**IN THE SUPREME COURT OF FLORIDA**

**ROBERT MORRIS**

**Appellant/Cross-Appellee,**

**vs.** **CASE NO. SC95623**

**STATE OF FLORIDA,**

**Appellee/Cross-Appellant.**

**_____/**

**APPEAL FROM THE CIRCUIT COURT**
**OF THE TENTH JUDICIAL CIRCUIT**
**IN AND FOR POLK COUNTY**
**STATE OF FLORIDA**

# ANSWER BRIEF OF THE APPELLEE


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## STATEMENT OF THE CASE AND FACTS

The State generally accepts appellant's statement of the case and facts as accurate, but adds the following.

A. Facts Relating To Cross Appeal On Severance And Motion In Limine Regarding Exclusion Of Sexual Battery Evidence

On September 29, 1994, a Polk County Grand Jury returned an indictment against appellant/cross-appellee Robert Morris [hereinafter appellant] for first-degree murder, burglary with a weapon, sexual battery, and armed robbery. On September 23, 1997, appellant filed a motion to sever the sexual battery count from the remaining charges. (V-6, 995-999). Prior to trial, the trial court granted the defense motion to sever the sexual battery count from the murder and burglary counts. The trial court granted the motion based upon the defense argument that severance was required for a fair determination of the defendant's guilt. Appellant argued because his viable defense to sexual battery that the victim was already dead at the time of the sexual assault was inconsistent with his defense on the remaining charges, i.e, that he was not present and did not commit the offenses. (V6, 1029).

The trial court also granted the defense motion-in-limine to preclude the State from presenting evidence of sexual contact between appellant and the victim. This ruling prohibited the State from advising the jury that sperm, positively linked to appellant through DNA testing, was found in the vaginal and anal regions of Mrs. Livingston. (Counsel argued that the relevancy of this

testimony was outweighed by the danger of unfair prejudice:

> ...Since the DNA evidence is admissible for identification purposes, and since it's irrelevant where that biological material, or what source of that DNA material is, I do not see how the State is prejudiced by having the testimony that biological material was recovered from the body of the victim and that the DNA testing was then performed on that biological material. According to Dr. Word, that's all I need, biological material. It does a DNA match.
>
> To then allow in the fact that the biological material tested, the sample biological material tested was from semen, brings in irrelevant issues that there was a sexual battery. I'm sorry, that there was sexual activity, not necessarily a sexual battery. The fact that the biological material was recovered from the vaginal and anal cavities of the victim brings in that same particular evidence.
>
> So it is simply our position that the prejudicial effect of that evidence, what type of biological material it is and where it came from, outweighs any probative value in light of Dr. Word's testimony about the significance of where biological material or what type of biological material is tested. I mean I think it's laid out in the motion. I don't think I really need to say anymore than that.

(V7, 1118).

In response, the prosecutor argued, in part:

> ...The so what argument is, Judge, that it is our position that all this evidence comes in and is admissible for their motion regarding the motion in limine on well, we do not need to tell. All Dr. Word needs is bodily fluid.
>
> Well, Dr. Word is not a jury of mine, but Dr. Word is a witness. It's all what the State needs, it's not what Dr. Word needs. And it's all what the jury needs to get a full picture of this case, and the full picture is it's semen and where it came from.
>
> As far as the photo -- the defense missed the part of my argument that - it was not mentioned in previous motions. It was never mentioned up until today that there is a photo out there that shows injury.
>
> Now, if that injury is not part of her severed ear, her broken tooth and her bloody seen (sic), I don't see

> what it – it's part and parcel of the series of injuries that she suffered that night or that early morning. So it is highly relevant and very well-connected to Count One, which is the murder. I mean it's a part of her injuries inflicted by the defendant [injury to victim's vagina].
>
> That's why – I mean it's relevant. The defense agreed that it is relevant to the sexual battery, but it's not relevant to Count One and I strongly disagree with that. It's an injury that the jury is entitled to know about. It's an injury that the State is entitled to use to show and also he did this look at this photograph. That's all we have as to our response to the defendant's argument.

(T7, 1120-22).

After hearing the argument of counsel, the trial court entered a written order, granting the motion in limine, stating in part: "The State will not be permitted to introduce evidence during the trial of Counts I, II, and IV which infers sexual activity between the perpetrator of the offenses and the victim." (V7, 1147). The State was ordered not to present evidence of the locations on the body of Mrs. Livingston where appellant's sperm was found. Moreover, the State was prevented from advising the jury that the DNA results linking appellant to the crime were from sperm found on the victim's body. The State was limited to advising the jury that sperm from appellant's ejaculate was "biological" material. As a result of the trial court's ruling, the prosecutor was having to alter the names used for evidence and DNA testing:

> ...I'm having to give different names to certain evidentiary items. Clearly, we can't say this is a vaginal swab, anal swab and so forth, or semen, so I'm having to track the language of the order on a motion in limine to call these items bodily fluids, et cetera, et

> cetera. And then to distinguish between when it comes to the semen part we've got a DNA analysis, they call that sperm fraction versus non-sperm fraction.
>
> The names I gave these things is male versus female. And clearly, they're going to say, the expert will say this is male coming from, we believe the defendant is included; this is female, the victim is included. And we know he's a male and she's a female...

(V8, 1417). And, in order to accommodate the trial court's ruling, the prosecutor had to insure that State witnesses not refer to the victim's body parts:

> ...In there, Your Honor, you will find what I called an index. If you recall, during the rape trial, there were exhibits which were called vaginal swabs and rectal swabs. Those will be referred to by the witnesses as biological fluids collected from the victim's body during the autopsy.
>
> In order to differentiate between fluids -- and, of course, we cannot say where they came from. So I went ahead and called vaginal swabs as coming from Location A, rectal swabs as coming from Location B. So we know that they know that they're different, different sites, and we'll call them A and B.
>
> There's also -- they were able to break down the defendant's semen to -- the sperm fraction and nonsperm fraction during the serological analysis that was conducted. The nonsperm fraction will be referred to Fraction 1, sperm fraction will be referred to as Fraction 2. That's the terminology that's going to be used. I went ahead and retyped, renamed those items in the Cellmark reports.

(V8, 1464).

B. Penalty Phase

Four family members testified regarding the loss of Violet Livingston, as a result of appellant's homicidal violence. (V31, 3868-71). Victoria Lee Livingston McCarthy testified that Violet was her grandmother. Victoria read a statement regarding her loss

to the family:

> ...I can recall the moment like it was yesterday. I was sitting at my desk at work in September of 1994 and hearing my mother's trembling voice tell me over the telephone that my grandma had been murdered. I was in shock, denial, and finally enraged. How could such a horrible thing happen?
>
> As the activity director for a 120 bed nursing home, I was surrounded daily by elderly citizens with ailments from Alzheimer's to broken hips to cancer. They indeed knew that death was inevitably around the corner but a small part of life left to live.
>
> My grandma was 88 years old, but she didn't need a nursing home. She was healthy, took care of herself. She didn't need an activity director. She knew the answers to Jeopardy and kept abreast of the latest golf tournaments. My grandmother was 88 years old, but she had a lot of life left to live.
>
> I will never be the same person that I was before that phone call. I was so proud of my intact family tree and the fact that my children would know and remember their great grandparents. How proud they would have been to know that I have three beautiful children and how much joy those children would have given them.
>
> I think of conversations we never had, letters I never wrote, things I always wanted to ask of someone who had lived a wise and interesting life. She should have died peacefully in her sleep. She deserved that. I try not to dwell on the horrible thoughts and instead replace them with happy ones: Her wonderful smile, her great sense of humor and story telling, her strawberry shortcake, and her sweet iced tea.
>
> She was my grandma, my children's great-grandma, my dad's mother, a wife, an aunt, a sister, a friend. All of this taken from us tragically by the hand of another, not by the hand of God. I take comfort in the fact that I do believe that she is in Heaven, and I do believe that I will see her again. So until then I must keep her memory alive and live my life to the best of my ability knowing she would have been proud, supportive, encouraging. I hope and pray she knew how much I loved her.

