IN THE SUPREME COURT OF FLORIDA

CASE NO: 89,368

ARTURO BENEDITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE/CROSS APPELLANT

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STATEMENT OF THE CASE AND FACTS

The State supplements the Statement of the Case and Facts with the following exceptions, additions, and/or corrections. However, other facts pertinent to the specific arguments made herein are set forth in the appropriate point on appeal.

Benedith moved for an acquittal on the felony murder charge, claiming the State's case was strictly circumstantial and 'we merely have to present a sufficient hypothesis of innocence." (T 1938, 1939). The court concluded that there was both direct and circumstantial evidence. (T 1939, 1940-1941). Benedith claimed that the evidence was "equally susceptible" to either "that they stole the car" or "that they purchased the car." (T 1943). He offered the following hypothesis of innocence:

> There's equal evidence that Mr. Benedith went to purchase the car. That was his intention. He did not intend to participate in a robbery or murder; that Mr. Taylor killed, and that Mr. Benedith helped him conceal the crime after the fact.

(T 1944).

The trial judge summarized the evidence, noting that: Benedith was positively identified as being at the scene of the crime with Codefendant Taylor and the murder victim, John Shires; they were standing next to the red car belonging to Mr. Shires. (T

1939-1940, 1941). Mr. Shires was killed with "three shots fired" from a gun that 'can be traced to Arturo Benedith." (T 1939-1940). Benedith had asked Mr. Loblack to paint a car that he was going to obtain, and he returned to Mr. Loblack "[i]n the middle of the night" asking him to "paint it in the night time" so he could 'then drive to New York." (T 1945). The judge opined that this conduct indicated 'there's some notorious outlaw reason." (T 1945). He ruled that whether the defense hypothetical of innocence had been overcome was a matter for the jury to decide. (T 1945).

Mr. Shires had placed an ad in the paper, offering his red Nissan for sale. (T 1106-1107). The evening of his murder, Mr. Shires told his roommate that he was going to sell his car. (T 1105). He went to the murder scene intending to do so. (T 1940).

George Lane testified that upon arrival at his home (the motel where the murder occurred) about 3:15 p.m., he saw Benedith sitting with Codefendant Taylor.[1] (T 1122, 1128, 1941). There was a telephone at the corner where these men were. (T 1138). Later that evening, Mr. Lane saw Benedith standing in the motel parking

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[1] Mr. Lane said that the youth who came to his room prior to the shooting was playing with his shirt like he was trying to hide something." However, contrary to Appellant's representation, (IB at 9), there was no testimony to the effect that "[t]he boy kept patting his shirt, checking what was there."

lot beside a red car with Codefendant Taylor and a white man, identified as John Shires. (T 1119, 1122, 1941). The men were talking and "looking at some papers" which Mr. Shires held. (T 1119). "[T]he car door was open," and Mr. Shires "was in the door . . ." (T 1120). Benedith was "behind him," and Taylor was 'in front of the door." (T 1120). "[T]hey was the only persons there," (T 1136).

About "four or five minutes" later, Mr. Lane heard three gunshots. (T 1121). He was scared, and he stood beside his door with "a bottle" for protection. (T 1121). When he looked out, he saw Taylor jump in the car "real quick" and it "speeded off." (T 1121, 1416). Mr. Shires was laying on the ground. (T 1397, 1398).

Mr. Loblack testified that around noon on May 5th, Benedith and Taylor came to see him. (T 1249, 1254, 1257). Benedith did all of the talking and said that 'he was getting a car, and he wanted me to paint the car for them because they want to go to New York." (T 1250). Later that same night, Benedith knocked on Mr. Loblack's trailer door and said that he had 'got a car and he wanted me to paint that car for him to get to New York." (T 1250, 1252). Mr. Loblack identified Mr. Shires' vehicle as the car Benedith possessed. (T 1251). As before, Benedith did all of the talking. (T 1251). Mr. Loblack said: "[T]hey were looking too

suspicious to me, so I told them they got to come back in the morning." (T 1252).

The medical examiner testified that "Mr. Shires had three gunshot wounds."[2] (T 1284). Gunshot wound A entered "just below the left side of the jaw towards the front of the face." (T 1288). Gunshot wound B entered lower on the "left side of the face below the lower jaw . . . just above the voice box . . .."[3] Gunshot wound C entered "on the mid portion of the right side of the back," and passed through Mr. Shires' lungs and heart, causing the space around his right lung to fill with 'well over two cups of blood." (T 1297, 1298). These wounds caused Mr. Shires' death. (T 1301).

Gunshot wound A would have required the shooter to be facing the victim, while gunshot wound B came "from the side." (T 1307). The doctor testified that Gunshot wound C - in the back - might have been the first shot, followed by B and C as the victim turned. (T 1310). Mr. Shires' body was found face-up.[4] (T 1358).

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[2] Distance gunshot wounds are at least eighteen to twenty-four inches from the target. (T 1306).

[3] As to gunshot would A, Mr. Shires could have survived if surgery was promptly performed. (T 1294, 1295). With prompt attention, gunshot would B was also survivable. (T 1297) .

[4] Detective Nichols did not say that "a person by the name of Mr. Vickers was an eyewitness to the murder," as Appellant represents.

The victim's car was found abandoned. (T 1421). It was processed for fingerprints. (T 1430). Benedith's prints were found on the hood, right fender, left fender, driver's windshield post, and rear driver's side door handle. (T 1653-1656). The fingerprints on the passenger side door were not his. (T 1657).

Judge Moxley found one statutory aggravator, prior-violent-felony. (R 1045). He found two nonstatutory mitigators to which he gave some weight, i.e., a malingered personality disorder and cocaine use, and he found one mitigator, i.e., the sentence of the 14 year-old codefendant, to which little or no weight was given. (R 1042-1046).

Regarding the prior-violent-felony aggravator, the judge said:

> First, after major participation in the robbery which lead to the death of John Shires on May 5, 1993, the defendant orchestrated another robbery attempted using the same firearm that killed John Shires. The Defendant had a .32 caliber pistol, socks, and handcuffs. The Defendant put the firearm to the head of the victim and said he would have to kill her.

(R 517-518). In his written sentencing order, Judge Moxley wrote:

> The essential difference between that case [Terry] and this one is that the New York attempted robbery was not contemporaneous with the murder, but was subsequent and was undertaken by the Defendant with the same means and

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(IB at 10). Rather, he said that "possibly" a person by that name had been an eyewitness. He added that Mr. Vickers had given a statement, but not to him. (T 1556).

> knowledge of the prior death of John Shires. This distinction between the two cases is therefore great and is the basis for concluding that death is warranted . . . .

(R 1047). The New York attempted robbery had been charged as robbery in the first degree, but was reduced to facilitate Benedith's prompt return to Florida to stand trial for the murder of Mr. Shires. (R **146, 148, 157).**

The victim of the New York case, Blanca Mercette, testified that Benedith was the leader of a gang of five men who broke into her apartment to rob her. (R 187-188). Benedith "grabbed me by the neck." (R **185).** He held the same gun, which fired the shots that killed John Shires approximately a month earlier, (R 192, 1042), to Ms. Mercette's head and repeatedly told her that he was sorry, but he would have to kill her. (R 187). Benedith "orchestrated" the robbery, and entered her apartment with the pistol and handcuffs. (R 187). Benedith directed the movements and participation of his cohorts. (R 187-189, 1046). Ms. Mercette's roommate, Juan was attacked when he entered the apartment; he was cut with a knife. (R 190).

In a motion to preclude the death penalty, Benedith claimed the evidence did not show that his "state of mind was culpable enough to rise to the level of reckless indifference to human life

. . . ." (R 1085). The judge denied the motion. (R 100).

The trial court precluded the testimony of Dr. Riebsame regarding Thomas Taylor. (R 321). The testimony was proffered as follows: Taylor was "mildly retarded" with "an I.Q. of around seventy;" "[h]e acted under the substantial domination of Arturo Benedith in this crime;" he had 'a mental age of twelve or eleven at the time this crime was committed;" he had been treated for "a long-standing history of learning disabilities;" and, "he did not reveal any criminal history." (R 337-338).

As to Taylor, the death penalty was precluded as a matter of law. (R 338). Thus "the only plea . . . available to avoid a trial" was to second degree murder. (R 339).

Benedith had a "good, normal childhood" with "a good upbringing" and "a lot of love." (R 513). He did not suffer 'abuse, poverty, or lack of schooling." (R 513, 514). He came to the United States when he was 15, and he did not have any problems until about four years prior.[5] (R 290, 291).

Benedith had a personality disorder; such are "the least

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[5] Contrary to Appellant's claim, Benedith's sister, Juanita, did not testify that he 'was in need of medical care and medication." (IB at 15). She said that she took him to seek medical care and helped remind him to take medication. (R 282).

serious of all disorders." (R 514, 515). Benedith's problems were malingered, his "intelligence **was average or above," and** he "would not be law abiding . . .." (R 515).

Benedith's bar complaint, prompting his attorney's motion to withdraw, provided:

> My complaint to the Florida Bar that I was accused by a person named Thomas Taylor. But this person states that he was in cocaine and alcohol the night before he said he identified me. And that person has a mental history and was taking treatment for suicidal thoughts. And this person identified me as Tony Jones. The person said -- and this person don't know me from no one. Attorney Eisenmenger don't want to get me out of this false accusation.

(R 60). Benedith had also filed a grievance against the prosecutor and his prior attorney; both had been dismissed as unfounded. (R 54, 55). Asked about the motion to withdraw, Benedith said:

> Well, I want to go to trial, too.
> . . .
> Yeah, I want to go to trial. But first of all, I need to subpoena all my witnesses, because I got witnesses. And I told Mr. Eisenmenger to get all my witnesses. And I don't know if he has done it yet. But he has to call every one of them. And I got it right here. So I can put it in my file.

(R 58). The trial judge concluded: "[T]his is not really a bona fide, good faith grievance . . . not a legitimate complaint . . . with any ethical violation." (R 59, 60). Concerned about delay, the judge denied the motion, stating: "Your client even says he

wants a trial." (R 60). The judge appointed Spanish-speaking Diana Figueroa as co-counsel. (R 59).

New York Ballistics Expert Patrick O'Shea testified that the murder weapon "is designed to shoot thirty-two Smith and Wesson long caliber ammunition." (T 1746). He testified that the handwritten notation on the business card found among Benedith's personal effects, stating 'thirty-two . . . S and W long, written out, L-O-N-G," referred to "the cartridge that would fit this gun" [the murder weapon]. (T 1747). Defense counsel objected on the basis of 'pure speculation." (T 1746).

Benedith objected on hearsay grounds to the victim impact evidence. However, the objection came two sentences after the complained-of testimony. (R 135).

Benedith did not object at the time the instruction on the aggravator, murder-committed-during-the-course-of-a-felony, was given. (R 378-379). Neither did he object at the charge conference when the State asked for the instruction, although he later objected, claiming there was no evidence of reckless indifference to human life. (R 209, 220).

When the jury and alternates had all been selected, Benedith had one unexercised peremptory. (T 942) . When he asked the court to excuse Juror Wyatt for cause, he had two remaining peremptories.

(T 897, 898). He asked for "an additional peremptory challenge to exercise against Miss Wyatt;" both sides had already been given two additional peremptories. (T 785, 897).

Defense Counsel wanted to challenge Juror Wyatt "for cause based on her answer to the question that she would not take into account whether or not someone who had been convicted of a crime . . ." (T 790). The trial judge inquired:

> [The Court] : If I instructed you that a witness's prior conviction of a crime is something that you would consider in determining whether or not that witness was a credible person, could you follow that instruction?
>
> [Juror Wyatt]: Yes, sir.
>
> [The Court]: Okay. Counsel have any questions? . . . Defense?
>
> [Defense Counsel]: No, sir.

(T 790, 791). The challenge was denied. (T 791) .

Again, Counsel sought to have Juror Wyatt excused for cause on the identical basis. (T 895-896). The court asked: 'The one that said she could follow the law after I asked her , . .?" (T 896). The judge said:

> For the appellate court's edification, I believe this juror was straight forward with the Court when the Court posed the question. And from the demeanor, the appearance, and the responsiveness to the question of the Court, I conclude she was credible when she said she would follow the law. Your motion -- your challenge for cause is, therefore, denied.

(T 896-897).

Responding to questions, Juror Taylor said that:

(1) He understood the State had to prove the aggravators;

(2) He could recommend a life sentence; and,

(3) He had previously thought "the death penalty was appropriate where no thought was put towards the victim. If that victim was shown no remorse . . .. But if it's done with no remorse, no feelings towards the victim, general attitude was not that of caring about others, the death penalty, I feel, is appropriate," . . .

The Court instructed him that "lack of remorse is not an aggravating circumstance in this state." Juror Taylor responded: "Right." The Court added:

> There's no such thing as a non-statutory aggravating circumstance. That is, if it's not listed, it cannot be used. . , . [I]f you feel there is something aggravating in your personal subjective view, but it's not an aggravating circumstance, it's not an aggravating circumstance. Do you understand that, sir?

Juror Taylor replied: "Yes, sir." (T 228-229, 230-233). Later, the following occurred:

> [Juror Taylor] : . . . [I]f you performed a crime with no -- I say remorse, no respect to the victim, planned, no caring towards that victim's life or that person themselves . . . .
>
> [The Prosecutor]: So, if someone committed a premeditated murder, they deserve the death penalty?
>
> [Juror Taylor]: Premeditated and how many variables, what type of premeditated. They can be the person who in

> vengeance plans the death of another, and it could have been . . . the death committed a sorrow brought on them by another death.
>
> That, maybe not. But the death where it was planned for greed, the victim was someone not known, it was no other circumstances other than death, killing, yes. . . .
>
> . . . [B]ecause of the way I am raised, I would look at it objectively as how I'm instructed. . . .

(T 361-363). The trial court denied the for-cause claim, ruling it was "not sufficient." (T 659).

Counsel moved to strike Juror Lang "for cause," based on the "[p]erception that his intelligence is so low that he doesn't really have an understanding about what's going on." (T 661). Counsel added:

> There's nothing -- 1 will admit that there's nothing on the record from the actual responses, but just his demeanor, the way he looks, the way he struggles with simple questions, the way that he just basically seems to agree with whoever speaks with him last. I have real concerns whether or not he has an understanding.

(T 662). The trial court denied the challenge. (T 662).

