IN THE SUPREME COURT OF FLORIDA

JASON DEMETRIUS STEPHENS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92,987

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

# ANSWER BRIEF OF APPELLEE

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## CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 or larger.

## PRELIMINARY STATEMENT

The record on appeal consists of 15 volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. The one-volume supplemental record will be referenced with an "S" prefix. A citation to a volume will be followed by any appropriate page number within the volume (e.g., "I 16" or "S-I 16"). "IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

Rather than belabor any quarrels with Appellant's phraseology within his Case and Facts or belabor omissions in them, the State incorporates detailed case/facts and record-citations within each issue. Basic facts of the robbery-burglary-kidnapping-murder on which the State relies throughout this brief are detailed in ISSUE I infra, and, rather than repeat them and other facts here, with the indulgence of the Court, the State incorporates them by reference.

## SUMMARY OF ARGUMENT

Appellant robbed several victims at the home of the three-year-old victim's father. He abducted the Murder victim ("Little Rob") in a car he stole from the home. Little Rob died that day in the car. There was evidence indicating that Little Rob was suffocated

to death. There was also some evidence that Little Rob died from hyperthermia in the June Jacksonville heat in the enclosed car where Appellant left him.

Even if one were to violate the well-settled principle of appellate review and accredit a defense expert in the face of conflicting evidence from the State's expert and assume that the three-old victim died of hyperthermia, **ISSUE I** is still meritless. Terrorizing and then leaving Little Rob in the car was like constructing a ticking time bomb, which, as the heat built up in the car, "ticked away" Little Rob's life. It was also analogous to starting a fire in a building and leaving the scene, where the fire eventually killed an occupant; just as the fire builds, so-too did the heat in the car; just as the arson supports felony murder, so-too does leaving a fearful three-year-old in the car during a kidnapping and flight from a robbery-burglary. Accordingly, even if Appellant had requested the trial court to re-weigh the evidence and somehow convinced the trial court to resolve all conflicts in the evidence in his favor, his Motion for New Trial would have still been reasonably denied, rendering **ISSUE II** meritless. Under any theory, Appellant was lawfully convicted of First Degree Murder.

However, Appellant failed to apprise the trial court of his current **ISSUE I** and **ISSUE II** claims, thereby failing to preserve them. Thus, Appellant speculates that, **IF** he had asked the trial court to decide his Motion for New Trial on the same basis as it decided the penalty phase question of suffocation/strangulation versus hyperthermia, the trial court would have resolved that

Motion in an identical manner. However, this overlooks the distinct test for granting a Motion for New Trial: whether the "manifest weight of the evidence dictates such action." Appellant's speculation is unfounded.

Concerning **ISSUE III**, the trial court did not abuse its discretion in denying Appellant's motion to withdraw his plea to the armed robbery of Derrick Dixon. The de minimis nature of the complaint is typified by Appellant's laughter at whether he completed the robbery of Derrick Dixon. Testifying on his own behalf in the guilt phase, Appellant swore that he robbed Dixon. By that time and prior to moving to withdraw the plea, Appellant had already reaped the tactical benefit of his plea to this count, as his attorney argued to the jury that Appellant owned-up to the robberies he did, while contesting the murder that he did not do.

In **ISSUE IV**, Appellant contends that he was entitled to three special jury instructions regarding felony murder. However, his instructions were misleading, in contrast to the correct statements of law in the standard instructions, which covered his defense.

**ISSUE V** claims that the trial court should have changed the venue of the trial due to publicity. However, co-felon Cummings' motion to change the venue was fatally deficient as to Appellant, who did not secure a ruling. On the merits, publicity did not reach the level requiring reversal, and the trial court's ruling was thorough and well-reasoned. The trial court painstakingly assured throughout the trial that it would not be contaminated by improper influences. And, Appellant's failure to use all of his peremptory

challenges discloses his perception that the chosen jury was impartial.

**ISSUE VI** assumes that Appellant complained that his counsel was not competent. This is incorrect. Instead, Appellant indicated general dissatisfaction and complained that he wanted more communication and more "paperwork" about the case. These complaints, which do not per se implicate competency, were fully addressed through a hearing and through remedial actions. And, Appellant subsequently expressed satisfaction with counsel, mooting this claim.

**ISSUE VII** complains about a ruling that allowed the prosecutor to ask Appellant on cross-examination if he requested that law enforcement assist him in being executed. Analogizing to ambiguous flight situations, Appellant argues that his statement to law enforcement was ambiguous. However, the record is clear that law enforcement was clear: They were discussing this murder case with Appellant. The prosecutor's question was proper cross-examination that showed Appellant's evasiveness on the witness stand, which Appellant chose to reinforce further by attempting to implausibly explain his execution statement.

In **ISSUE VIII through ISSUE XI**, Appellant attacks his death sentence on various grounds. None of them have merit. For example, in **ISSUE VIII**, Appellant erroneously attempts to apply a Tison analysis to a situation where he, rather than a co-felon, was the killer. Appellant committed the lethal act, killing Little Rob, after he brought lethal force to the robbery/burglary, brandished it, used it to pistol-whip Little Rob's mother in his presence,

and threatened to kill those who did not do and stay where he indicated. There is overwhelming evidence of Appellant's reckless indifference to life up to and including the lethal act of leaving terrified, three-year-old Little Rob entombed in the car.

## ARGUMENT

### ISSUE I

DID THE TRIAL COURT REVERSIBLY ERR BY DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL THAT "WITHOUT ARGUMENT, WE MOVE FOR JUDGMENT OF ACQUITTAL ON ALL COUNTS"? (Restated)

ISSUE I claims that the trial court reversibly erred in denying Appellant's motions for judgment of acquittal (XIII 1486, 1579) of the First Degree Murder count of the indictment (I 8). This count alleged that Appellant killed Robert Sparrow, Jr.,[1] (I 8) who, the evidence undisputably established, died (E.g., XII 1357, 1365) in a stolen car (E.g., XII 1259, 1266-67) June 2, 1997. Appellant stole the car for his flight from a robbery-burglary crime scene (See, e.g., XII 1263).

Appellant took Little Robert as a "hostage" (XI 1188, 1191, 1199, XII 1213) for "insurance" for his getaway (XI 1075, XII

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[1] The victim, was repeatedly referenced in the trial as "Little Robert" or "Little Rob," which distinguished him from his father, also named Robert Sparrow. (See, e.g., XI 1033-34, 1199) Therefore, the State references him in this brief as "Little Robert" or the murder victim.

The victim's mother testified that the victim was actually Robert Sparrow, "III," rather than "Jr.," (XI 1029-30) and the indictment was subsequently amended (XIII 1483-84) to reflect this technical and non-substantive amendment. The victim's identity as the three-year-old son of Consuelo Brown and Robert Sparrow, "Sr.," was undisputed.

1305). Little Robert was three years old (XI 1029-30) when he died in Appellant's stolen getaway car.

The State respectfully submits that ISSUE I was unpreserved and, in any event, the evidence was sufficient for the jury to find Appellant guilty of First Degree Murder using either felony-murder or premeditation as the manner in which the State proved its case. Appellant terrorized three-year-old Little Robert to the point that the victim cried and asked if he was going to be killed. Competent evidence showed that Appellant then kidnapped Little Robert in a getaway car he stole for that purpose, parked the car in the June Jacksonville heat, stole the car's CD player, shut the car door, left the windows closed, and left Little Robert entombed in the functional equivalent of an oven. Therefore, there was competent evidence sufficient for the jury to reasonably find felony-murder as the manner in which Appellant committed First Degree Murder. There also was competent evidence from which the jury could lawfully find that Appellant suffocated or strangled Little Robert in the stolen car.

The State elaborates.

**A. Appellant failed to preserve ISSUE I.**

Appellant's boilerplate, perfunctory, bare-bones motion for judgment of acquittal failed to preserve ISSUE I. It by no means apprised the trial court of the grounds now asserted on appeal with the "benefit" of 20-20 hindsight.

Woods v. State, 24 Fla. L. Weekly S183 (Fla. April 15, 1999) (capital case), and authorities cited within it, are on point:

> Woods initially argues the trial court erred in denying his motion for judgment of acquittal because the State's case rested entirely on **circumstantial evidence** and that insufficient evidence of **premeditation** existed to submit this case to the jury. He further claims that the only evidence of what transpired on the night of the murder came from Mrs. Langford and she did not see what happened immediately prior to the shooting. The State, on the other hand, contends Woods failed to preserve this issue for review because the grounds raised on appeal are not the specific legal grounds argued to the court below. Rather, during trial, defense counsel merely claimed the State had failed to establish prima facie evidence of guilt without providing any grounds or legal argument in support.
>
> To preserve an argument for appeal, it must be asserted as the legal ground for the objection, exception, or motion below. *See Archer v. State*, 613 So.2d 446, 448 (Fla. 1993); *Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982). Florida Rule of Criminal Procedure 3.380 requires that a motion for judgment of acquittal "*fully* set forth the grounds on which it is based." *See* Fla. R. Crim. Pro. 3.380(b) (emphasis added). Here, Woods submitted a **boilerplate motion for acquittal** without fully setting forth the specific grounds upon which the motion was based. He did not bring to the attention of the trial court any of the specific grounds he now urges this Court to consider.

In Woods, as here, the non-prevailing party below argued on appeal that the State's circumstantial case failed to establish premeditation yet below only presented "a boilerplate motion for acquittal." In Woods, as here, the non-prevailing party failed to preserve the claim.

Here, the State rested (XIII 1484), the trial court instructed the jury, e.g., to avoid news broadcasts (XIII 1484-86), and then asked if "anyone" has "motions," to which Appellant's counsel immediately responded: "Judge, without argument, we move for judgment of acquittal on all counts." The trial judge responded: "On behalf of Mr. Stephens the motions are denied." (XIII 1486) Defense counsel failed to amplify or in any way enhance the

"boilerplate" (Woods), detail-less, and precision-less motion for judgment of acquittal when the trial court resumed consideration of co-defendant Cummings' motion for judgment of acquittal (XIII 1496-1500) and when Appellant's motion for judgment of acquittal was renewed at the end of his evidence (XIII 1579). Indeed, in his Motion for New Trial, Appellant did not even belatedly enhance his bare-bones, perfunctory motion for judgment of acquittal when armed with the full, 20-20 hindsight of the full trial and verdict. (See II 303-305) Woods controls.

Woods relied upon, inter alia, Archer v. State, 613 So.2d 446 (Fla. 1993) (capital case). In Archer, the non-prevailing party-below claimed on appeal "that his motion for judgment of acquittal should have been granted because the victim's murder was independent of the agreed-upon plan to kill a different clerk." Id. at 447-48. Archer alternatively held: "Archer did not make the instant argument in the trial court, and, therefore, this issue has not been preserved for appellate review." Id. 448. Like Woods, Archer controls.

Thus, ISSUE I is procedurally barred. Also, see Morris v. State, 23 Fla. L. Weekly S620 (Fla. December 10, 1998) ("Once the motion [for judgment of acquittal) has been made at the close of the State's case and brought to the trial court's attention, the trial court has been given an opportunity to rule on the **precise** issue. The issue should then be considered preserved for appellate review"); Marquard v. State, 641 So.2d 54, 58 n. 4 (Fla. 1994) ("not preserved as to the trial court's denial of motion for judgment of acquittal on murder charge" ***); Hardwick v. State,

630 So.2d 1212, 1213 (Fla. 5th DCA 1994)("defendant's **perfunctory** motions for judgment of acquittal"); Patterson v. State, 391 So.2d 344, 345 (Fla. 5th DCA 1980) ("**bare bones** motion for directed verdict will not permit a defendant to raise every possible claimed insufficiency in the evidence"); De La Cova v. State, 355 So.2d 1227, 1230 (Fla. 3d DCA 1978) ("**bare bones** motion for directed verdict does not raise every possible claimed insufficiency in the evidence"). §924.051(1)(b),(3), Fla. Stat. (preservation requires trial be informed "sufficiently precise" ground). Cf. Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings "procedurally barred because defense counsel failed to object with the requisite specificity in the trial court"); Hill v. State, 549 So.2d 179, 181-82 (Fla. 1989) ("constitutional argument grounded on due process and Chambers was not presented to the trial court ... procedurally bars appellant from presenting the argument on appeal.").

If Appellant attempts to argue that Cummings' judgment of acquittal argument somehow preserved ISSUE I here, he would be mistaken. Regarding the Murder count, Appellant did not adopt Cummings' arguments below because they did not apply to Appellant. Instead, the arguments of Cumming's counsel pertaining to Appellant's kidnapping and deadly force emphasized whether Cummings aided it or even knew of them, **not** whether **Appellant** ultimately killed the victim while engaged in a felony/attempt/flight qualifying for felony murder and **not** whether

**Appellant** ultimately premeditatedly killed the victim. (See XIII 1486-99) Indeed, perhaps neither Cummings nor Appellant argued that the evidence was insufficient to prove the First Degree Murder of Little Robert because there was a genuine jury issue on these matters — a topic to which the discussion now turns.

**B. Arguendo, on the merits, there was sufficient evidence meriting affirmance of the trial court.**

**1. Standard of appellate review.**

Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), enunciated the

> general proposition[] [that] an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Woods v. State, 24 Fla. L. Weekly S183, recently explained in its introduction to analyzing Woods' claim that "the trial court erred in denying his motion for judgment of acquittal because the State's case rested entirely on circumstantial evidence":

> In *Gordon v. State*, 704 So.2d 107 (Fla. 1997), we reemphasized the standard courts must apply in considering motions for judgment of acquittal:
>
> > We have repeatedly reaffirmed the general rule established in *Lynch v. State*, 293 So.2d 44 (Fla. 1974), that:
> >
> > > [C]ourts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.
> >
> > *Id.* at 45; *see Gudinas v. State*, 693 So.2d 953 (Fla. 1997), *cert. denied*, __ U.S. __, 118 S. Ct.

345, 139 L. Ed. 2d 267 (1997); *Barwick v. State*, 660 So.2d 685 (Fla. 1995); *DeAngelo v. State*, 616 So.2d 440 (Fla. 1993); *Taylor v. State*, 583 So.2d 323 (Fla. 1991). In circumstantial evidence cases, "a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." *Barwick*, 660 So.2d at 694.

Therefore, at the outset, "the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences." *Barwick*, 660 So.2d at 694. After the judge determines, as a matter of law, whether such competent evidence exists, the "question of whether the evidence is inconsistent with any other reasonable inference is a question of fact for the jury." *Long v. State*, 689 So.2d 1055, 1058 (Fla. 1997).

*Gordon*, 704 So.2d at 112-13; *see also State v. Law*, 559 So.2d 187, 188-89 (Fla. 1989) (applying circumstantial evidence rule to determination of motion for judgment of acquittal). On review, we must view the conflicting evidence in a light most favorable to the state. *See Peterka v. State*, 640 So.2d 59, 68 (Fla. 1994). So long as competent, substantial evidence supports the jury's verdict, it will not be overturned on appeal. *Id.*

Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993), explained:

> Where circumstantial evidence is relied upon to prove a crime, in order to overcome a defendant's motion for judgment of acquittal, the burden is on the State to introduce evidence which excludes every reasonable hypothesis except guilt. The State is not required to conclusively rebut every possible variation of events which can be inferred from the evidence but only to introduce competent evidence which is inconsistent with the defendant's theory of events. *State v. Law*, 559 So.2d 187, 189 (Fla.1989). Once this threshold burden has been met, the question of whether the evidence is sufficient to exclude all reasonable hypotheses of innocence is for the jury to determine.

See also Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) (contradictory evidence by State's witnesses does not render evidence insufficient, jury's job to evaluate); Gordon v. State, 704 So.2d 107, 113 n. 15 (Fla. 1997) ("Gordon's reference to a "mystery man" in the shadows at the stairwell as the possible

murderer is unconvincing ... jury could have very reasonably inferred that the unidentified black male was McDonald").

Thus, where the State has no eyewitness to the murder,[2] the question becomes whether "after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment" (Tibbs) and exclude every reasonable defense theory, which does not require rebutting "every possible variation of events which can be inferred" (Atwater).

**2. Given the standard of appellate review, salient facts establish that Appellant terrorized Little Robert and the adults supervising him, lied about where he would leave the victim, ultimately entombing the victim in the stolen car.**

Given the standard of appellate review, salient facts include the following:

- All of the events occurred in the Jacksonville **June 2 heat**. (See, e.g., XI 1030, 1095; XII 1350. See also XIII 1583-84, 1638-39)
- Little Robert died (E.g., XII 1357, 1365) in a **car that Appellant stole** for his flight from a robbery-burglary crime scene (See, e.g., XII 1259, 1263, 1266-67. See also XIII 1521-23).