(T31, 3880-82).

The medical examiner, Dr. Melamud, testified to the result of

appellant's homicidal violence. At the scene, Dr. Melamud observed the victim's body, noting that her facial area was wrapped up in two or three bed sheets. (T31, 3835). The medical examiner testified that Mrs. Livingston suffered approximately 31 different types of injuries, and was in pain when she suffered these injuries:

> Mrs. Livingston sustained multiple injuries to her body, roughly approximately 31 different kinds of injuries such as lacerations, abrasions, and bruises. And of course while she was sustaining those injuries, she was in pain.

(T31, 3836). Appellant inflicted a number of these injuries to Mrs. Livingston's face:

> Here you see lacerations of the upper and lower lips, another laceration of the upper lip, and all these lacerations went through and through. So they were all thickness of the lips. There is also a large bruise on the left side of the face, and there are lacerations, two lacerations and two abrasions here. [indicating].
>
> On the right side of the face you can see multiple, six lacerations on the right cheek. There was laceration of the right ear with a rupture of the cartilage, laceration behind the right ear. And all these injuries were surrounded with bruise. All this was extended to the neck. And, if you remember, I told you there were injuries into the muscles of the neck in the front and right side.

(T31, 3837-38). In addition to facial lacerations and bruising, Dr. Malmud found large bruises on the "inner surface of the skull in the frontal area, in both temporal legions, and the back of the head." (T31, 3840). The medical examiner also noted injuries to the victim's back, shoulders, and arms. (T31, 3841). Three bruises on the abdomen, "six abrasions on the left buttock and on

the right buttock" surrounded by bruising. In addition, the medical examiner noted injuries to the body and legs of the victim:

> There are multiple abrasions, eight abrasions in that area of the right upper and back aspect of the right femoral. There are bruises of the back aspect of the lower end of the right – the lower end of the right thigh and the right popliteal region and on the back of the left calf. There are bruises over the right knee, under the right knee...

(T31, 3842).

The medical examiner found clear evidence of defensive type injuries. Six lacerations surrounded by deep bruises on the right forearm and right hand were found. (T31, 3842-43). While he could not pinpoint the time of death in relation to the attack inflicted upon Mrs. Livingston, the medical examiner testified: "Taking into count the multiplicity of those injuries, I think she was alive within several minutes." (T31, 3844). Based upon his observation of Mrs. Livingston's body, it was likely that the injuries were inflicted first, then her head was wrapped up in the sheets. (T31, 3845).

Crime Scene technician Leroy Parker testified as an expert in blood stain pattern analysis. At the crime scene, Parker analyzed the blood pattern found on the wall at the entrance of the victim's bedroom. (T31, 3860). Blood was found on the wall and dresser.[1] Castoff stains resulting from swinging an object result in a

[1]The blood stain found on the curtain near the window was a transfer stain, a contact stain "that might have resulted from him [appellant] cutting his hand on the way in to the apartment." (T31, 3863).

distinct pattern. "There is a change in direction. So the blood continues to travel at the speed it had when it was attached to the object. The castoff blood is from a result of a change in speed and direction." (T31, 3860-61). "...[S]plattered blood is blood that receives a forceful impact that's causing it to be deposited on a target." (T31, 3862). Multiple blood splatter and castoff stains were found in the apartment, at the entrance of the bedroom. The multiple stains from pooling blood and locations of castoff stains on the walls, ceiling, and dresser lead to a conclusion that the victim was beaten in several different locations in the bedroom. Parker testified:

> That she was beaten several - in several different locations in the bedroom, because, again, you have blood stains on one wall and bloodstains on the other wall. So there was some movement of the victim during the time she received the forceful impacts.

(T31, 3868-69). Mrs. Livingston was "upright at first and then she was lower and then eventually she was down." (T31, 3869). It was obvious to Parker that the victim and perpetrator struggled in the bedroom. (T31, 3870).

As noted in appellant's brief Dr. Dee was called to the stand to testify on behalf of the appellant. On cross-examination, Dr. Dee admitted that appellant's incarceration history was somewhat less than stellar. (V34, 4402). Dr. Dee acknowledged that appellant's records reveal that he was in a fight with another inmate while incarcerated in Missouri. (V34, 4407).

Any additional facts necessary for a discussion of the assigned errors will added in the argument, *infra.*

## SUMMARY OF THE ARGUMENT

**ISSUE I--**The trial court did not abuse its discretion in failing to grant a mistrial based upon defense witness Laventure's statement on cross-examination. The trial court provided a curative instruction advising the jury that no one from the defense had attempted to improperly influence any witness in this case.

**ISSUE II--**Appellant failed to preserve any issue surrounding an allegation of improper contact between the jury and a former juror by failing to request a mistrial until after the jury reached its verdict in this case. And, after full inquiry of the former juror, it was established that no improper or prejudicial communication occurred.

**ISSUE III--**The appellant's proportionality argument must be rejected. Appellant's sentence is supported by four particularly uncontested aggravators: Heinous, atrocious, or cruel, prior violent felony convictions, under Department of Corrections supervision at the time of the murder, and financial gain. A review of factually similar cases supports the propriety of the imposition of the death penalty on the facts of this case.

**ISSUE IV--**The trial court gave appropriate consideration to the appellant's asserted history of drug abuse. While the trial court initially stated that appellant's use of drugs in the past was not mitigating, the court ultimately found this factor to exist and gave it little weight. The weight to be accorded this non-

statutory mitigator was within the trial court's discretion.

**ISSUE V**--This Court has repeatedly rejected appellant's argument that the jury must be instructed by the trial court on specific non-statutory mitigating circumstances. Appellant has failed to offer this Court any compelling reasons to depart from the well settled precedent of this Court.

**CROSS APPEAL**--The trial court in this case clearly erred in granting a motion to sever the sexual battery count from the remaining charges. The sexual battery offense occurred during the same criminal episode, against the same victim as the other charged offenses. Moreover, the error granting severance was exacerbated when the trial court granted a motion in limine precluding the State from presenting any evidence of sexual activity. Evidence of sexual activity was inextricably intertwined with appellant's other criminal acts against the elderly victim. The sexual activity also resulted in compelling DNA evidence identifying appellant as the perpetrator of the murder, armed robbery, and burglary offenses. The trial court clearly abused its discretion in precluding the State from presenting a complete picture of appellant's crimes against the victim.

## ARGUMENT

### ISSUE I

**WHETHER THE TRIAL COURT ERRED IN PROVIDING A CURATIVE INSTRUCTION BUT NOT ALLOWING THE DEFENSE TO PRESENT THE PROFFERED TESTIMONY OF A DEFENSE INVESTIGATOR? (STATED BY APPELLEE)**

It was trial defense counsel who first suggested a stipulation to address defense counsel's concerns emanating from witness Sherry Laventure's testimony. Defense counsel stated:

> ...You know, the defense, I think, would be willing to solve this entire problem by a stipulation to the effect that none of the attorneys nor representatives of the public defender's office in any way encouraged any witness in this case to present false testimony.

(T27, 3082). After a short recess, the State and defense drafted a stipulation. Defense counsel stated:

> Well, I think the State and I have drafted a stipulation. The defense stands by its motion for mistrial. If that is not favorably ruled upon, then I believe that we have some language of a stipulation that addresses at least part of the issue.

(T27, 3083). The trial court denied the motion for mistrial. Defense counsel then read the proposed stipulation, as follows:

> The parties stipulate and agree that no attorney representing the defendant, nor any representative of the public defender's office, has suggested or encouraged any witness to present false testimony.

(T27, 3084). The stipulation was read to the jury. (T27, 3091).

Defense counsel, however, maintained that he still wanted to call investigator Maloney "simply for the purpose of explaining what her role in this was in terms of that she was not an

investigator interviewing the witness, but simply a process server to serve Ms. Laventure with her subpoena." (T27, 3084). After the trial court stated that her testimony would not fit any exception to the hearsay rule, defense counsel replied:

> **I was not seeking to elicit any hearsay testimony from Ms. Maloney. I was not going to ask her anything about what Ms. Laventure told her.** I was simply going to ask her what her role was.

