IN THE SUPREME COURT OF FLORIDA

LAWRENCE JOEY SMITH,

Appellant,

vs. **CASE NO. SC01-2103**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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SUMMARY OF THE ARGUMENT

ISSUE I. Smith's first claim asserts that the trial court erred in denying his motion for mistrial when eye-witness Theodore Butterfield testified that, " When Joey got back in the car, he had made a statement that that was the 13th or 14th people that had been - - that he had shot." This testimony was relevant to Smith's state of mind and the state did not assert that other crimes had been committed or draw any improper inferences from the testimony. Moreover, error, if any, was harmless beyond a reasonable doubt. Accordingly, the trial court did not abuse its discretion by denying the motion for mistrial.

ISSUE II. In reviewing motions for mistrial dealing with emotional outbursts from witnesses, the appellate courts should defer to trial judges' judgments and rulings when they cannot glean from the record the intensity of a witness's outburst. Here, the defense complaint that the prosecutor slammed the murder weapon on the defense table was not so prejudicial as to vitiate the entire trial and appellant has failed to satisfy his burden to establish an abuse of discretion.

ISSUE III. While the instant record does not affirmatively reflect the fact that prospective jurors were or were not sworn prior to voir dire, it does reflect the fact that after voir dire the selected jurors were sworn prior to the beginning of trial. Appellant did not offer any complaint or objection below

at the time of or after trial. Accordingly, relief must be denied as there is no fundamental error and the asserted error is procedurally barred for the failure to contemporaneously object at trial.

ISSUE IV. Appellant's next claim is that the prosecutor misled the jury and court on standard for weighing aggravating and mitigating circumstances by stating that the jury must recommend death if the aggravating circumstances outweigh the mitigating circumstances. It is the state's position that the claim is procedurally barred, without merit and harmless beyond a reasonable doubt.

ISSUE V. Appellant next urges that the evidence in the instant case does not establish that Smith had a careful plan or prearranged design to commit murder. As the following will establish, the facts of this case clearly support the giving of the instruction to the jury, and the finding by the trial court, of the cold, calculated and premeditated aggravating factor.

ISSUE VI. Smith next argues that a statement in the sentencing order that is not identical to the actual testimony presented at trial constitutes reversible error. This argument is meritless, as the gist of the statement remains the same and was only a very minor part of the court's basis for finding the CCP factor, the court's misstatement.

ISSUE VII. Smith next asserts that Florida's death penalty

statute is unconstitutional under Ring, Apprendi, and Jones v. United States. He claims that the sentencing scheme violated his constitutional rights to due process and a jury trial. Smith's allegations do not present any basis for relief as Florida's sentencing scheme comports with the requirements as set forth in those cases.

ARGUMENT

ISSUE I

WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT DENIED HIS MOTION FOR MISTRIAL WHEN BUTTERFIELD TESTIFIED THAT AFTER SHOOTING CRAWFORD APPELLANT SAID THIS WAS THE THIRTEENTH OR FOURTEENTH PERSON HE HAD SHOT.

Smith's first claim asserts that the trial court erred in denying his motion for mistrial when eye-witness Theodore Butterfield testified that, "When Joey got back in the car, he had made a statement that that was the 13th or 14th people that had been - - that he had shot." (V13, T432-33) At trial, defense counsel objected and made a motion for mistrial urging that this testimony was irrelevant to the case and that it was prejudicial as it implied that Smith has committed 13 or 14 other murders. The motion was denied. Counsel did not request a curative instruction. (V13, T434)

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review and should not be reversed absent an abuse of that discretion. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997) (noting that a ruling

on a motion for mistrial is within the trial court's discretion). Morever, "a motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial." Evans v. State, 800 So. 2d 182, 189 (Fla. 2001), quoting, Cole v. State, 701 So. 2d 845, 853 (Fla. 1997).

Smith asserts that the statement was not admissible or relevant. He also argues that the admission of the statement is presumed harmful and, therefore, the request for a mistrial should have been granted. As the following will show, under the facts of this case, the statement was relevant and admissible to Smith's state of mind.[1] Accordingly, Smith has not established that the trial court abused it's discretion in denying the motion for mistrial.

At the outset, it is important to note this evidence was not being offered to prove that Smith had actually killed 13 or 14 people. The state never argued or asserted that Smith, who was 22 at the time of crime, had killed anyone prior to his shooting Crawford and Tuttle. This statement made by Smith, after shooting his second victim, to codefendant Pearce was an affirmation to Pearce that Crawford was dead. It was evidence

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[1] The state notes that although the trial court denied the motion finding that the statement was "part of the testimony" the ruling of the court can be upheld for other reasons. Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999) (even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling.)

of his state of mind, was relevant to show his knowledge and intent and was not introduced to show propensity or bad character. This Court has held under similar circumstances that even where a defendant's statement implicates him in other crimes, it may be admissible if it is relevant to prove a material fact, such as the defendant's state of mind. Stephens v. State, 787 So. 2d 747 (Fla. 2001); Coolen v. State, 696 So. 2d 738 (Fla. 1997).

In Stephens, at 758-59, this Court rejected Stephen's claim that evidence he had asked authorities if they could help him get the death penalty was either irrelevant or that the prejudicial impact of such statement outweighed its probative value. This Court noted that:

> "In order for evidence to be relevant it must have some logical tendency to prove or disprove a fact which is of consequence to the outcome of the case. See Charles W. Ehrhardt, Florida Evidence § 401 (1999). Here, the State alleged the statement was relevant because it had a logical tendency to prove the defendant felt guilty for murdering Sparrow III. The defendant's state of mind at the time he made the statement was relevant to prove a material fact."
>
> Stephens at 758-59

This Court further rejected his claim of undue prejudice, stating:

> Stephens also argues the statement was unduly prejudicial. "Weighing all the evidence in this case and considering the overwhelming evidence of guilt, we find the trial judge acted within his discretion, and any potential error was harmless. See *Walker v.*

> *State*, 707 So. 2d 300 (Fla.1997); *Shellito v. State*, 701 So. 2d 837 (Fla.1997); *Reaves v. State*, 639 So. 2d 1 (Fla.1994). Here, the State did not ask Stephens to tell the jury about his other crimes. It merely asked Stephens if he had made an agreement with the authorities that he would tell them everything that had happened in this case if they agreed to help him get the electric chair."
>
> Id. at 759

Similarly, in Coolen v. State, 696 So. 2d 738, 742 (Fla. 1997), this Court held that a defendant's reference to previous criminal convictions and prison sentences was admissible. This Court stated:

> During a taped interview at the sheriff's office, Coolen made several references to his previous criminal convictions and prison sentences. Defense counsel filed a motion to redact Coolen's taped statement so that the jury would not hear about his criminal record. **While the court recognized that evidence of a prior criminal record is inadmissible to show bad character or propensity to commit crimes, the court determined that the statements were relevant here to show Coolen's state of mind during the attack**. Thus, the court denied the motion to excise the tape and admitted the confession in its entirety.
>
> **We agree with the trial court that these statements were properly admitted to explain Coolen's state of mind at the time of the offense.** Coolen stated that Kellar had "something silver in his hand." Coolen reacted quickly by stabbing Kellar because his previous "eight years in maximum prisons up in Massachusetts" had taught him not to take chances, to "react very quickly," and that it's better to "be safe than sorry." Thus, these statements were relevant to explain Coolen's actions and state of mind at the time of the stabbing.
>
> Coolen, at 742 (emphasis added)

In the instant case, where the evidence was relevant to Smith's state of mind and the state did not assert that other crimes had been committed or draw any improper inferences from the testimony, no reversible error has been shown.

Moreover, a review of the cases, as relied upon by appellant clearly establishes, that not only was there no error in this case, but also that error, if any, was harmless beyond a reasonable doubt. In Jackson v. State, 451 So. 2d 458 (Fla. 1984) this Court reversed where the prosecutor introduced the following testimony, by the defendant's nephew Dumas concerning an unrelated event, after a defense objection was overruled:

> A. He pulled his .44 magnum and set up and say, "No one gets off before me." And I told him, I say, "Well, Unc, look, if you ain't going to give me my money back or whatever you can do whatever you going to do 'cause I'm gonna do my own." So he kinda laughed and he change his whole attitude. He say, "you know what, that is why I can't mess with you." He say, "You a little bit too tough for me." He say, "You remind me of me in my heyday when I was in Detroit." He say, "When I used to do all the things I used to do." And we all were askin', "What things you used to do, Unc?" And he say, you know, "I used to be a killer. and I am a thoroughbred killer. I know how to kill somebody and do it right." And this was all the time. This was his main brag word. That he was a thoroughbred killer.
>
> Id. at n. 1

Noting that the testimony was precisely the kind forbidden by the ***Williams Rule*** and Section 90.404(2), this Court held that the testimony was erroneously admitted as it showed Jackson may have committed an assault on Dumas, that crime was irrelevant to

the case and that the "thoroughbred killer" statement may have suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice. 451 So. 2d 461. Additionally, this Court found that the trial court had erred in declaring a state witness to be adverse and in permitting him to be impeached and, therefore reversed the case.

