IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-1590

LUCIOUS BOYD,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****
*** ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)
****
***

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 North Flagler Drive
9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS i

AUTHORITIES CITED iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT 9

ISSUE 1
THE REQUEST FOR A MISTRIAL BASED UPON AN ALLEGATION OF JUROR MISCONDUCT WAS DENIED PROPERLY (restated) 9

ISSUE 2
BOYD's CONTENTION THAT THE STATE COMMITTED A BRADY VIOLATION BY DESTROYING EXCULPATORY FINGERPRINT REPORTS IS WITHOUT MERIT (restated) 20

ISSUE 3
THE MOTION FOR JUDGEMENT OF ACQUITTAL WAS DENIED PROPERLY (restated) 32

ISSUE 4
ADMISSION OF EVIDENCE THAT BOYD HAD BEEN CHARGED WITH A CRIME OF DISHONESTY WAS PROPER DURING CROSS-EXAMINATION OF THE DEFENDANT (restated) 45

ISSUE 5
TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DELINEATING THE CROSS-EXAM OF BOYD (restated) 48

ISSUES 6 AND 7
THE COURT DID NOT ABUSE ITS DISCRETION BY NOT CONSIDERING THE REPORTS OF DOCTORS SHAPIRO AND BLOCK-GARFIELD IN DETERMINING THAT BOYD WAS COMPETENT AND BY NOT ORDERING ANOTHER COMPETENCY HEARING PRIOR TO AND

AFTER SENTENCING. (restated) 53

ISSUES 8, 9, AND 15

THE DICTATES OF KOON v. DUGGER AND MUHAMMAD v. STATE ARE NOT APPLICABLE HERE AS BOYD DID NOT WAIVE MITIGATION (restated) 66

ISSUE 10
IT IS WITHIN THE DEFENDANT'S PROVINCE TO WAIVE MITIGATION (restated) 74

ISSUE 11
THE FELONY MURDER AND HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING FACTORS ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE (restated) . 80

ISSUE 12
PHOTOGRAPHS OF THE VICTIM WERE ADMITTED PROPERLY DURING THE PENALTY PHASE (restated) 86

ISSUE 13
THE DEATH SENTENCE IS PROPORTIONAL (restated) 93

ISSUE 14
THE COURT EXERCISED ITS DISCRETION PROPERLY IN ASSESSING AND WEIGHING MITIGATION (restated) 97

CONCLUSION 100

CERTIFICATE OF SERVICE 100

CERTIFICATE OF COMPLIANCE 100

AUTHORITIES CITED

FEDERAL CASES

Delaware v. van Arsdall, 475 U.S. 673 (1986) 13

Enmund v. Florida, 458 U.S. 782 (1982) 59

Faretta v. California, 422 U.S. 806 (1975) 42

Jones v. Barnes, 463 U.S. 745 (1983) 40

Pate v. Robinson, 383 U.S. 375 (1966) 22,29

Tison, Tison v. Arizona, 481 U.S. 137 (1987) 59

Wainwright v. Sykes, 433 U.S. 72 (1977) 40,41

STATE CASES

Adams v. State, 412 So. 2d 850 (Fla. 1982) 50

Almeida v. State, 748 So. 2d 922 (Fla. 1999) 54

Alston v. State, 723 So. 2d 148 (Fla. 1998) . . . 43,45, 62

Anderson v. State, 841 So. 2d 390 (Fla. 2003) 62

Armstrong v. State, 642 So. 2d 730 (Fla. 1994) 52

Banks v. State, 700 So. 2d 363 (Fla. 1997) 63

Bates v. State, 750 So. 2d 6 (Fla. 1999) 58,60

Bell v. State, 841 So. 2d 329 (Fla. 2002) 62

Berkman v. Foley, 709 So. 2d 628 (Fla. 4th DCA 1998) . . . 18

Blackwood v. State, 777 So. 2d 399 (Fla. 2000) 49,61

Bonifay v. State, 680 So. 2d 413 (Fla. 1996) 62

Brown v. State, 721 So. 2d 274 (Fla. 1998) 48

Bryant v. State, 785 So. 2d 422 (Fla. 2001) 26

Butler v. State, 842 So. 2d 817 (Fla. 2003) 49,61

Campbell v. State, 571 So. 2d 415 (Fla. 1990) 61

Cardona v. State, 641 So. 2d 361 (Fla. 1994), denial of postconviction relief reversed, 826 So. 2d 968 (Fla. 2002)49,61

Carter v. State, 576 So. 2d 1291 (Fla. 1989) 24

Castro v. State, 744 So. 2d 986 (Fla. 1999) 26

Chandler v. State, 702 So. 2d 186 (Fla. 1997) 17

Chatmon v. Woodard, 492 So. 2d 1115 (Fla. 3d DCA 1986) . . 18

Chavez v. State, 832 So. 2d 730 (Fla. 2002) 62,63

Coco v. State, 62 So. 2d 892 (Fla. 1953) 13

Cole v. State, 701 So. 2d 845 (Fla. 1997) 9

Conde v. State, 860 So. 2d 930 (Fla. 2003) 55

Coxwell v. State, 361 So. 2d 148 (Fla. 1978) 13,14

Davis v. State, 703 So. 2d 1055 (Fla. 1997) 48, 60

Diaz v. State, 28 Fla.L.Weekly S687 (Fla. Sept. 11, 2003) 47

DiGuilio, 491 So. 2d at 1135 12,17

Dickey v. McNeal, 445 So. 2d 692 (Fla. 5th DCA 1984) . . . 41

Doorbal v. State, 837 So. 2d 940 (Fla. 2003) 63

Dornau v. State, 306 So. 2d 167 (Fla. 2d DCA 1974) 12

Duest v. State, 855 So. 2d 33 (Fla. 2003) 48,55

Durocher v. Singletary, 623 So. 2d 482 (Fla.), cert. dismissed, 114 S. Ct. 23 (1993) 26