(T27, 3084-85). Defense counsel continued, stating that "now my intent in calling Ms. Maloney is simply to ask her what her role was and that it was not as an investigator to gather information from Ms. Laventure, but simply to serve her with a subpoena and keep her advised as to when she needed to appear in court." (T27, 3085).

After hearing defense counsel's explanation, the trial court denied the request to call Ms. Maloney, stating:

> The problem, of course, is that its relevancy is tenuous at best since it doesn't get to the ultimate issue, which is cured by the stipulation, and, therefore, your request is denied.

(T27, 3085).

On appeal, appellant argues that Ms. Maloney's live testimony was preferred over the stipulation. Further, appellant argues that the jury was entitled to learn of the substance of Ms. Laventure's statements to Ms. Maloney, not simply that Ms. Maloney did not suggest potential testimony to the witness. Appellant claims that he should have been allowed to impeach Ms. Laventure's testimony

with a prior inconsistent statement. The problem with this argument is that defense counsel never argued below that Ms. Maloney's testimony should be admitted as a prior inconsistent statement. In fact, in arguing this point to the trial court below, defense counsel stated that he would not ask Ms. Maloney the specific statements allegedly made by Ms. Laventure: "...I was not going to ask her anything about what Ms. Laventure told her." (T27, 3084-85). While Ms. Maloney did testify to specific statements on the proffer[2], defense counsel did not readdress his earlier position and assert that the jury was entitled to learn of the specific statements made by Ms. Laventure. Consequently, this particular argument has not been preserved for review. See Section 924.051 (1)(b), Fla. Stat. (1996)("'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) post conviction relief denied, 574 So.2d 1075 (Fla.

[2]On proffer, Ms. Maloney testified that when she served a subpeona, Ms. Laventure volunteered that she had seen a man milling about Ms. Livingston's apartment and that it appeared he had been locked out. Ms. Laventure volunteered that he was definitely not a black man. (T28, 3213). Ms. Laventure also added that she wanted nothing to do with the case and was upset about being served with a subpeona. (T28, 3214). Upon attempting to serve the second subpeona, Maloney testified that Laventure volunteered that she knew so little information and did not understand why she had to appear in court. (T28, 3215).

1991)("except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court."); Archer v. State, 613 So.2d 446, 448 (Fla. 1993)(For an issue "to be preserved for appeal . . it 'must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved for appellate review.'")(quoting Tillman v. State, 471 So.2d 32, 35 (Fla. 1985)).

As for the contention that the defense should have been able to call Ms. Maloney to testify that she never suggested possible testimony to Ms. Laventure and simply asked her to tell the truth, this portion of appellant's argument on appeal is preserved for review. This portion of appellant's argument, while preserved for review, is without merit.

Appellant claims that his allegation of error is subject to review under the harmless error analysis of State v. Diguilio, 491 So.2d 1129 (Fla. 1986). However, in this case, the defense requested a mistrial which was denied by the trial court. Instead, the trial court provided a curative instruction to the jury which was approved by the parties below. In Goodwin v. State, 751 So.2d 537, 546 (Fla. 1999), this Court noted that DiGuilio did not govern review of a trial court's denial of a mistrial motion. This Court stated:

> ...In Goodwin, the issue on appeal before the Fourth District was whether reversal was required because of the

> allegedly impermissible "bad neighborhood" testimony. However, in Goodwin, the trial court not only sustained the objection to the "bad neighborhood" testimony, but gave the jury a curative instruction to disregard the comment. The defendant then moved for a mistrial. The trial court reserved ruling on the motion until after trial at which time the motion for mistrial was denied. As explained by the Fourth District, similar testimony had already been admitted without objection. Goodwin, 721 So.2d at 728-29.
>
> This Court's case law states that a trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. See Cole v. State, 701 So.2d 845, 853 (Fla. 1997), cert. denied, 523 U.S. 1051, 118 S.Ct. 1370, 140 L.Ed.2d 519 (1998); Power v. State, 605 So.2d 856, 860 (Fla. 1992). Recently we reaffirmed that a motion for mistrial "should be granted only when it is necessary to ensure that the defendant receives a fair trial." Cole, 701 So.2d at 853; see also Terry v. State, 668 So.2d 954, 962 (Fla. 1996). We held in Cole that because the complained of remark "was not so prejudicial as to require reversal," the trial court did not abuse its discretion. 701 So.2d at 853.
>
> Therefore, use of a harmless error analysis under DiGuilio is not necessary where, as occurred in Goodwin, the trial court recognized the error, sustained the objection and gave a curative instruction. Instead, the correct appellate standard is whether the trial court abused its discretion in its denial of a mistrial. In analyzing the abuse of discretion issue in Goodwin, it is necessary to determine whether the single improper remark, to which the trial court sustained an objection and gave a curative instruction, was so prejudicial as to deny defendant a fair trial. See Cole, 701 So.2d at 853. Accordingly, while we answer the certified question in the negative, we approve the result in Goodwin.

As in Goodwin, the appropriate question on review is whether or not the trial court abused its broad discretion in denying appellant's motion for mistrial. Since defense counsel's argument below did not include a contention that Ms. Laventure's statements to Ms. Maloney were independently admissible, appellant's attempt to transform the denial of his motion for a mistrial into an

unfavorable or erroneous evidentiary ruling is not well taken.

It was simply not necessary for the trial court to order a mistrial in light of the favorable curative instruction provided to the jury. "Generally speaking, the use of a curative instruction to dispel the prejudicial effect of an objectionable comment is sufficient." Rivera v. State, 745 So.2d 343, 345 (Fla. 4th DCA 1999)(citing Buenoano v. State, 527 So.2d 194 (Fla. 1988)). See Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983), cert. denied, 464 U.S. 1063, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984)(A curative instruction purges the taint of a prejudicial remark because "a jury is presumed to follow jury instructions."). And, in his closing argument, the prosecutor did not in any way suggest that the defense had told Ms. Laventure what to say or had otherwise acted dishonestly. The single, isolated comment of Ms. Laventure simply did not warrant the drastic remedy of a mistrial in this case. See Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982)(quoting Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979) ("The law is well established that a motion for mistrial is addressed to the sound discretion of the trial court and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity.").

Regardless of the standard of review, appellant's suggestion

that absent the alleged error the result might have been different strains the outer bounds of credulity. The State possessed absolutely overwhelming evidence of appellant's guilt. In addition to appellant's fingerprint on the light bulb to the outer entrance of the victim's apartment, the DNA from blood matching appellant's was found on the curtain where the murderer apparently gained entry into the victim's apartment. (V23, 2284-86, 2290-92). Moreover, genetic material from biological fluid [semen] found at two places on the victim's body also matched appellant's genetic profile. (V23, 2289, 2296). Nothing presented at trial below casts any doubt upon the validity of the DNA evidence used in this case.[3]

In addition to the compelling DNA evidence presented by the State, appellant was observed passing the victim's stolen coins to two different merchants[4], and property stolen from the victim was found in his apartment.[5] (V24, 2536-39; V24, 2568-69; V25, 2539-40). Appellant had scratches on his hands and arms after the

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[3]Testing on blood found on the curtain revealed a genetic frequency of approximately 1 in 7.1 million among African Americans. (V23, 2296). For caucasions, the frequency is even more rare, approximately 1 in 39 billion. (V23, 2296).

[4]At the Texaco station, Tambra Clarke, who recognized appellant from previous visits to the store, testified that appellant used rare coins to purchase items two days after the victim's murder. Ms. Clarke testified that appellant used the following coins: "...one silver dollar and there was two kennedy half dollars and then two silver quarters." (V24, 2567-68).

