IN THE SUPREME COURT OF FLORIDA

CALVIN JEROME JOHNSON,

Appellant,

v. Case #: 88,986

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State generally accepts Johnson's rendition of the Case as put forth in his initial brief, subject to the following additions and or clarifications.[1] The second, third and fifth Count of the Indictment filed in this cause read in pertinent part as follows:*

SECOND COUNT

> The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ANTHONY WAYNE JOHNSON, ***CALVIN JEROME*** JOHNSON AND CHIFFON RENEE BRYANT on the 30th day of December, 1994, in the County of Duval and the State of Florida, did attempt to unlawfully kill Calvin Gaines, a human being, ***by shooting*** the said Calvin Gaines with a premeditated design to effect the death of Calvin Gaines, a human being, and during the commission of the aforementioned Attempted First Degree Murder, the said ANTHONY WAYNE JOHNSON, ***CALVIN*** **JEROME** JOHZVSON AND CHIFFON RENEE BRYANT ***carried or had in their*** *possession a* ***firearm, to*** wit: a ***pistol,*** contrary to the

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'Appellant was the Defendant in the trial court below. Appellee, THE STATE OF FLORIDA, was the prosecution. Henceforth, Appellant will be identified as "Johnson" or Defendant; his Co-Defendant and younger brother, Anthony, will be identified by his first name or Co-Defendant. Appellee will be identified as the "State". The Record and Transcript of this Case are contained in 41 Volumes. References to the same shall be by Roman (Record) and Arabic volume number (Transcript), as they were so designated by the clerk of the trial court, followed by the respective page number of that volume. Therefore, the reference I/33, is to page 33, located in volume I of the record, while 2/193, is to page 193, located in volume 2 of the transcript. "p" designates pages of Johnson's brief. All emphasis is supplied unless otherwise indicated.

'The rendition of the Counts and the Verdict forms for those Counts is relevant to Johnson's third issue on appeal, concerning the 3-year mandatory sentences for firearms.

provisions of Sections 782.04, ***735.087***[3] and 777.04, Florida Statutes.

THIRD COUNT

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ANTHONY WAYNE JOHNSON, ***CALVIN JEROME:*** JOHNSON and CHIFFON RENEE BRYANT on the 30th day of December, 1994, in the County of Duval and the State of Florida, ***did carry*** **a** ***firearm,*** to wit: ***a pistol,*** and did unlawfully by force, violence assault, or putting in fear take money or other property belonging to Willie Gaines, as owner of custodian from the person or custody of Willie Gaines, and during the course of committing or attempting to commit the aforementioned robbery the said ANTHONY WAYNE JOHNSON, ***CALVIN JEROME JOHNSON*** and CHIFFON RENEE BRYANT ***had in their possession a firearm,*** to wit: ***a pistol,*** contrary to the provision of Sections 812.13 and 775.087, Florida Statutes.

FIFTH COUNT

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ANTHONY WAYNE JOHNSON, ***CALVIN JEROME:*** JOHNSON and CHIFFON RENEE BRYANT on the 30th day of December, 1994, in the County of Duval and the State of Florida, ***did carry a firearm,*** to-wit: a pistol, and did unlawfully by force, violence, assault, or putting in fear, take money or other property belonging to Calvin Gaines, as owner or custodian, from the persons or custody of Calvin Gaines, and during the course of committing or attempting to commit the aforementioned robbery the

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[3]Reference to 735.087 must be a typographical error given the way the count reads and the fact that there is no such statute in Chapter 735, which is Florida's Probate Code. It should most likely read 775.087, as it does in the other Counts.

said ANTHONY WAYNE JOHNSON, ***CALVIN JEROME JOHNSON*** and CHIFFON RENEE BRYANT ***had in their possession a firearm*** or destructive device, to-wit: ***a pistol,*** contrary to the provisions of Sections 812.13 and 775.087, Florida Statutes. (I/25-26)

The Verdict forms for each count read:

VERDICT - COUNT II

WE, THE JURY, FIND THE DEFENDANT GUILTY OF ATTEMPTED MURDER IN THE FIRST DEGREE, ***AS CHARGED IN THE INDICTMENT.***

VERDICT - COUNT III

WE, THE JURY, FIND THE DEFENDANT GUILTY OF ATTEMPTED ROBBERY ***WITH A FIREARM, AS CHARGED IN THE XNDICXMENX.***

VERDICT - COUNT V

WE, THE JURY, FIND THE DEFENDANT GUILTY OF ROBBERY ***WITH A FIREARM, AS CHARGED IN THE INDICXMENX.*** (II/257-58, 260)

At no time did Johnson object, as he now does, to the 3 year minimum mandatories for the aforementioned counts (34/2017-19; 38/2365; 41/2449-50).

STATEMENT OF THE FACTS

I. Guilt Phase

A "full and fair" statement of facts, in the chronology they were provided below, follows.[4] Calvin Gaines [Big][5] testified he was close to 28-years-old (29/914). At that time he lived with his mother and aunt (29/914). His father, Willie Gaines, used to live there too, but he was "shot and killed" (29/914-15).

On December 30, 1994, around 10:15 a.m., he went out to help his father, who was installing a windshield wiper motor on a car (29/914-15). At his dad's request he climbed into the car, cranked it up, and determined the wiper motor worked (29/914-15). His dad moved to the rear of the car (29/915). As he attempted to get out of the car to shut the hood, his way was blocked by a guy who had crouched down next to him (29/915-16). The guy had a gun on him, ordered Big not to move, and asked him: "Where the money at, where the dope at." (29/916-17). Big responded that he did not have any dope and gave the guy $300.00 to $400.00 (29/916-17). He identified Johnson's brother, Anthony [Amp], as the assailant with the gun on him (29/917-18).

Anthony asked Big where his gun was at, to which Big responded

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[4] See *Thompson v. State, 588* So.2d 687, 689 (Fla. 1st DCA 1991).

[5] 'Calvin Gaines' street name was "Big" (29/1075). Because he shares the same first name as Appellant, he will be referred to by his street name in this brief. Big knew Anthony by his street name "Amp" and Defendant as "Chip." (29/921, 1082)

he did not have one (29/918). Anthony took Big's cellular phone, which was beside him on the front seat (29/918-19). After Big handed him the phone, Anthony ordered him out of the car and to place his hands on top of the car (29/919). Big did as he was ordered (29/919). Anthony reached for Big's left front pocket and Big gave him another $1,000.00 cash (29/919). As this transpired, Willie Gaines was still back by the trunk (29/919-20).

When Big put his hands on top of the car, he noticed a second guy, who stuck something in his father's back (29/920). The second guy and his dad went into the house (29/920). As Anthony hit Big's back pocket, Big heard two or three shots in the house, and he heard his mother scream: "Don't kill my husband, don't kill my husband." (29/921) His mother subsequently ran out of the house (29/921). Big dropped his wallet, turned, and grabbed the barrel of Anthony's gun (29/921-22). Anthony snatched his gun back from Big and shot him in the leg, three inches above the knee (29/923).

Big fell to the ground (29/923). Four or five seconds later, Calvin saw the other guy bring his dad out of the house, "backing him out . . . . had a hold of his arm." (29/923) Big never saw the face of the guy with his dad (29/923-24). His father's assailant sat his dad down in a chair on the front porch and stood over him maybe four or five seconds (29/924). Anthony said, "let's go," the second guy shot his dad in the jaw, and jumped off the porch (29/924). Big was lying eight to ten feet from his dad when he was

shot in the face (29/926). Big was shot a second time in the side, but he did not remember it (29/924). He spent three to four weeks in the hospital because of his wounds, and sustained a fifteen inch gash in his stomach (29/925).

Anthony and his accomplice ran toward a store, to the right of his parents' house if one were facing the park (29/926). Big asked his dad twice if he was alright, and he responded affirmatively both times (29/927). However, Big saw blood spots on his dad when he was brought out on the porch (29/927). His father owned a "little .25 automatic," which he either kept in the car or in his chair in the house (29/928).

Big further testified he was on the ground when he was shot the second time (29/935). Big recognized Anthony when he put the gun in his side, from one previous encounter when Big "was going to buy crack cocaine." (29/937) Big admitted he sold crack, but Anthony never saw him purchase any (29/937). He had $4,000.00 on him the day he was robbed and shot by Anthony, because he was going to buy a car (29/938). Of this amount, he gave Anthony $1400.00 (29/939). His cellular phone was never returned after Anthony stole it from him (29/940-42).

Under cross-examination, Big admitted that "very little" of the $4,000.00 he had on him that day was proceeds from illegal drug sales (29/947). Ninety percent of that money came from his pension

fund (29/947).[6] He denied losing $600.00 to Anthony in a crap game (29/954). Big denied owning a gun (29/956). The second guy who shot his father was between 6'2" and 6'4" (29/961). Big admitted being on probation for a third degree felony the day he was shot by Anthony, and that he was selling drugs at that time, which would have violated his probation (29/963-64). On redirect, Big again denied ever gambling with Anthony or owing him any money (29/967). Nor did his 76-year-old father owe Anthony any money (29/967).

Amanda Gaines, Big's mother, Willie's wife, testified as to what happened the day her husband was murdered (29/969-71). Mrs. Gaines was at the back of the house when she "saw this guy came in with [her] husband." (29/972-73). The guy had a "gun in his hand." (29/973). She did not know him (29/975). Her husband was sitting in a chair (29/975). The stranger looked up, saw her, and ordered her to come to him (29/975). Instead, she ran with her hands in the air screaming: "Don't kill us, don't kill us. We don't have no drugs. We don't have money." (29/975) She ran to the back of the house, fell to her knees, and asked the Lord: "Please don't let him kill us." (29/976)

Mrs. Gaines heard a shot and the front door open (29/976-77). She came out of her bedroom and saw her husband's hand was injured (29/978). She identified Anthony as the man who shot her husband

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[6]On direct, Big testified that the money came from $4,900.00 he received from his profit sharing when he was employed by Dixie Contract Carpet.

