IN THE SUPREME COURT OF FLORIDA

DAVID PAUL SNIPES,

Appellant,

vs. CASE NO. 90,413

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

I. The trial court properly allowed the State to correct the Indictment to reflect the actual spelling of the victim's name. Consistent with case law, scrivener's errors in Indictments may be corrected, as long as the charge is not changed and a new offense is not created. The appellant is not entitled to discharge on this issue.

II. The trial court correctly denied the defense motion for mistrial based on the State having revealed that Snipes was in custody while awaiting trial. The brief reference to Snipes having been in jail was not unduly prejudicial and did not vitiate the fairness of the trial. No new trial is warranted.

III. The trial court correctly denied Snipes' motions to suppress his statements to law enforcement. Snipes' status as a juvenile at the time of the offense did not destroy the voluntariness of his confession.

IV. The trial court properly denied Snipes' motion to suppress his statements to his uncle, Martin Patterson. No legal basis for exclusion of this evidence has been identified.

V. The appellant's claim based on testimony relating to Snipes' remorse or lack of remorse has not been preserved for appellate review. Even if considered, no relief is warranted since the defense invited any error by attempting to establish that Snipes was remorseful. In addition, any possible error would

clearly be harmless on the facts of this case.

VI. The imposition of the death sentence was proper and proportionally warranted in this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO AMEND THE INDICTMENT.

Appellant Snipes' first claim alleges that the court below erred in granting the State's motion to correct a typographical error in the Indictment. The Indictment had been returned on October 31, 1995 (V1/R9-11; V4/R133). The State filed a motion requesting permission to correct the spelling of one of the victim's names, and a hearing was held on September 18, 1996 (V4/R131-136). The prosecutor represented that the modification only involved the correction of a typographical error, resulting in the victim's name being spelled "Kark" rather than "Karl," and the court granted the motion (V4/R130, 134-135, 137).

A review of the relevant case law establishes that the trial court's ruling was proper. It is well settled that, although an Indictment cannot be amended, it can be altered as long as the substance of the document is not affected. United States v. Miller, 471 U.S. 130, 144-45 (1985); Pickeron v. State, 113 So. 707 (1927); Ingleton v. State, 700 So.2d 735 (Fla. 5th DCA 1997). An impermissible amendment has occurred only when the charge has been altered to be a different offense than that found by the grand jury. Miller, 471 U.S. at 144.

Florida Rule of Criminal Procedure 3.140(o) provides that no

relief can be granted due to any defect in the Indictment unless the accused was misled in the preparation of his defense or is exposed to a substantial danger of a subsequent prosecution for the same offense. This is consistent with the rule that any variance between the crime charged by the grand jury and the crime for which a defendant has been convicted is only fatal if prejudicial. Ingleton, 700 So.2d at 739. A variance between the allegata and probata is acceptable where there is no material difference, where the defense has been adequately informed of the charge and is adequately protected against another prosecution for the same offense. Raulerson v. State, 358 So.2d 826, 830 (Fla.), cert. denied, 439 U.S. 959 (1978). The same constitutional concerns of notice and jeopardy are involved in determining the validity of any variance in an altered charging document; it is these concerns that provide the basis for the rule prohibiting amendments to Indictments that charge new offenses. To preserve these protections, a defendant may only be convicted of the specific crime for which he has been charged.

In the instant case, no new crime was charged when the State was permitted to correct the Indictment with regard to the victim's name. Changing one letter in the name, an identified typographical error that created the unfamiliar first name "Kark" rather than "Karl," did not substantively affect the allegation. The

appellant's concern that this Court may not take judicial notice of "Kark" as either a nickname or a scrivener's error is unwarranted, since record clearly reflects there was no dispute with the prosecutor's characterization of a typographical error (V4/R133).

Clearly, not every change to an Indictment reduces the charging document to a nullity. It is only when the Indictment subjects an accused to an offense not charged by the grand jury that an improper amendment has occurred. Thus, surplusage may be stricken; times and dates may be altered. Tingley v. State, 549 So.2d 649 (Fla. 1989); Ingleton; Huene v. State, 570 So.2d 1031 (Fla. 1st DCA 1990). For the same reasons, scrivener's errors may be corrected. When such an error relates to a victim's name, the key issue is identity. See, Raulerson. Where, as here, the victim's identity doesn't change but the spelling of the name is corrected, no new offense has been alleged.

The cases cited by Snipes do not compel a contrary result. In Akins v. State, 691 So.2d 587 (Fla. 1st DCA 1997), the Indictment charged the non-existent offense of attempted felony murder. To remedy the situation, the parties stipulated that the charge should have been attempted premeditated murder. However, after Akins pled to the stipulated charge, the district court held that the stipulation could not confer jurisdiction of the new charge, so the plea could only apply to the initial Indictment, i.e., the non-

existent offense. In the instant case, the charge itself has not been impacted; even if the victim's identity were to be seen as an essential element of the crime, the identity was not changed here.

In Jacob v. State, 651 So.2d 147 (Fla. 2d DCA 1995), the district court granted relief where the offense charged a robbery of James Neeley and the only proof at trial identified the victim as Joseph L. Neeley. Noting there was no evidence which linked the two names and nothing to support an inference that both names were for the same person, the court reversed the conviction. The case at bar did not involve two distinct names, such as James and Joseph; at issue is the same name, with only one letter difference, which is fully explained in the record as a typographical error.

In addition, Snipes' assertion that "the victim's identity was not without question in this case," (Appellant's Initial Brief, p. 22) is refuted by the record. The victim was clearly identified as Karl Markus Mueller -- a pathologist identified the subject of the autopsy as Karl Markus Mueller and a certified death certificate for Karl Markus Mueller was admitted without objection (V13/T622, 624, 631-632). The trial judge noted prior to trial that the victim's identity was not "the most salient issue" in the case (V10/T8).

Snipes admits that it was Mueller's body found in Mueller's home but speculates that perhaps he actually shot someone else,

since he didn't know the victim and couldn't remember the address where he had gone to commit the murder. Agent Futch testified at trial that Snipes told him that Saladino provided an address and directions to an apartment in Bonita (V13/T736-737). He asked Saladino who he had to shoot, and Saladino described the intended victim as a big blond, with long hair in back (V13/T737-738). Saladino drew a map and wrote the word "Hacienda" on a piece of paper (V13/T739). Snipes went to Bonita, followed the directions, walked to the apartment, jumped a wall, entered a screen door and knocked on the inner front door (V13/T738, 740). When the victim answered, Snipes shot him four or five times, first in the head and then the chest (V13/T740). Snipes had told his uncle that he shot at his victim four times, missing once, and that the guy he shot was wearing a Mohawk (V13/T677). Other testimony at trial established that Mueller lived in Hacienda Village, a walled complex; his apartment had a screened-in front porch; he was shot three times, including in the head and chest; another bullet was found in the apartment; and his picture shows a large man with a Mohawk (V5/R263, 264; V11/T348, 350, 388, 391; V12/T426, 458, 467; V13/T625-630). This evidence was sufficient to establish that Snipes didn't kill just anyone, he killed Karl Markus Mueller.