Unlike the testimony presented in Jackson, which concerned a totally unrelated incident and was merely presented to establish Jackson's bad character, Smith's statement, as testified to by Butterfield, was made during the commission of the offense at issue, immediately upon entering the car after shooting and killing his second victim. It was made by the defendant to codefendant Pearce and related to his affirmation to Pearce that Crawford was dead and his guilty knowledge of that death. It was not relied upon by the state during closing or urged as ***Williams Rule*** evidence.

In Delgado v. State, 573 So. 2d 83, 84 (Fla. 2d DCA 1990), also relied upon by appellant, the prosecution theorized that Delgado went to King's house to kill him in jealousy over a woman and the defense argued that it was an accident during a struggle. Only one witness refuted the defense. Based on this limited evidence to refute the defense presented, the district court reversed where the state was allowed to present testimony,

over defense objections, from Delgado's former girlfriend, Velma Brown, that she and Delgado had used drugs, that they had once used cocaine at King's house, and that *Delgado told her earlier in the day*, in the context of a conversation about Delgado's arguments with her former husband, that he had killed ten men. Id. at 84. The Court reversed based on a finding that "Delgado's statement boasting that he had killed ten people did not relate to a material fact in issue: *it was made at a time, according to the state's evidence, when Delgado had no intent to harm or kill King*; it was made when he and Brown had gone to a lake to swim and effect a reconciliation. The statement was wholly unconnected to his threat to kill King made hours later, just before he left for King's house." (emphasis added) The Court also noted that the state's closing argument compounded the likelihood of unfair prejudice. In closing argument the state told the jury: "[W]e know that Velma was there when he said he was going to go over to kill, and that he had killed before, that he was going to kill here and he would kill again. We know that." 573 So. 2d 85.

In the instant case, the reference was an isolated statement that was not repeated or urged by the state; it was made during the commission of the offense by the defendant to codefendant Pearce; it related to his affirmation to Pearce that Crawford was dead; its admission was not sought by the state and was not

permitted over defense objection.

In Czubak v. State, 570 So. 2d 925 (Fla. 1990), this Court also predicated reversal based on a finding of two errors: "(1) reference by State's key witness on cross-examination by defense counsel that defendant was escaped convict constituted reversible error, and (2) photographs of victim's body, which was in severely decomposed condition, were more prejudicial than probative and were inadmissible." Finding that Czubak's status as an escaped convict had no relevance to any material fact in issue and because the case against Czubak was largely circumstantial, it could not be said beyond a reasonable doubt that the verdict was not affected by the revelation that he was an escaped convict.

In contrast, this statement was relevant to Smith's actions at the time of the murder and was only one of many inculpatory statements made by Smith that not only indicated his intent but, also his guilty knowledge. Brittingham testified that after Smith shot Tuttle, he responded to Pearce's inquiry as to whether Tuttle was dead, by saying, "Yeah, he's dead. I shot him in the head with a F'ing .40." (V13, T475) After Smith shot and killed Crawford, he got back in the car, said he didn't know if he could trust Brittingham and Butterfield, that it would be in his best interest if he shot them and that if he heard or thought they had said anything, he would kill them.

(V13, T477) Butterfield testified that, after shooting Crawford, Smith turned around, pointed the gun at them and said, "Snitches are bitches and bitches deserve to die." (V13, T435) Ken Shook testified that when Smith arrived at We Shelter America he had a gun and said he "was going to take care of business." (V12, T330)

As the evidence against Smith included several eyewitnesses, two eyewitnesses identified Smith as the sole shooter and the victim who testified the murder weapon was in Smith's hand and that Smith was the only possible assailant, the granting of the motion for mistrial was not necessary to ensure that the defendant received a fair trial. It cannot be said that the trial court abused its discretion by denying the motion for mistrial or that harmful error existed by the isolated reference to this portion of Smith's numerous inculpatory statements. See Evans v. State, 800 So. 2d 182, 189 (Fla. 2001); Cole v. State, 701 So. 2d 845, 853 (Fla. 1997) (denial of mistrial not an abuse of discretion where the remark "was not so prejudicial as to require reversal" and reference was "isolated and inadvertent and was not focused upon.")

Appellant's claim that the introduction of the statement cannot be harmless as to the penalty phase is also without merit. First, as the statement was relevant and admissible there is no error. Moreover, even if this Court should find that

it was error, since it was not argued to the jury that the statement constituted evidence that Smith was guilty of additional crimes, and, in fact, was not argued to the jury at all, the isolated testimony by Butterfield did not constitute harmful error that may have influenced the jury in its penalty phase deliberations. The only evidence of another crime presented was with regard to the contemporaneous attempted murder and kidnapping. The jury's recommendation was consistent with the minimum evidence in mitigation as compared to the cold blooded nature of this multiple shooting and the execution-style killing of Crawford.[2]

[2] The trial court found no statutory mitigating factors and five nonstatutory mitigating factors to which he gave little weight balanced against three aggravating factors. (V9, R1555-1586)

ISSUE II

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING APPELLANT'S MOTION FOR MISTRIAL DURING THE PROSECUTOR'S CLOSING ARGUMENT.

A trial court's ruling on a motion for mistrial is within the sound discretion of the court and will be sustained on review absent an abuse of discretion. Ford v. State, 802 So. 2d 1121 (Fla. 2001); Overton v. State, 801 So. 2d 877 (Fla. 2001); Rogers v. State, 783 So. 2d 980 (Fla. 2001); Goodwin v. State, 751 So. 2d 537 (Fla. 1999). A motion for mistrial should be granted only when it is necessary to ensure that the defendant received a fair trial. Cole v. State, 701 So. 2d 845 (Fla. 1997); Card v. State, 803 So. 2d 613 (Fla. 2001). In reviewing motions for mistrial dealing with emotional outbursts from witnesses, the appellate courts should defer to trial judges' judgments and rulings when they cannot glean from the record the intensity of a witness's outburst. Thomas v. State, 748 So. 2d 970 (Fla. 1999). Discretion is abused only where no reasonable man would take the view adopted by the trial court. Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997). Here, the alleged error was not so prejudicial as to vitiate the entire trial and appellant has failed to satisfy his burden.

In the instant case the record merely reflects that defense counsel in his initial closing argument urged that the only

evidence that appellant committed the crimes was the testimony of Heath Brittingham and Teddy Butterfield and that it was crucial to judge their credibility (V15, T752-753)[3]. The prosecutor responded that the evidence from Brittingham and Butterfield was that Smith got out of the car and shot the two boys in the head. He agreed with defense counsel that they had given inconsistent statements and were drug dealers and users. (V15, T788) The prosecutor argued that there was additional evidence, i.e., they were all in the car and the two victims were shot with this one gun. (V15, T789) The prosecutor argued that the physical evidence of the post mortem and the location and angles of the bullet wounds supported Brittingham's testimony that Smith put a bullet in the brain of the victim as he sat there and that common sense dictated that appellant on the passenger side had to get out of the car to let the back seat passengers out and there was neither evidence nor reason for driver Faunce Pearce to get out. He urged the angle was impossible for Pearce to have been the shooter. The prosecutor then indicated and said of the gun, "It goes right there." (V15, T792)

Defense counsel then approached the bench and requested a mistrial, contending that the prosecutor smashed the gun at the

[3] Defense counsel referred to a witness testifying about a switch of guns, a .40 caliber and a 9mm, between Pearce and Smith (V15, T739-740).

defense table and it was improper and prejudicial. The court denied the mistrial motion. Defense counsel added that his ear was ringing, it was as loud as a firecracker, there was a gasp from the crowd and that the jury was startled. The court responded: "I think it - - counsel is admonished: Don't do that again." (V15, T793-794)

In Justus v. State, 438 So. 2d 358 (Fla. 1983), the defense claimed requested mistrial motions should have been granted. During the testimony of the victim's grandmother the prosecutor showed her a photograph of the dead body of the deceased with the result that the witness broke down and wept. The defense argued this introduced an unnecessary emotional element to the trial with improper prejudice to himself. The court explained that the witness had relevant information (not identification testimony) not available from any other witness, but that there was no need for the prosecutor to display the photo to her. The Court concluded:

> Unfortunately, we cannot glean from the record how intense the response was nor the degree to which it may have affected the jury. Since the trial judge was present, we defer to his judgment. He found that the reaction was not of such intensity as to require a mistrial, and appellant has not shown from the record that the judge's determination was clearly erroneous. We therefore hold that the impropriety was harmless.
>
> Id. at 366

The defense sought a mistrial at another point in the

proceedings in Justus. During a recess in the selection of the jury the bailiff said "Everyone rise and keep your places." The defense contended that the manner in which it was said depicted him as a dangerous person and was prejudicial. In the judge's chambers the defense sought a mistrial arguing that the bailiff was "very loud and very authoritative", that he was "startled", that in this packed courtroom "suddenly a deputy comes up and grabs a hold of Justus' arms and escorts him down among all these standing people and I think it's just extremely prejudicial", that he had never seen the bailiff do it in this way. After denying a mistrial motion the judge ordered that in the future the defendant be allowed to remain seated until after the courtroom was cleared. This Court determined that the defense waived any impropriety by failing to ask for a curative instruction and:

> Moreover, appellant cannot demonstrate from the record that the denial of the motion for mistrial was an abuse of discretion.
>
> Id. at 367

See also Torres-Arboledo v. State, 524 So. 2d 403, 409 (Fla 1988) ("In a case such as this [witness outburst by crying on the stand], this Court cannot glean from the record how intense the outburst was nor the degree to which it may have affected the jury. Therefore, these determinations must first be made by the trial court." Since there was no mistrial request there was

no record determination by the trial court as to whether this outburst was so prejudicial as to require one. The claim was unpreserved for review); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999) (although reversing on other grounds, trial court did not abuse its discretion in denying a mistrial request when the judge stopped the trial and immediately removed the jury and did not resume it until witness gathered herself completely following emotional breakdown during identification testimony); Arbelaez v. State, 626 So. 2d 169, 175-176 (Fla. 1993) (witness crying during the administration of the oath; prosecutor requested a break for her to collect herself and moments later she called the defendant a "murderer" and "son of a bitch" in Spanish. Trial judge gave cautionary instructions to jury and this Court deferred to trial court mistrial denial that outburst was not of such necessity to require a mistrial).

In Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994), the Court held that the conduct of the prosecutor throughout the trial deprived him of a fair determination of the question of his sanity at the time of the commission of the offense. The prosecutor had commented in opening statement that assertion of the insanity defense was a "cop-out"; had vouched for the credibility of the state's experts; had circumvented pre-trial rulings on the admissibility of evidence by eliciting testimony that appellant's father was in prison; used a surrogate victim

and clay heads as demonstrative evidence during the trial; struck the table with the murder weapon during closing argument; and speculated as to the murdered child's last words. Id. at 1133. No such cumulative impropriety occurred in the instant case.

In U.S. v. Calhoun, 726 F.2d 162 (4th Cir. 1984), a prosecution for violations of 18 U.S.C. §242 required the government to show that the defendant deputy sheriff struck the victim and that it was unwarranted and with the intent to deprive him of a constitutional right. The prosecution was not for murder or manslaughter but for depriving a person of his civil rights under color of state law; it was undisputed that the defendant struck the victim. The nature of the force used was the only real issue. During cross-examination of the defendant the prosecutor struck the table with a flashlight - similar to the one the defendant had used - emphasizing the seriousness of the blow inflicted. The district judge issued a reprimand when he immediately sustained an objection to the prosecutor's act and told him not to do it again. The appellate court thought that the corrective action might well have been sufficient to avoid reversal but for special factors. The thumping with the flashlight was a graphic act where the relevant issue at trial was the use of unjustified force and secondly the prosecutor's improper act was calculated and

deliberate. The prosecutor in Calhoun was aware of a similar incident in U.S. v. Golden, 671 F.2d 369 (10th Cir. 1982), a case which had not resulted in reversal since apparently it was deemed inadvertent and not a calculated invasion of the defendant's rights. In Calhoun, the court, however, deemed reversal required.[4]

The record in the instant case does not support the view that the lower court - which was in the best position to see and evaluate the incident - abused its discretion in failing to grant a mistrial during the closing argument. Unlike Taylor, supra, the prosecutor did not engage in repeated egregious conduct depriving the defendant of a fair trial. Unlike Calhoun, the record does not support the conclusion that the prosecutor's act was deliberate and calculated to influence the jury on the central issue in the case in an improper way. In Calhoun the nature of the force used by the defendant was the only real issue and the prosecutor's striking the table with the flashlight to emphasize the seriousness of the blow during cross-examination improperly constituted an attempt to re-enact the incident or to emphasize (whether accurately or inaccurately) the severity of the blow inflicted. In the instant case, in contrast, there is no record evidence that the

[4] Reversal was also required for a second reason, i.e., improper limitation on Calhoun's testimony regarding his good faith and intent.

prosecutor deliberately and calculatedly attempted to re-enact the criminal offense; rather he demonstrated along with his argument to the jury that the gun must be considered on the evidence to have been in the possession of the appellant rather than someone else. Appellant's complaint is that he did it too loudly. Obviously, the trial court did not perceive it in the same way as trial defense counsel did.

Appellant contends that the prosecutor injected elements of emotion and fear into the jury's deliberations, but nothing aside from defense counsel's view of the incident supports the claim. While the trial court, after first denying the mistrial motion and listening to defense counsel's repeated complaint, admonished the prosecutor "Don't do that again" (V15, T794), it is not clear whether that represents a concurrence by the trial court with defense counsel's assessment or merely an acknowledgment that the prosecutor had made his point and he need not repeat it. The instant case is more like Golden than Calhoun; there, no reversible error was found in the court's failure to admonish the jury to disregard the prosecutor's action in thumping the chair with a flashlight when questioning a witness.

Appellant apparently in an effort to demonstrate that the prosecutor engaged in cumulative egregious misconduct alludes to his arguments in issues I and IV. Appellee will rely on its

arguments in response to those issues without repeating them again here. Appellee would note that neither was error or error of any consequence, certainly did not approach being fundamental error and, irrespective of whether the arguments are considered singularly or in combination, they do not constitute egregious prosecutorial misconduct requiring reversal for a new trial.

ISSUE III

WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THE RECORD DOES NOT REFLECT THE FACT THAT PROSPECTIVE JURORS WERE SWORN FOR VOIR DIRE AND APPELLANT DID NOT ASSERT SUCH A CLAIM BELOW.

The instant record merely does not affirmatively reflect the fact that prospective jurors were or were not sworn prior to voir dire; it does reflect the fact that after voir dire the selected jurors were sworn prior to the beginning of trial. (V11, T238) Appellant did not offer any complaint or objection below at the time of or after trial.

Florida courts and those courts which review Florida cases have held that there is no reversible or fundamental error where, as here, appellant has not submitted any evidence that in fact prospective jurors were not sworn before voir dire. See United States v. Pinero, 948 F.2d 698, 699 (11th Cir. 1991) ("The mere absence of an affirmative statement in the record, however, is not enough to establish that the jury was not in fact sworn"), citing also United States v. Hopkins, 458 F.2d 1353, 1354 (5th Cir. 1972).

In Pena v. State, __ So. 2d __, 27 Fla. L. Weekly D1542 (2d DCA, July 3, 2002), the court through Judge Altenbernd disposed of a similar claim:

> [4] Mr. Pena argues that the trial court committed fundamental error when it failed to swear the venire prior to jury selection. Florida Rule of Criminal

Procedure 3.300(a) requires that the members of the venire, the group of jurors from which a jury will be selected, each swear that they will truthfully answer all questions during jury selection. Mr. Pena does not cite any prior cases directly on point. Instead, he relies on cases holding that it is error for the trial court to fail to swear the trial jurors prior to the commencement of trial as required by Florida Rule of Criminal Procedure 3.360. *See Brown v. State*, 29 Fla. 543, 10 So. 736 (1892); *compare* Fla. R.Crim. P. 3.300(a) *with* Fla. R.Crim. P. 3.360 (requiring jurors to swear they will truly try issues in case and render a true verdict according to law and evidence).

[5] In response, the State argues that it is a common practice for another judge or a deputy clerk to swear the potential jurors in another room, when they are part of a general jury pool, prior to the venire's assignment to any particular courtroom. Case law permits a trial judge to delegate to a deputy clerk the process of swearing potential jurors. *See Johnson v. State*, 660 So. 2d 648, 660 (Fla. 1995). From its own experience, this court is aware that the oath is sometimes given to the venire in another courtroom in the presence of a different court reporter. Nevertheless, we cannot and will not rely on factual information about the jury selection process that is outside our record.

It is clear from our record that the trial judge did not swear the venire. It is clear that no lawyer asked the judge to swear the venire or to confirm that the potential jurors were already sworn. Mr. Pena has not alleged or proven by posttrial motions or affidavits that the venire was unsworn.

We are not required to decide whether it would be fundamental error to conduct a trial with members of a venire that had not been sworn. In this case, there is simply no record as to whether the venire was sworn. As a result, Mr. Pena is unable to demonstrate that the jurors from the venire were not sworn. He does not claim that any member of the venire gave untruthful answers during questioning. In this case, we merely hold that **fundamental error is not established by a record that fails to demonstrate, one way or the other, whether the venire received the oath required by 3.300(a)**.

Id. at 1543

The instant claim does not constitute fundamental error and appellant is procedurally barred from urging on appeal a claim not preserved by objection in the lower court. In Martin v. State, __ So. 2d __, 27 Fla. L. Weekly D1008 (2d DCA, May 3, 2002), another case asserting as error the failure of the record to show the jurors were sworn prior to voir dire examination, the court ruled:

> However, Martin failed to raise this objection at trial. Had counsel objected at trial the prospective jurors could have been sworn or if they had already been sworn, the judge could have noted that fact in the record. *See Ellis v. State*, 25 Fla. 702, 6 So. 768 (1889). In addition, Martin accepted the jury. Jury selection issues are deemed waived after acceptance of the jury, unless the objection is renewed, or the jury is accepted subject to an earlier objections. *See, e.g., Joiner v. State*, 618 So. 2d 174 (Fla. 1993) (defendant waived any objection to prosecutor's use of peremptory strikes against minority jurors where, without reserving earlier objection, defense affirmatively accepted the jury immediately before it was sworn); *Stripling v. State*, 664 So. 2d 2 (Fla. 3d DCA 1995) (defense claims that trial court unduly restricted *voir dire* inquiry were not preserved for appellate review where defendant affirmatively accepted the jury and did not renew his objection at any time prior to swearing of the jury); *Casimiro v. State*, 557 So. 2d 223 (Fla. 3d DCA), *rev. denied*, 567 So. 2d 434 (Fla. 1990) (defendant waived all objections concerning jury composition when defendant accepted jury panel); *Springer v. State*, 513 So. 2d 736 (Fla. 3d DCA 1987) (if defendant objects before trial to possible interim service by one or more of his jurors, court must afford supplemental *voir dire*; however, that objection is waived if the defendant fails to raise or re-urge the objection before trial when supplemental *voir dire* could effectively be held).