(29/985-86). At the State's request, because Johnson was wearing glasses, the trial court ordered all the black males in the courtroom to stand up and remove their glasses (29/987-88). Again, Mrs. Gaines identified Anthony as the stranger who shot her husband, and the trial court sua sponte noted for the record that Mrs. Gaines identified Anthony both times (29/988-89).[7] She visited both her son and husband in the hospital, but she did not speak with her husband after he was shot (29/990). She was not aware her son was a drug dealer (29/990).

Under cross-examination, Mrs. Gaines reiterated she did not know her son was in the drug trade (29/991). She testified no money or jewelry was taken from her home (29/992). She was not sure about the height of her husband's murderer because she "was very upset that day." (29/992) On the day of the murder she apparently told police the murderer was 6' tall either 280 or 180

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[7]Johnson highlights this point in his brief at pp.12-13. Although the prosecutor misspoke, referring to Anthony as Calvin Gaines, given Mr. Bell's acknowledgment that his client, Anthony was wearing glasses, it is apparent that Anthony was wearing glasses which he had "never worn before" in a successful attempt to confuse Mrs. Gaines (29/985-86).

Given her prior testimony, it is obvious Mrs. Gaines was highly traumatized by these events. Given the fact that she ran to the back of her home when ordered to come, she did not get a good look at Calvin Johnson. She did look out the front window, saw her son lying on the ground, and Anthony shoot her son in that position.

Anthony and Defendant are brothers, separated in age by less than two years (I/l-4, 28). Johnson's booking report lists him as 6'7", 270 pounds (I/l). Anthony's booking report lists him as 6'6", 220 pounds. (See Appendix, Exhibit B) One eyewitness described the brothers as "both . . . kind of tall." (30/1207)

pounds. (See footnote below.)

Detective Godbee, evidence technician, testified as to his processing the crime scene (29/996-1034). There were ***13*** shell casings collected both inside and outside the victims' house (29/1000-06, ***1017).*** He also collected 3 projectiles, one of which was from a .45 caliber handgun (29/1017, 1024).

Dr. Floro, Duval County's Chief Deputy Medical Examiner, testified Willie Gaines had five gunshot wounds in his body (29/1047). In his expert medical opinion: "Mr. Gaines died as a result of multiple gunshot wounds of the body." (29/1048) Mr. Gaines sustained a gunshot wound to his left jaw, two shots to his upper chest/right shoulder area, one shot to his left chest area, and one to his right hand (29/1048-56). Three bullets were recovered from his body (29/1057-58).

Under cross-examination, Dr. Floro testified that the gunshot wound to his left front chest was a fatal wound in that it penetrated Mr. Gaines' lung (29/1061). The gunshot wound to the left jaw had a slightly upward track, and Dr. Floro was not asked if this wound was fatal (29/1061-62). The following exchange transpired regarding the cause of death:

> Q And isn't it true that you described the cause and manner of death as multiple gunshot wounds, but isn't it true, sir, that Mr. Gaines died from pneumonia?
>
> A Died from pneumonia ***resulting from the gunshot wounds.*** (29/1063-64)

On redirect, Dr. Floro was asked to explain how Dr. Gaines ultimately died as a consequence of his being shot five times:

> Q So, did the accumulation of those gunshot wounds cause Mr. Willie Gaines' death.
>
> A Well, yes. He was immobilized as a result of the gunshot wounds. Now immobilization in a bed in the hospital predisposes you to a bout of pneumonia plus the damage to the body. (29/1067)

Chiffon Bryant, 22-years-old, testified she was currently housed in the Duval County Jail culminating from her plea of guilty to "[t]wo counts of armed robbery and accessory to murder." (29/1069) She had not been sentenced yet, and when asked what the maximum sentence she could receive, counsel for the Johnson brothers objected (29/1070). At sidebar, the prosecutor explained:

> MR. TAYLOR: Judge, what's important in this issue is her understanding of what she is exposed to --
>
> THE COURT: I agree.
>
> MR. TAYLOR: -- as to her credibility in terms of any favoritism or benefit she may be expecting from the state. Whether it is a legal sentence or not a legal sentence is not relevant. She understands that she could receive life in prison. What's in her mind is what's important, not Mr. Bell's [Anthony's counsel] mind about the state of the law.
>
> THE COURT: All right. You will need to confine it [to] what is in her mind. Mr. Bell, you will be allowed to explore it on cross or anything else you need to.
>
> MR. TAYLOR: He did so in the last trial, and I think he can on cross examination.
>
> THE COURT: Objection will be overruled. (29/1071-72)

Chiffon testified she could receive up to life in prison (29/1073). Her deal was negotiated by her lawyers in return for truthful testimony (29/1073). She acknowledged what she hoped she would receive in return: "A good recommendation from the state to the Judge [Stetson]." (29/1073)

Chiffon knew the Johnson brothers; Anthony was "Amp" and Calvin was "Chip" or "Junior" (29/1075). She met them through Anthony's girlfriend, Cindy Clark (29/1075-78). She and her boyfriend, Shirae Hickson, used to visit Anthony and Cindy "like every day" (29/1077). On December 30, 1994, she was going to move and place her things in storage (29/1079). The Johnson brothers, Anthony and Calvin, were supposed to help her, as well as her boyfriend, Shirae (29/1080). She picked Anthony up at 9:30 a.m., and Johnson around 10 a.m. (29/1081). She was driving, Shirae was in front with her, and the brothers were in the back (29/1081).

As they drove down East 21st she noticed a guy leaning over in his car working (29/1082). She looked in her rearview mirror, saw Johnson tap Anthony on the shoulder and heard Johnson say, "there is Big Gaines right there." (29/1082; 30/1089) Bryant thought to herself: "Gosh, he is fat!" (30/1089) Before Johnson tapped Anthony on the shoulder, Anthony said Big owed him some money (30/1089). Anthony said: "Pull over, pull over. I can get my money from him now." (30/1090)

Eventually, Chiffon did pull over and stop (30/1090). She

told Anthony that Big wasn't going to give him any money (30/1091). Anthony said he was broke and Big was going to give him his money (30/1091). She asked: "What are you going to do, rob him?" (30/1091) The brothers exited the car, "Anthony had his gun in his belt and he pulled his shirt over it and Calvin had his . . . under his shirt in the back of his pants." (30/1092) Neither gun was small (30/1092).[8] She told them she would be back in a few minutes, and drove around the block a couple of times (30/1093).

When she pulled on to East 21st Street, she "saw Big Gaines laying on the ground." (30/1093) Before she saw this she heard gunshots (30/1093). When she saw Big on the ground she turned the opposite direction from where they were (30/1094).[9] Her intention was to "[l]eave [b]ecause [she] figured something wrong had happened." (30/1097) She tried to stay off of main streets, which caused her to drive into a dead end (30/1097). "Anthony and Calvin were running through the field . . . ." (30/1098) By the time she was turned around "they were pulling on the handle of the car to get in." (30/1098) She allowed them to get in and they showed her how to vacate the area. (30/1098) From there, she drove the brothers to their mother's house on Santee Road (30/1098).

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[8] Johnson in his brief at p.9 represents as follows: "According to Bryant, Calvin carried a .22." Her testimony in this regard was: "It wasn't small either. It was a .22 or small. If you ever seen one -- but it was bigger than that or a .25."

[9] "It was never clarified who "they" were, but she probably was referring to the Co-defendants.

As Chiffon drove the brothers to their destination, Anthony said Big Gaines tried to take his gun from him, and he had to shoot him. (30/1098) Anthony had a cellular phone (30/1099). Bryant further testified: ***"Calvin said that the old*** man ***pulled*** **a** gun on ***him and he had the nerve to try and shoot him and he had to fire him up."*** (30/1100) The "old man" was "Mr. Gaines the older man." (30/1100) She testified Calvin Johnson said he shot the victim "everywhere" (30/1101). She saw the brothers the next day at their mother's house (30/1102). When Anthony arrived he still had the cellular phone, and Bryant asked him about it, commenting: "YOU know they could trace those calls." (30/1103) Anthony replied: "No, they can't." (30/1103) He further stated he had to leave town because he was in ***"big trouble".*** (30/1103) Bryant admitted she did not tell the truth to Detective Scott when he arrested her "[b]ecause [she] was scared of going to jail." (30/1105)

On redirect, when asked by the prosecutor if he ever told her what was going to happen at her sentencing, she answered: "No."[10] (30/1181) She explained her letters to Hickson as follows:

> Because he forget things just like I would. We have been together a long time but we still forget things, and I want to refresh his memory so he can help me refresh mine as well. (30/1184)

On recross, Mr. Eler, Johnson's lawyer, asked her if she was suggesting Hickson "is dumb", to which she responded: "In a sense,

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"Johnson has sufficiently presented her cross-examination in his brief.

yeah." (30/1187)

Linsey Walker had lived on East 21st Street 37 years, one block over from the Gaines' house (30/1189-90). He knew Willie, and knows his wife Barbara, as well as Big (30/1189). On December 30th, around 11 a.m., he drove by the Gaines' house in his car on the way to pick up his mother and daughter, who were attending church (30/1191).

As Mr. Walker drove by, he saw Big seated in the driver's seat of his car with his arms up in the air, and a guy with a gun in his hand bending down (30/1191). Mr. Walker drove two houses down and made a U turn (30/1191). As he turned around he heard gunfire and he saw Big falling down at the back of his car, "and a guy was standing over shooting." (30/1191-92) Mr. Walker identified Anthony as the man who shot Big (30/1192).

As he made his turn, he saw another guy run out of the house, when he pulled up "[Big] was laying on the ground and then the two guys they cut through this pass and [he] chased them in [his] car." (30/1192) ***Mr. Walker identified Calvin Johnson as the man who ran out of the house*** (30/1192). The brothers ran through the pass on to 22nd Street, and Mr. Walker chased them in his car to 23rd Street (30/1193). When Walker reached 23rd Street "they turned around and ***both of them had guns."*** (30/1197) Big did not have anything in his hand, nor did Mr. Walker see any guns around where he lay. (30/1197)

Under cross-examination by Johnson's counsel, Mr. Eler, Mr. Walker denied he ever said Anthony and Big were fighting (30/1200). Mr. Eler then impeached Mr. Walker with the following deposition statement, without allowing him to explain his answer, as follows:

Referring to page ***21*** line 14.

