his first degree and life felonies appears improper.

XIV. Appellant's shotgun blast at Florida's death penalty statute has been deflected in numerous previous skirmishes embodied in the various opinions of this Honorable Court and cited at length in the argument.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING A PORTION OF WITNESS PAMELA EDWARDS' TESTIMONY TO BE READ BACK TO THE JURY.

A trial court has wide latitude in deciding whether to have testimony re-read to jurors upon request. *Coleman v. State*, 610 So.2d 1283, 1286 (Fla. 1992); *Kelley v. State*, 486 So.2d 578 (Fla.

1986); Fla. R. Cr. P. 3.410; *DeCastro v. State*, 360 So.2d 474 (Fla. 3d DCA 1978). Under Florida Rule of Criminal Procedure 3.410, it is within the trial court's ultimate discretion whether to have the court reporter read back the testimony of a witness. *DeCastro v. State*, 360 So.2d 474 (Fla. 3d DCA 1978); *Simmons v. State*, 334 So.2d 265, 267 (Fla. 3d DCA 1976). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable - only where *no* reasonable man would take the view adopted by the trial court. *Matire v. State*, 232 So.2d 209, 211 (Fla. 4th DCA 1970).

There was no abuse of discretion in the instant case. The portions of the testimony read to the jury were directly related and responsive to the jury's interrogatory. The testimony re-read was not misleading and did not place undue emphasis on any particular statements. See *Garcia v. State*, 644 So.2d 59 (Fla. 1994); *Haliburton v. State*, 561 So.2d 248, 250 (Fla. 1990). [Regarding the complaint about cross-examination, there simply was none concerning Cole's statement that John, whose throat he had just slashed, was "having trouble with his dinner."]

Defense counsel objected and wanted the *whole* trial "scenario" re-read to the jury (R 1580). However, after the lower court had the transcript read exactly where requested by the jury, counsel below never objected nor asked that any portions of

cross-examination be re-read. Thus, any error in this regard is waived for lack of a contemporaneous objection. *Steinhorst v.State,* 412 So.2d 332, 339 (Fla. 1982).

II. THE TRIAL COURT DID NOT ERR IN CONDUCTING PORTIONS OF THE TRIAL IN THE ABSENCE OF THE APPELLANT.

This claim is procedurally barred for lack of an objection or request to be present during trial. *Wright v. State,* 21 Fla. L. Weekly S498 (Fla. Nov. 21 1996). Relief would not be warranted in any event.

On February 24, 1995, a hearing on Cole's motion for continuance and to sever was held (R 327-56). The defendants were not present because no one had asked that they be transported. The State expressed concern about hearing the motion to sever without either of the defendants present (R 329). Counsel for Defendant William Paul informed the court that he was ready to go forward with the motion in that his client had made it emphatically clear to him that he desired a severance. Mr. Gleason, Cole's attorney, agreed and represented that his client had also made such desire abundantly clear to him (R 330). Paul's attorney told the court that it would be deciding the issue as a matter of law, and there would be no need for testimony. He assured the court that at a later time his client would come in and specify on the record that

this was what he wanted. He indicated that he had given his client his professional opinion regarding the advantages and disadvantages of a severance, and his client indicated that he wished to have one. Mr. Gleason indicated likewise and said that Cole had told him that he wanted a severance (R 331). Cole's motion for continuance was granted (R 347). The judge asked counsel to leave their cases for him to read. He said he would hear oral argument on the severance when the clients were present (R 350).

A hearing was scheduled for argument the next Wednesday. Mr. Holloman was to do an order for transport (R 354-55). On March 1, 1995, the hearing on the motion to sever continued (R 357-81). The record does not reflect whether the defendants were or were not present. The court found that the motion was *premature* and did *not* entertain it because the hearing revealed that the potential problems with trying the two defendants at the same time had disappeared. The court took the motion under advisement until closer to trial (R 376).

On May 17, 1995, a status conference was held. Cole *was present* (R 17). The prosecutor withdrew his objections to the motion to sever, and the motion was entertained and granted (R 15, 18). Thus, it is not true that the motion to sever was entertained and decided Cole's absence.

Moreover, even if it could be concluded that Cole's motion was partially entertained in his absence the claim still fails. The question of whether a severance is appropriate is one of law for the court to decide, and the input of the defendant is not necessary. Counsel also said that the defendants would ratify their actions in seeking a severance on the record. The motion was successfully argued on May 17, 1995 in Cole's presence.

A defendant's subsequent acquiescence in matters conducted during his absence by his attorney will be construed as a waiver of his right to be present at proceedings before the court. *Henzel v. State*, 212 So.2d 92 (Fla. 3d DCA 1968). As far as the granting of a continuance in appellant's absence at the February 24, 1995 hearing is concerned, it is clear that only technical, procedural, or legal issues were discussed, and Cole's presence would not have assisted the defense in any way. Moreover his motion was favorably ruled upon. Any error was harmless. *Coney v. State*, 653 So.2d 1009, 1013 (Fla. 1995).

Appellant further complains that he was excluded from a hearing "within" a hearing on the same day, May 17, 1995. Counsel for Paul had some concerns for his client's safety (R 30). He wanted Paul to be moved to another jail based on correspondence from Cole to the effect that if he could get his hands on Paul he

would do something (R 31). Counsel indicated that he could not swear that such a thing would happen, but was being prudent (R 32). The court granted the request (R 33). Cole's lawyer was present at this conference (R 30). Cole omits that, at the time of this conference, the cases had been severed -- he had no right to be present anyway. As Cole acknowledges, the discussion of Cole's previously filed *pro se* motion to disqualify his attorney was not of any significance since Paul's lawyer simply wanted to clear up a joking reference made at the prior hearing concerning his membership in subversive vigilante groups (R 34).

Cole further complains that the record does not reflect his presence at a June 9, 1995 hearing on his motion to continue. He adds that he was apparently not present at numerous status conferences, since in his *pro se* motion to dismiss counsel, he cites defense counsel's failure to arrange his presence at status conference hearings (R 208). It is apparent from the transcript of the May 17, 1995 hearing, at which he was clearly present, that Cole is not identified specifically in transcripts as being present or absent. Cole's alleged absence from the June 9, 1995 hearing appears to be speculation based on the fact that he was not present at the February 24, 1995 hearing on a motion for continuance. In any event, Cole had no right to be present at a pretrial conference

which dealt with legal and administrative matters not needing his input or influence. *Junco v. State*, 510 So.2d 909 (Fla. 3d DCA 1987). Cole's absence at such a non-critical stage did not frustrate the fairness of the proceeding. *See generally Hardwick v. Dugger*, 648 So.2d 100 (Fla. 1994); *Wright v. State*, 21 Fla. L. Weekly S498, S499 (Fla. Nov. 21, 1996). Any possible violation of Florida Rule of Criminal Procedure 3.180 was harmless error since Cole's presence would not have aided defense counsel in arguing the motion. *Coney v. State*, 653 So.2d 1009 (Fla. 1995); *Garcia v. State*, 492 So.2d 360 (Fla. 1986). Cole does not identify the status conferences he claims he was not present for, and does not identify matters as to which, if present, he could have assisted counsel in arguing. Since a status conference is a non-critical stage of trial, no error has been shown, much less harmful error. *Stano v. State*, 473 So.2d 1282 (Fla. 1985); *Garcia, supra*.

Cole next complains of his absence at various bench

conferences. He was present in the courtroom.[1] Fundamental fairness was not thwarted by any absence from bench conferences at which purely legal or evidentiary matters were discussed where Cole could have provided no assistance. *Garcia, Wright, supra.*

In one instance cited by Cole, the conference concerned how to answer a juror's question regarding which co-defendant possessed the bag with jewelry in it. After the conclusion of the sidebar conference, defense counsel stipulated that the small bag containing the jewelry was in the possession of William Paul and suggested that same be announced to the entire panel (R 971). Cole does not even suggest that this judgment call was not made by himself, or with his concurrence, especially since possession of the bag by Cole would have been highly inculpatory. The State could have recalled the officer to testify that the bag of jewelry was found in the possession of Paul. This conference was purely administrative, and Cole's absence, if error, was harmless.