Events leading up to the Little Robert's death include the following at the home that Appellant burglarized and where he robbed the occupants in Little Robert's presence:

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[2] But see Orme v. State, 677 So.2d 258, 262 (Fla. 1996) (discussion of circumstantial versus direct evidence).

- At about 3 pm (XII 1320) Appellant entered Little Robert's father's home **brandishing** (XI 1032, 1186-87, XII 1257-58, XIII 1458) a **large** (XII 1257, XIII 1459-60) **automatic** (XI 1097, XII 1219) 45 or 9 mm **gun** (XI 1133-34, XII 1219); thus, when Kahari Graham, the victim's seven-year-old brother was asked, "What did he [Appellant] do with your brother?," Kahari responded, "He was **pointing the gun at everybody**" (XIII 1458).
- Appellant announced to the occupants of the house that "**This is a robbery**." (XII 1219, 1242)
- Appellant referred to himself as "**Psycho**" (E.g., XI 1083).
- Appellant **pistol-whipped Little Robert's mother** in the face, causing her to drop to the floor **bleeding** and in a daze (XI 1033, 1057, 1097, 1130-31, 1187, 1189, XII 1217, XIII 1465-66); as she bled, **Robert's mother cried** (XII 1262).
- Appellant **pressed his large gun to the heads** of Derrick Dixon (XI 1096, 1185-86. See also XII 1217-18, 1222) and David Cobb (XII 1295).
- Appellant "**clicked" the gun and ejected a round** from the gun, stating, "You-all think I'm playing?" (XI 1097, 1219-20. See also XI 1185-86).
- Appellant **searched the occupants**' pockets (XIII 1454. See XII 1225-27, 1280) and **took property** from little Robert's family and friends, (See, e.g., XII 1227, 1297-98. See also XI 1092-93, 1110) including **$2 from Kahari** (XIII

1454-55), who was seven years old at the time of the trial (XI 1100, XIII 1449).

- Appellant **ordered** Little Robert's family and friends around the house, including ordering them to **crawl** (XI 1074, 1096-97, 1105-1106, 1187, 1197, 1211, XII 1298, 1304-1305).
- Appellant's actions resulted in Little Robert and Kahari, **crying** (XI 1032, 1199).
- Appellant told the crying Kahari, "he better **shut his mouth or he was going to kill him**" (XII 1220-21). Kahari and Little Rob stopped crying when Appellant ordered them to "**shut up**" (XI 1106).
- At one point, minutes after Little Robert complained of someone choking him, Little Robert asked, "**Are you going to kill me**?" (XI 1039, 1080. See also XI 1199)
- David Cobb testified that an occupant of the home appeared like "he was getting ready to run"; Appellant reacted by "**grabb[ing] him** by the T-top and he said, 'N-----, **don't run or I'll shoot**'" (XII 1297).
- Appellant herded the home's occupants into the bathroom (See, e.g., XII 1298-99), **closed the bathroom door, then subsequently opened the bathroom door, stating, "Oh, you-all thought I was gone, didn't you**?," then closed the door again (XI 1108. See XI 1079).
- Appellant told the occupants of the bathroom that "**if they come out, he was going to kill the little boy**" (XII 1262-63). Another witness put it:

> He was saying that he was going to take little Rob with him, and that if he heard **any doors** or anything in the house, or if he saw any police **he would kill him**.

(XII 1280)

- Appellant took Little Robert as a "**hostage**" (XI 1188, 1191, 1199, XII 1213) for "**insurance**" for his getaway (XI 1075, XII 1305).
- Derrick Dixon testified that Appellant **grabbed** Little Rob when he announced that "This is **our little hostage** right here." (XI 1199. See also XII 1206) In Kahari's words, Appellant "**pulled**" Little Rob (XIII 1462-63). Appellant ultimately took Little Rob with him when he left the home.
- Appellant assured Little Rob's father that **he would leave Little Rob at the corner** (XI 1107), but, instead, according to the father, left him "**way down** from my house on the other side of the street" (XI 1108-1109).[3]

Little Robert was three years old (XI 1029-30) when he died in Appellant's stolen getaway car (See XII 1351-57, 1365).

After Little Rob asked, "Are you going to kill me?," his mother never saw him alive again. (XI 1074-75)[4]

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[3] The stolen car, containing Little Rob's dead body, was recovered at the corner of Ellis (or Ella) and Tyler streets. (XII 1329-30, 1352) One witness indicated that she was not a good judge of distances and then estimated the distance to the 1500 block of Logan Street as "probably a good half a mile or so." (XII 1352) The defendant testified that the distance was "eight-tenths of a mile." (XIII 1548)

[4] Appellant testified:

> When I was placing him in the car, he asked was I going to hurt his mommy, and I said, 'No.' *** I parked the car, took the CD player out of the car, I shut the door, and got into the other car and left[,

In sum, **Appellant terrorized Little Robert and his family with threats of deadly force and communicated that if anyone left where he put them he would kill them.**

**3. Felony-murder and premeditation are alternative ways that support affirmance.**

In determining whether the facts were sufficient for First Degree Murder, it is well-settled that in Florida, there are two alternative ways that First Degree Murder may be proved: felony-murder **OR** premeditation. Thus, in Florida, felony-murder and premeditated murder are not separate crimes, and the State disputes any suggestion to the contrary: "premeditated murder charge" (IB 37). Accordingly, at other junctures in Appellant's brief, he correctly identifies the charge as "murder" (IB 36, 40, 40) or "first degree murder" (IB 39, 40). See, e.g., Johnson v. State, 720 So.2d 232, 236-37 (Fla. 1998) ("jury returned a general verdict of guilt *** evidence is sufficient to uphold the conviction based on a theory of premeditation **or** felony murder"); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("sufficient evidence by which to sustain Donaldson's conviction of first-degree murder under a theory of **either** felony murder or premeditated murder"); San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997) ("evidence is sufficient to support San Martin's conviction for premeditated murder. Furthermore, the jury returned a general verdict on the first-degree murder charge and the

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leaving] *** little Robert Sparrow ... [s]eated in the passenger seat.
(XIII 1524, 1525)

circumstances of this case clearly support a conviction under the felony murder theory *** no error as to San Martin's conviction for first-degree murder"); Jenkins v. State, 692 So.2d 893, 894 (Fla. 1997) (claim attacking sufficiency of premeditated murder; "Assuming without deciding whether the trial court erred, we find this error would be harmless because the evidence clearly supported a first-degree murder conviction on a felony-murder theory"); Parker v. Dugger, 660 So.2d 1386, 1390 (Fla. 1995) ("even the reversal of an underlying felony conviction does not affect a first-degree murder conviction where the jury is instructed on both premeditated and felony murder, there is ample evidence supporting premeditation, and the jury returns a general guilty verdict of murder"); Mungin v. State, 689 So.2d 1026, 1029 (Fla. 1995) (Although the trial judge erred in denying the motion for judgment of acquittal as to premeditation, we do not reverse Mungin's first-degree murder conviction because the judge correctly denied the motion as to felony murder"); Atwater v. State, 626 So.2d 1325, 1327-28 n. 1 (Fla.1993) ("reversal of the robbery conviction would not affect the murder conviction because the jury was instructed on both premeditated and felony murder, there was ample evidence to demonstrate premeditation, and the jury returned a general guilty verdict of murder"); Teffeteller v. State, 439 So.2d 840, 844 (Fla. 1983) ("evidence shows that the conviction can be sustained not solely under a felony murder theory but also under a premeditation theory. The latter being valid, the alleged inadequacies in the underlying felony instructions become moot"); Vasil v. State, 374 So.2d 465, 470-71

(Fla. 1979) ("there was evidence to support a conviction for first degree murder based on premeditation *** this Court has held that any error in instructing on homicide in the perpetration of other crimes is harmless"); Frazier v. State, 107 So.2d 16, 20 (Fla. 1958) ("We have carefully reviewed the record and find sufficient evidence to support a finding by the jury that the killing was by premeditated design. In view of this the charge complained of [concerning felony murder] cannot be said to be harmful, even if it were erroneous"); Sims v. Singletary, 155 F.3d 1297, 1313 (11th Cir. 1998) ("jury did not need to agree on the precise theory of first degree murder, only the offense itself").

Thus, the issue becomes whether any favorable view of the evidence and inferences from the evidence supported either felony-murder **OR** premeditation. Here both theories were supported.

**4. There was evidence on which the trial court could lawfully instruct the jury on felony-murder as a manner in which First Degree Murder may be proved.**

Even if the victim died from hyperthermia as Appellant argues (See IB 35, 38-40), the evidence was sufficient for First Degree Murder. Hyperthermia is an increase in body temperature to the point where the body's organs fail (XIII 1419). In this sense, under Appellant's claim, the stolen car was like an oven, in which the temperature can "rise above 100 degrees pretty quickly" (XIII 1422). Dr. Floro acknowledged that "cars that are closed up the temperature can rise over 105 degrees within about ... 15 to 45 minutes" and that 105 degrees is "dangerous" for a child. (XIII 1422-23)

When Appellant lethally left Little Rob in the car, assuming he was still alive at that time, his actions fell within his kidnapping and flight from the scene of the robbery-burglary, thereby committing First Degree Murder through felony murder.

The trial court properly charged the jury with considering as felonies for felony murder kidnapping, robbery, burglary, or escape from the immediate scene of one of these felonies (XV 1908-1909).

As a fundamental premise, the State contests the legal significance of Appellant's argument that "the child died from hyperthermia" (IB 51. See IB 38-39) in the stolen car where Appellant left him. Evidence that a killing was accidental is not a defense to felony murder. See, e.g., Pope v. State, 94 So. 865, 872 (Fla. 1922) ("not necessary that the shooting should have been intentional"). Cf., e.g., Lovette v. State, 636 So.2d 1304, 1306-1307 (Fla. 1994) (upheld the trial court's rejection of an independent-act instruction where Lovette claimed that his accomplice unexpectedly killed three victims during a robbery in which he participated).

**a. The kidnapping continued until the victim's death, thereby supporting a felony murder instruction as a manner in which Appellant committed First Degree Murder of Little Robert.**

When Appellant shut the door[5] to the stolen car that entombed Little Robert, he also shut the door on ISSUE I. Regardless of whether Appellant strangled, suffocated, or left Little Robert in

[5] The windows and doors functioned properly. (XII 1265)

the car to cook to death, the kidnapping of Little Robert continued until his death because, by Appellant's own words, he abducted and confined Little Robert "as a shield or hostage," §787.01(1)(a)1, Fla. Stat., and confined him in the car "without the consent of ... his parent or legal guardian," §787.01(1)(b).

In Jacobs v. State, 396 So.2d 713 (Fla. 1981), the defendant's accomplices placed Leonard Levinson in Levinson's Cadillac to continue their getaway. Here, Appellant abducted Little Robert in a car stolen for his getaway to "insure" its success. In Jacobs, based upon a principal theory, there was "sufficient evidence to sustain her kidnapping conviction." Here, Appellant personally abducted the victim, rendering the evidence sufficient for kidnapping. See also Suggs v. State, 644 So.2d 64, 68-69 (Fla. 1994) ("evidence exists to support the charge that he forcibly required the victim to leave the bar"; "record supports Suggs' conviction for kidnapping"). As long as Little Robert remained in the car, where Appellant had encased him, Little Robert's confinement continued. The duration of the kidnapping was commensurate with the duration of the confinement, rendering Little Robert's death felony murder, regardless of how Appellant killed him.

In holding that "[t]his is not the sort of confinement that is incidental to robbery," the analysis of the duration of a kidnapping confinement in Berry v. State, 668 So.2d 967, 969 (Fla. 1996), is on point:

> [I]n this case the robbers left the scene of the robbery without untying the victims, thereby leaving them both in a precarious and vulnerable state for a period beyond

> the robbery. Like the situation where the victim of a forcible felony is barricaded or locked in a room or closet, the confinement continued even after the robbery had ceased.

Here, a reasonable person, who knew what Appellant knew Little Robert had been through because Appellant put him through it, would know that three-year-old Little Robert would not feel free to leave the car. Appellant had told other victims not to leave or he would kill him. He told an adult victim, "don't run or I'll shoot." Little Robert was "in a precarious and vulnerable state for a period beyond the robbery" and kidnapping. He effectively was "barricaded" in the car until his death.

Even without Appellant's knowledge of Little Rob's terror, Appellant still abducted Little Rob and then maintained his confinement by "terroriz[ing] the victim or another person," §787.01(1)(a)3, i.e., the adults at the home from which Appellant abducted Little Robert.

In conclusion, the continuing nature of the kidnapping encompassed the killing of Little Rob, rendering the evidence sufficient for felony murder as the manner in which Appellant committed First Degree Murder.

**b. Because Appellant's lethal act occurred within his escape from the immediate scene of the kidnapping, robbery, or burglary, the evidence supported a felony murder instruction as a manner in which Appellant committed First Degree Murder of Little Robert.**

Arguendo, even if the kidnapping ceased when Appellant abandoned Little Robert in the fully enclosed, stolen car, Appellant's lethal act was nevertheless done during his escape

from the immediate scene of the kidnapping, robbery, or burglary,[6] thereby providing sufficient evidence for a felony murder instruction.

Analytically, the determination of whether the evidence was sufficient for a felony murder turns upon whether Appellant's **lethal act** of leaving Little Robert in the enclosed car on the street in Jacksonville in June was during the commission of a kidnapping, or a robbery, or a burglary (XV 1909), an attempt to commit one of those felonies, or flight from one of them. Concerning flight, see Parker v. State, 641 So.2d 369, 376 (Fla. 1994) (robbery occurred in restaurant; victim shot while chasing Parker in street; "no merit to Parker's claim that a killing during flight from the commission of a felony is not felony murder"); Griffin v. State, 639 So.2d 966, 971-72 (Fla. 1994); Parker v. State, 570 So.2d 1048 (Fla. 1st DCA 1990), discussed approvingly in Griffin ("entire chain of events from the robbery to the murder was no more that one hour and the killing occurred no more than several miles away from the site of the robbery"); cf. Pietri v. State, 644 So.2d 1347, 1350, 1353 n. 11 (Fla. 1994) (upheld "aggravator that the murder was committed while Pietri was engaged in flight after committing a burglary").

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[6] The State does not address Aggravated Child Abuse as a felony qualifying for felony murder here because the jury was not instructed on it (See XV 1908-1913). Compare §782.04(1)(a)2h, Fla. Stat. (1997); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("Felony murder was established by evidence that Donaldson caused the death of the victims while committing kidnapping or aggravated child abuse").

The relationship of the Appellant's **lethal act** to an underlying felony, or flight from it, determines the issue, **not** the **time of the victim's death**. Accordingly, the evidence is sufficient for murder even though the death of the victim transpires hours, days, or weeks after the lethal act and its infliction of injury. See, e.g., Trepal v. State, 621 So.2d 1361, 1366 n. 12 (Fla. 1993) (alternatively on merits, rejected claim that doctors caused victim's death "by removing her from life-support systems"; "evidence sufficient to support a verdict of premeditated murder"); Rose v. State, 591 So.2d 195, 200 (Fla. 4th DCA 1991) ("medical negligence was not a legal 'cause' of death so as to avoid criminal responsibility").

As Hallman v. State, 371 So.2d 482, 485-86 (Fla. 1979) overruled on other ground 591 So.2d 911, 915 (Fla. 1991), explained, the analysis of responsibility for a victim's death focuses upon the defendant's acts, not any delay in the death and not others' negligence during that delay.

Hallman, 371 So.2d at 486, favorably cited to Adams v. State, 310 So.2d 782 (Fla. 2d DCA 1975) (reduced to Second degree murder on other ground) quashed on other ground 335 So.2d 801 (Fla. 1976), which approved felony murder due to a chain of events the perpetrator initiated:

> Appellant Yarborough snatched the victim's purse causing her to fall. The fall caused the broken hip. The broken hip required treatment by surgery. The surgery brought about the cardiac arrest. The cardiac arrest was the immediate cause of death.

Here, Appellant terrorized Little Robert then enclosed him in a car far away from his family, especially from a three-year-old's

perspective. Assuming, arguendo, hyperthermia as the cause of death, this caused Little Robert not to exit the car, which "brought about" his death.

Johnson v. State, 59 So. 894, 895 (Fla. 1912), a seminal case, reasoned, quoting an Alabama authority:

> 'A defendant cannot escape the penalties for an **act** which in point of fact produces death, which death might possibly have been averted by some possible mode of treatment. The true doctrine is that, where the wound is in itself dangerous to life, mere erroneous treatment of it or of the wounded man suffering from it will afford the defendant no protection against the charge of unlawful homicide.'

Here, Appellant's "act" was leaving Little Robert in the car. Appellant's "act" was "itself dangerous to [the] life," Id., of a terrorized three-year old child, rendering Appellant responsible for the result of Little Robert's death.

