IN THE SUPREME COURT OF FLORIDA

PERRY OMAR BUCKNER,

Appellant,

vs.

CASE NO. 89,001

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Buckner's chronology of the proceedings largely is acceptable. However, the State does not agree that the defense objected to Buckner's being shackled in leg irons at "the beginning" of his trial. On the contrary, the record clearly shows that Buckner's attorney merely sought permission for Buckner to rise when the trial judge and/or jury entered the courtroom (T 204). The court granted the only relief sought, i.e., allowed Buckner to rise with everyone else when either the judge or jury entered or left the courtroom (T 204). As will be discussed in more detail later, the defense did subsequently request permission to remove the leg restraints during the playing of a videotape of the crime scene (T 482). The trial court denied this request, but granted a later request to allow Buckner to testify while unfettered (T 832-35).

The State would note that only two jurors saw a montage of wallet-sized photographs of the victim being displayed by a family member (T 962). , Although defense counsel eventually moved for a mistrial (after expressing some reluctance to do so--T 952), the defense (as the prosecutor noted) did not move to excuse the two jurors who actually had seen the display, despite the availability of two alternate jurors (T 1017-20).

The two aggravating circumstances found by the trial court were CCP and HAC (R 762). In mitigation, the trial court found (1) mental and emotional disturbance, which was not "extreme;" (2) age;

(3) impairment in the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, which impairment was not "substantial;" and (4) nonstatutory factors, including: (a) defendant expressed remorse; (b) defendant was a poor student who quit school in the tenth grade; (c) defendant has artistic talent; and (d) defendant had been living a chaotic lifestyle at the time of the murder (R 765-66)

Any necessary elaboration will be provided in argument.

STATEMENT OF THE FACTS

GUILT PHASE: The State rejects Buckner's statement of the facts as to the guilt phase and will present its own. Initially, the State would respond to Buckner's introductory remarks about the consistency and credibility of the evidence by stating that, especially in view of the jury's verdict of guilty, it is safe to say that Buckner's own testimony that he had acted in self defense was impeached successfully. Although the defense attempted to discredit the State's eyewitnesses to the shooting on various grounds, their testimony about the murder, in the main, was both consistent and credible, and obviously was accepted, in essential respects, by the jury.

On the evening of June 2, 1995, Buckner rode with several others, including Robert Monroe and Jerry Williams (Kojak) to a bar

called Shady Oaks (T 607). After Shady Oaks closed at midnight, they drove to the Royal Palm Bar (T 838). Robert Monroe acknowledged that he had smoked some 'reefer," but "didn't do too much drinking" (T 607). Buckner denied drinking anything that evening, claiming, 'I don't drink" (T 839).[1] He did claim to have smoked marijuana that evening (T 838), but testified that he had not started until after his arrival at Royal Palm (T 858). He did not recall how much "reefer" he had smoked, but the amount was not enough to affect his ability to perceive what he had seen and done that evening; he testified that he still had a "clear head" (T 859).

Buckner had been living off and on with Latarcia Hampton (Tasha) (T 801). Apparently, he also had other girlfriends, including Joy Monroe (Robert's sister) (T 684-85, 801). In fact; Buckner and his group had driven to Royal Palm in Joy's car (T 685, 838). However, notwithstanding his relationships with other women, both Tasha and Buckner habitually referred to Tasha as Mrs. Buckner (T 804, 837), and Buckner referred to Tasha's child as Taquan Buckner (even though the child was not his) (T 805).

Tasha was at the Royal Palm that evening (T 586, 839-40). Although Tasha denied having danced with Thaddeus Richardson (the murder victim) (T 802), Kojak and Reginald Davis (Bobo) testified that they had seen her dancing with Richardson (T 561, 1005-06).

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[1] "Kojak" confirmed that Buckner was not drunk (T 1007).

Moreover, although both Tasha and Buckner denied having argued with each other that night (T 814, 859), Kojak testified that he saw Buckner slap Tasha inside the bar (T 1006), and Robert Monroe testified that he saw Buckner arguing with Tasha after the shooting (T 611).

Katrina Williams (Nisie) and her cousin Voncile Mills (Shawn) were at the Royal Palm that evening (T 583-84, 650-51). Shawn's truck was parked just to the left of Thaddeus Richardson's Honda (T 587, 652). Nisie admitted having drunk a quart of beer that night (T 598–99), but Shawn testified that she had not had anything to drink that evening (T 653). When the Royal Palm closed, they went outside. Richardson was already seated in his Honda, so Nisie walked over and got in, on the passenger side, to talk to him (T 586-87). She saw no gun in his car (T 588). Shawn, meanwhile, stood just outside the driver's side door of the Honda (T 655). Both Nisie and Shawn described the victim's mood as good (T 588, 655). According to Nisie, the victim was "smiling and laughing and everything with us" (T 588). After a few minutes, Nisie got out of the Honda and went to Shawn's truck, getting in on the passenger side (T 589-90). Shawn likewise broke off the conversation and headed towards her truck. As she did, she saw Tasha nearby (T 656).

Shawn got to her truck and was backing out of her parking space when she heard a noise which sounded like firecrackers (T

657). Nisie, in the passenger seat, looked toward the noise and saw Buckner standing outside the victim's Honda. Richardson was still sitting in the driver's seat of his car. Buckner's hands were "like going down in the car" (T 592). Richardson then "made his way out of the car and was like trying to make it around the rear end of the car" (T 594), "[l]ike he wanted to run" (T 595). He was stumbling and asking for help, hollering "oh my God, somebody help me" (T 594). Nisie saw a "flash two times," coming from Buckner's hand, which was pointed "straight out" (T 595). When she saw the flashes, Buckner and victim were both on the passenger side of the Honda (T 598). The victim stumbled and fell on his face (T 594).

When Shawn first looked, Richardson was already out of the car, but still on the driver's side (T 658). She saw the victim "go around the back of the car" (T 657). Shawn backed the truck "in the grass" to park, while Nisie jumped out of the truck and ran to the victim (T 660). By the time Shawn got to the victim, he was lying on the ground on the passenger side of his Honda, and Buckner was running away (T 661-62, 664). Shawn testified that she had heard "four or five" shots (T 661). She heard the victim say "oh my God" while he was lying on the ground, after Buckner had run off (T 666),

Bobo testified that he had drunk "[m]aybe two quarts" of Busch beer (T 559). When Bobo exited the club after it closed, he heard

a shot and saw Buckner at the driver's side of Richardson's car, holding a small-caliber revolver (T 562, 578, 580). Buckner said "what's up." The victim asked Buckner to "just let me leave" (T 566). Instead, Buckner shot the victim twice as the latter sat in his car, and two or three more times after the victim got out of the car and was "trying to get away" (T 562-63). Buckner "kept saying, what's up, what's up," even as he was shooting (T 566). Meanwhile, Tasha ran up, saying "Stop, don't do that" (T 564-65). Bobo grabbed her around the waist to stop her (T 565). The victim said "oh, God, somebody help me," and fell to the ground in front of Bobo (T 567). Bobo called 911 (T 564).

Garlinda Towns (Linda) knew Buckner through her boyfriend Chris Sanders (T 696). She and Chris went to Shady Oaks bar the evening of June 2, but it was already closed, so they went to Royal Palm, where they hung out in the parking lot for maybe an hour (T 700-01). Because Chris was "snorting powder," Linda got angry and took him home (T 703). She left him there and returned to Royal Palm (T 703-04). Again, Linda just stayed in the parking lot (T 704). She admitted she "was selling drugs" (T 711).[2] She testified, however, that she was not using drugs that night herself (T 711). After selling to a couple of people, including Bobo, she got back in her car (T 711-12). Just as the pickup truck (carrying

[2] She also admitted having 29 prior felony convictions, primarily for a series of bad checks she had written in 1979, and having pending charges of grand theft in Ocala (T 727).

Nisie and Shawn) that had been parked between her car and the victim's car was backing out, Linda saw Buckner coming from the club (T 712, 771-72). She started to speak to him, but he was walking too fast (T 714-15).[3] He went to the victim's car. According to Linda, Richardson said, "let me explain, let me explain," but Buckner told him, "f____n_____, ain't nothing you can explain to me. Ain't nothing you can tell me." (T 715-16). And then they were "tussling," Buckner still standing outside the car, the victim still seated in the driver's seat with his door open (T 716). Next, Linda saw Buckner's hand come up, then down (reaching over the door or else through the window--she was not sure), and then she heard one shot and then another (T 716-17). She watched Buckner walk away and into the crowd (T 718). Meanwhile, the victim exited his car. When Linda looked back at him, he was no longer on the driver's side of the car. The victim fell, saying "please help me . . . . please Lord, somebody help me, please help me." At this point, Buckner returned, saying, "you

[3] In footnote 12 of Buckner's brief, he claims that "others" testified that he and Linda had fought earlier that day about a refrigerator. It is undisputed that Buckner had been to Linda's place earlier that day to pick up a refrigerator, but only one witness--Robert Monroe (Joy's brother), with whom Buckner had ridden to Royal Palm and with whom Buckner had spent the previous five months in jail--testified there was any argument about the refrigerator (T 618). According to Linda, the refrigerator was unplugged and sitting outside the back door when Buckner came over; not only were no harsh words spoken, but he told her he would drop by later that day (T 700). Linda testified that when she started to speak to Buckner as he was headed for the victim's car, she meant to ask him why he had not come back to her house (T 714).

ain't had enough. . . . You mother f_____, you ain't had enough" (T 718-19). Tasha started running toward Buckner and the victim, pleading with Buckner not to kill him, but Bobo grabbed her (T 721). Buckner shot the victim two or three more times (TR 721). Linda left immediately afterwards (T 725).