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[1] This court has recently approved an amendment to rule 3.180(b) which provides that "A defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed." *Amendments to the Florida Rules of Criminal Procedure,* No. 87,769, slip op. at 2 (Fla. Nov. 27, 1996).

Appellant claims that the most egregious involuntary absence occurred at a lengthy bench conference near the close of all of the evidence and concerned the defense calling a witness out of order to accommodate his traveling schedule after which the State called two more witnesses. It was established that if the court had allowed defense counsel to ask Mr. Thomson whether Ms. Gamble had ever mentioned that Cole had admitted to her that he cut John Edwards' throat instead of calling the witness, the prosecutor would not have elicited testimony concerning Paul's fibers during the testimony of the FDLE microanalyst which would have forced the defense to call the witness during its case-in-chief (R 1064-65). The trial court certainly did not abuse its discretion in clarifying an action which, on a cold appellate record, could be misread, considering the fact that ineffective assistance of counsel claims are routinely raised not only in postconviction proceedings but often on appeal, as well. Cole, having no knowledge of trial tactics, could have added nothing to this dialogue. His rights were not abridged in any manner. Indeed, after the motions for judgment of acquittal were denied, defense counsel stated for the record:

> Your Honor, at this point the defense having put on John Thomson out of order, *having conferred with my client* Loran Cole, he advises me that he does not intend to

> testify. I explained to him that it would be necessary for that to be placed on the record. And with that being done, the defense would rest.

(R 1196). The court explained to Cole that he had a right to testify and determined that he was voluntarily waiving it (R 1196-98). Cole indicated, at that time, that *he* was satisfied with defense counsel's representation (R 1198).

III. VICTIM IMPACT EVIDENCE WAS PROPERLY ADDUCED, AND THE JURY'S RECOMMENDATION AT THE PENALTY PHASE WAS NOT TAINTED.

In *Payne v. Tennessee,* 501 U.S. 808, 830 n.2 (1991), the United States Supreme court receded from holdings in *Booth v. Maryland,* 482 U.S. 496 (1987), and *South Carolina v. Gathers,* 490 U.S. 805 (1989). Those cases held that victim impact evidence was inadmissible in capital sentencing proceedings. The only part of *Booth* that *Payne* did not overrule was "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Id.* The Court held that evidence and argument relating to the victim's personal characteristics, and the impact of the victim's death on the victim's family, are legitimate means of informing the sentencer about the specific harm caused by the defendant's acts. 501 U.S. at 825. Subsequent to *Payne,* this court held victim impact testimony admissible as long as it falls within

the parameters of the *Payne* decision. *See, Windom v. State*, 656 So.2d 432 (Fla. 1995); *Stein v. State*, 632 So.2d 1361 (Fla. 1994); *Hodges v. State*, 595 So.2d 929 (Fla. 1992).

The testimony of John Edwards' former teacher in this case clearly came within the parameters of *Payne*. It reflected the personal characteristics of John and his progress toward a fulfilling career in engineering. Indeed, the evidence did not go as far as it could have. No parents or family were put to testify as to the impact of John's death upon them. Rather, the least emotional of all impact evidence was presented. Section 921.141(7), Florida Statutes (1995) clearly authorizes victim impact evidence of this nature:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.

Cole's argument seems to be that telling the jury anything about John Edwards would inexorably lead them to contrast John's personal characteristics with those of Cole, who appellate counsel refers to as a "derelict." Initial Brief at 36. This argument is not well-taken since the circumstances of Cole's life were offered

and are now argued as substantial mitigation calling for a sentence less than death. Thus, the jury would have seen Cole for what he is, even if the impact testimony had not been elicited. The jury was never instructed to make a comparison, and even if it did make one, the only possible conclusion is that Cole did not have the advantages in life that the young man he murdered had. John was a good student, an athlete, and an American. That his former teacher felt that a good American had been lost does not imply a nationwide loss. Certainly, the reference to a country with problems does not imply that John, himself, would have solved the nation's racial problems. Such an interpretation is a great-stretch of the imagination; a stretch that a reasonable juror would not have made. If error is found in this regard, it is harmless. *Cf. Windom v. State*, 656 So.2d 432, 438 (Fla. 1995).

IV. THE DEATH PENALTY IS NOT DISPROPORTIONAL; THE TRIAL COURT FOUND APPROPRIATE AGGRAVATING CIRCUMSTANCES, CONSIDERED ALL VALID MITIGATION, AND PROPERLY WEIGHED BOTH.

A. THE TRIAL COURT PROPERLY FOUND THE HEINOUSNESS FACTOR AND INSTRUCTED THE JURY THEREON.

This Court has upheld the application of the heinous, atrocious, or cruel aggravating factor based, in part, upon the intentional infliction of substantial mental anguish upon the victim. *See, e.g. Routly v. State*, 440 So.2d 1257, 1265 (Fla.

1983). Moreover, fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous. *Preston v. State*, 607 So.2d 404, 410 (Fla. 1992). It is proper to base this factor upon the entire sequence of events, including the fear and emotional trauma suffered during the episode culminating in death. *See, Henyard v. State*, No. 84,314 Slip op. 16 (Fla. Dec. 19, 1996).

One can only imagine the thoughts that ran through John Edwards' mind as he walked in the woods with his killer (on what he, at first, thought was a sightseeing expedition) and heard the words, "the third one in line always gets it." Being third and followed by Paul, who attacked him with a club, John knew, by this early point, that the duo meant him harm. (R 1118-19;1124).

John heard when Pam was told not to move, or she would be shot (R 1124). He was subdued by Cole and made to lie on his stomach, on the ground next to Pam, who was *handcuffed* (R 1122-24). John was told that they wanted their cars, and their money and jewelry were taken (R 1125-29). John could not have had a single doubt that they were the subjects of a robbery and that it was a crapshoot whether the pair, who had already used violence on John, would let him and Pam live. Clearly, John knew that Cole was angered at his having injured Paul, and he watched helplessly as

Cole took Pam up the trail on what could have been a death march, or to prevent her witnessing what was about to happen to him. From John's expression of regret to his sister, it is clear that John understood the implications of the situation. No doubt he understood even better after Cole bashed his head in, and he lay on the ground moaning, waiting for the final assault. The trial court properly considered John's concern and understanding of the developing events.

The fact that John was bound, rendered helpless, and acutely aware of his impending death is not the only basis for finding the HAC aggravator. This factor has been applied to victims who have not only been beaten to death, but who have died by drowning in their own blood after a stab wound. *Cook v. State*, 542 So.2d 964 (Fla. 1989); *Perry v. State*, 522 So.2d 817 (Fla. 1988). The finding of this factor is also appropriate in murder cases that evince extreme and outrageous depravity as exemplified by a desire to inflict a high degree of pain, or utter indifference to, or enjoyment of, the suffering of another. *Williams v. State*, 574 So.2d 136 (Fla. 1991). John had injured Cole's "brother" which clearly offended Cole. He, in turn, made John's death a protracted affair by first bashing his head, then letting him lie in pain, moaning as Cole sadistically called to him from a distance.

Considerable time passed before Cole administered the final *coup de grâce*. That Cole enjoyed, or relished, what he did to John is exemplified not only by the method, but by his sardonic comment to Pam that John was, "having trouble with his dinner" - made as John lay drowning in his own blood with his life force spilling to the ground from the cavernous slash in his throat. Indeed, Cole later commented to Mary Gamble that Pam lived only because, "he had more sympathy for women than he did men." (R 900, 1130).

1. <u>The State proved that the victim was conscious.</u>

The facts do not show that the blows to the head occurred just prior to, or contemporaneous with, the brutal slashing of John's throat. The evidence reflects that Cole departed with John. Thereafter, Pam heard John grunt a few times. Cole then left John and rejoined Pam and Paul. Cole announced that they would remain there until John "passed out." Certainly this comment makes it clear that John was then conscious. Cole also called out to John a few times. Pam heard John moaning. After John quieted, Cole went back and slashed John's throat (R 1129-30).