[5]Ian Floyd, who used to play basketball with appellant, observed a small television set of the type missing from the victim's residence in appellant's apartment after the victim's murder. (V24, 2574-77).

victim's murder (V24, 2546-48) and a glove with blood on it was recovered from a dirty clothes hamper in his apartment.[6] (V24, 2538-39). Appellant's cell mate, Sastre, testified that he helped appellant come up with the 'story' to explain away his fingerprint on the victim's lightbulb, i.e., the attempted theft of a bike. (V26, 2889-91). Further, appellant admitted to Sastre that he murdered the victim and that he would take a deal for life, but would not accept the death penalty. (V26, 2894-95). Appellant also admitted to Sastre that he wore socks on his hands at the time of the murder. (V26, 2891).

Finally, militating against the need for remand in this case is the deft manner in which trial defense counsel addressed Laventure's testimony in closing argument:

> ...I wanted you to hear from Sherry Laventure because the bottom line, the issue she was going to talk about is the fact that there was somebody lurking around Violet Livingston's apartment the afternoon of September 1st, the afternoon before the night when she was murdered, who didn't belong there. I thought she was going to say he wasn't black. I was willing to live with that. It didn't help me a lot because there were Negroid body hairs found inside Ms. Livingston's apartment. So you would think, well, maybe it's more likely that a black was the one in there.
>
> The population geneticists have told you that this particular DNA profile is more common, significantly more common in the African American database than it is in the Caucasian database or the Hispanic database. I still wanted you to hear it even though I thought she was going to say it wasn't a black person. It didn't matter. We know it wasn't him because Julie Woodruff from Taco Bell got on the witness stand and said he was working from

[6]The glove had blood on it with genetic characteristics consistent with the appellant's. (V23, 2286).

> 2:00 to 5:30 on Thursday afternoon, September 1st. She had the records initialed by the manager on duty.
>
> You heard Ms. Laventure say she knows what time it was, after two o'clock, because she goes to get her daughter from school, so she went out to get the mail just before getting in her car. So we know it wasn't him. Apparently, maybe it was a black person. So be it. The issue is somebody was lurking around that apartment, somebody who the police got told about. Ms. Laventure told you she told the police about this person, and yet that's not checked out either.

(T29, 3436-37). The fact that the person Ms. Laventure observed may have been African American probably worked to appellant's advantage given the physical evidence suggesting that the attacker was in fact, African American. The most important fact elicited from Ms. Laventure in favor of appellant's defense was the time this individual was observed near the victim's apartment. And, contrary to appellant's claim, the prosecutor apparently did not dispute the fact that the defendant was at work between 2:00 and 5:00 on September 2nd. The prosecutor in fact, appeared to accept the testimony that appellant was at work:

> ...We know that Mrs. Livingston was alive at six o'clock that night. We know that he did not get home until about 5:45 p.m. He said he got off work about 5:30, took him about 15 minutes and things got vague from that point on. Things got so conveniently vague as to the time.

(T28, 3361-62).

Thus, based upon this record, the race of the individual observed by Ms. Laventure was not critical to appellant's defense. And, since the jury was specifically advised that no defense attorney or any representative of the defense advised **any** witness

to present false testimony, it cannot be said that the trial court abused its discretion in denying appellant's motion for mistrial.

## ISSUE II

**WHETHER APPELLANT SHOULD RECEIVE A NEW TRIAL BASED UPON AN ALLEGATION OF JUROR MISCONDUCT WHERE HE FAILED TO REQUEST A NEW TRIAL ON THIS BASIS BELOW? (STATED BY APPELLEE).**

Appellant argues that the simple fact that a juror who was earlier excused from service was observed talking to prospective jurors mandates reversal of his convictions. While he concedes that he cannot show prejudice based upon this record, he apparently contends that the risk of possible juror influence was so great that his convictions cannot stand. The State disagrees.

Appellant's argument might have some merit if no inquiry was made into this allegation below. However, the trial court inquired of the former juror and appellant did not ask for any additional inquiry of this individual or the panel as a whole below. And, fatal to appellant's claim on appeal, he did not seek a mistrial based upon this contact or otherwise indicate that the issue was not resolved to his satisfaction below. Consequently, this argument has clearly been waived on appeal. See Section 924.051 (1)(b), Fla. Stat. (1996)("'Preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."); Steinhorst, 412 So.2d at 338 ("except in cases of fundamental error, an appellate court will not consider an issue

unless it was presented to the lower court.").

A party cannot sit back when they become aware of juror misconduct, then wait until an adverse verdict to finally bring it to the attention of the trial court and request a new trial. For example, in Rooney v. Hannon, 732 So.2d 408, 410 (Fla. 4th DCA 1999), rev. denied, 744 So.2d 456 (Fla. 1999), the court stated:

> ...Because she failed to object or otherwise alert the court that a problem had occurred with the jury, plaintiff's lawyer waived any objection to what occurred in the courtroom. Where a lawyer knows of an incident potentially compromising the jury before a verdict is returned, but fails to object or alert the court until after the verdict is announced, the incident may not be raised as a ground for a new trial. As the third district held in *Eastern Airlines, Inc. v. J.A. Jones Construction Co.,* 223 So.2d 332, 333-34 (Fla. 3d DCA 1969):
>
> > As a general rule, if a party obtains knowledge during the progress of the trial of acts of jurors, *or acts affecting them*, which he shall wish to urge as objections to the verdict, *he must object at once, or as soon as the opportunity is presented, or be considered as having waived his objection.*
>
> *(quoting 89 C.J.S. Trial § 483)).*

Since the possibility of juror misconduct came to the appellant's attention prior to the verdict being reached and he sought no relief at that time, appellant should not be heard to complain about such misconduct after the verdict. See United States v. Morris, 977 F.2d 677, 685 (1st Cir. 1992), cert. denied, 123 L.Ed.2d 155 (1993)("[A] defendant cannot learn of juror misconduct during trial, gamble on a favorable verdict by remaining

silent, and then complain in a post-verdict motion that the verdict was influenced by the misconduct.")(citing United States v. Bolinger, 837 F.2d 436 (11th Cir. 1988), cert. denied, 486 U.S. 1009, 108 S.Ct. 1737 (1989)). The Second District has similarly recognized waiver in this situation, finding that "the respondent should have brought it [juror misconduct] to the court's attention at the time it was observed rather than waiting until after an unsatisfactory verdict." Hampton v. Kennard, 633 So.2d 535, 537 (Fla. 2d DCA 1994). Indeed, appellant did not even mention the allegation of juror misconduct concerning Ms. Garrett in his motion for new trial, clearly suggesting that this issue was resolved to his satisfaction below.[7] (R10, 1748-49).

In any case, even if this issue had not been waived, the record reflects that absolutely no prejudicial communication occurred between Ms. Garrett and the jurors in this case. When questioned under oath, Ms. Garrett testified that she did not talk to the jurors about anything at all concerning the substance of the case. (T33, 4287). When given the opportunity to expand upon the questioning of Ms. Garrett, trial defense counsel declined to do so. (T33, 4288). Appellant has offered no reason to doubt or second guess the sworn testimony of Ms. Garrett below. Based upon this record, there is no basis in law or fact to reverse

[7]The motion for new trial did mention the failure to conduct additional voir dire concerning outside influence but this did not mention contact with the former juror at issue here.

appellant's conviction. See Sullivan v. State, 303 So.2d 632 (Fla. 1974)(reversible error cannot be predicated on mere conjecture).

## ISSUE III

**WHETHER THE DEATH SENTENCE RECOMMENDED BY THE JURY AND IMPOSED BY THE TRIAL COURT BELOW IS DISPROPORTIONATE TO OTHER DEATH CASES IN THIS STATE?**

Appellant's final claim disputes the proportionality of his death sentence. The State disagrees. When factually similar cases are compared to the instant case, the proportionality of appellant's sentence is evident.