The proper demise of the so-called "year and a day rule" recognized the responsibility for a lethal act resulting in deaths even over a year after the lethal act. See §782.035, Fla. Stat. State v. Young, 372 A.2d 1117 (N.J. Super. Ct. 1977) application limited prospectively 390 A.2d 556 (N.J. 1978), explained: "'year and a day rule' does not conform to present-day medical realities, principles of equity or public policy." Commonwealth v. Lewis, 409 N.E.2d 771, 773 (Mass. 1980), explained: "In particular the rule appears anachronistic upon a consideration of the advances of medical and related science in solving etiological problems as well as in sustaining or prolonging life in the face of trauma or disease."

If the defendant shoves the robbery victim off of a cliff, it is no defense that the defendant walked away from the scene prior to the victim's fatal impact with the ground, such has where the victim teetered in a narrow cliff for several minutes on the way down. Here, Appellant's act of enclosing and abandoning Little Rob is like pushing him off of the cliff; Little Rob may have "teetered" for awhile before succumbing to the heat.

If the defendant starts a fire at the victim's home (arson) and arrives home prior to the victim-occupant's death in the fire, the defendant is just as responsible for the victim's death as if he/she had poured gasoline on the victim's person and watched the victim burn to death. The key is the defendant's lethal act not the time of death.

Little Robert is like the arson victim. Just as the fire eventually engulfs the arsoned premises and overwhelms the victim-occupant, the heat eventually engulfed the Kia containing three-year-old Robert and overwhelmed him.

Accordingly, an arsonist may place a fire bomb set to ignite hours or days later, and leave the premises. The legislature could not have intended for him to escape the ambit of felony murder simply because he was not present during the death of an occupant to the building. The lethal act is setting the fire or placing the bomb, which continues until its reasonably foreseeable results are realized, See generally Howell v. State, 707 So.2d 674 (Fla. 1998) (defendant in Ft. Lauderdale when his bomb exploded in North Florida; defendant convicted of First Degree Murder based upon "proof of premeditated design and felony murder"; aggravator of

"the murder was committed while Howell was engaged in the unlawful making, possessing, placing, or discharging of a destructive device or bomb"; rejected claim that felony-murder aggravator unconstitutional); Coney v. State, 653 So.2d 1009 (Fla. 1995) (Defendant set victim afire, and victim died the next day; aggravator of "murder was committed during the course of an arson"; upheld death sentence's proportionality); Henry v. State, 613 So.2d 429, 432, 432 n. 10 (Fla. 1992) (robbery-arson-murder; victim whom defendant had hit in head with hammer then set on fire died next day; affirmed proceeding "on alternative theories of premeditated and felony murder"); Toole v. State, 479 So.2d 731 (Fla. 1985) ("appellant guilty of felony murder" based upon victim dying from injuries caused by fire defendant set; rejected claim that "aggravating circumstance that the capital felony occurred during the commission of a felony, here arson, takes into account the underlying felony").

Analogously, in analyzing the independent act defense in co-felon situations, Bryant v. State, 412 So.2d 347, 350 (Fla. 1982), explained that "liability is circumscribed by the limitation that the **lethal act** must be in furtherance or prosecution of the common design or unlawful act the parties set out to accomplish." Also, see, e.g., Hawkins v. State, 436 So.2d 44, 46 (Fla. 1983) ("the felony murder rule and the law of principals combine to make a felon generally responsible for the **lethal acts** of his co-felon") quoting Enmund v. State, 399 So.2d 1362, 1369 (Fla.1981) (quoting Adams v. State, 341 So.2d 765, 768-69 (Fla.1976), cert. denied,

434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977)), rev'd on other grounds, --- U.S. ----, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

Further, this Court has rejected dual convictions of Aggravated Battery and felony murder based upon the same "**lethal act**," Mills v. State, 476 So.2d 172, 177 (Fla. 1985). The "lethal act" was the "felonious conduct" that otherwise would have provided the basis of felony murder. Here, there is no issue of dual convictions, but, analogously, Mills' analysis on the lethal act as a focus for felony murder applies.

Although Appellant (at IB 49-50) mistakenly relies upon Mills v. State, 407 So.2d 218, 221 (Fla. 3d DCA 1981), as purported support for his jury instruction claims, Mills can properly be considered regarding sufficiency of the evidence concerning the scope of the robbery/burglary/kidnapping here:

> The fact that the taking of Meli's money and car had been accomplished some **twenty-four hours** before the killing occurred did not, under the facts of the present case, terminate the robbery so that it could no longer constitute the underlying felony for felony murder purposes.

Mills (3d DCA) reasoned:

> Most certainly in this case, where Meli [the robbery victim] remained in **continuous captivity** from the commencement of the felony until his death, the nexus between the robbery and his death is clear.

407 So.2d at 221-22. Here, although Little Robert was not one of the originally-intended robbery victims, he effectively was in "continuous captivity from the commencement of the felony until his death," with the additional theft of the CD player from the car reinforcing that nexus.

It is no defense that Little Robert did not attempt his escape due to age or anything else, as "[c]riminals take their victims as they find them," including the victims' "prior existing physical infirmities," Swan v. State, 322 So.2d 485, 487 (Fla. 1975). Here, albeit unnecessary for Appellant's responsibility, Little Rob's infirmity was as obvious as his age and small stature and the terror that Appellant imposed upon him. In this additional incriminating context, it is Appellant's wrongful act that remains crucial to the analysis.

Further, as suggested by the failure of the defendant to provide for the buried baby's breathing needs in Roman v. State, 475 So.2d 1228 (Fla. 1985), or by the failure to warn potential victims of a bomb in Howell, 707 So.2d at 682 ("at the time Howell was informed that law enforcement officers had the rental car containing the bomb in their custody, and chose not to inform them of the presence of the bomb"), Appellant had a special duty towards Little Rob. Appellant created a lethal situation for him while kidnapping him. Here, Appellant did nothing to save little Robert. Instead, he enclosed him in an oven to bake to death in the Jacksonville June heat.

In sum, when Appellant lethally left Little Rob in the car, his actions fell within his kidnapping and flight from the scene of the robbery-burglary.[7]

[7] Indeed, Appellant continued the robbery to the location where he left the victim in the enclosed car, where he also took the CD player from the car. (See XII 1267)

**5. There was evidence on which the trial court could lawfully instruct the jury on premeditation as a manner in which First Degree Murder may be proved.**

The evidence was sufficient to support the premeditated murder instruction even if Appellant did not suffocate or strangle Little Rob to death. By his own words, Appellant repeatedly indicated that he felt free to kill to achieve his ends: "he better shut his mouth or he was going to kill him"; "don't run or I'll shoot"; "if they come out, he was going to kill the little boy"; "he was saying ... if he saw any police he would kill him." (See cites bulleted supra) Appellant sealed the victim's fate and his own when he left the windows closed and closed the car doors, intending the victim's death just as if had sealed the victim inside a kitchen oven.

In Roman v. State, 475 So.2d 1228 (Fla. 1985), the defendant abducted a baby and placed it underground. There, the defendant took an affirmative measure of providing a breathing tube. Here, Appellant sealed the car with its windows and doors closed. In Roman, the child died of asphyxiation. Roman upheld, albeit without further discussion, "convictions of premeditated first-degree murder, kidnapping and sexual battery." Just as it was improbable that the baby in Roman could escape, it was improbable that terrified Little Rob would. Roman's and Appellant's actions were like pushing someone off of a cliff: Although it is possible that the pushed victim might grab a branch on the way down or that rescue might then save them, such possibilities do not exculpate the defendant, even if there are a lot of branches. The victim in Roman might have survived with the

breathing tube or through a good Samaritan's actions, but the possibility of survival does not negate responsibility for the result that is so highly foreseeable that it is sufficient to infer that they intended it. See also Trepal, 621 So.2d at 1366 n. 12 (medical personnel removing her from life-support); Hallman, 371 So.2d at 485-86 (medical negligence); Rose, 591 So.2d at 200 (medical negligence). Here, there is no evidence that Appellant knew of Little Rob's ability to open doors and windows. Here, there was evidence of Appellant terrorizing Little Robert and his obvious young age. Here, it was difficult to see Little Rob inside the car "until you got up close to the car" because the "windows were tinted" (XII 1353), thereby reducing the chances of the intervention of a Good Samaritan.

Here, as each minute passed after Appellant left Little Robert in the stolen car to cook in Jacksonville's June heat, Appellant corroborated the State's evidence of premeditation.

Further, although subject to conflicts, there was competent evidence that the victim's death was caused by strangulation/suffocation, which is sufficient for premeditation. See Holton v. State, 573 So.2d 284, 289-90 (Fla. 1990) ("Death was caused by strangulation"; exculpatory statements when questioned by police detectives" but jury not required to believe "defense version of facts on which the state has produced conflicting evidence"; substantial competent evidence to support the jury verdict that the murder was premeditated").

Here, the question of whether there was sufficient evidence of strangulation/suffocation is resolved by Appellant's admission

that there was "[c]onflicting expert testimony ... concerning the cause of death" (IB 38). Thus, Dr. Floro found no evidence indicating that Little Rob had died from hyperthermia (XII 1380), and the defense expert opined to the contrary (XIV 1615 et seq). In such cases, it is the jury's province to determine the credibility of each witness. See, e.g., Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981) (rejected claim that asked appellate court to "evaluate the credibility of the [conflicting] witnesses"); Donaldson and other authorities cited under standard of appellate review supra.

Appellant relies (IB 36-38) primarily upon Mungin v. State, 689 So.2d 1026 (Fla. 1995). The key to Mungin, however, was the instantaneous manner in which the victim was killed. There, the "victim was shot once in the head at close range; the only injury was the gunshot wound," Id. at 1029. Here, like Holton, and unlike the instantaneous single flick of a trigger finger in Mungin, there was competent evidence of a much slower method of killing, here through suffocation. Moreover, in contrast to Mungin's absence of any statements indicating a pre-existing inclination to kill, Appellant repeatedly displayed such a willingness.

In contrast to Mungin, Delap v. State, 440 So.2d 1242, 1253 (Fla. 1983), enunciated the controlling principle:

> In a criminal case expert medical opinion as to cause of death does not need to be stated with reasonable medical certainty. Such testimony is competent if the expert can show that, in his opinion, the occurrence could cause death or that the occurrence might have or probably did cause death. *See Copeland v. State*, 58 Fla. 26, 50 So. 621 (1909); *Hampton v. State*, 50 Fla. 55, 39 So. 421 (1905); 24 Fla.Jur.2d Evidence and Witnesses Sec. 683

(1981); Smith and Tipton, Reasonable Medical Certainty in Florida, 30 Fla.B.J. 327 (May 1956).

Here, Dr. Floro testified that, to a reasonable medical certainty, Little Rob was suffocated to death. (XII 1375) Dr. Floro based his opinion upon the combination of --

- Conjunctival hemorrhage (XII 1377, 1389);
- Severe petechiae in the victim's face (XII 1377);
- Petechial hemorrhages on the surface of the heart (XII 1377);
- A mark indicating that the victim's neck had been squeezed (XII 1377;
- Discharge from the child's mouth and nose consistent with suffocation (XII 1377-78);
- A bruise on the victim's lower lip consistent with "his face being compressed into" a car seat (XII 1379, 1388).

(See also photographs described at XII 1386-88, petechial process described at XII 1387)

As in Delap, "the weight to be given [the expert's opinion] is a matter to be determined by the jury." 440 So.2d at 1253. A fortiori, in Delap, the expert did not testify to a "reasonable medical certainty," unlike here.

Moreover, here Dr. Floro testified:

> Q In the observation that you had of that child, could he have been suffocated by an individual forcing his face, closing his nose and mouth into a seat like the seat which is about 12 feet in front of you? ...
> A Yes, sir.

(XII 1378) The officer who first found the victim's dead body on June 2 (XIII 1350) testified that Little Rob was found in the car

with "his face ... compressed into the seat." (XII 1355) When she lifted up the victim's head, "air came out of his lungs like he couldn't get air." (XIII 1356-57) She also described the discharges on the victim's face and in the car. (XIII 1359-61)

Moreover, to the degree that Appellant contends that Little Rob had the **skills** to exit the car (See XI 1041-42, XII 1307) further establishes that he was **unable** to exit because Appellant suffocated him to death or otherwise disabled him physically – or psychologically by terrorizing him.

**6. The trial court's penalty-phase findings do not require reversal of its guilt-phase denial of the perfunctory motion for judgement of acquittal.**

The trial court ultimately in its role as finder of fact in the penalty phase decided that it could not conclude beyond-a-reasonable-doubt that Appellant suffocatad/strangled the victim. (II 387) Appellant suggests that this finding is somehow persuasive or dispositive concerning the sufficiency of evidence at the motion-for-judgment-of-acquittal stage: "Indeed, the Court's Sentencing Order makes it perfectly clear that the evidence was not inconsistent with that theory of innocence" (IB 39. See also ISSUE II at IB 42). Appellant mistakenly merges distinct basic functions of the trial judge, on the one hand, as gatekeeper for the verdicts the evidence would support (sufficiency of evidence) and, on the other hand, what it finds in its role as trier of fact in the penalty phase. The former role determines whether the evidence and inferences from it reasonably

support each verdict that is presented to the jury as an option, whereas the latter role makes a specific finding.

Appellant would violate the well-settled principle, which this Court very recently repeated in Woods (April 15, 1999):

> Once competent evidence has been submitted to the jury, determining the credibility of witnesses is **solely within the province of the jury**, see Davis v. State, 703 So.2d 1055, 1060 (Fla. 1997), *cert. denied*, 118 S. Ct. 2327 (1998); *Terry v. State*, 668 So.2d 954, 962 n.9 (Fla. 1996); *Holton*, 573 So.2d at 290; *cf. Carter v. State*, 560 So.2d 1166, 1168 (Fla. 1990) (noting that credibility of accomplices' version of murder is question for jury), and its findings will not be disturbed on appeal absent a clear showing of error. *See Jent v. State*, 408 So.2d 1024, 1028 (1981), *modified on other grounds*, *Preston v. State*, 444 So.2d 939 (Fla. 1984).

The principle enunciated in Lynch v. State, 293 So.2d 44, 45-46 (Fla. 1974), is on point:

> Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should **submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge**. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal. *Holland v. State*, 129 Fla. 363, 176 So. 169 (1937); *Adams v. State*, 138 Fla. 206, 189 So. 392 (1939); *Sheehan v. Allred*, 146 So.2d 760 (Fla.App.1st, 1962); *Budgen v. Brady*, 103 So.2d 672 (Fla.App.1st, 1958).

Under Woods, Lynch, cases cited in them, as well Tibbs and Donaldson, it would have been error for the trial court to re-weigh the evidence as Appellant now requests.

Furthermore, the determination of the precise cause of the victim's death is unnecessary. As argued at length supra, regardless of whether Appellant enclosed the terrified three-year-

old victim in the functional equivalent of an oven or suffocated him to death, the result is the same, a lawful conviction of First Degree Murder. Thus, the trial court's penalty-phase order is irrelevant to ISSUE I.

Indeed, just as Appellant's motions for judgment of acquittal failed to raise any improper and meritless claim of sufficiency of evidence of First Degree Murder based on conflicts on the evidence, they also failed to contend that the trial court should consider how it would view the evidence in the future penalty phase. This claim is also unpreserved.

## ISSUE II

DID THE TRIAL COURT REVERSIBLY ERR BY DENYING A MOTION FOR NEW TRIAL, WHICH CONTENDED THAT "THE VERDICT IS CONTRARY TO THE WEIGHT OF THE EVIDENCE"? (Restated)

Concerning ISSUE II, Appellant's Motion for New Trial (II 303) contended, in its entirety: "The verdict is contrary to the weight of the evidence." The Motion was submitted "without further arguments and denied (V 808). As in ISSUE I's motions for judgment of acquittal, the Motion for New Trial was bare-bones, perfunctory, and thereby unpreserving. See authorities in ISSUE I supra.

Essentially, Appellant is speculating that **IF** he had presented this claim to the trial court, the trial court would have weighed the evidence for the purpose of a new trial exactly as it did for the penalty phase. However, speculation is not the "stuff" of reversal. See, e.g., Brookings v. State, 495 So.2d 135, 138-39

(Fla. 1986) (polygraph; "pure conjecture *** is too tenuous to support a finding of harmful error"); Ford v. Wainwright, 451 So.2d 471, 474 (Fla. 1984) (petition for writ of habeas corpus; "mere fact that a second vote was taken does not establish anything in this record to indicate that the jury felt compelled to reach a conclusion that they would not otherwise have reached"; "Petitioner's assertion to that fact is based purely upon conjecture, but this Court has stated that reversible error cannot be predicated on conjecture").