It is certain that John was conscious for the first blow to his head. He had sufficient time to conclude that he would be executed as he was separated from Pam. John's responsive moaning after the beating indicates that he was conscious and in pain *after*

the blows to the head. Dr. Pillow testified that John would not have been able to speak after the injury to the throat, so common sense dictates that John was first beaten about the head, was conscious and able to moan loudly before his throat was cut (R 760). Also, as the trial court astutely found, a small laceration above the large cut to the throat indicated that John was alive and consciously reacted to the knife, or jerked, causing a small laceration above the main cut (R 916). After his throat was cut, John likely remained conscious for up to thirty seconds during which time he experienced air hunger (R 751;760).

2. <u>The victim was aware that he was about to die.</u>

The argument that John Edwards had no clue that the assailants were going to hurt him defies logic. Cole had already announced that the third one, John, would "get it." Paul had already violently attacked him with an oak club. Cole had beat and subdued him, rendering him helpless. When they removed him from his sister's view, he had to know that, despite any previous reassurances,[2] something very bad was going to happen to him. The conversation with John was largely accusatory and concerned his

[2]The record reflects that the assurances were made to Pam, whom Cole permitted to live.

wounding of Paul. Their intent was clear. The instant case is clearly distinguishable from *Robinson v. State*, 574 So.2d 108, 112 (Fla. 1991) (R 1128,1125-29,1189-90).

3. Cole clearly intended for John to suffer.

The assertion that Cole did not intend for John to suffer is the most specious of all. After bashing John's head in, Cole left him lying in agony until he was ready to slash his throat. Then, he blithely described John's mortal condition as simply "having trouble with his dinner." This case is distinguishable from the cases Cole cites which involved crimes of passion, emotional rage, or the ingestion of alcohol. This was not a crime of rage or passion. Cole was competent enough, despite any annoyance over the wounding of Paul, to subdue John and then quiz the Edwards as to their valuables. He did not immediately attack John and then finish him off. He first relieved him of his possessions, then coldly marched him away from view of his sister, whom he planned to let live. These calculated actions, committed in the course of a robbery, also dispose of any argument that alcohol ingestion played some role in John's murder. Further, there was extensive testimony that Cole did not appear intoxicated (R 1191,781).

Unquestionably, John Edwards was alive at the time his wounds were inflicted (R 741). Certainly, he was in fear of his life when

the first blows were delivered. His moaning makes it clear that he was alive thereafter. The nick on his throat indicates that he struggled, or jerked, to avoid having his throat slit. It was not error for the trial court to determine that John suffered from air hunger after his throat had been slashed. Dr. Pillow testified that John would have been able to make agonal or gasping noises (R 760). Even if he was unconscious, or became unconscious shortly after his throat was slit, the HAC factor was still properly found based on events prior thereto and John's fear of impending doom.

B. **THE PRIOR VIOLENT FELONY CONVICTION AND THE FELONY MURDER AND PECUNIARY GAIN CIRCUMSTANCES WERE PROPERLY FOUND AND ACCORDED THE APPROPRIATE WEIGHT.**

Concerning the aggravator of a previous conviction of another capital felony, or a crime involving the use or threat of violence toward another person, the court found as follows:

> In the instant case, based on the evidence presented, the jury found the Defendant guilty of committing multiple violent felonies on Pamela Edwards: kidnaping with a weapon, robbery with a weapon, and two counts of sexual battery while armed. The evidence showed that the Defendant forcibly subdued Pamela, handcuffed her, and threatened to shoot her. While restrained, the Defendant robbed Pamela of personal articles, including jewelry, money and car keys. Over a period of hours, the Defendant held Pamela captive with threats of violence to her and to her brother John. In two separate incidents, the Defendant raped Pamela. During one of the rapes, the Defendant held what Pamela believed to be a knife against her stomach. The Defendant finally abandoned Pamela after gagging and tying her to a tree.

(R 913-914). In *Terry v. State*, 668 So.2d 954, 965 (Fla. 1996), this Court stated:

> While this contemporaneous conviction qualifies as a prior violent felony and a separate aggravator, we cannot ignore the fact that it occurred at the same time, was committed by a codefendant, and involved the threat of violence with an inoperable gun. This contrasts with the facts of many other cases where the defendant himself actually committed a prior violent felony such as homicide.

In *Terry*, the prior violent felony was committed by a codefendant. In the present case, it was Cole alone who twice sexually battered Pamela while armed. The remaining crimes were committed not by a co-defendant, but by Cole and Paul in concert with each other. The sentence in the case at bar is not disproportional.

Cole next argues that the felony murder during the course of a kidnaping aggravator is inapplicable since the slight movement of John Edwards, down the trail from his sister, is insufficient asportation. Cole neglects to mention that he initially "subdued" John and forcibly returned him to the area where Pam was, then forced him to lie on the ground bound until he marched him to the sight of the killing. This is much more than "slight" asportation.

Cole additionally argues that the evidence was insufficient to support a finding of the pecuniary gain factor because John's murder was based on his fight with, and wounding of, Paul. This

claim, again, finds no record support. The robbery motive and pecuniary gain factor surfaced the moment the duo lured the Edwards into the woods and Paul began to carry his stick like a weapon. John could have been killed at that point. The only glitch seemed to be Paul's lack of strength. That Cole found John's ability to overpower Paul annoying is an incidental fact outside the original robbery/murder scheme.

C. THE TRIAL COURT PROPERLY CONSIDERED MITIGATING EVIDENCE.

Cole first claims that the trial court's finding that "there is no evidence that the Defendant was physically or sexually abused as a child" contradicts the court's written "finding" that Don Cole testified that "Ann would beat the children." First, what Cole terms a "finding," is not a finding at all. Rather, it is simply a recounting of the testimony adduced at the penalty phase. The court also noted that Cole's sister, Andrea Headlee, described the household as fairly normal and testified that Cole was not physically abused (R 920).[3] It is readily apparent that there is no contradiction in the sentencing court's written findings for the reason that what Cole would have the court believe is a "finding,"

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[3] The court did not, but could also have, recounted the testimony of Ann Powers, another of Cole's half-sisters. She also testified that she never saw the children physically abused (R 1385).

is no more than a recounting or recap of testimony. The only "finding" was that "there is no evidence that the Defendant was physically or sexually abused as a child." This finding was clearly based on credibility determinations. The children, who were supposedly the subjects of such beatings, were unaware of any physical abuse. The only person to testify to the same was Don Cole, who was physically abusive to his wife and whose testimony was obviously discounted by the sentencing judge. It is within the trial court's discretion to reject either opinion, or factual, evidence in mitigation if there is record support for the conclusion that it is untrustworthy. *Farr v. State,* 656 So.2d 448 (Fla. 1995). This Court's duty is to review the record in the light most favorable to the prevailing theory. *Wuornos v. State,* 644 So.2d 1012, 1019 (Fla. 1994).

Cole claims that the court's most glaring error is its conclusion that "there is no evidence...that the circumstances of his childhood substantially affected his adult behavior." (R 921). Cole argues that the same mistake of rejecting an abused childhood was made in *Nibert v. State,* 574 So.2d 1059 (Fla. 1990).

Cole first assumes a finding was, or should have been, made that he actually had an abused childhood. The evidence, aside from Don Cole's vague references to beating children, did not support

such a finding. Half-sister Andrea Headlee testified that "aside from normal spankings Loran was never abused." (R 1374). Half-sister Ann Powers, who felt there was psychological abuse, never saw the children physically abused (R 1385). Loran Cole, on the other hand, was not exposed to psychological pressure from fights between Don Cole and his mother (though same may have been felt by his older siblings) because his father was, for all intents and purposes, out of the house and out of his life by the time he was only three years old (R 1379,1393). He obviously did not share Ann's assessment of their mother, since he kept in contact with her. Contrary to appellate counsel's assertion, he did not have to "extricate himself from his mother's clutches." (R 1383).

A trial court may well reject a defendant's claim that a mitigating circumstance has been proved when the record contains competent substantial evidence to support the trial court's rejection thereof. *Kight v. State*, 512 So.2d 922,933 (Fla. 1987). The trial court found that Cole came from a poor, deprived childhood and gave proper weight (slight) to that mitigating factor. The weight assignment is particularly reasonable in view of the fact that Cole's siblings became productive members of society. *Williamson v. State*, 681 So.2d 688, 698 (Fla. 1996). It is within the purview of the trial court to determine whether a

mitigating circumstance is proven and, if so, to assign the weight to be given to it. *Foster v. State*, 654 So.2d 112 (Fla. 1995).