This Court has acknowledged that our discovery rules have eliminated the necessity for a number of common law rules initially

developed to assure a fair trial. Tingley, 549 So.2d at 650-51. Snipes has never alleged any prejudice from the ruling he challenges. He clearly was not misled about the victim's identity and, indeed, it is difficult to imagine that the correction could have any affect on his defense, particularly since he never knew the identity of his victim. Since no potential prejudice has been identified, Rule 3.140(o) precludes any relief on this issue.

On these facts, Snipes has failed to demonstrate that there was an improper amendment to the Indictment charging him with this murder. He is clearly not entitled to be discharged.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL WHEN THE JURY HEARD SNIPES HAD BEEN IN JAIL AWAITING HIS TRIAL.

Snipes next asserts that a mistrial should have been granted when one of the prosecutor's questions revealed that Snipes had been in jail at some point prior to his trial. Snipes suggests that mention of his pretrial detention destroyed his presumption of innocence, and unfairly tipped the scales in the State's favor. However, the record does not reflect that any egregious error was committed, and the motion for mistrial was properly denied.

Although Snipes analogizes the prosecutor's comment on his pretrial detention to situations where a defendant has been tried while in shackles or wearing prison garb, the isolated reference to Snipes having been a jail inmate is hardly comparable to a defendant appearing in court day after day as a person that has already been removed from society. The impact on a defendant's presumption of innocence in the latter circumstance, and resultant deprivation of a fair trial, is largely a measure of the fact that such physical evidence of restraint serves as a "constant reminder of the accused's condition." Anderson v. State, 574 So.2d 87, 93-94 (Fla. 1991), quoting Estelle v. Williams, 425 U.S. 501, 504 (1976). In Anderson, this Court rejected the claim that a mistrial should have been granted after the jury viewed a short videotape which showed a brief glimpse of Anderson wearing prison garb. This

Court noted that the circumstances did not demonstrate a "constant reminder" of Anderson's situation to support a conclusion that Anderson was denied a fair trial. The facts of the instant case are much closer to what occurred in Anderson than in the standard shackling/prison garb cases cited by Snipes. See also, Jackson v. State, 545 So.2d 260, 265 (Fla. 1989) (jury's inadvertent sight of defendant in handcuffs not so prejudicial as to require mistrial), cert. denied, 506 U.S. 1004 (1992); Maxwell v. Wainwright, 490 So.2d 927, 930-931 (Fla.) (mere viewing of defendant in custody of officers does not raise question of denial of indicia of innocence as in prison garb/shackling cases; this was routine security measure, courts are not to lightly presume jurors would perceive it as anything else), cert. denied, 479 U.S. 972 (1986).

Clearly, the limited comment on Snipes having been in jail at some time following his arrest and prior to trial could not have the prejudicial effect suggested in Snipes' brief. There was no indication from the comment that Snipes' custody had continued up to and throughout the trial. Most jurors would possess the common sense to realize that a person that has been arrested and indicted for first degree murder would, at some time, be detained in jail. Of course, Florida law does not require that such a person even be granted a right to bail. Fla.R.Crim.P. 3.131(a). Jurors are frequently aware of some pretrial detention in murder cases by virtue of testimony by cellmates or jailhouse informants describing

conversations with a defendant. See, e.g., Hayes v. State, 660 So.2d 257 (Fla. 1995); Thompson v. State, 648 So.2d 692 (Fla. 1994), cert. denied, 515 U.S. 1125 (1995); Heath v. State, 648 So.2d 660 (Fla. 1994), cert. denied, 515 U.S. 1162 (1995); Pittman v. State, 646 So.2d 167 (Fla. 1994), cert. denied, 514 U.S. 1119 (1995); Rodriguez v. State, 609 So.2d 493 (Fla. 1992), cert. denied, 510 U.S. 830 (1993); Happ v. State, 596 So.2d 991 (Fla. 1992). Such knowledge surely does not vitiate the fundamental fairness of a trial so as to require the granting of a mistrial.

The appellant's reliance on Reeves v. State, 23 Fla. L. Weekly D121 (Fla. 2d DCA Dec. 31, 1997), does not provide a basis for relief on this issue. In Reeves, the error for which the district court reversed the conviction was improper impeachment of a defense witness. Reeves' brother had coincidentally been in jail with Reeves prior to trial on an unrelated matter; when the State cross examined the brother, the prosecutor brought out the fact that Reeves and his brother had been in jail together, suggesting they had had an opportunity to collaborate their stories about Reeves' fight with a co-worker which had led to the charges for which Reeves was being tried. The district court held that the brother's incarceration was a collateral matter which did not affect his credibility, and therefore this evidence served only to embarrass and discredit the only defense witness. Although the court noted, as an aside, that the evidence also revealed to the jury that

Reeves had been detained prior to trial, impermissibly raising "an inference that the appellant was especially dangerous or had committed other crimes," this was not the basis of the court's granting of relief and should not be considered persuasive authority on the point. Furthermore, any impermissible inference arose because, presumably, the jury would not expect someone merely accused of striking a co-worker in the face to be detained prior to trial. The same presumption does not apply for a defendant accused of the far more serious crime of first degree murder, so the knowledge of pretrial detention would not carry the same potential for prejudice feared in Reeves.

In addition, pursuant to Section 924.051, Florida Statutes (1996), the appellant has the burden of proving that any error was prejudicial. He has not attempted to do so beyond characterizing the comment as "highly prejudicial" and asserting that the State's evidence as to the identity of the victim was entirely circumstantial. As previously discussed, the State clearly established the identity of Snipes' victim, and the appellant's guilt has never been seriously contested. Snipes' repeated statements to different witnesses describing the circumstances of this murder were consistent with the physical evidence at the scene, and the only real theory of defense presented to the jury was that Snipes was young and easily led and his statements had been coerced (see defense opening and closing arguments, V11/T345-

347; V14/T829-855; 877-884). Given the strength of the State's case against Snipes, any impropriety in the jury hearing that he had been in jail at some point prior to trial was clearly harmless under any standard. The prosecutor's use of Snipes' confinement as a point of reference for testimony about a conversation between Snipes and witness Johnson did not vitiate the fundamental fairness of the appellant's trial so as to require the granting of a mistrial. Thus, the trial court correctly denied the motion for mistrial, and no relief is warranted on this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING SNIPES' MOTION TO SUPPRESS STATEMENTS.