Arguendo, on the merits, ISSUE II has none. Smith v. Brown, 525 So.2d 868, 870 (Fla. 1988), enunciated the standard of appellate review on a motion for new trial:

> The trial judge should only intervene when the **manifest weight of the evidence dictates such action**. However, when a new trial is ordered, the **abuse of discretion** test becomes applicable on appellate review. The mere showing that there was evidence in the record to support the jury verdict does not demonstrate an abuse of discretion. *Ford Motor Co. v. Kikis*, 401 So.2d 1341 (Fla.1981).

In order to establish an abuse of discretion, the non-prevailing party-below must establish on appeal that "no reasonable [person] would take the view adopted by the trial court," Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), quoting Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942). Put another way, Appellant must establish on appeal that the trial court's finding was not "innovate[d] at pleasure," 382 So.2d at 1203, quoting Cardozo, The Nature of the Judicial Process 141 (1921).

Overlooking arguendo the critical preservation point that Appellant failed to specify in any way in his Motion for New Trial how "the manifest weight of the evidence dictates" a new trial and that Appellant failed to ask the trial court to re-weigh the evidence on this basis, it would have been unreasonable and error to grant a facially sufficient motion. Here, the "manifest weight of the evidence" did not "dictate[] such action," Smith v. Brown. Here, as a matter of law, even resolving all conflicts in the evidence in Appellant's favor and accepting Appellant's testimony at face value, the evidence supported at least felony murder. As argued at length in ISSUE I supra, Appellant intimidated the patently young and impressionable victim and then left him enclosed in the stolen getaway car. Appellant's kidnapping continued as long as Little Robert remained confined in the car, i.e., until he died. Moreover, Appellant's lethal act of enclosing the victim in the car and abandoning him occurred within at least Appellant's flight from one of the underlying felonies for felony murder.

Further, the State put numerous witnesses on the stand who testified of the terror inflicted upon them, Little Rob, and his slightly older brother Kahari. The "conflicts" among those witnesses generally concerned who was precisely at which locations in the house when. Concerning the essential facts of Appellant brandishing a large gun, maximizing its terror by pistol-whipping Little Rob's mother with it and ejecting a bullet from it, and threatening to kill anyone who does not cooperate, the witnesses were substantially consistent with one another. This evidence

would have supported an reasonable inference of premeditated murder, as argued in ISSUE I, and it would have rendered error the granting of a motion for new trial.

Here, however, the Motion for New Trial was denied and reasonably so. There was no error. Compare Parker v. State, 641 So.2d 369, 376 (Fla. 1994) ("Parker's 'new' evidence did not meet ... standard ... [of] no abuse of discretion"; "we will not disturb its determination of this issue").

For ISSUE II, Appellant (IB 40-41) relies upon Fisher v. State, 715 So.2d 950 (Fla. 1998), which concerned sufficiency of the evidence, not re-weighing evidence to determine if the "manifest weight of the evidence dictates" a new trial. Therefore, Fisher is inapplicable. Moreover, there, the evidence showed only that the defendant and his accomplices fired gunshots into a very large object, a house, ultimately killing an unintended victim-occupant who had not been previously involved. Here, in contrast, Appellant had made comments about killing this victim, See facts bulleted in ISSUE I supra, and here Appellant's lethal act specifically concerned that same helpless person. Appellant's actions towards **this** three-year-old were as incriminating as if he had lit a fuse that would have ignited the gas tank to the stolen car, where he put **this** victim. See discussion of arson, pushing someone off of a cliff, and related topics in ISSUE I.

Further, here, if there was any error regarding re-weighing either manner of First Degree Murder (felony or premeditation), it was harmless and non-prejudicial. See Johnson; Donaldson; San Martin; and other related authorities supra.

Appellant summarily posits that there was **something** about the trial court's penalty-phase instruction that **somehow** "skewed" the jury's analysis (IB 42), thereby prejudicing Appellant. The State submits that it should not be forced to guess at the appellate stage the aspect(s) of the penalty-phase jury instruction to which Appellant refers or to guess on any supposed impact of the instruction.[8] See Bryan v. Dugger, 641 So.2d 61, 63 (Fla. 1994) ("not allege sufficient facts to demonstrate"); Henderson v. State, 569 So.2d 925, 927 (Fla. 1st DCA 1990)("perfunctory argument made by appellant ... the state's justifiable lack of response, ...decline to consider ... not been properly preserved and presented for review on this appeal"); U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention"; "Failure to specify error or provide citations in support of an argument constitutes waiver, ... so we decline to reach the propriety of the district court's actions in this regard"); U.S. v. Dawn, 129 F.3d 878, 881 n. 3 (7th Cir. 1997) ("Dawn ... argues that sentencing on the basis of his conduct abroad would violate his due process rights because he lacked notice that he would be held responsible for that conduct"; "has left this argument undeveloped, however, and consequently we

[8] Defense counsel withdrew (V 869) a claim in a motion for new trial (II 344) that relied upon a newspaper article interview of a juror. Instead, defense counsel argued it to the trial judge as mitigation (V 869). Also, the trial court found that the "the comments contained in the article are inherent comments relating to matters that are inherent within the verdict and not of the nature of jury misconduct." (V 869)

need not address it"); U.S. v. Harvey, 959 F.2d 1371, 1376 (7th Cir. 1992) ("skeletal 'argument,' which is really nothing more than an assertion, does not preserve his claim that the district court erred by refusing to allow him to question"); U.S. v. Williams, 877 F.2d 516, 518-19 (7th Cir. 1989) (failure to designate on appeal specific evidence contested waives the issue; "Neither this court nor the United States Attorney has a duty to comb the record in order to discover possible errors"); U.S. v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (rejected a defendant's attempt to summarily adopt arguments co-defendants made; "no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"). Thus, Appellant, as the non-prevailing party below, has failed to overcome the well-settled presumption of correctness that attaches to trial court's actions. Any attempt to embellish the argument at the reply-brief stage, when the State would not have the opportunity to respond in writing, would be unfair.

Further, here, the trial court did not give the jury instruction on CCP (cold, calculated and premeditated) (See IV 689-90, 703, V 786-88), and under Johnson, Donaldson, San Martin, et al, it was perfectly proper to previously provide, in the guilt phase, the jury with alternative methods in which the defendant may have committed the crime.

Thus, the skewed penalty phase assertion is raw, unsupported speculation, which also was unpreserved as not presented to the trial court.

## ISSUE III

AT THE END OF THE STATE'S CASE-IN-CHIEF, DID THE TRIAL COURT REVERSIBLY ERR BY DENYING A MOTION TO WITHDRAW A PLEA TO THE ARMED ROBBERY OF DERRICK DIXON AND NOT GRANTING A JUDGMENT OF ACQUITTAL AS TO THAT COUNT TO REDUCE IT TO ATTEMPTED ARMED ROBBERY?(Restated)

Shortly before jury selection (VI 65 et seq), Appellant pled guilty to the armed robbery of Derrick Dixon (VI 4). Appellant went to trial on other counts, including First Degree Murder. In the State's case-in-chief, Dixon testified that Appellant ejected a round from his [Appellant's] gun, demanded "where everything at?," "put the gun to [his] head," (XI 1185-87) announced that Little Rob was "our little hostage" (XI 1188, 1191), pistol-whipped Little Rob's mother (XI 1189), and searched his [Dixon's] pockets without taking anything from him (XI 1193).

Appellant later testified in the guilt-phase, when asked whom he took "anything" from in the robbery:

> A *** Derrick Dixon gave me $20 in denominations of two tens.
> Q Now, you heard Derrick Dixon testify that nothing was taken from him?
> A (laughing)
> Q But you took money from him, too, didn't you?
> A Yes, I did.

(XIII 1526-27)

The State contends that Appellant moved to withdraw his plea after he had already reaped the tactical benefit of his plea and that his subsequent sworn testimony supports the trial court's ruling, which merits affirmance if correct for any reason, See, e.g., Dade County School Board v. Radio Station WQBA, et al., 24 Fla. L. Weekly S71, S72-73 (Fla. Feb. 4, 1999) (collecting

authorities); Murray v. State, 692 So.2d 157, 159 n. 2, 159-60 (Fla. 1997) (trial court summarily denied motion to suppress; "trial court reasonably could have denied Murray's motion to suppress because" of consent); Caso v. State, 524 So.2d 422, 424 (Fla. 1988) ("conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"). The State elaborates.

On December 8, 1997, prior to, and on the same day as, jury selection (VI 40), Appellant pled guilty to eight counts in the indictment, including the one contested in ISSUE III. (VI 3-38, II 232-34) He pled guilty because "in fact" was guilty (VI 37), and the trial court relied upon (at VI 37) a factual basis that the co-defendant's attorney Chipperfield provided in arguing for a severance (VI 13). In addition, defense counsel stipulated to "a factual basis to support these pleas." (VI 37)

In that dialog over the severance, it was confirmed that Derrick Dixon was a "victim[]" (VI 30) and that there was no "issue as to whether or not these robberies occurred" (VI 34). Appellant personally confirmed that he wished to maintain his plea of guilty (VI 36) and that he "in fact" was guilty (VI 37). The trial court then, without objection, adjudged Appellant guilty of this count as well as the others to which he pled (VI 37).

Appellant then reaped the tactical benefit of his plea multiple times. His attorney requested that he wished for the entire indictment to be read to the jury. (VI 41) The trial court read all 12 counts of the indictment to the jury, including Count 6

(contested here) (VI 70-71, VII 354-58) and indicated that Appellant would only be tried on "one count of murder in the first degree and three counts of armed robbery" (VI 74). With this stage set, defense counsel then argued in opening statement that Appellant had candidly admitted what he actually did (robbing and kidnapping) but contests what he did not do (murder):

> Mr. Stephens has plead guilty to kidnapping, to burglary, to several of the robberies ***. And almost immediately from the time that he was arrested, he described everything that he had done. He told the police what he had done. And at the appropriate time we entered pleas to these charges. Mr. Stephens is a robber, a kidnaper and a burglar, he is not a murderer. The evidence will show that there was absolutely no intention on Mr. Stephens' part to harm the child, and that when he left the child the child was unharmed.

(XI 1026)

On December 15, 1997, at the end of the State's case, defense counsel reconfirmed the plea by stipulating that he pled to this count as well as the others. (XIII 1482) The State rested (XIII 1484) and agreed, regarding co-defendant Cummings, to a judgment of acquittal of this count down to an attempt (XIII 1493), and only then did Appellant's counsel ask to withdraw the plea and grant a judgment of acquittal as to the Count 6 robbery of Dixon (XIII 1493). In the next day of the guilt phase, Appellant swore that he actually robbed Dixon (XIII 1526-27) and defense counsel again argued to the jury that Appellant had taken full responsibility for what he had done (XV 1885-87, 1892).

First and foremost, and in keeping with the defense tactic of arguing to the jury that Appellant had "come clean," there has been no complaint that the plea was involuntary. Indeed, Appellant

testified at the guilt phase, under the watchful and protective eye of the trial judge, that he committed this armed robbery. Without even the slightest hint of a claim of innocence, the withdrawal of Appellant's plea was within the sound discretion of the trial court. See generally Hunt v. State, 613 So.2d 893, 896 (Fla. 1992) ("sound discretion of the trial court whether to allow the withdrawal of a guilty plea").

Here, by the time of the motion to withdraw the plea, Appellant had already benefitted from his plea by his multiple assertions that he honestly admitted to what he actually did, i.e., several robberies, while contesting what he had not done, i.e., the murder. In this situation it would have been unfair to the State to allow Appellant to withdraw his plea. Compare Thomas v. State, 593 So.2d 219, 221 (Fla. 1992) ("defendant was nevertheless entitled to withdraw his plea because he was deprived of the benefit of his bargain, i.e., the persuasive effect of the State's original recommendation").

Trenary v. State, 473 So.2d 820 (Fla. 2d DCA 1985) (then-Judge Grimes writing), affirmed the denial of a motion to withdraw a plea on the basis of a defense tactic that was a "reasonable course of action for the benefit of his client." As here, in Trenary, the tactical advantage of asserting a position was sufficient to justify the denial of withdrawing a plea. A forttiori, here Appellant's tactical advantage was also the State's tactical disadvantage.

Furthermore, ISSUE III fails to overcome the presumption of correctness by failing to establish that Appellant was entitled to

a ruling on his motion to withdraw plea at the moment it was made. Appellant had no right to such an instantaneous ruling at the end of the State's case. The trial court could have waited until after Appellant had testified the next day. By that time, it had before it sworn testimony from Appellant that Appellant did rob Dixon, thus rendering the trial court's decision ultimately correct, non-prejudicial, and harmless.

Because of Appellant's testimony and the tactical benefit that had already accrued to Appellant, Andres v. State, 683 So.2d 604 (Fla. 4th DCA 1996) (IB 43-44) is inapplicable. In contrast to there, here the "newly discovered evidence" included Appellant's sworn admission to this count of the indictment as charged and as pled.

In addition to the lack of harm due to the discretion of the trial court to rule the next day, by which time Appellant's laughter had demonstrated his pride in completing this robbery, ISSUE III merely complains that one count of the eight to which he pled should be reduced and that it should be reduced from armed robbery to attempted armed robbery. ISSUE III's complaint is de minimis.

## ISSUE IV

DID THE TRIAL COURT REVERSIBLY ERR BY DENYING APPELLANT'S SPECIAL INSTRUCTIONS CONCERNING FELONY MURDER? (Restated)

Appellant extensively displays (at IB 47-49) trial litigation concerning whether the State proved that he committed First Degree Murder through the manner of felony murder. The State respectfully submits that part of ISSUE IV was not preserved, and, concerning

the "merits," the extent of litigation over an issue does not per se require special jury instructions on it. Further, the existence of case law analyzing the sufficiency of evidence under a felony murder theory (See IB 49-52) does not entitle a defendant to instructions on it. Appellant has failed to meet his burden of establishing reversible error.

**A. Part of ISSUE IV is unpreserved.**

At the outset, the State contends that any appellate claim of due process (IB 52) is unpreserved. See, e.g., Geralds v. State, 674 So.2d at 98-99, 98 n. 6 (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings "procedurally barred"); Hill v. State, 549 So.2d at 181-82 (Fla. 1989) ("due process ... not presented to the trial court ... procedurally bars appellant from presenting the argument on appeal"). Here, when Appellant's special instructions were finally presented to the trial court (XIV 1745), defense counsel cited two cases and failed to mention due process or how it might apply here.

**B. Arguendo, on the merits of ISSUE IV, there are none, and any technical deficiency in the instructions was non-prejudicial or harmless.**

This Court has held that the presumption of correctness applies to a trial court's jury instructions, See, e.g., James v. State, 695 So.2d 1229, 1236 (Fla. 1997) ("wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal"); Kearse v. State, 662 So.2d 677, 681-82 (Fla. 1995) ("judge's decision regarding the charge to the jury 'has historically had

the presumption of correctness on appeal'"). See also Operation Rescue v. Women's Health Center, 626 So.2d 664, 670 (Fla. 1993); Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979).

Moreover, "it is preferable to use the standard instructions where they are appropriate," State v. Bryan, 290 So.2d 482, 484 (Fla. 1974). See also Fla. R. Cr. P. 3.985.

Accordingly, a party seeking reversal due to a trial court denial of non-standard jury instructions bears the appellate burden of establishing "a palpable abuse of that court's discretion," Phillips v. State, 476 So.2d 194, 196 (Fla. 1985) (affirmed trial court use of a standard instruction on alibi). Accord Williams v. State, 437 So.2d 133, 136 (Fla. 1983) ("will not disturb the action of the lower court in the exercise of its judicial discretion unless palpable abuse of this discretion is clearly shown from the record").

Put another way, this Court has indicated that in order to merit a reversal, an appellant must show that any error "has resulted in a miscarriage of justice," Goldschmidt v. Holman, 571 So.2d 422, 425 (Fla. 1990).