Moreover, the sentencing court's determination was correct in that there was no evidence that the circumstances of Cole's childhood substantially affected his adult behavior. Dr. Berland indicated that whatever degree of impairment or psychosis that Cole suffered from was not attributable to, or the product of, his background (R 1479).

In any event, Cole's childhood was simply not that dismal, unlike that of the defendant in *Nibert v. State*, 574 So.2d 1059, 1060 (Fla. 1990). Nibert's mother forced him to start drinking at eleven or twelve years of age, frequently brought men home from bars, had sex with them in front of the children, and beat the children with a belt or switch nearly every day. *Id.* at 1060-1061. These things caused Nibert's sister to later require psychiatric treatment. *Id.* at 1061. Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years, but the trial court dismissed this mitigation because Nibert was twenty-seven years old. *Id.* The lower court in the instant case did not fail to assess and find mitigation, and there is no indication in the sentencing order that mitigation was discounted because of Cole's age.

The psychiatrist in *Nibert* also concluded that Nibert committed the murder under the influence of extreme mental or emotional disturbance, and that his capacity to control his behavior was substantially impaired *Id.* at 1062. Neither was the case here. Rather, Dr. Berland testified that, despite any adverse background influences, one with a psychosis such as Cole's still had substantial control over his behavior as a result of understanding the consequences thereof (R 1482).

Cole next contends that the sentencing court erred in weighing his mental illness. Again, Cole quarrels with the weight given, although the law makes is that the weight to be given a death penalty mitigator is left to the trial judge's discretion. *Mann v. State*, 603 So.2d 1141 (Fla. 1992). A "mitigating circumstance," for purposes of capital sentencing, is any aspect of a defendant's character or record, and any of the circumstances of the offense, that may reasonably serve as a basis for imposing a sentence less than death. *Campbell v. State*, 571 So.2d 415 (Fla. 1990). Evidence is "mitigating" only if, in fairness or totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. *Wickham v. State*, 593 So.2d 191 (Fla. 1991). The State submits that there is nothing mitigating about a psychosis of a

degree that cannot be determined, the influence of which cannot even be connected to the actions leading to the murder. It reveals nothing of the character of the defendant as it relates to the crime, or the circumstances of the offense itself. It is a character trait in a vacuum, not even of marginal relevance. Even hypothesizing some relevance does not lead to weighty mitigation when the evidence shows that this functioning individual would have substantial control of his behavior. There was no evidence that alcohol ingestion played any role in John's murder. There was no evidence that delusions or hallucinations controlled Cole's responses. Neither was there any independent evidence of an injury to Cole's brain.

Indeed, Cole lied so extensively on the tests that Dr. Berland could not even say that the profile of Cole which he reviewed was legitimate(R 1473;1482;1494). In a similar case, *Patten v. State*, 598 So.2d 60 (Fla. 1992), this Court upheld a trial court's rejection of nonstatutory mitigation of alleged mental impairment. Rejection was supported by evidence of malingering and testimony that the defendant was simply antisocial. 598 So. 2d at 63. Considering Cole's deceit and malingering, as well as the previously mentioned circumstances, the trial court's assignment of slight to moderate weight was generous and should be upheld.

Further, logic also dictates that in the absence of a causal connection between the illness and the crime (as required for the statutorily enumerated mitigators), mitigation weight should decrease. The trial court could rightfully give this mitigating circumstance less weight than a statutory mental mitigating circumstance because of its marginal relevance.

Cole complains further that the sentencing court used the wrong standard in its consideration of the disparate treatment of Codefendant William Paul. He complains that he was required to establish "by a greater weight of the evidence" that he and Paul were "equal participants" before they would be accorded "equal treatment." Cole makes the novel argument that lack of equality may determine the proper weight in considering nonstatutory mitigating circumstances, but lack of absolute equality should not prevent the finding of the circumstance.

It is within the trial court's discretion to decide whether a mitigator has been established, and the court's decision will not be reversed merely because the defendant reaches a different conclusion. *Lucas v. State*, 613 So.2d 408 (Fla. 1992). A trial court properly refuses to consider a lesser sentence imposed on a codefendant as a mitigating factor in light of evidence that the defendant, himself, perpetrated the murder without aid or counsel

from the codefendant. *Rogers v. State*, 511 So.2d 526 (Fla. 1987). That is certainly the case here. Paul was in no shape to do anything after he was beaten by the victim with his own stick. He thought that his hand was broken and was moaning (R 1124). Further, Pam Edwards testified that Paul seemed uncomfortable with what had happened (R 1171). Even assuming that Paul would have been more active but for his injury, this mitigator would not apply. What Cole suggests is that his culpability should be reduced because the heinous acts he perpetrated were also desired by one unable to carry them out or provide any help. For purposes of sentencing in a capital murder case, a mitigating circumstance is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. *Ferrell v. State*, 653 So.2d 367 (Fla. 1995). The sentencing court did not apply the wrong standard. A sentence is either disparate or not, and appellant's argument that a finding should be made on less than adequate evidence, and the weight thereof reduced, is meritless.

Cole next argues that the trial court made no mention of his behavior during trial or his drug use in its sentencing order in mitigation, and therefore, the judge ignored this nonstatutory mitigation. The record reflects that Cole's behavior at trial was

not argued as mitigating evidence. Defense counsel argued that Cole was a walking time bomb because of his illness, would be put away for life where he could get treatment, and that the jury should step above the animals and not eradicate the weak and the sick (R 1561-66). Although Cole had a problem with marijuana as a teenager, there was no evidence that Cole was actually abusing drugs at the time of the murder. He appeared to function normally to all who saw him. The sentencing court did consider Dr. Berland's testimony that alcohol and marijuana may intensify the symptoms of psychosis and found that although there was evidence that the defendant had been drinking prior to the murder, there was no evidence that such affected his ability to understand the consequences of his actions or control the circumstances (R 919).

V. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR MISTRIAL.

The defense moved in limine to preclude testimony by Mary Gamble concerning the contents of letters Cole had written to her while he was in jail, his prior record, and his attempt to escape (R 873). The court instructed her not to mention those things, and Ms. Gamble indicated that she would not (R 873).

Ms. Gamble testified that she discovered a piece of paper with a name on it. Explaining the circumstances, she said:

> I was nosey and knew some history on K.C., so I decided to go outside and look at the tag on the car. And then when I walked around to the driver's side . . ..

(R 889).

The defense objected and moved for a mistrial on the ground that the statement that she knew "some history" was an obvious reference to a prior criminal history, and therefore, she was suspicious (R 889-90). The prosecutor responded that "history" to the average layperson would not mean "criminal" history, that the comment was not elicited intentionally by the state, and Ms. Gamble's deposition reflects that what she really meant was that she knew he lied about a lot of things and was suspicious of where he got the car from. She just did not trust him to be honest (R 891). The court ruled that the remark did not rise to the level of a mistrial. The prosecutor said he had no objection to an instruction drafted by the defense and given to the jury, requiring the jury to disregard the witness' subject statement. The court asked defense counsel if he would like one given, and counsel responded: "No, sir. I'm not going to heighten it, Judge, by that." The other prosecutor commented: "Good move." (R 892).

In a similar case, *Sims v. State*, 444 So.2d 922 (Fla. 1984), a defense witness mentioned using Sims' "mug shot" in a

photographic display. On appeal, Sims argued that the trial judge should have granted his motion for mistrial. This Court held that since the words in question were used by a defense witness and did not *specifically refer* to a prior conviction, the vague reference to other possible criminal activity was not so prejudicial as to require a new trial. 444 So.2d at 924. The words used in Cole's case were far less descriptive, or inference-worthy, than the term "mug shot" used in *Sims*. Like *Sims*, it was not so prejudicial as to require a new trial. As the prosecutor pointed out, the term "history" applied to those events or occurrences that transpired between Cole and the witness in the past and would not be taken by the average layperson to mean a "criminal" history. *See also, Ferguson v. State*, 417 So.2d 639, 642 (Fla. 1982)(testimony that "the first time...my first time in prison, all three of us was together" found not to be so prejudicial as to warrant a reversal) *Hardie v. State*, 513 So.2d 791 (Fla. 4th DCA 1987), on which Cole relies, is clearly distinguishable. In *Hardie*, officers of the law based their identification of the defendant on their prior knowledge and contacts with him, leaving no doubt as to a past criminal history.