The next issue challenges the trial court's denial of Snipes' motions to suppress the statements he made to Agent Futch. Snipes claims that his age; an alleged "subterfuge" to get him out of his house; the failure to secure the presence of a parent; the conflict over whether Snipes asked for an attorney; and Agent Futch's desire to obtain an incriminating statement establish that his statement was involuntary. For several reasons, this claim must fail.

It must be noted initially that this claim, as presented, was not adequately preserved for appellate review. Although Snipes' brief takes the position that his statements were not voluntary because no parent or attorney had an informed opportunity to be present during the interview, the claim was addressed to the trial court as an allegation that Snipes' Miranda rights were violated. There was never an assertion to the court below that Snipes' statements were not voluntary. The Motions to Suppress that were filed merely stated that Snipes' constitutional rights had been violated; no facts were offered in support of this conclusory allegation (V1/R12-13, R56-57). At a hearing on the motions to suppress, Lee County Sheriff's Detective Barry Futch testified to the circumstances surrounding Snipes' confession; Snipes then testified that he had asked Lt. Jeff Taylor for an attorney twice before he was interviewed by Det. Futch (V1/R28-37; R46-51).

Snipes stated that he believed he had previously asked Futch for a lawyer as well (V1/R47-48). Det. Futch had testified that Snipes did not ask for a lawyer and that no interrogation had taken place until around 6:00 a.m. (V1/R42, 44). The hearing was continued so that the State could present Lt. Taylor's testimony (V1/R51). Taylor later testified that he had had a short conversation with Snipes prior to Futch taking Snipes' statement, at which time Taylor introduced himself, told Snipes he was there on this case and that they wanted to get to the bottom of it (V2/R65). According to Taylor, Snipes never asked him for an attorney, never said anything which could be interpreted as a request for an attorney, and never asked anyone else for an attorney in Taylor's presence (V2/R66-67). Snipes then testified again, insisting that he had asked both Futch and Taylor for an attorney at different times (V2/R71).

Following argument by both attorneys, defense counsel stated:

> One other brief argument, Judge. The officers also, at the time of this incident, Mr. Snipes was 17 at the time the crime was committed; therefore, we would argue that -- while the juvenile rights by Statute applied, they did not advise him of that and/or his parents and we submit that's additional reason it should be suppressed.

(V2/R75-76). This lone reference to unspecified statutory rights for juveniles as an independent basis for suppression could not have put the trial judge on notice as to the claim now being raised, and therefore did not preserve this issue. Snipes' brief

does not cite any statutory rights or allege any violation thereof. Defense counsel below did not request the opportunity to present evidence to support any implication that Snipes' mother would have liked to have accompanied her son had she known he was going to be interviewed about a murder; nor did counsel address this issue with the witnesses that were presented at the suppression hearings. Clearly, the State had no reason to believe it was necessary to adduce testimony about what the mother may or may not have been told at the time. Given the general nature of this allegation as made to the trial court after all the evidence had been presented, and defense counsel's failure to provide evidentiary support for any claim beyond his assertion that he requested an attorney, this argument was insufficient to preserve the claim now offered on appeal.

The trial judge denied the motions to suppress, and offered to make specific findings, but defense counsel stated he was not requesting any findings (V2/R76). When Futch was called during trial to testify about Snipes' statements, defense counsel renewed his prior objections, but did not offer the additional claim that the statements were not voluntary (V13/720). Since no challenge was made at the time of trial to the voluntariness of these statements, the issue of involuntariness now presented is procedurally barred. San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Even if this Court considers the claim now presented, the appellant has failed to demonstrate any error in the admission of his statements to Det. Futch. Of course, a trial court's ruling on a motion to suppress comes to this Court clothed with a strong presumption of correctness. San Martin, 705 So.2d at 1345; Rolling v. State, 695 So.2d 278, 291 (Fla.), cert. denied, 118 S.Ct. 448 (1997). The transcripts of the suppression hearings below support the trial court's finding that the statements were knowingly and voluntarily made.

The voluntariness of these statements must be determined by the totality of the circumstances. Walker v. State, 707 So.2d 300, 311 (Fla. 1997); Traylor v. State, 596 So.2d 957, 964 (Fla. 1992); Fare v. Michael C., 442 U.S. 707 (1979). In this case, Det. Futch testified that he and Deputy Biddle went to Snipes' house about 2:00 a.m. and asked if Snipes would come down and give a statement with regard to an investigation next door (V1/R30). In the previous day, the sheriff's office had executed a search warrant at a neighbor's house, and a person at the house had indicated that Snipes was responsible for the murder of Markus Mueller (V1/R29). Snipes' mother went in the back to get him; when he came out, he was awake, did not look like he'd been drinking, and did not resist (V1/R40-41). Snipes agreed to go with them, and was placed in an interview room about 2 or 2:30 a.m. (V1/R29-30). Futch did not specifically recall if he had offered a drink or restroom to

Snipes, but he believed that he did as this was his normal practice (V1/R41). Futch told Snipes not to say anything at that time, that they weren't ready to talk with him yet (V1/R38-39). Futch was telling Snipes all that Futch knew about the Mueller case; Snipes started to speak at one point, but Futch told him not to talk, just listen (V1/R40). Snipes was left in the room from that time until about 6:00 a.m., while the officers were out trying to locate John Saladino and get Saladino's statement (V1/R42-43). Lt. Taylor had spoken to Snipes briefly when Snipes was first brought in, and Deputy Biddle was also present, but no one interrogated Snipes until 6:07 a.m. when Futch began to interview him (V1/R39, 43-44).

At 6:07 a.m., Futch taped a conversation with Snipes (V1/R32, 34). Futch read Snipes his Miranda rights off the printed waiver form; no coercion, threats, or promises were used (V1/R31). Snipes did not appear to be intoxicated or impaired in any way, and indicated that he understood his rights, agreed to talk, and signed the written waiver form (V1/32). Defense counsel stipulated to the accuracy of the transcript from the taped statement (V1/R33). The interview lasted 18 minutes, concluding at 6:25 a.m. (V1/34).[1] After the interview, Snipes was arrested and placed into a holding facility (V1/R35). Following the interview, another witness was interviewed, leading to more information about Snipes' involvement

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[1]This clearly was not a situation where a child was questioned "for hour after hour," as suggested by Snipes' brief (Appellant's Initial Brief, p. 32).

in another offense (V1/R34). Snipes was returned to the interview room, was again read and again waived his Miranda rights, and was asked about the other offense (V1/35-36). This conversation, which was also taped, occurred between 7:00 and 8:00 a.m. and lasted shorter than the first interview (V1/R36-37).