> "Q You had gotten up and going past and you see this guy with a gun patting big Gaines?"
>
> And do you recall your answer:
>
> "A When I realize what they was doing I went about half a block and when I went to make an U-turn that's when I started hearing the shooting and I seen Calvin and the guy was outside fighting and then Calvin hit the ground."
>
> A ***When I turned around*** --[11]
>
> Q Here is the question, sir: Do you recall making that statement?
>
> A Yeah. I recall making that statement.
>
> Q Okay. Now it's also true, sir, is it not, that you seen another black male run out the door of this residence? (30/1201)

Shea Brookins testified that on the day of the shootings, he was working at the Silver Moon Gas Company, which is on 21st Street near the Gaines' house [three houses down] (30/***1206***). Shea further testified:

> A We were coming back from lunch down the street. The two guys that got out of the car, both ***of them***

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[11]Big testified he heard two or three shots. His mother screamed: "Don't kill my husband, don't kill my husband." And she ran out of the house. He dropped his wallet and ***grabbed Anthony Johnson's*** gun. (29/921-22)

kind of tall and one of them when he came out we were about 20 feet away and we just turned around and we heard some shooting.

Q All right.

A And then ran around the house and ran through the pass. That's the last I seen.

Q Did you see any men come out of the Gaines' home after you heard the shooting?

A When we turn around I seen one.

Q All right. Do you see that man in the courtroom today?

A ***It look like him over there but he didn't have no*** **glasses.** I don't remember nobody wearing no glasses.

Q Can you point to the man that you are talking about who looks like him for us, please?

A Right over here.

MR. TAYLOR: Can the record reflect that he is pointing to the defendant, *Calvin* ***Johnson.***

THE COURT: What color shirt or jacket is he wearing?

THE WITNESS: I am talking about the guy with the white shirt.

THE COURT: All right. ***He has identified the defendant, Calvin Johnson.***

BY MR. TAYLOR:

Q All right.

A He didn't have **no glasses** or nothing.

Q Didn't have any glasses on that day?

A No.

Q All right. What did you see him do after you saw him come out of the home?

A They fled and ran around the side of the house through this pass right around the side of their house. (30/1208)

In his brief at p.12 Johnson relates remarks Shea made when he was deposed. However, he fails to include the following testimony when Shea was allowed to refresh his recollection with the transcript of the deposition:

A (Reviewing transcript)

Q Have you had a chance -- does this refresh your recollection?

A Yeah.

Q Sir, just on the question of did you give those questions and answers that we just discussed on September the 30th of last year, did you give the answers we discussed?

A I said that but I ain't see no shooting.

Q So you were wrong about that? You were wrong about that?

A I figure he try to take care of his son.

Q After the shooting a bunch of people ran up, right?

A Right.

Q People from the laundromat and all over the neighborhood?

A Yeah.

Q And maybe if I am understanding some of your answers to the earlier questions, you saw Mr. Willie Gaines outside on the porch with the .25 in his hand?

A Yeah. I seen that when he was lying down. (30/1223-24)

Jacquelyn Bell, Bell South Mobility records custodian, was called for the purpose of introducing a "cellular phone bill" listing the subscriber as Ronald Crawford Holmes, and a detailed listing of all calls made from the cellular phone, #904-705-7416 (30/1227-30).[12] Ellen Reddick, another Bell South Mobility records custodian, identified where various calls were made from regarding the cellular phone (30/1237-43). One call was made to Calvin Johnson, Sr. (30/1242). C.P. James, owner of a beeper service, testified as to a sales contract for his business entered into with Joseph Wright (30/1243-45). A call was made to Wright's beeper number by Anthony from the cellular phone (30/1247).

Joseph Wright testified that he was the Co-Defendants' uncle (30/1258-59). Sometime in 1994, Anthony asked Joseph to rent a beeper for him, which he did (30/1259). He turned the beeper over to Anthony and that was the last he saw of it (30/1260). Joseph was not responsible for the beeper bill (30/1260). Joseph also testified as to the identities and locations of various individuals known by him and the Johnson brothers (30/1261-62).

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[12]Johnson's co-counsel argued this evidence was not relevant. However, the trial court correctly recalled Big's testimony regarding the cellular phone belonging to his cousin and that he provided the phone number (29/939-44; 30/1230). Ms. Sopp corrected the trial court regarding Mr. Holmes' relation to Big as follows: "Brother-in-law actually." (30/1230)

Johnell [J.L.] Spikes testified the Co-Defendants' brother, Robert Johnson, lived with him at his home on Brookwood Forest Blvd. (30/1265). Anthony called Robert on J.L.'s phone (30/1265). Anthony also called J.L. and provided him with a number to call so Anthony could stay in touch with his family (30/1266). J.L. would place Anthony on a "3-way line,' lay the phone down and they talked (30/1266). J.L. quit doing the 3-way phone conversations because they became too expensive (30/1266).

Jody Phillips, fingerprint expert, testified there were fingerprints lifted off the telephone at the murder scene, but they could not be identified (30/1267-77). Carol Herring, also a fingerprint expert, testified prints were lifted from a 1976 Oldsmobile, but they were not identified as those of Calvin Johnson, Anthony Johnson or Shirae Hickson (31/1287).

Tracey Gates testified her ex-boyfriend, Michael Johnson, another brother, would visit her where she was staying and Anthony would call Michael there (31/1291). Michael Johnson, 18-years-old, testified he was in jail for auto theft and violation of probation (31/1305-06). He had two felony convictions and there was no plea agreement entered into for his testimony (31/1306). He had three brothers, Calvin, Anthony and Robert; Calvin was the oldest (31/1306). Michael admitted seeing Tracey at the time of the shootings, and provided her phone number (31/1308-09). He identified Cindy Clark as Anthony's girlfriend, who lived on

Woodlawn, and that sometimes his brother stayed with her (31/1307-08). Michael identified Rosa Greer has his mom's neighbor from across the street (31/1309). In the Fall, 1994, and Winter, 1994-95, Anthony used a pager, which Cindy Clark sometimes had (31/1311). Michael provided the number (31/1312). Yvonne **Phelps** was Johnson's girlfriend (31/1312). Michael's mother's sister lived with Willie Jackson in Albany, Georgia (31/1312).

Yvonne Phelps testified she had been Johnson's girlfriend since April 14, 1994 (31/1318). In December of 1994, Calvin lived with her (31/1319). Detective Scott, who she recognized as part of the Homicide squad, appeared at her residence and inquired if she knew Johnson's whereabouts December 30, 1994 (31/1320). She lied and said she did not know where he was (31/1320). Ultimately, after Detective Scott made some comments to her she told him what he wanted to know (31/1323). On that day she woke up at 7:30 a.m. to watch T.V., Johnson told her to turn it off, and she went back to sleep (31/1323). There was a knock on the door, Calvin answered it, dressed, and told her he was leaving (31/1323). That was between 10 and 10:30 a.m. (31/1323). The next time she saw Calvin was that night when she got off work, around 2 a.m. (31/1324). She did not see Johnson between 10 a.m. and 2 a.m. (31/1324). Under cross-examination, she admitted she did not know where Johnson went after he left that morning (31/1324).

Ed Mason testified he was presently housed in the Duval County

Jail for selling "crack" (31/1375-76).[13] He pled in return for a 15 year Habitual Offender sentence (31/1376-77). A condition of his plea agreement was that he must testify truthfully (31/1377). He admitted other felony convictions involving the sale of cocaine (31/1378). In early January, 1995, Calvin Johnson, after viewing a newspaper article in *The Florida Star,* commented to Mason that "[h]e was involved in the crime that was mentioned."[14] (31/1379) Mason was a convicted felon at this time, and he knew he was not supposed to have a gun (31/1380-81).

A transaction transpired between Mason and Calvin Johnson in January of 1995, which "consisted of two guns, . . . a .380 and . . . a . 45 automatic." (31/1380-81) Mason "had asked [Johnson] about a handgun and he told [him] that he had two handguns and that [he] could have one of them if [he] sold the other one." (31/1380) Mason said he "needed protection" (31/1380). Mason did as Johnson instructed, keeping the ,380, which was loaded and came with extra shells, while selling the .45 to some guy in a trailer park (31/1383-84). Ultimately, Mason sold the . 380 as well (31/1384).

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[13]Ed Mason's testimony was proffered before it was heard by the jury to assure avoidance of any *Bruton* problems (31/1364-74). *Bruton v. United States,* 391 U.S. 123, 38 S.Ct. 1620, 20 L.Ed.2d 476 (1968). However, there were no interlocking confessions taken during custodial interrogation in this cause.

[14]At Anthony's counsel's request the trial court instructed the jury that "any statements that may be elicited from this witness as to what Mr. Calvin Johnson may have said to him, should not be considered as to the guilt or innocence of Mr. Anthony Johnson." (31/1379-80)

He squandered the proceeds from the sale of the .45 to support his crack cocaine habit (31/1384).

Sometime after Johnson was arrested, Mason received a call at his home from Johnson in jail (31/1384). The substance of that conversation follows:[15]

> Q What did he tell you about the guns?
>
> A He told me -- he asked me first did I still have them, and I told him I had got rid of them, and he said, well, that is good at first, you know, because those were the guns that was used in the crime that he was accused of.
>
> Q And was that the crime that he had referred to earlier in the Florida Star?
>
> A Yes, sir. It was.
>
> Q What else did he tel1 you during that telephone conversation?
>
> A I believe he told me that if I just, you know, be quiet that everything would be all right. (31/1385)

Johnson also told Mason where the crime occurred and his involvement:

> Q Did he tell you anything about where that crime had occurred?

"Johnson objected during Mason's proffer that no predicate had been laid for the phone conversation. The State laid the predicate and stated that it would be highly prejudicial if done to the jury. Mason testified he had known Johnson for five years, and had been Johnson's cell-mate for over a year in prison. Mason had learned to recognize his voice, and recognized the same when Johnson called him from jail. Besides, Johnson identified himself as "Chip". Johnson, subsequently stipulated to the predicate through counsel. (1371-73)

A 21st and Phoenix.

Q Did he tell you anything about his involvement in that crime?