Evans v. State, 838 So. 2d 1090 (Fla. 2002) 9

Execu-Tech Bus. System v. New Oji Paper Co., 752 So. 2d 582 (Fla. 2000) 39

Farr v. State, 621 So. 2d 1368 (Fla. 1993) 44

Farr v. State, 656 So. 2d 448 (Fla. 1995) 42,43

Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) . . . 58,59

Fowler v. State, 255 So. 2d 513 (Fla. 1971) 23

Geralds v. State, 674 So. 2d 96 (Fla. 1996) . . . 13-17, 60

Gonzalez v. State, 450 So. 2d 585 (Fla. 3d DCA 1984) . . . 15

Gore v. State, 784 So. 2d 418 (Fla. 2001) 45

Green v. State, 688 So. 2d 301 (Fla. 1997), cited by . . . 14

Grim v. State, 841 So. 2d 455 (Fla. 2003) 43,44

Grossman v. State, 525 So. 2d 833 (Fla. 1988) 37, 38

Gudinas v. State, 693 So. 2d 953 (Fla. 1997) 50

Gudinas v. State, 816 So. 2d 1095 (Fla. 2002) 63

Guzman v. State, 721 So. 2d 1155 (Fla. 1998) 47,48

Hall v. State, 742 So. 2d 225 (Fla. 1999) 29

Hamblen v. State, 527 So. 2d 800 (Fla. 1988) . . . 40, 42, 43

Hardy v. State, 716 So. 2d 761 (Fla. 1998) 24

Henderson v. State, 463 So. 2d 196 (Fla. 1995) 51, 57

Hill v. State, 473 So. 2d 1253 (Fla. 1985) quoting Dusky v. United States, 362 U.S. 402 (1960) 23

Hoffert v. State, 559 So. 2d 1246 (Fla. 4th DCA 1990) . . 54

Hunter v. State, 660 So. 2d 244 (Fla. 1995) 24, 27

Hurst v. State, 819 So. 2d 689 (Fla. 2002) 63

Jackson v. State, 575 So. 2d 181 (Fla. 1991) 59

Jones v. State, 580 So. 2d 143 (Fla. 1991) 13

Kearse v. State, 770 So. 2d 1119 (Fla. 2000) 62

Kent v. State, 702 So. 2d 265 (Fla. 5th DCA 1997) 26

King v. State, 387 So. 2d 463 (Fla. 1st DCA 1980) 23

Klokoc v. State, 589 So. 2d 219 (Fla. 1991; Farr v. State, 656 So.2d 448 (Fla. 1995) 42

Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) 30, 31, 35, 38, 42, 44

Kramer v. State, 619 So. 2d 274 (Fla. 1993) 59

Lawrence v. State, 691 So. 2d 1068 (Fla. 1997) 39, 44

LeDuc v. State, 365 So. 2d 149 (Fla. 1978) 38, 49, 61

Lemon v. State, 456 So. 2d 885 (Fla. 1984) 61

Livingston v. State, 565 So. 2d 1288 (Fla. 1988) 59

Mansfield v. State, 758 So. 2d 636 (Fla. 2000) . . 50, 60, 62

McCoy v. State, 853 So. 2d 396 (Fla. 2003) 13

Mines v. State, 390 So. 2d 332 (Fla. 1980) 62

Moore v. State, 701 So. 2d 545 (Fla. 1997) 13

Mora v. State, 814 So. 2d 322 (Fla. 2002) 23, 26, 31, 32, 35, 37 40-42, 44

Morgan v. State, 639 So. 2d 6 (Fla. 1994) 62

Muhammad v. State, 494 So. 2d 969 (Fla.1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987) . . . 23

Muhammad v. State, 782 So. 2d 343 (Fla. 2001) 30, 31, 35-38 43, 44

Nibert v. State, 508 So. 2d 1 (Fla. 1987) 55

Nixon v. Singletary, 758 So. 2d 618 (Fla.), cert. denied, 531 U.S. 980 (2000) 41, 44