The Martin court rejected a defense argument of fundamental error by noting that it had found no case so holding and similar claims have been held not to rise to the level of fundamental error, citing Fernandez v. State, 786 So. 2d 38 (Fla. 3d DCA 2001) (failure of contemporaneous objection precluded reversal where transcript did not reflect that interpreter took interpreter's oath and it was not fundamental error) and Rodriguez v. State, 664 So. 2d 1077 (Fla. 3d DCA 1995) (failure to have interpreter sworn was not fundamental error, there was no contemporaneous objection, and the matter could have readily been cured if timely called to the attention of the trial court). See also, Lott v. State, __ So. 2d __, 27 Fla. L. Weekly D2038d (2d DCA, September 12, 2002) (Denying claim of ineffective assistance for failure to object to failure to place jurors under oath prior ro voir dire.)

In the instant case relief must be denied as there is no fundamental error and the asserted error is procedurally barred for the failure to contemporaneously object at trial[5].

[5] Since there is Florida law on this point it is unnecessary to study the nuances of Alabama law as suggested by appellant. Appellee would note that in Fortner v. State, 2001 WL 1148122 (Ala. Crim. App. Sept. 28, 2001), the Alabama Court of Criminal Appeals explained that the primary concern in Ex parte Hamlett, 815 So. 2d 499 (Ala. 2000), was the ineffective assistance of counsel claim (which the courts are reluctant to waive). Fortner upon narrowing its reading of Hamlett concluded that the separate claim that the jury venire or petit jury was not properly sworn is not jurisdictional and is waivable.

Alternatively, this Court could remand the case for an evidentiary hearing on this limited issue should it conclude that the record's failure to affirmatively demonstrate that the jurors were properly sworn requires further evidentiary development.

ISSUE IV

WHETHER APPELLANT IS ENTITLED TO A NEW PENALTY PHASE BECAUSE THE PROSECUTOR ALLEGEDLY MISLED THE JURY AND COURT ON STANDARD FOR WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Appellant's next claim is that the prosecutor misled the jury and court on standard for weighing aggravating and mitigating circumstances by stating that the jury must recommend death if the aggravating circumstances outweigh the mitigating circumstances. It is the state's position that the claim is procedurally barred and, therefore, review is de novo.[6] Moreover, no reversible error has been shown, as the prosecutor

[6] Although most issues are reviewed for abuse of discretion, since this claim was not presented to the court below and there is no trial court ruling to give deference to, the standard of review is de novo. cf. West v. State, 790 So. 2d 513, 514 (Fla. 5th DCA 2001) (Whether or not a claim is procedurally barred is reviewed de novo.) However, since the defendant has received the windfall of a more liberal standard of review, i.e. de novo, by failing to preserve the issue in the lower court, the higher burden for unpreserved error (must be a violation of due process going to the foundation of the case) must be strictly enforced or the result is that the contemporaneous objection rule becomes meaningless on appeal.

did not tell the jury they "must" or were "required" to return a death sentence and the trial court correctly instructed the jury pursuant to the standard jury instructions.

(A) Prosecutor's remarks

During voir dire the prosecutor made the following statement without defense objection (V10, T95-96):

> Here's the situation. You found the existence of an aggravated circumstance or circumstances proven beyond a reasonable doubt. You found that that aggravating circumstance or circumstances justify the imposition of the death penalty. You go back to the evidence, you look to mitigating circumstances. If you find that there are no mitigating circumstances, your job is over. Your recommendation to the Court is the verdict of death.
>
> If, however, after reviewing the evidence, you find the existence of mitigating circumstances, then the weighing process begins. And this is not a numbers game. It's not, "Well, there's three aggravators over here, and four mitigators over here. Four versus three, four wins." It's not like that. It's a weighing situation. If you find, based upon this weighing situation that the aggravating circumstances outweigh the mitigating circumstances, then your recommendation to the Court is one of death. If you find that the aggravating circumstances are outweighed by the mitigating circumstances, then your recommendation to the Court is one of life. * * *

During penalty phase closing argument, the prosecutor gave the following argument again without objection (V16, T921-923):

> Those are the two groups, so to speak, that you must look at. The aggravating circumstances and the mitigating circumstances.
>
> Now, again your first duty is to look to the evidence and determine whether or not one or more aggravating circumstances has been established beyond a reasonable doubt.
>
> If you find from the evidence that one or more

aggravating circumstances has been established beyond a reasonable doubt, then your obligation is to - - if you find that none have been established rather, then your obligation is to return to the Court a recommendation of life.

If you find from your review of the evidence that one or more aggravating circumstances have been established beyond a reasonable doubt, then your obligation is to look to those aggravating circumstances and to determine whether or not the aggravating circumstances justify the imposition of the death penalty.

If your review of the aggravating circumstances does not, in your opinion, justify the imposition of the death penalty, then your responsibility is to return a recommendation of life. If however, you find from your review of the aggravating circumstances that they do justify the imposition of the death penalty, then you go to the evidence to determine whether or not there is mitigating factors - - or there are mitigating factors.

If you find no mitigating factors, if you find that the evidence is devoid of mitigation, then your obligation is to return a verdict to the judge recommending a sentence of death.

If your review of the evidence indicates to you the existence of mitigation, then your responsibility becomes one of weighing the factors against one another. If your deliberation leads to the conclusion that the mitigating factors outweigh the aggravating factors, your recommendation to the Court should be that Joey Smith live.

If you find, to the contrary, that the aggravating factors outweigh the mitigating factors, then your recommendation to the Court will be that Joey Smith die. (emphasis added)

The prosecutor did not tell the jury they "must" or were "required" to return a death sentence. Appellant's claim about the prosecutor's remarks is procedurally barred for the failure to interpose any objection below in the lower court. See e.g. Rogers v. State, 783 So. 2d 980, 1002 (Fla. 2001); Mordenti v.

State, 630 So. 2d 1080 (Fla. 1994); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990); Chandler v. State, 702 So. 2d 186, 195 (Fla. 1997); Zack v. State, 753 So. 2d 9, 22 (Fla. 2000); Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999) ("Our appellate cases are filled with examples of errors that are unpreserved either because no objection was made or because the objection was not specific. If the error is 'invited' or the defendant 'opens the door', the appellate court will not consider the error a basis for reversal"). Moreover, as a review of this Court's prior rulings on similar claims will establish, the statements made by the prosecutor here do not constitute harmful reversible error.

In Henyard v. State, 689 So. 2d 239 (Fla. 1996), this Court held that it was error for the prosecutor during voir dire to inform prospective jurors that if the evidence of aggravators outweighs mitigators their recommendation "must be" for death. The Court found no prejudice in this error because the misstatement was not repeated by the trial court when instructing the jury prior to penalty phase deliberations and Henyard did not contend that the jury was improperly instructed before making an advisory sentencing recommendation in the penalty phase. Thus, the error was harmless. Id. at 250.

In Brooks v. State, 762 So. 2d 879, 902 (Fla. 2000), the Court recited that the prosecutor gave an improper statement

when urging the jury must recommend a death sentence because "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors" but on defense counsel's objection the Court correctly informed the jury concerning the law relating to the weighing of aggravating and mitigating circumstances. And even if the initial misstatement by the prosecutor were viewed in isolation, it was harmless error. The Court reversed due to additional unrelated errors by the prosecutor.

In Franqui v. State, 804 So. 2d 1185 (Fla. 2001), this Court held that the defense had preserved the issue for appeal by contemporaneous objection since the trial court was apprised of the asserted error by defense objection and had the opportunity to correct the error at an early stage of the proceedings - unlike the instant case where there was no objection to voir dire or closing argument. Id. at 1192.

As in Henyard, the Court in Franqui found that it was error for the trial court to comment that the law required jurors to recommend death if the aggravators outweighed the mitigating circumstances but as in Henyard the error was not prejudicial because the trial court's subsequent comments to jurors during voir dire were consistent with the standard jury instructions and more importantly, did not repeat the misstatement of law when instructing the jury prior to its deliberations. The final

jury instructions were consistent with the standard jury instructions. The Court also gave a defense requested instruction that the weighing process was not a mere counting process of aggravators and mitigators but a reasoned judgment. Id. at 1193. The Court also found the lower court did not abuse its discretion in refusing to give an instruction on jury's pardon power. Id. at 1194.

In Cox v. State, __ So. 2d __, 27 Fla. L. Weekly S505, 508 (Fla. May 23, 2002), the Court again denied relief on a similar claim of prosecutorial misstatement. The Court noted that defense counsel did not object to the state's mischaracterization of the law at any time. Further:

> Despite the lucidity of the law here, and the unavoidable conclusion that the prosecution's comments during Cox's trial were error, we hold that no fundamental error occurred in the instant case. Fundamental error reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996) (quoting *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991)). During voir dire, the prosecutor made the following additional statement:
>
> > Well, maybe I'm being a little too simplistic here. What the law says is that you need to weigh the evidence against and weigh it in the other direction, and depending upon which way it balances out, that is supposed to decide your recommendation. You're supposed to make your recommendation based on the weight. It's not worded that way, but that's a short rendition.