In *Ferguson v. State*, 417 So.2d 639, 642 (Fla. 1982), this Court held that in situations such as this, a curative instruction

should be requested. In the present case, the defense deliberately chose to forego the curative measure. Such remarks may be erroneously admitted, yet not be so prejudicial as to require reversal. *Darden v. State*, 329 So.2d 287 (Fla. 1976). Any prejudice arising from the admission of testimony concerning prior criminal history, or incarceration, can be corrected by an instruction to the jury to disregard the testimony. In the absence of a defense request for such an instruction, the trial court properly denied the motion for a mistrial. *Ferguson*, 417 So.2d at 642; *Smith v. State*, 365 So.2d 405 (Fla. 3d DCA 1978).

Where there is overwhelming evidence of guilt, such an error is harmless. *Henderson v. State*, 463 So.2d 196, 200 (Fla. 1985); *Roman v. State*, 475 So.2d 1228, 1234 (Fla. 1985); *Craig v. State*, 510 So.2d 857, 864 (Fla. 1987). Considering the vast amount of physical and circumstantial evidence, as well as Cole's admissions, the evidence of his guilt was overwhelming. Thus, any error was harmless.

VI. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

In *McCaskill v. State*, 344 So. 2d 1276, 1278 (Fla. 1977), this Court adopted the test set forth in *Murphy v. Florida*, 421 U.S. 794 (1975), and *Kelley v. State*, 212 So.2d 27 (Fla. 2d DCA

1968), for determining whether to grant a change of venue:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

344 So. 2d at 1278 (quoting *Kelley*, 212 So. 2d at 28). *See also Pietri v. State*, 644 So. 2d 1347 (Fla. 1994), *cert. denied*, 115 S. Ct. 2588, 132 L. Ed. 2d 836 (1995). In *Manning v. State*, 378 So.2d 274 (Fla. 1980), the Court further explained:

> An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of . . . showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause.

Id. at 276 (citation omitted). Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury. *See, e.g., Henyard, supra.*

During voir dire, the prospective jurors were questioned about their exposure to the pretrial publicity surrounding this case. While many of the venire had read something about the case, each stated that he or she had not formed an opinion and would consider only the evidence presented during the trial in making a decision. All jurors indicated that they could disregard any prior knowledge of the case and decide the case fairly on the evidence (R 51-56,63-65,71-73,87-93,97-100,102-106,115-117,124-126,141-144,152-156). Cole has not shown that the jurors' assurances were "incredible" and "unreliable." Further, the record demonstrates that the members of Cole's venire did not possess such prejudice or extensive knowledge of the case as to require a change of venue. Therefore, the trial court did not abuse its discretion in denying Cole's motion.

VII. THE TRIAL COURT PROPERLY ADMITTED RELEVANT PHOTOGRAPHS OF THE VICTIM AND THE PROBATIVE VALUE OF SUCH WAS NOT OUTWEIGHED BY ANY POSSIBLE PREJUDICE.

During the testimony of Marion County Sheriff's Department Detective William Sowder photographs of the body of John Edwards were introduced into evidence. State's Exhibit 20 reflects the manner in which the deceased had been covered. Exhibit 21 is a close-up of the back of the head, covered up. A slight injury to the back of the head is visible. Exhibit 22 is a different angle

reflecting the upper torso (R 615). These photos depicted the body before it was disturbed (R 616). The defense objected to the photos claiming the prejudicial effect outweighed the probative value and that the photos were duplicative with the only difference being that Exhibit 21 was closer (R 616). The State argued that the standard was relevance and 21 showed the head wound that was visible when one was close up. The other photo portrayed the whole body as it was found (R 617). The objection was overruled, and the photos were published to the jury (R 617).

The State proffered the photographs of the victim introduced during the testimony of the medical examiner.[4] Dr. Pillow testified

[4] Dr. Pillow ultimately testified that:
Exhibit 39 - is a photograph of the front of the body from waist to head and showed the condition of the body when first received.
Exhibit 40 - is a photo from the lower waist area down, front of the body, and showed the condition of the body as it was received into the morgue.
Exhibit 41- showed the black shoelace tied around the left wrist.
Exhibit 45- is an identification photo of the upper chest and face after the body had been undressed and cleaned, to show his appearance.
Exhibit 46- is a photo of a ligature mark on the left wrist where the black shoelace had been.
Exhibit 47- reflects the abrasion on the back of the left shoulder.
Exhibit 48- is a photo of the back of the right hand, showing the bruising and small laceration on the back of the right ring finger and the two small abrasions at the base of the right ring finger and little finger.
Exhibit 49 - is a close-up photo of the back of the right hand taken to show the laceration and bruising on the right mid portion of the right ring finger.

on proffer that the photographs, State's Exhibits 39-57, would assist her in showing the manner of death, the nature and location of the wounds, and the identity of John Edwards (R 725). On cross-examination, Dr. Pillow indicated that although all of the photos were might not be essential, they would aid in demonstrating the position and type of injury. She testified that Exhibit 39 showed the front of the body as it was when she received it, from

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Exhibit 50 - shows the back of the left hand with dark discolorations to the skin of the little finger and the left ring finger consistent with post-mortem discoloration that would occur as the body was decomposing after death.
Exhibit 51 - shows the abrasion and laceration to the right external ear and the abrasion extending just behind the ear.
Exhibit 52 - shows a laceration to the back part of the right ear when the ear is pulled forward.
Exhibit 53 - is a photo of the right side of the back of the head before the hair was shaven, showing the laceration on the right back of the head and a portion of the injury to the right ear.
Exhibit 54 - is a photo showing the laceration and abrasion to the right side of the back of the head after the head hair had been shaved.
Exhibit 55 - is a photo taken during autopsy with the scalp pulled back reflecting bruising underneath the scalp, the area of the right ear, and the area of small bruises and abrasions below the laceration to the back of the head.
Exhibit 56 - shows the left side of the cut to the neck. It also shows a very superficial cut or scratch slightly below and farther back on the left side of the neck that just involved the uppermost portion of his skin. It appears to be perimortem, meaning it occurred close to or around the time of death. The exhibit also shows the left portion of the cut to the neck.
The exhibits were admitted into evidence subject to the prior objections (R 751-756).

approximately the pelvis upward to the head. The photo reflects the neck injury prior to the area being cleaned (R 727). She indicated that Exhibit 40, a photo of the deceased, dressed, from the waist down, would assist in showing the state and condition of the body before she disturbed or examined it. Blood or dirt is reflected in the photo, as well as a sock (R 733-34). It is a companion photograph to Exhibit 39, which shows the victim from the waist up (R 733). The photo does not portray wounds to the body (R 726). Exhibit 45 demonstrates a neck wound and another injury to the right ear, after the body had been cleaned. It is largely a shoulder and head photograph. It shows the neck injury close-up. Exhibit 45 reflects an abrasion on the back of the left shoulder (R 727). Exhibit 55 shows the undersurface of the right side of the scalp and the back of the right side of the scalp. It also shows the outside portion of the cranium or the skull bone. It was taken to demonstrate the underlying bruising in the undersurface of the scalp not visible on the surface of the scalp (R 728).