By the time medical personnel got to the scene, Richardson was dead, lying "sort of on his side and sort of face down, at the right front corner of his car (T 473-74, 503-04). There were blood spots on the trunk and left rear taillight area of his car, and also near the right rear corner of the rear window (T 503-04). Buckner was gone and there was no sign of the murder weapon (T 484, 495). Although Buckner was arrested two days later (T 485), the murder weapon has never been recovered (T 491).

Dr. Sara Irrgang conducted the autopsy (T 518). Richardson's blood tested negative for the presence drugs and alcohol (T 533). He died from hemorrhage and blood loss from five gunshot wounds (T 519, 533). The bullets were small caliber, probably a .22 (T 537). In addition to the gunshot wounds, Richardson's right eye was swollen (T 519). Dr. Irrgang testified that it was possible, but not "real probable" that the swelling was caused by a fall to the ground after the victim had been shot five times (T 519). It was more likely that he had been punched in the eye before the shooting (T 540).

Dr. Irrgang described the gunshot wounds as follows. There were two gunshot wounds to the upper neck area, one just above the collarbone, and one a little bit higher (T 520-21). There was one wound to the right chest, and another to the abdomen (T 521). Finally, there was a bullet wound in the back of the neck that had been fired from near contact range--from just a couple of inches away or less (T 521, 524, 532-33). The stomach wound was just a flesh wound (T 526), but three of the bullets had penetrated his lungs causing a "lot" of internal hemorrhaging (T 524, 527, 528-30), and a fourth bullet had gone through the victim's jugular vein and embedded in his vertebral column (T 526). Death was caused by internal hemorrhaging (T 533). These wounds would not immediately have prevented Richardson from getting up and walking a short distance (T 531). Dr. Irrgang estimated that the victim could have remained conscious for maybe four or five minutes (T 534).

Buckner testified on his own behalf. He testified that he was walking through the club parking lot looking for a woman named "Teensie," with whom he had scheduled an assignation (T 841-42). As he circled a puddle, Richardson's car began backing up. Buckner "bumped" on the car to let Richardson know he was behind him (T 843). Richardson shouted an obscenity as Buckner walked up to explain why he had hit the car, and then Richardson reached down for a gun with his right hand (T 845, 863).[4] When Buckner saw the

[4] It was stipulated that Richardson is left-handed (T 799).

gun, he "rushed" the car and the "gun went off" (T 845). Buckner backed up to check himself. He explained that he did not turn and run because Richardson would have shot him in the back (T 852). However, Richardson did not shoot. Instead--according to Buckner--Richardson got out of the car, went to Buckner, and began choking him, while still holding on to the gun (T 846, 866). This gave Buckner the opportunity to grab the gun. As he and Richardson struggled over the gun, it "went off" twice more (T 846). So far, Buckner had not been hit by any of these shots (T 867). They "tussled" towards the rear of the car, where Buckner obtained possession of the gun, even though Richardson was bigger and stronger (T 846-47, 869).[5] Although now unarmed, Richardson (according to Buckner's testimony) continued to attack, charging Buckner while Buckner was holding a gun on him (T 870, 872). When asked if the victim had said anything, Buckner answered, "I don't know. I wasn't paying attention." (T 872). Buckner fired three more times (T 872), then dropped the gun and ran (T 875). Buckner claimed he never heard the victim begging for his life, he never went to the passenger side of the car, and he never shot the victim while he was on the ground (T 848, 850, 854). The other witnesses "were lying" (T 848).

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[5]Buckner did not know how much he weighed (T 868), but acknowledged that if the victim was five feet, nine inches tall and weighed 187 pounds (as Dr. Irrgang had testified--T 517), the victim was bigger than Buckner (T 869).

Joy Monroe testified that she had been awakened at 3 a.m. by Buckner (T 686). She had been expecting him. However, she noticed "little red specks" on his shorts that "looked like blood" (T 687). She asked him if he had been fighting, and he said no (T 687). Buckner did not appear to be injured in any way (T 687-88). Because she thought that he had been fighting, she made him leave (T 688).

At five or six a.m., Buckner showed up at Teretha Canady's house with his uncle Tim Erving (T 673-75, 983). Later Teretha and Tim met Buckner at a motel in Ocala (T 990), where Tasha joined him (T 677, 809). Although Tim testified that Buckner had told him that the victim was "mooshing him" and had reached for a gun (T 679, 985), Tim previously had given a sworn statement in which--in response to the question, did the defendant tell you what had happened --Tim had answered, "I don't know what happened" (T 991).

In rebuttal, the State presented several witnesses who had known the victim, all of whom testified that the victim was not known to be violent--on the contrary, he had a reputation for nonviolence (T 927, 971-72, 978). In addition, Charles Williams testified that he had been parked immediately behind the victim's car at Royal Palm and had not moved his car until after the first shot (T 981-82).

SENTENCING PHASE: The State would offer the following to supplement and clarify Buckner's recitation of the sentencing phase evidence:

The State's first witness was the victim's "God brother," Aaron Masoline, who testified that he had been at Royal Palm night of the murder (T 1112-13, 1116). He had not been drinking; he was with the "music crew" (T 1116-17). He heard a couple of shots and ran outside (T 1117). He saw the victim's car parked in front of a white car. The victim was coming around the side of his car. Masoline saw "a gun go up" and saw someone shoot the victim in the back of the head. As the victim was falling, the shooter fired a "couple" more shots and ran away (T 1118-19). Masoline ran to the victim. Masoline testified that Richardson was still conscious and he was "looking right into my eyes" (T 1120). He remained conscious for several minutes (T 1120).[6]

In addition, the State presented victim-impact testimony from Richardson's father and twin brother (T 1122 et seq).

Buckner waived the no-significant-criminal-history mitigator (T 1107). He presented two witnesses in mitigation--his mother and Dr. Dorothy Lekarczyk, a psychologist.

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[6] It was stipulated that the witness originally had told the prosecutor in a February 1996 telephone conversation that he had not witnessed the shooting, and that the prosecutor had not learned the contrary until a "face-to-face" conversation with the witness the previous Friday (T 1166).

Although Dr. Lekarczyk testified on direct examination that Buckner had "not ever received any counseling" (T 1142), she acknowledged on cross-examination that Buckner had received biweekly anger control group counseling and counseling with the "cottage case manager" for an extended period of time in 1993 (T 1150).[7] She also acknowledged that she had believed what Buckner had said about how the shooting had occurred until she had read the interviews of the various eyewitnesses and the police reports. Now, she thought, "there could have been some things that he told me that weren't one hundred percent the truth," and, moreover, there might be "two truths" here (T 1151-52). She acknowledged that, according to a 1993 evaluation, Buckner had no history of head injury or of abuse of alcohol or drugs (T 1154). In fact, Dr. Lekarczyk herself did not think that Buckner had any significant psychological problems other than what anyone on death row, by definition, might have; as she noted, "the normal, average, well-adjusted person doesn't find themselves [sic] in this kind of situation" (T 1155). Finally, she acknowledged that she did not "know for sure" if Buckner's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law was substantially impaired (T 1156).

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[7] She explained that this had not been "psychological counseling" (T 1150).

Buckner's mother testified that he had moved to Florida to live with his grandparents in the summer of 1988. Although Buckner's father had been abusive to her, Buckner himself had only witnessed "[j]ust one incident" (T 1159). She had remarried five or six years ago, when the defendant was fourteen or fifteen (T 1163). Her new husband cares for Buckner just like she does (T 1163). Since she moved to Florida, she has attended church, and she has taught her son right from wrong (T 1163-64).

The jury deliberated for 35 minutes (T 1224), before returning a 7-5 recommendation of death (T 1225).

SUMMARY OF THE ARGUMENT

There are seven issues on appeal: (1) The evidence is sufficient to support Buckner's conviction for premeditated murder. Buckner's claim of self-defense was not credible, and was inconsistent with the testimony of the other witnesses. The jury was entitled to reject his claim of self-defense. Moreover, substantial, competent evidence was presented to demonstrate that, even if Buckner fired the first two shots without premeditation, he had ample time to reflect on the consequences of his actions between the first two shots and the final three. (2)(a) Because trial counsel did not object to the peremptory challenge procedures, Buckner has failed to preserve any Conev issue in this case. Moreover, there was no Coney violation in this case, because new Rule 3.180 supersedes Conev and applies to Buckner's trial. The new rule does not require a defendant's attendance at bench conferences in which peremptory challenges are exercised so long as the defendant is present in the courtroom and has a' meaningful opportunity to be heard through counsel. In any event, Buckner himself waived his right to be present at bench conferences. (2)(b) Because Buckner never sought an inquiry into the necessity for shackling, no shackling issue has been preserved for appeal. Moreover, Buckner's complaint here is limited to the court's denial of his request to remove the leg irons during the playing of a videotape of the crime-scene area. His stated concern was that the

jury might see the leg irons if he moved to where he could see the tape being played. But he did not seek permission to move to such location while the jury was out. Moreover, the tape was not critical to the prosecution or defense. It merely portrayed the parking lot and immediate surroundings of the Royal Palm Bar, and was filmed during daylight hours less than a month before trial. The State only played the tape once, during the testimony of Captain Jenkins from the sheriff's office, and defense counsel did not even cross-examine the witness about the tape. The State never again used the video, and trial counsel did not renew the request to move Buckner when the defense played the video during its cross-examination of Garlinda Lewis. (3)(a) The evidence supports the trial court's determination that this murder was CCP. Buckner had ample time to consider his actions, and shooting the victim after listening to him plead for help shows deliberate ruthlessness. (3)(b) Because this shooting was protracted, with an interval between the shots in which the victim was pleading for help and obviously suffering, the trial court was authorized to find that this murder was HAC. (3)(c) The trial court did not reject Buckner's proposed mitigation; the court merely gave this mitigation "slight weight." This was not an abuse of discretion. (3)(d) In view of the finding of two aggravators weighed against slight mitigation, death is a proportionate sentence. (4) The trial court's statement during a charge conference that he would