When Snipes testified, he acknowledged that he was not given any promises for his cooperation, and that he was not threatened (V1/R48-49). He was offered water and went to the bathroom several times (V1/R48-49). He claimed that Futch and Taylor came in and out several times, interviewing him over the course of two hours, and that he asked Taylor and maybe Futch for an attorney (V1/R47-49). However, he recalled Futch reading him his rights; he understood what Futch was telling him, and there were no threats or coercion used to get him to waive his rights (V1/R50-51). He did not ask for a lawyer when Futch read him his rights (V1/R50-51).

The suppression hearing continued at a later date, and Lt. Taylor testified that he met Snipes at the substation on September 23, 1995, introduced himself, and told Snipes they were trying to get to the bottom of the Markus Mueller case (V2/R65). This was a short conversation; Taylor was not present when Futch later secured a statement from Snipes (V2/R65-66). Taylor stated that Snipes never asked him or anyone else for an attorney, or said anything that could be interpreted as such a request (V2/R66). Taylor noted that Snipes appeared normal and did not smell of alcohol (V2/R67).

He also noted that Snipes was not in custody, but was there voluntarily, and could have left at any time (V2/R68). Snipes again testified, stating that he asked both Taylor and Futch for an attorney, and that he was threatened with "the max" if he wanted to play hardball (V2/71-72).

These facts clearly establish that Snipes' statements were voluntary and not the result of coercion, deception or intimidation. Furthermore, Snipes admitted that he understood his rights as Futch read them, demonstrating his awareness of the nature and consequences of the rights he was giving up. These are the two components necessary for a valid Miranda waiver; since both were proven, the trial court correctly denied the motions to suppress. Sliney v. State, 699 So.2d 662, 668 (Fla. 1997), cert. denied, 118 S.Ct. 1079 (1998); Moran v. Burbine, 475 U.S. 412, 421 (1986); Fare v. Michael C., 442 U.S. at 725.

In Fare v. Michael C., the United States Supreme Court identified the relevant factors for consideration in this situation. The Court noted that the juvenile's age, experience, education, background, intelligence, and capacity to understand his Miranda warnings, the nature of his Fifth Amendment rights, and the consequences of waiving those rights must be evaluated. Unfortunately, these factors were not developed at the evidentiary hearing because the voluntariness of his statements was not raised as an issue. However, other evidence in the record shows that

Snipes was eighteen at the time of the interview,[2] had a history of prior contacts with law enforcement, had obtained his GED, performed very well on his general intelligence tests, and acknowledged that he understood the Miranda warnings at the time of his interview (V1/R50-51; V7/R454-457, 494, 545).

The State takes issue with Snipes' assertion that the factual dispute as to whether Snipes asked for an attorney is a proper "totality of the circumstances" factor for consideration. The fact that Snipes testified that he asked for an attorney and both officers testified that Snipes never asked for an attorney cannot reasonably suggest that his confession was involuntary. This factual dispute was resolved against Snipes by the trial court. The rejection of this testimony by the fact finder suggests only that Snipes lied under oath. Surely a defendant that voluntarily confessed to a crime cannot vitiate that voluntariness by lying at a subsequent suppression hearing. A factual dispute can be created, after the fact, in any given case. The fact that one was created here does not support the claim that this confession was not voluntary.

Similarly, Snipes' reliance on Det. Futch's "need" to obtain a confession is irrelevant to the question of voluntariness, as the United States Supreme Court has expressly acknowledged. Moran v. Burbine, 475 U.S. at 423. By suggesting some level of police

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[2]Snipes was 17 at the time of the crime but 18 by the time he was interviewed by police. See Appellant's Initial Brief, p. 28, n. 5.

misconduct occurred when the officers questioned Snipes about his involvement in Mueller's murder simply because they did not feel like they had enough to arrest Snipes before he confessed, the appellant ignores the "indispensable role" that confessions and interrogations play in the investigation and prosecution of crimes, and that the State's authority to obtain freely given confessions is "an unqualified good." Traylor, 596 So.2d at 968.

Thus, when the irrelevant factors are removed from Snipes' totality of circumstances argument, his complaint is reduced to the claim that his age of eighteen years, the fact that he was told the police wanted to talk to him about an investigation next door (when the investigation next door was the source of information as to Snipes' involvement in this murder), and the lack of evidence as to what his mother was told when the police arrived to ask him to come make a statement are sufficient to establish that the trial court erred in determining his Miranda waiver and subsequent statements to have been voluntary. Given the clear case law that a juvenile's confession is not rendered inadmissible by the fact that a parent did not have a meaningful opportunity to be present at the interrogation, this argument must fail.

This Court has expressly rejected the claim that a child cannot be subject to interrogation unless a parent has had the opportunity to consult with the child. Doerr v. State, 383 So.2d 905 (Fla. 1980). See also, Brookins v. State, 704 So.2d 576 (Fla.

1st DCA 1997). The appellant's concern with any inconsistency between Doerr, and Allen v. State, 636 So.2d 494 (Fla. 1994), has no bearing on the trial court's ruling on his motions to suppress. Doerr held that a violation of Section 39.03(3)(a), Florida Statutes (1975),[3] was not, in itself, a basis for exclusion of any statements taken after a juvenile was taken into custody. Allen acknowledged that, in order for the statute on parental notification to be meaningful, an interrogation of a juvenile should stop once a parent arrives and asks to see the child. See also, J.E.S. v. State, 366 So.2d 538 (Fla. 1st DCA 1979). In the instant case, no lack of compliance with the relevant juvenile statute has been established, or even alleged. Testimony at the suppression hearing established that Snipes' mother was home and went to get Snipes when Dep. Biddle and Det. Futch asked him to come down and provide a statement (V1/R40). Furthermore, the statute only requires notification once a decision has been made to detain a child; in this case, the unrefuted testimony established that the decision to arrest and detain Snipes was not made until after his confession (V2/R68). State v. Paille, 601 So.2d 1321, 1324 (Fla. 2d DCA 1992). If the failure to comply with what the statute requires is not reason in itself to suppress a confession, then surely the failure to go beyond what the statute requires cannot require suppression.

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[3]This subsection was codified as §39.037 when considered in Allen, and is currently codified as §985.207, Florida Statutes (1997).

The other cases cited by the appellant do not provide a basis for excluding his statements. Gallegos v. Colorado, 370 U.S. 49 (1962), and Haley v. Ohio, 332 U.S. 596 (1948) involved younger defendants (fourteen and fifteen years old, respectively) that had not been provided Miranda rights and were understandably found to be unaware of the consequences talking to the police. The appellant was eighteen at the time of the interview, and properly characterized as an "old" juvenile.[4] See, Paille, 601 So.2d at 1324. He voluntarily left his mother to accompany sheriff's officers to a substation, where he heard and waived his Miranda rights prior to making his incriminating statements (V1/R40, 50-51).