Ocha v. State, 826 So. 2d 956 (Fla. 2002) 41-43

Owen v. State, 862 So. 2d 687 (Fla. 2003) 48

Pangburn v. State, 661 So. 2d 1182 (Fla. 1995) 51

Philmore v. State, 820 So. 2d 919 (Fla. 2002) 50

Porter v. State, 564 So. 2d 1060 (Fla. 1990) 58

Preston v. State, 607 So. 2d 404 (Fla. 1992) 51

Ray v. State, 755 So. 2d 604 (Fla. 2000) 9

Reese v. State, 768 So. 2d 1057 (Fla. 2000) 63

Richardson v. State, 437 So. 2d 1091 (Fla. 1983) . . . 7, 52

Roberts v. State, 662 So. 2d 1308 (Fla. 4th DCA 1995) . . 12

Rodriguez v. State, 753 So. 2d 29 (Fla. 2000) 11

Rose v. State, 787 So. 2d 786 (Fla. 2001) 50, 51

Ross v. State, 386 So. 2d 1191 (Fla. 1980) 37, 38

Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) 51

Sean v. State, 775 So. 2d 343 (Fla. 2d DCA 2000) 9

Shere v. State, 579 So. 2d 86 (Fla. 1991) 14

Slawson v. State, 796 So. 2d 491 (Fla. 2001) 26

Spann v. State, 857 So. 2d 845 (Fla. 2003) 39

Spencer v. State, 615 So. 2d 688 (Fla. 1993) . . 1, 6, 35, 44

Spencer v. State, 691 So. 2d 1062 (Fla. 1996) 61

State v. Dixon, 283 So. 2d 1 (Fla. 1973), superseded by statute as stated in State v. Dene, 533 So. 2d 265 (Fla. 1988) . . 49

State v. Smith, 840 So. 2d 987 (Fla. 2003) 8

Steinhorst v. State, 412 So. 2d 332 338 (Fla. 1984) . .18, 29, 39,
52, 53

Sutton v. State, 834 So. 2d 332 (Fla. 5th DCA 2003) . . . 9

Tedder v. State, 322 So. 2d 903 (Fla. 1975) 37

Terry v. State, 668 So. 2d 954 (Fla. 1996) 58

Thompson v. State, 619 So. 2d 261 (Fla. 1993) 54

Tompkins v. State, 502 So. 2d 415 (Fla. 1986) 13

Tompkins v. State 2003 WL 22304578, 12 (Fla. 2003) . . . 62

Trease v. State, 768 So. 2d 1050 (Fla. 2000) . . . 10, 61, 62

Trepal v. State, 621 So. 2d 1361 (Fla. 1993) 16

Urbin v. State, 714 So. 2d 411 (Fla. 1998) 58

Watts v. State, 593 So. 2d 198 (Fla. 1992) 26

Welty v. State, 402 So. 2d 1159 (Fla. 1981) 50

Willacy v. State, 696 So. 2d 693 (Fla.), cert. denied, 522 U.S. 970 (1997) 45

Wilson v. State, 436 So. 2d 908 (Fla. 1983) 50

Wuornos v. State, 676 So. 2d 972 (Fla. 1996) 39

Zack v. State, 753 So. 2d 9 (Fla. 2000) 9

Zakrzewski v. State, 717 So. 2d 488 (Fla. 1993) 47

STATUTES AND RULES

Florida Rule of Criminal Procedure 3.210(b) 22

Section 90.402, Florida Statutes 10

Section 90.403, Florida Statutes 11

PRELIMINARY STATEMENT

Appellant, Lucious Boyd, Defendant below, will be referred to as "Boyd". Appellee, State of Florida, will be referred to as "State". Reference to the record will be by "R", to the transcripts by "T", to supplemental materials by "SR" or "ST", and to Boyd's brief will be by "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On April 14, 1999, Boyd was indicted for first-degree murder, armed kidnapping, and sexual battery of Dawnia Dacosta ("Dacosta"). Voir dire commenced December 3, 2001 and a jury was seated the next day. Opening statements were given January 7, 2002, and on January 30, 2003, guilty verdicts were returned on each count. (R 6-7, 461-63; T 2, 378, 457, 1758-76, 2088-89).

Following the March 11-12, 2002 penalty phase, the jury unanimously recommended death for the murder. The Spencer v. State, 615 So. 2d 688 (Fla. 1993) hearing was held on March 27, April 10, April 30, and May 29, 2002. During the June 21, 2002 sentencing, the court imposed death for the murder, 15 years for the armed kidnapping, and life for the sexual battery. (R 498, 546-55).

The facts developed below established that on the evening

of Friday, December 4, 1998, 21 year-old Dacosta attended church services which ended after 1:00 a.m on Saturday, December 5, 1998. Shortly thereafter, she ran out of gas and left her car on the shoulder of Interstate 95 at Hillsboro Boulevard, Deerfield Beach. Dacosta went for gasoline at a nearby Texaco gas station on Hillsboro Boulevard, just east of the highway. While waiting in line at the Texaco, Linda Bell and Johnnie Mae Harris saw a young woman carrying a little red gas can approach from I-95 seeking assistance. Dacosta purchased fuel and sought a ride. Boyd, identified by Harris, arrived driving a van,[1] spoke to Dacosta, and indicated he would help. She was not seen alive again. (T 486-87, 492-94 507-08, 517-42, 548-55).

Later that morning, Daphne Bowe reported her daughter missing. During the weekend, friends and police distributed fliers about Dacosta throughout the area. On December 7, 1998, Dacosta's body was found in an Oakland Park warehouse area near a dumpster. Her head was wrapped in two black plastic trash bags and a laundry bag, and her body was enshrouded in a shower curtain and two sheets - one brown, the other yellow. (T 494-

[1]According to Bell, the van was green with no writing. Harris thought the van had the word Hope on it, but was unsure of the color, although she told the police it was burgundy. Geneva Lewis said Boyd used a green van with "hope" in burgundy lettering to take her shopping that weekend (T 518-22, 549, 560-65, 683-89).