"in all likelihood" follow the jury's recommendation as to sentence was merely an acknowledgment of the great weight to which a jury recommendation is entitled, and not an abdication of the trial court's responsibility independently to review the evidence. (5) Only two jurors noticed that one of the victim's family members was holding up a montage of wallet-sized photographs. Neither of these jurors actually saw what was portrayed in these photos, and neither saw anything that would affect their ability to be fair and impartial jurors. The defense did not move to excuse either of these two jurors and replace them with alternates, and the motion for mistrial was denied properly. (6) Buckner has not preserved for appeal any issue of the qualifications of three prospective jurors excused for cause as a consequence of their views on the death penalty. Moreover, the trial court did not err in excusing them. (7) Florida's death-penalty statutes are not unconstitutional.

ARGUMENT

ISSUE I

THE TRIAL JUDGE DID NOT ERR IN DENYING BUCKNER'S MOTION FOR JUDGMENT OF ACQUITTAL; THE EVIDENCE SUPPORTS THE CONVICTION FOR FIRST-DEGREE MURDER

Buckner contends that the trial court erred in denying his motion for judgment of acquittal because, he contends, "the evidence proved nothing more than a second-degree murder." Initial Brief of Appellant at 21. As this Court has noted, when reviewing a motion for judgment of acquittal:

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. [Cit.] The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.

State v. Law, 559 So.2d 187, 189 (Fla. 1989). Furthermore:

> If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury.

Taylor v. State, 583 So.2d 323, 328 (Fla. 1991).

Initially, Buckner acknowledges that the victim had "provided at least some provocation" by dancing with Tasha in front of Buckner's friends, that the victim was bigger and stronger, and

that Buckner had initiated the confrontation. Otherwise, Buckner argues, nothing is "crystal clear." Initial Brief of Appellant at 23. Although the State does not agree that Buckner has accurately summarized all that is "crystal clear" from the record,[8] the State would note, first, that the trial judge's task was to review the evidence in the light most favorable to the State to determine whether the State had introduced competent evidence which was inconsistent with Buckner's theory of events. All Buckner argued on the motion for judgment of acquittal was that State's witnesses Garlinda Lewis (Linda) and Reginald Davis (Bobo) were "unworthy of belief" (T 787). Any question of the credibility of witnesses, however, was for the jury to resolve. Fierstos v. Cullum, 351 So.2d 370, 371 (Fla. 2d DCA 1977) ("Credibility of the witnesses ... [was] distinctly within the province of the jury."). See also McKee v. State, 159 Fla. 794, 797, 33 So.2d 50, 52 (1948) ("Under our scheme of administering justice, the jury resolves factual conflicts."). As Buckner's trial counsel implicitly conceded, the testimony of these two witnesses supported premeditation (T 787); therefore, the trial judge properly denied the motion for judgment of acquittal. Taylor v. State, supra; Lott v. State, 22 Fla. L. Weekly S289, S290 (Fla. May 22, 1997) (despite defendant's claim

[8] If by "crystal clear" Buckner means undisputed and irrefutable even by him, the State would add that, at the very least, it is "crystal clear" that the victim had been shot five times while Buckner, by contrast, was uninjured.

that Whitman's testimony was not credible, "Whitman's testimony was direct evidence of Lott's guilt and the jury was entitled to believe it").

Once the case was submitted to the jury, it became "the jury's duty to exclude every reasonable hypothesis of innocence beyond a reasonable doubt." State v. Law, supra. Buckner's jury did so, and its determination will not be reversed on appeal if there is substantial, competent evidence to support it. Rose v. State, 425 So.2d 521, 523 (Fla. 1983) (whether the State's evidence was sufficient "to exclude all reasonable hypotheses of innocence [was] for the jury to determine," and this Court "will not reverse a judgment based upon a verdict returned by a jury where there is substantial, competent evidence to support the jury verdict"). This Court does not itself weigh the evidence. "Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981) (aff'd Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The issue on appeal, therefore, is not whether this Court is itself persuaded of the appellant's guilt beyond a reasonable doubt, but only whether there is substantial, competent evidence to support the jury's verdict. [9]

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[9] This standard is consistent with the great weight of authority in this country. See, e.g., U.S. v. Hubbard, 96 F.3d 1223 (9th Cir. 1996) ("The reviewing court must respect the exclusive province of the fact finder to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable

Although hardly mentioned by Buckner on appeal, his primary hypothesis of innocence at trial was self defense. This defense was quite properly rejected by the jury as being an unreasonable hypothesis of innocence under the circumstances. Not only was Buckner's self-defense testimony incredible, standing alone, but it was inconsistent with the testimony of the other witnesses and with the physical evidence. First of all, Buckner's testimony that the confrontation with the victim began when latter began backing up his car is hard to credit in view of Charles Williams' testimony that he had been parked immediately behind the victim until after the shooting began. Second, Buckner's testimony that the victim had reached for a gun is inconsistent with the stipulated fact that the victim was left-handed. Third, if the victim had been in possession of the gun, why would he have been pleading with Buckner to let him explain? (As Linda observed, if the victim had been the one with the gun, Buckner should have been the one saying let me explain (T 743, 749, 782).) And if, as Buckner testified, Buckner had stepped back after the first shot, why would the victim have not merely shot Buckner (as Buckner claimed he would have if

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inferences from proven facts."); U.S. v. Dean, 59 F.3d 1479, 1484 (5th Cir. 1995) (Appellate review is limited to "whether the jury made a rational decision, not whether its verdict was correct on the issue of guilt or innocence."); U.S. v. Griffin, 84 F.3d 912, 927 (7th Cir. 1996) ("It is for the jury--not the Court of Appeals--to judge the credibility of witnesses, and attacks on witness credibility are insufficient to sustain a challenge to the sufficiency of the evidence.").

Buckner had turned and fled), instead of exiting his car and trying to choke Buckner with one hand while still holding onto the gun with the other? And once Buckner wrestled the gun from his bigger and stronger opponent, why would the victim have continued the attack, charging at a now gun-toting Buckner? In any event, Buckner's claim that he never heard the victim beg for his life and that he never went to the passenger side of the car is inconsistent with the testimony of the State's witnesses, and the jury was entitled to believe them and to disbelieve Buckner, particularly in view of Buckner's flight, his disposal of the murder weapon, and testimony that the victim was a nonviolent person who had been in a calm, relaxed and congenial mood before being accosted by Buckner.

All this Buckner implicitly concedes on appeal, as his argument is not that the jury erred in finding him guilty of murder, but only in finding him guilty of premeditated murder. Instead of claiming that this was a self-defense killing, Buckner argues on appeal that the evidence "fails to exclude a 'heat of passion' killing," and therefore, Buckner is, "at most," guilty of second-degree murder. Initial Brief of Appellant at 23. Buckner emphasizes the "heavy burden" which the State must carry on the issue of premeditation. With respect, Buckner has his burdens improperly shifted. The State's burden at trial was to overcome Buckner's presumption of innocence and to demonstrate to the

satisfaction of the jury, beyond a reasonable doubt, that-Buckner was guilty of premeditated murder. That was indeed a heavy burden, but it was one that the State carried successfully, because the jury returned a verdict of guilty of first-degree murder. Now that Buckner has been convicted, he is no longer presumptively innocent; he is presumptively guilty. The heavy burden to overcome this new presumption--of guilt--is now his to bear. E.g., U.S. v. Amato, 15 F.3d 230, 235 (2d Cir. 1994) ("An appellant challenging the sufficiency of the evidence bears a very heavy burden."); U.S. v; Wriuht, 16 F.3d 1429, 1439 (6th Cir. 1994) (same); U.S. v. Hoyle, 51 F.3d 1239, 1245 (4th Cir. 1995) (same); U.S. v. Bover, 106 F.3d 175 (7th Cir. 1997) (same).

The evidence, viewed in the light most favorable to the State (as it must be on appeal) shows the following: Buckner and friends drove to the Royal Palm Bar a couple of hours before it closed. Buckner's main girlfriend was there, dancing with the victim. Buckner argued with her. At closing time, the victim went to his car, where he sat for a few minutes, talking to two women. The victim was in a good mood, unaware that he had angered Buckner. Immediately after the two women left, Buckner approached the car, walking fast. He was armed with a .22 caliber pistol. He verbally accosted the victim and then punched him in the face. The victim asked Buckner to let him explain, and "just" to let him leave. Instead, Buckner reached over and shot the victim twice. Buckner

then left the victim and went into the crowd. The victim got out of his car and staggered around the rear of the car to the passenger side, leaving a trail of blood on the car, pleading for help and crying in pain and fear. Buckner heard him, went back to the victim, told him he hadn't had enough yet and shot the victim three more times. Then Buckner left the scene, disposed of the gun, and hid from the police for two days.