On these facts, Snipes has failed to demonstrate any error in the trial court's denial of his motion to suppress. It should also be noted that any potential error in this regard would be rendered harmless in light of Snipes' admissions to other witnesses, including his extensive confession to Martin Patterson. Clearly, he is not entitled to a new trial on this issue.

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[4]Snipes had voluntarily obtained his GED in 1993 (V7/R494), and was living with his girlfriend at the time of the murder (V13/T608).

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING ADMISSION OF SNIPES' STATEMENTS TO HIS UNCLE.

Snipes also disputes the trial court's ruling on his motion to suppress the statements he made to his uncle, Martin Patterson. According to Snipes, allegations of coercion by non-state actors in securing inculpatory statements should be weighed by a trial judge to determine a threshold of voluntariness for admissibility before the statements may be presented for the jury's consideration. However, no legal basis exists to exclude such statements, and no reasonable theory requiring any such legal basis has been offered.

At one time, Florida courts held that due process required the suppression of an involuntary confession, even when the confession was made to a private person. See, State v. Kettering, 483 So.2d 97 (Fla. 5th DCA 1986); Peak v. State, 342 So.2d 98 (Fla. 3d DCA 1977) (confessions which had been given to private individuals, unrelated to law enforcement, could not be admitted due to the involuntariness demonstrated by their circumstances). However, the holding in these cases, which appears to be what Snipes is asking this Court to adopt, was eviscerated by Colorado v. Connelly, 479 U.S. 157 (1986), which held that police misconduct was a necessary prerequisite to finding a due process violation when the voluntariness of a defendant's statements is at issue. Given the square rejection of this issue by the United States Supreme Court, the appellant's claim is without merit.

Thus, the appellant's suggestion that the trial judge be required to initially rule on the admissibility of alleged involuntary statements made to non-state actors, while academically interesting, would serve no useful purpose. Notably, Snipes fails to identify any legal authority which could preclude the admission of even an involuntary statement to a private individual. Any such authority would seemingly be premised on due process; therefore, Connelly's requirement of affirmative state misconduct would defeat the claim. Since the question of voluntariness alone is not an issue which determines admissibility, there is clearly no need for the trial judge to make specific findings as to voluntariness prior to the admission of a defendant's statements.

This Court has consistently refused to exclude relevant evidence when no misconduct by the state has been demonstrated. Allen, 636 So.2d at 497 (evidence from electronic eavesdropping admissible as long as no police inducement or privileged communication involved); Spivey v. State, 529 So.2d 1088, 1091 (Fla. 1988) (Miranda only addressed to the action of the state and its agents); Maqueira v. State, 588 So.2d 221, 223 (Fla. 1991), cert. denied, 504 U.S. 918 (1992); Stewart v. State, 549 So.2d 171, 173 (Fla. 1989), cert. denied, 497 U.S. 1032 (1990); Dufour v. State, 495 So.2d 154, 158-159 (Fla. 1986) (exclusion not required when non-state actor interfered with defendant's right to counsel), cert. denied, 479 U.S. 1101 (1987); see also, State v. Edwards, 650

So.2d 630, 631 (Fla. 2d DCA 1994). The purpose of the exclusionary rule is to deter improper police conduct. Voorhees v. State, 699 So.2d 602, 611 (Fla. 1997) (noting exclusionary rule's theory of deterrence operates only if evidence is target of police activity); Johnson v. State, 660 So.2d 648, 658 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996); Echols v. State, 484 So.2d 568, 571-572 (Fla. 1985), cert. denied, 479 U.S. 871 (1986). This purpose is not served by keeping otherwise relevant information from a jury when no state action is at issue.

Jury instruction 2.04(e) permits the jury to determine the voluntariness of any statement, and to disregard statements deemed to have been involuntarily obtained. The appellant's jury was given this instruction, and convicted him of this offense. He now seeks to create a legal right which does not exist in order to claim that an alleged violation of this newly created right entitles him to a new trial. The adoption of the illogical rule he now proposes would result only in the frustration of justice in this case. Clearly, the appellant is not entitled to relief on this issue.

ISSUE V

WHETHER REMAND IS NECESSARY DUE TO TESTIMONY THAT SNIPES WAS NOT REMORSEFUL.

Snipes next presents a claim which clearly has not been preserved for appellate review. The record reflects that, during the direct examination of Martin Patterson, the prosecutor asked Patterson why he had turned over his tape-recorded conversations with Snipes to the police. Patterson responded that he had not seen any remorse and he was concerned about the welfare of the community (V13/T674). Defense counsel did not object, probably because it provided him the opportunity to suggest, on cross examination, that Snipes had expressed remorse in letters that he had written to Patterson (V13/T674, 684-685). Counsel asked repeatedly about remorse, and tried to get Patterson to retract his opinion as to Snipes' lack of remorse (V13/T684-685). On re-direct, the prosecutor asked Patterson to explain why he felt Snipes was not remorseful (V13/T685). Defense counsel's relevancy objection was overruled, and Patterson answered (V13/T685). On re-cross, counsel again asked Patterson's opinion that about Snipes' written expression of regret (V13/T689).

After Patterson was excused from the witness stand and the next witness was announced, the defense moved for a mistrial, alleging that Patterson's comments about Snipes' lack of remorse warranted a new trial (V13/T690). When the defense claimed that any remorse or lack of remorse was not relevant to Snipes' guilt,

the trial judge offered to instruct the jury not to consider any evidence relating to remorse (V13/T690-692). Defense counsel declined, noting that he wanted the jury to consider the evidence he presented about Snipes' being sorry (V13/T693).

Since defense counsel did not request a mistrial until after the witness had been excused, the objection was untimely and this issue was not preserved for appellate review. Norton v. State, 709 So.2d 87, 94 (Fla. 1997). In addition, it is readily apparent that any possible error created was invited by defense counsel's attempt to convince Patterson that Snipes had expressed remorse. A party may not complain on appeal of an error induced by that party. Norton, 709 So.2d at 94; Terry v. State, 668 So.2d 954, 962 (Fla. 1996); Czubak v. State, 570 So.2d 925, 928 (Fla. 1990). To the extent that the appellant is complaining that Patterson was presented as a close relative, having been in the military, a private investigator, and in law school (apparently suggesting that this evidence was more prejudicial because it came from a credible source, see Appellant's Initial Brief, p. 51), it must be noted that all of this information was brought out in the cross examination by defense counsel. Furthermore, the appellant's focus on Patterson's statement of concern for the community was never objected to during the trial and was not the basis for the motion for mistrial made below (V13/T690-693). On these facts, this issue must be rejected as invited and procedurally barred.

Even if the issue is considered, Snipes has failed to demonstrate any error in the denial of his motion for mistrial. Patterson's initial statement that Snipes did not appear remorseful and Patterson was concerned for the community was responsive to the prosecutor's relevant question as to Patterson's motives. His motives were relevant because defense counsel had been asserting since the beginning of trial that Snipes had been tricked into making these statements (V10/T346). As the judge noted, the State did not address this evidence again until the defense focused on remorse during the cross examination (V10/T684-686, T691).