To meet his burden of showing error on appeal, Ray must show that his proposed special instruction was —

A. **Supported by the evidence**, See, e.g., Pomeranz v. State, 703 So.2d 465, 467 n. 1 (Fla. 1997) (no merit to claim "(8) that the trial court erred in giving a jury instruction on principals when there was no evidence to support this theory");

B. **Not adequately covered by the other instructions**, See, e.g., Elledge v. State, 706 So.2d 1340, 1346 (Fla. 1997) ("jury was given the standard instruction"; affirmed regarding claim based on trial court's rejection of special instruction); Branch v. State, 685 So.2d 1250, 1253 (Fla. 1996) (held not error to refuse to use former standard instruction on circumstantial evidence where "fully instructed on reasonable doubt and burden of proof"); Trepal v. State, 621 So.2d 1361, 1366 (Fla. 1993) ("a circumstantial evidence instruction is unnecessary if the jury is properly instructed on reasonable doubt and the burden of proof"; upheld trial court's denial of special instruction); Hansborough v. State, 509 So.2d 1081 (Fla. 1987) ("... the standard instructions adequately apprised the jury as to the law ..."; upheld trial court rejection of "four special jury instructions on sanity"). See also Fenelon v. State, 594 So.2d 292 (Fla. 1992) (flight instruction should not be given because "no valid policy reason" for focusing on evidence of flight with an instruction and because of confusion of application of the instruction); Baldwin v. State, 35 So.220, 222 (Fla. 1903) ("objectionable in that they ... single out and emphasize specific parts of the testimony to be considered without reference to the other parts, and are arguments to be addressed to the jury by counsel, rather than the law of the case to be given by the court"); **AND**,

C. **A correct statement of the law and not misleading or confusing**, See, e.g., Ray v. State, 403 So.2d 956, 961 (Fla. 1981) ("If Ray's counsel had requested the improper instruction, ..."); U.S. v. Sans, 731 F.2d 1521, 1530 n. 10 (11th Cir. 1984) (requested instruction "at its best, ... correct, but misleading").

U.S. v. Caporale, 806 F.2d 1487, 1514 (11th Cir. 1986), combined several of these principles:

> Where an appellant objects to the trial court's refusal to give an instruction, we will reverse only if the proposed instruction is an accurate statement of the law, is not covered in substantial part by the instructions given , and is so important that the defendant's ability to defend himself is seriously impaired by the denial.

Likewise, Parker v. State, 641 So.2d 369, 376 (Fla. 1994), combined a number of the foregoing principles in rejecting a claim based upon the denial of proposed special instructions:

> Parker requested thirty special penalty-phase jury instructions and now argues that the court committed reversible error in refusing to give them. We disagree. All of the requested instructions are either adequately covered by the standard instructions, misstate the law, or were not supported by the evidence. The trial court, therefore, did not err in denying them. Moreover, we find no error in the instructions the court did give to the jury.

Appellant has labored hard on appeal to show the first of this three-pronged test. However, he has failed to establish how the defense was not adequately covered by the standard instructions; he essentially wished for the trial court to comment on the evidence by improperly highlighting aspects of his defense. In spite of his efforts (IB 49-52), he has also failed to show that

his proposed special instructions were accurate statements of the law and not confusing or misleading. The State elaborates.

Here, the trial court properly used the standard jury instruction that required the State to prove that the death of Robert Sparrow, III, "occurred

- **as a consequence of**

  and

- **while**

the defendant was engaged in" one of the enumerated felonies, an attempt, or escape from the immediate scene of one of them. (II 255, XI 1908-1909) The defense on which Appellant waxes in his brief was covered by these instructions:

1. Was the victim's death a consequence of Appellant engaging in one of the listed felonies or an attempt or flight from them?
2. Was the victim's death while Appellant engaged in one of the listed felonies or an attempt or flight from them?

This is precisely what the jury was told that the State must prove under a felony-murder theory.

Thus, defense counsel properly couched his closing arguments repeatedly in terms of key concepts of "**as a consequence of**" and "**while**" (XIV 1764-65) found in the standard instructions, which the trial court provided. Appellant was not deprived of his defense.

Appellant is not entitled to highlight his attack on aspects of what the State was already required to prove pursuant to the standard instruction. See Fenelon and Baldwin.

Accordingly, Alston v. State, 723 So.2d 148, 159(Fla. 1998), upheld the trial court's rejection of a special independent act instruction. There, Alston claimed on appeal that "there was sufficient evidence to support his theory that Ellison was the primary planner and perpetrator of Coon's murder ... ." The trial court rejected the following instruction on the ground that the defense theory was "argumentative and ... covered by the standard jury instructions":

> If you find that the killing was committed by a person other than the defendant and that it was an independent act of the other person, not part of the scheme or design of a joint felony, and not done in furtherance of a joint felony, but falling outside of, and foreign to, the common design or the original collaboration, then you should find the defendant not guilty of felony murder.

Alston held: "We find that, on this record, the trial court did not abuse its discretion in denying this request. *See Hamilton v. State*, 703 So.2d 1038 (Fla.1997); *Bryant v. State*, 412 So.2d 347 (Fla.1982)." The instruction in Alston would have embellished the theory of defense. However, this is not the test, which, instead, is whether the standard instruction covers the defense. Just as the standard instruction covered the nexus between the defendant and the acts of an accomplice in Alston, the standard instruction here covered the required nexus between the defendant's earlier and later actions. There was no abuse of discretion in Alston, and there is none here.

Just as the standard instruction on "reasonable doubt and burden of proof" cover cases in which circumstantial evidence is introduced, obviating any requirement that a special on the latter

be given, See Branch v. State, 685 So.2d at 1253; Trepal v. State, 621 So.2d at 1366, here the standard instruction on the nexus between the death and the felonies/attempts/flight obviated any requirement that an instruction highlight the defense attacking that nexus.

The ISSUE IV claim is like the claim in Hansbrough v. State, 509 So.2d at 1085, based upon the defense of a "psychotic break" between the robbery and the killing. There, as here, the defense requested a number of "special jury instructions on" the defense, but the trial court gave "the standard jury instructions," there "on felony murder and insanity." There and here, "the standard instructions adequately apprised the jury as to the law and the evidence and ... the requested instructions would only have engendered confusion," Id.

Campbell v. State, 227 So.2d 873, 878 (Fla. 1969), upheld a trial court's instruction, similar to the ones given here:

> A person may be said to be engaged in the commission or perpetration of a robbery **while** he is endeavoring to escape and make away with the property taken in such robbery.

There, as here, the defense argued that there was a break in the chain of events between a felony and the death, yet the instruction was proper, as here.

Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996), held:

> The necessary elements of premeditation were presented with the standard instruction and the trial court was well within its prerogative to refuse a separate, and possibly confusing, instruction.

In the absence of a distinct felony committed by a co-felon, the standard jury instructions are sufficient to explain felony

murder, just as they are "sufficient to explain premeditation," Id.

Furthermore, each of Appellant's special instructions was an **incorrect statement of the law, or misleading, or confusing**.

A basic premise for determining the correctness of Appellant's proposed special instructions is that a judicial analysis for the purpose of determining the sufficiency of evidence should not be per se ported to jury instructions. As this Court reasoned in Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530, 533 n. 3 (Fla. 1985), the "fact that a statement of reasoning may be set forth in a judicial opinion does not mean that it is a proper jury instruction."

The first special instruction included: "some definitive break in the chain of circumstances" (II 245). What is "some definitive"? This instruction begged more questions than it answered. Although this language may appear in appellate analysis of sufficiency of evidence, it would have confused the jury.

The second special instruction discussed the "passage of time and/or the separation in space" (II 246). However, this instruction overlooks that these are "**factors**" of an **appellate** analysis of sufficiency of evidence concerning the causal nexus between the death and felony/flight. See Parker v. State, 570 So.2d 1048, 1051 (Fla. 1st DCA 1990) (IB 50); Griffin v. State, 639 So.2d 966 971 (Fla. 1994) (analysis of sufficiency of evidence for aggravator; "several **factors**"). As the additional inclusion of "causal relationship," See Parker; Griffin, clearly indicates, "time" and "space" were not intended to be all-inclusive, whereas

the special instruction erroneously limited the State to them. Indeed, the very case on which Appellant relied below and here (IB 49-50) for his instruction, i.e., Mills v. State, 407 So.2d 218, 221 (Fla. 3d DCA 1981), clearly indicates that "**[n]either** the passage of time nor separation in space from the felonious act to the killing precludes a felony murder conviction ... ." In other words, other factors may suffice to establish the nexus.

Moreover, the second special instruction indicated that if the jury had a "reasonable doubt about **it**," they must find the defendant not guilty. The "**it**" was ambiguous, and it may be interpreted to erroneously require the State to prove both factors beyond a reasonable doubt, effectively nullifying one factor compensating for another one. These considerations are especially important here, where the causal relationship between the death, on the one hand, and the felonies and flight from them, on the other hand, was a very important "factor" of the State's proof. See ISSUE I supra.

Further, these "factors," which were part of sufficiency analysis, were not intended as jury instructions.

The third special instruction (II 247) is also erroneous. It required the State to prove that Little Robert's death was the "predictable result of the felonious acts of" Appellant. It totally excludes his flight from the felonies (or attempts to commit them) as a basis for felony murder. This was incorrect, See, e.g., Griffin; Parker; Fla. Std. Jury Instr. (Crim) Felony Murder — First Degree ("escaping from ..."), justifying and requiring denial of the special instruction. Thus, Appellant's

reliance upon Mills v. State, 407 So.2d 218 (Fla. 3d DCA 1981) (IB 49-50), is misplaced. It involved no flight, and it concerned the sufficiency of evidence, not jury instructions.

As this Court has made clear, analyses for the purpose of determining the sufficiency of evidence should not be ported to jury instructions. Marr v. State, 494 So.2d 1139, 1141 (Fla. 1986), reasoned:

> What is worthy of repetition is the district court's observation that **none of the cited cases involved a jury instruction issue** or held that the trial court's failure to give such an instruction was error. Further, as the district court found, the cases apparently dealt with the language of the requested instruction in the context of appellate review of the **sufficiency of the evidence**.

A fortiori, here the standard instructions covered the defense, and the proposed jury instructions would have been misleading.

Arguendo, even assuming error, it was non-prejudicial and harmless, given the instructions that were provided to the jury and given the evidence showing premeditation, as discussed in ISSUE I, See Parker v. Dugger, 660 So.2d 1386, 1390 (Fla. 1995) ("even the reversal of an underlying felony conviction does not affect a first-degree murder conviction where the jury is instructed on both premeditated and felony murder, there is ample evidence supporting premeditation, and the jury returns a general guilty verdict of murder") citing Atwater v. State, 626 So.2d 1325, 1327-28 n. 1 (Fla.1993); §924.051(1)(a),(3),(7), Fla. Stat. (appellant required to show "prejudicial error"), §924.33. Fla. Stat. (no reversal unless error "injuriously affected ...").

## ISSUE V

DID THE TRIAL COURT REVERSIBLY ERR BY DENYING CUMMINGS' MOTION FOR CHANGE IN VENUE WHERE APPELLANT HAS NOT SHOWN THAT THIS JURY WAS PARTIAL AND WHERE HE STILL HAD A PEREMPTORY CHALLENGE REMAINING WHEN HE ACCEPTED THE JURY? (Restated)

Appellant (at IB 54) cites to Rolling v. State, 695 So.2d 278 (Fla. 1997), and argues that its standard applies. However, he overlooks that Rolling approved the denial of the change of venue there. The State will contend that the reasonableness of the denial is especially compelling here where the trial court assiduously guarded the impartiality of the jury and where Appellant was provided an additional peremptory challenge and failed to exercise it. However, first, the State contends that the Motion for Change of Venue, on which ISSUE V is based, was unpreserved on several grounds.

To prevail on ISSUE V, Appellant must establish that the trial court "palpabl[y] abuse[d] ... [its] discretion," Davis v. State, 461 So.2d 67 69 (Fla. 1984); See also Rolling v. State, 695 So.2d at 284-85 ("trial court in its discretion must determine whether a defendant has raised such a presumption of prejudice"), by showing the trial court's ruling unreasonable, Canakaris, under any reasoning, Dade County School Board.

Here, the trial court's ruling denying the Motion was reasonable for several alternative reasons.

**First and second**, Appellant adopted the Motion of his co-defendant. However, **Appellant's** Motion failed to include --

> (1) affidavits of the movant and 2 or more other persons setting forth facts on which the motion is based; and

> (2) a certificate by the movant's counsel that the motion is made in good faith.

Fla. R. Cr. P. Rule 3.240(b). An affidavit from Appellant, as "movant," was not attached nor were two affidavits of "2 or more other persons," rendering the Motion fatally defective as to Appellant. Cf. Allen v. State, 174 So.2d 538, 540 (Fla. 1965) ("motion for change of venue ... not supported by affidavits as the statute specifies, therefore, the application was fatally defective and the judge could have properly done nothing but deny it"). Here, the two affidavits attached to the Motion that Appellant purportedly adopted did not even mention Appellant. (See S-I 46, 48)

Furthermore, Appellant's counsel did not certify "that the motion is made in good faith" as to him.

**Third**, although the State must acknowledge that Rolling v. State, 695 So.2d 278, 284 n. 4 (Fla. 1997) ("preserved his claim for review on appeal"), addressed an otherwise tardy motion for change of venue there, the tardiness here, when combined with the failure to include requisite affidavits and certificate of good faith, would totally gut Fla. R. Cr. P. Rule 3.240, contrary to Rolling's warning that it should not be taken as a license to delay: "our conclusion that this issue was properly preserved for review in no way suggests that a defendant should delay filing a motion for a change of venue, as Rolling did ... ." 695 So.2d at 284 n. 4.

Here, the Motion for Change of Venue was filed December 10, 1997. (S-I 16. See VIII 472) Jury selection began December 8,

1997. (VI 65) The Motion attached a number of newspaper articles. The last date the State has found on the articles in the record was in August 1997 (S-I 19), with many of the articles in June and July. In other words, the publicity attached to the Motion was concentrated in the summer months, over four months prior to the beginning of the trial. Under these conditions, the purported ground for the Motion had been apparent for months; there was no "good cause" for the delay, and therefore, as the prosecutor argued below (VIII 575), it was untimely. See Fla. R. Cr. P. 3.240(c) ("motion for change of venue shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to file within such time").

Defense counsel for co-defendant Cummings sought to excuse the delay by claiming that it would have been premature. (VIII 577) But, the trial court noted that local Jacksonville practice is that motions for change of venue are "filed before and the ruling comes after the effort to pick a jury." (VIII 577) Moreover, any prejudicially pervasive nature of pre-trial publicity would certainly been palpable prior to jury selection, as argued infra.

The trial court's findings are pertinent to preservation as well as to the merits:

> I reviewed the case law, and the motion to change the venue -- together with the affidavits of the two noted defense attorneys, Mr. Cotney and Mr. Shepard, I reviewed again, and I reviewed the newspaper reports that were submitted with the motion for change of venue, and I believe I had occasion to review those in connection with the motion for severance.
>
> And in reading the case that was submitted, I reviewed the Rolling case, and this case, like that case, the attorney never moved for a change of venue until the sixth day of jury questioning. In this case

the defense never moved for a change of venue until the third day of juror questioning, and that was as to Mr. Cummings. And with respect to Mr. Cummings, I think it's clear that the evidence or pretrial publicity as to Mr. Cummings was not nearly the amount of pretrial publicity as it's related to Mr. Stephens. I'm going to give some figures. These figures are not accurate exactly because there have been some changes.

We called 115 jurors. One failed to return, one was in an accident and could not return. We challenged about four or five jurors because of illness or sickness and reasons unrelated to any pretrial publicity. We challenged approximately 40 jurors that felt they couldn't be fair and impartial, or if I had any reasonable doubt that they could not be fair and impartial. I believe that's the law. But I granted those challenges, and cannot recollect a challenge on that basis that that was denied.

What is significant is that the majority, or two-thirds of the jurors stated that they could be fair and impartial, and of those two-thirds, many of those jurors were not even questioned by defense counsel and accepted their statements. Also, many of them saw perhaps something on TV but didn't read anything in the newspaper. Many of them saw something in the newspaper but didn't see anything on TV. Several indicated that they recognized that there was a difference between what's reported in a news report and the facts and evidence. And they all agreed that they would base their verdict solely on the evidence that's admitted in court and set aside anything they may have heard or saw on television or read in the newspaper.

The Rolling case also indicates that the burden is on the defendant to show a presumption that there is prejudice in the community against the defendant. I don't believe that presumption was met. Accordingly, I have denied the motion for change of venue.

I also want the record to reflect that I -- should reflect in this regard that, unlike the Rolling case, in which pretrial publicity jurors were questioned in groups of 20 to 24, we took the time, and I believe rightfully so, to question each juror individually, and we did so to avoid the taint of any other jurors. I believe that process was fair. I believe that those jurors had indicated that their verdicts would be based solely on the evidence. And again should be noted that complete ignorance about the juror in the case is not the test, but those jurors that are seated all stated that they could set it aside and base their verdicts solely on the evidence as admitted in this courtroom. I believe that respectfully that they would do that.

Accordingly motion for change of venue is denied.