A. Standard of Review

Appellant's counsel candidly admits that the this qualifies as among the most aggravated murders which would qualify for the highest penalty authorized by law. However, he claims that the mitigation presented sufficiently outweighs the aggravators and renders the death penalty inappropriate. (Appellant's Brief at 61-62). What appellant is essentially asking this Court to do is reweigh the aggravating and mitigating factors. However, that is not the appropriate function of this Court on a proportionality review. In addressing a similar argument on appeal, this Court stated the following:

> Thus, what Hudson really asks is that we reweigh the evidence and come to a different conclusion than did the trial court. It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances. Brown v. Wainswright, 392 So.2d 1327 (Fla. 1981). We must, therefore, decline Hudson's invitation to reweigh the mitigating evidence and place greater emphasis on it than the trial court did.

Hudson v. State, 538 So.2d 829, 831 (Fla. 1989). Similarly, in

Bates v. State, 750 So.2d 6, 12 (Fla. 1999), this Court stated:

> Our function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors. As we recognized in our first opinion in this case, that is the function of the trial judge. Bates, 465 So.2d at 494. Rather, the purpose of proportionality review is to consider the totality of the circumstances in a case and compare it with other capital cases. Terry v. State, 668 So.2d 954, 965 (Fla. 1996). For purposes of proportionality review, we accept the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence.

While the existence and number of aggravating or mitigating factors do not prohibit or require a finding that death is nonproportional, this Court nevertheless is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer v. State, 619 So.2d 274, 277 (Fla. 1993). The purpose of the proportionality review is to compare the case to similar defendants, facts and sentences. Tillman, 591 So.2d 167, 169 (Fla. 1991).

B. Appellant's Death Sentence, Supported By Four Aggravators Is Clearly Proportional

The trial court found four aggravating factors in this case, HAC, financial gain (great weight), prior violent felony convictions, and committed while under supervision or imprisonment (moderate weight). In mitigation, the trial court found one statutory mitigating factor of impaired capacity and a number of non-statutory mitigators relating to appellant's childhood[8], family

[8]As the prosecutor noted below, the fact his siblings grew up in the same environment and yet turned into productive citizens militates against providing appellant's childhood great weight.

background, and personal traits.

This Court has stated that heinous atrocious or cruel is one of the strongest aggravators to be considered in this Court's proportionality review. See e.g. Larkins v. State, 24 Fla.L.Weekly S379, S381 (Fla. July 8, 1999)(noting that "heinous, atrocious, or cruel" and cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme..."); Blackwood v. State, Slip. Op. SC90859 (Fla., December 21, 2000)(affirming death sentence where the sole aggravator was HAC despite the presence of significant criminal history statutory mitigator and eight non-statutory mitigators); Guzman v. State, 721 So.2d 1155 (Fla. 1998)(affirming sentence where victim received nineteen stab wounds to face, skull, back, and chest, and a defensive wound to a finger on his left hand). Mrs. Livingston did not die a quick or painless death in this case. To the contrary, she was brutally attacked over the course of several minutes in her own home. As the trial court noted in its sentencing order:

> ...Mrs Livingston suffered the infliction of over thirty injuries while she was being killed by Robert Morris. She had wounds caused by blunt trauma to her head, face, neck and chest. These wounds included a serious blow or blows to the head which severely lacerated her ear and which could have caused unconsciousness. She suffered blunt trauma to her abdomen and extremities. Many of these latter wounds could be called defensive wounds. Several wounds had the characteristic shape of her own cane...

(SR-1, 93). The blood splatter expert testified that Mrs.

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(V34, 4490-4491).

Livingston was involved in a struggle in several locations in her own bedroom and sustained blows in three different body positions, including standing and prone. As the trial court noted: "It is clear that Mrs. Livingston spent the last minutes of her life struggling with, and aware of the intent of, her murderer." (SR-1, 93).

What this evidence reveals is that appellant broke into Mrs. Livingston's apartment, entered her bedroom, and embarked upon a horribly violent attack upon the 88 year-old victim. Defensive wounds revealed that Mrs. Livingston attempted to resist the attack, but was beaten down by the appellant, and, ultimately killed. When coupled with appellant's financial motive and the crimes of violence in appellant's past, for which he was still under supervision by corrections, it becomes abundantly clear that appellant earned the highest penalty authorized under the law. Balanced against a single statutory mitigator and non-compelling non-statutory mitigation, this Court must affirm the sentence recommended by the jury and imposed by the trial court below.

This Court has affirmed death sentences in the past with more mitigation and/or fewer aggravators than the instant case. For example, in Spencer v. State, 691 So.2d 1062, 1063 (Fla. 1996), cert. denied, 522 U.S. 884 (1997), the "defendant was sentenced to death for the first degree murder of his wife Karen Spencer, as well as aggravated assault, aggravated battery, and attempted

second degree murder." The trial court found only two aggravating circumstances: "1) Spencer was previously convicted of a violent felony, based upon his contemporaneous convictions for aggravated assault, aggravated battery, and attempted second degree murder; and 2) "the murder was especially heinous, atrocious, or cruel." The judge found three mitigating circumstances: 1) "the murder was committed while Spencer was under the influence of extreme mental or emotional disturbance; 2) Spencer's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and 3) the existence of a number of non-statutory mitigating factors in Spencer's background, including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, and ability to function in a structured environment that does not contain women." Spencer, 691 So.2d at 1063. The trial court found that the mitigating circumstances did not outweigh the aggravators and this Court affirmed after conducting a proportionality review. See also Pope v. State, 679 So.2d 710 (Fla.), cert. denied, 136 L.Ed.2d 858 (1996)(death sentence proportional for murder of defendant's former girlfriend with aggravating circumstances of prior violent felony convictions and murder committed for pecuniary gain while mitigation included extreme mental or emotional disturbance and the defendant's capacity to conform conduct to the requirements of the law was

substantially impaired); Brown v. State, 565 So.2d 304 (Fla.) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators), cert. denied, 498 U.S. 992 (1990).

Appellant cites no factually analogous case in which this Court found the death penalty disproportionate. Appellant simply asks this Court to reweigh the aggravating and mitigating factors and reach a different conclusion than that reached by the trial court and jury below. As noted above, a review as appellant proposes is not, in the State's view, appropriate.

In Freeman v. State, 563 So.2d 73, 75 (Fla. 1990), the defendant beat a man to death who confronted him as he was trying to burglarize the man's house. Freeman had prior violent felony convictions of a similar nature that had been committed three weeks prior to this murder, and the trial court also found as one aggravator that it was committed in the course of a burglary/pecuniary gain. In mitigation, the trial court found low intelligence, abuse as a child, artistic ability, and enjoyed playing with children. This Court determined the sentence to be proportional, noting that the non-statutory mitigating evidence was not compelling.

In Hudson v. State, 538 So.2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989), the defendant took a knife into his girlfriend's apartment and stabbed the girlfriend's roommate. The aggravators

were Hudson's prior violent felony conviction and committed during the course of an armed burglary. Although the trial court also found three statutory mitigating factors, including the mental mitigators, this Court upheld the sentence. Bowden v. State, 588 So.2d 225 (Fla. 1991)(heinous atrocious or cruel and prior violent felony weighed against terrible childhood and adolescence); Hayes v. State, 581 So.2d 121 (Fla. 1991)(two aggravating factors weighted against mitigating factors of age, low intelligence, learning disabled, and product of a deprived environment).

In sum, nothing appellant has offered at trial or on appeal suggests that appellant's sentence for the murder of Violet Livingston is disproportionate. Appellant's death sentence for the brutal murder of Violet Livingston as recommended by the jury and imposed by the trial court below is clearly appropriate and proportional.

## ISSUE IV

**WHETHER THE TRIAL COURT ERRED IN IT'S EVALUATION OF THE NON-STATUTORY MITIGATOR RELATED TO APPELLANT'S HISTORY OF DRUG ABUSE. (AS RESTATED BY APPELLEE).**

Appellant claims error resulted from the trial court's findings regarding the non-statutory mitigator related to his alleged history of drug abuse. With respect to this mitigator, the sentencing order reads as follows:

> *The defendant began using alcohol and drugs at an early age, and developed a lifelong addiction problem.* Established and uncontroverted. That the defendant used drugs in the past is not mitigating. Moreover, there is no evidence that he was using drugs in September, 1994 when he murdered Mrs. Livingston. This factor is entitled to little weight.