Buckner "recognizes that premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of the act." Initial Brief of Appellant at 22. He further acknowledges that "[w]hether a premeditated design to kill was formed prior to the killing is a question of fact for the jury that may be established by circumstantial evidence." Ibid. He contends, however, that the evidence was legally insufficient to establish premeditation, citing Rogers v. State, 660 So.2d 237 (Fla. 1995) (in which the victim had grabbed the defendant's gun during a struggle); Jackson v. State, 575 So.2d 181 (Fla. 1991) (in which the victim had resisted a robbery, inducing the defendant to fire a single shot reflexively); Clay v. State, 424 So.2d 139, 140-41 (Fla. 3d DCA 1982) (in which the defendant had procured a gun to protect herself from a man who, a few minutes earlier, had beaten and threatened her, and had shot him when he accosted her again); and Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990) and Tien Wang

v. State, 426 So.2d 1004 (Fla. 3d DCA 1983) (in which the defendants had killed their victims under unknown circumstances and/or without any witnesses to the murder). These cases are all inapposite. There were witnesses to this shooting, and we do know the circumstances of the killing. Buckner did not fire a single shot--he shot the victim five times. The victim had not previously beaten or threatened Buckner, and Buckner had no reason to fear him. There is no evidence that the victim tried to take Buckner's gun during a struggle (Buckner himself testified that he had tried to take the victim's gun), and the State's evidence demonstrates clearly that the last three shots, at least, were not fired during any struggle.

Buckner obtained the murder weapon in advance, went to the victim's car, verbally accosted him, and then shot the victim while the latter sought a chance to explain. It is the State's contention that the first two shots were premeditated. But even assuming, arguendo, that Buckner fired the first two shots without premeditation, he had ample time to reflect on the consequences of his actions between the first two shots and the final three. Buckner had left the immediate scene after the first two shots, and the victim obviously posed no further threat to him (even assuming that he ever did). Instead of leaving well enough alone, however, Buckner returned and deliberately and ruthlessly resumed his attack on the mortally-wounded victim as the latter begged for help. This

court has found heiahtened premeditation under similar circumstances. See, e.a., Walls v. Stat-e, 641 So.2d 381, 387 (Fla. 1994) (heightened premeditation found where defendant left one victim, weapon in hand, and returned to another victim; at point when defendant decided to return to second victim, defendant "obviously had formed a 'prearranged design' to kill); Bonifay v. State, 680 So.2d 413 (Fla. 1996) (evidence that, after shooting victim twice, defendant cursed victim as victim begged for his life and then shot victim twice more "exhibited deliberate ruthlessness, which supports the heightened premeditation requirement"); Foster v. State, 654 So.2d 112, 115 (Fla. 1995) (it was "particularly telling" that, after rendering victim helpless, defendant stabbed him again when he realized the victim was still alive; defendant had "ample time" to reflect on his actions and their consequences); Damren v. State, 22 Fla. L. Weekly S262 (Fla. May 8, 1997)(CCP upheld where, after defendant struck blow which eliminated any resistance on part of victim, defendant resumed attack after listening to victim plead for mercy). In light of these cases, Buckner's argument that the evidence was insufficient even to establish simple premeditation is without merit. The evidence supports Buckner's conviction for premeditated murder.

ISSUE II

BUCKNER WAS NOT INVOLUNTARILY ABSENT FROM ANY PROCEEDINGS, AND HE HAS FAILED TO PRESERVE FOR APPEAL ANY ISSUE OF HIS BEING SHACKLED AT TRIAL

Buckner makes two related claims here: first, that he was not personally present at bench conferences and that his absence during these bench conferences was not shown to be voluntary; and second, that he was in leg irons during trial with the result that he was unable to watch a videotape of the crime scene without revealing to the jury that he was fettered. The State will address Buckner's two subclaims in order.

A. The alleged Coney violation. Buckner prefaces his argument here with an observation that, just before the jury voir dire examination began, his trial counsel complained about Buckner being in leg irons. An examination of the transcript--in fact, of that portion of the transcript which Buckner quotes in his brief--shows that trial counsel's only stated concern was whether or not Buckner had to remain seated when the judge or jury entered the courtroom. Implicitly, counsel was concerned that the jury might think Buckner rude if he alone remained seated in such circumstances. Trial counsel did not, however, object to Buckner's being shackled, nor even express concern that the jury would observe the leg irons if Buckner rose. On the contrary, trial counsel thought that the jury would not see the leg irons. The trial court satisfied trial counsel's only expressed concerns when

the court gave Buckner permission to rise with everyone else (T 204).

As noted in Buckner's brief, bench conferences occurred during the jury selection and at intervals throughout the trial. Buckner remained in the courtroom, seated at counsel table, while all of these bench conferences were conducted. During the initial bench conferences, challenges for cause and excusals for hardship were discussed. In subsequent bench conferences, peremptory challenges were exercised. Finally, at trial, bench conferences were conducted concerning objections to evidence and other matters.

Buckner acknowledges that any possible application of the rule of Coney v. State, 653 So.2d 1009 (Fla. 1995), regarding the defendant's presence, not just in the courtroom, but at the immediate site of the bench conferences, is limited essentially to the exercise of peremptory challenges. Initial Brief of Appellant at 27-28. See Wright v. State, 688 So.2d 298, 300-01 (Fla. 1996) (Coney's holding that the "defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised," has no application to excusals for hardship). Although Buckner provides transcript citations to numerous bench conferences occurring throughout the trial, his complaint is limited (apparently) to the fact that "he was not present at the bench during the exercise of peremptory challenges." Initial Brief of Appellant at 27. The State has three responses to this claim;

First, trial counsel failed to preserve any Coney issue. Second, Coney has been superseded by rule so that the physical presence requirement is satisfied if the defendant is in the courtroom and has the opportunity to be heard through counsel. Third, even if the issue is preserved, and even if Coney, rather than the new rule, applies to Buckner's trial, the record sufficiently shows that Buckner waived his presence at bench conferences and was satisfied with the procedure; thus, there was no Coney error.

As Buckner acknowledges, "[p]rior to the exercise of any peremptory challenges, defense counsel explained to Omar that he had a constitutional right to be present at the bench conferences." Initial Brief of Appellant at 26. However, noting that Buckner's presence at bench conferences would be "somewhat cumbersome," defense counsel recommended to Buckner that he waive that right. Counsel asked Buckner if it would be "all right" for counsel to leave Buckner at counsel table during bench conferences. Buckner answered, "Yes." (T 320-21).

Immediately following the first round of the exercise of peremptory challenges (T 393-98), the prosecutor stated: "Your Honor, maybe we should also reflect on the record--I know that we talked about it previously--that counsel has had ample opportunity in each break in the discussion to consult with the Defendant, and that the Defendant agrees to that procedure, and in fact, that is what's been taking place now." Defense counsel responded, "That's

fine, Your Honor." (T 400). Then, following the final round of the exercise of peremptory challenges (T 432-440), the prosecutor stated: "I think the record should also reflect that counsel has had an opportunity to discuss these challenges with the Defendant during the break, and he's satisfied with the procedure." Defense counsel responded, "That's correct." (T 439).

The State's first contention is that no Coney issue has been preserved. In Gibson v. State, 661 So.2d 288 (Fla. 1995), the appellant had argued that the trial court (a) violated his right to be present with counsel during the challenging of jurors by conducting the challenge procedure at a bench conference and (b) violated his right to assistance of counsel by denying defense counsel's request to consult with appellant before exercising peremptory challenges. This Court held in Gibson that the alleged error had not been preserved because "no objection to the court's procedure was ever made." Id. at 291. Buckner, however, cites Brower v. State, 684 So.2d 1378 (Fla. 4th DCA 1996), for the proposition that violating a defendant's right to be present at the time of peremptory challenges is fundamental error that may be raised for the first time on appeal. The State acknowledges that Brower appears to hold just what Buckner says it does. However, although the Brower court attempted to distinguish Gibson, the State would contend that Brower is inconsistent with Gibson, with

Coney itself, and with this Court's subsequent adoption of a rule superseding (and, in effect, overruling) Coney.

Nothing in this Court's Coney opinion specifically states that a defendant's absence from a bench conference during which peremptory challenges are exercised is fundamental error. See Hill v. State, 22 Fla. L. Weekly D484, D485 (Fla. 2d DCA, February 21, 1997)(Altenbernd, J., concurring)(noting the removal of a sentence in the original release of Coney which had suggested that a defendant need not or cannot preserve this issue at trial). Moreover, any notion that a mere Coney violation is fundamental error is inconsistent with this Court's refusal to apply Coney retroactively (e.g., Boyett v. State, 688 So.2d 308 (Fla. 1996)), and with this Court's subsequent adoption of an amendment to Rule 3.180, Florida Rules of Criminal Procedure, which "supersedes" Coney and defines 'presence" of the defendant to make it clear that, so long as the defendant is in the courtroom and has a meaningful opportunity to be heard through counsel, he is "present." Amendments to the Florida Rules of Criminal Procedure, 685 So.2d 1253, 1254, 1259 (Fla. 1996). [10]

[10] This Court emphasized in Boyett that it had found error in Coney in large part because the State had conceded error, stating: "It was incorrect for us to accept the State's concession of error." This observation, while not controlling on the issue, certainly implies that nothing in Coney involves fundamental error.