503, 592, 598, 906-15).

Forensic odontologist, Dr. Rifkin, identified Dacosta using dental records. Dr. Alexandrov, the medical examiner, deemed the death a homicide caused by a penetrating head wound. The bruising to Dacosta's head was consistent with being hit with the face plate of a Craftsman reciprocating saw. Her 36 stab wounds were consistent with a Torx screwdriver, and injuries to her hands and arms were defensive wounds. The injuries were obtained antemortem. The vaginal bruising was consistent with either consensual or non-consensual intercourse (T 764-65, 773-74, 1570-71, 1580).

From August until October 1998, Boyd, Geneva Lewis ("Lewis"), and her three children lived at 259 SW 1st Street, Apartment #2, Deerfield Beach ("apartment #2"). When Lewis moved out, she left her queen size bed and matching bedroom furniture on which she was making payments. When she returned in February, 1999, the bed was missing. Only when asked about the bed did Boyd give various explanations - he sold or gave it away - eventually stating she would not want the bed (T 813-16, 823-24, 1825-26).

While on another investigating, Detectives Bukata and Kaminisky, happened upon a green van with the word "Hope" in burgundy lettering and discovered it was owned by Reverend Lloyd

("Lloyd"). In March, 1999, Lloyd stated he left town on the afternoon of December 4, 1998 and Boyd had the van from then until December 7, 1998. Among the items found missing from the van were a Torx screwdriver set, Craftsman reciprocating saw, and a laundry bag. The van was detailed at least four times between December, 1998 and the March, 1999 police examination (T 683-91, 710-12).

Fingerprints, tire tracks, bodily fluids, and fiber evidence were collected from the scene where Dacosta's body was found, from her body, and from apartment #2. DNA samples were obtained from Boyd, Dacosta, and others connected with the case. Such analysis revealed Boyd's sperm was in Dacaosta's vagina, on her thighs, under her fingernails, and in a hair found on her chest. Dacosta's blood was found on the underside of Boyd's bedroom carpet, on the armoire, and living room floor. Two fingerprints (from Lewis and her son, Zeffrey) were on the black trash bag covering Dacosta's head. The tire track left at the scene was made by a tire of the same size and brand mounted on the van. A burgundy fiber collected from the sheet wrapped around Dacosta was the same as one collected from a rug in apartment #2. Dr. Rifkin's dental exam concluded Boyd was the person who left the bite marks on Dacosta's hands and arms (T 824-26, 904-15, 918-31, 940-45, 954-55, 958-69, 986, 992-1004,

1028-41, 1079-97, 1128, 1372-93, 1412-14, 1511-16, 1552-57, 1570-80, 1607-10, 1623-31, 1638-42, 1674-77, 1696-1703, 1716-36).

Boyd testified and denied committing the crimes charged. On cross-exam, he admitted working in the family funeral home. He confirmed living in apartment #2 in December, 1998, and that Lewis and her children had lived with him until October, 1998. Boyd reported leaving Lewis at her mother's home before 11:00 p.m. on Friday, December 4, 1998 and not returning until the following morning before 10:00 a.m. driving Lloyd's green van with the word "Hope" in burgundy lettering. He had the van the entire weekend and was the only person to drive it. Boyd affirmed, that although Lewis was making payments on the queen bed, he Boyd sold it. He admitted telling the police he had never seen Dacosta before. Boyd confirmed he did not supply a sperm sample to the police and offered no explanation how his sperm came to be found on/in Dacosta or his DNA under her fingernails. In an attempt to explain Dacosta's blood on his armoire, Boyd offered Detective Bukata planted it. The jury convicted Boyd of the crime charged (R 461-63; T 1806-07, 1809-14, 1817-21, 1825-26, 1838-45, 2088-89).

In the penalty phase Chief Medical Examiner, Dr. Perper, noted the injuries to Dacosta's head were consistent with the

face plate of the reciprocating saw. The 36 injuries to her chest, and those near her right eye, temporal lobe area, back of right hand, right forearm, and left hand were consistent with being caused by a #10 Torx screwdriver. The wounds to the hands and forearm were defensive wounds. With the exception of the one to her brain, all were superficial, involving only the skin and subcutaneous fat below, but not penetrating the body cavity. These would cause bleeding, pain, and fear, but not death. They would not induce a loss of consciousness, unless the person fainted from fear. Conscious victims do not sustain defensive wounds. The bruising around the superficial wounds indicates Dacosta was alive when they were inflicted. Protruding from her head in the temporal right parietal area was brain matter; this was the fatal wound. It perforated and touched her brain, causing extensive hemorrhaging in the skin, head, and scalp which indicates she survived for "some time", but "less than hours." The State rested after presenting victim impact evidence through Dacosta's mother, sister, and friend (ST 443-45, 447-54, 461-62, 470; ST 454, 462, 479-88).

Pre-trial, and during the interim between the phases, Boyd vacillated on presenting mitigation. At the close of the State's penalty case, Boyd announced he did not wish to put on witnesses even though counsel had caused some to be available.