The defense objected that Exhibit 56 shows the cut to the throat, which is also shown in Exhibit 57, just at a different angle, and that 56 was also a duplicate as to the wound covered in 45, which also shows the wound to the throat (R 728). Dr. Pillow testified that there were differences in the photos. She indicated

that 56 is the most closely taken photo of the neck wound. In addition to showing the cut across the front of the neck, it also shows a superficial cut in the skin on the left side of the neck which is not visible in its entirety in 45 or 57. Exhibit 57 is a closer shot of the wound to the neck and shows the thyroid cartilage or Adam's apple, which demonstrates the depth of the wound more than Exhibit 45. Exhibit 45 is more of an identification photograph, showing on whom the autopsy was performed (R 730). The trial court overruled the objection and found that the three photographs were distinct enough not to be duplicative of each other and noted that Dr. Pillow had testified that they each explain a various aspect of the victim, cause of death, or the injuries sustained by the victim (R 730).

The defense further objected to Exhibit 55, the skullcap laid open, and argued that the information could be described by the doctor without exposing the jury to a highly prejudicial photo and that the prejudicial value outweighed the probative value (R 731). Dr. Pillow testified that although the photo was not essential, it showed the extent of the bruising which was not visible on the surface. She explained that a scalp is so thick, the extent of bruising cannot be ascertained from looking at it unopened. Also, it demonstrates the force or velocity of the blows that were struck

(R 731). The photo also demonstrated that John Edwards was alive when the blows impacted his head (R 732). The court found that the photograph was relevant to show that the victim was alive at the time and the force of the trauma he underwent (R 732).

The defense also objected to Exhibits 39 and 40 "for the same reasons stated earlier" and that they merely show the condition at the time the body was brought in (R 733). The lower court ruled that since the photos were described in the evidence the photos were admissible into evidence to show the body as it was found on the ground (R 734).

Dr. Pillow also testified that the photographs blown up for the courtroom testimony were not the sum and total of all the photographs taken. Forty-six photos were taken and only sixteen were used at trial. (R 732). Dr. Pillow assisted the State Attorney's office in selecting the photos (R 733).

Generally, the admission of photographic evidence is within the trial judge's discretion, and a trial judge's ruling on this issue will not be disturbed on appeal unless there is a clear showing of abuse. *Wilson v. State,* 436 So.2d 908 (Fla. 1983). The test for the admissibility of a photograph is whether the photograph is relevant to a material issue either independently or by corroborating other evidence. *Straight v. State,* 397 So.2d 903,

906 (Fla. 1981). Under the relevancy test of admissibility, photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted. *Bush v. State*, 461 So.2d 936, 939 (Fla. 1984). The photographs in this case were certainly relevant to demonstrate the manner in which the victim died, the nature of his injuries and the method by which they were inflicted.

The fact that photographs are gruesome does not render their admission an abuse of discretion. *Thompson v. State*, 565 So.2d 1311,1315 (Fla. 1990). In *Young v. State*, 234 So.2d 341, 347 (Fla. 1970), receded from on other grounds, *State v. Retherford*, 270 So.2d 363 (Fla. 1972), the court ruled that the fact that the photographs are gruesome is insufficient by itself to constitute reversible error. If the photographs have some relevancy, independently or as corroborative of other evidence, they may be admitted. *Id.* At 347-48. This court has consistently upheld the admission of allegedly gruesome photographs where they are independently relevant or corroborative of other evidence. *See, e.g., Jackson v. State*, 545 So.2d 260 (Fla. 1989) (photographs of victims' charred remains admissible where relevant to prove identity and circumstances surrounding murder and to corroborate medical examiner's testimony); *Bush v. State*, 461 So.2d 936 (Fla.

1984)(photographs of blowup of bloody gunshot wound to victim's face admissible where relevant to assist the medical examiner in explaining his examination); *Wilson v. State*, 436 So.2d 908 (Fla. 1983)(autopsy photographs admissible where relevant to prove identity, nature and extent of victims' injuries, manner of death, nature and force of the violence, and to show premeditation); *Straight v. State*, 397 So.2d 903 (Fla. 1981)(photograph of victim's decomposed body admissible where relevant to corroborate testimony as to how death was inflicted); *Foster v. State*, 369 So.2d 928 (Fla. 1979)(gruesome photographs admissible in guilt phase to establish identity and cause of death).

Juries are not expected to make their recommendations in a vacuum. "It is within the sound discretion of the trial court to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence." *Teffeteller v. State*, 495 So.2d 744, 745 (Fla. 1986). The subject photos are not unduly gruesome and are relevant to the state's case of premeditated murder as well as to the aggravating circumstances. Exhibit 55 was never portrayed as anything but an autopsy photograph which any juror would expect to be somewhat graphic, considering the nature of an autopsy itself. Further, the image contained thereon was never

offered as, and could not have been attributed to, the handiwork of the defendant.

This court has held that the admission of gruesome photographs may be improper if they are irrelevant and other photographs are adequate to support the State's contentions. *See, e.g., Thompson v. State,* 619 So.2d 261 (Fla. 1993)(autopsy photographs were improper where they were not essential given that other photographs well supported that the murder was heinous, atrocious, or cruel); *Czubak v. State,* 570 So.2d 925 (Fla. 1990)(gruesome photographs improper when not relevant to any issue). That is not the case here. The subject photographs were not cumulative and were relevant and necessary to explain the manner of death.

This Court has cautioned trial judges to scrutinize photos for prejudicial effect, especially when less graphic photographs are available to illustrate the same point. *Marshall v. State,* 604 So.2d 799 (Fla. 1992). That admonition was followed in this case, and no unnecessarily inflammatory photos were introduced into evidence or viewed by the jury. As was the case in *Pangborn v. State,* 661 So.2d 1182, 1187 (Fla. 1995), the trial judge personally viewed the pictures, after defense counsel objected to their introduction, and determined that the pictures should be admitted. The medical examiner confirmed that the pictures assisted her in

explaining to the jury the multiple injuries observed on the deceased. Even if the photographs could be said to depict gruesome sights, the relevance of such photographs to the case was not outweighed by the danger of unfair prejudice. Where a victim is beaten severely and has his throat slashed, it is not likely that the State's proof would be to the liking of the defendant. A defendant, however, suffers no undue prejudice when true details of his crime are rendered to the jury considering his punishment. *Hill v. Black,* 891 F.2d 89, 91-92 n.1 (5th Cir. 1989).

The subject photos were not so shocking as to outweigh their relevance. Given the relevance of the photographs to this testimony, it cannot be said that the trial judge abused his discretion in admitting them. Moreover, even if the court found that the trial court erred in admitting one, or several, of the photographs into evidence, the error would be harmless. *Peterka v. State,* 640 So.2d 59, 69-70 (Fla. 1994); *State v. DiGuilio,* 491 so.2d 1129 (Fla. 1986).

The closing argument of the prosecutor in the penalty phase does not show that he argued from, or utilized, photographs in any manner (R 1546-1560). The jury requested the autopsy photos: "Can we have the autopsy photos, please, the ones with cut throat?" The court stated for the record that they were State Exhibits 56 and 57

(R 1578). The following colloquy then occurred between the court, defense counsel Don Gleason, and the State Attorney, Brad King:

> **MR. GLEASON**: Did the request ask for a particular autopsy?
> **THE COURT**: This is what it says. I'll ask them when they come in here again. Because they have to come in to listen to this. "Can we have the autopsy photos, please, the one with the cut throat." Maybe they mean--Let me have the big top one.
> **MR. GLEASON**: Judge, **he** really only showed them **one photograph** of the cut throat, on his closing.
> **MR. KING**: But they may not be just talking about what **he** showed them.
> **MR. GLEASON**: That's our assumption, is that they want to see the **ones I** showed them.
> **THE COURT**: Yeah, right.
> **MR. KING**: I think there is only one other.
> **THE COURT**: This one here.
> **MR. GLEASON**: No, it has the throat cut covered up pretty much. **Whichever ones they want is fine.**
> **THE COURT:** Well, I'll ask them.

(R 1579).

The jury returned to the courtroom, and the following ensued:

> **THE COURT:** ...You also have a question about: Can we see, can we have the autopsy photos, please, the one with the cut throat. Do you want to see all of the autopsy photos, or do you want--
> **FEMALE JUROR:** It was just the ones **he** showed before, just a little while ago. It was like **four** pictures.
> **THE COURT:** Four pictures?
> **FEMALE JUROR:** Yeah. I think there were two mainly that they wanted to see.
> **THE COURT:** Did you want to see that one and this one (indicating)?
> **FEMALE JUROR:** Yes.
> **THE COURT:** That one and this one?
> **MALE JUROR:** There's supposed to be one more.
> **THE COURT:** Do you want to see this one?