A Yes, sir. He told me that he was doing the robbery and the guy bucked him and he had to shoot him. (31/1386)

Mason testified he had come in contact with Johnson since he was placed in jail (31/1386). On April 12, 1995, during visitation, although they were on different sides of the jail, Johnson had to come over to Mason's side because his side was crowded (31/1387). Johnson told him if he kept his "mouth closed about those guns that he could beat his case." (31/1387) One time when Mason was in recreation, Johnson passed him a written note the substance of which follows:

> He had written on a piece of paper about Shirae Hickson was telling on him and for me if I could find somebody to do something to him to convince him not to be able to testify, (31/1387-88)

Mason's last testimony on direct was that "bucked" meant that the victim resisted a robbery (31/1388).

Woodrow Allen testified he was in custody for armed robbery and armed sale (31/1428). He had no agreement with the State (31/1428). He had seven prior felonies (31/1429). He met Johnson twice, one of those times he was with Mason when Johnson gave him a .45 and a .380 Beretta (31/1430). Mason requested Allen to check out the weapons, and Johnson told Mason to "give him $125.00 for the .45 and he could have the .380." (31/1430-31) Mason took the

handguns to the trailer park and that was the last Allen saw of them (31/1431). On redirect, Allen testified that Johnson's appearance had changed since he had been in jail (31/1442). Johnson weighed 260 pounds when he was arrested, now he weighs 195, 200 pounds. On recross by Johnson's counsel, Allen testified Johnson's appearance had also changed in that he was wearing glasses now (31/1444).

Prior to Cindy Clark [Anthony's girlfriend] testifying, the State's request to declare her a hostile witness was granted (32/1487).[16] Clark testified she was romantically involved with

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[16]Cindy Clark was not a willing witness, and in fact had to be jailed to insure she would testify (29/891-909). The problem began when the State requested a continuance on June 12, 1996, because she could not be located (28/813). The State called Clark's sister, Alcenia Owens, in support of its motion. Ms. Owens testified that her sister had told "she would hide and . . . she could not be touched . . . and . . . they could not come into her home unless she was issued a subpoena." (28/818-19) Clark told her "she did not want to testify against her boyfriend [Anthony]." (28/819) Ms. Owens then testified that Clark told her:

> She said that Amp's [Anthony's] attorneys said that she -- she is okay. She would -- she does not have to come here because if you mailed in a subpoena that it does not mean too much of anything. She does not have to come to court. (28/820)

The problem was resolved the next day when Clark appeared in Mr. Bell's office (28/861-66).

Given this history, on the day she was to testify, the State had earlier expressed its desire to declare Clark a hostile witness, alleging she was a "dangerous witness," a veritable "loose canon." (31/1328) The court declared her a hostile witness "for the reasons already set forth in the state's motion under which she was arrested," her sister's pretrial testimony, and the fact she

Anthony prior to his going to jail, that she still considered herself his girlfriend and that she had strong feelings for him (32/1488-89). On the New Years Eve following the shootings, she was at the brothers' parents' home (32/1490). The following exchange transpired:

> Q And while you were there on New Years Eve at one point you went into the bathroom and while you were in the bathroom you heard Calvin ask Amp how are we going to tell her something like that?
>
> A No.
>
> Q I am sorry?
>
> A No.
>
> Q You never heard that statement?
>
> A Sir, I did not enter the bathroom.
>
> Q You never into the bathroom?
>
> A No, sir, and that whole statement was not true.
>
> Q Did you ever tell Detective Herb Scott of the Jacksonville Sheriff's Office that you went into the bathroom and hear that statement?
>
> A Yes, I did. (32/1490)

Clark did not recall Johnson say to Anthony: "Man, the money you get from the niggers." (32/1491) She just recalled "nigger" being used (32/1492).

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was Anthony's girlfriend (31/1330). Clark's testimony was then proffered as to the statement portion of her testimony, at the State's suggestion, where she demonstrated her declared status (31/1331-57). Subsequently, Detective Scott was called on a proffer to impeach this proffer (31/1445-57). All of this was for the purpose of ensuring the Johnson brothers had a fair trial.

Clark admitted she told Detective Scott that she "put a cup to the wall and overheard the name Big Gaines." (32/1493) She admitted she heard "Anthony tell Calvin, 'if I wanted her to know I would have told her."' (32/1494) She further testified:

> Q And the "her" that is being referred to is in fact you, isn't it?
>
> A I believe so, sir.
>
> Q All right. And the subject of that conversation is the shooting of Calvin and Willie Gaines on East 21st Street, isn't it?
>
> A I would assume so, yes. (32/1494)

Clark continued her attempt to be coy with the prosecutor, and then admitted:

> Q Did you ever tell Detective Herb Scott of the Jacksonville Sheriff's Office that some time after New Years Eve that you had talked to Anthony Johnson on the telephone and he had told you that he had screwed up real bad and that he should have finished the job referring to Big Gaines?
>
> A I could have said that to him, sir.
>
> Q You could have or you did say that?
>
> A I don't recall saying it but I probably have. (3/1495)

She further admitted accompanying Anthony and Johnson "to some part of Georgia (3/1496).[17]

Before Detective Scott was recalled, the trial court instructed the jury as follows:

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[17]At the conclusion of her testimony Clark was served with an order to show cause (32/1508-11)

> THE COURT: Yes, sir. Ladies and gentlemen, you did hear some testimony from the previous witness, Ms. Clark, to the effect or you may find to be to the effect that she gave some prior statements which were inconsistent with her testimony today. You may also hear other evidence to that effect as this trial goes along.
>
> I want to instruct you that the prior statements she made may be used by you only to weigh the credibility of her testimony and not for the purpose of proving any of the facts that may have been contained in that prior testimony. (32/1517-18)

Detective Scott testified he interviewed Clark on January 10, 1995 (32/1518). Clark informed him that she had a phone conversation with Anthony and he told her he had "screwed up real bad and he should have finished the job." (32/1519) Detective Scott also interviewed Anthony, and testified Anthony said the only thing he knew about the murder of Willie Gaines "was what he had seen on television and that he never hurt anybody."[18] (32/1523-24) Anthony also told Detective Scott when the search warrant was executed on the house he shared with Clark he was hiding in the attic (32/1524). Detective Scott testified that when they conducted the search they looked in the attic and Anthony was not there (32/1525).

Detective Scott interviewed Johnson as well, he objected, and his statement was proffered (32/1526-32). The trial court found

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[18]A suppression hearing was conducted regarding Anthony's statements, and the trial court found them to be freely and voluntarily given subsequent to his being properly informed of his rights (31/1458-77).

that Johnson's statement regarding his taking a bus was "clearly admissible" (32/1532). Johnson told Detective Scott he was home that morning with Yvonne, left the house about 11:17 a.m., caught a bus, and arrived at his mother's house at 4117 Santee Road, about 11:45 a.m. (32/1531, 1534). Under cross-examination, Johnson elicited that his oral statement was never reduced to writing, that he was wearing glasses when he was interviewed, and that no one identified him as being at the murder scene (32/1537-39). Johnson also claimed to know nothing of the murder on December 30th (32/1539).

Peter Lardizabal, FDLE firearms expert, testified that the three bullets and thirteen red cartridge cases came from .380 and .45 caliber handguns (32/155-73). Officer Tracy Hawes testified that on January 31, 1995, he discovered a handcuff key in Anthony's left shoe located under his bunk (32/1584). He further testified that handcuff keys are contraband because they "could help facilitate an escape" (32/1584). Under cross-examination, Anthony elicited that it would have been very difficult to escape from where he was located on the sixth floor, and that on a second occasion, June 1, 1995, Anthony had Officer Hawes' another handcuff key (32/1589).

At the conclusion of Officer Hawes' testimony, Johnson requested the jury be instructed that his testimony should be considered only as evidence against Anthony Johnson, which the

trial court did (32/1591). The trial court denied the motions for judgment of acquittal [JOA] on all counts for both brothers, except Count III, where Willie Gaines was the victim, of which it granted the JOA and allowed the lesser included attempted robbery to stand (32/1596, 1603-04).

Anthony called Detective Highsmith in defense, who testified he was present when Big was being attended at University Hospital (32/1614). Big was visibly upset "about his own injuries and what happened to his father." (32/1616) Big said "Amp" shot him, and described Anthony as "... approximately six foot, 200 pounds, short black hair" (32/1617). Under cross-examination, Detective Highsmith testified the shooting took place at 11 a.m., and he arrived at the hospital at 11:35 a.m. (32/1618). The reason he arrived at the trauma unit so quickly was a concern that Big might not survive, and the police had no suspects (32/1618-20). At the conclusion of his testimony, at Anthony's request, the trial court advised the jury of Chiffon Bryant's possible sentence (32/1550-52, 1624).

Anthony took the stand on his own behalf (32/1625-80; 33/1683-1724).[19] Under cross-examination, he testified he owned a .45 which

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[19]The State will only relate his testimony on cross-examination. Johnson relied on his brother's testimony to represent his version of what occurred on December 30, 1994 in his Statement of the Facts in his brief, despite the fact that the jury obviously rejected this testimony in finding him and his brother guilty of all counts as charged in the Indictment.

he kept at his apartment (33/1675-76). He testified: "Everywhere I go in the State of Florida I have my firearm with me." (33/1676). He traded for the .45 on the streets with a .357 Magnum because he ***"wanted something with more fire*** power," and he needed it allegedly for "protection" of himself and his family (33/1676-78). Anthony claimed to have left the .45 in someone's car and it was never returned to him (33/1679-80)

The first time Anthony met Big Gaines was at the "drug house" where he went to see his cousin Rodney (33/1686-87). Cocaine was being sold, marijuana smoked, and heavy gambling was transpiring (33/1688). Anthony answered the door to the "drug house" and there was Big to purchase drugs (33/1689). He knew Big was a drug dealer (33/1689). Anthony knew that gambling was illegal, and he had his .45 on him because he carried it with him "everywhere" he went (33/1690).

He walked up to Big Gaines the day of the shootings with his .45 because he carried it with him wherever he went (33/1698). He claimed Big handed over his cellular phone to him as collateral for the money Big owed him, despite the fact the phone would be important to Big because he was a drug dealer (33/1701).