The court asked Boyd to have further discussions with his counsel and family, going so far as to clear the courtroom to permit them to meet privately in comfort. In the end, Boyd decided to present mitigation involving testimony from Pastor Matthews, then himself. Pastor Matthews spoke of Boyd's forgiveness, good jail behavior, and religious beliefs. Boyd's narrative revolved around denying guilt for the crimes and claiming evidence was planted. He voiced sympathy for Dacosta's death and her family's sorrow, but denied responsibility. (T 2097, 2120-21, 2138-68, 2215-38, 2290).

The Jury rendered a unanimous death recommendation. The court ordered a PSI and sentencing memoranda. During the Spencer hearing, Boyd did not present evidence, but asked for new counsel, which was denied. On June 21, 2002, he was sentenced to death with the judge finding HAC and "felony murder" in aggravation and mitigation of: (1) no significant history of prior criminal activity; (2)religion; (3) good jail record; (4) family and friends love Boyd; (5) good family; (6) remorse. (R 487, 498 511-34, 546-55).

SUMMARY OF THE ARGUMENT

Issue 1 - There was no abuse of the court's discretion in denying individual juror interviews or a mistrial as the court heard from the witness alleging misconduct and deputies in charge of the jury before assessing the credibility of the allegation and noting it did not rise to a need for juror interviews.

Issue 2 - The discarding of an AFIS report done on fingerprints never introduced into evidence and which yielded no matches was neither a Brady or Richardson violation. The claimed Richardson violation is not preserved for appeal. However, the material satisfied none of the prongs of Brady or Richardson, but in particular, the material was neither exculpatory nor did it prejudice the defense case.

Issue 3 - The denial of the judgments of acquittal were proper. There is sufficient evidence to establish sexual battery, premeditation, and armed kidnapping.

Issue 4 - The admission of a Tri-Rail citation was appropriate as it placed Boyd in his apartment near the time of the crimes and rebutted the defense argument otherwise. At worst it was harmless given the vast amount of evidence of Boyd's guilt.

Issue 5 - The court did not abuse its discretion in

permitting the prosecutor to cross-examine Boyd regarding his employment in a funeral home and aspects about the crimes changed.

Issue 6 and 7 - The court did not abuse its discretion in not considering the reports of Drs. Shapiro and Block-Garfiled as they were not presented to him. Additionally, there was no basis to conduct another competency hearing as there was nothing presented to call into question the prior determination of competency.

Issues 8, 9 and 15 - Neither Koon nor Muhammad apply to Boyd's case as he presented mitigation, thus, such hearings were not required. The dictates of Mora apply wherein a defendant's right to direct the type mitigation presentation is acknowledged.

Issue 10 - Whether mitigation should be presented and by whom it should be offered rests with the defendant.

Issue 11 - HAC was established from the number, type, placement, and timing of the wounds. The felony murder aggravator was established through the contemporaneous felony convictions. The death penalty has been affirmed in cases where only HAC and little mitigation has been found.

Issue 12 - Dacosta's autopsy photographs were admitted properly as they assisted in proving HAC through the defensive

wounds which showed she was conscious, fighting her attacker, while experiencing torturous pain and fear.

Issue 13 - Boyd's death sentence is proportional.

Issue 14 - The court did not abuse its discretion in its assessment and weighing of Boyd's mitigation.

ARGUMENT

ISSUE 1

THE REQUEST FOR A MISTRIAL BASED UPON AN ALLEGATION OF JUROR MISCONDUCT WAS DENIED PROPERLY (restated)

Boyd points to the testimony of Margaret Woods-Alcide ("Alcide") and asserts it was error not to question the jurors individually and to deny a mistrial (IB 16-24). The record shows that the court found Alcide not credible given her refuted testimony and the representations of the court deputies that standard jury procedures were followed. Because the allegations were not credible neither interviews nor a mistrial were required.

Review of a decision to deny **juror interviews** is abuse of discretion. Shere v. State, 579 So.2d 86 (Fla. 1991); Gonzalez v. State, 511 So.2d 700 (Fla. 3d DCA 1987). Discretion is abused only when the judicial action is arbitrary, fanciful or unreasonable. Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So.2d 1247 (Fla. 1990). A trial court's ruling on a **motion for mistrial** is subject to an abuse of discretion standard. Smith v. State, 866 So.2d 51, 58-59 (Fla. 2004); Anderson v. State, 841 So. 2d 390 (Fla. 2002); Smithers v. State, 826 So. 2d 916, 930 (Fla. 2002); Gore v. State, 784 So. 2d 418 (Fla. 2001).

On March 12, 2002, the court was given a note written by Boyd's long time friend, Alcide, alleging an incident took place just prior to jury deliberations involving jurors in the bathroom discussing a news article about Boyd. Also, Alcide recounted six areas where she questioned the State's evidence and gave her opinion that there should have been a venue change. (T 2292).

The court voiced skepticism at the possibility jurors were in a public restroom given the court's safeguards "because at least if my deputies do what they normally do these jurors would never have been in the restroom because they're taken as soon as they present themselves into the jury room where they pretty much remain." Also, "the general procedure in this courtroom...once the jury has been sat are sworn (sic), we don't let them languish in the hallways, we get them and seat them in the jury room to keep them sequestered from the public." Deputies Robin and Tracy affirmed the standard procedures had been followed. (T 2291-94).