MALE JUROR: No.
THE COURT: This one. Do you want to see anything else?
ANOTHER MALE JUROR: As far as I know, that's--
THE COURT: Anybody else? (No response) You would be able to take these with you. For the record, Exhibit 45 and 56 and 57.

(R 1585-86).

VIII. COLE'S MOTION TO SUPPRESS WAS PROPERLY DENIED.

On pages 60-67 of his brief, Cole argues that the trial court erred in denying his motion to suppress evidence seized following his arrest. Despite Cole's assertions to the contrary, probable cause to arrest existed, and therefore, the evidence obtained in the search incident to that arrest was properly admitted.

When Cole was taken into custody, law enforcement had a detailed description of the suspects, as well as a detailed description of the victims' automobiles. The surviving victim described Cole (known to her as "KC" or "Kevin") as a stocky, muscular white male, thirty-six years of age, 5'6" to 5'7" in height, with a beard and strawberry blond hair which was thin on top and curly around the collar, weighing approximately 200 pounds[5] (R 445). He was described as wearing a camoflauge "utility" type cap, a black and blue flannel shirt, black jeans, a belt with the initials "KC" on it, and a black T-shirt with gold writing (R 445).

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[5]This is Defendant Cole (R 447).

The other suspect, Paul (known to the victim as "Kurt" or "Chris") was described as in his late teens to early twenties, thin, about 5'8" in height, and weighing about 155 pounds (R 446). She further described Paul as having shoulder length brown hair and a goatee (R 446). He was wearing boots and a black T-shirt with lettering on it, and had a severe (and fresh) injury to his left hand (R 446). Paul wore an earring and had a chipped tooth. He was wearing "moccasins with protectors that would actually protect your pants if you were walking through the woods" (R 457).

Around 8:00 a.m., on Monday, February 21, 1994, a citizen called the Sheriff's Office and reported seeing two men, matching the descriptions, behind the NAPA auto parts store in Ocala (R 458). Law enforcement contacted the caller (R 461). That person identified the subjects' last direction of travel, and, shortly thereafter, the two subjects were located (R462). The subjects' clothing and hair "matched perfectly" with the descriptions given by Pam Edwards, as did the distinctive "leggings" worn by Defendant Paul (R 462). The facial hair worn by the subjects matched the descriptions, as did the initials "KC" on Cole's belt (R 463).[6]

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[6]On page 65 of his brief, Cole argues that two men "in camouflage clothing" is not unusual in Ocala. He misses the point. Cole was wearing a camouflage cap (R 484). Hunting season was over at the time of the arrests (R 694).

Following a hearing on Cole's motion to suppress, the trial court found that probable cause to arrest existed, and denied the motion (R 494). For the reasons set out below, that ruling was correct.

Florida law is settled that, on appeal from a trial court's ruling on a motion to suppress, the evidence is viewed in the light most favorable to sustaining the lower court's ruling. *McNamara v. State*, 357 So.2d 410, 412 (Fla. 1978). Under that standard, the basis for probable cause to arrest includes all of the surrounding facts and circumstances. These include Cole's presence in close proximity to the location from which the murder victim's car was recovered, as well as descriptions of the defendants from the surviving victim. As set out above, those descriptions "matched perfectly" with the defendants' clothing and appearance when they were observed by law enforcement. Under settled law, "[t]he probable cause standard for a law enforcement officer to make a legal arrest is whether the officer has reasonable grounds to believe that the person has committed a felony." *Blanco v. State*, 452 So.2d 520, 523 (Fla. 1984). Further, "[t]he standard of conclusiveness and probability is less than that required to support a conviction." *Id.*; *See also, Kearse v. State*, 662 So.2d 677, 686 (Fla. 1995); *Shriner v. State*, 386 So.2d 525 (Fla. 1980). Based upon the detailed description of the suspects, and their

close proximity to the site from which the murder victim's car was recovered, law enforcement had probable cause to arrest Cole.[7] Because the arrest was based on probable cause, the physical evidence seized as a result of that arrest was properly admitted.

Alternatively, Cole has waived appellate review of this issue because he did not preserve it by objection at trial. *See, e.g., Rutherford v. State*, 545 So.2d 853 (Fla. 1989). In his brief, Cole asserts that the evidence seized from him at the time of his arrest was introduced over his objection. *Initial Brief* at 60. However, while Cole did renew the objection contained in the motion to suppress during the trial (R 937), he subsequently waived that objection by stating "no objection" when evidence seized from Cole was offered in evidence (R 960-61, 975). Even if the renewed objection based upon lack of probable cause to arrest was sufficient to preserve the issue contained in the motion to suppress for appellate review, the express statement "no objection" when the various items were offered into evidence waived whatever objection may have initially preserved for review. Thus, besides having no merit, this claim is not preserved for review.

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[7]That the two suspects were located together and both matched the descriptions is yet another fact supporting probable cause to arrest.

IX. THE COURT DID NOT ERR IN ADMITTING THE OAK WALKING STICK WHICH WAS RELEVANT, ADMISSIBLE EVIDENCE.

The evidence reflects that William Paul, who began to carry the oak walking stick like a weapon, and was behind John Edwards in a single file line, walked to the area where the assault occurred, and did something to John, i.e. attacked him with the stick. In defense, John took the stick from Paul and hit him with it, before being overpowered by Cole (R 1118-1124). Pamela Edwards saw her brother hit Paul with the stick (R 1121-22). Paul did not return with the stick (R 1148-49). The stick was found in the area of the assault and near where John's body was found (R 628). A stump was located there that matched the cut-off stick (R 629). The tree in front of a deer stand had been freshly cut. It was not hunting season, and the tree was not blocking the stand (R 694). A forensic microanalyst testified that the large oak stick and the stump were at one time the same object (R 1044,1048). Pam said the stick looked like the one she had seen Paul carry (R 1107-08).[8] The trial court properly ruled that the stick was relevant to show that the defendants had a stick and properly allowed it to be admitted into evidence over defense objection (R 1203). It was the

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[8]As the State pointed out below, one would be unable to testify that the piece of tree limb was the very same one seen.

State's theory that stick was a weapon used in the crimes, and it was relevant to the issues in this case. Given the distinctive appearance of the stick, and the fact that Pam could match the attributes on the State's exhibit with those of the stick she had seen Paul carry, there is little danger that a reasonable jury would not be satisfied that it was the same stick. The fact that there was no blood or hair found on it was explained by the weather and rain (R 1059-60, 1085). The court properly found that the lack of physical evidence on the stick would not go to its admissibility, but to its weight (R 1205). *Cf. State v. Joseph*, 419 So.2d 391 (Fla. 3d DCA 1982). Furthermore, considering Pam's eyewitness testimony that she had observed her brother hitting Paul with the stick, any error in the admission into evidence of this particular stick is harmless.

X. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY IN THE MANNER REQUESTED BY APPELLANT.

The trial court did not err in refusing to give an instruction regarding independent acts. A defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense, **if** there is any evidence to support such instructions. *Hansbrough v. State*, 509 So.2d 1081, 1085 (Fla. 1987); *Smith v. State*, 424 So.2d 726, 732 (Fla. 1982). In the case at bar, there

was no evidence to support such an instruction, which distinguishes this case from *Rodriguez v. State*, 571 So.2d 1356 (Fla. 2d DCA 1990), and *Lewis v. State*, 591 So.2d 1046 (Fla. 1st DCA 1991). Cole did escort Pamela Edwards to the bathroom and Paul was left alone with the victim. However, Pam was only gone for a minute, and when she left the wounded Paul was lying on the ground, slumped over on his elbow. When she returned, he was in that same position (R 1192). Pam also heard her brother grunt while Cole was with him and later moan as Cole called out to him (R 1129-30). Cole admitted that he slashed John's throat (R 896-900). A felony was also committed as to Pam, the kidnaping, in which Cole and Paul acted in concert. In any event, any error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

Also, there was absolutely no evidence that the "theft" was an "afterthought" which might support such an instruction. The robbery was obviously planned from the beginning and commenced when Pam and John were lured away from the camp and Paul began to carry the oak stick more like a weapon than a walking stick, ultimately attacking the victims. The judge read the standard penalty phase instructions, and any proposed instructions were either unnecessary or incorrect statements of the law. Further, any error in not so instructing the jury was harmless under *DiGuilio*, *supra*.