> Also, the trial court did not repeat the prosecutor's misstatements of the law during its instruction of the jury – - indeed, the trial court's instructions properly informed the jury of its role under Florida law. Thus, the prosecutorial misrepresentation of the law was harmless error, and certainly does not constitute fundamental error. *See Henyard*, 689 So. 2d at 250 (holding that three of precisely the same prosecutorial misstatements of the law, when accompanied by correct jury instruction on the matter, were *harmless error*).

In the instant case, there was no defense objection to the prosecutor's remarks at voir dire or in closing argument[7] and the trial court correctly instructed the jury pursuant to the standard jury instructions (V16, T972-974):

> Now, each aggravating circumstance must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision.
>
> If one or more aggravating circumstances are established, you should then consider all of the evidence tending to establish one or more mitigating circumstance, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence to be imposed.
>
> A mitigating circumstance need not be proven beyond a reasonable doubt. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.
>
> Now, the sentence that you recommend to the Court must be based upon the facts as you find them from the evidence, and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based upon these considerations.
>
> Now, in these proceedings it is not necessary that your advisory sentence be unanimous. The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case

[7] The defense adequately responded below in argument that "the law never requires the death penalty under any circumstances." (V16, T940)

> can be reached by a single ballot should not influence you to act hastily or without due regard for the gravity of these proceedings.
>
> Before you ballot, you should carefully consider the evidence and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

As in Cox there is no fundamental error.[8]

(B) The Court's Sentencing Order[9]

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[8] Appellee offers the following comments to Smith's reliance on Gregg v. Georgia, 428 U.S. 153, 203 (1976) for the proposition that a jury can dispense mercy even where the death penalty is deserved. It is misleading if proposed as an endorsement by the Supreme Court that the jury act arbitrarily. The Court first explained that the Georgia procedures requiring the jury to consider the circumstances of the crime and criminal and the proportionality review conducted by the Georgia Supreme Court "in their face . . . seem to satisfy the concerns of Furman". Id. at 198. The Court then addressed the complaint that the opportunities for discretionary action still violated Furman (e.g. prosecutor may select whom to prosecute for a capital offense and to plea bargain with them; the jury may convict of a lesser included offense, the governor may commute a death sentence). The Court explained such decisions did not violate Furman since that decision only held that to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant. Id. at 199. The Court was not endorsing the view that juries should arbitrarily select life over death rather, the fact that a jury has the power to decline to impose death (even if it finds the presence of one or more aggravators) that isolated decision to afford mercy does not render unconstitutional death sentences imposed on (other) defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice. Id. at 203. The language in Gregg must be understood as endorsing rationality and the use of guidelines and channeled discretion rather than arbitrariness.

[9] A Spencer hearing was conducted on July 13, 2002 (V9, T1661-1689). Appellant did not complain at the Spencer hearing about the prosecutor's remarks or at the sentencing hearing about

In a thoughtful, well-reasoned thirty-two page sentencing order (V9, R1555-1586) the Court found as aggravators (1) the defendant had been previously convicted of a felony involving the use or threat of violence, to wit: the attempted murder in the first degree with a firearm of Stephen Tuttle (considerable weight) (V9, R1557-1558), (2) the crime was committed while he was engaged in the commission of a kidnapping (considerable and great weight) (V9, R1560-1563), and (3) the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (great weight). (V9, T1563-1577) The Court considered but did not find as established the statutory mitigating factor of acting under extreme duress or under the substantial domination of another person, to wit: Faunce Pearce (V9, R1578-1579); the Court declared that other statutory mitigators not requested by the defendant were not established (V9, R1580) and as to other non-statutory mitigation the court either did not find to exist or gave little weight to that which was found. (V9, R1581-1584)

After detailing the findings,[10] the court concluded (V9, R1585):

> In weighing and comparing the aggravating and mitigating factors discussed above, this court concludes that beyond and to the exclusion of all

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either the prosecutor's remarks or the court's sentencing order.

[10] The court also considered a very comprehensive P.S.I. report of almost 500 pages. (V9, R1556-1557)

> reasonable doubt Defendant killed Robert Crawford with a firearm in a cold, calculated and premeditated manner while assisting in the kidnapping of Robert Crawford and after having tried to kill Stephen Tuttle with a firearm, and that Defendant was a close friend of Faunce Pearce but not dominated by him, was saddened by the long illness of his father, had a loving, caring family, had a very good childhood, and had a long history of drug abuse. **The aggravating factors far outweigh the mitigating factors and as such requires that the appropriate punishment in this case is death**.
>
> Death is never a pleasant or easy resolution to any criminal conduct, and this court is deeply saddened that death must even be considered. However, the legislature of this state has required that death must be imposed when the aggravating factors far outweigh the mitigating factors, and this court must be guided by this law. Ours is a country of law, not men, and the law of this state requires the result to be rendered hereafter. (emphasis added)

The trial court did not employ an erroneous standard. In Kilgore v. State, 688 So. 2d 895, 899-900 (Fla. 1996), this Court considered a defense argument:

> "... he argues, the trial court found itself obligated to impose the death sentence. Kilgore cites the following language in the sentencing order:
>
> > Under certain circumstances the state not only has the right to take the life of convicted murderers in order to prevent them from murdering again. This is one of those cases. To sentence Mr. Kilgore to anything but death would be tantamount to giving him a license to kill.
>
> Kilgore argues that the "license to kill" language indicates that the trial judge failed to consider any sentence other than the death penalty."

Id. at 899

* * *

> Kilgore claims that the inclusion of the "license to kill" language indicates that this trial judge would impose the death sentence on any defendant serving a life sentence from a prior conviction. We disagree. In context, the sentencing order is simply an attempt by the judge to evaluate the specific evidence in this case and independently apply it to Kilgore. The challenged language comes after an express evaluation of both the aggravating and mitigating factors. All proposed statutory mitigators were individually evaluated. Two were found to exist. The judge also evaluated the nonstatutory mitigation. Finally, the judge also considered the recommendation by the jury. In our view, the record clearly supports the conclusion that Kilgore received an individualized sentence.
>
> Id. at 900

See also Johnson v. State, 593 So. 2d 206, 209 (Fla. 1992) (affirming post-conviction denial of relief and noting "The record also shows that the judge conducted an independent review of the aggravating and mitigating circumstances in determining that '**under the evidence and the law of this state a sentence of death is mandated**'") (emphasis added).

In the instant case, the sentencing order reflects that the trial court seriously evaluated, found and applied the appropriate applicable aggravators and mitigators. The court found the presence of three aggravators (prior violent felony conviction, during the commission of a kidnapping and CCP). The court explained why it declined to find the duress or under domination of another mitigator (V9, R1578-79) and why certain

non-statutory mitigators either were not found or if found why given little weight. (V9, R1581-84) In the last sentence of the paragraph preceding the now challenged remarks at V9, R1585, the trial court recites:

> "The aggravating factors far outweigh the mitigating factors and **as such** requires that the appropriate punishment in this case is death." (emphasis added)

Clearly, the trial court is explaining there that the **facts of the case** - not any perceived command by the legislature for a mandatory sentence - call for the imposition of a sentence of death rather than life imprisonment.

The following paragraph reciting that the ultimate sanction is not "a pleasant or easy resolution to any criminal conduct" and the reference to the legislature (the court must be guided by this law, ours is a country of law, not men) is simply a reassertion of the principle that a trial court does not have the authority by whim or caprice to be arbitrary and to ignore the law for whatever personal reasons a trial judge may have.[11]

The statement in the sentencing order that "... the legislature of this state has required that death must be imposed when the aggravating factors **far outweigh** the mitigating

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[11] For example, a trial judge may have a personal view or philosophy opposed to capital punishment, yet that does not authorize him to reject the law established by the legislature and simply impose a sentence that only conforms to his personal views.

factors, and this court must be guided by this law" (emphasis added) is not erroneous. If the aggravators **far outweigh** the mitigators then death is the appropriate sentence. If that is not true, then a license has been given to the trial courts to engage in arbitrariness, caprice, whim and whatever feels good at the moment for the trial judge.

Although a jury may exercise a "pardon" power improperly - which may go uncorrected since their deliberations are secret - the trial judge is not authorized to exercise a similar freedom. Instead, the court must articulate and evaluate all applicable aggravators and mitigators and give a reasoned judgment in writing. Death penalty statutes must restrain and guide the sentencing discretion to ensure "that the death penalty is not meted out arbitrarily and capriciously." California v. Ramos, 463 U.S. 972, 999, 77 L.Ed.2d 1171 (1983).[12]

Examining the trial judge's sentencing order in context, it is clear that he well understood and explained that the facts of the crime and the character of the defendant made the imposition

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[12] This Court has acknowledged both that a prosecutor may not misstate the law and urge they are "required" or "compelled" to recommend a sentence of death when the law does not so require them, but also that it is not an abuse of discretion for the court to refuse to instruct the jury on its pardon power. Franqui, supra, at 1194; Foster v. State, 624 So. 2d 455, 463 (Fla. 1992); Mendyk v. State, 545 So. 2d 846, 850 (Fla. 1989); Dougan v. State, 595 So. 2d 1, 4 (Fla. 1992). Similarly, a jury may consider sympathy in its penalty phase deliberations but it is not improper for a prosecutor to argue that a jury should not be swayed by sympathy. Valle v. State, 581 So. 2d 40, 47 (Fla. 1991); Ford v. State, 802 So. 2d 1121, 1132 (Fla. 2001).

of the death penalty the only appropriate sanction under the facts of the case.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY UPON AND FINDING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR.