This case does not involve a defendant's actual absence from the courtroom during the exercise of peremptory challenges. A defendant's absence from the courtroom might amount to fundamental error, if it occurs during a critical stage of the proceedings and if the defendant has not, by conduct or otherwise, waived his right to be present. Buckner, however, was not absent from the proceedings; he was present in the courtroom during the exercise of peremptory challenges and had ample opportunity to consult with counsel. He merely did not go to the bench with counsel. His absence from the immediate site of the bench conference during the exercise of peremptory challenges--if error at all--was not fundamental error that can be raised for the first time on appeal.

Because neither Buckner nor his trial counsel objected to the procedure for exercising peremptory challenges, this issue has not been preserved for appeal. Gibson v, State, supra.

As its second contention, the State would urge that, even if the issue is preserved, it is without merit for reason that the Conev rule has been superseded. Buckner contends that, because he was tried after Conev became final, but before this Court adopted its new rule defining "presence," he 'falls within the Coney window." Initial Brief of Appellant at 27. He cites no authority, however, for the proposition that he can obtain a new trial on the basis of a procedural right that defendants no longer have, and that Buckner himself would not have at any retrial of this case.

Although this Court set January 1, 1997, as the effective date of the amendment to Rule 3.180, 685 So.2d at 1255, nothing in the opinion announces that the new definition of "presence" is to be given prospective application, or limits its application to those cases tried after January 1, 1997.[11] It now is obviously after January 1, 1997, the amendment is in effect, and Buckner's appeal is pending; therefore, the State would contend that the present Rule 3.180 (c), defining "presence," applies to this appeal. "[T]he law to be applied in this case is the law that was in effect at the time of the appeal.... Smith v. State, 598 So.2d 1063 (Fla. 1992), limited by Wuornos v. State, 644 So.2d 1000, 1008 n. 4 (Fla. 1994) (Smith read to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise), cert denied, ___ U.S. , 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995)." Domberg v. State, 661 So.2d 285, 287 (Fla. 1995). Accord, Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983) ("Decisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since time of trial."); Dougan v. State, 470 So.2d 697 fn. 2 (Fla. 1985) ("[A]s a general rule, the law in effect at the time of an appeal is the law that should be applied.").

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[11] Compare new Rule 3.851 (c), which is specifically stated to apply "only to rule 3.850 motions that have not been ruled on as of January 1, 1997. Amendments to Florida Rules of Criminal Procedure, supra, 685 So.2d at 1254, 1272.

The requirement of "presence," then, is satisfied if Buckner was "physically in attendance for the courtroom proceeding, and ha[d] a meaningful opportunity to be heard through counsel on the issues being discussed." Rule 3.180. Buckner's appellate counsel concedes that trial "counsel never refuted the prosecutor's statements on the record that defense counsel had conferred with Omar prior to the exercise of peremptory challenges at the bench." Indeed, as appellate counsel acknowledges, trial counsel not only failed to refute the prosecutor's statements, he "affirmatively" agreed with the prosecutor that he and Buckner had conferred: Initial Brief of Appellant at 29. The record clearly demonstrates, then, that Buckner was "present" during the exercise of peremptory challenges under Rule 3.180. Thus, there was no violation of Buckner's right to be "present" during the exercise of peremptory challenges.

As its final contention, the State would argue that even if the new rule does not apply here, Buckner nevertheless waived his Coney right to participate in the bench conferences. Counsel advised him that he had the right to attend the bench conferences and asked Buckner if it was "all right" if he remained at counsel table. Buckner answered in the affirmative. Trial counsel reported to the court that Buckner had waived his right to attend bench conferences. Coney explicitly allows the defendant to "waive" his right to attend bench conferences and "exercise

constructive presence through counsel." 653 So.2d at 1013. Although Conev does not say how much of an inquiry by the court is "proper," the State would contend that in this case the inquiry was sufficient, See United States v. Gaanon, 470 U.S. 522, 529, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)(per curiam)("failure by a criminal defendant to invoke his right to be present under Federal Rule of Criminal Procedure 43 which he knows is taking place between the judge and a juror in chambers constitutes a valid waiver of that right"). Even if the inquiry was insufficient, however, under precedent from the Third and First District Courts of Appeal, as Buckner concedes, his trial counsel's responses would demonstrate not only that any Coney error was invited (and therefore not preserved for appeal), but also that any Conev error was harmless. Initial Brief of Appellant at 29 (citing Williams v. State, 687 So.2d 858 (Fla. 3d DCA 1997) and Meiia v. State, 675 So.2d 996 (Fla. 1st DCA 1996)). For each and all of the foregoing reasons, Buckner has demonstrated no reversible error here.

B. The shackling issue. As noted above, when court convened at 10:30 am at the outset of trial, before prospective jurors entered the courtroom, Buckner was wearing leg irons. Defense counsel and the court referred to this fact while discussing whether or not Buckner could rise when the court and/or the jury entered the courtroom:

MR. HARRISON: Your Honor, I'm concerned about it that he has to stay seated. He should be able to rise when the Judge comes in or rise when the jury comes in. He ought to be like everybody else. I don't think they'll see his leg irons.

THE COURT: I don't care. That will be all right, he can rise.

MR. HARRISON: Just set [sic] back far enough so that you can get up, Omar.

THE COURT: If he does anything to expose his leg irons to the jury, that's on him.

MR. HARRISON: Yes, sir.

THE COURT: We're doing everything we can to keep them from the jury. Call Sandy and have her bring them.

(T 204). Although Buckner's appellate counsel has alleged in his Statement of the Case that the defendant objected at this point to being shackled (Initial Brief of Appellant at 2), and states at the outset of his argument as to the alleged Coney violation that "defense counsel expressed concern about the trial court's insistence that Omar Buckner had to wear leg irons during his trial (Initial Brief of Appellant at 25), it is clear from the transcript that defense counsel did not object at the outset to the leg irons, nor inquire into the reasons for them, nor, for that matter, even express "concern" about the leg irons themselves (so long as the Court allowed Buckner to rise when appropriate).

Moreover, Buckner acknowledges that the trial court allowed the shackles to be removed when Buckner testified in his own defense. Notwithstanding the encompassing language of the caption

appellate counsel gives to his Point II, his claim of "reversible error" apparently is limited to the denial of trial counsel's request to remove the shackles during the playing of a videotape. Initial Brief of Appellant at 30. The transcript shows the following occurred:

> MR. GROSS: Our next witness [Lavern Jenkins from the sheriff's department], Your Honor, is bringing a videotape. And so we're going to need to set up the video equipment. I assume they have some video equipment here, that's what I've been told. So could we take a break and set that up?

(T 475). Then, following the recess:

> THE COURT:, . ..Let.s see. I assume the defense attorneys would want to station themselves over here to watch this?
>
> MR. HARRISON: Yes, sir.
>
> MR. GROSS: If you want to see this, this is of the scene taken during the day. This was taken during the day. It is not the way things were that night. Just giving the layout and so forth.
>
> MR. HARRISON: Well, you know, we might as well approach or consider this, Your Honor. They're going--he--the Defendant indicates he would like to see the video also. He is in shackles. There is going to be another time, if the Defendant takes the stand, when we're going to want to have him step down and show how things happened, his version of how things happened. And his behavior has been quite innocent, it appears to me, in the courthouse to the present time. He appeared without shackles, I believe, at grand jury with no incident whatsoever. 'His behavior in court has been exemplary.
>
> I would suggest that also perhaps it would be reasonable to let him be unshackled to watch this video, and we could have him maybe sit in a chair right here, you know, so that he's not right over by the jury like we usually get, but maybe sit him right here in front.

THE COURT: If he wants to watch it, just march him right over there and sit down and he stays in shackles.

MR. HARRISON: Okay. He will choose not to watch it at this time, Your Honor.

THE COURT: All right. Bring the jury in.

(T 482). It should be noted that, although the videotape was played not only by the State during Mr. Jenkins testimony, but also by defense counsel during Garlinda Lewis' testimony, the shackles were not mentioned again until Buckner testified, when the trial court granted the request to remove them. Moreover, neither side played the videotape during Buckner's own testimony.

There is no issue in this case of any alleged impairment of Buckner's presumption of innocence by the use of visible security measures: there is no indication in this record that the jury ever knew that Buckner was in leg irons. See Elledge v. State, 408 So.2d 1021, 1022 (Fla. 1981). Nor is this a case in which the defendant was prohibited from moving to a position where he could view an exhibit while a witness testified about it. Unlike the trial judge in Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986), on which Buckner relies, the trial judge in this case did not forbid a shackled defendant from moving to a position where he could see the exhibit. On the contrary, the trial court gave Buckner permission to move; the court merely refused to remove the shackles during the testimony of this witness.