Benedith's expert, Dr. Olsen, testified that information from the Circles of Care Community Mental Health Center in New York was a basis for his opinion. Benedith had been treated as an outpatient, (R 252, 253). He also reviewed records from Harlem Hospital and the New York police. (R 252). Dr. Olsen testified that Benedith was placed on medication used to treat "psychotic

symptoms, including hearing voices." (R 253, 254). Dr. Olsen ran several tests on Benedith. (R 254). He used them in making his diagnosis, described them to the jury. (R 254-259).

On cross, Dr. Olsen testified that Benedith was in "the county jail . . . in the forensic program" when he was seen by personnel from Circles of Care. (R 260). Dr. Olsen admitted that Benedith was "[e]xaggerating his symptoms to some degree . . .." (R 260). He said:

> There's a number of indices that you can use on the MMPI to look and see if the person is telling the truth . . . . At times, when that F-Scale is extremely high, we tend to think that person is exaggerating or even malingering.

(R 260-261). The doctor then confirmed that Benedith's F-Scale test score "was extremely high," and his K-Scale score was "quite low;" and, in the opinion of "[s]ome people," such a difference in the F-Scale and K-Scale scores 'is a very good indicator of . . . malingering. . .." (R 261). Dr. Olsen admitted that Benedith 'was not as troubled as he was saying that he was on the test. (R 262).

The State's psychological expert, Dr. Riebsame, testified that he believed that Benedith was malingering, and that

> such behavior was seen in persons who have a motivation to behave in this way. You usually see it in a couple of different situations. In a legal situation, a person is motivated to appear more disturbed in order to relieve themselves of some amount of responsibility.

(R 310). The doctor had reviewed the records from Circles of Care and had talked to 'Miss Penny, . . . the nurse and director of the Forensic Services." (R 314). Asked, "What did you learn from Miss Penny?, the doctor replied that Benedith was "being seen on a case management basis;" he 'was not taking his medication," he 'was arrested on forgery charges;" and "[i]t was at this time that he was arrested that he reported hearing voices." (R 314-315).

Defense counsel did not object to the trial judge's proposal "to tell the jury to disregard" the reference to an arrest for forgery. (R 315). Neither did he object or make any complaint regarding the adequacy of the curative instruction. (R 315-316).

Prior to the announcement of the verdict, Counsel said that if the verdict was guilty, he was "going to move . . . to strike the alternates" because Benedith was "unhandcuffed, unshackled in front of them." (T 2196). After counsel moved to strike the alternate jurors, the trial judge said:

> The two alternate jurors obviously were separated from the twelve deliberating jurors. And while they did observe the defendant constrained by handcuffs and shackles, they did not participate in the decision with regard to guilt or not guilt of first degree murder and robbery.
>
> . . . [T]hen the defendant is . . . found guilty . ,. . [a]nd it is logical to believe that a Court would remand to custody someone so constrained . . ..

> . . . I'm not going to grant a motion to strike those alternate jurors because I need to have the ability should there be an emergency arise to replace the regular jurors.
>
> And I don't see . . . prejudice . . . .

(T 2202, 2203).

SUMMARY OF THE ARGUMENTS

POINT I: The trial court did not err in denying the motion for acquittal of felony murder. The State's evidence was inconsistent with the defendant's hypothesis of innocence. The evidence of felony murder was overwhelming.

POINT II: The death penalty was not disproportionately imposed. The trial court did not abuse its discretion in weighing of the prior-violent-felony aggravator with the three nonstatutory mitigators, and therefore, it should be upheld. Neither is the death penalty disproportionate in relation to other similiar cases or to the sentence of the codefendant.

POINT III: The trial court did not err in denying the motion to preclude the death penalty. The evidence met or exceeded the level necessary to meet the *Enmund/Tison* proportionality concerns. The evidence supports a conclusion that Appellant was the triggerman,

that he intended the killing, and that he **was** a major participant who had reckless disregard for human life.

POINT IV: The trial court did not err in denying the motion to permit defense counsel to withdraw. The filing of a bogus bar complaint is an insufficient basis therefor. Appellant wanted to proceed to trial and did not make a request fox self-representation. ***No Faretta*** inquiry was warranted.

POINT V: The trial court did not err in permitting penalty phase testimony describing a crime committed on another victim where that offense established the prior-violent-felony aggravator. The testimony **was** relevant and was not the focus of the trial.

POINT VI: The trial court did not err in admitting testimony explaining the meaning of information written on a business card. The evidence **was** relevant to identity, and it **was** not more prejudicial than probative.

Point VII: The complained-of remarks of the prosecutor during opening statement and closing argument did not violate due process rights to a fair trial. The evidence supported both statements. Any error in the statement regarding a plan by Appellant was waived when not objected to later in the argument when the evidence on the issue was detailed to the jury.

Point **VIII**: The trial court did not err in permitting the murder

victim's sister to testify regarding victim impact. Her evidence was relevant and admissible. The objection was too late to preserve the issue for appellate review. In any event, the evidence was relevant and admissible under the statute.

POINT IX: The trial court did not err in instructing the jury on the murder-committed-during-the-course-of-a-felony aggravator. This issue was not preserved for appellate review. The guilt-phase convictions for robbery and felony murder warranted the instruction. The aggravator is authorized by statute.

POINT X: The trial court did not err in refusing to strike jurors for cause, The issue is procedurally barred for failure to exhaust peremptories and because of barebones pleading. The claims are meritless in any event as the jurors said they could and would follow the law and the instructions.

POINT XI: The trial court did not err in denying the mistrial motion made when a state rebuttal witness briefly referenced an unrelated charge made against Appellant. The reference to a conviction for forgery was relevant as a basis for an expert's opinion, was invited by the defense, and was not harmful to Appellant. Any error was cured by the instruction given the jury.

POINT XII: The trial judge did not err in denying the motion to strike the alternate jurors on the basis that they had seen

Appellant in shackles, Appellant failed to show prejudice.

POINT XIII: The claim that Florida's death penalty statute which permits a recommendation of the death penalty to be made by a bare majority of the jurors is unconstitutional is without merit.

POINT XIV: The trial court did not err in refusing to instruct the jury on specific nonstatutory mitigating circumstances.

POINT XV: The trial court did not err in sentencing Appellant outside the sentencing guidelines range for robbery with a firearm. Appellant's conviction for first degree murder is a sufficient reason for departure.

STATE'S CROSS-APPEAL

POINT I: The trial court erred in failing to find the statutory aggravator, committed-during-the-course-of-a-felony. The convictions for robbery and felony murder were decisive. The State is entitled to this aggravator as a matter of law.

POINT II: The trial court erred in refusing to accept and consider the testimony of the State's expert witness on the issue of the relative culpability of Appellant and his codefendant. Appellant requested that the nonstautory mitigator of lesser codefendant sentence be found. The testimony was relevant and admissible on the proportionality issue.

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING BENEDITH'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE CHARGE OF FELONY MURDER.

Benedith complains that due to insufficiency of the evidence, the trial judge should have. granted his motion for judgment of acquittal on the felony murder charge. It is well established that an acquittal should not be granted "unless 'there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the **law.** '" ***Gudinas v. State, No.*** 86,070, slip op. at 1 (Fla. April 1, ***1997) [quoting Taylor*** *v.* State, 583 So.2d 323, 328 (Fla. 1991)].

At trial, Benedith argued that he **was** entitled to an acquittal on felony murder **because** the State's case was "strictly a circumstantial evidence case," and "we merely have to present a sufficient hypothesis of innocence." (T 1938, 1939). The trial judge disagreed, stating that there was both direct and circumstantial evidence. (T 1939, 1940-1941). Certainly, the eyewitness testimony of Mr. Lane, which positively identified Benedith as being at the scene of Mr. Shires' murder just before the fatal shots were fired, was direct evidence. See Orme v. State, 677 So.2d 258, 262 (Fla. 1996). Also, with Benedith at that

time were Codefendant Taylor and the murder victim. Additional direct evidence consisted of Mr. Loblack's eyewitness testimony placing Benedith in possession of the murder victim's car immediately after the robbery/murder. Since there was direct as well as circumstantial evidence, the hypothesis of innocence doctrine is not applicable.[6] *See Orme*, *677* So.2d at 261.

However, assuming *arguendo* that the evidence was entirely circumstantial, Benedith is entitled to no relief. In *Orme*, this Court explained:

> [T]he sole function of the trial court on motion for directed verdict in a circumstantial-evidence case is to determine whether there is prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories, If there is such inconsistency, then the question is for the finder of fact to resolve. The trial court's finding in this regard will be reversed on appeal only where unsupported by competent substantial evidence.

677 So.2d at 262.

In the instant case, Benedith opined that the evidence was "equally susceptible" to either "that they stole the car" or "that they purchased the car." (T 1943). The State points out that there is an obvious difference: In a legitimate purchase of a

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[6] Indeed, on appeal, Benedith acknowledges that the State's case consisted of both types of evidence. (IB at 23).

vehicle, the seller does not leave the transaction dead. Thus, the evidence of Mr. Shires' death by gunshot wounds at the scene of the transaction defeats the "equally susceptible" argument.

Nonetheless, Benedith's hypothesis of innocence will be further examined. In the lower court, he offered the following hypothesis of innocence:

> There's equal evidence that Mr. Benedith went to purchase the car. That was his intention. He did not intend to participate in a robbery or murder; that Mr. Taylor killed, and that Mr. Benedith helped him conceal the crime after the fact.

(T 1944).

Responding to the foregoing contention, the trial judge pointed out that the evidence positively identified Benedith as being at the scene of the crime with Codefendant Taylor and the murder victim, John Shires, standing next to the red car belonging to Mr. Shires, with 'three shots fired" from a gun that "can be traced to, ultimately, Arturo Benedith." (T 1939-1940). Further, the evidence established that Benedith went to Mr. Loblack inquiring whether he would paint a car that he was going to obtain. Benedith returned to Mr. Loblack "[i]n the middle of the night" asking him to "paint it in the night time" so he could "then drive to New York." (T 1945). Pointing out that a person is not generally going to rush a car he's just purchased to a painter in

the middle of the night to have it painted so he can leave the state in it the next morning "unless there's some notorious outlaw reason," the trial judge ruled that the fact finder could resolve the inconsistency between the evidence viewed in the light most favorable to the State and the hypothetical of innocence. (T 1945). That ruling is well supported by competent substantial evidence, and therefore, should be upheld.

As conceded by Benedith below, the evidence established that Mr. Shires went to the scene intending to sell his car. (T 1940). He had placed an ad in the paper, offering his red Nissan for sale. (T 1106-1107). The evening of his murder, Mr. Shires told his roommate that he was going to sell his car. (T 1105).

State Witness Lane testified that when he arrived home (the motel where the murder occurred) about 3:15 p.m., he saw a man he positively identified as Benedith (T 1941, 1122, 1128) sitting with Codefendant Taylor. (T 1128). There was a telephone at the corner where these men were.[7] (T 1138).

Later that evening, Mr. Lane saw the same man, who he positively identified as Benedith (T 1941, 1122), standing in the

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[7] Purportedly in mitigation of sentence, Benedith admitted that at some time on the subject date, he went to the scene of the crime to make a phone call. (R 498).

motel parking lot beside a red car with Codefendant Taylor and a white man, identified as John Shires.[8] (T 1119). They were talking and "looking at some papers" which Mr. Shires held. (T 1119). "[T]he car door was open," and Mr. Shires 'was in the door . . .." (T 1120). Benedith was "behind him," and Taylor was "in front of the door." (T 1120). "[T]hey was the only persons there." (T 1136).

About "four or five minutes" later, Mr. Lane heard three gunshots. (T 1121). He was scared, and he stood beside his door with "a bottle" for protection. (T 1121). When he looked outside, he saw Taylor jump in the car 'real quick," and the car "speeded off." (T 1121, 1416). Mr. Lane saw Mr. Shires laying on the ground. (T 1397, 1398).

Benedith's fingerprints were found on the driver's side door handle and the driver's side windshield post. (T 1655-1656). The fingerprints on the passenger side door were not his. (T 1657).

The reasonable inferences from this evidence include:

1. Benedith, who was standing behind Mr. Shires, shot him and then slipped into the driver's seat; and,

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[8] The car, positively identified by Mr. Lane as the one at the murder scene, belonged to John Shires. (T 1395, 1137).

2. Taylor, who was standing in front of Mr. Shires, with the car door open between them, was not the shooter, and he ran around the car and into the passenger side of the vehicle as Benedith drove away.[9]

Mr. Loblack testified that around noon on May 5th, Benedith and Taylor, both of whom he positively identified (T 1249, 1254, 1257), came to see him.[10] (T 1249). Bensdith told Mr. Loblack that "he was getting a car, and he wanted me to paint the car for them because they want to go to New York." (T 1250). Benedith did all of the talking. (T 1250). Later that same night,[11] Benedith knocked on Mr. Loblack's trailer door and Benedith told Mr. Loblack that he had "got a car and he wanted me to paint that car for him to get to New York." (T 1250, 1252). Mr. Loblack identified Mr. Shires' vehicle as the car Benedith possessed. (T 1251). As before,

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[9] The evidence made it clear that Taylor was very short, (T 1129, 1419-1420), and a reasonable inference therefrom is that he could not have shot Mr. Shires without shooting through the car door or window between them. There was no evidence of damage to either.

[10] Mr. Loblack knew Benedith as 'Tony," and Taylor as "Smally." (T 1258). He had known Tony about six weeks. (T 1259).

[11] It was "between twelve and one, about that time." (T 1252).

Benedith did all of the talking.[12] (T 1251). Mr. Loblack testified: "[T]hey were looking too suspicious to me, so I told them they got to come back in the morning." (T 1252).

The medical examiner who performed the autopsy on Mr. Shires testified that "[h]e had three gunshot wounds." (T 1284). Gunshot wound A entered 'just below the left side of the jaw towards the front of the face." (T 1288). Gunshot wound B entered lower on the "left side of the face below the lower jaw . . . just above the voice box . . .."[13] (T 1294, 1295). Gunshot wound C entered "on the mid portion of the right side of the back." It passed through Mr. Shires' lungs and heart, causing the space around Mr. Shires' right lung to fill with "well over two cups of blood." (T 1297, 1298). These wounds were the cause of Mr. Shires' death. (T 1301).

Gunshot wound A would have required the shooter to be facing the victim. (T 1307). Gunshot wound B came 'from the side." (T 1307). The doctor testified that Gunshot wound C - in the back - might have been the first shot, followed by B and C as the victim

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[12] Mr. Loblack repeatedly testified that Benedith did all of the talking. (T 1250-1252, 1255). Taylor said nothing.