(X 967-89) The State disagrees with Appellant (IB 53) that this ruling pertained to **his** supposed motion for change of venue (attempting to adopt the co-defendant's). Thus, the order he cites (IB 53 citing to S-I 71) only contains co-defendant Cummings' name. **Fourth**, because Appellant has failed to show where he obtained a ruling on his purported motion, he has failed to show a ruling for ISSUE V to appeal. See Armstrong v. State, 642 So.2d 730 (Fla. 1994) ("trial judge reserved ruling on this issue and apparently never issued a ruling ..., this issue is procedurally barred"); Frazier v. State, 107 So.2d 16, 19 (Fla. 1958) ("no ruling having been secured by the defendant by the trial court as to the composition of either the grand jury or the petit jury, there is no action, request, or ruling had or made in the proceedings below properly before us for review").

Arguendo, on the merits, "[p]retrial publicity alone does not warrant a change of venue," Pietri v. State, 644 So.2d 1347, 1352 (Fla. 1994).

Here, the State submits that the Motion was filed late as an afterthought because, **fifth**, the publicity had substantially subsided, or, in any event, had not reached the "general state of mind" that Rollings reiterated as the test, 695 So.2d at 284. See Id. at 287 ("in light of the fact that Rolling chose not to request a change of venue pretrial, it appears that even he was not concerned or otherwise disturbed by the extent or nature of the coverage at any time during the three years he awaited trial").

**Sixth**, Appellant has failed to meet his burden on appeal of establishing that the trial court's reflective and well-reasoned

ruling, quoted at length above, is unreasonable, especially here where jurors were individually questioned and explicitly assured fairness and impartiality. Indeed, the trial court's specific factual findings remain undisputed. (See IB 53-54) There was no error. See Cole v. State, 701 So.2d 845, 854 (Fla. 1997) ("throughout the voir dire, the trial court readily excused jurors who stated that they had formed an opinion as to the defendant's guilt or would not be able to base a decision solely on the evidence presented at trial *** demonstrates that the members of Cole's venire did not possess such prejudice or extensive knowledge of the case as to require a change of venue *** Cole was not prejudiced from striking any undesirable juror or by any knowledge the jurors may have possessed"); Henyard v. State, 689 So.2d 239, 245-46 (Fla. 1996) ("While the jurors had all read or heard something about the case, each stated ...").

Appellant has failed to show where any of "those ultimately chosen indicated they could [not] base their verdicts on the evidence presented," Farina v. State, 679 So.2d 1151, 1154 (Fla. 1996), overruled on other ground 699 So.2d 1312, 1320 (Fla. 1997), thereby failing to show the trial court's ruling as unreasonable. In Farina, "there were numerous media accounts of the crime, including reports of the defendants' confessions." Id. Appellant has failed to make anywhere near such a showing here. Farina rejected the venue claim.

Furthermore, **seventh**, the trial court took great pains to repeatedly admonish the jury "not to discuss the case, not to listen to television or radio accounts, and not to read any

newspaper articles about the trial," Tafero v. State, 403 So.2d 355, 359 (Fla. 1981) ("nearly every juror had heard something of the incidents"). (See IX 691-92, X 970, 972, XII 1273-74, 1276-77, XIII 1485, XIV 1687-88, XIV 1750-53, XV 1896, 1904) Further, it repeatedly ordered them to base their verdict solely on the evidence. (See IX 692, X 985-87, XV 1934-35)

A fortiori, here, **eighth**, the trial court provided Appellant with an additional peremptory challenge (X 956), which he did not use. (X 960-61) Thus, Appellant's counsel was convinced that no one who served on the jury might have been prejudiced, even to the degree that he would peremptorily challenge him/her. Provenzano v. State, 497 So.2d 1177, 1182 (Fla. 1986), is on point:

> More importantly, the fact that the defense did not use all of its peremptory challenges is the best evidence that Provenzano was personally satisfied with the jury selected. See *Davis v. State*, 461 So.2d 67 (Fla.1984), cert. denied, --- U.S. ----, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985).

Thus, returning to Farina, there the appellant claimed that "the trial court refused to grant additional peremptory challenges," 679 So.2d at 1153 n. 1, whereas here, such a challenge was conferred and not used. See also Rolling v. State, 695 So.2d at 288 ("Rolling never challenged for cause any member of his actual jury based on bias or any other grounds"); Holsworth v. State, 522 So.2d 348, 351 (Fla. 1988) ("Appellant could have exercised a peremptory challenge to excuse her but chose not to do so").

In sum, the "defendant has [failed to meet] the burden to show prejudice," Pietri v. State, 644 So.2d at 1352 ("pretrial

knowledge of the jurors who served did not preclude a fair and impartial jury"), at the trial or appellate levels.

## ISSUE VI

WAS THE TRIAL COURT'S INQUIRY INTO APPELLANT'S COMPLAINTS ABOUT APPOINTED COUNSEL REQUIRED AND ADEQUATE AND WAS HE ULTIMATELY SATISFIED WITH APPOINTED COUNSEL? (Restated)

ISSUE VI claims that "[t]he trial court erred by not conducting a Nelson inquiry" (IB ii, 54). The State responds that (1) Appellant failed to complain about the competency of counsel, thereby not requiring any Nelson inquiry, (2) that the trial court's response was commensurate with Appellant's complaint, and (3) that ultimately Appellant expressed satisfaction with counsel's representation, which was further supported by indicia of measures taken by counsel addressing Appellant's concern.

As the non-prevailing party below, Appellant bears the burden of overcoming the presumption of correctness attached to the trial court's actions. See Operation Rescue v. Women's Health Center; Applegate v. Barnett Bank of Tallahassee. Here, in a matter imbued with intonation and the other nuances of fact-based determinations, Appellant must establish that the trial court's actions were unreasonable thereby abusing its discretion. Compare Jones v. State, 612 So.2d 1370, 1373 (Fla. 1992)("[w]e find that the refusal to dismiss Pearl was within the court's discretion and that no error occurred"); Nelson v. State, 274 So.2d 256, 259 (Fla. 4th DCA 1973) ("trial court may in his discretion discharge counsel"); U.S. v. Allen, 789 F.2d 90, 92 (1st Cir.

1986)("evaluating whether a trial court's denial of motion for ... substitution of counsel constituted an abuse of discretion") with Canakaris.

In order to prevail, Appellant bears the burden of showing that the trial court unreasonably handled a matter in which --

1. **He complained to the trial court about the competency of counsel**, See, e.g., Smith v. State, 641 So.2d 1319 (Fla. 1994) ("Smith expressed dissatisfaction with Sanders, but did not question his competence"; no hearing); Bowden v. State, 588 So.2d 225, 230 (Fla. 1991) ("failing to inquire into Bowden's request to discharge counsel that was made prior to sentencing"; "Bowden was merely expressing his **dissatisfaction** with counsel's performance during the trial and reiterating his belief that counsel should have been allowed to withdraw prior to trial"); Hardwick v. State, 521 So.2d 1071, 1074 (Fla. 1988) ("If **incompetency** of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel ..."); **AND**
2. **The trial court's inquiry was not reasonably adequate, given the complaint**, See, e.g., Davis v. State, 703 So.2d 1055 (Fla. 1997) ("Where a defendant seeks to discharge court-appointed counsel due to alleged incompetency, it is incumbent upon the trial court to make a **sufficient inquiry** of the defendant and counsel to determine whether there is **reasonable cause** to believe that counsel is not

rendering effective assistance"); Lowe v. State, 650 So.2d 969, 975 (Fla. 1994) ("trial judge's inquiry into a defendant's complaints of incompetence of counsel can be **only as specific and meaningful as the defendant's complaint**").

However, Appellant is not entitled to appellate relief if

3. Appellant **ultimately expressed satisfaction** with counsel; in such a case, the claim is moot. See Scull v. State, 533 So.2d 1137, 1141 (Fla. 1988) ("failings of the inquiry were mooted by Scull's expressions of satisfaction with Mr. Van Zamft as his attorney").

The State respectfully submits that ISSUE VI fails each of these three tests.

**First, Appellant complained to the trial court about communication with counsel, not about the competency of counsel.**

The trial court read a note Appellant had written and summarized it in open court as complaining about defense counsel's lack of contact with him, as well as the lack of contacts with "his priest and his mother." (III 444) The trial court then invited Appellant to supplement these complaints, but Appellant responded only by shaking his head. (III 444)

When Appellant complained that he had "never seen" defense counsel's co-counsel (III 445), the trial court agreed that defense counsel "should be in contact with" Appellant and explained to Appellant:

> Under the law you're entitled to the appointment of an attorney and if that attorney is not competent to represent you then I will consider appointing you

> another attorney. You have not raised the issue of his competence. I hope that he would be responsive to you to the extent that you're satisfied but that's something between the two of you.
>
> Secondly, you always have the right to hire your own attorney if you can afford it.
>
> Thirdly, you have the right to represent yourself. Absent some allegation that Mr. Nichols [defense counsel] is not competent to represent you, there's not a basis for me to appoint you another attorney. Do you understand?

(III 445) Appellant then asked for the public defender, and the trial court explained that they cannot represent him because of their representation of co-defendant Cummings. (III 445-46)

The trial court then suggested that Appellant "communicate with Mr. Nichols [defense counsel]" and "encouage[d]" defense counsel "to visit with him more often and communicate with his family." (III 446)

The trial court then asked open-endedly if there was "anything further," to which Appellant responded:

> Yeah. It ain't much as the visits; it's the paperwork. *** Police reports, depositions, medical reports, autopsy reports. *** I don't have nothing.

(III 447) This exchange followed:

> [DEFENSE COUNSEL]: *** Mr. Stephens ... does have a very extensive copy of the supplemental report, the homicide report. There are a few things that I have in my possession that I haven't transmitted to him yet but it's not accurate that he doesn't have anything.
>
> THE DEFENDANT: All I have is the police murder continuation report. That's all he gave me. I have some contacts on the outside who sent me some more of his work that he say he have but he ain't sent me yet. No pictures, nothing.
>
> [PROSECUTOR]: Judge, I can tell you that the depositions have only recently become available to me so I will see and make certain that those are available to Mr. Nichols so he can give them to Mr. Stephens but I've only recently gotten them. I started receiving copies of those.

> THE COURT: I would expect -- you will be provided all the documents that Mr. Nichols has that pertain to your case.
> Is there anything further?
> THE DEFENDANT: Still ain't going to be satisfied.
> THE COURT: I understand, Mr. Stephens.

(III 447-48)

Thus, the trial court summarized Appellant's written note and invited Appellant to comment, with Appellant subsequently making only complaints about a lack of communication between defense counsel and himself. He wanted more visits and more "paperwork." These complaints do not rise to the level of incompetency and therefore do not require a so-called Nelson hearing.

In Watts v. State, 593 So.2d 198, 203 (Fla. 1992),

> Watts informed the trial court that he was dissatisfied with his attorneys because they allegedly had not been to see him in the jail. A short time later, Watts requested that another attorney be appointed.

There was no hearing[9] at that time. Watts reasoned and held:

> We also reject Watts' claim that the trial court erred by **failing to conduct further inquiry in connection with his request for another attorney**. Where a defendant seeks to discharge court-appointed counsel due to **alleged incompetency**, it is incumbent upon the trial court to make a **sufficient inquiry** of the defendant and counsel to determine whether there is reasonable cause to believe that counsel is not rendering effective assistance. *Hardwick*, 521 So.2d at 1074; *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973). However, under the circumstances present in this case, **no further inquiry was warranted**.

593 So.2d at 203. Indeed, the mere paucity of communication at the pre-trial phase of a case entirely fails to address the second

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[9] Even though "defense counsel later addressed Watts' allegations and explained that he and co-counsel had seen Watts on a number of occasions," 593 So.2d 203, Watts concerned the adequacy of the trial court inquiry into the complaint.

prong of the test of effective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), i.e., judicially cognizable prejudice to the defendant. And, indeed, as the prosecutor pointed out here, providing the "paperwork" was more a matter of the timing of its availability. Here, Appellant has not shown where he complained to the trial court that, by the time of trial, he was not provided the documents he wished or otherwise provided mission-critical communications with his counsel, and he has not complained that he was prejudiced by their timing. See Jones v. State, 612 So.2d 1370, 1373 (Fla. 1992) ("Jones' complaints about Pearl's handling of the prior sentencing proceeding do not provide a legal basis for challenging his prospective performance in the resentencing"). To the contrary, as elaborated infra, there was every indication that, as time for trial approached, Appellant was provided hundreds of pages of "paperwork" and was satisfied with counsel's performance.

In a nutshell, a pre-trial lack of communication, by itself, fails to invoke the right to effective counsel and any hearing designed to assure effectiveness. Also, see Kenney v. State, 611 So.2d 575 (Fla. 1st DCA 1992) (expression of dissatisfaction because of frequency of visits to jail, not a complaint of ineffectiveness).

In contrast to complaining about competency of counsel, Appellant wished to pick his attorney. Thus, he wanted the public defender. Even more revealing was at the end of the hearing, after the trial court and prosecutor had addressed his concerns over paperwork and after the trial court encouraged defense counsel to

visit Appellant more often, Appellant concluded that he "still" would not be satisfied. However, Appellant is not entitled to pick his counsel. See Davis v. State, 703 So.2d 1055 1058-59 (Fla. 1997) ("merely expressed general dissatisfaction with his attorney"); Capehart v. State, 583 So.2d 1009 (Fla. 1991)("Without establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel").

**Second, the trial court's inquiry was adequate, given the complaint.**

Although on October 20, 1997, when Appellant expressed his dissatisfaction with counsel, he was entitled to no hearing, the trial court nevertheless gave him one and fully heard him out and addressed each and every one of his complaints. As the record quoted above indicates, Appellant complained that he wanted more visits from counsel and the trial court "encouraged" them "more often." Regarding "paperwork," Appellant complained that he had "nothing" and then confirmed defense counsel's representation that he was provided "a very extensive copy of the supplemental [police] report," and then the trial court directed that Appellant be "provided all of the documents that Mr. Nichols has that pertain to your case." To the degree that Appellant was specific about his dissatisfaction, so-too was the trial court. The trial court's hearing was commensurate to the complaint and not a basis for reversal. See Lowe v. State, 650 So.2d at 975 ("trial judge's inquiry into a defendant's complaints of incompetence of counsel

can be only as specific and meaningful as the defendant's complaint").

The adequacy of the trial court's response to Appellant's complaint is substantiated by the result of massive communications (including "paperwork") between counsel and Appellant and Appellant's expressions of satisfaction with counsel, topics that are now discussed.

**Third, Appellant expressed satisfaction with counsel.**

In Scull v. State, 533 So.2d 1137, 1140-41 (Fla. 1988),

> Scull was not given the opportunity by the trial judge to explain why he objected to his present trial counsel. Rather, each time Scull tried to explain his objections, the trial judge interrupted him. At no time during the proceeding did the judge inquire into Scull's allegations of conflict of interest.

However, ultimately, "the failings of the inquiry were mooted by Scull's expressions of satisfaction with Mr. Van Zamft as his attorney," Id. at 1141.

Here, the trial court gave Appellant a full opportunity to be heard and addressed each of Appellant's complaints. Here, what complaint Appellant may have had at one time was "mooted," as in Scull. Cf. Sweet v. State, 624 So.2d 1138, 1141-42 (Fla. 1993) ("while it appears that Sweet unequivocally requested discharge of counsel, and the court failed to conduct an adequate inquiry into Sweet's ability to represent himself, under the circumstances of this case the failure was rendered moot by Sweet's subsequent acceptance of and satisfaction with new counsel and by the dissipation of his reason for wanting counsel removed"). See generally §924.051(1)(a),(3),(7), Fla. Stat. "prejudicial

error"); §924.33. Fla. Stat. (no reversal unless error "injuriously affected ...").

On October 24, 1997, within one week of Appellant's complaint that he wanted the "paperwork," he was provided "the entire contents of all files" (III 495-96).

On December 4, 1997, in Appellant's presence, his counsel announced: "We're ready for trial on Monday, Your Honor." Appellant said nothing to indicate he disagreed with this. (III 554) Subsequently at that hearing, defense counsel told the trial court that the "several hundred pages of police reports, depositions and other documents" that defense counsel had provided to Appellant had been removed from Appellant's cell. The trial court directed that the Sheriff to provide Appellant access to those documents. (III 561-63)

On December 5, 1997, Appellant swore that he

> has discussed all aspects of this case with attorneys Eler and Nichols. Your Affiant does not desire any delay and requests that the trial go forward as schedule[d] for December 8, 1997.

(II 231)

On December 8, 1997, Appellant signed a "Plea of Guilty" form (II 232-34) that concerned charges integrally intertwined with those ultimately tried; indeed they were all charged in the same case. (See I 8-12) In the form, he agreed that he had "fully discussed all aspects of **this case**" with his attorney. He also indicated that he was "satisfied with the services" of his "attorney in the case." (II 232) In the plea dialog, Appellant told the trial court that he had "enough time to discuss [his]

**case** ... with [his] attorneys" and that he was "satisfied with the representation that they have given to [him] in this **case**." (VI 10) As discussed in ISSUE III supra, defense counsel used Appellant's pleas of guilty to Appellant's advantage defending against the Murder: The pleas of guilty were tactically and factually intertwined with the Murder. (See also plea on another case in early 1998, at V 849-50: "satisfied")

Later on December 8, 1997, jury selection for the trial began. (VI 40, 65)

In sum, the record is replete with indicia of Appellant's post-complaint satisfaction with counsel. Scull is on point. Cf. Sweet.