(SR 96). Appellant argues that the seemingly contradictory statements made by the trial court in the above-quoted passage require reversal. The State disagrees.

Rather, the language of the sentencing order concerning appellant's history of drug abuse constitutes the requisite evaluation of the mitigator which the lower court was obligated to undertake. In death penalty cases, "...trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to 'expressly evaluate in [their] written order[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence.'" See Walker v. State, 707 So.2d 300, 319 (Fla. 1997)(quoting Campbell v. State, 571 So.2d 415, 419 (Fla. 1990)). See also

Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995).

To satisfy Campbell:

> This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

See Walker, 707 So.2d 300, 319 (citing Ferrell, 653 So.2d 367, 371). Without such a deliberate inquiry and documentation of its findings and conclusions, it cannot be determined that the trial court properly considered all mitigating evidence. See Walker, 707 So.2d at 319.

Here, the trial court's order reflects the deliberative evaluation process applied to all mitigators, statutory and non-statutory, raised by appellant. Initially, the trial court found that the drug abuse mitigation was "established and uncontroverted." Thus, the trial court properly found that the mitigating circumstance had been proven. See Mahn v. State, 714 So.2d 391, 400-401 (Fla. 1998), citing Spencer v. State, 645 So.2d 377, 385 (Fla. 1994); Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990); and Kight v. State, 512 So.2d 922, 933 (Fla. 1987).

Additionally, the trial court gave weight, albeit little weight, to appellant's uncontroverted history of drug and alcohol abuse as a non-statutory mitigating circumstance. Cf. Walker, 707 at 318 (trial court erred in rejecting defendant's abusive childhood as non-statutory mitigation and giving it no weight despite trial court's acknowledgment that evidence supported mitigator's existence). Thus, where the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard, no error can be demonstrated in the trial's evaluation of the mitigator in question. See Blanco v. State, 706 So.2d 7, 10 (Fla. 1997)(quoting Campbell, 571 So.2d 415).

In Barwick v. State, 660 So.2d 685 (Fla. 1995), cert. denied, 133 L.Ed.2d 766 (1996), this Court rejected an even stronger claim by a defendant regarding failure to find as a non-statutory mitigator childhood abuse. This Court stated:

> Although the trial judge stated that he did not consider Barwick's history of child abuse a mitigating factor, we find that the sentencing order indicates that the judge properly considered evidence of abuse in imposing the death sentence. The sentencing order provides:
>
> > The Court has considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances that are established by the evidence or on which there has been any significant evidence produced as they relate to the murder charge.
>
> This statement indicates that the trial judge weighed the factor as ultimately required by our decision in

> *Campbell*. We therefore conclude that the trial judge sufficiently considered the mitigating evidence presented on this factor. Any error in articulating the particular mitigating circumstance was harmless. See *Armstrong v. State*, 642 So.2d 730 (Fla. 1994).

Finally, even if appellant's argument concerning the trial court's failure to consider this mitigator is well taken, any resulting error must be deemed harmless. Neither this mitigator, nor any of the other mitigating factors discussed in the sentencing order, outweighed the four strong aggravators established in this case. (SR 91-93). See Lawrence v. State, 691 So.2d 1068, 1076 (Fla. 1997), citing Wickham v. State, 593 So.2d 191, 194 (Fla. 1991), cert. denied, 505 U.S. 1209, 112 S.Ct. 3003, 120 L.Ed.2d 878 (1992); Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Death is thus still a proper, as well as proportionate, sentence in this case. See Lawrence, 691 So.2d 1068, 1076.

## ISSUE V

**WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON SPECIFIC NON-STATUTORY MITIGATING CIRCUMSTANCES? (STATED BY APPELLEE).**

Appellant next argues that the trial court reversibly erred in failing to instruct the jury on his proposed non-statutory mitigating circumstances. The trial court declined to provide the specially requested instruction and provided the standard instruction on non-statutory mitigation. Appellant has offered this Court no compelling reason to depart from the well settled precedent of this Court approving of the standard jury instruction.

This Court has consistently rejected the argument appellant posits on appeal. For example, in Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992), the Court stated: "Finally, the standard jury instruction on non-statutory mitigators is sufficient, and there is no need to give separate instructions on individual items of non-statutory mitigation. (citing Randolph v. State, 562 So.2d 331 (Fla. ), cert. denied, 498 U.S. 992, 111 S.Ct. 538, 112 L.Ed.2d 548 (1990); Jackson v. State, 530 So.2d 269 (Fla. 1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 882, 102 L.Ed.2d 1005 (1989)). Similarly, when asked to recede from this precedent in Finney v. State, 660 So.2d 674, 684 (Fla. 1995), this Court declined to do so, stating: "This Court has repeatedly rejected Finney's next claim that the trial court must give specific instructions on the non-statutory mitigating circumstances urged." (citing Jones, supra; Robinson v.

State, 574 So.2d 108 (Fla.), cert. denied, 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991)).

"Respect for the rule of stare decisis impels us to follow the precedents we find to have governed this question for so long. This is especially true where the argument to change is persuasive but not overwhelming." Old Plantation Corp. v. Maule Industries, Inc., 68 So.2d 180, 183 (Fla. 1953). In Blanco v. State, 706 So.2d 7, 12 (Fla. 1997), Justice Wells noted the value of stare decisis: "If the doctrine of stare decisis has any efficacy under our law, death penalty jurisprudence cries out for its application. Destabilizing the law in these cases has overwhelming consequences and clearly should not be done in respect to law which has been as fundamental as this and which has been previously given repeatedly thoughtful consideration by this Court." (Wells, J., concurring). Similarly, Justice Overton has stated:

> I ... strongly believe that adhering to precedent is an essential part of our judicial system and philosophy of law. The doctrine of precedent is basic to our system of justice. In simple terms, it ensures that similarly situated individuals are treated alike rather than in accordance with the personal view of any particular judge. In other words, precedent requires that, when the facts are the same, the law should be applied the same.

Perez v. State, 620 So.2d 1256, 1259 (Fla. 1993)(Overton, J., concurring).

The standard instruction on non-statutory mitigating circumstances is simple to apply, is not restrictive, and has not proved unfair or unworkable in the courts of this state.

Appellant's argument that specific non-statutory mitigating factors be specifically delineated by the judge is fraught with potential problems. Of course, when defense counsel or the trial court leave out a circumstance or factor which was presented during the sentencing phase and supported by the evidence a risk occurs that the jury will, by its omission, assume that such a factor is not mitigating. Moreover, this entire area is open to additional litigation on direct appeal and collateral litigation (ineffective assistance of counsel) when a factor is not specifically enumerated by the trial court but is supported by the evidence. This Court should decline appellant's invitation to alter the standard instruction which has not proved either unworkable or unfair.

## CROSS-APPEAL

**WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENSE MOTION TO SEVER THE SEXUAL BATTERY COUNT FROM THE REMAINING COUNTS AND GRANTING A MOTION IN LIMINE PROHIBITING THE STATE FROM PRESENTING EVIDENCE ESTABLISHING SEXUAL ACTIVITY?**

Appellant's sexual assault upon Violet Livingston was clearly connected in an episodic sense with the burglary of the victim's residence, robbery, and her murder. The sexual assault was charged with the other offenses in the grand jury indictment. In fact, appellant below conceded that they were connected so as to be properly jointed in the same indictment. (V6, 1014). Nonetheless, defense counsel argued that he was intending to present inconsistent defenses to the charges and could not reasonably or ethically present a defense to the sexual battery count that was inconsistent with his defense on the remaining counts. The trial court agreed and granted the motion for severance. In addition, the trial court granted a motion in limine precluding the State from presenting any evidence of sexual activity between the appellant and the victim.

Based upon this record, the trial court abused its discretion in granting the severance and in precluding the State from presenting relevant evidence at trial.