Anthony admitted that when he spoke with Detective Scott all he told him was that all he knew about the crimes was what he saw on T.V. (33/1715-16). He denied ever telling Detective Scott he was hiding in the attic when the police searched Clark's place

(33/1716). He denied ever telling Clark he screwed up, and that he should have finished the job (33/1717). He picked up the gun he alleged Big Gaines had because there were a lot of people coming up, and he "was not going to take the chance to get shot in the back running." (33/1719) When asked who the .45 bullet was intended for that was found in the facing of the Gaines' home, he replied: "Only thing I can tell you is it was put there by my rapid manner of firing." (33/1721-22)

Anthony rested (33/1725). Johnson elected not to testify after discussing the matter with his counsel (33/1725-26). The trial court inquired on the record as to Johnson's waiving his right to testify (33/1726-27). Both Johnson and his brother were found guilty on all counts ***"as charged in the indictments"*** (34/2073-75).[20]

II **Penalty Phase and *Spencer*[21] Hearing**

The jury determined that Anthony did not substantially participate and exhibit reckless indifference in the shooting death of Willie Gaines (38/2341). It recommended 9 to 3 that Johnson be sentenced to death for the murder of Willie Gaines (38/2342-45). The State will rely on the trial court's findings as regards both aggravation and mitigation as they appear in its Sentencing Order

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[20]As previously delineated, Count III was lowered from armed robbery to the attempted armed robbery of Willie Gaines prior to submission to the jury (32/1596, 1603-04; 34/2036).

[21]*Spencer v. State,* 645 So.2d 377 (Fla.1994).

which is attached as an exhibit hereto (Exhibit "A").

SUMMARY OF THE ARGUMENT

I.

Severance of Johnson's trial from his brother, Anthony's, was not necessary. Anthony claimed he shot one of the victims in self-defense, while inferring that someone other than Johnson killed the other victim. Johnson stood mute and held the State to its burden of proof.

II.

The matter of the handcuff key was never admitted against Johnson, and the jury was so instructed at his request. This claim is a nonsequitur.

III.

The trial court correctly imposed three-year minimum mandatories because Johnson used a firearm during the offenses.

IV.

The trial court applied the right rule of law, and competent substantial evidence supports its finding the prior violent felony aggravator.

V.

The trial court applied the right rule of law, and competent substantial evidence supports its finding Johnson was engaged in a burglary when he murdered Willie Gaines.

VI.

Death was the appropriate sentence in this case.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN ALLOWING JOHNSON TO BE TRIED WITH HIS BROTHER.

This Court, in *McCray v. State,* **416** So.2d 804 (Fla. 1982), delineated the general principles of joinder and severance as follows:

> Rule 3.152(b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one or more defednants . ..." As we stated in *Menendez v. State,* 368 So.2d 1278 (1979), and in *Crum v. State,* 398 So.2d 810 (Fla. 1981), this rule is consistent with the American Bar Association standards relating to joinder and severance in criminal trials. (footnote omitted) The object of the rule is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime. Rather, the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conducts, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants. A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. *Bruton v. United States, supra.*
>
> In situations less obviously prejudicial than the *Bruton* circumstance, the question of whether severance should be granted must necessarily be

> answered on a case by case basis. Some general rules have, however, been established. Specifically, the fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. (citations omitted) If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter. . . .

Id., at *1285.*

This Court's severance analysis in *Coleman v. State, 610 So.* 2d *1283* (Fla. 1992), *cert. denied,* 114 S.Ct. 321 (1993) which follows, provides an instructional foundation for the analysis which this Court should undertake in this cause:

> These codefendants did not blame one another for these crimes, nor did anyone confess. Coleman and Robinson raised alibi defenses, and Frazier held the State to its burden of proof by standing mute. The evidence of the facts and circumstances leading to these murders explained these murders and the drug conspiracy to the jury; the convictions did not depend on the use of antagonistic evidence by one defendant against the others. The jury's lack of confusion is illustrated by its finding Coleman and Robinson guilty of four counts of first-degree murder and Frazier guilty of only one count of first-degree murder when the eyewitness, Merrell, testified that Coleman and Robinson slashed and shot the victims and played the major roles in these crimes. We see no undue prejudice cause by the refusal to sever the trials of the defendants and hold that the trial judge did not abuse his discretion by denying the motions for severance.

Id., at 806.

As in *Coleman,* Johnson and his brother, Anthony, did not blame one another for these crimes, nor did either one confess. In fact, when Anthony testified, he inferred it was Shirae Hickson, not his

brother, who accompanied him to the Gaines house and shot Willie Gaines (32/1639-40, 1646-47, 1652, 1664). Anthony claimed he shot Calvin Gaines in self-defense, while Johnson stood mute and held the State to its burden of proof (32/1648-59, 1665). Id. "The evidence of the facts and circumstances leading to the murder explained" the murder, attempted murder, attempted armed robbery, burglary, and armed robbery (34/2073-75); "the convictions did not depend on the use of antagonistic evidence by one defendant against the other[] ." *Id.* "The jury's lack of confusion is illustrated by its" recommendation of death for Johnson, and life for his brother. *Id.* As support for this conclusion, the trial court found, regarding one of Johnson's non-statutory mitigating factors, that he "was a relatively minor accomplice in the entire criminal incident:"

> The Court finds that this factor has not been proved by the greater weight of the evidence. To the contrary, the evidence was overwhelming that Calvin Johnson was the only defendant in the vicinity of Willie Gaines when he was shot; and that only the Defendant shot Willie Gaines. The shooting was committed without any possible pretense of legal justification. (3/435)

Johnson's reliance on ***Roundtree v.*** State, 546 So.2d 1042 (Fla. 1989), is misplaced because it involved interlocking confessions. This "*Bruton* circumstance" as it was spoken of in *McCray v.* ***State,*** *supra* , at 806, is absent in this cause. The trial court here correctly exercised its discretion in denying the motions for severance, and no undue prejudice was caused by its refusal to

sever the trials of the Johnson brothers. *Coleman,* at **1285.**

ISSUE II

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN ALLOWING TESTIMONY THAT ANTHONY JOHNSON HAD SECRETED A HANDCUFF KEY INTO A SHOE UNDER HIS BUNK AT THE JAIL WHERE SAID TESTIMONY WAS ONLY ADMITTED AS TO HIM, AND THE JURY WAS SO INSTRUCTED.

Officer Hawes testified that on January 31, 1995, while Anthony was an inmate at the Pretrial Detention Facility for first degree murder, he discovered a "[a] handcuff key" in Anthony's left shoe located under his bunk (32/1582-83). He further testified that handcuff keys were considered contraband because they "could help facilitate an escape." (32/1583-84) This testimony was the basis for a motion in limine by Anthony (23/196-207). Johnson argued that he had not been charged with escape; it had no relevancy to his trial; it was prejudicial to him and grounds for severance (23/207-208). Both Johnson and his brother renewed their motions prior to Officer Hawes' testimony (32/1577).

Johnson now argues at p.28 of his initial brief: "The trial court erred in permitting this testimony to be admitted ***against appellant*** because it was irrelevant under any theory of criminal liability and because it was extremely prejudicial to appellant." First, and foremost, Officer Hawes testimony was ***not admitted against Johnson.*** Rather, at Johnson's request, the jury was instructed by the trial court at the conclusion of said testimony

as follows:

> MR. ELER: Judge, I apologize. I was unclear whether Ms. Sopp had requested that instruction to the jury that this apply only to Anthony Johnson if you granted that request.
>
> MR. HARDEE: We agree to giving it now.
>
> THE COURT: I will give it. I think you are insulting their intelligence. It's obvious.
>
> (Sidebar discussion concluded.)
>
> THE COURT: ***Ladies and gentlemen, the evidence you just heard should be considered only in the case against Anthony Johnson and not in the case against Calvin Johnson. . . .*** (32/1591-92)

Johnson's second point on appeal is, therefore, a nonsequitur.

Given the fact that the matter of the handcuff key was admitted only as to Anthony, it is not necessary to address the merit of Johnson's claim here. However, for the sake of argument, with the clear understanding Johnson's second claim is a nonsequitur, the State will argue that this matter was relevant to Anthony as an inference of guilt. This Court recognized this principle in *Mackiewicz v. State, 114* So.2d 684, 689 (Fla. 1959), *cert. denied,* 362 U.S. 965 (1960), when it said:

> [S]ince it well settled that evidence that a suspected person in any manner endeavors to escape or evade a threatened prosecution, by flight, concealment, resistance to lawful arrest, or other ex post facto indications of a desire to evade prosecution, is admissible against the accused, the relevance of such evidence being based on the consciousness of guilt inferred from such actions.

See *also, Harvey* v. *State,* 529 So.2d 1083, 1086 (Fla. 1988). The

fact that Anthony had a handcuff key, which Officer Hawes testified could facilitate an escape, is relevant to consciousness of guilt and, therefore, admissible against him.

The cases cited by Johnson for his second claim are factually distinguishable from this cause. There was no instruction on flight in this cause as there was in Fenelon *v.* State, 594 So.2d 292 (Fla. 1992), which Johnson admits in a footnote found on p.29 of his brief.[22] *LeFevre v. State, 585* So.2d 457 (Fla. 1st DCA 1991), also concerned the giving of a flight instruction, which the First District determined was not warranted:

> This evidence suggests that Lefevre left the scene of the shooting because he was afraid for his own safety. The evidence does not support an inference that appellant's act was circumstantially probative of guilt. He did not elude law enforcement, as evidenced by his arrest only very shortly after the incident

In State v. St. *Jean, 658* So.2d 1056 (Fla. 5th DCA 1995), the Fifth District found:

> Here, where the defendant fled just as the officer was opening the bag containing over two kilograms of cocaine (or, more to the point, containing minimum fifteen-year jail terms), it is hard to imagine any other motivation that would cause the owner (or the passenger for that matter) to abandon the vehicle along I-95 and take to the woods.

Id., at 1057.