The appellant's reliance on Derrick v. State, 581 So.2d 31 (Fla. 1991), cert. denied, 513 U.S. 1130 (1995), and Kormondy v. State, 703 So.2d 454 (Fla. 1997), is misplaced. In those cases, testimony was presented that the defendants had stated that they would kill again, and this evidence of future dangerousness was highly inflammatory. No such direct evidence of future dangerousness was presented in the trial below. What happened in this case is much closer to the facts of Shellito v. State, 701 So.2d 837 (Fla. 1997), cert. denied, 118 S.Ct. 1537 (1998); Atwater v. State, 626 So.2d 1325 (Fla. 1993), cert. denied, 511 U.S. 1046 (1994); and Wuornos v. State, 644 So.2d 1000 (Fla. 1994), cert. denied, 514 U.S. 1069 (1995), where brief references to the defendants' lack of remorse, without more, was found not to be error -- except that, in the instant case, Patterson's perception

that Snipes was not remorseful was relevant to the defense claim that Patterson's motives were suspect.

The appellant's concern with the impact this evidence may have had on his penalty phase is unwarranted. Of course, Snipes never suggested to the trial court that this evidence could prejudice him in his penalty phase. He argued his remorse as a mitigating factor to the jury and the judge, and therefore any testimony about his lack of remorse could be properly considered. No error has been presented in this regard.

The appellant has failed to meet his burden of establishing that any prejudicial error occurred based on this testimony. Given the clear evidence of his guilt, there is no reasonable possibility that any impropriety could have affected the jury's verdict. Therefore, he is not entitled to a new trial on this issue.

ISSUE VI

WHETHER THE IMPOSITION OF SNIPES' DEATH SENTENCE IS DISPROPORTIONAL.

Snipes' final challenge disputes the proportionality of his death sentence. Of course, a proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). When factually similar cases are compared to the instant case, the proportionality of Snipes' sentence is evident.

The court below found two aggravating circumstances: (1) pecuniary gain and (2) cold, calculated, and premeditated. In mitigation, the court gave the appellant's age "considerable" weight and found various nonstatutory mitigating circumstances including the appellant's dysfunctional family history and positive character traits (V9/R777-800). The jury recommended death by a vote of 11 to 1 (V8/R598, 620).

A review of factually similar murders compels the imposition of death on this defendant. In Bonifay v. State, 680 So.2d 413 (Fla. 1996), this Court upheld a death sentence imposed on a seventeen year old offender that had agreed to kill a man for another person. See, Bonifay v. State, 626 So.2d 1310 (Fla. 1993).

Although the crime did not go as planned and Bonifay shot and killed the wrong clerk while robbing a store (the robbery was to be a cover for the murder), Bonifay is strikingly similar to the case at hand. The offense in Bonifay arose as a contract killing, and the only additional aggravating factor was that the murder was committed during a robbery.[5] Bonifay had the additional statutory mitigator of no significant criminal history, and both Bonifay and the appellant offered expert but unremarkable evidence of nonstatutory mental mitigation. The significant similarities between Snipes and Bonifay demands this Court's rejection of the appellant's claim of disproportionality.

Another factually similar case is Hayes v. State, 581 So.2d 121 (Fla.), cert. denied, 502 U.S. 972 (1991). Hayes was an eighteen year old that volunteered to shoot a cab driver that he and his codefendants intended to rob. The same two aggravating factors as in the instant case (pecuniary gain was merged with during the course of a robbery) were weighed against the statutory age factor, and nonstatutory factors of low intelligence, learning disabled, and a product of deprived environment. Hayes had been neglected and abused for most of his life, had a brain dysfunction, could not read, spell, or count beyond the level of a five-year-

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[5]Since the victim in the instant case was killed inside his own home, the aggravating factor of "during the course of a burglary" should have been applied. The State's failure to argue and the trial court's failure to weigh this factor does not preclude this Court from considering the factor in a proportionality analysis. See, Sliney, 699 So.2d at 672.

old, and was a heavy consumer of drugs and alcohol that had never received any counseling or rehabilitative treatment. In rejecting Hayes' proportionality argument, this Court also noted that the dissimilar treatment accorded his codefendants did not render his sentence disproportional, since the record amply supported the trial court's finding that Hayes was more culpable. Thus, Hayes' crime was very comparable to the instant case (his jury recommendation was also 11 to 1 for death), and he had far more extensive mitigation, yet this Court approved his death sentence. See also, Gamble v. State, 659 So.2d 242 (Fla. 1995) (twenty year old offender with childhood abuse and neglect and severe emotional problems killed landlord during robbery), cert. denied, 116 S.Ct. 933 (1996).

This Court routinely upholds death sentences for the actual killers in contract murder situations. Gordon v. State, 704 So.2d 107 (Fla. 1997); Johnson v. State, 696 So.2d 317 (Fla. 1997) (twenty-one year old triggerman in contract murder), cert. denied, 118 S.Ct. 1062 (1998); Mordenti v. State, 630 So.2d 1080 (Fla. 1994) (same two aggravating factors, some mitigation in common, contact/middle person to contract murder got immunity), cert. denied, 512 U.S. 1227 (1994); Downs v. State, 572 So.2d 895 (Fla. 1990), cert. denied, 502 U.S. 829 (1991); Ventura v. State, 560 So.2d 217 (Fla.), cert. denied, 498 U.S. 951 (1990); Kelley v. State, 486 So.2d 578 (Fla.), cert. denied, 479 U.S. 871 (1986);

Echols, 484 So.2d at 568; Hoffman v. State, 474 So.2d 1178 (Fla. 1985).

The cases cited by the appellant do not establish a lack of proportionality in this case. The appellant primarily relies on Nibert v. State, 574 So.2d 1059 (Fla. 1990); Livingston v. State, 565 So.2d 1288 (Fla. 1988); and Urbin v. State, 23 Fla. L. Weekly S257 (Fla. May 7, 1998). None of these cases involved the contract murder situation presented herein or are truly comparable to the instant case. In Nibert, only a single aggravating circumstance was applicable; in such cases, this Court has noted that death is only appropriate where there is "either nothing or very little in mitigation." Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989). There were also a substantial number of mitigating factors established in Nibert, including both statutory mental mitigators, which are notably absent in the instant case.

Livingston involved a seventeen year old with marginal intellectual functioning and a history of severe physical abuse and neglect that shot a store clerk during a robbery. Thus, the case offered less aggravation and more mitigation than the instant case. Similarly, in Urbin, a seventeen year old robber shot his victim. The statutory mental mitigator of substantial impairment also applied, as well as stronger mitigation of parental abuse and neglect than that noted in Livingston.