[13] It **was** possible that Mr. Shires could have survived gunshot wound A "[i]f he could have gotten surgery in an adequate period of time . . . ." (T 1294). With prompt attention, gunshot wound B was also survivable. (T 1297).

turned. (T 1310). Mr. Shires' body was found face-up. (T 1358).

A reasonable inference from the gunshot and body position evidence is that the man standing behind Mr. Shires, Benedith, shot him. Upon being shot in the back, Mr. Shires turned to face his attacker. That attacker. Benedith, then shot him from the side as he turned (gunshot wound B) and in the face (gunshot wound A) as he completed the turn. The force of the gunshot to the face caused Mr. Shires to land on his back as he fell to the ground. From this evidence, the fact finder could reasonably reject the defense hypothesis that Taylor shot Mr. Shires first in the face (gunshot wound A), then from the side (gunshot wound B) as he fell, and then in the back (gunshot wound C) as he lay on the ground.[14] Indeed, given the fact that Mr. Shires was face-up at the scene, Benedith's version of the shooting was highly implausible and any reasonable fact finder would have rejected it.

As Benedith concedes, "the State provided substantial evidence that Benedith possessed the murder weapon after the murder , . . ." (IB at 22). It also presented evidence from which it could reasonably be inferred that Benedith possessed, or had access to,

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[14] This hypothesis was first presented during the cross-examination of the medical examiner. (T 1307-1308). It was also argued to the jury at closing argument. (T 2112-2115).

the murder weapon prior to the killing. A search of Benedith's Florida residence revealed a card on which was hand written the type of ammunition needed for the murder weapon. (T 1465).

In Wyatt *v. State,* this Court found ample evidence that the murder was committed during a robbery where the defendant was seen leaving a bar with the victim, admitted being in the victim's car, and was seen driving the victim's car on the day her body was found. 641 So.2d 355, 359 (Fla. 1994). Her car was later found in a parking lot where it had been abandoned. *Id.*

Comparing the facts of the instant case to those of *Wyatt,* it is clear that there was ample evidence that the murder was committed while Benedith was involved in the robbery of John Shires. Benedith was standing with the victim near the open driver's door of his car and talking to him just before the murder. Other than the Codefendant Taylor, there was no one else around. After the gunshots, the owner of the car was dead. Taylor was seen entering the passenger's side of the victim's car, which sped off. Benedith's fingerprints were found on the driver's door handle and windshield post of the victim's car. Benedith was seen in possession of the victim's car shortly after, and the same evening of, the victim's murder. The victim's car was later found abandoned. (T 1421). Clearly, the trial court did not err in

ruling that whether the murder was committed during the course of a robbery was an issue for the jury.

In this Court, Benedith has only raised the issue of the sufficiency of the evidence in the context of whether the acquittal motion should have been granted. However, without waiving any procedural bar which would prevent consideration of any sufficiency of the evidence issue beyond that of the acquittal motion, the State points out that the evidence of Benedith's guilt of the felony murder of which he has been convicted is not only sufficient to sustain the verdict, it is overwhelming. That evidence, together with the reasonable inferences therefrom, shows that Benedith planned to rob Mr. Shires of his car, have it repainted overnight, and take it to New York the next morning. During that robbery, Benedith shot and killed Mr. Shires, drove away in his car, tried to get the car repainted during the night, and abandoned it when he was unsuccessful in so doing. Benedith's conviction for first degree felony murder should be affirmed.

POINT II

THE DEATH PENALTY WAS NOT DISPROPORTIONATELY IMPOSED IN THIS CASE.

Benedith complains that the death penalty recommended by a 10 to 2 vote of his jury, and imposed by Judge Moxley, is

disproportionate to other capital sentences imposed in similar murder cases. Judge Moxley found one statutory aggravator, to-wit: prior-violent-felony.[15] The judge found two nonstatutory mitigators to which he gave some weight, i.e., a malingered personality disorder and cocaine use; and he found one, i.e., the sentence of the 14 year-old codefendant, to which little or no weight was given. (R 1042-1045).

"Deciding the weight given to a mitigating circumstance is within the trial court's discretion, and a trial court's decision is subject to the abuse-of-discretion standard." ***Cole v. State,*** No. 87,337, slip op. 6 (Fla. Sept. 18, 1997). ***See Foster v. State,*** 679 So.2d 747, 756 (Fla. 1996) [Neither will it be reversed 'because an appellant reaches the opposite conclusion."]. Abuse of discretion can be found "only where no reasonable man would take the view adopted by the trial court." Cole, No. 87,337, at 4 n.16 ***(quoting Huff v. State, 569*** So.2d 1247, 1249 (Fla. 1990) . In a

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[15] The State contends that Judge Moxley erred in finding only one statutory aggravator. Since the murder in this case was unquestionably committed during the course of the felony robbery of which Benedith was convicted, the State was entitled to this aggravator as a matter of law. See Point I on State's Cross Appeal, ***infra*** at 95. Thus, it is submitted that although it is not essential in order to uphold the death penalty in this case, this Court should also consider this aggravator when deciding the proportionality issue.

detailed and well-reasoned order, Judge Moxley made it clear that he carefully considered all relevant information and weighed it in a manner consistent with the law of this State. Certainly, it cannot be said that no reasonable man would take the view taken by the trial judge. Thus, the conclusion he reached - that the aggravating circumstance outweighs the mitigating factors - should be upheld by this Honorable Court.

Perhaps recognizing that the State is entitled to the aggravator, committed-during-the-course-of-a-felony, Benedith asserts that his case is similar to that of ***Terry v. State,*** 668 So.2d 954 (Fla. 1996) wherein the death penalty was found disproportionate despite the presence of the statutory aggravators -- prior-violent-felony and committed-during-the-course-of-a-felony. This argument was also made, and rejected, in the trial court. In his written sentencing order, Judge Moxley wrote:

> The essential difference between that case and this one is that the New York attempted robbery was not contemporaneous with the murder, but was subsequent and was undertaken by the Defendant with the same means and knowledge of the prior death of John Shires. This distinction between the two cases is therefore great and is the basis for concluding that death is warranted . . ''

(R 1047).

The attempted robbery case referred to in the trial court's

order, which was the basis for the prior-violent-felony aggravator, was charged as robbery in the first degree,[16] but was reduced and disposed of in order to facilitate Benedith's prompt return to Florida to stand trial for the murder of Mr. Shires. (R 146, 148, 157). The victim of the New York case, Blanca Mercette,[17] testified that Benedith was the leader of a gang of five men who broke into her apartment to rob her. Benedith held the same gun, which fired the shots that killed John Shires approximately a month earlier, to Ms. Mercette's head and repeatedly told her that he would kill her. (R 187). Benedith, who 'orchestrated" the robbery, entered the apartment with the pistol, socks, and handcuffs, and he directed the movements and participation of the other would-be robbers.[18] (R 167, 187-189, 1046).

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[16] The New York prosecutor who handled the case explained: "Robbery in the first degree has certain subdivisions . . .. It's either the use of a weapon, use of a deadly instrument, that being a firearm, a knife, something of that nature, also that the person could have suffered serious physical injury, that being more than just bruises or lacerations . . .." (R 146).

[17] Ms. Mercette's name appears in the record with two different spellings, to-wit: Blanca Mercette and Blanca Merced. (R 69, 1046). Throughout this brief, her name is spelled 'Mercette."

[18] The robbery, and planned murder of Ms. Mercette, ended after the victim's boyfriend and a neighbor entered the apartment, scaring off Benedith and his gang. (R 448).

The Terry facts are quite different. In *Terry,* this Court concluded that "although there is not a great deal of mitigation in this case,[19] the **aggravation is also** not extensive given the totality of the underlying circumstances." Id. This Court identified certain circumstances of the aggravators which rendered them usually weak, to-wit:

(1) The committed-during-the-course-of-a-felony aggravator 'is based on the armed robbery being committed by appellant when the killing occurred."

(2) The prior-violent-felony 'does **not** represent an actual violent felony previously **committed by Terry,** but, rather **a contemporaneous conviction as principal** to the aggravated assault **simultaneously committed by the codefendant** Floyd who pointed an **inoperable** gun at Mr. Franco."

(emphasis added) *Id.* This Court stressed that its decision to overturn the death penalty was based on "the fact that [the prior violent felony] occurred at the same time, was committed by a codefendant, and involved the threat of violence with an inoperable

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[19] Despite the trial court's having 'rejected Terry's minimal nonstatutory mitigation," this Court noted that the defendant was only 21 when he committed the crime and had "no significant history of prior criminal activity." 668 So.2d at 965.

gun." ***Id.*** at 966. This Court explained: "This contrasts with the facts of many other cases where the defendant himself actually committed a prior violent felony such as homicide." Id.

In Cole v. ***State,*** this court distinguished Terry on the ground that the prior violent felony was "predicated upon Cole's own actions in forcibly subduing [the victim], handcuffing her, robbing her . . ., and raping her twice." No. 87,337, slip op. at 6 (Sept. 18, ***1997)*** . In the instant case, Benedith himself committed the prior violent felony which is predicated upon Benedith's own actions in breaking into the victim's home, armed with a gun, socks, and handcuffs, forcibly subduing her by grabbing her around the neck, (R 185), handcuffing her and taping her mouth, (R 187) , placing a gun, proven operable by the death of John Shires, to her head, and announcing his intention to both rob and kill her. (R 187). Benedith himself planned, led, and directed the prior violent felony. The prior violent felony occurred about a month after John Shires, the victim of another of Benedith's robberies, had been killed with the same operable gun. Thus, it seems clear that the instant case is not one which the Terry majority would regard as deserving of a reduction to a life sentence.

Indeed, as Benedith concedes, this Court has affirmed death sentences where the sole aggravator was a prior violent felony.

In *Ferrell v. State, 680* So.2d 390, 390-391, 392 n.2 (Fla. 1996), the trial court found 7 nonstatutory mitigators and only one aggravator - prior-violent-felony. This Court said that even in the presence of **substantial** mitigation, the death penalty will be upheld "where the lone aggravator was especially weighty." 680 So.2d at 391. The prior violent felony was "a second degree murder bearing many of the earmarks of the present crimes," which occurred prior to the crime at issue, *Id.*

Earlier, in *Windom v.* State, this Court found the sole aggravator, prior-violent-felony, sufficient to support a death sentence despite three statutory mitigating factors and four non-statutory ones. 656 So.2d 432, 435, 441 n.3 (Fla. 1995). The prior violent felony consisted of two **contemporaneous** murders and a **contemporaneous** attempted murder committed by Windom. *Id.* at 439-440. Clearly, the prior-violent-felony aggravator is one which, alone, may outweigh a great deal of mitigation. *Id.,* Ferrell. *See Duncan v. State,* 619 So.2d 279, (Fla. 1993), *cert. denied,* 510 U.S. 969, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993).

In this case, the prior violent felony is a particularly weighty one and bears many of the earmarks of the instant crime. Benedith planned, led, and directed the prior violent felony during which he placed the same gun used to kill John Shires to the head

of his victim and announced his intention to kill her. That Benedith's plan to murder Ms. Mercette was thwarted hardly militates against the weightiness of this aggravator. Neither does the label attached to the prior violent felony - attempted robbery - do so. The circumstances of the prior violent felony are such as to render the single aggravator found by the trial judge particularly weighty. Compared to the scant mitigating factors in Benedith's case, the prior-violent-felony aggravator well supports the lower court's decision to follow the 10 to 2 recommendation of the jury and impose the death penalty upon Benedith for the murder of John Shires. That sentence should be upheld.

Finally, the State contends that it was entitled to the committed-during-the-course-of-a-felony aggravator as a matter of law. See State's Cross Appeal, Point I, ***infra*** at 95. Thus, there were in fact, two statutory aggravators, one of which was particularly weighty, to be weighed against three non-statutory mitigators. It is within the trial court's discretion to determine the weight to be given mitigators, Cole, No. 87,337, ***at*** 6, and it is clear from the sentencing order that Judge Moxley regarded the instant mitigators to be weak.

In ***Hunter*** v. State, 660 So.2d 244, 254 (Fla. 1995), this Court reviewed a trial court's conclusion that the prior-violent-felony

aggravator and the committed-during-the-course-of-a-felony aggravator outweighed ten non-statutory mitigators. The non-contemporaneous prior violent felonies were two convictions for aggravated battery, one for shooting into an occupied vehicle, and one for attempted armed robbery. 660 So.2d at 254. This Court held "death is not a disproportionate penalty here." ***Id.*** Neither is it disproportionate in Benedith's case.

Similarly, in *Blanco* v. State, No. 85,118 (Fla. Sept. 18, 1997), the same two aggravators were weighed against one statutory mitigating factor and eleven nonstatutory mitigating factors. No. 85,118 slip op. at 2, 2 n.5. The prior violent felony was a conviction for armed robbery and armed burglary, ***See*** *Blanco* ***v. State,*** 452 So.2d 520, 525 (Fla. 1984) and *Blanco* ***v. State, 438*** So.2d 404 (Fla. 4th DCA 1983).[20] This court found Blanco's death sentence proportionate. No. 85,118, at 5. Benedith's is likewise proportionate.

Benedith's trial and appellate challenges to the death sentence make only brief reference to the sentence received by Codefendant Taylor. The State submits that the issue is

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[20] Blanco's armed robbery and armed burglary convictions were reversed but he was reconvicted of the subject crimes on March 14, 1984. ***Blanco,*** 452 So.2d at 525.

procedurally barred for failure to properly raise and argue it. However, without waiving that bar, the State contends that the sentence received by Taylor does not render Benedith's instant sentence disproportionate.

The lower court took judicial notice of Taylor's plea to second degree murder with a deadly weapon and robbery with a deadly weapon. (R 212). That evidence was admitted for the purpose of the proportionality issue. The State sought to present the testimony of Dr. Riebsame regarding his expert opinion of the factors relating to the degree of Taylor's culpability in the subject crimes. The trial judge improperly precluded the State from presenting Dr. Riebsame's testimony on that issue.

"Once the defense argues the existence of mitigators, the state has a right to rebut through any means permitted by the rules of evidence, and defense will not be heard to complain otherwise." *Wuornos* ***v. State, 644*** So.2d 1000, 1009-1010 (Fla. 1994), *cert. denied,* ___ *U.S.* ___, 115 S.Ct. 1705, 131 L.Ed. 2d 566 (1995). In ***Gore v. State,*** the defense sought to establish equal culpability with Gore's co-defendant who had been convicted of manslaughter for the same crimes. No. 80,916, slip op. at 7 (Fla. July 17, 1997). This Court said that the state was entitled to put on testimony showing why the co-defendant received 'more lenient treatment."