Moreover, albeit unnecessary for resolving ISSUE VI, Appellant is no novice to the criminal justice system. In 1992, he had been convicted of Burglary and Carrying a Concealed Firearm. (IV 587, II 390) Indeed, at one point, he felt so comfortable with the "system" that he laughed at Derrick Dixon's testimony (XIII 1526-27).

## ISSUE VII

DID THE TRIAL COURT REVERSIBLY ERR BY ALLOWING THE PROSECUTOR TO ASK APPELLANT ON CROSS-EXAMINATION WHETHER HE TOLD INVESTIGATORS THAT HE WANTED THEM TO ASSIST HIM IN BEING EXECUTED IN THE ELECTRIC CHAIR? (Restated)

Appellant complains that the trial court allowed the prosecutor to ask Appellant on cross-examination in the guilt-phase of the trial about his statement that he wished to be executed for this murder. The State contends that ISSUE VII is meritless because Appellant's statement clearly exhibited a consciousness of guilt

concerning this case and because it fell within the legitimate scope of cross-examination.

The contested evidence and its context are as follows:

> Q *** you actually talked to some other law enforcement people before Detective Douberly came [on July 22, 1997, XIII 1551, 1557]; is that true?
> A Yes.
> Q Some people with the FBI and the GBI, the Georgia Bureau of Investigation; is that right?
> A Yes.
> Q And did you tell them that you would tell them **everything that occurred** if they would **help you do something**; right?
> A Yes.
> Q Let me show you if -- what's been marked as State's Exhibit JJ and ask you if that is the statement that you gave to the FBI and GBI, and is this your signature on that statement?
> A Yes.
> *** [OBJECTION AND PROFFER] ***
> Q Now, when you were -- we talked about this statement that you gave to Detective Douberly on July 22nd, 1997. Were you also **interviewed about this case** by a Georgia Bureau of Investigation agent named Dean McManus and an FBI agent by the name of Bruce Perkins the day before?
> A Yes.
> Q Did you tell them that that -- **they were interviewing you about this Sparrow murder case**?
> A Yes.
> Q Did you tell them that, or did you ask them to promise you that they would attempt to have you executed by the electric chair within a year and a day after being returned to Florida?
> A Yes.

(XIII -1570)

In order to prevail on appeal, Appellant must show that the trial court's ruling was unreasonable, Canakaris, under the abuse of discretion standard of appellate review:

> A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Kearse v. State*, 662 So.2d 677, 684 (Fla. 1995); *Blanco v. State*, 452 So.2d 520, 523 (Fla. 1984). We do not find that the court abused its discretion in

> admitting this testimony which was relevant to the issue of consciousness of guilt.

Cummings v. State, 715 So.2d 944 949 (Fla. 1998). As in other rulings, the trial court's admittance of this evidence merits affirmance if correct for any reason. See Dade County School Board; Murray; Caso.[10]

Johnson v. State, 660 So.2d 648 (Fla. 1995), is instructive. There, the defendant asked an officer who was walking him to the jail "if he could get a 'shot'" and then, upon the officer's inquiry, said that "he would rather receive a shot than die in the electric chair," Id. 659. Although Johnson's holding concerned the volunteered nature of the statement, it reasoned:

> The fact that the officer asked an innocuous question does not in itself constitute interrogation because the question here was not intended to elicit an **incriminating** response. The fact that Johnson **incriminated himself** was a complete surprise in light of the obvious ambiguity of his initial unsolicited remark.

Id. at 659. Johnson's characterization of a suspect's wish to be executed as an "incriminating response" and as "incriminat[ing]

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[10] In addition to asserting the right-for-any-reason principle, the State also disputes any significance to Appellant's inference that the trial court was somehow confused regarding whether Appellant turned himself in (See IB 60). The gist of Appellant's testimony and his trial tactic was that he wanted to turn himself in, attempted to turn himself in, (See, e.g., XIII 1528) and subsequently cooperated with law enforcement regarding the crimes he actually committed (See, e.g., XIII 1528-29). See ISSUE III supra. Indeed, at one point, defense counsel even mentioned in the trial that Appellant "even turned himself in," then corrected himself by admitting that Appellant ultimately fled (See XI 1026). A gist of the trial court's reasoning that the evidence contested in this issue was pertinent to Appellant's state of mind (XIII 1568). As the State will argue in the ensuing pages, this was correct.

himself" supports the reasonableness of the trial court's ruling here concerning Appellant's statement that he would tell law enforcement everything about "this Sparrow murder case" if they would assist in his execution. In both instances, they were incriminating. In both instances, they were party admissions. In both instances, they showed consciousness of guilt.

In contrast to the record clearly showing that Appellant's statement was in the context of law enforcement asking Appellant about the instant murder, he contends (IB 61-63) that he was actually referring to meriting execution for other crimes and that therefore the ambiguity of the statement required him to explain it.

The clear context of the statement renders Appellant's trial-testimony explanation even more incriminating, not because he admitted to deserving "punishment for everything that [he] had done throughout [his] lifetime,"[11] but rather because of its preposterous nature. It was preposterous because of the evidence, acknowledged from Appellant's own mouth, that law enforcement was **interviewing Appellant about the instant murder**. Appellant's explanation at trial can be viewed as an attempt to "misdirect" the jury, rendering it also relevantly incriminating. See Larzelere v. State, 676 So.2d 394, 404-405 (Fla. 1996) ("State introduced the bullets to show that the appellant attempted to misdirect the police investigation away from her").

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[11] Appellant changed his story at the penalty phase, where he testified that he "asked for the chair ... to go to heaven," "not out of guilt or any crime. No crime deserves the chair ... ." (IV 674-75)

Thus, Appellant's perfunctory reference to Section 404 of the evidence code (IB 63) is not only unpreserved and insufficiently developed to be cognizable on appeal, but also misplaced. **Appellant** introduced evidence that he had done some (unidentified) other wrong in the past, not the State.

Indeed, here, law enforcement was not only interviewing Appellant about this case and referenced it as a murder, but also, Appellant admitted to knowing of the victim's death (XIII 1527-28) and then fleeing because of this case (XIII 1528-29, 1549-50).

Because of the clear reference of Appellant's statement to wishing to be executed for this Murder, his attempt to invoke flight cases (IB 61-62) is nugatory. Moreover, their analogous application here supports the admissibility of Appellant's statement.

Appellant (at 61-62) primarily relies upon Escobar v. State, 699 So.2d 988 (Fla. 1997). There, this Court reasoned:

> We agree, as an abstract rule of law, that evidence of flight, concealment, or resistance to lawful arrest after the fact of a crime is admissible as 'being relevant to consciousness of guilt which may be inferred from such circumstances.' *Straight v. State*, 397 So.2d at 903, 908 (Fla.1981). However, in applying this principle to a particular case, there must be **evidence which indicates a nexus between the flight, concealment, or resistance to lawful arrest and the crime(s) for which the defendant is being tried in that specific case**. This is necessary in the application of this rule of law since the evidence creates an inference of a consciousness of guilt of the crime for which the defendant is being tried in that case. *See Merritt v. State*, 523 So.2d 573, 574 (Fla.1988). The ultimate admissibility issue is the **relevance to the charged crime**.

699 So.2d at 995. Here, the officers were extremely specific, as they were asking Appellant about "this Sparrow murder case."

Appellant's resulting statement desiring execution therefore was extremely "relevan[t] to the charged crime."

Moreover, Escobar, used Bundy v. State, 471 So.2d 9 (Fla.1985), as an example of a way to show relevancy by inferring the nexus through "flight occurr[ing] only a few days after the victim's much publicized disappearance," 699 So.2d at 996. Here, the nexus was established by law enforcement's clear reference to "this Sparrow murder case."

Accordingly, Bundy, or any other defendant wise to the system, can always attempt to explain away flight or, as here, a desire for **the** punishment (execution) that fits **this** crime (Murder) through a reference to other crimes.

**Like any other incriminating evidence**, when evidence of flight or a desire to be punished is introduced, the defendant may be "forced" to choose whether the risks of testifying are worth the attempted explanation for the evidence. This was Appellant's choice here. He made it. It is not reversible error, however, for the State to adduce the incriminating evidence.

Shellito v. State, 701 So.2d 837 (Fla. 1997), supports the foregoing arguments. Shellito rejected a claim that "evidence of flight ... was inadmissible ... because it was impossible to say whether the flight resulted from illegal activities taking place inside Gill's apartment or from the homicide." Id. at 840. There, because of evidence establishing a nexus between the crime tried and the flight, the

> fact that Shellito committed several robberies during the brief period of time between the murder and the raid

> does not prevent a jury from hearing evidence regarding his flight and use of force under these facts.

701 So.2d at 841. Here, where the evidentiary nexus was in plain words, Appellant's commission other felonies "does not prevent a jury from hearing evidence regarding" his desire to be executed for this murder.

Where a jury in Cummings v. State, 715 So.2d 944 948-49 (Fla. 1998), "could properly have inferred" the incriminating nature of "So f--- it," here the incriminating nature of a desire to be executed for "this Sparrow murder case" was patent. As in Cummings, the trial court did not abuse "its discretion in admitting this testimony which was relevant to the issue of consciousness of guilt."

As an alternative ground for admitting the statement, the State contends that it properly consisted of

> questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross-examination.

McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980). Accordingly, cross-examination of a defendant who takes the stand, like any other witness, may include evidence of other crimes. See Holton v. State, 573 So.2d 284, 288 (Fla. 1990) ("defense counsel opened the door to ... [a] line of questioning" that "suggested that other similar homicides had been committed prior to Holton's arrest but that none had occurred after his arrest"); McCrae v. State, 395 So.2d at 1151-52 (prosecutor "elicit[ed] the nature of the felony to which appellant referred on direct").

Here, in keeping with his tactic of pleading guilty to several counts immediately prior to trial (See ISSUE III supra), Appellant testified that immediately after he was taken into custody, he admitted to everything that he had done (XIII 1528-29), which did not include the murder. The cross-examination filled-up and clarified this testimony: Appellant also admitted to the "Sparrow murder" because he wished to be executed for it. On re-redirect examination, it was Appellant's prerogative to "rebut or explain matters elicited during the cross-examination," Ehrhardt, Florida Evidence §612.3 Redirect Examination. See, e.g., Harmon v. State, 527 So.2d 182 (Fla. 1988) (evidence that "Harmon previously had a drug habit, but had since "kicked it"; "record indicates that the redirect examination of Kathy Gates was within the scope of questions asked on cross-examination"). Appellant decided to exercise his option on redirect, but this does render the trial court's ruling reversible error.

Moreover, even if the trial court's ruling was somehow erroneous, it was non-prejudicial and harmless, given the evidence of Appellant terrorizing the three-year-old victim with his gun, orders, threats to kill, and grabbing him as a "hostage," See ISSUE I supra, and, at a minimum, abandoning the terrorized victim in the functional equivalent of an oven with the heat turned to "HIGH." Further, Appellant tactically highlighted his pleas to the jury to eight serious felonies, See ISSUE III supra, rendering any speculation about what else might be in the "everything" de minimis.

## ISSUE VIII

WAS THE SENTENCE OF DEATH LAWFUL UNDER TISON? (Restated)

Appellant raises a "Tison" claim. See Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). He argues that the Eighth Amendment precludes the death sentence here because his state of mind did not amount to a "reckless indifference to human life" (IB 63). The State disagrees and submits that the trial court's findings were supported by competent evidence, See Benedith v. State, 717 So.2d 472, 477 (Fla. 1998) (whether "competent substantial evidence to support the Tison culpable state of mind requirement"):

> This court ... finds that the Defendant was a major participant in the underlying felonies and ... finds that the Defendant by his conduct demonstrated reckless indifference to human life.
>
> The victim in this case, Robert Sparrow, III, was virtually a baby at three years and four months of age. ... [The Defendant's] conscious decision to invade another's home; to terrorize and rob at gunpoint men, women and children; to batter a woman with his pistol; to abduct a three year old child and then abandon him in an enclosed car on a hot summer day, is reckless indifference to human life. Moreover, ... these are the acts which killed this child, regardless of whether or not the Defendant intended for him to die. *** Even assuming the facts argued by the Defendant, he committed acts which demonstrated the necessary evil mind which makes him constitutionally eligible for the death penalty ... .

(II 388-89) See facts bulleted and discussed and supportive record cites in ISSUE I supra.

Accordingly, the jury voted 9 to 3 to recommend death and specifically found the Tison criteria (V 798).

Appellant cites to Tison (I 63), Jackson v. State, 575 So.2d 181 (Fla. 1991) (I 64, 65), Enmund v. Florida, 458 U.S. 782, 102

S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (I 64-65), and Benedith v. State, 717 So.2d 472 (Fla. 1998) (I 65). However, none of these cases undermine the imposition of the death penalty here. In contrast to the gravamen of these cases, Appellant himself committed the lethal act. See discussion of lethal act, ISSUE I supra. Indeed, he essentially admitted this in the guilt phase, when he testified that he parked the car he had stolen moments before, stole a CD player from it, and then shut the door to the car with the victim "[s]eated in the passenger seat" (XIII 1525, 1570-71).

Thus, Appellant left Little Rob in the Jacksonville June heat, where, according to the defense's theory of the case, hyperthermia increased Little Rob's body temperature to the point where his organs failed (See XIII 1419). In this sense, under Appellant's theory, the stolen car was like an oven, in which the temperature can "rise above 100 degrees pretty quickly" (XIII 1422). "[C]ars that are closed up the temperature can rise over 105 degrees within about ... 15 to 45 minutes" and 105 degrees is "dangerous" for a child. (XIII 1422-23) As Appellant walked away from the car where he had just enclosed Little Rob, he displayed a reckless indifference to Little Rob's life.

Appellant compounded his recklessness by terrorizing the crying Little Rob with his gunpoint display of intimidation to do what, and stay where, he said. Appellant brandished his gun and commanded various victims (paraphrased): "don't run or I'll shoot" (See XII 1297); "shut your mouth or I am going to kill him" (See XII 1220-21); "if they come out, I am going to kill the little boy"

(See XII 1262-63); "if I hear any doors or anything in the house, or if I see any police I would kill him" (See XII 1280).

Appellant's threats were punctuated by the blood of Little Rob's mother from Appellant pistol-whipping her (See XI 1033, 1057, 1097, 1130-31, 1187, 1189, XII 1217, XIII 1465-66) and by pressing the gun to the heads of two adults (See XI 1096, 1185-86, XII 1217-18, 1222, 1295).

Appellant further compounded this recklessness by parking the car in a location different from where he had assured Little Rob's dad he would leave him. (Compare XI 1107 with XI 1108-1109)

Thus, because all of Appellant's actions indicate that he was the killer, not one of his accomplices, a Tison analysis does not apply. Accordingly, Tison pointed out that Enmund analyzed felony murder, with "the felony murderer who actually killed" at the pole opposite to situations where there is a "minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state." 481 U.S. 149-50, 107 S.Ct. at 1684. Enmund and Tison were designed to assure that the death penalty is justified in situations other than the polar extreme of the defendant as the killer.

Moreover, arguendo, assuming their applicability, a summary of Tison, Diaz v. State, 513 So.2d 1045 (Fla.1987), and DuBoise v. State, 520 So.2d 260 (Fla.1988), found in Jackson v. State, 575 So.2d 181, 192 (Fla. 1991), indicates Appellant's culpability:

> The facts in *Tison*, *Diaz*, and *DuBoise* presented compelling evidence not only that each defendant actively participated in their respective crimes, but that each had a highly culpable state of mind. In *Tison*, the defendants armed known killers, one of whom had

> killed in the same situation once before. During a prolonged affair, they watched four murders, at least some of which they may have been able to stop, and then they continued on their criminal ways until the police stopped them in a shoot-out. One of the Tison brothers [Raymond] admitted that he was prepared to kill to get his father out of prison. In *Diaz*, the evidence proved that Diaz entered the bar possessing a gun equipped with a silencer, from which a reasonable inference can be drawn that he contemplated killing someone. Not only did he discharge the weapon with twelve innocent people in the bar, but a witness testified that Diaz was the actual killer. In *DuBoise*, the defendant kidnapped and robbed the woman, and then raped her while he watched his companions beat her to death. It was a long, drawn-out episode, like the one in *Tison*, during which DuBoise had the chance to stop his companions from committing murder, but he chose not to do so.