The mitigation in the instant case is a far cry from that

discussed in Livingston or Urbin. Although some of Snipes' family noted difficulties in his childhood during his younger years, the testimony also established that, when Snipes was nine years old, his mother and stepfather began receiving alcohol treatment, and his mother had been sober since October, 1987 (seven and a half years before the murder) (V7/R537-539, 553). His stepfather had been involved in his life since Snipes was three years old, and was a positive father figure in his life, attending Snipes' football games and scrimmages, and other school and family activities, as well as participating in family counseling (V7/R509-513, 550). When his mother learned that Snipes had been subject to sexual abuse while staying with his father when he was nine, she immediately confronted his father, but the perpetrator had already left the state (V7/R544-545). Snipes had received extensive rehabilitative treatment through South West Florida Addiction Services, both voluntarily and by court order, as an outpatient and also in their residential program (V7/R545-547). When he ran away from the SWFAS residential program at fifteen years of age, he was returned to his father (V7/R547). Although there were times he did not want to go to his father's house, the decision to send him was discussed by all four parents/stepparents and Snipes' counselor (V7/R543). Family members agreed that Snipes had been well cared for and well loved as he was growing up (V7/R509-513, 524, 550).

The mental mitigation offered below by Dr. Sidney Merin was

not compelling. Dr. Merin testified that Snipes did very well on his psychological testing; the only subtest on which Snipes did not perform well was the social comprehension/understanding test (V7/R454-457). There was no evidence of any brain impairment or dysfunction, no mental or emotional disorder or defect (V7/R463, 471-472, 476). Rather, Snipes has a "behavioral disorder," which Merin attributed to his dysfunctional family and exposure to alcoholism and drug abuse at an early age (V7/R473-474). Although Snipes places great weight on this alleged mental mitigation, it is highly unlikely that there is any individual on death row that cannot be diagnosed as having a behavioral problem.

In Urbin, this Court noted that Urbin's age of seventeen, *in combination with the other statutory and nonstatutory mitigating circumstances,* was an extremely weighty factor. 23 Fla. L. Weekly at S259. This is consistent with the recognition that the weight to be accorded this factor may be affected by other evidence of maturity or immaturity. Shellito, 701 So.2d at 843. In this case, Snipes had obtained his GED, was living with his girlfriend, and had conceived a child prior to the crime; he had married the girlfriend and developed a relationship with his son by the time of the trial (V7/R494, 495, 497, 549, 607-608). He had a normal IQ and had been a productive member of the work force for years (V7/R454-457, 513). In contrast, the seventeen year old in Livingston had marginal intellectual functioning and was

characterized as inexperienced and immature.

The remaining cases noted by the appellant are also easily distinguishable. See, Songer, 544 So.2d at 1011 (single aggravator of under sentence of imprisonment; mitigation included three statutory factors of age and both mental mitigators, in addition to nonstatutory factors of sincere remorse, dependency on drugs, positive character traits, emotionally impoverished upbringing, strong religious standards); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (single aggravator of during the course of a robbery; mitigation included statutory factor of no significant criminal history, and several nonstatutory factors). Boyett v. State, 688 So.2d 308 (Fla. 1996), involved a jury override and therefore is not relevant to a proportionality analysis, since different principles are involved. Burns v. State, 699 So.2d 646, 649 n. 5 (Fla. 1997), cert. denied, 118 S.Ct. 1063 (1998).

The appellant's proportionality argument is no more than an expression of his difference of opinion with regard to the trial judge's conclusion that the aggravating factors proven outweighed the mitigation offered below. He does not dispute the existence of any of the aggravating factors, and he does not identify the existence of any mitigating factors which he believes the court overlooked. This Court has acknowledged that it is not proper to reweigh the aggravating and mitigating circumstances under the guise of a proportionality analysis. Hudson v. State, 538 So. 2d

829 (Fla.), cert. denied, 493 U.S. 875 (1989). Yet that is clearly what the appellant seeks to do in this case, since he merely argues the weight of the respective factors, and does not attempt to compare this case with factually similarly cases that this Court has previously considered.

Snipes' discussion of the mitigating circumstances found by the court below and his attack on the judge's failure to accord more weight to the mitigation found are unpersuasive. Although his brief drones on for pages about the 37 mitigating factors found, many of these factors are duplicitous and obviously inconsequential. For example, it is difficult to understand the distinction between mitigators 4, 8, and 21 (#4: Mr. Snipes' family life was very dysfunctional in that his biological parents drank and other family members were alcoholics or used marijuana frequently; #8: Mr. Snipes had a very difficult childhood because of being raised in a dysfunctional family; #21: Mr. Snipes' childhood was very traumatic due to his dysfunctional family and the alcohol and drugs widely used by his family and himself). Snipes noted no less than six factors based on his pretrial "voluntary" statements which, of course, he asserts in Issues III and IV were not voluntary at all (factors 26 - 32).

It is also significant that of the 43 mitigating factors discussed in the trial court's order, six were rejected (including both statutory mental mitigators); seven were given "minimal"

weight; eight were given "slight" weight; six were given "little" or "very little" weight; ten were given "some" weight; four were given "moderate" weight; and two were given "considerable" weight (including the statutory mitigator of age) (V9/R779-800). It is this assessment, and not the appellant's belief that the mitigators "must be given great weight" (Appellant's Initial Brief, p. 55), which must be taken into account in this Court's proportionality review.

This Court has repeatedly recognized that the relative weight to be assigned any aggravating or mitigating circumstance is within the broad discretion of the trial judge. Blanco v. State, 706 So.2d 7, 10 (Fla. 1997); Cole v. State, 701 So.2d 845, 852 (Fla. 1997), cert. denied, 118 S.Ct. 1370 (1998); Bell v. State, 699 So.2d 674, 678 (Fla. 1997), cert. denied, 118 S.Ct. 1067 (1998); Campbell v. State, 571 So.2d 415, 420 (Fla. 1990). Nevertheless, Snipes suggests that this Court should remand to the trial court "in order to have the trial court reweigh the mitigators and aggravators" (Appellant's Initial Brief, p. 62), alleging that the court's treatment of some of the mitigators conflicts with this Court's opinion in Nibert. Such a remand would clearly be inappropriate. First of all, the problem in Nibert was not the degree of weight noted by the judge; it was that the judge completely rejected legally mitigating factors as not mitigating. This Court has never suggested that a trial judge may not diminish

the weight of mitigating factors based on relevant considerations in the case.