Id. This evidence on which the State based its determination that young Taylor's level of culpability for the instant crimes was less than Benedith's was admissible. Gore ; ***Wuornos.***

Although the trial judge improperly precluded the State from presenting the testimony of Dr. Riebsame in relation to this issue, the court permitted the State to proffer Dr. Riebsame's testimony regarding Taylor. (R 321, 337). The doctor would have testified that: Taylor was 'mildly retarded" with 'an I.Q. of around seventy." "[H]e acted under the substantial domination of Arturo Benedith in this crime," he had "a mental age of twelve or eleven at the time this crime was committed," he had been treated for 'a long-standing history of learning disabilities," and 'he did not reveal any criminal history." (R 337-338).

In addition, the death penalty was precluded as a matter of law due to the boy's youthful chronological age. (R 338). Thus, "the only plea . . . available to avoid a trial" was to second degree murder. (R 339).

Evidence that a co-defendant "was a 'follower,'" may support imposition of a lesser sentence. ***See*** *Hazen* v. State, No. 84,645, slip op. at 9 (Fla. Sept. 4, 1997). Also, evidence indicating that he was not "the dominate actor" is relevant. ***See Cole*** *v.* ***State, No. 87,377,*** slip op. at 6 (Fla. Sept. 18, 1997). Further, that the

defendant was 'bigger, older . . . and was the leader" is relevant. *Hall v. State, 614* So.2d 473, 479 (Fla. 1993). Thus, Taylor's chronological and mental age and that he acted under the substantial domination of Benedith in participating in this crime was clearly relevant and should be considered.

Moreover, a prosecutor may enter a plea bargain with a less culpable participant without violating "the principles of proportionality." *Larzelere v. State, 676* So.2d 394, 407 (Fla. *1996) [citing Garcia v. State, 492* So.2d 360 (Fla. 1986)], cert. *denied, 479* U.S. 1022, 107 S.Ct. 680, 93 L.Ed. 2d 730 (1986). Even where the state does not prosecute a defendant's cohorts in the crime, a death sentence may still be proportionate where 'the defendant is the more culpable participant in the crime." *Larzelere, 676* So.2d at 406-407.

Further, the facts at trial established that Benedith did all of the talking when trying to arrange for a quick paint job.[21] The reasonable inferences from the evidence support the conclusion that Benedith was the shooter, that he drove Mr. Shires' car from the crime scene, and that possessing the murder weapon, he continued

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[21] The proffered evidence also showed that he substantially dominated the youthful codefendant.

his life of crime after the murder.

Indeed, the evidence regarding Benedith's subsequent attack on Ms. Mercette was relevant on the issue of the degree of culpability of the defendants, Having just been involved in a robbery/murder a month before, Benedith staged another robbery, with the same gun used to kill the prior victim, threatened to kill the subsequent victim with that gun, and directed the actions of the other four perpetrators in the later crime. That this mature man did this without the help, much less the direction, of the 14 year old Taylor is relevant to the issue of the degree of culpability.

Finally, Benedith, who had a "good, normal childhood" with "a good upbringing" and "a lot of love," did not suffer "abuse, poverty, or lack of schooling." (R 513, 514). Although he had a personality disorder, such is "the least serious of all disorders," and was largely malingered. (R 515). His 'intelligence was average or above," and he "would not be law abiding . . .." (R 515). These facts, combined with the proffered evidence from Dr. Riebsame, make it clear that the retarded child, Taylor, was far, far less culpable than the 28 year old intelligent adult, Benedith. Benedith's death sentence is not disproportionate and should be upheld.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING BENEDITH'S MOTION TO PRECLUDE THE DEATH PENALTY; THE EVIDENCE ESTABLISHED THAT BENEDITH'S STATE OF MIND MET OR EXCEEDED THAT OF RECKLESS INDIFFERENCE TO HTJMAN LIFE.

Benedith claims that the trial judge erred in denying his motion to preclude the death penalty, made after he was convicted of the instant crimes. (IB at 38). In his motion, Benedith presented a single argument, i.e., that the evidence did not establish that his 'state of mind was culpable enough to rise to the level of reckless indifference to human life . . .." (R 1085).

The *Enmund/Tison* line of cases make it clear that a proportionate imposition of the death penalty requires that the evidence, and reasonable inferences therefrom, show that the felony murder defendant either "actually killed, attempted to kill, or intended to kill." *Tison v. Arizona, 481* U.S. 137, 148, 107 S.Ct. 1676,1684, 95 L.Ed.2d 127 (1987). In the absence thereof, the Court held that "major participation in the felony committed, combined with reckless indifference to human life" satisfies the culpability requirement. *Id.*

The State contends that the evidence before the sentence was sufficient to conclude that Benedith himself actually killed Mr. Shires. See Point I, *supra,* at 4-8. The evidence shows that

twenty-eight year old Benedith, with his fourteen year old codefendant in tow, twice approached Mr. Loblack, inquiring about the possibility of getting a car he planned to obtain painted overnight. At all times, Benedith did **all** of the talking. The positions of Benedith and the codefendant in relation to Mr. Shires and the open car door, together with the placement of the shots into Mr. Shires' body, and the position in which his body fell to the ground indicate that Benedith, not Taylor, actually shot and killed Mr. Shires. See Point I, *supra*, at 5, 7-8. Further evidence from which the sentence could infer that Benedith was the shooter includes: A hand written note containing the type of ammunition used in the slaying of John Shires which was found in Benedith's Florida residence among his personal effects; the murder weapon was found in Benedith's possession in New York a short time after the crime; and, Benedith planned, led, and directed an armed robbery in New York approximately one month after the robbery/murder of Mr. Shires, during which, he directed the activities of the other four criminal participants, and held the same gun used to kill John Shires to the head of his victim, announcing his intention to kill her.

Finally, should this Court be unconvinced that this evidence was sufficient to permit the conclusion that Benedith actually

killed Mr. Shires, the State contends that the proffered testimony of Dr. Riebsame should also be considered. That evidence would have established that the fourteen year old codefendant was 'mildly retarded," had 'a mental age of twelve or eleven at the time this crime was committed," and "acted under the substantial domination of Arturo Benedith in this crime." (R 333-338). Again, the reasonable inference from this evidence is that Benedith, and not the retarded child, Taylor, shot and killed Mr. Shires. Further, even if Taylor shot Mr. Shires, he did so while acting under the substantial domination of Benedith, and therefore, the culpable requirement for Benedith is nonetheless satisfied.

At a minimum, the evidence shows that Benedith participated in the robbery with reckless disregard for human life. In *Van Poyck v.* State, this Court upheld the imposition of the death penalty against a proportionality challenge based on *Enmund/Tison.* 564 So. 2d 1066 (Fla. 1990). The evidence did "not establish that Van Poyck was the triggerman," however, it did "establish that he was the instigator and the primary participant in this crime." *Id.* at 1070. Further, having possessed a gun at the scene of the crime, he had to know that lethal force could be used. *Id.*

The evidence presented to the sentence in the instant case clearly established that Benedith was the instigator and primary

participant in this crime. Further, from the evidence, it is reasonable to infer that Benedith knew that lethal force could be used. Such an inference could arise from the evidence of the hand written note containing the type of ammunition needed for the murder weapon found in Benedith's personal effects left in his Florida residence when he fled to New York after the murder, that Benedith possessed and used the murder weapon to threaten the life of another robbery victim about a month after Mr. Shires' murder, and that Benedith possessed the murder weapon when police subsequently arrested him in a New York apartment. From this evidence, it could be inferred that Benedith knew that the murder weapon was present at the murder scene, that it **was** loaded with ammunition, and that it could be used against the robbery victim,

Finally, if Taylor was the shooter as Benedith claims, the shot to the back, gunshot wound C, occurred after Mr. Shires had fallen to the ground. The medical examiner testified that had Mr. Shires received prompt medical attention, he might have survived gunshot wounds A and B. Since Taylor was standing in front of, facing, Mr. Shires, gunshot wounds A and B would have had to occur before gunshot wound C. Thus, the 28 year old, large adult male, Benedith, would have had an opportunity to prevent the small, 14 year old kid, Taylor, from firing that last, and unsurvivable, shot

into the back of the fallen victim.[22] His failure to do so further evinces his reckless indifference to human life.

The trial judge did not err in denying the motion to preclude the death penalty; neither is Benedith's death sentence disproportionate. It should be affirmed.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR WITHDRAWAL OF COUNSEL BASED ON THE FILING OF A BAR GRIEVANCE.

Benedith complains that his trial counsel, Greg Eisenmenger, should have been permitted to withdraw because Benedith filed a bar grievance against him. (IB at 45. See R 54). Describing the grievance, the trial court read from the Bar complaint:

> My complaint to the Florida Bar that I was accused by a person named Thomas Taylor. But this person states that he was in cocaine and alcohol the night before he said he identified me. And that person has a mental history and was taking treatment for suicidal thoughts. And this person identified me as Tony Jones. The person said -- and this person don't know me from no one. Attorney Eisenmenger don't want to get me out of this false accusation.

(R 60).

The prosecutor disclosed that Benedith had also filed a

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[22] The positioning of the three men, as described by Mr. Lane, makes it clear that Benedith was standing in close proximity to Taylor.

grievance against him, and the Bar had dismissed it as unfounded. (R 54). Further, Benedith had grieved his prior court-appointed counsel, Attorney Bradley. (R 55). That complaint was also dismissed as unfounded, (R 55).

The State pointed out the timing involved. Benedith had been set for trial in October, 1995. He filed his grievance against Attorney Bradley, and counsel moved to withdraw based thereon in August, 1995. The motion was granted, and Benedith's case was continued for several months while new counsel was appointed and prepared to try the case.

At the time of the instant withdrawal hearing, Benedith's trial was set for June 10, 1996. (R 55). The withdrawal motion, also based on a bar complaint, was filed on March 28, 1996 and heard in April, 1996. (R 52, 620-621). Both times, the motions to withdraw were based on unfounded grievances and occurred two months before trial was to commence. Clearly, as the State argued below, the attempt to remove counsel was made solely for the purpose of delay and not because Benedith had any legitimate problem with Attorney Eisenmenger, much less that he wanted to represent himself. Such a purpose is an improper reason for discharging current counsel and appointing a new one, *See Wike v. State, No. 86,537,* slip op. at 4 (Fla. July 17, 1997) [indefinite avoidance of

a proper sentencing proceeding].

Contrary to Appellate Counsel's claims, at no time did Benedith make any type of request for self-representation. In fact, when availing himself of his opportunity to speak on the issue, he said only:

> Well, I want to go to trial, too.
> . . .
> Yeah, I want to go to trial. But first of all, I need to subpoena all my witnesses, because I got witnesses. And I told Mr. Eisenmenger to get all my witnesses. And I don't know if he has done it yet. But he has to call every one of them. And I got it right here. So I can put it in my file.[23]

(footnote added) (R 58).

The trial judge concluded: "[T]his is not really a bona fide, good faith grievance." (R 59). He added: "That is not a legitimate complaint to the Florida Bar with any ethical violation." (R 60). The judge said:

> . . . I know if I grant your motion, there's going to be a Motion for Continuance by the next attorney because they'll say it's a death penalty case and they haven't had time to prepare. I'm not going to go through that. Your client even says he wants a trial,

(R 60). The judge denied the motion, but appointed Spanish-

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[23] The referenced document was a witness list which Attorney Eisenmenger perused and commented that he believed it was 'the same list" he had previously disclosed. (R 63).

speaking Diana Figueroa as co-counsel. (R 59). Personally, verbally acknowledging his understanding of the proceedings and Ms. Figueroa's appointment, Benedith stated no objection to the court's disposition. (R 63-64).

In *Bell* v. ***State, No.*** 86,094 (Fla. July 17, 1997), this Honorable Court reviewed a similar factual situation. In Bell, the defendant complained on two separate occasions about his court-appointed counsel's performance.[24] Bell, No. 86,094, at 2. Included in his complaints, was the claim that counsel had not developed witness information. Id. Instead of objecting to the competence of his counsel, Bell merely "objected to the manner in which counsel was conducting the defense." ***Id.*** at 3. After giving Bell the opportunity to present his complaints, the trial judge concluded that counsel's performance was not inadequate. ***Id.*** This Court rejected the claimed impropriety in the lower court's ruling and held: 'As in Hardwick, we find nothing , . . to establish that appellant's counsel was incompetent." *Id.*

In the instant case, the trial judge gave Benedith an opportunity to make his complaint about Mr. Eisenmenger known. Benedith stated only that he wanted his attorney to call all of his

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[24] Benedith only "complained" once.

witnesses, and provided the court with a list which defense counsel acknowledged he already had. There was no allegation that Mr. Eisenmenger had refused to call any witness, nor was there a claim that he had not investigated witness information. All Benedith said was that he did not know if his counsel had subpoenaed "all of his witnesses," (R 58). At the time the statement was made, the case was still some two months away from trial. Thus, like Bell, Benedith's complaint concerned the manner in which his counsel was handling his case and is insufficient to merit relief.

In *Valdes* ***v. State,*** 626 So.2d 1316, 1319 (Fla. 1993), this Court said:

> **If a defendant alleges** that his **counsel is incompetent and requests that counsel be discharged,** the trial court must 'make sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant.' *Hardwick v. State, ...*

(emphasis added). Benedith did not allege attorney incompetence - he said only that he did not know if his witnesses had been subpoenaed at a point two months prior to trial. Neither did he move for discharge of his attorney; rather, counsel moved to withdraw due to the filing of the bogus Bar complaint. Since Benedith never alleged incompetence, or asked that his attorney be fired, the trial court had no duty to inquire further on this

issue.