When questioned by the State, Alcide admitted knowing Boyd's family for a long time and that she does not remember things well. She was in court the last week or two of the guilt phase, sometime just before deliberations. She claimed three jurors were in the public restroom discussing a news article about Boyd

in the presence of other "spectators." While in there, the jurors were talking among themselves, but "spectators" were having the same discussion. One of the spectators sat next to Alcide and "**he** was saying, you know, I heard this guy and he said the same thing. Said **he** heard the same thing these ladies were talking about." (T 2295-98, 2301, 2307-10, 2317-18, 2328).

Alcide had difficulty identifying the jurors giving only a general seating location; she had trouble with hair colors. At one point she stated she knew the black juror, but could not recall her name as she had not seen her in a long time. Alcide offered she knew the juror from an apartment complex where Alcide drove a bus, but then retracted it. She first told Boyd of the incident a few nights ago when he telephoned. Alcide explained the five week delay was because she did not want to say anything in front of Boyd's mother, and was trying to have Boyd call her, but they missed each other. She did not tell Boyd in court because the judge had excused the gallery, but when reminded the judge keeps the gallery in place until the jury leaves, Alcide replied "exactly. But I did not come up to him during that time." She then fell back to the explanation she had been trying to have him call, but they missed each other. Eventually, Boyd telephoned via a conference call with another woman. Alcide did not get a name, but later said it may

have been "Mosely." The call was sometime between the 8th and 10th of March. She noted it would be on her Caller-ID. (T 2298-2300, 2303-06, 2310-13).

Responding to questions about the six paragraphs challenging the State's evidence, Alcide claimed she could not remember what was written without reading it. She maintained she listened to the prosecutor and wrote in the note[2] the things he said which questioned the State's evidence. (T 2314, 2319-23). The exchange between the prosecutor and Alcide is telling.

> Q. This sounds like the stuff that Mr. Boyd said --
>
> A. No, it came out of your mouth. Mr. Boyd didn't even know I was thinking like that and I talked to him. I haven't seen Lucious since 1990. We have not spoken. Have not talked. Okay. Until he talked to me the other night. And I brought him all this stuff to him that I pay attention to what you were saying. He was shocked.
>
> Q. Right. Isn't this all the stuff I heard Mr. Boyd argue to the jury?
>
> A. **Because he read the letter from what I wrote**.[3]

---

[2]She claimed she wrote the note when the prosecutor said these things, but did not give it to Boyd's brother until "court today." She complained she kept telling Boyd to call and he said he would. Later, she said she was asking Boyd's brother to have Boyd call. (T 2315-16). **When defense counsel objected to questioning Alcide about the first six paragraphs, the objection was overruled because the issue before the court involved Alcide's credibility** (T 2321).

[3]Earlier, she said she gave Boyd the note that day (2315).

...

> Q. And you thought that would help him, didn't you?
>
> A. No, I didn't. ... I just wanted him to know what I wrote, how I felt and what I heard in the bathroom and we was very, very shocked because that's the first I talked to Lucious. I didn't want nothing to interfere with the trial.

(T 2323-25).

When defense counsel voiced concern at a civilian witness being interrogated by the court without counsel. The judge noted:

> My primary focus is Mr. Boyd's rights and preservation of the integrity of this trial. Ms. Alcide is really not of great concern to me, and I don't mean to say this in a callous way, and I am certainly not going to trounce her rights without the benefit of counsel.

(T 2330). The judge wished for guidance from counsel after he had an opportunity to confer with Boyd (T 2332-34). Following a recess, the State reported a check of NCIC and the Clerk's computer revealed Alcide had been before another judge that morning for a termination of felony probation. It was the Court's conclusion:

> In reflecting on the information, the source of the information, the circumstances of the information, respectfully the Court is going to deny the defendant's motion for mistrial. We are going to proceed to present this case to the jury panel and then we will follow-up, if you will, with Ms. Alcide at the conclusion of the jury's decision.

(T 2339). When challenged by Boyd, the court stated "I would

make a finding that the evidence that has been presented to this Court does not rise to a level that I would even make the inquiry to the members of this jury panel.” (T 2342-43).

Following the jury’s sentencing recommendation, the court inquired of the jury whether the jurors could:

> ... assure us that at no time during any moment since you have been seated as a juror since the beginning of this trial, have you discussed this matter with any third persons, whether it be at home, whether it would be at the office, whether it would be in the hallway, **whether it would be in the restroom**, whether it would be in the Burger King, or any place in this courthouse, you have not discussed these matters with anyone **nor have you seen, listened, viewed, heard anything about this case other than what transpired in this courtroom in your presence**.

(T 2395) (emphasis supplied). This was the same type of inquiry the court made each time the jury reconvened. For example, on January 23, 2002 the court inquired:

> ... I would again like to ask by nods of your heads, can all of you assure that you have not discussed any matters related to this case with anyone since we parted company yesterday afternoon?
>
> ...
>
> ... can all of you assure us that you have not seen, heard, listened, viewed anything regarding the State versus Lucious Boyd should there had (sic) been anything in the media presentation, again since we parted company yesterday?