Similarly, in this cause, where Anthony was housed in a pretrial

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[22]Of note, this Court determined in *Fenelon* that the giving of the flight instruction was harmless error. *Id.*

detention facility on charges of first degree murder and attempted first degree murder ("or more to the point," potential penalties of death or life in prison), "it is hard to imagine any other motivation that would cause" him to have a handcuff key in his possession, other than to use it to facilitate an escape at the appropriate time. *Id.*

Even if the matter of the key was not admissible against Anthony, error, without conceding there was any, would have been harmless beyond a reasonable doubt. State v. *DiGuilio*, 491 So.2d 1129 (Fla. 1986). As previously discussed, there was no instruction on flight in this cause as there was in *Fenelon v. State, supra.* Rather, the jury was specifically instructed that Officer Hawes' testimony ***"should be considered only in the case against Anthony Johnson."*** There is a presumption that a jury will follow the instructions it is given. *Greer v. Miller, 483* U.S. 756, 767, 107 S.Ct. 3102, 97 L.Ed.2d 618, 631, n. 2e, 10b (1987). Clearly, error, if any, was harmless beyond a reasonable doubt.

ISSUE III

THE TRIAL COURT CORRECTLY IMPOSED THREE-YEAR MINIMUM MANDATORY SENTENCES FOR COUNTS II, III, AND V WHERE THE JURY FOUND JOHNSON USED A FIREARM FOR EACH COUNT.

Johnson begins his third claim at p.30 of his brief by alleging that the Indictment failed to specify "which sub-provision of Section 775.087 applied" as to Counts III and V, and there was "no reference to Section 775.087" for Count II. The State respectfully submits that Johnson's failure to file a pretrial motion to dismiss the indictment regarding any defects, real or imaginary, "constitutes a waiver of such defect[s] in this case." *See Mesa v. State, 632* So.2d 1094, 1098 (Fla. 3d DCA 1994).

Johnson also complains at p.30 that "[t]he verdict forms did not provide for the 'sub-finding' required to impose the three-year minimum mandatory against appellant, and no such findings were made by the court." However, as previously delineated in the State's rendition of the Case at p.3, at no time did he ever object below on either ground as regards the three-year minimum mandatories (34/2017-19; 38/2365; 41/2449-50). Again, the State respectfully submits this claim is procedurally barred. *Mesa v. State,* *supra*, at 1096-98.

On the merits, the State would say that it is difficult to discern exactly what Johnson's argument on this claim is. It would appear to be that it is not sufficient for a jury to find that Johnson committed attempted murder, attempted robbery and robbery

with a firearm. Rather, Johnson seems to argue the jury must also make a "sub-finding" that Johnson "personally carried the firearm." That is, the verdict form must say Johnson "possessed" the firearm, rather than simply relating he committed the crimes with a firearm. If that is Johnson's argument, the State is not aware of a case requiring such a specific finding, Johnson did not provide one below, and does not provide one now.

The law on the matter of three-year minimum mandatories for possession of a firearm is as follows:

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm ***either*** by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." *Overfelt* ***v. State,*** 434 So.2d 945, 948 (Fla. 4th DCA 1983).

State v. Overfelt, 457 So.2d 1385, 1386 (Fla. 1984). "When an information charges that a defendant committed a crime while armed with a firearm, and the jury finds him guilty 'as charged,' such is a sufficient finding to require the imposition of the statutory mandatory minimum sentence. ***Wray v. State,*** 632 So.2d 682, 683 (Fla. 5th DCA 1994); ***Accord, Riley v. State, 654*** So.2d 621, 622 (Fla. 5th DCA 1995). For the minimum mandatories to apply, the State must prove Johnson was in actual physical possession of a firearm. *Hernandez* v. ***State,*** 621 So.2d 1353, 1356 (Fla. 1993).

In this cause, the State proved, and the jury so found, that

Johnson was in actual physical possession of a firearm when he committed attempted murder, attempted robbery and robbery. Big Gaines testified that Anthony held a gun on him as he robbed him and then shot him (29/915-25). As he placed his hands on top of the car he was working on with his father, Willie Gaines, Big noticed a second guy, who had something stuck in his father's back, move his dad into their house (29/920). Big Gaines then heard 2 or 3 shots; his mother screamed and then she ran out of the house (29/921-22). He dropped his wallet and grabbed *Anthony's* ***gun*** (29/921-22).

Big never saw the second man's face, but he did see him lead his father out to the front porch and sit him down in a chair (29/923-24). He could see "blood spots" on his dad (29/927). The second man stood over Willie Gaines maybe four or five seconds, Anthony said, 'let's go," and the second guy shot his father in the jaw (29/924-26). Anthony took $1400.00 and a cellular phone from Big (29/939-942).

Amanda Gaines testified that the man who invaded her home and shot her husband, had a "gun in his hand" (29/969-973). Detective Godbee testified he recovered 13 shell casings from both inside and outside the victims' house, and 3 projectiles, one of which came from a .45 (29/1006, 10017). Dr. Floro testified Willie Gaines died as a result of multiple gunshot wounds of the body, and that he recovered three bullets from the body as well (29/1048-58).

Chiffon Bryant testified when the Johnson brothers exited her car to confront Big Gaines, they had their handguns concealed: ***"Anthony had his gun*** in ***his belt and he pulled*** his ***shirt over it and Calvin had his . . . under*** his ***shirt in the back*** of ***his pants."*** (30/1092). Neither gun was small (30/1093). As the brothers made their escape in Chiffon's car, she testified: "Calvin said that the old man pulled a gun on him and he had the nerve to try and shoot him and ***he had to fire him up."*** (30/1100) She explained that "fire him up" meant Johnson said he had to ***"shoot him"*** (30/1100). Johnson also said he ***shot the victim "everywhere"*** (30/1101).

Linsey Walker testified he witnessed Anthony shoot Big Gaines while he "was laying on the ground." (30/1191-92). Linsey also witnessed Johnson run out of the Gaines' house (30/1192). Mr. Walker chased the brothers and at one point, "they turned around and ***both*** of ***them had guns."*** (30/1197) Shea Brookins testified he witnessed Johnson exit the Gaines' home after he heard the shooting (30/1208).

Ed Mason testified that after the shootings a transaction occurred between him and Johnson which ***"consisted of two guns, . . . a .380 and . . . a .45 automatic."*** (31/1380-81) Mason "had asked [Johnson] about a handgun and he told [him] that he had two handguns and that [he] could have one of them if [he] sold the other one." (31/1380) Mason did as instructed but failed to

provide Johnson with the proceeds because he was in jail, and Mason squandered the money to support his cocaine habit (31/1383-84).

Sometime after Johnson was arrested, he called Mason from jail, inquiring whether Mason still had the guns and telling him if he remained quiet "everything would be all right." (31/1386) On a separate occasion, ***Johnson admitted that he did the robbery on 21st and Phoenix*** that the newspaper had related, and that as ***"he was doing the robbery ... the guy bucked him and he had to shoot him."*** (31/1386) While incarcerated with Johnson, after Mason had been arrested for dealing crack, Johnson repeated that if Mason kept his ***"mouth closed about those guns that he could beat his case."*** (31/1387) Woodrow Wilson witnessed the transaction between Johnson and Mason regarding the .45 and the .380 (31/1430-31).

Peter Lardizabal testified that ***three bullets and thirteen cartridge cases came from .380 and .45 caliber handguns*** (32/155-73). Detective Highsmith testified that Big Gaines identified Anthony as his shooter when he interviewed him in the hospital (32/1616).

Anthony admitted he owned a .45, and that he carried his firearm "everywhere" he went in the State of Florida 33/1675-76). He traded on the street for the .45 with a .357 Magnum because he ***"wanted something with more fire power."*** (33/1676-78) Anthony claimed he left the .45 in someone's car and it was never returned (33/1679-80).

of Counts II, III, and V, as they appeared on the Verdict forms, as follows:

VERDICT - COUNT II

> WE, THE JURY, FIND THE DEFENDANT GUILTY OF ATTEMPTED MURDER IN THE FIRST DEGREE, ***AS CHARGED IN THE INDICTMENT.***

VERDICT - COUNT III

> WE, THE JURY, FIND THE DEFENDANT GUILTY OF ATTEMPTED ROBBERY ***WITH A FIREARM,*** AS ***CHARGED IN THE INDICTMENT***.

VERDICT - COUNT V

> WE, THE JURY, FIND THE DEFENDANT GUILTY OF ROBBERY ***WITH A FIREARM, AS CHARGED IN THE IZVDICTMENT.*** ***(See*** p.3 this brief. II/257-58, 260)

Count II of the indictment charged Johnson with attempting to unlawfully kill Big Gaines "***by*** shooting" him and that he ***carried or had in his possession a firearm, to wit: a pistol.***"[23] (I/25). Count III of the indictment charged that Johnson ***"did carry a firearm, to wit: a pistol"*** when he committed or attempted to commit a robbery upon Willie Gaines, and ***"had*** *in* ***his possession a firearm, to wit:*** *a* ***pistol,"*** contrary to § 775.087 (I/25-26). Count V similarly charged Johnson in the robbery of Big Gaines (I/25-26).

The only real complaint Johnson may have would relate to Count II, regarding the scrivener's error, where § 75.087 was mistakenly

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[23]See pp.1-2 this brief.

identified as § 735.087.'" The State respectfully submits any such complaint is waived, and the scrivener's error is harmless beyond a reasonable doubt, given the fact that the count charges "***possession of a firearm.***" **Mesa** *v. State, supra*. The trial court correctly imposed the three-year minimum mandatories for Counts II, III, and V, because the jury found Johnson carried a firearm when he committed the crimes.

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[24]The State previously alerted this Court to this typo in fn. 3 of this brief at p.2.

ISSUE IV

THE TRIAL COURT APPLIED THE RIGHT RULE OF LAW, AND COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS ITS FINDING THE PRIOR VIOLENT FELONY AGGRAVATOR.