In addition, the factual assertions included in the appellant's claim are not supported by the record. For example, Snipes describes his sexual abuse as "starting as a young child and continuing on for years so as to occur in his formative and adolescent years" (Appellant's Initial Brief, p. 59). In fact, Snipes' mother testified that Snipes had been sexually abused by an uncle while living with his father when he was around nine years old (V7/R544). When she found out about it, she confronted the father, but the uncle had left the state (V7/R544-545). Snipes received counseling but about six years later, after he ran away from a residential rehabilitation program at about age 15, he was returned to his father's house (V7/R547). All four parents/stepparents and a counselor were part of this decision (V7/R543). Although his mother stated that he wanted to come home, but she made him stay there the whole school year, and that she later found out the uncle had also been there much of the time, there was no testimony by anyone that any abuse had reoccurred during that time (V7/R547). Still, of course, the trial judge provided "considerable" weight to this mitigating factor (V9/R784).

The weight assigned by a trial court to a mitigating factor is within the court's discretion, and such discretion is only abused where no reasonable person would take the view adopted by the trial

judge. Elledge v. State, 706 So.2d 1340, 1347 (Fla. 1997); Blanco, 706 So.2d at 11. The standard for establishing an abuse of discretion has not been met in this case. As this Court has noted, "mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence." Quince v. State, 414 So.2d 185, 187 (Fla.), cert. denied, 459 U.S. 895 (1982). The appellant's concerns with the trial court's assessment of his mitigation offer no basis for disturbing the death sentence imposed herein.

Finally, the appellant's attempt to diminish the weight of the aggravating factors is unpersuasive. He claims that pecuniary gain and cold, calculated and premeditated are "closely connected," often applied together and occurring at about the same time. This Court has consistently rejected the suggestion that these factors must be merged, noting that they involve separate and distinct aspects of the crime which are entitled to consideration. Folopoulos v. State, 608 So.2d 784, 793 (Fla. 1992), cert. denied, 508 U.S. 924 (1993); Echols, 484 So.2d at 574-575. Any temporal proximity is inconsequential; most aggravating factors, perhaps all except for (sometimes) the prior violent felony conviction aggravator, are based on circumstances of the crime itself and therefore occur around the same time as each other. That is no reason to diminish the weight of these factors. These are egregious factors which clearly support a death sentence. Jones v.

State, 690 So.2d 568 (Fla. 1996), cert. denied, 118 S.Ct. 205 (1997); Archer v. State, 673 So.2d 17 (Fla. 1996), cert. denied, 117 S.Ct. 197 (1996); Hodges v. State, 595 So. 2d 929 (Fla.), vacated on other grounds, 506 U.S. 803 (1992).

The appellant also claims that his sentence of death should be reduced due to allegedly disparate treatment of his codefendants. The trial judge rejected the mitigating value of any potential disparity and specifically found Snipes, as the triggerman, to be "the paramount player" in the killing (V9/R786, 796). This Court has repeatedly upheld death sentences when codefendants that participated in the crime but did not actually kill were sentenced to less than death. See, Raleigh v. State, 705 So.2d 1324, 1331 (Fla. 1997); Johnson, 696 So.2d at 326; Armstrong v. State, 642 So.2d 730, 738 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Hannon v. State, 638 So.2d 39, 44 (Fla. 1994), cert. denied, 513 U.S. 1158 (1995); Hall v. State, 614 So.2d 473, 479 (Fla. 1993), cert. denied, 510 U.S. 834 (1993); Coleman v. State, 610 So.2d 1283, 1287-88 (Fla. 1992), cert. denied, 510 U.S. 921 (1993); Robinson v. State, 610 So.2d 1288 (Fla. 1992), cert. denied, 510 U.S. 1170 (1994); Downs, 572 So.2d at 901; Williamson v. State, 511 So.2d 289, 292-293 (Fla. 1987), cert. denied, 485 U.S. 929 (1988); Craig v. State, 510 So.2d 857, 870 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986), cert. denied, 511 U.S. 1100 (1994); Woods v. State, 490

So.2d 24, 27 (Fla.), cert. denied, 479 U.S. 954 (1986); Deaton v. State, 480 So.2d 1279, 1283 (Fla. 1985), cert. denied, 513 U.S. 902 (1994); Brown v. State, 473 So.2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985); Troedel v. State, 462 So.2d 392, 397 (Fla. 1984); Bassett v. State, 449 So.2d 803, 808-809 (Fla. 1984). In all of the above cases, the codefendants were actually present during the crimes, clearly participating more than Saladino did in this case, and were convicted of first degree murder but sentenced to less than death.

The trial judge expressly considered the significance of the fact that Snipes is the only participant in this murder to have received a death sentence (so far), and expressly found that the evidence established that the appellant was the actual killer. As noted above, this Court has repeatedly acknowledged that a death sentence may be imposed on the actual killer when a non-killing codefendant receives a life sentence. See, Bush v. Singletary, 682 So.2d 85 (Fla. 1996); Cardona v. State, 641 So.2d 361 (Fla. 1994), cert. denied, 513 U.S. 1160 (1995); Colina v. State, 634 So.2d 1077 (Fla.), cert. denied, ___ U.S. ___, 115 S. Ct. 330 (1994); Mordenti, 630 So.2d at 1080; Sims v. State, 602 So.2d 1253, 1257 (Fla. 1992), cert. denied, 506 U.S. 1065 (1993); Cook v. State, 581 So.2d 141 (Fla.), cert. denied, 502 U.S. 890 (1991); Hayes, 581 So.2d at 127.

Snipes' assertion that the other codefendants were more

culpable because Bieber and the victim were involved in international steroid trafficking and Saladino was older and supplied Snipes with directions to the victim's house is unavailing. These facts do not diminish the seriousness of the appellant's actions or demonstrate that the trial court's finding of greater culpability was in error. While the actual killer may be deemed to have less culpability in unique factual circumstances such as Larzelere v. State, 676 So.2d 394 (Fla. 1996), cert. denied, 117 S.Ct. 615 (1996), the instant case offers facts which demonstrate that Snipes' culpability was much greater than that of Saladino. Since Bieber remains at large, any consideration of his role in comparison to the appellant's is premature.

The appellant's reliance on Puccio v. State, 701 So.2d 858 (Fla. 1997), is misplaced. In that case, this Court reversed a trial court's determination that Puccio was more culpable than his codefendants. The facts in that case demonstrated that the codefendants played a larger role in the planning and the killing of the victim, physically stabbing and beating the victim along with Puccio. Since the evidence below supports the trial court's finding that the appellant was the sole killer in this case, Puccio is clearly distinguishable.

A review of the facts established in the instant case clearly demonstrates the proportionality of the death sentence imposed. The circumstances of this contract execution compels the imposition

of the death penalty. Accordingly, this sentence should not be disturbed on appeal.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Deborah Brueckheimer, Public Defender's Office, Polk County Courthouse, P. O. Box 9000--Drawer PD, Bartow, Florida, 33831, this 31st day of August, 1998.

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