Assuming *arguendo* that Benedith made the prerequisite allegations, he is entitled to no relief because "[o]n the record here, there [is] no basis for a finding of ineffective representation." *See Valdes,* 626 So.2d at 1320, In *Valdes,* the defendant complained that his attorney was "too busy with another case to pay attention to [his]." *Id.* at 1319. Two months later, he complained again, this time in writing, asking the court to dismiss his attorney. *Id.* Valdes claimed that he "had a long-standing conflict with him over the appropriate defense and that they were not adequately prepared for trial." *Id.* He also disclosed that "he had filed criminal charges against his attorneys and was considering pursuing a civil complaint and a complaint with the American Bar Association." *Id.*

At a hearing on the motion to dismiss counsel, Valdes physically attacked a witness, denigrated the court proceeding, and swore 'at the judge." *Id.* The judge held that Valdes' conduct "precluded the court from further inquiry," and denied the motion. *Id.* This Court upheld the denial, finding that the court's inquiry was adequate. *Id.* Valdes had the opportunity to express why he wanted a new attorney, but "he refused to explain his allegations of ineffectiveness." *Id.*

Like Valdes, Benedith had the opportunity to tell the court about any commission or omission of counsel which rendered his attorney's performance deficient. The sole bone of contention was that he did not know if his attorney had subpoenaed his witnesses 'yet." (R 58). Plenty of time to subpoena those witnesses remained. At no time thereafter, did Benedith complain about this, or any other, matter relating to counsel's performance. Thus, there was no basis for a finding of ineffectiveness.

Neither does the filing of a bar complaint entitle Benedith to a new attorney. In *Boudreau* ***v. Carlisle, 549*** So.2d 1073 (Fla. 4th DCA 1989), ***cause dismissed,*** 557 So.2d 866 (Fla. 1990), the defendant filed a civil malpractice action and a bar grievance complaint against his criminal defense attorney. Counsel moved to withdraw from representation of his client in the criminal case. 549 So.2d at 1074. Counsel explained that he did not know why the client was dissatisfied with him, but it might have been related to counsel not calling a witness the client wanted.[25]

The district court noted that the client had "created the

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[25] "[T]he only thing he could think of was Mr. Amos had requested that he call a certain witness but he did not do so because he felt the witness knew nothing about the case and the testimony would be inadmissible in evidence." 549 So.2d at 1074.

Conflict" with counsel by filing the complaints. ***Id.*** at 1077. The claims underlying the complaints were 'deemed to be frivolous" by the trial court. ***Id.*** The court held: "[A] trial court is not obligated to grant a motion to substitute counsel based solely upon the filing of a malpractice complaint or grievance alleging incompetence of counsel where the court has held an evidentiary hearing and determined such claims to be without foundation." ***Id.***

In the instant case, the trial judge examined the bar complaint filed by Benedith against his counsel and determined that it was frivolous. He gave Benedith ample opportunity to explain any problems he had with counsel. At no time did Benedith indicate that he wanted Mr. Eisenmenger fired, and at no time did Benedith identify any attorney performance, or lack thereof, which was ineffective. Thus, there was no error in the trial court's denial of counsel's motion to withdraw. ***Boudreau. See Jones v. State,*** 658 So.2d 122, 129 n.2 (Fla. 2d DCA 1995).

Finally, Benedith claims that he made "the assertion that [he] wished to go to trial and represent himself," and "[t]he trial court improperly refused to let him represent himself . . .." (IB at 49). Neither is true. No request for self representation was ever made, even equivocally, and the trial judge never ruled, or even remarked, on such an issue. This claim, raised for the first

time on appeal, is procedurally barred. *Steinhorst v.* ***State, 412*** So.2d 332 (1982). ***See Judd v.*** *Rodman*, 105 F.3d 1339, 1342 (11th Cir. 1997)[" [A]n objection on specific grounds does not preserve the error for purposes of appeal on other grounds."].

Assuming ***arguendo*** that the statement Benedith made to the trial court could be tortured into an equivocal request for self-representation, it was utterly insufficient to entitle him to relief. Under ***Faretta v. California, 422*** U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975), a defendant must be permitted to represent himself if he "clearly and unequivocally declares to the trial judge a desire for self-representation and the judge determines that the defendant has knowingly and intelligently waived the right to be represented by a lawyer." ***Bell*** v. State, ***No. 86,094,*** slip op. at 3 (Fla. July 17, 1997). In ***Bell,*** the defendant "asked the judge to allow him to assist in his own defense by acting as co-counsel or stand-by counsel along with a court-appointed lawyer." No. 86,094, at 3. This Court said:

> [T]he context . . . . concerned appellant's complaints about his counsel's representation and appellant's desire to be more active in assisting his lawyer rather than any potential assertions of a right to self-representation. Appellant never asserted clearly and unequivocally at any other time that he wanted to represent himself.

Id. Noting that Bell could have made any desire to represent

himself clear in a later proceeding, but did not, the Court concluded that "[t]he trial court was not required to comply with Faretta." Id. at 3-4.

In the instant case, Benedith has conceded that any request he made for self-representation was "not unequivocal." (IB at 49). Therefore, he was not entitled to a Faretta inquiry. *Bell.* Thus, the trial judge did not err in failing to hold such an inquiry or 'let him represent himself." This claim is wholly without merit.

POINT V

THE TRIAL COURT DID NOT ERR IN PERMITTING PENALTY PHASE TESTIMONY RELATING TO A CRIME APPELLANT COMMITTED ON ANOTHER VICTIM WHICH ESTABLISHED THE **AGGRAVATOR, PRIOR-VIOLENT-**FELONY.

During the penalty phase, the State called three witnesses who referred to a prior violent felony which Benedith had committed in the State of New York. The victim of that crime, Blanca Mercette, testified about the facts thereof.[26] A prosecutor from New York

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[26] On appeal, counsel claims that the State should only have been permitted to introduce the certified copy of a judgment of conviction. (IB at 55). However, at trial, defense counsel objected 'to the authenticity" of the judgment, so the State was forced to put on additional testimony regarding the crime. (R 141). In any event, as explained hereinabove, the State had every right to present the details of the prior violent felony to the

testified to Benedith's conviction for the crime against Ms. Mercette. The State did not ask the prosecutor any questions about the details of the prior crime, although the defense did.[27]

The State then put on the New York detective who investigated the prior violent felony. The witness reported a statement of one of Benedith's co-defendants in that case. (R 167). That statement indicated that the robbery was Benedith's idea, and he carried a .32 caliber gun, socks, and handcuffs used in the crime when he entered the apartment. (R 167).

The only State witness to describe the facts of the prior violent felony was the victim, Blanca Mercette. She said Benedith "grabbed me by the neck." (R 185). She said that he had a gun and "he put it right here . . . (indicating) . . .." (R 187). Holding the gun to her head, "many times," Benedith told her that "he was

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judge and jury during the penalty phase of the trial.

The State also notes that Benedith did not offer to stipulate to the validity of his prior violent felony conviction. Thus, appellate counsel's argument that such would have been a more appropriate manner in which to present the evidence of this aggravator has no place in this case.

[27] On recross, counsel asked "[I]s it a correct statement that there was no personal injury sustained by anyone during this event?" The witness responded: "No, that's incorrect." (R 153). Defense Counsel proceeded to draw out details from this witness. (R 153). The State did not go into any details of the subject crime at any point throughout the testimony of this witness.

going to have to kill me." (R 187). Ms. Mercette explained that Benedith was "the head" of the robbery in which four others were also involved. (R 188). He gave the others instructions regarding what to do during the crime. (R 189-190) . Ms. Mercette identified the murder weapon in the instant case as the gun Benedith held to her head and threatened to kill her with. (R 192, 1042).

Ms. Mercette said that she takes "pills so that I can sleep, and I can never forget that happened to me that day."[28] (R 190). She said her roommate, Juan, was attacked when he entered the apartment, and he was cut with a knife. (R 190).

The State's entire direct examination of Ms. Mercette fills six and one-third pages including Defense Counsel's objections, motion, and argument. Cross and redirect filled a combined total of two pages. Benedith's claim that this became the feature or focal point of the penalty phase is wholly incredible.

Further, the evidence was clearly relevant. As the trial judge said: "[i]t seems to me that as far as the weighing of the aggravating circumstance, it's certainly important for the jury to

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[28] To the extent that it might be argued that the comments regarding the effect of Benedith's crimes upon Ms. Mercette were improper, the State points out that the brief remarks were harmless as there is no reasonable possibility that they contributed to the jury's death recommendation. *See Coney, 653* So.2d at 1014.

know what happened . . . ." (R 195). Certainly that is true where the factor is a prior violent felony. *Finney v. State, 660* So.2d *674, 683* (Fla. 1995) ["[R]elevant evidence concerning the circumstances of a prior violent felony conviction is admissible in a capital sentencing proceeding, unless . . . the prejudicial effect of the evidence clearly outweighs its probative value."]. Such evidence is also proper to show the defendant's character. Coney v. State, 653 So.2d 1009, 1014 (Fla. 1995), *cert. denied,* _ U.S. ___, 116 S.Ct. 315, 133 L.Ed. 2d 218 (1995), *receded from on* other *grounds,* 688 So.2d 308, 310 (Fla. 1996).

Clearly, victims of prior violent felonies are permitted "to provide important details" of those offenses. *Coney, 653 So.* 2d at 1014. In *Finney,* "[t]he victim's testimony was the only evidence of the circumstances resulting in the prior conviction. The testimony was not overly emotional; nor was it made the focal point of the proceedings." *Finney, 660* So.2d at 683. Likewise, in the instant case, Ms. Mercette's testimony was the only evidence of the circumstances resulting in Benedith's prior violent felony conviction. There is no indication whatsoever that her testimony was emotional, much less "overly emotional." Neither did the short, to-the-point explanation of the events overshadow the proceedings, or become the focus of the proceeding.

Finally, Ms. Mercette's evidence was also admissible to rebut the disparate treatment of the codefendant nonstatutory mitigator. The State argued, and Ms. Mercette's testimony was relevant to, the position that Benedith was the more culpable of the two perpetrators. Having just been involved in a robbery/murder a month before, Benedith staged another robbery, with the same gun used to kill the prior victim, threatened to kill the subsequent victim with that gun, and directed the actions of the other four perpetrators in the later crime. That this mature man did this without the help, much less the direction, of the 14 year old codefendant Thomas, is relevant to the issue of the degree of culpability. Thus, the trial judge did not err in admitting the evidence.

POINT VI

THE TRIAL COURT DID NOT ERR IN PERMITTING EVIDENCE OF THE MEANING OF INFORMATION WRITTEN ON A BUSINESS CARD; THAT EVIDENCE WAS NOT MORE PREJUDICIAL THAN PROBATIVE.

Benedith contends that the trial judge should not have permitted a New York City police officer, qualified as a ballistic's expert, (T 1742-1743), to testify regarding handwritten information on a business card found in a search of Benedith's

Florida apartment after the murder. (IB 59). Ballistics Expert Patrick O'Shea testified that the murder weapon 'is designed to shoot thirty-two Smith and Wesson long caliber ammunition." (T 1746). Thereupon, the prosecutor showed the witness State Exhibit 13, the subject business card, and asked 'if there's anything in it of significance to you written on that document?" (T 1746). At that point, defense counsel objected on the basis of 'pure speculation." He argued that it had not been established who wrote the handwritten information or what "that person meant by that." (T 1746). When this evidence was elicited, there **was** no objection based on the probative value versus prejudicial effect. (T 1746). Thus, the issue as raised on appeal is not preserved, and therefore, it is procedurally barred.[29] ***Steinhorst v. State,*** 412 So.2d 332 (Fla. 1982). ***See Judd v.*** *Rodman*, 105 F. 3d 1339, 1341 (11th Cir. 1997)[failure to object on basis of federal rule 412 precludes review of a claim based thereon despite objections on relevancy and federal rule 4021.

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[29] The objection Benedith claims preserved the instant issue for review occurred on August 9, 1996, whereas the testimony of the witness regarding the meaning of the notation occurred three days later, on August 12, 1996. (See T 1606-1608). It is well settled that an objection at the time the subject testimony is elicited at trial is essential to preserve the issue for appeal. Since there was none in this case, the claim is not cognizable.

Assuming *arguendo* that the matter is properly before this Honorable Court, it is without merit. The expert witness testified that the handwritten notation on the business card states: "[T]hirty-two . . . S and W long, written out, L-O-N-G." (T 1747). He added that that information "would be the cartridge that would fit this gun" [the murder weapon]. (T 1747) . That note was found in Benedith's Melbourne apartment, in the general area of, and shortly after, the crime, and referenced the kind of ammunition used in the murder and which fit the murder weapon found in the black bag Benedith threw out of his New York apartment after the murder and upon entry by police.

The relevancy and probative value of this evidence is obvious and cannot seriously be contested. It is probative of the issue of identity. The killer shot the victim with Smith & Wesson longs, and Benedith, like the gunman, had some involvement with that type of ammunition and gun. Evidence having much slighter bearing on identity has been upheld by this Honorable Court. *See Williamson v. State,* 681 So.2d 688, 697 (Fla. 1996). Thus, the value of the subject evidence in Benedith's case was not outweighed by any potential for prejudice, and the trial court's admission of the evidence should be upheld.

Further, there has been no showing of unfair prejudice.

"certainly, most evidence that is admitted will be prejudicial to the party against whom it is offered. Section 90.403 . . . is directed at evidence which inflames the jury or appeals improperly to the jury's emotions." 1 C. Ehrhardt, *Florida Evidence* §403.01 at 100-03 (2d ed. 1984) (footnotes omitted). The subject evidence was not such as to inflame the emotions of the jury, and therefore, was not unduly prejudicial.

Finally, harmless error analysis is applicable to this issue. *Williamson,* 681 So.2d at 697. Benedith was seen in possession of the murder weapon. It could reasonably be inferred that he knew what type of ammunition it fired - which was the same as that described on the business card.

Point VII

THE ALLEGEDLY IMPROPER REMARKS OF THE PROSECUTOR IN OPENING AND CLOSING ARGUMENT DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL AND WERE NOT REVERSIBLE ERROR.

Benedith complains about two comments made by the prosecutor during argument which he claims were so egregious as to deprive him of a fair trial. (IB 62-65). In the opening statement prior to the start of the guilt phase, the prosecutor said that "Benedith, fled to the state of New York." (T 1071). Defense counsel moved

for a mistrial, alleging that the comment was improper as "[t]here's no evidence that anyone fled anywhere." (R 1071) . The judge denied the motion. (T 1071).

On appeal, Benedith claims that the State's witness testified "that prior to the murder Benedith had plans of returning to New York." (IB at 63). He adds that the comment was 'prejudicial and demonstrated bad faith . . .." (IB at 63). This claim is meritless.