More than in Tison, Appellant armed himself, who ultimately committed the lethal act. Moreover,

> Ricky Tison[] ... intentionally brought the guns into the prison to arm the murderers. He **could have foreseen that lethal force might be used**, particularly since he knew that his father's previous escape attempt had resulted in murder. He, too, **participated fully** in the kidnaping and robbery and watched the killing after which he **chose to aid those whom he had placed in the position to kill rather than their victims**.

575 So.2d at 191. Appellant brandished the gun and threatened to kill with it, establishing that he "could have foreseen that lethal force might be used." He "participated fully" throughout the events, and, indeed, orchestrated them. When he placed Little Rob in the oven "he chose" not to "aid" him, as Little Rob's life ebbed away in the Jacksonville heat. Appellant even undermined others' attempts to aid Little Rob by lying about his location.

Like Diaz, Appellant brandished a gun. One need not infer an intent to kill on Appellant's part — he stated one.

Here, as in DuBoise, the defendant "kidnapped and robbed." He raped no one, but he pistol-whipped Little Rob's mother. Here, as

in DuBoise, the episode was relatively extended, as Appellant abducted Little Rob, zig-zagged through the streets and then allowed Little Rob to slowly cook to death. As in DuBoise, Appellant "had the chance to stop" the victim's death. See also Cardona v. State, 641 So.2d 361 (Fla. 1994) ("the extended period of time little Lazaro was subjected to the torturous abuse leading to his death, the ultimate sentence is warranted in this case").

Although sufficient to show the requisite recklessness, the victim need not die through the precise method by which the defendant displays indifference. Thus, in Tison, there was culpability for both Tisons, without regard to which one(s) supplied the shotgun(s) used to kill the victims. Diaz did not rely upon evidence that Diaz or anyone else used his gun to kill the victim, but instead, upon his general behavior during the flow of events. Just as Diaz was "at the very least was recklessly indifferent to human life," 513 So.2d at 1048, through his general display of his firearm, so-too was Appellant through his multiple deadly threats by word and deed. It, therefore, is irrelevant that Appellant did not kill Little Rob by shooting him. Instead, he killed him through the car he stole from the robbery, in which he openly and notoriously displayed deadly force and boisterously proclaimed an intent to kill.

Moreover, even if a Tison analysis applied here and even if the State were required to show that the victim died through precisely the same method in which the defendant showed a reckless indifference to human life, it met its burden. The death of terrified Little Rob from hyperthermia was at least as likely from

leaving him in an enclosed car as the death of the victims in Tison from (hypthetically) bringing the murder weapon to the scene. It was more likely that the commonly-known product of physics of the car heating in the Jacksonville June would kill Little Rob than Ricky Tison's accomplices would kill their victims.

## ISSUE IX

DID THE TRIAL COURT REVERSIBLY ERR IN ITS DETERMINATIONS OF AGGRAVATORS AND MITIGATORS? (Restated)

Appellant shotguns a litany of complaints about the aggravators and mitigators. In determining whether the trial court erred, the standard of appellate review is whether "substantial, competent evidence exists in the record to support the trial court's finding of ... aggravators and ... mitigation," Gordon v. State, 704 So.2d 107, 118 (Fla. 1997). Accord Larzelere v. State, 676 So.2d 394 (Fla. 1996) ("evidence supports trial court's conclusion that the aggravating factors outweigh the mitigating factors"). This Court has indicated that whether an aggravator or mitigator has been established through the facts of the case is discretionary with the trial court. See Banks v. State, 700 So.2d 363, 368 (Fla. 1997) ("within a trial court's discretion to decide whether a proposed mitigator has been established, and whether it is truly mitigating in nature"). Applying this deference to the trial court here, Appellant has failed to meet his appellate burden of overcoming the presumption of correctness.

At the outset, however, the State notes the distinctive change in Appellant's tactics, now that he is armed with 20-20 hindsight

of a death sentence. At the sentencing phase, rather than isolate and attack each possible aggravator as inapplicable as a matter of law, defense counsel emphasized the trial court's discretion to not follow the jury's 9-3 recommendation of death by weighing certain aggravators less and certain mitigators more. (See V 816-36, II 353-60) On appeal, Appellant should be bound by that tactic.

Appellant (at IB 68-69) first complains that the trial court improperly doubled felony murder and the felonies that underlie that felony murder. He is incorrect. Here, there were not only multiple victims in the underlying felonies in addition to the homicide victim (Little Rob's father, Dixon, Gardner, Tammy Cobb, David Cobb, Kahari Graham, Compare II 234 & XV 1956 with I 8-11), they were victimized at a distinct phase of the flow of events. Indeed, as the State argued in ISSUE I, the evidence was compelling for felony murder based upon the kidnapping of Little Robert, a felony that grew out of, but merited separate consideration from, the burglary and robberies at the Sparrow home. The trial court's weighing of each of these aggravators was reasonable because "each ... is supported by such distinct facts," Stein v. State, 632 So.2d 1361, 1366 (Fla. 1994). Indeed, here, the trial court, distinct from the prior violent felony aggravator, emphasized Appellant using "this child as a hostage to effect his getaway." (Compare II 390 with II 389)

As in Walls v. State, 641 So.2d 381 (Fla. 1994), there were separate and distinct felonies supporting each of these aggravators.

Accordingly, James v. State, 695 So.2d 1229, 1236 (Fla. 1997), rejected a defense claim: "felonies committed contemporaneously with the capital crime can qualify under the "prior violent felony" aggravator where, as here, the criminal episode involved multiple victims."

Johnson v. State, 438 So.2d 774, 778 (Fla. 1983), characterized the trial court's sentencing order as "thoughtful and well-reasoned" and held that "the evidence supports the findings in the trial court order." The order there found the following aggravators:

> previously convicted of a capital or violent felony (all three homicide charges); felony murder (all three); avoiding arrest ([Deputy] Burnham); pecuniary gain ([taxi driver] Evans); and cold, calculated, premeditated manner (all three).

Here, as there, separate victims in the various phases of the events supported separate aggravators. See Id. at 778-79.

Cole v. State, 701 So.2d 845, 849 n. 1 (Fla. 1997), upheld a death sentence where the following aggravating circumstances were found yet based upon the same sequence of events:

> The trial court found the following aggravators: (1) Cole had previously been convicted of another felony; (2) the murder was committed during the course of a kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was heinous, atrocious, or cruel.

Cole discussed the first aggravator in terms of Pamela Edwards as the victim and the next two with John Edwards as the victim and held that "each aggravating circumstance was established," Id. at 852. As here, the

> record contains competent, substantial evidence to support the trial court's findings regarding these

> aggravators, and we find no error in the trial court's ruling that each aggravator be considered separately.

Id. citing Preston v. State, 607 So.2d 404 (Fla.1992).

See also Hildwin v. State, 23 Fla. L. Weekly S447 (Fla. Sept. 10, 1998) ("argues that because the very same offenses underlie both aggravators, they should have been merged and considered as only one aggravator. Even if this issue had been preserved, which it was not, we would reject this argument"); Trepal v. State, 621 So.2d 1361, 1366-67 (Fla. 1993) ("... as long as two crimes involve multiple victims ..."); LeCroy v. State, 533 So.2d 750 (Fla. 1988) ("contemporaneous prior convictions involving another victim may be used as aggravation"; upheld various factors based on different victims). Cf. State v. Enmund, 476 So.2d 165, 168 (Fla. 1985) ("we hold that a defendant can be convicted of and sentenced for both felony murder and the underlying felony").

Appellant argues (IB 69) that the evidence did not support the aggravator that the "death is the direct result of the Defendant's perceived need and conscious decision to use this child as a hostage to effect his getaway." The State argued at length in ISSUE I supra, and adopts that discussion here, that Appellant's lethal act occurred within several felonies/flight underlying felony murder, especially the kidnapping of Little Robert.

Appellant argues that the trial court did not give the proper weight to "defendant's acceptance of responsibility" (IB 69-70) and erred in rejecting Appellant's purported remorse (IB 70-71). However, the weight to be given factors is a matter for the trial court, given competent evidence. See Gordon; Larzelere; Banks.

Appellant self-gratuitously paints himself "unquestionably" cooperative (IB 69) and "candidly" admitting "to his role in the charged offenses" and attacks the trial court's observation that he appeared to be "amused" with the proceedings (IB 71). The trial court's findings were reasonable and supported by the record.

Several facts belie Appellant's picture of himself as cooperative and remorseful. Illustrative, and patently supporting the trial court's observation of Appellant's apparent amusement (II 394), is Appellant's laughter at Derrick Dixon's testimony (See XIII 1526-27). Also, Appellant concealed others who the State wished to identify and locate. When asked the identity and location of a person ("plats") who "stood over" the robbery victims "with a gun" (XI 1098. Also, see XII 1223-25, XII 1260, XII 1294-95, XIII 1457-61), Appellant testified: "I'm not going to say." (XIII 1536) When asked about another person "with" Appellant at the time of the robbery, Appellant responded: "I'm not going to tell him either." (XIII 1537. Also, see XIII 1547)

Appellant swore that he was candid with the police (XIII 1537), as he asserts this now (IB 70). However, as discussed in ISSUE VII supra, his explanation for his statement wishing to be executed was unreasonable, and he changed his story at the penalty phase when he testified that he "asked for the chair ... to go to heaven," "not out of guilt or any crime" (IV 674-75).

Thus, Appellant tactically attempted to minimize his responsibility for any wrongdoing against the children in this case. He refused to plead guilty to the murder of Little Robert and he refused to plead guilty to robbing Little Robert's slightly-

older brother, Kahari Graham. Yet, Kahari clearly testified that Appellant robbed him too (See XIII 1455), justifying the jury's finding of guilt on that Robbery count (XV 1956: Count 5).

In sum, as the trial court observed and as discussed in ISSUE III, Appellant tactically benefitted from his pleas of guilt at the last moment prior to trial. However, Appellant's cavalier attitude towards his guilt of robbing Derrick Dixon was surpassed by his cavalier attitude at the crime scenes, as he repeatedly ordered the occupants around, repeatedly threatened to kill them, pistol-whipped the victim's mother, pointed his large gun to the head of two victims, and abducted Little Robert and lied about where Little Robert could be found. Instead of caring for Little Robert, Appellant cared to help himself to the CD player in the car and shut the car door on Little Robert's life and on his defense to the death penalty.

Appellant also claims (IB 71) that Cummings' life sentence should have been given "significant weight." However, "[a] codefendant's sentence may be relevant to a proportionality analysis where the codefendant is equally or more culpable," Cardona v. State, 641 So.2d 361 (Fla. 1994). The entire trial is permeated with Appellant's leadership role in the robbery/burglary, and Appellant, not Cummings, left Little Robert in the car. In this sense, Appellant was the "triggerman." Moreover, Appellant's trial testimony attempted to minimize Cummings' role in the flow of events. For example, Appellant testified: "figures waving me off like telling me don't get in the car with the kid" (XIII 1523). See Raliegh v. State, 705 So.2d

1324, 1331 (Fla 1997) (comparison of co-felons' relative roles; "[r]easonable people could agree with the trial court's ruling; thus we find no abuse of discretion").

Therefore, given these facts and given the aggravators and mitigators, which the trial court properly found, the State respectfully submits that the death sentence was justified. As the trial court noted, and as supported by the facts discussed in ISSUE I supra, Little Robert's age was "entitled to the most weight of the three aggravating factors" (II 391). See Davis v. State, 703 So.2d 1055 (Fla. 1997) ("victim was two years old when she was killed"; "two aggravators: that the murder was committed during the course of a sexual battery and that it was heinous, atrocious, or cruel (HAC)"; several nonstatutory mitigating factors; "reject Davis's argument that the death penalty is disproportionate"); James v. State, 695 So.2d 1229 (Fla. 1997) (victims included 8-year-old; "In aggravation, the trial court found HAC, "James was contemporaneously convicted of another violent felony; and ... each murder was committed during the course of a felony ... also considered sixteen mitigating circumstances ..."; "when we consider the circumstances of these murders in relation to other similar decisions that death is not a disproportionate penalty in this case"; collecting cases); Cardona v. State, 641 So.2d 361 (Fla. 1994) (three-year-old victim; one aggravator of HAC, which was given "overwhelming and of enormous weight," and several mitigators; "in light of the extended period of time little Lazaro was subjected to the torturous abuse leading to his death, the ultimate sentence is warranted in this case");

Meyers v. State, 704 So.2d 1368 (Fla. 1997) (14-year-old victim; "Aggravating factors: (1) Meyers had previously been convicted of another capital felony or a felony involving the use or threat of violence to a person, and (2) the capital felony was committed while Meyers was engaged in the commission of, or attempt to commit, or escape after committing a sexual battery"; four non-statutory mitigators; "death sentence in this case is proportionate"); Henry v. State, 649 So.2d 1361 (Fla. 1994) (two homicide victims included 5-year-old; "aggravating factors: (1) Henry had previously been convicted of another capital felony; and (2) the murder was committed during the course of a kidnapping"; "court gave some weight to two statutory mitigating factors and six nonstatutory mitigating factors"; "we do not find any lack of proportionality in Henry's sentence"); Duckett v. State, 568 So.2d 891 (Fla. 1990) (11-year-old victim; "two aggravating circumstances, specifically, that the murder was committed during the commission of or immediately after a sexual battery and that the murder was especially heinous, atrocious, or cruel"; "one statutory mitigating circumstance, namely, that Duckett had no significant history of prior criminal activity"; "Duckett's family background and education gave rise to nonstatutory mitigating evidence"; "we find no error in his determination that the aggravating circumstances outweighed the mitigating evidence"); Atkins v. State, 497 So.2d 1200 (Fla. 1986) (aggavators of "murder of Antonio Castillo, a six year old child, was committed while the defendant was engaged in the crime of kidnapping," "committed for the purpose of avoiding or preventing a lawful arrest," and HAC;

two statutory mitigators; "not this Court's function to engage in a general de novo re-weighing of the circumstances"; "no reason to disturb the court's judgment"); Adams v. State, 412 So.2d 850 (Fla. 1982) (8-year-old victim; "three aggravating circumstances: 1) that the capital felony was committed while defendant was engaged in or attempting to engage in, or in the flight after committing or attempting to commit rape and/or kidnapping; 2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; 3) that the capital felony was especially heinous, atrocious, or cruel"; "three mitigating circumstances: 1) that the defendant had no significant history of prior criminal activity; 2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; 3) that the defendant's age (20) was of significance"; "sentence of death was appropriate under the circumstances").

Therefore, if the trial court committed any error in determining and weighing aggravators and mitigators, it was non-prejudicial and harmless. See Reaves v. State, 639 So.2d 1 (Fla. 1994) (prior violent felony and avoiding lawful arrest ... as "two other strong aggravating factors" indicating harmless error of considering HAC as aggravator vis-a-vis "relatively weak mitigation"); Pietri v. State, 644 So.2d 1347, 1354 (Fla. 1994) ("we cannot say there is a reasonable likelihood that the trial court would have imposed a different sentence").

## ISSUE X

IS SECTION 922.10, FLA. STAT., UNCONSTITUTIONAL? (Restated)

No. See, e.g., Jones v. State, 701 So.2d 76 (Fla. 1997); Ferguson v. State, 105 So. 840 (Fla. 1925) ("Infliction of the death penalty by electrocution is not cruel or unusual punishment"); Hunt v. Nuth, 57 F.3d 1327, 1337-38 (4th Cir. 1995) ("existence and adoption of more humane methods does not automatically render a contested method cruel and unusual"). Compare Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994) ("number of states using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice"; "cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice").

Appellant concedes that the "weight of law may not presently support this argument" (IB 71). Indeed, that "weight" controls.

## ISSUE XI

IS SECTION 921.141, FLA. STAT., UNCONSTITUTIONAL? (Restated)

No. As in ISSUE X, Appellant concedes that the weight of the law belies this claim. Again, there is controlling law. See, e.g., Brown v. State, 721 So.2d 274, 277 n. 6, 283 (Fla. 1998) (rejected multiple claims that "section 921.141, Florida Statutes (1991), is unconstitutional under the Florida and United States Constitutions"); Hunter v. State, 660 So.2d 244, 252 (Fla. 1995) (rejected "challenges the constitutionality of section 921.141, Florida Statutes (1993), on numerous grounds" as without merit or

unpreserved); King v. State, 436 So.2d 50, 53 (Fla. 1983) ("section 921.141 is both facially constitutional, as we have previously held, and has been constitutionally applied to the appellant in this case").

## CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm all aspects of Appellant's judgment and sentences entered in this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Michael R. Yokan, Esq., 204 Washington Street, Jacksonville, FL 32202, this 18th day of June, 1999.

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