Appellant next urges that the evidence in the instant case does not establish that Smith (after having shot Tuttle in the back of the head and proclaiming him dead) had a careful plan or prearranged design to commit murder before shooting Crawford in the head and then standing over his fallen body and shooting him a second time in the head. Therefore, he contends that the trial court committed reversible error in instructing the jury on and in finding the cold, calculated and premeditated (CCP) aggravating factor. As the following will establish, the facts of this case clearly support the giving of the instruction to the jury and the finding by the trial court of the cold, calculated and premeditated aggravating factor.

When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt - that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if

so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997). Smith concedes that the trial court applied the right rule of law in finding the CCP factor, but urges error by instructing the jury upon the CCP factor and finding CCP was proven. (Initial Brief of Appellant, pg. 58)

As to Smith's claim with regard to the jury instruction, this Court has mandated that where evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required. Raleigh v. State, 705 So. 2d 1324, 1327 (Fla. 1997); Bowden v. State, 588 So. 2d 225, 231 (Fla. 1991); Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990). In each of those cases, the trial court had declined to find an aggravator after having instructed the jury on same. In the instant case, not only was there evidence to support a CCP instruction, the trial court agreed that the factor had been proven.

Further, given that Smith agrees the trial court applied the right rule of law, the only question for this Court to consider is whether there is "competent substantial evidence" to support the finding. Willacy v. State, 696 So. 2d at 695. As a review of the trial court's findings will show, the evidence clearly supported a conclusion that this murder was cold, calculated and

premeditated. With regard to this factor, the trial court made the following extensive findings in its written order:

> 3. The crime for which Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> The State argues for this factor based largely on the following evidence:
>
> a. Faunce Pearce phoned Butterfield to come and to bring Defendant and someone else to his office where he needed "muscle" to assist him.
> b. Defendant was armed with a 9mm handgun when he arrived at the office where Faunce Pearce was located, together with the other men who were also armed.
> c. Upon arrival Defendant said, "We're here to do business".
> d. Defendant and Faunce Pearce had a short conversation outside the hearing of everyone else, shortly before Faunce Pearce directed Stephen Tuttle and Robert Crawford and Defendant and his two armed companions to get into Pearce's automobile.
> e. Defendant said nothing to Stephen Tuttle and Robert Crawford prior to them getting into the automobile, but his actions clearly were supportive of Faunce Pearce.
> f. The automobile was driven several miles, south on U.S. 41, then west on S.R. 54, to a deserted area where Pearce stopped the automobile on the shoulder of the road.
> g. During the ride, Defendant and Pearce exchanged handguns, Defendant claiming that his 9mm was jammed.
> h. The automobile was a two-door model.
> i. Pearce stopped the automobile on the shoulder of the road, directing Tuttle to exit and Defendant to "break his jaw", to which Defendant, replied, "Fuck that".
> j. Immediately upon exiting, Defendant pointed the muzzle of his 45-caliber handgun at the back of Tuttle's head and fired once. Tuttle fell to the ground, apparently dead. He did not die, unbeknownst to Defendant or

Faunce Pearce.

k. Defendant got back into the automobile and in response to Pearce's request, "Is he dead?" said, "I shot him in the head with the 45".
l. Pearce drove about 200 yards, stopped again, and yanked the terrified Crawford out of the automobile.
m. Again, Defendant put the gun to the back of Crawford's head and fired, causing Crawford to fall to the ground.
n. Defendant stood over the prostrate body of Crawford and again fired his handgun into Crawford. Crawford died.
o. Defendant got back into the automobile with Pearce and they all drove away.
p. Defendant pointed his gun at the men in the backseat and said, "snitches are bitches, and bitches die". The men in the backseat got the message.
q. Defendant and Pearce stopped for breakfast.
r. Defendant and Pearce left the other two men at a shopping center for 45 minutes while they went off alone.
s. Defendant, Pearce and the other two men drove to the hump of the Howard Franklin bridge where Defendant wrapped the murder weapon in newspaper and threw it into Tampa Bay.
t. Defendant tried to catch a late, inter-city bus out of Tampa Bay, but there were no buses running due to a hurricane warning and he was unable to leave town before he was arrested.

In applying the evidence to the elements that are required to prove this aggravating factor, this court finds:

1. There is absolutely no evidence that Defendant was acting in an emotional frenzy, panic or fit of rage. There is overwhelming evidence that Defendant's actions were the product of cool, calm reflections, to wit:

a. When leaving the party he was at to respond to Faunce Pearce's, request for assistance, Defendant brought with him a 9mm handgun.

Faunce Pearce did not indicate that he was in any danger that required a firearm to protect himself. The Defendant's actions in arming himself can only be explained by Defendant reflecting that he needed a firearm for some purpose other than thwarting an attacker.

b. The trip from the party to Pearce's location took several minutes, ample time for Defendant to reflect upon what he was going to do with his gun.

c. Upon arriving at Faunce Pearce's location, Defendant said, "we're here to do business". What business? The only business that can be reasonably inferred from this comment is that Defendant intended to use his firearm to intimidate, threaten, or harm someone.

d. Defendant did not know either Robert Crawford or Stephen Tuttle and the record is absolutely void of any basis for Defendant having any feelings against either of these victims.

e. From the time that Defendant, Pearce, and the others got into the automobile to the time when the attempted murder took place, a time of several minutes and a distance of several miles, Defendant had ample time to reflect about what was going to happen.

f. During that ride Defendant said, "My gun is jammed" and gave it to Faunce Pearce in exchange for Pearce's operating 45 caliber. If Defendant did not intend to use his handgun, what difference would it make if the gun was jammed and inoperative? Clearly, Defendant had reflected on what he intended to do with his firearm, and that was to fire it.

g. As Tuttle was exiting the automobile, Pearce told Defendant to "break his jaw", to which Defendant replied, "Fuck that". Defendant's response was a negation of Pearce's request and can only be construed to mean that Defendant intended and planned to do something else.

h. Defendant tried to kill Stephen Tuttle by firing one shot from his 45-caliber pistol at the back of Tuttle's head. A single 45 caliber shot to the back of someone's head

is the act of an executioner, not a madman acting in an emotional frenzy.

i. After the attempted killing of Tuttle, Defendant responded to Pearce's inquiry, "is he dead?" with, "I shot him in the head with a 45". Defendant's answer was clinically correct and reflected no emotion of any kind.

j. From the attempted killing of Tuttle to the killing of Crawford, Defendant had several moments to reflect on his actions and had ample time to back off.

k. The killing of Crawford execution-style again showed Defendant was acting sanely, rationally, and intentionally.

l. In firing a second shot down into Crawford's prone body Defendant demonstrated clearly that he intended to make sure that Crawford was dead: a craftsman making sure that his creation was complete.

m. In threatening to kill the other two men in the automobile after killing Crawford, Defendant clearly showed that he knew what he had done was very wrong and intended to cover his tracks.

n. In eating breakfast with Pearce after the killing, Defendant's calmness was clearly demonstrated particularly since the other two men in the automobile were so sickened by the killing that they could not eat. Defendant's nonchalance about his killing is appalling.

2. The murder of Crawford was the product of a careful plan or prearranged design to commit murder before the fatal incident, to wit:

a. Defendant arrived at Pearce's location with a 9mm handgun. Pearce was in no danger requiring a firearm to protect himself and no need for a gun was shown other than to be used in some fashion.

b. Defendant and Faunce Pearce had a secret pow-wow. This is not cited to prove a conspiracy, for such would be speculation. Rather, it is cited to show that Defendant and Pearce had the opportunity to conspire.

c. The murder scene was in a deserted area of

Pasco County, several miles from where the ride in the automobile began. If the killing was spontaneous, it is beyond belief that it was mere coincidence that the decision to kill just happened to occur in a deserted section of the county.

d. At the murder scene, Faunce Pearce had made a U-turn in the road and pulled over to the right shoulder of the road. Why did he not merely pull to the shoulder of the road in the same direction he was driving? No explanation for this U-turn was given and the court cannot speculate as to the reason for it. However, this fits very nicely into a possible plan to drive to a deserted section of the county, make sure no automobiles are approaching from either direction to disrupt the proceedings, and carry out the execution in seclusion.

e. In the ride to the murder scene the two victims, Robert Crawford and Stephen Tuttle, were sitting in the backseat of the automobile between two armed men with the Defendant and Pearce, both armed, in the front seat and with the only conversation being between Defendant and Pearce about exchanging firearms. The atmosphere was very tense. If there had been no prearranged plan, then why did Defendant know that it was necessary for him to have an operative firearm? If the purpose of the trip was to intimidate someone who had ripped off the victims in a failed drug deal, then what difference did it make if Pearce or Defendant had the operating firearm?

However, if the purpose of the trip was for the Defendant to kill the victims while Pearce sat behind the wheel of the automobile prepared to make a fast get-away, then it was necessary for Defendant to have the operating firearm.