The witness, Mr. Loblack, testified that Benedith told him, the day of and prior to the murder, that he wanted a car painted that night because he was going to take it to New York. (T 1250). This in no **way** undercuts the State's characterization of Benedith's leaving Florida for New York after the murder. Indeed, it supports it. That Benedith wanted a car (which he did not yet possess) painted overnight so he could take it to New York, supports the reasonable inference that he planned to flee to New York in it after obtaining it unlawfully. Thus, the evidence adduced at trial supports the comment made by the prosecutor in his opening statement; the comment was not improper. Hartley v. State, 686 So.2d 1316, 1321 (Fla. 1996).

It has long been the law in Florida that "[i]t is within the trial judge's discretion to determine when an attorney's argument

is improper, and such a determination will not be upset absent an abuse of discretion by the lower court judge." ***Watson v. State,*** 651 So.2d 1159, 1163 (Fla. 1994) ***[quoting Breedlove*** v. State, 413 So.2d ***1, 8*** (Fla. 1982), ***cert. denied, 459*** U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982)]. A judge may grant "wide latitude" to attorneys "making legitimate arguments to the jury." 651 So.2d at 1163. This rule extends to "logical inferences" put forward during counsel's argument. ***Id.***

Further, Benedith did not preserve this issue for appellate review because he failed to make an objection and request a curative instruction. See ***Duest*** v. State, 462 So.2d 446, 448 (Fla. 1985). The making of a mistrial motion does not dispense with this requirement. ***Id.***

Moreover, Benedith has demonstrated no error in regard to the prosecutor's opening statement. However, even if some error were found, it would be harmless beyond a reasonable doubt.

Regarding the penalty phase closing argument, Benedith complains that the prosecutor told the jury that Benedith "planned it, he called John Shires . . .." (R 346). Defense counsel objected that there was "no evidence . . . Benedith planned anything" and none that he called the victim. (R 347). The trial judge granted counsel's request for a curative instruction. (R

347). Nonetheless, counsel was not satisfied and asked "for a more strenuous curative instruction." (R 348). He wanted the judge to tell the jury that there was no evidence of a plan or a call to the victim by Benedith. (R 347, 348). The judge refused, stating that he could not comment on the evidence. (R 348).

The State submits that a reasonable inference from the evidence adduced at trial and during the penalty phase proceeding was that Benedith planned the crime. The victim's roommate, Scott Kurzawa, testified that Mr. Shires placed a classified ad to sell his car and was going to attempt to sell his car the evening of his murder. (T 1105-1107). Benedith first saw Mr. Loblack around noon and asked him about painting a car he was going to get. (T 1249-1250). Mr. George Lane saw Benedith sitting near a telephone at the murder scene in mid-afternoon. (T 1117). Later, he saw Benedith talking with Mr. Shires while papers were being bandied about. (T 1119-1120). Shortly, thereafter, Mr. Lane saw Benedith and codefendant, Thomas Taylor, leave in Mr. Shires' vehicle. (T 1121). Benedith then returned to Mr. Loblack around midnight trying to get the car painted that night. (T 1252). Mr. Loblack was suspicious and refused. (T 1252). Mr. Loblack testified that both times he had contact with Benedith and Taylor, Benedith did all of the talking. (T 1251). The prior violent felony crime

victim, Blanca Mercette, testified that Benedith was the leader of the group that perpetrated the crime against her.[30] (R 188-190). Thus, there was abundant evidence from which it could reasonably be inferred that Benedith planned the crime against Mr. Shires, and that in furtherance of that plan, he called Mr. Shires. That evidence would have been sufficient to sustain a ruling by the trial judge that no curative instruction was needed.

Assuming ***arguendo*** that the prosecutor's comment was improper, the error was cured by the trial court's curative instruction. The instruction given was sufficient, and the judge did not err in refusing to grant a mistrial. ***See Watson v. State,*** 651 So.2d at 1163. Neither did he err in refusing to comment on the evidence.

In ***Steinhorst v. State,*** 412 So.2d 332, 339 (Fla. 1982), the defendant complained about the prosecutor's attributing 'a particularly callous remark regarding one of the victims" to Steinhorst 'when the testimony showed it was actually made by [the co-defendant] ." Responding to the defense objection, the court "advised the jurors that they were the sole judges of the evidence." ***Id.*** This Court held that "[t]he impropriety was

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[30] Further, Dr. Riebsame would have established that Benedith substantially dominated Taylor in the commission of the instant crime.

thereby corrected." *Id.* The same situation is presented by the instant case, and the same result should be reached.

Finally, any error in regard to the prosecutor's statement on the curative instruction, or the denial of the mistrial motion, is harmless beyond a reasonable doubt. Later in the closing argument, the prosecutor argued **without** objection:

> The defendant went to Loblack's before and after. Shows a plan. They were going to get the car. They had to call the victim.
>
> We had Scott Kurzawa testify that the victim had received a phone call and that he was going down to Melbourne to sell his car. It was planned.
>
> It's obvious from the evidence that there was a plan to lure John Shires down to the Colonial Motel. They were anticipating getting the car. They received the car.
>
> And who was involved in doing that? Arturo Benedith. He was at Loblack's place before and after, and he's the one who did all the talking.

(R 353). After pointing out that reasonable inferences from the evidence show Benedith provided the gun, drove the victim's car from the murder scene, had proven leadership qualities, and **a** pattern of using minors to **carry** out his criminal escapades, the prosecutor again argued that "he planned" the instant crime. (R 355). Again, there was no objection. Thus, any error in the prosecutor's initial statement asserting that the evidence showed that Benedith planned the crime was waived when Benedith failed to

object when the evidence of his having planned the crime was later argued in detail. This waiver rendered any errors harmless beyond a reasonable doubt.

Point VIII

THE TRIAL COURT DID NOT ERR IN PERMITTING THE MURDER VICTIM'S SISTER TO TESTIFY TO VICTIM IMPACT; SAID EVIDENCE WAS RELEVANT AND ADMISSIBLE.

Benedith complains that two comments made by the sister of his murder victim during the penalty phase of his trial were improper victim impact evidence. (IB at 66-68). Specifically, he complains:

> ...the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be presented as a part of victim impact evidence.
>
> Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. §921.141(5). The impact of the murder on family members and friends is **not one of these aggravating circumstances,** Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978).

Grossman v State, 525 So.2d 833, 842 (Fla. 1988).

(IB at 66-67).

In *Payne v. Tennessee,* 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Court held that evidence and argument pertaining to the personal characteristics of the murder victim and the impact of the victim's death on his family members are valid means of advising the sentence of the specific harm caused by the defendant's unlawful conduct. Florida's constitutional provisions and legislative enactments make it clear that "victim impact evidence is to be heard in considering capital felony sentences." *Windom* v. State, 656 *So.2d* 432, 438 (Fla. 1995). See §921.141(7), Fla. Stat. (1995). Victim impact evidence 'should be limited to that which is relevant . . .." *Bonifay v. State, 680* So.2d 413, 419 (Fla. 1996).

In *Windom,* this Court made it clear that to preserve this issue for appellate review, there must be a specific objection to the allegedly improper victim impact evidence at the time the evidence is adduced. 656 So.2d at 438. Benedith made no objection to the first or second complained-of comments. (See R 134). Rather, after the witness uttered two additional sentences (neither of which he complains of), he objected. (R 135). Thus, this issue is not properly before this Court in regard to either complained-of comment; it need not be further considered. *Windom.*

Moreover, the objection eventually made was not based on relevancy; rather, it was a "hearsay" objection. (R 135). The trial judge properly overruled the hearsay objection, and any relevancy objection would have been subject to the same ruling.

In *Bonifay v. State,* this Court said:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. a loss to the family is a loss to both the community of the family and to the larger community outside the family.

680 So.2d at 419-420. In *Bonifay,* the murder victim's wife commented on "the effects of her husband's death on her . . .." *Id.* at 419. This Court found such testimony clearly relevant. *Id.* at 420.

In the instant case, the sister's comments explained the composition, and nature, of the family community which consisted of the victim, herself, another brother, and their mother. (R 134). It also showed the financial effect of the murder victim's death on herself and their mother. (R 135). Thus, these comments were relevant, admissible victim impact evidence. *Bonifay; Windom.*

Finally, assuming *arguendo* that the testimony was improper victim impact evidence, Benedith is entitled to no relief as the error was harmless beyond a reasonable doubt. *See Windom, 656 So.*

2d at **438-439.** There is no reasonable possibility that the jurors advised imposition of the death penalty based on the complained-of comments. Benedith is entitled to no relief.

POINT IX

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE AGGRAVATOR, MURDER-COMMITTED DURING-THE-COURSE-OF-A-FELONY, I.E., ROBBERY.

The trial court did not err in instructing on the potential aggravator, murder-committed-during-a-felony. Benedith made no objection at the time the instruction on this potential factor was given. (R 378-379). Neither did he object at the charge conference when the State said it wanted the two aggravating factor instructions given.[31] (R 209).

Further, at a post-jury sentencing hearing, the defense

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[31] Later, when the judge indicated that in conjunction with the committed-during-a-felony aggravator, he would also instruct that "before you can recommend a sentence of death, you must find . , . Benedith . . . was major participation in the felony of robbery , . . and this major participation is combined with reckless indifference by . . . Benedith, to human life," (R 219), defense counsel objected that he did not believe "that there's any evidence" of such participation by Benedith. (R 220). The State listed the evidence which it felt would establish both major participation and indifference to human life, and the trial judge ruled it to be "a jury question." (R 221). There was no objection to the giving of the committed-during-a-felony aggravator on any basis other than sufficiency of the evidence as to reckless intent. Thus, the issue raised on appeal is not preserved.

complaint about the aggravator was argued. Defense counsel did not raise the issue asserted on appeal, to-wit: That an instruction on an aggravator not supported by the evidence "skews the analysis in favor of imposition of the death penalty." (IB at 70). Rather, trial counsel argued only that the evidence on the issue of "how the defendant acted . . , whether . . . his actions were indifferent . . ." to life **was** insufficient. (R 451). Later, he made it clear that his argument went only to "[t]he question of intent for John Shires to die."[32] (R 455). Thus, the argument raised on appeal was not presented to the trial court and is not, therefore, cognizable in this Court. ***Steinhorst v. State, 412*** So.2d 332 (Fla. 1982); ***Judd*** v. *Rodman,* 105 F. 3d 1339, 1341 (11th

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[32] As a separate issue, defense counsel below complained that 'since he could not have been convicted but for the underlying felony, the underlying felony is really subsumed in the conviction and carries very little weight as an aggravating factor. (R 458). However, he contended that "the Supreme Court resolved that issue . . . coming up with the additional requirement that in **a** felony murder case, the State has an additional burden . . . to show the defendant . . . was a major participant in the felony murder itself. But then they must also show that the defendant acted with reckless indifference to the life." (R 451). Although this issue was not raised on appeal, the State points out that the contention is incorrect. No additional burden has been placed on the State seeking to establish committed-during-course-of-a-felony. All the State needs to establish is a murder occurred during a felony in which the defendant participated. See State's Cross-Appeal, Initial brief, Point I, ***infra,*** at 95.

Cir. 1997)["[A]n objection on specific grounds does not preserve the error for purposes of appeal on other grounds"]. *See Wyatt v. State, 641* So.2d 355, 360 (Fla. 1994) [inflammatory objection below cannot support hearsay claim on appeal - issue not preserved].

The claim that *Omelus v. State,* 584 So.2d 563 (Fla. 1991) requires a reversal and a new penalty phase is without merit. *Omelus* does not stand for the proposition asserted; rather, its holding regarding the HAC factor instruction was simply that the HAC "aggravating factor cannot be applied vicariously." 584 So.2d at 566. See, e.g., *Williams v. State, 622* So.2d 456, 463 (Fla. 1993) ["We have expressly held that this aggravating factor cannot be applied vicariously, absent a showing by the State that the defendant directed or knew how the victim would be killed." *citing Omelus] ; Archer v. State,* 613 So.2d 446, 448 (Fla. 1993). Omelus did not know how his hit man would murder the victim, and therefore, the choice of an HAC method of murder could not be imputed to him. 584 So.2d at 566.

The committed-during-the-course-of-a-felony aggravator was applicable to Benedith's case. He personally participated in the crime. Thus, there was no improper instruction. The standard for the giving of a jury instruction on a potential aggravator is "some evidence." See *Hunter* v. State, 660 So.2d 244, 252 (Fla. 1995) .

Clearly, the evidence of Benedith's participation in the subject crimes exceeded that threshold,

Finally, Benedith complains that "[t]he actions by Appellant would necessarily have been viewed by a lay person as occurring during the course of robbery with reckless regard for human life." (IB at 70). This claim is procedurally barred because it was not raised below.

Further, assuming *arguendo* that the statement is true, it does not entitle Benedith to relief. There is no requirement that the State prove that the felony murderer committed the crimes with reckless disregard for human life in order to be entitled to that aggravator. Finally, even if such a proof was required, Benedith's claim is without merit as the jury was instructed that it had to make such a finding, unless it concluded that Benedith was the shooter, or intended that the victim be killed or that lethal force be used. (R 378, 379; T 2163-2164). Further, the sufficiency of the evidence on that point was argued to the jury by both the State and the defense.[33] (R 353-356, 364; T 2052, 2130).

As Benedith points out, the jury is presumed to follow the

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[33] Further argument was made to the trial court in a hearing held subsequent to the jury recommendation. (See R 451, 454-455).

law, (IB at 71-72), and therefore, if the evidence was insufficient to establish the aggravator, it must be assumed that the jury rejected it. *See Wyatt v. State,* 641 So.2d at 360 [*citing Sochor v. Florida,* *U.S.* ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992)]. There is nothing but Benedith's unsupported speculation to indicate that the jury 'found" the allegedly improper aggravator and relied on same in rendering death recommendation. "[I]t cannot be presumed that the jury found the existence of aggravating factors not supported by the record." *Wyatt,* 641 So.2d at 360.

In *Banks v. State,* this Court faced a similar issue. The CCP aggravator submitted to the jury was not found by the trial court. No. 83,774, slip op. at 3 (Fla. Aug. 28, 1997). This Court held: "The fact that the trial judge did not determine the existence of CCP does not preclude a finding of harmless error." *Id.* There was some evidence supporting the CCP instruction, three other aggravators, and little mitigation. *Id.* This Court held that any error in giving the CCP instruction was harmless. *Id.*

The same result should be reached in the instant case. Clearly, there was evidence supporting the committed-during-a-felony aggravating factor instruction. The mitigation was so slight as to be almost non-existent, and although there was only one other aggravating factor found by the trial court, it was

especially compelling. Emphasizing the importance of the prior violent felony aggravator, the trial judge said:

> First, after major participation in the robbery which lead to the death of John Shires on May 5, 1993, the defendant orchestrated another robbery attempted using the same firearm that killed John Shires. The Defendant had a .32 caliber pistol, socks, and handcuffs. The Defendant put the firearm to the head of the victim and said he would have to kill her.[34]

(footnote added) (R 517-518). The prior-violent-felony aggravator was particularly weighty, far outweighing the scant mitigation. As a result, any error in giving the challenged instruction was harmless beyond a reasonable doubt.[35] *Banks.*

POINT X

THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE JURORS FOR CAUSE.