XI. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S PRETRIAL MOTIONS AND ALLOWING THE STATE TO PROCEED UNDER BOTH PREMEDITATION AND FELONY MURDER.

The gist of Cole's argument is that the evidence does not support a conviction for premeditated murder. The trial judge instructed the jury on both premeditated and felony murder, and the jury returned a general verdict of first-degree murder. According to Cole, the court cannot be certain which of the two theories the jury relied on in reaching its verdict, and so, the verdict must be set aside. Cole's first argument is without merit. Premeditation is a "fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probably result of that act." *Asay v. State,* 590 So.2d 610, 612 (Fla. 1991). John was severely beaten about the head, and to ensure death, his throat was cut. The Edwards were lured into the woods away from campsites, and people, to facilitate a robbery. Once John was incapacitated, Cole could have chosen to let him live along with his sister. Cole, however, had "more sympathy for women." Indeed, he kept John alive for some period of time, reflecting on his ultimate decision as to what to do with him. It was also expedient to remove John from the picture to facilitate undisturbed, sexual relations, by force or coercion,

with John's sister. Cole's decision to kill John was a conscious, premeditated one. The evidence is not consistent with a killing that occurred on the spur of the moment. *Cf. Adams v. Wainwwright,* 764 F.2d 1356, (11th Cir. 1985). Even if it could be found that the evidence did not support premeditation, and it was error to instruct the jury on both premeditated and felony murder, such error is harmless. *McKennon v. State,* 403 So.2d 389 (Fla. 1981); *Mungin v. State,* 667 So.2d 751, 754 (Fla. 1995).

XII. THE TRIAL COURT DID NOT ERR IN IMPOSING AN ORDER OF RESTITUTION WHICH INCLUDED TRAVEL EXPENSES FOR A STATE WITNESS.

Cole complains that the trial court entered a restitution order against him for the travel expenses of the deceased victim's parents - one of whom was a State witness. He says that "apparently" he did not receive notice, there was no inquiry into his ability to pay, travel expenses cannot be awarded as restitution, and the State did not provide "any documentary evidence in support of the restitution amounts." Initial Brief at 78, 79.

At sentencing, the State presented three proposed restitution orders "in the amounts set forth in the PSI . . .." (R 96). There was no objection raised either to the imposition of restitution generally or the amounts reflected on the proposed orders or in the

PSI. Likewise, no objection was made to a lack of notice or to consideration of Cole's ability to pay restitution. Indeed, following the restitution requests, the court specifically sought comment from Cole and his counsel (R 97). Both responded that they had nothing to say (R 97).

First, it is important to note that Cole does not claim that he did not receive notice; rather, he offers only that "apparently" he did not receive it. Such a claim does not state a basis upon which relief can be granted. It is legally insufficient.

Second, even if Cole did not receive notice, he is not entitled to relief. His failure to object to a lack of notice at the sentencing hearing bars consideration of this issue on appeal. *Reynolds v. State*, 598 So. 2d 190 (Fla. 1st DCA 1992). *See Earle v. State*, 519 So. 2d 757 (Fla. 1st DCA 1988).

In order to challenge a restitution award due to a failure to consider ability to pay at the time of imposition, an objection must be made and the defendant "must present evidence of his inability to pay at the time restitution is ordered." *Bolling v. State*, 631 So. 2d 310, 311 (Fla. 5th DCA 1994). Indeed, it is too late to object when, after having advised the court he had nothing else, counsel takes "exception to the imposition of restitution . . .." *Id.* at 311-312. Cole never objected in the

trial court. To the contrary, when asked, he said that he had nothing at all to reply to the State's position. Thus, this claim is not cognizable on appeal. *See Driggers v. State*, 622 So. 2d 1374 (Fla. 5th DCA 1993).

Further, even if preserved, there is no merit to the claim. An ability to pay determination may be made at the time enforcement of a restitution order is sought, rather than upon imposition. *See State v. Beasley*, 580 So. 2d 139 (Fla. 1991).

The State contends that the claim as to the deceased victim's parents' travel expenses is also procedurally barred for failure to make a contemporaneous objection at the time of imposition. In any event, the award was authorized by Fla. Stat. Section 775.089(1)(c) (1993) because family members are "victims" within the meaning of that statute where the "aggrieved party is deceased as a result of the offense." *Gluesenkamp v. State*, 636 So. 2d 1367, 1368 (Fla. 1st DCA 1994). A victim is entitled to a restitution award for the expenses incurred in traveling to the restitution hearing.[9] *See Haynes v. State*, 575 So. 2d 1341 (Fla. 1st DCA 1991). Thus, the murder victim's parents are victims whose expenses, including travel, may be the subject of a restitution

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[9]The order awarding travel expenses also included monies for "repair to damaged vehicle." (R 925).

order.

In *Deleveaux v. State*, 646 So. 2d 850 (Fla. 3d DCA 1994), the defendant claimed that the evidence was insufficient to support a restitution order where it consisted of a recommendation in the PSI that a certain dollar amount be paid to the deceased victim's family. The court held the issue procedurally barred because the defendant failed to make a contemporaneous objection. 646 So. 2d at 850. Cole made no contemporaneous objection to the use of the PSI to support the restitution award. Thus, the issue is procedurally barred. *Deleveaux*, 646 So. 2d at 850; *Flanagan v. State*, 536 So. 2d 275 (Fla. 2d DCA 1988). *See Driggers*, 622 So. 2d at 1375. Further, "[u]nder certain circumstances, a trial court may rely on the hearsay evidence of recommended restitution amounts from a PSI to make his determination." *Reynolds*, 598 So. 2d at 190 (Fla. 1st DCA 1992)(*citing Flanagan v. State*, 536 So. 2d 275 (Fla. 2d DCA 1988)).

The restitution orders entered by the trial court in this case should be affirmed.

XII. THE TWENTY-FIVE YEAR MINIMUM MANDATORY PROVISIONS APPEARING ON APPELLANT'S FIRST DEGREE AND LIFE FELONY CONVICTIONS APPEAR IMPROPER.

It appears that the twenty-five year minimum mandatory provisions appearing on Cole's written sentences for the first

degree and life felonies is improper.

XIV. THE CONSTITUTIONALITY OF FLORIDA STATUTE SECTION 921.141.

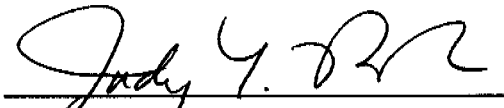
Cole lodges a broad-based, boilerplate attack on Florida's death penalty statute. For the most part, this point is devoid of record citation, and it has not been demonstrated that these sundry issues were presented, argued, ruled upon, or preserved below.

Even if the various arguments were cognizable, no relief should be granted. This Court has previously found such arguments to be without merit. *Hunter v. State*, 660 So.2d 244, 252-53 (Fla. 1995); *Fotopoulos v. State*, 608 So.2d 784, 794 n.7 (Fla. 1992); *Taylor v. State*, 638 So.2d 30, 34 n.4 (Fla. 1994); *Johnson v. State*, 660 So.2d 637, 648 (Fla. 1995); *Hannon v. State*, 638 So.2d 39, 43 (Fla. 1994); *Preston v. State*, 607 So.2d 404, 410 (Fla. 1992); *Power v. State*, 605 So.2d 856, 864-65 (Fla. 1992).

CONCLUSION

Based upon the above and foregoing argument the judgment and sentence of death should be affirmed.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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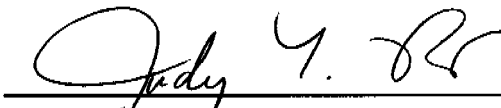
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by delivery in the basket at the Fifth District Court of Appeals to Christopher S. Quarles, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, on this 13th day of January, 1997.



Of Counsel