A. Standard of Review

The State is seeking review of two rulings of the trial court

below. The trial court's granting a severance of the sexual battery count and the court's ruling on the motion in limine, prohibiting the State from presenting any evidence which would tend to show sexual contact between the victim and the appellant. Each ruling of the trial court is subject to the same standard of review on appeal.

Two or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on two or more connected acts or transactions. Fla. R. Crim. P. 3.150 (a). The standard for reviewing the trial court's decision on severance is whether the trial court abused its discretion. Crossley v. State, 596 So.2d 447 (Fla. 1992).

A trial court's ruling on the relevancy of evidence and whether or not the probative value is outweighed by the danger of unfair prejudice is also governed by an abuse of discretion standard of review. See Williamson v. State, 681 So.2d 688, 696 (Fla. 1996).

B. The Trial Court Erred In Granting A Motion For Severance And Granting A Motion In Limine Precluding The State From Presenting Relevant Evidence Concerning Sexual Activity Between The Appellant And The Victim At The Time Of Her Murder

(I) Severance

Since the trial court granted a motion for a judgment of acquittal after severing the sexual battery count, the State would

likely be precluded from trying appellant again on double jeopardy grounds. See Hudson v. State, 711 So.2d 244 (Fla. 1st DCA 1998); Kee v. State, 727 So.2d 1094 (Fla. 2d DCA 1999). Nonetheless, because severance was erroneously granted, and this issue is closely related to the trial court's ruling on the motion in limine, the State will briefly address this issue.

Under Florida Rule of Criminal Procedure 3.150(a), two or more offenses that "are based on the same act or transaction or on two or more connected acts or transactions" may be charged in the same indictment or information. This Court stated the following in Spencer v. State, 645 So.2d 377, 381 (Fla. 1994):

> Offenses are "connected acts or transactions" within the meaning of rule 3.150(a) if they occurred within a single episode. Wright v. State, 586 So.2d 1024, 1029-30 (Fla. 1991). Crimes can constitute a "single episode" if they are linked in some significant way. Ellis v. State, 622 So.2d 991, 1000 (Fla. 1993). Even crimes that are separated by a substantial lapse in time can constitute a single episode if the crimes are casually related to each other. Id. Fotopoulos v. State, 608 So.2d 784 (Fla. 1992), cert. denied, __ U.S. __, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993).

Appellant acknowledged below that the offenses were connected in an episodic sense and therefore were properly charged together: "I mean, I don't question that it's a related offense." (V6, 1014). Nonetheless, defense counsel argued that a fair determination of appellant's guilt on the sexual battery count and the remaining counts could not be obtained due to the possibility of an inconsistent defense, i.e., testifying that the victim was

dead at the time he sexually abused her (sexual battery), and, that he was not present when he murdered her. (V6, 1006-07). While such a theory was perhaps, ingenious, appellant's choice of defenses did not warrant severing a related, relevant charge.

The law is well settled that even serious offenses of the type presented here may be charged and tried together if connected in an episodic sense. See Mendyk v. State, 545 So.2d 846, 849 (Fla.), cert. denied, 107 L.Ed.2d 521 (1989)(consolidation of indictment for first degree murder and information charging two counts of sexual battery and one count of kidnaping was proper because all the crimes were committed upon a single victim in one continuous episode); Johnson v. State, 438 So.2d 774, 778 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); (no need to sever murder charges where "only hours separated the three homicides and related crimes."); Ziegler v. State, 402 So.2d 365, 370 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982)(consolidation of indictments charging defendant with murder of three family members, and the murder of a fourth person in the same location on the same evening was proper); King v. State, 390 So.2d 315, 317-18 (Fla. 1980), cert. denied, 450 U.S. 989 (1981)(approving consolidation of offenses against a work release inmate who was charged with escape and attempted murder of a work release counselor and by indictment with charges related to the murder of a woman who lived near the facility where the offenses took place within approximately one hour). Here, the

sexual battery was committed against the same victim as the murder, robbery and burglary offenses. The offenses occurred at or about the same time and in the same place. Moreover, evidence derived from appellant's sexual attack upon the victim, alive or dead, provided significant, indeed, compelling evidence of his guilt on the remaining offenses.

In the State's opinion, the question of severance in this case was not even a close one. In fact, the State can find no case where a sexual battery was severed from a murder count where the sexual battery and murder were of the same person, occurring at or near the time of the murder. The trial court made an incredible accommodation for the appellant in this case, protecting him from his own misconduct, forcing the State to separately try an offense that was clearly connected by time, place, victim, and perpetrator.

Bundy v. State, 455 So.2d 330, 344-45 (Fla. 1984), cert. denied, 476 U.S. 1109 (1986) addressed joinder of a number of crimes, including murders, which occurred within a matter of hours in a sorority house and a nearby building. This Court noted that the joinder of "connected acts or transactions" involves consideration of the "temporal and geographical association, the nature of the crimes, and the manner in which they were committed." Bundy, 455 So.2d at 344-45. This Court held no severance was required, stating:

> ...the crimes occurred within a few blocks of each other and within the space of a couple of hours. The crimes

> were similar in that they involved a person entering the residences of female students in an off campus neighborhood and beating young white women with a club as they slept. Hence the criminal acts are connected by the close proximity in time and location, by their nature, and by the manner in which they were perpetrated.

Id. See also Spencer. 645 So.2d at 381 (attempted murder and aggravated assault charges properly joined with capital murder charge despite the fact the incidents occurred some two weeks apart where the offenses were "casually related because they all stem from the same underlying dispute **and involve the same parties.**")(emphasis added).

*Sub judice*, the arguments against severance are much stronger than in Bundy or Spencer. In Bundy, the offenses occurred against different victims in the same general geographic area over a period of two hours. In Spencer, the offenses occurred against the same victim but were separated by approximately two weeks. Here, the sexual offense was committed against the same victim, at the same time, and in the same location as the other charged offenses. Thus, there can be no question that the sexual battery count in this case should have been tried with the remaining crimes against the same victim.

Any contention that appellant was entitled to severance in order to pursue a separate inconsistent defense for sexual battery is without merit. Presumably, appellant wanted to reserve his right to testify on the sexual battery count in order to establish that the victim was clearly dead at the time he sexually molested

her body. On the murder, robbery, and burglary charges appellant wanted to reserve his right to testify that he was not present. Appellant had no right to present perjured testimony. See United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978).

Hamilton v. State, 458 So.2d 863 (4th DCA 1984) presented a classic scenario of a defendant claiming severance was necessary to present inconsistent defenses among joined counts. There, the defendant was charged with DUI. Upon being transported to the police station, the defendant began trying to kick out the windows in the police vehicle. The officer stopped in order to put flex cuffs on the defendant, and the defendant lunged at the police officer hitting and kicking him. The defendant was tried for DUI and battery on a law enforcement officer in a single trial, having previously moved to sever. In upholding the trial court's denial of his motion, the district court found no preservation of the defendant's argument that he wanted to raise intoxication as a defense to the battery upon a law enforcement officer, since that would have been a confession to the DUI. However, despite the court's observation regarding failure to preserve that precise issue below, it declined to find error in denying severance because the offenses were based on connected acts or transactions as provided in Fla.R.Crim.Proc. 3.151(a). See Alvarez v. Wainwright, 607 F.2d 683, 685 (5th Cir. 1979)("Severance is not mandatory simply

because a defendant indicates that he wishes to testify on some counts but not on others.").

In Espinosa v. State, 589 So.2d 887 (Fla. 1991), reversed on other grounds, 505 U.S. 1079 (1992), the issues involved both severance of defendants and severance of counts. Espinosa and Beltran-Lopez were tried together in the murders of Mr. and Mrs. Rodriguez and the attempted murder of their ll-year-old daughter, Odanis. The evidence shows that Mr. and Mr. Rodriguez were murdered in their home, and both defendants lured Odanis out of her bedroom where she had locked the door under the ruse that her mother wanted to speak with her. Upon opening the door, she was stabbed 16 times, surviving this horror. Espinosa claimed the attempted murder of Odanis should have been severed from the trial of the murders of her parents because he could not get a fair determination of guilt on each count. He argued that he did not want to testify about Odanis' stabbing and that during the penalty phase, the jury would not be able to separate the stabbing of an ll-year-old little girl from the murder of her parents. The court rejected this claim holding that the attempted murder was part of the same criminal episode of the murders of Mr. and Mrs. Rodriguez and therefore properly joined. Further, this Court held the evidence of the attempted murder of Odanis, the facts surrounding it, as well as her testimony was an integral part of the State's case concerning her parents' murders.