Buckner complains, however, that this was a "Hobson's choice" between viewing the videotape or compromising his presumption of innocence by allowing the jury to view him in leg irons. But such a choice could be inappropriate only if the security measures taken by the court were inappropriate. It is not necessarily inappropriate to shackle a defendant, even if doing so creates some risk that his presumption of innocence will be impaired. Diaz v. State, 513 So.2d 1045, 1047 (Fla. 1987) ('The court's obligation to maintain safety and security in the courtroom outweighs, under proper circumstances, the risk that the security measures may impair the defendant's presumption of innocence."). Buckner has failed to preserve for appeal any issue of the necessity for his being shackled. As in Finney v. State, 660 So.2d 674, 682-83 (Fla. 1995), defense counsel only asked that the shackles be removed; counsel never requested an inquiry into the necessity for the shackling. Under this Court's decision in Bello v. State, 547 So.2d 914, 918 (Fla. 1989), both objection and request for inquiry into the necessity for shackling are necessary to preserve the issue.

Furthermore, appellate counsel misstates the options available to trial counsel. Buckner could have been moved to a good viewing position while the jury was out of the courtroom. See Waters, supra at 615: "Since the appellant was shackled he could not move from counsel table. Twice appellant's counsel objected that

appellant was unable to confront the witnesses and the evidence [aerial views of the crime scene] and the court allowed defendant to move while the jury was out of the room so that he could see." (emphasis supplied).[12] Trial counsel in this case did not suggest moving Buckner to a good viewing position while the jury was out; instead, he merely acquiesced to the Court's refusal to remove the shackles and stated that Buckner would choose not to watch the video. Such acquiescence is a strong indication that trial counsel did not think it would be particularly useful for Buckner himself to watch the videotape of the crime scene.

Aside from any issue of the failure to preserve this issue for appeal, the State would question whether, as Buckner seems to imply, that he his right to be present includes the right to view any and all exhibits not only before the witness testifies, but also while that witness testifies. Even Waters, which relied upon the earlier version of Rule 3.180, rather than the present rule defining "presence," does not seem to go so far, and it would seem cumbersome, at least, to grant the defendant the right to hover over the shoulder of every witness who gives testimony about any kind of exhibit, just so the defendant can view the exhibit while the witness testifies. Due process does not assure "the privilege of presence when presence would be useless, or the benefit but a

[12] The error in Waters occurred when the court later refused to allow the defendant to move to see what the crime scene technician was pointing out during his testimony. Id. at 615.

shadow." Snyder v. Massachusetts, 291 U.S. 97, 106-07, 54 S.Ct. 330, 78 L.Ed.2d 674 (1934). The relevant question is whether the defendant had an "[o]pportunity ... to learn whatever there was a need to know." Devin v. DeTella, 101 F.3d 1206, 1209-10 (7th Cir. 1996)(quoting Snyder). Buckner clearly had that opportunity,

This is not a case in which a witness testified via videotape. The videotape at issue in this case merely portrayed the parking lot and immediate surroundings of the Royal Palm Bar, and was filmed during the daytime hours less than a month before the trial (T 486-87, 490). A car shown in the video was positioned "pretty close" to where the victim's car was that night (T 488). Next to the car was a light pole (T 489). In addition, the video showed County Road 235, going north and south in front of the bar, some nearby residences, a church, a fire station and a 'little cook shack," (T 489-90).

Although appellate counsel now characterizes the videotape as being "critical in this case," Initial Brief of Appellant at 35, trial counsel did even not cross-examine Captain Jenkins about the videotape, And the State did not again use the videotape.

The only other time the tape was played was during the defense cross-examination of State's witness Garlinda Lewis (T 735-747). Neither trial counsel nor Buckner himself sought permission to move him to where he could see the video during this cross-examination,

and no one used the video during either the direct or cross examination of Buckner when he testified.

The videotape simply was not the kind of "critical" evidence that appellate counsel is attempting to make it out to be. It is obvious that trial counsel did not think it was very important that Buckner seat himself where he could view the tape while Captain Jenkins testified; trial counsel made only the most perfunctory request to move Buckner, and abandoned that attempt when the judge declined to remove the leg irons, even though alternatives were available which could have prevented the jury from seeing them. Moreover, defense counsel did not cross-examine Captain Jenkins about the video; the State never again used the video; and trial counsel did not renew the request to move Buckner when the defense replayed the video during its cross-examination of Garlinda Lewis. The fairness of the trial was not frustrated by any ruling of the trial court, an no reversible error occurred here.

ISSUE III

DEATH IS THE APPROPRIATE SENTENCE IN THIS CASE

In this multi-pronged issue, Buckner contends the evidence is insufficient to establish either the CCP or the HAC aggravator; that his death sentence is disproportionate; and that the trial judge's consideration of mitigation was deficient. The State will address each prong in the order raised by Buckner, except that the

State will address proportionality last. The State would note that the penalty phase record, like the guilt phase record, must be reviewed "in the light most favorable to the prevailing theory;" that the evidence might be conflict does not "of itself undermine a trial court's findings on aggravators and mitigators." Wuornos v. State, 644 So.2d 1012, 1019 (Fla. 1994).

A. The CCP aauravator. As the State argued previously, Buckner's testimony that the victim had the gun and that Buckner wrestled it away from him was not credible and the trial judge, like the jury, was authorized to reject it. Likewise, any suggestion that this killing arose out of a "fight" between Buckner and the victim, rather than an unprovoked attack on the victim by Buckner, was properly rejected by the sentencer. The evidence, construed in the light most favorable to the State, is sufficient to demonstrate that this murder was cold, calculated and premeditated. The victim did not start a fight with Buckner, he did not punch Buckner, and he did not pull a gun on Buckner. Instead, Buckner went to the victim's car, punched him in the face, and shot him twice as the victim pleaded for a chance to explain and for a chance just to leave. Then Buckner walked off. The victim climbed out of his car, already mortally wounded, and staggered around to the opposite side of his car, begging for help. Hearing this, Buckner returned to the victim, told him that he

hadn't had enough yet, and deliberately and ruthlessly shot him three more times.

Even assuming, as is likely, that Buckner's motive for killing Thaddeus Richardson was that the latter had been dancing with one of Buckner's many girlfriends, Buckner had ample time between the provocation and the murder to contemplate his action. The dancing had occurred inside the club. The murder occurred outside the club, after it had closed, and after the victim had gone to his car and taken the time to talk to at least two young women. The evidence--including evidence that the victim was an unarmed, nonviolent sort of person who was sitting in his car preparing to leave--supports a conclusion that this shooting was an unprovoked assault upon one whom Buckner had no reason to fear, and was the product of cold-blooded reflection, not emotional frenzy, panic, or fit of rage.

Moreover, even if Buckner had not yet formed a premeditated design to kill when he first approached the victim, the circumstances of this case show that, after shooting the victim twice and then walking off, Buckner listened to the victim's pleas for help and formed a prearranged design to return to the victim and kill him. Walls v. State, 641 So.2d 381, 387 (Fla. 1994) (when defendant returned to victim he had previously bound and gagged, he "obviously had formed a 'prearranged design' to kill"); Damren v. State, supra, 22 Fla. L. Weekly fn. 3 and fn. 17 (upholding CCP

finding where defendant, upon being surprised by victim during burglary, struck him with a steel pipe, paced the floor while victim pleaded for mercy, and then bludgeoned him to death).

The fact that Buckner shot the victim three additional times after listening to the victim plead for help demonstrates the kind of "deliberate ruthlessness" that supports the element of heightened premeditation. Bonifay v. State, 680 So.2d 413, 418-19 (Fla. 1996)(where defendant shot victim twice, and then twice more after listening to the victim beg for his life, his conduct "exhibited deliberate ruthlessness, which supports the heightened premeditation requirement of this aggravator"); Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 1994)(heightened premeditation shown by evidence that after struggle over defendant's bag containing gun, Wuornos shot victim at least once while he sat behind the wheel of his car; victim crawled out of car; Wuornos ran to front of car and shot victim three more times); Walls v. State, supra at 388. Because Buckner had ample time to reflect coldly and calculatedly on his actions, heightened premeditation existed. Foster v. State, 654 So.2d 112, 115 (Fla. 1995)("We find it particularly telling that after having concealed Lanier's body with bushes, Foster then proceeded to cut Lanier's spine when he realized that Lanier was still breathing. The fact that Foster had ample time to reflect on his actions and their attendant consequences, after concealing Lanier's body and before cutting Lanier's spine, is compelling

evidence of the heightened level of premeditation required to establish the cold, calculated, and premeditated aggravator.").

Finally, Buckner contends that he had a pretense of moral or legal justification because he could have acted in a "jealous rage" and because he testified that he had acted in self-defense. However, a "pretense" of the type required here is "any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Walls v. State, supra at 388 (footnote omitted). "An incomplete claim of self-defense would fall within this definition provided it is uncontroverted and believable." Wuornos v. State, supra at 1008. However, Buckner's self-defense testimony is neither uncontroverted nor believable, as the State pointed out at some length in argument as to Issue I, and properly could be--and obviously was--rejected. Wuornos v. State, 676 So.2d 972, 974 (Fla. 1996) (defendant's claim of self defense lawfully could be rejected in view of conflict in evidence; thus, claim that defendant acted under pretense of moral or legal justification also could be 'rejected). A "jealous rage" would not constitute an excuse, justification or defense to a homicide, and therefore cannot establish even a pretense of moral or legal justification for the murder; furthermore, for reasons stated above, viewing the

evidence in the light most favorable to the State, the sentencer was entitled to reject any claim of a jealous rage.

For all these reasons, the trial court did not err in finding this murder to be CCP.