3. The murder of Robert Crawford was caused by a heightened premeditation over and above what is required for first degree murder. To wit:

a. In making sure he had an operative firearm

by exchanging guns with Pearce on the ride to the murder scene, Defendant clearly showed that he intended to fire his gun.

b. In the moments and 200 yards between the attempted killing of Tuttle and the actual killing of Crawford, the Defendant had ample time to reflect on his course of conduct.

c. When he killed Crawford, Defendant thought he had already killed Tuttle. To intend to kill a second time in such a short period of time requires a clear and unambiguous purpose to kill and a mind that has no regard for human life.

d. After the killing, the Defendant announced to the people in the automobile: “That’s twelve and thirteen, eight more to go and I’ll match Billy the Kid”.

4. The murder of Robert Crawford was without any pretense of moral or legal justification, to wit:

a. Defendant did not know Robert Crawford and had had no dealings of any kind with him.

b. Robert Crawford had never said anything to Defendant at the scene or at any other time.

c. There is no evidence that Defendant was to receive any reward or profit from his killing. Killing for profit is neither moral nor legal, but at least it is understandable. The only possible explanation in this case is that Defendant enjoys killing people. His boast after killing Crawford that: “This is 12 and 13” was probably braggadocio and does not of itself constitute the basis for this aggravation, but it does show that he had no qualms about killing a human being and could even be proud of it. His state of mind clearly favored murder.

This court gives this factor great weight.

(V9, R1563-1577)

Although Smith takes issue with the court’s reliance on the fact that Smith came to the scene with a weapon, that he and

Pearce had a discussion prior to the kidnapping, that the murder scene was in a remote location and that the purpose of the trip was to kill the victims, these findings by the trial court are well supported by competent substantial evidence. Simply because Smith suggests that these facts may have other meanings does not undermine the reasonable inferences and findings made by the court based on a cumulative analysis of all the evidence in the context of this case.

This Court's consideration of this factor in Hertz v. State, 803 So. 2d 629, 650 (Fla. 2001) is especially instructive, "Here the calm and deliberate nature of the defendants' actions against the victims establish this element beyond any reasonable doubt." Smith's actions in this case show a coldness of action that defines this element. Without comment or hesitation Smith put a bullet in Tuttle's brain, then minutes later gets out again to repeat the action on Crawford. He then stands over the prostate body of Crawford, and, in what can only be described as execution style, puts a second bullet into Crawford. Under similar circumstances, this Court has not hesitated to affirm the CCP factor. Darling v. State, 808 So. 2d 145, 157-58 (Fla. 2002), citing, Bruno v. State, 574 So. 2d 76, 82 (Fla. 1991) (observing--after making the initial observation that, from the evidence presented, it was shown that the defendant first "administer[ed] his savage beating which rendered the victim

helpless," and then "shot the victim twice in the head at point blank range through a pillow"--that, as noted by the judge in his sentencing order, "[t]his was especially cold, calculated and premeditated. It was essentially an execution."); Parker v. State, 456 So. 2d 436, 444 (Fla. 1984) (upholding a finding that the murder was cold, calculated, and premeditated, where the evidence showed that the "victim had been pleading with defendant not to harm his girl friend and, at the time he was murdered, was lying naked, face down, on a bed," and that, "[b]efore killing the victim by a gunshot blast into his back, defendant accepted a pillow from his partner in order to muffle the shot"); Lightbourne v. State, 438 So. 2d 380, 391 (Fla. 1983) (upholding a finding of premeditation where the victim, who, during the course of a burglary, had been forced into acts of oral sex and intercourse as she begged the defendant not to kill her, had been murdered in an "execution-style killing using a pillow placed between the murder weapon and the victim's head").

Finally, even if this Court were to conclude that the trial court's finding was not supported by competent substantial evidence, the striking of this factor would be harmless beyond a reasonable doubt. Jennings v. State, 782 So. 2d 853, 865 (Fla. 2001) (Where an aggravating factor is stricken on appeal, the harmless error test is applied to determine whether there is

no reasonable possibility that the error affected the sentence.); Johnston v. Singletary, 640 So. 2d 1102, 1105 (Fla. 1994) (Where there are two other strong aggravators and no mitigation present, error harmless); Reaves v. State, 639 So. 2d 1, 6 (Fla. 1994) (error harmless where two other strong aggravating factors found and relatively weak mitigation.) See also Blanco v. State, 452 So. 2d 520, 526 (Fla. 1984) (regarding a proportionality analysis, this Court explained that "[w]here there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, death is presumed to be the appropriate penalty.")

Finally, although appellant has not asserted that his sentence is disproportionate, the state would note that based on the facts before this Court and a review of factually similar cases supports the imposition of the death sentence herein. This Court addresses the propriety of all death sentences in a proportionality review by reviewing and considering all the circumstances in the case relative to other capital cases. Foster v. State, 778 So. 2d 906, 921 (Fla. 2000). Upon comparison to similar "execution-style" killings this Court has repeatedly affirmed sentences of death. Foster, at 921; Ford v. State, 802 So. 2d 1121, 1133 (Fla. 2001); Jones v. State, 690 So. 2d 568, 571 (Fla. 1996); Walls v. State, 641 So. 2d 381, 391

(Fla. 1994).

In the instant case, the court found three aggravating factors, including the contemporaneous attempted murder and the kidnapping, balanced against insignificant nonstatutory mitigation and correctly imposed a sentence of death. This sentence is proportionate to other similar crimes and should be affirmed.

ISSUE VI

WHETHER APPELLANT IS ENTITLED TO RESENTENCING BECAUSE THE TRIAL COURT'S ORDER REFERS TO A FACT THAT IS NOT SUPPORTED BY THE EVIDENCE IN THIS RECORD AND WHETHER THE UNPROVEN STATEMENT CONSTITUTES THE NONSTATUTORY AGGRAVATING CIRCUMSTANCE OF FUTURE DANGEROUSNESS.

In support of the cold, calculated and premeditated aggravating circumstance, the trial court's order misstates the quote from Butterfield where he testified that after killing Crawford, Smith said that Crawford was the 13th or 14th person he had shot. (V13, T433) Rather, the court stated, "After the killing, the Defendant announced to the people in the automobile: 'That's twelve and thirteen, eight more to go and I'll match Billy the Kid.' (V9, R1576) Smith now argues that this misstatement constitutes evidence of future dangerousness, a prohibited nonstatutory aggravating circumstance. He also argues that it is a violation of Gardner v. Florida, 430 U.S. 349 (1977) because it may be based upon evidence outside the record that Smith has not had an opportunity to refute.

Neither of these arguments have merit. The court's order clearly states that he relied upon this testimony only in consideration of the pretense of moral or legal justification aspect of the CCP factor and that the court believed the statement to be mere braggadocio. Whether the statement was as described by the court initially or as testified to by

Butterfield, the underlying message remains the same. In fact, in addressing the statement's import, the court did not refer to the "Billy the Kid" statement and described it as Butterfield testified at trial:

> 4. The murder of Robert Crawford was without any pretense of moral or legal justification, to wit:
>
> a. Defendant did not know Robert Crawford and had had no dealings of any kind with him.
> b. Robert Crawford had never said anything to Defendant at the scene or at any other time.
> c. There is no evidence that Defendant was to receive any reward or profit from his killing. Killing for profit is neither moral nor legal, but at least it is understandable. The only possible explanation in this case is that Defendant enjoys killing people. **His boast after killing Crawford that: "This is 12 and 13" was probably braggadocio and does not of itself constitute the basis for this aggravation, but it does show that he had no qualms about killing a human being and could even be proud of it.** His state of mind clearly favored murder. (emphasis added)
>
> (V9, R1576-1577)

In any event, as the gist of the statement remains the same and was only a very minor part of the court's basis for finding the CCP factor, the court's misstatement does not require reversal. In Morton v. State, 789 So. 2d 324, 334 (Fla. 2001), this Court rejected a similar claim where the trial court relied upon facts in the sentencing order that had not been presented at the resentencing proceeding. This Court held the reversal

was not warranted as the court's reliance on the unsupported facts was de minimis. In the instant case, the trial judge wrote a very extensive order and the reference to this misstatement was very minor and clearly did not form a substantial basis for any finding.

Moreover, as no finding of future dangerousness was made or suggested, Smith's claim that it constitutes a nonstatutory aggravator is not supported by the facts of this case and do not warrant relief.

Finally, no Gardner violation has been established as there is no indication that the court obtained this information from any outside source. To the contrary the genesis of this statement is clearly based on the testimony presented at trial.

Based on the foregoing, the state maintains that no harmful reversible error has been established.

ISSUE VII

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Smith next asserts that Florida's death penalty statute is unconstitutional. Citing Ring v. Arizona, 122 S. Ct. 2428 (2002), Apprendi v. New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526 U.S. 227 (1999), he claims that the sentencing scheme violated his constitutional rights to due process and a jury trial. This Court's review is de novo; however, Smith's allegations do not present any basis for relief.