What the case law in this area shows, is that a defendant is not entitled to severance of clearly related charges based upon a claim of prejudice. In this case, appellant was not entitled to severance of the sexual battery count where this offense was closely tied to the burglary, robbery, and murder offenses. The trial court's ruling to the contrary was clearly erroneous.

(II) Motion-in-Limine

Appellant successfully argued below that any reference to sexual contact was so prejudicial that it should be excluded from evidence. Of course, the jury did hear evidence emanating from appellant's sexual attack upon Mrs. Livingston, the jury was simply not given the proper context of this evidence. As a result, the State was prevented from establishing the full force and effect of its identification evidence. The jury was shielded from unpleasant terms like "semen" and unpleasant locations on the victim's body where appellant's semen was found. Instead, the trial court protected appellant from his own misconduct, requiring the State witnesses to refer to appellant's semen as "biological material" and the vaginal and anal areas of the victim as points "A" and "B". (V8, 1417, 1464; V23, 2267-68; V26, 2819). Further, injuries to the victim's genitalia were not mentioned and pictures representing such injury were not shown to the jury. (V26, 2819).

The appellant's semen, identified through DNA testing was found in Violet Livingston's vagina and anal area. This evidence

is directly relevant to identity, opportunity, motive, and was critical to the State's presentation of evidence on the murder count. Merely because this evidence is prejudicial did not require the State to prosecute appellant's crimes in a vacuum.

Appellant's sexual battery of Mrs. Livingston was "inextricably intertwined" with the burglary, robbery and murder offenses. Evidence of uncharged crimes which are inseparable from crime charged, or evidence which is inextricably intertwined with crime charged, is not Williams rule evidence; rather, it is admissible under other crimes provision because it is relevant and inseparable part of act which is in issue. Griffin v. State, 639 So.2d 966 (Fla. 1994). Generally, evidence of other crimes or acts may be admissible if it is relevant to prove a material fact in issue. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989); Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); Pittman v. State, 646 So.2d 167, 170-171 (Fla. 1994). *Relevance*, not necessity, is the standard for admissibility. The evidence need not prove the defendant's guilt of the charged offense if "it is in the nature of circumstantial evidence forming part of the web of truth" proving the defendant to be the perpetrator, Bryant v. State, 235 So.2d 721 (Fla. 1970) or would "cast light" upon the character of the act under investigation. See U.S. v. Canelliere, 69 F.3d 1116, 1124

(11th Cir. 1995)("Furthermore, Rule 404(b)[9] does not apply where the evidence concerns the 'context, motive, and set-up of the crime' and is 'linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.'")(quoting United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985)).

In proving its case, the State is entitled to paint an accurate picture of events surrounding crimes charged. Smith v. State, 699 So.2d 629 (Fla. 1997). Inextricably intertwined evidence or inseparable crime evidence may be admitted at trial to establish the entire context out of which a criminal act arose. State v. Cohens, 701 So.2d 362, 364 (Fla. 2d DCA 1997); Hunter v. State, 660 So.2d 244, 251 (Fla. 1995), cert. denied, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996). See also, Remeta v. State, 522 So.2d 825, 827 (Fla. 1988) (Collateral murder admissible because the same gun was used in both crimes and the evidence established defendant's possession of the murder weapon and counteracted defendant's statements blaming the crimes on a companion.)

Here, the relevancy of appellant's sexual attack upon the living or dead Mrs. Livingston is beyond dispute. The offense occurred at or near the time of the murder and resulted in compelling DNA evidence to identify appellant as the perpetrator.

[9]The Federal equivalent to Section 90.404 of the Florida Statutes.

The relevancy of this evidence was not substantially outweighed by the danger of unfair prejudice. In fact, this evidence was so highly relevant and material that appellant entirely failed to show any unfair prejudice in its admission. Admission of this evidence is no more unfair than the admission of the certainly prejudicial evidence establishing the brutal nature of appellant's attack upon Mrs. Livingston.

In Williamson v. State, 681 So.2d 688, 696 (Fla. 1996), this Court found the trial court did not abuse its discretion in admitting a statement of a witness who claimed that the defendant had previously beaten a baby to death. This Court stated:

> Almost all evidence introduced during a criminal prosecution is prejudicial to a defendant. Amoros v. State, 531 So.2d 1256, 1258 (Fla. 1988). In reviewing testimony about a collateral crime that is admitted over an objection based upon section 90.403, a trial judge must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice. Only when the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded. Id. Based upon our review of the record, we conclude that the trial judge did not abuse his discretion in performing the necessary weighing process and admitting the testimony regarding appellant's prior crime. See e.g, Jackson v. State, 522 So.2d 802, 806 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988); Washington v. State, 432 So.2d 44, 47 (Fla. 1983). The testimony from O'Brien and Panoyan was integral to the State's theory of why its key witness acted as he did both during and after the criminal episode. **Had the trial judge precluded either witness's testimony, the jury would have been left with a materially incomplete account of the criminal episode. Thus, we conclude that the trial judge did not err in admitting this testimony.**

Williamson, 681 So.2d at 696 (emphasis added).

A logical inference that the State should have been able to argue from the evidence was a sexual motive for appellant's attack upon Mrs. Livingston. The fact that the victim was attacked in her own bedroom and was sexually assaulted supports such an argument. That the State could also argue a felony murder theory based upon burglary or robbery did not require the state to forego a legitimate and factually supported theory at trial. See Caruso v. State, 645 So.2d 389 (Fla. 1994)(Evidence regarding Caruso's drug-related activities established relevant context in which the crimes occurred, the defendant's state of mind at the time of the murders, and his motive to commit a burglary, which was relevant to the State's theory of felony-murder).

As a result of the trial court's ruling in this case the jury was left with a "materially incomplete account of the criminal episode." Williamson, 681 So.2d at 696. To contend that the danger of unfair prejudice outweighs the probative value of this evidence is absurd because exclusion of this evidence confuses the issues and misleads the jury. The jury is left to speculate about what this biological material was, i.e., blood, sweat, hair, saliva, skin. And, the jury is left to speculate about where locations "A", "B" and "C" were on the victim's body. Appellant's desire to keep the full extent of his criminal misconduct from the jury is understandable, but the trial court's ruling clearly prejudiced the State. Appellant's argument against admissibility

of this evidence is little different from that of a defendant claiming photographs of his criminal misconduct should be excluded as prejudicial. In Henderson v. State, 463 So.2d 196, 200 (Fla. 1985) this Court said:

> Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy. Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.

In sum, this Court has repeatedly approved the admission of highly prejudicial evidence, including evidence of the defendant's commission of other murders, when sufficient probative value has been shown. See Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Henry v. State, 649 So.2d 1361, 1365 (Fla. 1994), cert. denied, ___ U.S. ___, 116 S.Ct. 101, 133 L.Ed.2d 55 (1995); Wuornos v. State, 644 So.2d 1000, 1007 (Fla. 1994) (finding relevance of six similar murders committed by Wuornos "clearly outweighs prejudice" of their admission), cert. denied, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995). The trial court's ruling on the motion in limine prevented the State from presenting highly relevant evidence which was inextricably intertwined with the remaining offenses. Consequently, the trial court's ruling constituted a clear abuse of discretion.

## CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State respectfully asks this Honorable Court to affirm the judgments and sentences imposed below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831-9000, this _____ day of December, 2000.

**COUNSEL FOR STATE OF FLORIDA**

## CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

**COUNSEL FOR STATE OF FLORIDA**