B. The HAC aaaravator. Where 'death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstance does not apply." Cochran v. State, 547 So.2d 928 (Fla. 1989). Even multiple gunshots alone do not establish HAC. E.g., Hartley v. State, 686 So.2d 1316, 1323 (Fla. 1996). However, when the shooting is "protracted," with an interval between the first shots and the final shots--particularly where, as here, the victim is pleading for help and obviously suffering-- the mental suffering that "necessarily would entail" can justify a finding of HAC. Wuornos v. State, supra at 1011 (After being shot once, victim "still was conscious and able to walk from the car. In spite of seeing this, Wuornos then ran around to where [the victim] was standing, and shot him several more times.... [T]he protracted nature of this killing together with the mental suffering it necessarily would entail" supported sentencer's determination that murder was HAC.); Hannon v. State, 638 So.2d 39 (Fla. 1994)(although this Court "rarely" applies the HAC aggravator to shootings, HAC was upheld where victim pled for his life and attempted to flee before being shot six times; because "victim undoubtedly suffered great fear and terror prior to being murdered,

the trial court did not err in finding" HAC); Lucas v. State, 613 So.2d 408 (Fla. 1992)(where defendant shot victim, then beat her as she pleaded for her life, then fired another series of shots, including the fatal shot, trial court's HAC finding was affirmed); Rodriguez v. State, 609 So.2d 493, 501 (Fla. 1992)(HAC found properly where, after defendant shot victim twice, latter ran away, pleading for his life, while defendant pursued him for some 200 feet and then shot him a final time; held: "These facts set this murder apart from the norm of capital felonies and support the conclusion that Rodriguez enjoyed or was utterly indifferent to the suffering of his victim.").

"[A] homicide is especially heinous, atrocious or cruel when 'the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily tortuous to the victim."' Buenoano v. State, 527 So.2d 194, 199 (Fla. 1988)(quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Buckner demonstrated neither conscience nor pity when he first taunted and then shot his mortally wounded and helpless victim, and the murder clearly was unnecessarily torturous to the Thaddeus Richardson. The trial court's HAC finding was proper.

C. The mitigation findings. Buckner argues as if the trial court rejected his proposed mitigation. On the contrary, the trial court accepted his mitigation, finding that the evidence

"[r]easonably established, that is, by a preponderance of the evidence, each of the mitigating circumstances enumerated above" (R 762). What Buckner really is complaining about is the weight the trial court assigned to the mitigating circumstances, However, "this Court has repeatedly recognized that it is within the purview of the trial court to determine whether a particular mitigating circumstance was proven and the weight to be given to it." Foster v. State, supra, 654 So.2d at 114. This claim essentially is a plea for this Court to reweigh mitigation, and should be rejected. Hudson v. State, 538 So.2d 829, 831 (Fla. 1989).

To the extent that any further argument is necessary, the State would note that in light of Buckner's own testimony that, although he had smoked "reefer" at Royal Palm, he had not smoked enough to affect his ability to perceive what he had seen and done, and that he had a "clear head," the trial judge was justified in giving only "slight consideration" to the'proposed mitigator that the murder was committed while the defendant was under the influence of extreme mental and emotional disturbance. Kilgore v. State, 688 So.2d 895, 900-01 (Fla. 1996) (giving slight weight to statutory mental mitigators was not inconsistent with finding that such mitigators had been established; conclusion that mental health mitigators were entitled to little weight was within discretion of trial court). As for the age mitigator, the trial judge found and weighed Buckner's age of 18 years and 11 months at the time of the

murder as a mitigating factor. Bonifay v. State, supra, 680 So.2d at 417 fn. 8. Although a defendant's "immaturity" is relevant to the weight to be given to the age mitigator, Echols v. State, 484 So.2d 568, 575 (Fla. 1985), Dr. Irrgang's testimony that Buckner acted emotionally like a fourteen-year-old did not compel the trial court to give more than "slight" consideration to Buckner's age in view of her acknowledgment that Buckner had not told her the truth about what had happened, and her opinion that Buckner did not have any significant psychological problems other than what anyone on death row, by definition, would have. As for the treatment of the substantial impairment mitigator, the trial court found that although Buckner's reasoning capacity "was diminished" from smoking marijuana, he was not substantially impaired. These conclusions are supported by the record, and any omission to explicitly describe the weight the court gave this mitigator is no more than harmless error. As for the proposed nonstatutory mitigators, Buckner complains about "the trial court's treatment of a plethora of nonstatutory mitigating circumstances as only one mitigating factor." Initial Brief of Appellant at 57. However, this Court approved such grouping in Hodges v. State, 595 So.2d 929, 934-35 (Fla. 1992), and in Gudinas v. State, 693 So.2d 953, 966 (Fla. 1996). The trial court did not err by assigning "slight weight" to the proposed nonstatutory mitigation. Gudinas v. State, supra.

Buckner is a defendant who has no significant psychological problems, whose IQ tested only very slightly below average, who has no history of drug or alcohol abuse, and who was not himself either physically or sexually abused as a child. Moreover, although he saw he father physically abuse his mother one time, she had remarried years before the murder, to a man who cares for Buckner. Buckner's mother has raised him in the church, and she has attempted to teach him right from wrong. The trial judge did not err in failing to find more than slight mitigation in this case.

D. Proportionality. Buckner's argument that his death sentence is disproportionate is premised on an assumption that there are no valid statutory aggravating circumstances in this case. If he is correct that no valid aggravators are present in this case, then, of course, his claim of disproportionality is meritorious. The trial court, however, found two statutory aggravating circumstances and minimal mitigation. If, as the State has contended, these findings were proper, then Buckner's claim that death is an inappropriate sentence fails. Geralds v. State, 674 So.2d 96 (Fla. 1996) (death sentence proportionate when two aggravators weighed against one statutory and three nonstatutory mitigators); Hunter v. State, 660 So.2d 244 (Fla. 1995) (death penalty appropriate where there were two aggravators versus ten nonstatutory mitigators); Gamble v. State, 659 So.2d 242 (Fla.1995) (death sentence proportionate where there were two aggravators, one

statutory mitigator and several nonstatutory mitigators); Haves v. State, 581 So.2d 121 (Fla. 1991) (two aggravating factors weighed against mitigators of young age , low intelligence, learning disability and deprived environment); Kight v. State, 512 So.2d 922 (Fla. 1987) (two aggravators versus evidence of mental retardation and deprived childhood).

Even if only one statutory aggravator is affirmed on appeal, death penalty is nonetheless appropriate in light of the slight weight accorded to the mitigation evidence presented in this case, and of the weightiness of either of the two aggravators found by the trial court. Ferrell v. State, 680 So.2d 390, 391 (Fla. 1996) (affirming penalty in single-aggravator case despite mitigation where the lone aggravator was "weighty").

ISSUE IV

THE TRIAL COURT'S STATEMENT THAT "IN ALL LIKELIHOOD" HE WOULD FOLLOW THE JURY'S SENTENCING RECOMMENDATION WAS MERELY A CORRECT ACKNOWLEDGMENT OF THE GREAT WEIGHT WHICH MUST BE ACCORDED THE JURY'S RECOMMENDATION, AND DID NOT INDICATE THAT THE COURT WOULD "ABDICATE" HIS OWN SENTENCING RESPONSIBILITY.

As the parties were discussing the sentencing-phase jury instructions, it was agreed that if there were a life recommendation, the court would "go ahead and sentence" the defendant--the State had no intention of seeking a jury override in the event of a life recommendation. If, however, the jury recommended death, the court, "in all likelihood," would follow the

recommendation. The court would, however, look at all the "facts" that had been presented, and the trial judge told the attorneys that he would want memoranda from both sides on the issue (T 1182-83). Although trial counsel saw nothing pernicious in these comments (making no objection whatever), appellate counsel contends that the trial court abdicated its responsibility "to perform an independent weighing of the evidence." Initial Brief of Appellant at 60.

In light of settled law that the jury's sentencing recommendation, whatever it might be, would be entitled to "great weight" (as Buckner acknowledges), it is difficult to fault the trial judge for predicting that he probably would follow it. Moreover, if it had been the trial court's intention to abdicate his responsibility to perform an independent weighting of the evidence, the court would not have bothered to solicit sentencing memoranda from the parties. The court's comments and actions, considered in their entirety, do not indicate that the court planned merely to "rubber-stamp the state's position." Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988).

Contrary to Buckner's contention on appeal, the trial court did not declare that it would automatically follow the jury's sentencing recommendation, and the record does not reflect that the court failed independently to review the evidence and to determine

the appropriate sentence. Even if this issue is preserved, it clearly is without merit.

ISSUE V

THE TRIAL COURT DID NOT ERR IN DENYING BUCKNER'S BELATED MOTION FOR MISTRIAL WHERE ONLY TWO JURORS SAW ONE OF THE VICTIM'S FAMILY MEMBERS HOLDING A MONTAGE OF SMALL PHOTOGRAPHS OF THE VICTIM, WHERE NEITHER OF THESE JURORS WERE AFFECTED BY THE DISPLAY, AND WHERE THE DEFENSE DID NOT MOVE TO EXCUSE THESE TWO JURORS NOTWITHSTANDING THE AVAILABILITY OF TWO ALTERNATE JURORS

Near the end of the evidentiary presentation at the guilt phase of the trial, juror DeFiore reported to a bailiff that, according to the bailiff, she had noticed "the family was holding up pictures" (T 937). Upon learning this, the trial court sent the jury out and collected all such photographs (T 932). These consisted of (1) one eight by ten photograph of the victim holding a small infant, (2) another eight by ten photograph of the victim with a child in a white dress, and (3) a montage of five wallet-sized photographs, four of which showed the victim (with a young woman and/or a small child) (T 933-34). The montage was retrieved from Danielle Richardson, seated in the fourth row from the jury, while the two eight-by-ten photos were taken from Haisha Richardson and Summer Bell, who were seated in the sixth row (T 938, 942); The trial judge conducted an inquiry to determine, first, which jurors saw any of the photographs and whether or not they could recognize the photographs as being of the victim.