Benedith claims that the trial court should have stricken three prospective jurors for cause, i.e., Juror Wyatt, Juror

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[34] Indeed, the reason the later victim was not killed appears to be that the crime was interrupted by two men, Ms. Mercette's friend and the couple's neighbor. (See R 190).

[35] Although another aggravator is not needed for this Honorable Court to conclude that any error was harmless, the State points out that the trial judge erred in failing to find the committed-during-a-felony aggravator. Since the State was entitled to that aggravator, as a matter of law, this Court could consider same in determining the harmlessness of any error.

Taylor, and Juror Lang. (IB at 73). He represents that "[t]he defense exhausted their preemptory challenges and requested additional preemptory challenges." (IB at 73). He also claims that "[t]he defense stated that had they had the opportunity, they would have used a peremptory challenge on Juror Wyatt." (IB at 73). Benedith misrepresents the record in several respects.

First, the defense did not exhaust its peremptory challenges. When the jury and alternates had all been selected, Benedith still had one unexercised peremptory. (T 942). At the time he asked the court to excuse Juror Wyatt for cause, he still had two remaining peremptories.[36] (T 897, 898). Rather, he wanted the court to give him 'an additional peremptory challenge to exercise against Miss Wyatt."[37] (T 897) .

"'To show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted.'" *Hall v. State,* 614 So.2d 473, 476 (Fla. *1993) [quoting, Pentecost v. State, 545* So.2d 861, 863 n.1 (Fla.

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[36] Contrary to appellate counsel's claim, Benedith never said "had he had the opportunity," he would have used a peremptory on Juror Wyatt; he had two such challenges remaining at the time.

[37] The judge had previously given both sides two additional peremptories. (T 785).

1989)]; ***Trotter v. State, 576*** So.2d 691, 693 (Fla. 1990). The defendant must specify which juror he "otherwise would have struck peremptorily," and that person must have been challenged or objected to "after his peremptory challenges had been exhausted." ***Trotter, 576*** So.2d at 693. Benedith did not exhaust all of his peremptories; thus, he did not meet the standard. This issue is procedurally barred.

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.

Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984), cert. ***denied, 469*** U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). "[T]he competency of a challenged juror is a mixed question of law and fact, the resolution of which is within the trial court's discretion." ***Hall,*** 614 So.2d at 476. Benedith has failed to allege, much less show, that the trial court abused his discretion in denying the for-cause challenge to Juror Wyatt.

Benedith's objection to Juror Wyatt is that she 'stated that she would not take in to account a prior conviction in judging evaluating the credibility of a witness." (IB at 73). That statement is the entire appellate complaint about Juror Wyatt, and the State submits that such a barebones presentation of an issue is

wholly insufficient for appellate review. Therefore, the complaint about Juror Wyatt is procedurally barred.

Assuming ***arguendo*** that the Juror Wyatt issue is properly before this Court, it is without merit. The record reveals the following:

> [Prosecutor]: In determining credibility in a criminal case or in a trial setting, would you take into account things like whether they have a criminal record, whether or not they have pending criminal charges, or whether they were paid money?
>
> [Juror Wyatt]: You mean the witness or --
>
> [Prosecutor] : The witness, yes.
>
> [Juror Wyatt]: No.

(T 768). Later, Defense Counsel wanted to challenge Juror Wyatt "for cause based on her answer to the question that she would not take into account whether or not someone who had been convicted of a crime . . .." (T 790). The judge sent for her and asked:

> [The Court]: If I instructed you that a witness's prior conviction of a crime is something that you would consider in determining whether or not that witness was a credible person, could you follow that instruction?
>
> [Juror Wyatt]: Yes, sir.
>
> [The Court]: Okay. Counsel have any questions? . . . Defense?
>
> [Defense Counsel]: No, sir.

(T 790, 791). The "[c]hallenge for cause [was] denied." (T 791) .

Still later, Defense Counsel again sought to have the court excuse Juror Wyatt for cause on the identical basis. (T 895-896). The court responded: 'The one that said she could follow the law after I asked her . . .?" (T 896).

Again, the test is "whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." ***Smith v. State,*** No. 83,485, slip op. at 4 (Fla. July 3, 1997). In ***Smith,*** this Court expounded:

> The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record. ***Taylor v. State, 638 So.*** 2d 30, 32 (Fla. 1994). It is the trial court's duty to determine whether a challenge for cause is proper. ***Id.*** Since the carrying out of this duty poses a mixed question of law and fact, the trial court's determination will not be overturned in the absence of manifest error. ***See Mills*** v. ***State,*** 462 So.2d 1075, 1079 (Fla. 1985).

The trial judge made it clear that the witness's voir dire responses, and his observations of her as she made those responses, satisfied him that she met the ***Lusk*** standard. He said:

> For the appellate court's edification, I believe this juror was straight forward with the Court when the Court posed the question. And from the demeanor, the appearance, and the responsiveness to the question of the Court, I conclude she was credible when she said she would follow the law. Your motion -- your challenge for cause is, therefore, denied.

(T ***896-897).***

In ***Penn*** *v.* ***State, 574*** So.2d 1079, 1081 (Fla. 1991), this Court said that there is no abuse of discretion in denying challenges for cause where the jurors "ultimately demonstrated their competency by stating that they would base their decisions on the evidence and instructions."

> [T]he trial court is in the best position to observe the attitude and demeanor of the juror and to gauge the quality of the juror's responses. . . . So long as the record competently supports the trial court's interpretation of those words, appellate courts may not revisit the question.

Johnson *v.* ***State, 660*** So.2d 637, 644 (Fla. 1995). ***See Gore v. State,*** No. 80,916, slip op. at 3 (Fla. July 17, 1997).

Very clearly, Juror Wyatt said that she would base her decision on the instructions given her by the trial judge.[38] Thus, she was not objectionable, and the record competently supports the lower court's interpretation of her words. Benedith cannot demonstrate prejudice because he has not shown that he had to accept an objectionable juror. ***See Johnson; Penn.***

The issue of for-cause challenges to Jurors Taylor and Lang are procedurally barred because the only challenge to the composition of the jury was based on the trial judge's refusal to

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[38] When given the opportunity, Defense Counsel did not attempt to impeach her, or inquire further, on that assertion.

excuse Juror Wyatt for cause. (T 897). Since there was no mention of Jurors Taylor and/or Lang, the issue is not preserved.

Further, the issue is otherwise procedurally defaulted. Benedith's objection to Juror Taylor is that he "demonstrated unwillingness to follow the Court's instruction on aggravating factors focusing upon whether Appellant had remorse." (IB at 73). That statement is the entire appellate complaint about this juror. Such a barebones presentation of an issue is utterly insufficient to have it reviewed by this Honorable Court on appeal. It is, therefore, procedurally barred.

Assuming *arguendo* that the Juror Taylor issue is properly before this Court, it has no merit. The record shows:

> [Prosecutor]: Do you understand . . ., it's the burden on the State to prove the aggravators . . .?
>
> [Juror Taylor] : Yes.
>
> [Prosecutor]: Okay. And if . . . the State failed to convince you beyond a reasonable doubt that the aggravators existed, ... would you be able to recommend a life sentence?
>
> [Juror Taylor] : Yeah.
>
> [Prosecutor]: Do you have any question in your mind about that?
>
> [Juror Taylor]: No. . . .

[Prosecutor]: Have you ever thought about what type of cases the death penalty is appropriate for?

[Juror Taylor]: Yes. . . . Cases where no thought was put towards the victim. If that victim was shown no remorse . . . . But if it's done with no remorse, no feelings towards the victim, general attitude was not that of caring about others, the death penalty, I feel, is appropriate. . . .

[The Court]: Mr. Taylor . . . lack of remorse is not an aggravating circumstance in this state. Okay. So, that factor couldn't be used as an aggravating circumstance. . . . [O]nly the ones that are listed can be applied.

[Juror Taylor]: Right.

[The Court]: There's no such thing **as** a non-statutory aggravating circumstance. That is, if it's not listed, it cannot be used. , , . [I]f you feel there is something aggravating in your personal subjective view, but it's not an aggravating circumstance, it's not an aggravating circumstance. Do you understand that, sir?

[Juror Taylor]: Yes, sir.

(T 228-229, 230-233). Later, the following occurred:

[Juror Taylor]: . , . [I]f you performed a crime with no -- 1 say remorse, no respect to the victim, planned, no caring towards that victim's life or that person themselves . . . .

[The Prosecutor]: So, if someone committed a premeditated murder, they deserve the death penalty?

[Juror Taylor] : Premeditated and how many variables, what type of premeditated. They can be the person who in vengeance plans the death of another, and it could have been . . , the death committed a sorrow brought on them by another death.

That, maybe not. But the death where it was planned for

> greed, the victim was someone not known, it was no other circumstances other than death, killing, yes.
>
> . . . [B]ecause of the way I am raised, **I would** look **at it objectively as how I'm instructed.** . . .

(emphasis added) (T 361-363).

It is apparent from the colloquy that Juror Taylor understood that remorse was not an aggravating circumstance. He made it clear that he would consider all of the mitigating circumstances, and that there were instances in which he would not recommend the death penalty. Most importantly, he twice said that he would follow the court's instructions. Clearly, Juror Taylor did not qualify for a for-cause strike, and the trial judge did not err in denying same.[39]

Benedith's objection to Juror Lang is that his "intelligence was so low that the juror didn't really understand what is going on." (IB at 73). That statement is the entire appellate complaint about Juror Lang. The State submits that the complaint is unworthy of consideration because of the barebones presentation of the issue. The claim is procedurally barred.

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[39] The trial court denied the for-cause claim based on the alleged "unwillingness to follow the Court's instruction on aggravating factors," ruling it was "not sufficient." (T 659). The court also properly denied a for-cause strike request based on the claim presented at trial, but not on appeal, that due to Mr. Taylor's position on "technicalities," he would be prejudiced against the defense. (T 660).

Assuming *arguendo* that the Juror Lang issue is properly before this Court, it also lacks merit. The record shows that defense counsel moved to strike him "for cause," based on the "[p]erception that his intelligence is so low that he doesn't really have an understanding about what's going on." (T 661). He added:

> There's nothing -- I will admit that there's nothing on the record from the actual responses, but just his demeanor, the way he looks, the way he struggles with simple questions, the way that he just basically seems to agree with whoever speaks with him last. I have real concerns whether or not he has an understanding.

(T 662). The trial court, who also observed the prospective juror's responses, including his demeanor and looks, denied the challenge. The trial court's determination on this issue is decisive. *Johnson,* 660 So.2d at 644. Thus, Benedith has demonstrated no error.

POINT XI

THE TRIAL COURT DID NOT ERR IN DENYING THE MISTRIAL MOTION MADE WHEN A STATE REBUTTAL WITNESS BRIEFLY REFERENCED AN UNRELATED CHARGE MADE AGAINST APPELLANT.

Benedith complains that reversible error occurred when a state rebuttal witness, Dr. Riebsame, mentioned that "Benedith was arrested for forgery." (IB at 75). He claims that the trial court's curative instruction was insufficient 'to dissipate the harm," and that it "exacerbated the error by underscoring the fact

that Appellant was arrested in connection with another serious offense." (IB at 76).

Benedith neglects to mention that trial defense counsel never objected to the judge's proposal 'to tell the jury to disregard," and did not object or make any complaint regarding the adequacy of the instruction after it was given. (R 315-316) . Since this issue was not raised below, it is not proper on appeal.

Assuming ***arguendo*** that the issue may be considered by this Honorable Court, it is without merit. During presentation of the defense case, Benedith's psychological expert, Dr. Olsen, testified that one of the bases for his expert opinion was information he received from the Circles of Care Community Mental Health Center in New York.[40] (R 252, 253). He also reviewed records from Harlem Hospital and the New York police. (R 252). Dr. Olsen testified that Benedith was placed on medication used to treat "psychotic symptoms, including hearing voices." (R 253). He said that Benedith was also placed on this medication when he was seen by Circles of Care in 1991. (R 253, 254).

On direct, defense counsel also asked Dr. Olsen about "a series of tests as part of your evaluation." (R 254). Counsel

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[40] Benedith had been an outpatient in this facility. (R 252).

asked the doctor to "[t]ell the jury about those tests." (R 254). Dr. Olsen described them in considerable detail and testified to the diagnosis he reached based in large part on Benedith's performance on the tests. (R 254-259).

On cross, in response to the prosecutor's question that Benedith's contact with Circles of Care was not a hospitalization as Dr. Olsen had implied on direct, Dr. Olsen volunteered that Benedith was in "the county jail . . . in the forensic program" when he was seen by personnel from Circles of Care. (R 260). Although Dr. Olsen denied that he had found that Benedith was malingering his symptoms, he admitted that Benedith was "[e]xaggerating his symptoms to some degree . . .." (R 260). Later, Dr. Olsen explained that

> There's a number of indices that you can use on the MMPI to look and see if the person is telling the truth . . . . At times, when that F-Scale is extremely high, we tend to think that person is exaggerating or even malingering.

(R 260-261). The doctor then confirmed that Benedith's F-Scale score on that test 'was extremely high, yes." (R 261). He also admitted that Benedith's K-Scale score was "quite low," and in the opinion of "[s]ome people," such a difference in the F-Scale and K-

Scale scores 'is a very good indicator of . , . malingering. . .."[41] (R 261). Although Dr. Olsen admitted that Benedith "was not as troubled as he was saying that he was on the test," he refused to label Benedith's untruthfulness as malingering. (R 262).

On rebuttal, the State's psychological expert, Dr. Riebsame testified that he believed that Benedith was malingering, and that such behavior was seen in persons who have a

> motivation to behave in this way. You usually see it in a couple of different situations. In a legal situation, a person is motivated to appear more disturbed in order to relieve themselves of some amount of responsibility.