It must be noted initially that this issue has not been preserved for appellate review, and therefore this claim should be rejected as procedurally barred. Although, as Smith notes, a defendant may challenge the facial constitutionality of a statute for the first time on appeal when the argument presents a claim of fundamental error, the current allegation of a Ring and/or Apprendi violation would not amount to fundamental error even if this Court were to find that those decisions were not fully satisfied on the facts of this case. In Maddox v. State, 760 So. 2d 89, 95-96 (Fla. 2000), this Court noted several different definitions for fundamental error, including "error that goes to the foundation of the case," "error which reaches down into the validity of the trial itself," and error "where the interests of justice present a compelling demand for its

application," none of which is implicated on the facts of this case. In addition, this Court has repeatedly recognized that not all errors of "constitutional magnitude" constitute fundamental error. State v. T.G., 800 So. 2d 204, 212 (Fla. 2001); Maddox, 760 So. 2d at 100 (quoting Judge v. State, 596 So. 2d 73, 79 n. 3 (Fla. 2d DCA 1991).

In Barnes v. State, 794 So. 2d 590 (Fla. 2001), this Court found an alleged Apprendi[13] error had not been preserved for appellate review. The United States Supreme Court has also held that an Apprendi claim is not plain error. United States v. Cotton, 122 S. Ct. 1781 (2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). These cases confirm that any possible constitutional violation under Apprendi is not "fundamental error" warranting judicial review of an unpreserved claim.

Even if Apprendi error could be deemed fundamental in some contexts, the present case does not provide the facts for such

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[13] Ring is merely an extension of Apprendi. Clearly, the application of Apprendi was limited to (1) factual findings, other than prior conviction, (2) which increase the statutory maximum for a charged offense. Because the Arizona Supreme Court interpreted its law as prescribing only a life sentence upon conviction for first-degree murder, Ring, 122 S. Ct. at 2436; Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001), Ring fits squarely within the Apprendi holding, and thus, the Ring decision does not extend or expand the Sixth Amendment right at issue in Apprendi.

a conclusion here. Smith fails to acknowledge that, due to the existence of his "prior violent felony conviction" aggravating factor, the judge was authorized to impose the death penalty even if additional jury findings may be deemed necessary in the context of other cases. Both Jones and Apprendi expressly limit their holdings as to the necessity of jury findings to enhance a statutory punishment to facts "other than a prior conviction." Jones, 526 U.S. at 243 n. 6; Apprendi, 530 U.S. at 476. Ring did not involve a defendant with a prior conviction, and therefore expressly declined to address this limitation. Ring, 122 S. Ct. at 2437, n. 4. It is undisputed that Smith's judge properly found the existence of the prior conviction factor, and therefore no additional jury findings were required with regard to Smith's eligibility to receive the death penalty. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment). Since the defect alleged to invalidate the statute - lack of jury findings to enhance the sentence - is not implicated in this case due to the existence of the prior conviction, Smith has no standing to challenge any potential error in the application of the statute on other facts.

If Smith had no prior conviction, his sentence would still be constitutionally valid. According to Smith, Florida's

capital statute is constitutionally flawed due to its failure to require that a "death qualifying aggravating factor" be alleged in the indictment and found by a jury beyond a reasonable doubt. This argument is premised on a fundamental misunderstanding of Florida law. In Ring, the United States Supreme Court applied Apprendi to invalidate Arizona's capital sentencing scheme, which required a judge, acting alone, to determine a capital defendant's eligibility for the death penalty. In Florida, unlike Arizona, death eligibility is determined by the jury upon conviction for first degree murder. See Shere v. Moore, 27 Fla. L. Weekly S753 (Fla. Sept. 12, 2002) (statutory maximum sentence for first degree murder is death); Mills v. Moore, 786 So. 2d 532, 538 (Fla.), cert. denied, 532 U.S. 1015 (2001) (same). Ring is not applicable in Florida because capital punishment is not an "enhanced" sentence for first degree murder; accordingly, no further jury findings are required.

Thus, Smith's argument that an aggravating factor must be alleged in the indictment and expressly found by a jury beyond a reasonable doubt is without merit, as the existence of an aggravating factor is a determination that concerns the defendant's selection for capital punishment, rather than his eligibility for the death penalty. Clearly, Ring does not require jury findings for sentencing, only for eligibility. As Justice Scalia stated, Ring "has nothing to do with jury

sentencing." Ring, 122 S. Ct. at 2445. Apprendi and Ring involve the jury's role in determining death eligibility, but do not require that the actual selection of sentence be made by a jury. Quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976), Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required."[14] Ring, 122 S. Ct. at 2447, n. 4. Rather, Ring involves only the requirement that the jury find the defendant death eligible. That determination must be made by the jury, while the actual sentencing decision may constitutionally be made by the trial court. See Spaziano v. Florida, 468 U.S. 447, 459 (1984) (finding Sixth Amendment has no guarantee of right to jury trial on issue of sentence).

In addition, even if an aggravating factor is construed to determine eligibility rather than selection, the suggestion that it must be charged in the indictment has no basis in law. This claim has been repeatedly rejected. See Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988) (rejecting claim that Florida law makes aggravating factors into elements of the offense so as to make the defendant death-eligible), aff'd., 490 U.S. 638 (1989); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) (aggravating

[14]See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

circumstances do not need to be charged in indictment). In addition, United States Supreme Court precedent does not support Smith's position. Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). Apprendi did not address the indictment issue. Apprendi, 530 U.S. at 477, n. 3. Ring similarly did not address the issue, and although Ring, in part, overruled Walton v. Arizona, 497 U.S. 639 (1990), this claim was rejected prior to Walton being decided and does not, in any way, rely on Walton for support. Thus, Ring does not compel further consideration of this issue.

Moreover, any Florida death sentence which is imposed following a jury recommendation of death, as in the instant case, satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one statutory aggravating factor existed. Ring merely requires a jury, rather than a judge acting alone, make the determination of certain factors and that those factors be established beyond a reasonable doubt. These requirements have been met in this case. Smith had a penalty phase jury which heard evidence related to aggravation and mitigation. The jury was instructed that the aggravators had to be proven beyond a reasonable doubt. Following the instructions, Smith's jury recommended a death sentence. Clearly, aggravation was proven

beyond a reasonable doubt. See Hildwin v. Florida, 490 U.S. 638 (1989) (holding that where jury made a sentencing recommendation of death it necessarily engaged in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved). Because the finding of an aggravating factor clearly authorized the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense is fulfilled.

Smith's speculation that the jury may have disagreed as to which aggravating factors existed, or "completely disregarded" the instructions to consider aggravating factors, is unwarranted. Jurors are presumed to follow the court's instructions, and jurors are not required to agree on different theories of liability. See Schad v. Arizona, 501 U.S. 624 (1991) (jury need not agree on alternative theories of prosecution). That seven jurors (or, in Smith's case, eight) conclude at least one aggravator exists is constitutionally sufficient.

Any claim that a jury must unanimously agree on which aggravating circumstances exist is not supported by case law. See Card v. State, 803 So. 2d 613, 628 n. 13 (Fla. 2001) (rejecting claim Apprendi requires unanimous jury recommendation; "capital jury may recommend a death sentence by

a bare majority vote"), cert. denied, 122 S. Ct. 2673 (2002); Larzelere v. State, 676 So. 2d 394, 407 (Fla. 1996) (rejecting claims that jury recommendation must be unanimous, that jury is improperly told its role is advisory, and that special verdict as to sentencing was required); Jones v. State, 569 So. 2d 1234 (Fla. 1990) (federal constitution does not require jurors to use a special verdict form and to unanimously agree on the existence of aggravating factors applicable). Even in the context of guilt, jury unanimity is not required. Johnson v. Louisiana, 406 U.S. 356 (1972) (jury unanimity not required for twelve-person jury); Apodaca v. Oregon, 406 U.S. 404 (1972) (same); Williams v. Florida, 399 U.S. 78, 86 (1970) (Constitution does not require States to provide a jury of twelve persons). Moreover, it must be noted that requiring unanimity with respect to mitigation factors has been condemned by the United States Supreme Court. McKoy v. North Carolina, 494 U.S. 433 (1990) (determining that requirement of unanimous findings of mitigators unconstitutional); Mills v. Maryland, 486 U.S. 367 (1988) (same).

This Court's interpretation of Florida's death penalty statute, fixing death eligibility at the time of conviction, is not called into question by any United States Supreme Court decision. Neither Ring nor Apprendi overruled prior decisions by that Court rejecting constitutional challenges to Florida's

capital sentencing procedures. See Hildwin, 490 U.S. at 638, 641 (stating case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," and concluding that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury"); Proffitt, 428 U.S. at 252 (holding Constitution does not require jury sentencing); Spaziano, 468 U.S. at 459 (same). It cannot be assumed that either Apprendi or Ring has implicitly overruled these cases; as this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989))." Mills, 786 So. 2d at 537.

In conclusion, aggravating factors in Florida are not elements of the offense, but are constitutionally mandated capital sentencing guidelines. Florida's capital sentencing scheme affords the sentencer the guidelines to follow in determining the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be

considered. Given that a defendant faces the statutory maximum sentence of death upon conviction of first degree murder, the employment of further proceedings to examine the assorted "sentencing selection factors," does not violate due process. The plain language of Apprendi and Ring establishes that those cases come into play when a defendant is exposed to a penalty exceeding the maximum allowable under the jury's verdict. Because Smith was death eligible upon conviction, Ring does not invalidate his death sentence or render Florida's sentencing scheme unconstitutional.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests that this Honorable Court affirm the judgments and sentences.

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 Paul C. Helm, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831-9000, this _____ day of October, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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