When there is a legal basis to support finding an aggravating factor, this Court will not substitute its judgment for that of the trial court. *Occhione v. State,* **570** So.2d 902 (Fla. 1990); *Willacy v. State,* 696 So.2d 693 (Fla. 1997), petition for cert. filed, No.97-5893 (U.S. Sept. 1997). In *Willacy,* this Court stated:

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt --that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

Id. (footnote omitted). *See also, Raleigh* v. *State,* Slip Opinion No. **87,584** (Fla. November 13, 1997). Further, this Court's "duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence." *Orme* ***v. State,*** *677* So.2d 258, *262* (Fla. 1996), ***cert. denied, 117*** S.Ct. 742 ***(1997); Willacy v. State,*** *supra,* n.7. The trial court's findings for this aggravator were as follows:

> 1. The Defendant was previously convicted of other felonies involvina the use or threat of violence to some werson:
>
> On April 21, 1989, the Defendant was convicted of ***aggravated assault*** for shooting a firearm at his

> brother, Anthony Wayne Johnson. On October 19, 1989, he was convicted of aggravated *battery* for shooting one David Greenwall. In addition, the Defendant was convicted in this cause of the contemporaneous crimes of the ***robbery with a firearm and the attempted murder*** of a separate victim, Calvin Gaines. This aggravating circumstance has been proven beyond a reasonable doubt. (III/433)

Johnson's argument at p.32 of his brief is that "[t]he trial court erred in assigning weight to" the prior violent felony aggravator. As support for this conclusion, he argues the inverse of the issue resolved in Slawson v. State, 619 So.2d 255, 260 (Fla. 1993), *cert. denied,* 512 U.S. 1246 (1994), where this Court determined "that a trial court's consideration of record evidence of the circumstances of a prior violent or capital felony in weighing that factor is not error." In *Slawson,* the defendant maintained "that consideration of the facts of the prior capital felonies amounted to the improper consideration of nonstatutory aggravating factors. *Id.* at 259. From this conclusion, Johnson argues at p.33 of his brief the trial court's consideration of the circumstances ***of four*** (4) prior violent felonies should have resulted in a finding that the "'prior crimes of violence' in this case is simply not extensive." Given this conclusion, Johnson in essence argues the trial court assigned too much weight to this aggravator. Yet, *Slawson* clearly delineated: "The weight to be given each of the factors found was within the province of the sentencing court. *Campbell v. State,* 571 So.2d 415, 420 (Fla.

1990)." *Id.,* at 260.

Johnson argues that his aggravated assault prior violent felony, "involved an incident between appellant and his brother [Anthony]." He further argues that Anthony testified he did not want to file criminal charges against him, and that the whole thing was just "a misunderstanding" (pp.32-33 Johnson's brief; 37/2266-68). Johnson seems to be arguing here that the aggravated assault is insufficient to support the death sentence because Anthony was not harmed. However, this Court has determined that "the resultant harm, or lack thereof, to the intended victim of a violent felony is an irrelevant consideration." *Johnston v. State, 497* So.2d 863, 871 (Fla. 1986). This "incident" when explored in more detail at Johnson's Spencer hearing, involved ***Johnson shooting at Anthony three or four times,*** necessitating the neighbors calling the police. (40/2409-10)

Johnson describes the second prior violent felony, aggravated battery, as "a 1989 incident involving a crack cocaine deal." (P.33) He further states: "The arrest and booking report for this offense indicated that Calvin Johnson fired shots because someone had attempted to steal cocaine from him." (p.33) Johnson does not divulge that at his *Spencer* hearing, he asked the trial court to take judicial notice of the aforementioned booking report leading to his conviction, and read the contents of the affidavit which follow:

> On the fifth of October, 1989, the listed victim and witness were in the 200 block of Mohavey Court attempting to buy some crack cocaine from this suspect.
>
> Some type of argument started and this suspect began shooting what appeared to be a .38 caliber revolver. ***The suspect fixed at least five shots at the victim, one of which struck the victim in the left arm.*** The suspect was later arrested on a different charge and this writer then interviewed the suspect.
>
> After the suspect was advised of his rights ***suspect gave this writer a written statement admitting to the shooting of the victim.*** He said the victim attempted to snatch his crack cocaine and he shot him. (40/2416-17)

Below, Johnson argued this conviction 'should not be relied on as an aggravating circumstance . . . or . . . it should not be given significant weight" because "basically the victim had placed himself in a position --sort of an assumption of the risk if you will . . . ." (40/2417-18)

Johnson dismisses the final two prior violent felonies, the attempted murder and robbery of Calvin Gaines, as "contemporaneous crimes." (p.33) Yet, this Court has "consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes. *Wasko v. State, 505* So.2d 1314 (Fla. 1987)." *Pardo v. State,* 563 So.2d 77, 80 (Fla. 1990), *cert. denied, 500* U.S. 928 (1991); See *also, Windom v. State, 656* So.2d 432 (Fla.), *cert. denied,* 116 S.Ct. 571 (1995). Such was the case here.

The trial court applied the right rule of law, and competent and substantial evidence supports its finding of the prior violent felony factor. *See Raleigh v. State, supra.* The trial court also correctly attributed to it the proper weight. Clearly, Johnson had a propensity for violence with firearms. What Johnson alleges here as error is a mere disagreement with the weight the trial court assigned this circumstance, which was absolutely within its discretion, and Johnson has failed to demonstrate that it abused that discretion.

ISSUE V

THE TRIAL COURT APPLIED THE RIGHT RULE OF LAW, AND COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS ITS FINDING JOHNSON WAS ENGAGED IN A BURGLARY WHEN HE MURDERED WILLIE GAINES.

Again, as previously delineated, this Court stated in *Willacy:*

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt --that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

Id. (footnote omitted). *See also, Raleigh v. State, supra.* Further, this Court's "duty on appeal is to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent, substantial evidence." *Orme v. State, supra,* at *262; Willacy v. State, supra,* n.7. "...In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a 'common-sense inference from the circumstances,' *Swafford v. State, 533* So.2d 270, 277 (Fla. 1988), *cert. denied, 489* U.S. 1100 (1989)." *Gilliam v. State,* 582 So.2d 610, 612 (Fla. 1991).

The trial court's findings for this aggravator were as follows:

> 2. The Defendant, in committing the crime for which he is to be sentenced, was engaged in the commission of the crime of burglary/the crime for which the Defendant is to be sentenced was committed for pecuniary gain: The Defendant and

his co-defendant, Anthony Wayne Johnson, originally went to the residence of Willie Gaines for the purpose of robbing his son, Calvin Gaines, who also resided there. In doing so, Calvin Johnson and Anthony Johnson carried loaded pistols with them. At the residence, they found Calvin Gaines and Willie Gaines working together in front of the house on the automobile of Calvin Gaines. While Anthony Johnson initiated the armed robbery of Calvin Gaines, then, the Defendant took Willie Gaines at gunpoint and forcibly entered the residence. Once inside, the Defendant attempted to rob Willie Gaines. He also fired the first of the gunshots which led to the death of Willie Gaines. (The last bullet fired into Willie Gaines was shot on the front porch of the house after the Defendant had removed the wounded but conscious Willie Gaines from his house to that front porch following the attempted robbery.)

The record is not clear as to why the Defendant originally removed Willie Gaines from the location of the automobile of Calvin Gaines and forced him into the home. Most likely, this action was taken to ensure that Willie Gaines could not interfere with the robbery of Calvin Gaines. Under that circumstance, the shooting of Willie Gaines would not have been for the overall purpose of obtaining pecuniary gain from Willie Gaines.

The Court is not convinced beyond a reasonable doubt, however, that the murder of Willie Gaines, and burglary to his home, were not committed for the overall purpose of obtaining pecuniary gain from him through robbery. The Defendant may have forced Willie Gaines to enter his home for the sole purpose of robbing him of valuables contained therein.

The State has now urged the Court to find as separate aggravating factors both that the murder of Willie Gaines was committed in the course of committing the crime of burglary of the home of Willie Gaines; and also that the murder was committed for pecuniary gain through the robbing of Calvin Gaines. However, because the State has failed to prove beyond a reasonable doubt that these two events were committed entirely

> independent of each other, they must be considered to be merged for sentencing purposes. Accordingly, ***the Court finds beyond a reasonable doubt that there exists only the aggravating factor of commission of murder while the Defendant was engaged in burglary.*** (III/433-435)

Johnson argues at p.34 of his brief: "There is substantial confusion about the factual scenario underlying the second aggravator which the trial court determined to exist." The State respectfully submits that Johnson attempts to create substantial confusion as demonstrated by his presentation of evidence which was rejected by the jury, as seen through its verdicts of guilt.

First, Johnson takes exception to the trial court's determination that he and his brother went to the residence of the victim "for the purpose of robbing his son, [Big] Gaines, who also resided there." Johnson represents at p.34 of his brief: "The testimony presented by the state was completely the opposite." In the light most favorable to the trial court's finding, the facts which follow demonstrate that its finding is supported by competent, substantial evidence.

Big Gaines testified Anthony crouched down next to him, while he was seated in his car (29/915-18). Anthony had a gun on him and ordered him not to move, asking him: "Where the money at, where the dope at?"(29/916). Big responded that he didn't have any dope and handed Anthony $300.00 or $400.00 (29/916-17). Anthony took Big's cellular phone, ordered him out of the car and to place his hands on top of the car (29/919). Anthony reached for Big's left front

pocket and Big gave him another $1,000.00 cash (29/919). As this transpired, Willie Gaines was still at the back of the car, by the trunk (29/919-20). As Big placed his hands on the top of the car, he noticed **a *second guy, who stuck something in his dad's back,*** and watched as they went into the house (29/919-20).

Johnson further represents at p.34 that "Chiffon Bryant testified that there had been no discussion between Anthony and Calvin regarding any robbery . .." (emphasis his). This testimony occurred during her cross-examination (30/1174). Johnson fails to present Chiffon's testimony given during her direct examination. Chiffon testified that after she pulled over at Anthony's orders, she told him that Big wasn't going to give him any money (30/1091). Anthony replied that he was broke, and Big was going to give him his money (30/1091). She asked Anthony: What are you going to do, rob him? (30/1091) The brothers exited her car, ***"Anthony had his gun in his belt and he pulled his shirt over it and*** **Calvin** ***had his ... under his shirt in the back of his pants."*** (30/1092)

Linsey Walker testified that as he drove by, he saw Big Gaines seated in the driver's seat of his car with his arms up in the air, and Anthony with a gun in his hand bending down (30/1191). As he turned around, he heard gunfire and saw Big Gaines falling down toward the back of the car (30/1191-92). Anthony "was standing over shooting" Big (30/1191-92). Mr. Walker also witnessed Johnson run out of the Gaines' house (30/1192). As the Johnson brothers

fled, Mr. Walker pursued them, and ultimately "they turned around and both had guns." (30/1197) Shea Brookins also saw Johnson come out of the Gaines' home after he heard shooting (30/1028). This testimony is competent, substantial evidence from which the trial court could make a common sense inference that the Johnson brothers' purpose from the outset was the robbery of Calvin Gaines.