(T 1670-71). Comparable questions were asked on January 8 (second day of testimony), January 28 (prior to Boyd’s guilt

phase testimony), January 29, (before closing arguments and sequestration), and on March 11 (day before Alcide's note) (T 616-18 1804-05, 1932-33; ST 429-30). On January 30, **just before deliberations**, the judge asked: "Can all of you assure us that none of you have discussed any matters with anyone including amongst yourselves outside our presence when we adjourned yesterday evening?" and "can you assure us that you've seen nothing or heard nothing or listened to anything about this case?" (T 2081).

A verdict may not be impeached by juror conduct which inheres in the verdict. Johnson v. State, 593 So.2d 206, 210 (Fla. 1992). "[J]uror interviews are not permissible unless the moving party has made sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceeding. Kearse v. State, 770 So.2d 1119, 1127-28 (Fla. 2000). While reading news articles about the case does not inhere in the verdict and is subject to inquiry, Baptist Hospital v. Maler, 579 So.2d 97, 100 (Fla. 1991), the scope of that inquiry is within the court's sound discretion. Resolution of conflicting evidence is a function of the court's fact finding responsibilities which will not be overturned unless unsupported by the evidence. Marshall v. State, 854 So.2d 1235,

1242 (Fla. 2003) (remanding for limited evidentiary hearing to attempt to obtain identity of female juror who spoke to affiant and to interview that juror and conduct further inquiries "only if the court determines that there is a reasonable probability of juror misconduct."); Kelly v. State, 569 So.2d 754, 762 (Fla 1990) (affirming finding of no juror misconduct based upon resolution of conflicting evidence); Gonzalez, 511 So.2d at 701 (recognizing judge has discretion in determining how to respond to claim of juror misconduct); United State v. Ramsey, 726 F.2d 601, 604 (10th Cir 1984) (recognizing before juror interviews are required, there must be finding allegation is not frivolous).

Although a postconviction case, Marshall is instructive.

> In considering claims of juror misconduct, a court must initially determine whether the facts alleged are matters that inhere in the verdict and are subjective in nature, or are extrinsic to the verdict and objective. ... However, jurors may testify as to "overt acts which might have prejudicially affected the jury in reaching their own verdict.".

Marshall, 854 So.2d at 1240 (footnote and citation omitted). Resolving this issue, this Court considered State v. Santiago, 245 Conn. 301, 715 A.2d 1 (1998) and quoted from Chief Justice Callahan's concurring in part and dissenting in part opinion:

> In *Brown*, we concluded that "[t]he more obviously serious and credible the allegations, the more extensive an inquiry is required; frivolous or incredible allegations may be disposed of summarily."

> *Id.* An allegation of racial bias is perhaps the most serious of juror misconduct allegations. Pursuant to the rule adopted in *Brown*, the trial court always will be obliged to conduct an inquiry.... Once the allegation is found to be frivolous or incredible, however, there is no compelling reason to engage in a full evidentiary hearing.
>
> ... Every case is unique, however, and must be viewed individually. It is for this reason that, in *Brown*, we left the form and scope of the inquiry to the discretion of the trial court. In light of all of the evidence presented in this case, the trial court's inquiry was adequate because the court found the source of the allegations unbelievable and thus did not abuse its discretion in halting the inquiry when it did. The majority opinion discounts any consideration of factors that weigh in favor of the state, and instead tips the balance wholly in favor of the defendant, irrespective of the unbelievability of the allegations or the harm that might result from an unnecessary recall of the jurors.
>
> ... Moreover, the finality of judgments and the legitimate expectation of jurors that their deliberations will be private and that they will not unjustly be made to defend against baseless charges or have their integrity impugned, weigh in favor of not continuing the investigation when the source of the allegation is completely discredited by the trier of fact. To give credence to [the juror's] meritless allegations in this case by establishing a per se rule that arbitrarily mandates a full evidentiary inquiry into the most baseless of assertions demeans, rather than enhances, our notions of justice. [State v. Santiago, 715 A.2d 1] at 26-27.

Marshall, 854 So.2d at 1244. The case was remanded for a **limited inquiry**, one which could be expanded only if the court finds "a reasonable probability of juror misconduct." Id. at 1253.

The record reflects the court conducted a sufficient inquiry to establish there was no reasonable probability of misconduct. The judge knew the jurors would not be using a public restroom because when they arrived in the morning they are taken by deputies to the jury room where they remained. Also, when the jurors were released for recesses, the court held the gallery spectators until the jurors had cleared the area. The daily questioning of jurors about outside influence never revealed any misconduct. It is upon this backdrop Alcide's allegation was addressed.

Investigating the issue, the court questioned its deputies and determined the appropriate procedures were followed. After the extensive examination of Alcide, which showed her ever evolving answers and clear bias, the court learned she had been released from a felony probation just that day. The court denied the mistrial based upon "the information, the source of the information, [and] the circumstances of the information" (T 2339). The court found: "the evidence that has been presented to this Court does not rise to a level that I would even make the inquiry to the members of this jury panel." (T 2342-43). Clearly, the court conducted a sufficient inquiry, found Alcide not credible and determined no invasive inquiry of the jurors was necessary before penalty phase deliberations. Nonetheless,

later the jurors were asked as a group whether they had any outside contact or discussions about the case or whether they read media accounts, including in the restroom. All replied in the negative. Based upon Marshall, the court's inquiry was extensive enough to determine the nature of the allegations and to assess them for what they were, a misguided, frivolous attempt to cast aspersions on the jurors in hopes of helping a long time friend.