(R 310). The doctor testified that he, too, had reviewed the records from Circles of Care and had talked to 'Miss Penny, . . . the nurse and director of the Forensic Services." (R 314). Upon being asked "What did you learn from Miss Penny?, the doctor explained that Benedith was "being seen on a case management basis," that he "was not taking his medication," that he "was arrested on forgery charges, and "[i]t was at this time that he was arrested that he reported hearing voices." (R 314-315).

Clearly, the report of a forgery arrest coupled with the sudden onset of hearing voices was important to Dr. Riebsame's

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[41] Benedith's F-Scale score was 107, and his K-Scale score was 49. (R 261).

conclusion regarding Benedith's malingering. Thus, it was relevant as the basis for the doctor's expert opinion, and not, as Benedith claims on appeal, to attack his character. Further, even if it were not relevant, the testimony of Dr. Riebsame regarding the forgery arrest and its connection to the report of hearing voices was invited by the defense questioning of Dr. Olsen, by the doctor's volunteering that Benedith was in jail when seen, and by the contradictory and incredible statements the doctor made regarding the issue of malingering. ". . . [A] party may not invite error and then be heard to complain of that error on appeal." Terry v. State, 668 So.2d 954, 962 (Fla. 1996).

Because the evidence was relevant as the basis of an expert's opinion, and because it was invited by the defense, it was not objectionable. No curative instruction was warranted. That Benedith received such an instruction was a windfall to him, and he should not now be heard to complain to this Court, as he did not do below, that the windfall he received was not big enough!

Finally, even if there was an error not cured by the instruction, it was harmless beyond a reasonable doubt. Benedith, through his own expert, had already made it known to the jury that Benedith had already made it known to the jury that Benedith had been incarcerated previously. That Dr. Riebsame identified the

type of offense for which he was so incarcerated added little, if anything, detrimental to Benedith. Indeed, it **may** have benefited him that his jury **learned** that the prior incarceration was for a non-violent **crime.** In any event, considered in light of the overwhelming evidence of Benedith's guilt of felony murder and robbery, any undissipated prejudice arising from the rebuttal expert's reference to perjury was harmless error. *Cf. Williams v. State, 438* So.2d 152, 153 (Fla. 3d DCA 1983)[police officers suggest that defendant was suspect in another crime, harmless error in light of curative instruction and overwhelming evidence of guilt].

POINT XII

THE TRIAL JUDGE DID NOT ERR IN DENYING THE MOTION TO STRIKE THE ALTERNATE JURORS ON THE BASIS THAT THEY HAD SEEN THE DEFENDANT IN SHACKLES.

Benedith complains that two alternate jurors saw him in shackles, and therefore, his "sentences must be reversed." (IB at **77). He claims that counsel** moved to strike the alternate jurors "[s]oon after the verdict." (IB at 77) . The record reflects that the issue was raised prior to the verdict. (T 2196) .

Trial Counsel announced to the court that if the verdict was

guilty, he was "going to move . . . to strike the alternates." (T 2196). He claimed that Benedith was "unhandcuffed, unshackled in front of them." (T 2196). After the jury's guilty vote was confirmed, the judge prodded counsel to make his motion. (T 2202). Counsel moved to strike the alternate jurors. (T 2202).

The trial judge said:

> The two alternate jurors obviously were separated from the twelve deliberating jurors. And while they did observe the defendant constrained by handcuffs and shackles, they did not participate in the decision with regard to guilt or not guilt of first degree murder and robbery.
>
> . . . [T]hen the defendant is . . . found guilty . ,. . [a]nd it is logical to believe that a Court would remand to custody someone so constrained . . . .
>
> . . . I'm not going to grant a motion to strike those alternate jurors because I need to have the ability should there be an emergency arise to replace the regular jurors.
>
> And I don't see . . . prejudice . . . .

(T 2203). The trial judge's reasoning and conclusion is imminently logical, and his decision should be upheld on the bases given.

However, the State also points out that the issue is procedurally barred. Benedith failed to raise this claim at the crucial time - the commencement of the penalty phase proceeding. The penalty phase began some three weeks after the conclusion of the guilt phase; thus, if Benedith had managed to conceive of some

possible prejudice, he clearly had the opportunity to place it before the trial judge for consideration. His failure to do so bars this claim on appeal.

Finally, the case law shows that the claim is without merit. In *Heiney v. State,* 447 So.2d 210 (Fla. 1984), the defendant raised a similar claim during the guilt phase of his trial. He claimed that "some of the jurors may have momentarily seen him in chains on two occasions while he was being transported to and from the courtroom." 447 So.2d at 214. This Court held that "the inadvertent sight of Heiney, . . . was not so prejudicial as to require a mistrial." *Id.* Likewise, in *Neary v. State,* a claim of prejudice based on jurors having seen the defendant brought to the courtroom in handcuffs was rejected. 384 So.2d 881 (Fla. 1980).

Benedith has demonstrated no error. However, even if error were found, it would be harmless beyond a reasonable doubt. Benedith has not shown that the jurors were affected by the shackles. He is entitled to no relief. *See Robinson v. State, 610* So.2d 1288, 1290 (Fla. 1992).

POINT XIII

THE CLAIM THAT FLORIDA'S DEATH PENALTY STATUTE WHICH PERMITS A RECOMMENDATION OF THE DEATH PENALTY TO BE MADE BY A BARE MAJORITY OF THE JURY IS UNCONSTITUTIONAL IS WITHOUT MERIT.

Benedith claims that Florida's sentencing scheme which permits a jury to recommend imposition of the death penalty based on a bare majority vote of the panel is unconstitutional. However, nowhere in his brief does he indicate that he raised this issue in the lower court. It appears from the record that he did not do so. Thus, this issue is procedurally barred. *See Larzelere v. State,* 676 So.2d 394, 407, 408 n.7 (Fla. 1996); *Fotopoulos v. State,* 608 So.2d 784, 794, 794 n.7 (Fla. 1992). *See Steinhorst v. State, 412* So.2d 332, 338 (Fla. 1982)

Assuming *arguendo* that the issue is not procedurally barred for failure to raise it below, it is without merit. Although Benedith concedes that this Honorable Court has "previously rejected" this issue, he contends that it is "ripe for re-evaluation now, however, because it has become clear that a Florida penalty jury's role is not merely advisory." (IB at 79). He proceeds to cite to a 1992 and a 1993 case which he offers in support of that contention. (IB at 79).

It is clear that this issue has not only been repeatedly

rejected by this Court for many, many years, it has recently been so rejected. Rejecting the **claim in** *Fotopoulos* ***v. State,*** this Court said that even if the issue had been preserved, the claim 'lacks merit." Id. at 794, 794 n. 7. The same result on the merits of this issue was reached two years later in ***Taylor*** v. ***State,*** 638 So.2d 30, 33 (Fla. 1994), and three years later in ***Hunter v. State,*** 660 So.2d 244, 253 (Fla. 1995). Finally, in ***Larzelere,*** this Court reaffirmed its repeated rejection of this issue. 676 So.2d at 407, 408 n.7.

Benedith has stated no valid reason for re-evaluating this claim. Further, he has stated no valid basis for reaching a different result after re-evaluation. Having demonstrated no constitution violations, Benedith is entitled to no relief.[42]

POINT XIV

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON SPECIFIC NONSTATUTORY MITIGATING CIRCUMSTANCES CLAIMED BY THE DEFENSE.

This claim is utterly without merit. ***Burns v. State, No.***

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[42] It is noteworthy that Benedith's vote was much greater than a 'bare majority." Death was recommended for him by a vote of 10 to 2. (See IB at 81).

84,299, slip op. at 2 (Fla. July 10, 1997). *See Consalvo v. State, No. 82,780, slip op. at 4 n.3 (Fla. July 17, 1997); Finney v. State, 660* So.2d *674, 684* (Fla. 1995); *Robinson v. State, 574* So.2d 108, 111 (Fla. 1990).

POINT xv

THE TRIAL COURT DID NOT ERR IN SENTENCING APPELLANT OUTSIDE THE SENTENCING GUIDELINES RANGE FOR ROBBERY WITH A FIREARM BECAUSE APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER IS PROPER.

Benedith's conviction for first degree murder should be upheld. By implication, Benedith concedes that if it is upheld, it is a sufficient reason for departure from the sentencing guidelines on his sentence for Count II, robbery with a firearm. (IB at 83). **Clearly**, that is the law. *Williams v. State,* 601 So.2d 1253, 1256 (Fla. 5th DCA 1992); *See Johnson v. State, 660* So.2d 637 (Fla. 1995). Thus, the trial court did not err in sentencing Benedith to a departure sentence for Count II. (See R 1031).

STATE'S CROSS APPEAL

POINT ONE

THE TRIAL JUDGE ERRED IN FAILING TO FIND THE AGGRAVATOR, THE MURDER WAS COMMITTED DURING THE COURSE OF A FELONY.

At the close of the trial phase evidence, the jury convicted Benedith of robbery and first degree felony murder. (T 2197) . During the penalty phase of the trial, the state requested a jury instruction on the statutory aggravator, committed-during-the-course-of-a-felony. (R 208). The jury was instructed thereon. (R 378-379). After the jury's 10 to 2 recommendation of death, the trial judge conducted a pre-sentencing hearing during which he heard argument relating to the subject aggravator. (R 451).

Without explanation, the trial court failed to find the committed-during-a-felony aggravator at sentencing on October 9, **1996.** (R 1041-1048). The Defendant filed his notice of appeal from the conviction and sentence on November 8, 1996. (R 1120). The State timely filed its notice of appeal on November 13, 1996. (R 1129).

The trial court erred in failing to find the committed-during-a-felony aggravator. The jury's verdict of guilty of robbery established the aggravating circumstance beyond a reasonable doubt. Cole v. State, No. 87,337, slip op. 6 (Fla. Sept. 18, 1997).

Indeed, this Court has long held that a contemporaneous armed robbery conviction 'unquestionably" warrants the finding of the committed-during-a-felony aggravator. *Perry* v. State, 522 So.2d 817, 820 (Fla. 1988). *See Clark v. State, 443* So.2d 973, 978 (Fla. 1983).

Further, in *Johnson v. State,* the defendant's complaint about what he characterized as an automatic aggravator was rejected:

> . . . Johnson urges the Court to find error in the use of the felony-murder aggravator, on grounds it creates an 'automatic" aggravator and renders death a possible penalty even in the absence of premeditation. This contention has been repeatedly rejected by state and federal courts. E.G., *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d *568 (1988); Stewart v. State, 588* So.2d 972 (Fla. 1991), cert. denied, 503 U.S. 976, 112 S.Ct. 1599, 118 L.Ed.2d 313 (1992).

660 So.2d 637, 647 (Fla. 1995). Most recently, in *Blanc0 v. State, No.* 85,118 (Fla. Sept. 18, 1997), this Court more fully addressed the issue. Again rejecting the automatic aggravator argument, this Court said:

> Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. . . . This scheme thus narrows the class of death-eligible defendants. See Zant v. Stephens, 462 U.S. 862 (1983). t e v . State, 403 So.2d 331 (Fla. 1981). We find no error.

NO. 85,118, at 5.

The State was entitled to the committed-during-a-felony aggravator as a matter of law. This Court should find that factor and consider it in regard to any issues to which it is relevant in Benedith's appeal.

POINT II

THE TRIAL COURT ERRED *IN* PRECLUDING THE STATE FROM PUTTING ON EVIDENCE RELATING TO THE DEGREE OF CULPABILITY OF THE CODEFENDANTS.

In the lower court, Benedith argued that he should not be given a death sentence because his codefendant did not get one. On that issue, the lower court took judicial notice of Taylor's plea to second degree murder with a deadly weapon and robbery with a deadly weapon. (R 212). The State sought to present the testimony of Dr. Riebsame regarding his expert opinion of the factors relating to the degree of Taylor's culpability in the subject crimes. The judge improperly precluded the State from doing so.

"Once the defense argues the existence of mitigators, the state has a right to rebut through any means permitted by the rules of evidence, and defense will not be heard to complain otherwise." *Wuornos v. State, 644* So.2d 1000, 1009-1010 (Fla. 1994), cert.

with Gore's co-defendant who had been convicted of manslaughter for the same crimes. No. 80,916, slip op. at 7 (Fla. July 17, 1997). This Court said that the state was entitled to put on testimony showing why the co-defendant received 'more lenient treatment." *Id.* Thus, the evidence on which the State based its determination that young Taylor's level of culpability for the instant crimes was less than Benedith's was admissible. Gore; *Wuornos*.

The doctor would have testified that: Taylor was "mildly retarded" with 'an I.Q. of around seventy." The boy "acted under the substantial domination of Arturo Benedith in this crime," he had "a mental age of twelve or eleven at the time this crime was committed," he had been treated for "a long-standing history of learning disabilities," and 'he did not reveal any criminal history." (R 337-338) .

Evidence that a codefendant "was a 'follower," may support imposition of a lesser sentence. *See Hazen* v. State, No. 84,645, slip op. at 9 (Fla. Sept. 4, 1997). Also, evidence indicating that he was not "the dominant actor" is relevant. Cole v. State, No. 87,337, slip op. at 6 (Fla. Sept. 18, 1997). See Answer Brief, Point II, *supra*, at 28-40. Thus, that Taylor acted under the substantial domination of Benedith in participating in this crime was clearly relevant, and should have been considered.

Further, evidence of mental retardation and low I.Q. is mitigating. ***Mason v. State, 597*** So.2d 776, 780 (Fla. 1992). *See* ***Thompson*** *v.* ***State, 648*** So.2d 692, 697 (Fla. 1994). Likewise, age and a history of learning disabilities is legitimate mitigation. ***Griffin v. State, 639*** So.2d ***966, 968*** (Fla. ***1994); Hall v. State,*** 614 So.2d 473, 478 (Fla. 1993). Finally, a lack of any criminal history is significant mitigation. ***Hall, 614*** So.2d at 479. Thus, the doctor's testimony regarding young Taylor was relevant and admissible. The trial court erred in precluding it.

CONCLUSION

Based upon the foregoing arguments and authorities, Benedith's convictions and sentences of death should be affirmed in all respects.

Respectfully submitted,

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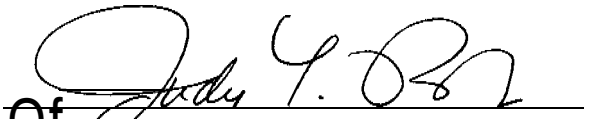
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by U.S. Mail to George D. E. Burden, a Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 19th day of September, 1997.



Of counsel