Johnson argues at p.35 of his brief that the trial court's finding that he "took Willie Gaines at gunpoint and forcibly entered the residence," is not supported by the evidence. Again, Big Gaines testified he observed the second guy, **stick *something in his father's back*** and they went into the house (29/920). His mother, Amanda Gaines, although she mistakenly identified Anthony as he husband's assailant, testified she "saw this guy came in with [her] husband," and he had a ***"gun in his hand."*** (29/972-73) Mr. Walker and Shea Brookins testified they witnessed Johnson exit the Gaines' house. While Mr. Walker pursued the Johnson brothers, they turned and ***both had guns.*** As the brothers made their escape in Chiffon Bryant's car, Johnson admitted ***'the old man pulled a gun on him and he*** **had *the* nerve *to try* and *shoot him and he had to fire him up."*** (30/1100) Again, a common sense inference can be made that it was Johnson who stuck a gun in Willie Gaines' back and forced him into the house.

Johnson alleges at p.35 of his brief that "the trial court's finding that 'once inside, the defendant attempted to rob Willie

Gaines' is not substantiated by the evidence." The best evidence supporting the trial court's finding in this regard comes from Johnson himself. He admitted to his friend, Ed Mason, that "he was ***doing the robbery and the guy bucked him and he had to shoot him."*** (31/1386-88). Johnson used Mason to get rid of the murder weapon and his brother's gun, and later told him if he kept his mouth shut "about those guns that he could beat his case." (31/1380-87)

As regards the trial court's uncertainty as to Johnson's motive for forcing Willie Gaines inside the home, Johnson alleges "the trial court reached its conclusions of fact without substantiating evidence, and speculates on what might have happened." In fact the trial court made a common sense inference from Calvin Gaines' testimony, which was, that as he was being mugged by Anthony, his father was taken into the house by a second guy, who stuck something in his father's back (III/434). Even if the trial court was incorrect finding burglary, which the State does not concede, it is of no import, because the pecuniary gain aggravator, which it was merged with, remains (III/434-35). The alleged error, would be harmless beyond a reasonable doubt as to this inference.

The trial court applied the right rule of law,[25] and competent

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[25] § 810.02(1), Fla. Stat. (1995), states:

> (1) "Burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the

substantial evidence supports its finding. *See Raleigh v. State, supra.* Even if it erred in finding this aggravator, which the State emphatically denies, the pecuniary gain aggravator still exist, demonstrating any error would be harmless beyond a reasonable doubt because the sentence would remain the same in view of two aggravators, one of which was a very weighty prior violent felony aggravator, and neglible mitigation. *Ferrell v. State,* 680 So.2d 390 (Fla. 1996).

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premises are the time open to the public or the defendant is licensed or invited to enter or remain.

ISSUE VI

DEATH WAS THE APPROPRIATE SENTENCE IN THIS CASE.

The imposition of the death penalty as Johnson's sentence for the murder of Willie Gaines is proportionate when compared with other capital cases. Recently, in *Moore* v. *State,* 22 Fla, L. Weekly S619 (Fla. October 2, 1997) this Court affirmed the death sentence where the trial court found three aggravating factors: "1) Moore had been convicted of the prior violent felonies of armed robbery and aggravated battery; 2) he committed the murder to avoid arrest; and 3) he committed the murder for pecuniary gain." *Id.,* at S621. In rendering its proportionality analysis, it opined as follows:

> We have upheld the death sentence in other cases based on only two of the three aggravating factors present here. In Pope v. *State, 679* So.2d 710 (Fla. 1996), cert. denied, 117 S.Ct. 975 (1997), we held the death penalty was proportionate where there were two aggravating factors (the murder was committed for pecuniary gain and the defendant had been convicted of a prior violent felony), two statutory mitigating circumstances (commission while under the influence of extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of the conduct), and three nonstatutory mitigating circumstances (defendant was intoxicated, committed the murder subsequent to a disagreement with his girlfriend, and was under the influence of mental or emotional disturbance). In *Melton v. State, 638* So.2d 927 (Fla. 1994), we held the death penalty was proportionate where there were two aggravating factors (the murder was committed for pecuniary gain and the defendant had been convicted of a prior violent felony) and some nonstatutory mitigation. We find that the death penalty was proportionate here. *See also Consalvo v. State,* 21

> Fla. L. Weekly S423 (Fla. Oct. 3, 1996)(holding death penalty was proportionate where there were two aggravating factors--avoiding arrest and commission during the course of a burglary--with some nonstatutory mitigation).

Id., at S621.

Other opinions supporting the proportionality of Johnson's sentence include: Hunter v. State, 660 So. 2d 244 (Fla. 1995), *cert. denied,* 116 S.Ct. 946 (1996)(Two aggravators, prior violent felony conviction and capital felony committed during a robbery, outweighed no statutory mitigating circumstances and 10 non-statutory mitigators including fetal alcohol syndrome; separation from siblings; lack of motherly nurturing and bonding; physical abuse; emotional abuse and neglect; unstable environment; violent environment; lack of positive role models; death of adoptive mother; and narcissistic personality disorder.); *Ferrell v. State,* 680 So.2d 390 (Fla. 1996), cert. denied, (Single prior violent felony aggravator which was especially weighty, outweighed several non-statutory mitigators including the facts Ferrell was impaired, disturbed, under the influence of alcohol, a good worker, a good prisoner and remorseful.); *Shellito v. State,* 22 Fla. L. Weekly S554 (Fla. September 11, 1997)(Two aggravators, prior violent felony and pecuniary gain/committed during a robbery (merged) outweighed age, background and character.).

Johnson requested the trial court to consider the statutory mitigator of age, of which it attributed "very little weight"

because he was 22-years-old when he murdered Willie Gaines (III/412, 435). As non-statutory mitigation, Johnson claimed he was "a relatively minor accomplice in the entire criminal incident." (III/412) The trial court found that this factor was not proven by the greater weight of the evidence finding:

> To the contrary, the evidence was overwhelming that Calvin Johnson was the only defendant in the vicinity of Willie Gaines when he was shot; and that only the Defendant shot Willie Gaines. The shooting was committed without any possible pretense of legal justification.

Johnson also requested the court to consider that he "turned himself in to Detective Herb Scott." (III/412) The court fought that it was proven, but gave it "slight weight" because "there was no other evidence of the Defendant's cooperation with police . . . ." (III/436)

Johnson alleged he "was a member of an extremely abusive and dysfunctional childhood home . . . ." (III/412) The trial court explained in depth why it found this non-statutory mitigator deserved "only slight consideration":

> The Defendant grew up in an in-tact family. He lived at a very young age in a lower middle class, high-crime area. Because the father did not want his children reared in such an environment, however, he moved them to a better neighborhood. The father was strict, but also loving. His first choice of discipline was to send the recalcitrant children to their rooms. He tried to use corporal discipline only as a last resort. Nonetheless, the Defendant was, by his own admission, the type of child who always did what he wanted to do. For instance, if sent to his room for punishment, he might simply sneak out of the house. The Defendant

had run away from home to avoid discipline. (III/436-37)

Johnson alleged his "work history" mitigated the murder (III/412-13). The trial court found this "factor is entitled to very little weight because there was no evidence that the Defendant consistently engaged in lawful employment." (III/437) Johnson said he "was good to his parents and was a respectful son and neighbor." (III/413) The trial court afforded this factor "very little weight" because "the Defendant was disrespectful and a serious discipline problem." (III/437)

Further non-statutory mitigation was that Johnson "has an 8-year-old daughter who resides in Albany, Georgia (III/413)." Slight weight was afforded this factor because "there was an absence of evidence that the Defendant was much more than a biological parent to the child." (III/437) Johnson played football and basketball in junior high school, and varsity football for two years in high school (III/413). The trial court afforded this factor "substantial weight because it finds that the Defendant has a good school background." (III/438) Finally, Johnson argued the sentences of Shirae Hixon and Chiffon Bryant "are ludicrous and extremely out-if-line when their participation in this offense is considered." (III/413) The trial court rejected this allegation as a mitigating factor, and provided a detailed analysis for its rejection (III/438-39). It found "none of the allegations against Shirae Hickson has anything to do with the charges for which this

Defendant was convicted." (III/438) As regards Chiffon Bryant, the trial court found:

> As to Chiffon Bryant, though she was originally indicted with this Defendant for the murder of Willie Gaines, the only evidence at trial was that she might have been guilty of being an accessory after the fact to the murder." (III/438)

It further found that Bryant was sentenced after Johnson's trial and an appropriate Florida sentencing guidelines sentence was imposed. (III/438-39)

Mr. Gaines was truly an innocent victim. Mrs. Gaines appropriately categorized his innocence and the effect his murder had upon her as follows:

> He didn't bother anybody. He was just an old man [76-years-old][26], and we were married for like 25 years. We would have been married 26 in November and we were married 25 years, and he didn't bother anybody. All he like to do was sit on the porch and watch sports, and this is very -- you know, surprising it happened to me.
>
> I didn't know this was going to happen, and it was just a shock to my life. My life is just a mess to me now because I am nervous. I see flashbacks of it. Sometime I am afraid to go out of the door. When the phone rings I jump out of my bed. All through the night I get up and walk. (40/2387)

Mr. Gaines died trying to protect his family and his home. Johnson's attack upon Mr. Gaines warrants the death penalty.

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[26]Subsequent to Johnson's penalty phase, the Florida legislature enacted § 921.141(5)(m): The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

CONCLUSION

Based upon the foregoing facts, authorities and reasoning, the State respectfully requests this Honorable Court affirm Calvin Johnson's convictions and sentences, including that of death.

Respectfully submitted,

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to, Teresa J. Sopp, Counsel for Appellant, 211 N. Liberty St., Ste. Two, Jacksonville, Fl, 32202-2800, this 17th day of November, 1997.

Mark S. Dunn

MARK S. DUNN
Assistant Attorney General