Juror DeFiore was questioned in open court outside the presence of the other jurors. She stated that she had reported to the bailiff "that one of the family members was holding up pictures" T 946). She "just saw a bunch of separate photos," like a "group" of pictures (T 946). Although she could see "six or eight" photos, she could not tell who was depicted in them, except that she could tell that "one picture was a male and a female" (T 946). She saw no pictures other than the one composite (T 947). She had reported it to the bailiff because she "just felt that they shouldn't be holding up pictures during the trial" (T 947). The incident would not affect her decision in any way (T 947). Juror number six said she had seen the photos, but nobody else said anything (T 948).

Juror number six--Sumner--was questioned next. She stated that she had seen the photographs, but had not looked at them. In fact, she had "refused" to look at them (T 953). Because she had not looked at them, she did not know who was depicted in the photographs (T 954). All she had seen was a "frame with some little circles" (T 954). She thought only she and juror DeFiore had noticed the photos (T 956). They would not influence her in any way (T 955).

The jury as a group was returned to the courtroom. The trial court asked the remaining jurors if they had seen any photographs. Except for jurors Sumner and DeFiore, none had (T 961-62). The

court then asked them if the fact that some members of the family had held up photographs would affect their ability to serve as fair and impartial jurors. Each responded that it would not (T 962-65).

Defense counsel stated: "[W]e need some time to talk to our Defendant, because, frankly, I think we have a good trial. I would much rather go to the jury right now than retry this thing.... We need to properly advise our Defendant about whether to pursue the mistrial motion." (T 952). Defense counsel reserved his right to make a formal motion until after a lunch break (T 967, 1001). After the close of the evidence, defense counsel again expressed his desire "personally" to continue on with the trial, stating that he would have to confer with co-counsel and "try to predict what your ruling on the motion would be" (T 1011). Ultimately, however, defense counsel did move for a mistrial, stating that the incident "has so fundamentally flawed the process by exposing the jury to what is a blatant appeal to sympathy that we feel that the Defendant cannot get a fair trial at this point" (T 1017). The prosecutor responded that it had been established that the montage of wallet-sized photographs was the only display seen by any of the jurors, and that only two of the jurors had even seen that. He noted that juror DeFiore had been seated "some distance" from the end of the jury box, that there was a distance of four to five feet from the end of the jury box to the front spectator row, and that the person holding the montage had been seated another four rows

back. The family member holding the montage, he noted, was a young person in her early teens, and "it seems to me she that this was not a blatant attempt to engender sympathy for the victim, as much as it was a personal memento that she was carrying with her." Nothing had been presented to indicate that the display had been deliberate rather than inadvertent, but in any event, the prosecutor argued, the proper remedy--even if it could be assumed that the two jurors who had seen the montage were prejudiced by the incident--was not to declare a mistrial, but to excuse these two jurors and replace them with alternates. The defense, he argued, "obviously doesn't want that, they haven't asked for it" (T 1019).

The Court ruled: "The Court feels that the display of the photographs was totally inappropriate, and certainly frowns on such conduct. But after the voir dire examination made by the Court and the attorneys, and asking each one of the individual members of the jury, and the two alternates, if that display of photographs would affect their ability to serve as a juror, and if they could still render a fair and impartial verdict, I was assured that they could. So I feel that the motion for mistrial has to be denied." (T 1019-20).

At the outset, the State would acknowledge this Court's decision in State v. Hamilton, 574 So.2d 124 (Fla. 1991), in which this Court held that is was inappropriate for a trial judge to inquire into jurors' thought processes as to whether their exposure

to non-evidentiary materials brought into the jury room was prejudicial. However, although jurors generally cannot testify about the mental processes by which a verdict was arrived, "[a] juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide and whether extraneous prejudicial information was improperly brought to the juror's attention." Rushen v. Spain, 464 U.S. 114, 121 fn. 5, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). In this case, it was not inappropriate to inquire of the jurors whether they had seen anything which might have an effect on their ability to be fair and impartial.

But even if any portion of the trial court's inquiry was improper, the trial court properly determined that the jury had not been tainted by the incident. Larzelere v. State, 676 So.2d 394, 404 (Fla. 1996). Only two of the jurors even saw anything, and these two jurors were seated so far from the montage of wallet-sized photos that they hardly could see them. Juror DeFiore stated that because she did not have her glasses on and because she had never seen a picture of the deceased, she could not identify any people in the photos. Juror Sumner stated that she refused to look at the photos. But even if these two jurors were "tainted" by this incident, it is "not reasonable to assume" that the remaining jurors were prejudiced by something which they did not see, State v. Hamilton, supra, and any possible taint could have been removed

by excusing the two "tainted" jurors and replacing them with two alternates--a course of action which the defense declined to urge.

Buckner acknowledges that he "cannot show actual prejudice." Initial Brief of Appellant at 64. No inherent prejudice has been demonstrated, and under all the circumstances, the trial court did not err in denying Buckner's motion for mistrial.

ISSUE VI

BUCKNER'S ONLY OBJECTION AT TRIAL TO THE EXCUSAL OF THREE DEATH-BIASED JURORS WAS BASED ON FAIR-CROSS-SECTION GROUNDS; THIS WAS INSUFFICIENT TO PRESERVE ANY WAINWRIGHT V. WITT ISSUE FOR APPEAL; FURTHERMORE, EVEN IF PRESERVED, THIS ISSUE IS WITHOUT MERIT

The prosecutor challenged prospective jurors Cash, Mobley and Harris, on the grounds that "all three of them have indicated that under no circumstances could they recommend the death penalty (T 259). Their answers, the prosecutor argued, went "far beyond" the test enunciated in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), which only requires substantial impairment in a juror's ability to perform her duties as a juror in accordance with her instructions and oath.

Defense counsel responded to the prosecutor's challenges for cause of these three prospective jurors by stating: 'I don't have any argument, Your Honor. I would object based upon the federal and the Florida Constitution right to a fair cross-section jury." (T 260). Following a luncheon recess (T 263), defense counsel

stated: "Your Honor, we would object to those three excusals of those jurors pursuant to the Sixth, the Eighth and Fourteenth Amendments to the U.S. Constitution, and Article 1, Sections 2, 9, 16, 17 and 22 of the Florida Constitution" (T 264).

A timely objection is necessary to preserve any issue of the qualification of a juror to serve. Turner v. State, 645 So.2d 444, 446 (Fla. 1994). Trial counsel did object here, but his objection was a fair-cross-section challenge to death-qualification per se, not to whether these three jurors met the Wainwright v. Witt standard for excusing jurors. Buckner does briefly raise a fair-cross-section issue on appeal, Initial Brief of Appellant at 71, but his primary contention on appeal is that the trial court's ruling violated the Wainwright v. Witt standard. The fair-cross-section issue is clearly without merit and the Wainwriaht v. Witt issue is not preserved, because it is an attack on the trial court's ruling that was not raised below. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("Except in cases of fundamental error, an appellate will not consider an issue unless it was presented to the lower court. [Cits.] Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Even if preserved, however, this issue is without merit. Harris stated that he was "not in favor of the death penalty at

all," (T 230), and that he could not envision any circumstances in which he could vote to impose a death sentence (T 235). Mobley stated that he could not make a death recommendation (T 236); he insisted that there is "no possibility" that he could sentence the defendant to death (T 257). Cash stated: "I could never say take his life. I could never do that." (T 251). The trial court did not err in excusing these prospective jurors for cause. Foster v. State, 676 So.2d 747, 752 (Fla. 1996); Sims v. State, 681 So.2d 1112, 1117 (Fla. 1996). No error appears here.[13]

ISSUE VII

EVEN IF SUCH ISSUE IS PRESERVED, FLORIDA'S DEATH PENALTY IS NOT UNCONSTITUTIONAL FOR ANY REASON STATED

Buckner contends here that basing a death sentence upon a seven-to-five vote of the jury is unconstitutional. Nowhere in his brief does Buckner demonstrate how this issue might have been preserved for appellate review. Nevertheless, even is this issue is preserved, it is without merit. The constitutionality of this State's death penalty statute has been upheld repeatedly. E.g., Pope v. State, 679 So.2d 710, 716 (Fla. 1996).

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[13] In any event, only the death sentence, not the conviction, would be affected by any error here. Farina v. State, 680 So.2d 392, 396 fn. 3 (Fla. 1996).

CONCLUSION

For all the foregoing reasons, the State would urge this Court to uphold the judgment below in all respects.

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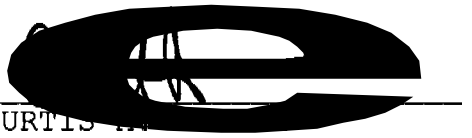
ATTORNEY GENERAL



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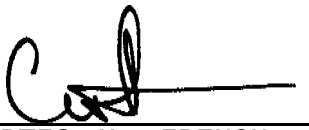
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. James Gibson, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this 25th day of August, 1997.



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