It is Boyd's contention the court's failure to question the jurors requires Alcide's allegations be taken as true. (IB 24 n.3). However, Alcide's allegations were controverted not only by the court deputies', but by the court's knowledge of how the jury was handled, the daily juror acknowledgments of no outside contact, and Alcide's own meanderings in testimony and recollections. It is within the province of the court to determine witness credibility. Given these conflicts, the court's finding must be affirmed.

Boyd points to Gonzalez, 511 So.2d at 700 and Henderson v. Dade County School Bd., 734 So.2d 549, 549-50 (Fla. 3d DCA 1999) to suggest interviews were required. Yet, in Gonzalez, unlike here, the allegation of misconduct was more credible coming from a fellow juror. Gonzalez, 511 So.2d at 701. In Hernandez, the allegation was brought by an officer of the court and of

sufficient weight to re-instruct the jury. It was the remedy, mere re-instruction without jury questioning, which was insufficient. Conversely, in Boyd's case, the judge found the allegation not credible. Upon this, the inquiry should end. Marshall, 854 So.2d at 1244, 1253.

Neither Cappadona v. State, 495 So. 2d 1207 (Fla. 4th DCA 1986) nor Weber v. State, 501 So. 2d 1379 (Fla. 3d DCA 1987) are dispositive. Both involve cases where the court found the allegations that the jurors learned the defendants had been convicted previously, but were being retried. Again, the instant matter is different.[4] The information did not involve knowledge of a prior conviction on the instant charges, predetermination of guilt, or truthful allegations. The question to be resolved here was whether the court abused its discretion in rejecting the non-credible allegations by Alcide after a thorough inquiry, not the appropriateness of remedy applied after a finding of misconduct.

The facts in Keen v. State, 639 So. 2d 597 (Fla. 1994) and Wilding v. State, 674 So. 2d 114 (Fla. 1996) distinguish them from Boyd's case. In Keen, there was uncontroverted evidence

[4]Alcide's allegation is not one of a predetermination of guilt, but merely where Boyd had been acquitted previously. Her claim was not believable based upon the facts she alleged and bias she showed.

that improper materials were in the jury room and had been read during deliberations. In Wilding, the jurors were concerned the defendant had their personal information and would exact revenge. Both allegations came from credible sources. In Keen it was counsel who saw improper material gave them to the court and it was a disinterested third party, assistant clerk in Wilding. Such is not the situation here. Instead, a non-credible, friend of Boyd's came forward about overhearing jurors discussing a news article in a location where the jurors would not frequent. Given that the impossibility of the account and bias of the witness, there was no basis to require intrusive juror questioning.

This Court should find the court exercised its discretion properly in resolving the veracity of the allegations. Where the allegations of misconduct are not credible, and in this case are proven untrue, there is no basis for a mistrial. As provided in Smith v. State, 866 So.2d 51, 58-59 (Fla. 2004), "[a]n order granting mistrial is required only when the error upon which it rests is so prejudicial as to vitiate the entire trial, Overton v. State, 801 So.2d 877, 898 (Fla.2001), making a mistrial necessary to ensure that the defendant receives a fair trial, [Cole v. State, 701 So.2d 845, 853 (Fla. 1997)]." There is nothing in this record to suggest there was anything so

prejudicial as to vitiate the entire trial. The denial of the mistrial was proper.

ISSUE 2

BOYD's CONTENTION THAT THE STATE COMMITTED A BRADY VIOLATION BY DESTROYING EXCULPATORY FINGERPRINT REPORTS IS WITHOUT MERIT (restated).

Boyd contends the State committed a Brady v. Maryland, 373 U.S. 83 (1963) violation by destroying an exculpatory computer print-out from the Automated Fingerprint Identification System ("AFIS") and the court erred by denying the defense request to either re-produce the AFIS print-out or strike the testimony of the fingerprint examiner, Thomas Mesick. Alternatively, Boyd contends the court failed to conduct a proper Richardson v. State, 246 So.2d 771 (Fla. 1971) inquiry upon notification of a discovery violation. This Court will find that the trial court properly denied the defense request, finding neither a Brady nor Richardson violation.

The standard of appellate review for a Brady claim is that deference is afforded to the court's factual findings as long as they are supported by competent, substantial evidence, while the application of the law to the facts is reviewed *de novo*. See Lightbourne v. State, 841 So.2d 431, 437-38 (Fla. 2003); Stephens v. State, 748 So.2d 1028, 1031-32 (Fla. 1999); Rogers

v. State, 782 So.2d 373 (Fla. 2001). The standard of review for a Richardson violation is whether the court abused its discretion in determining if a violation occurred and if so, whether it was inadvertent, and not prejudicial to the defense preparation. Pender v. State, 700 So. 2d 664 (Fla. 1997) (opining "where a trial court rules that no discovery violation occurred, the reviewing court must first determine whether the trial court abused its discretion").

The alleged Brady or Richardson violation arose during the testimony of Thomas Mesick ("Mesick"), a latent print examiner for 15 years, who works for the Broward County Sheriff's Office Latent Fingerprint Unit, and was the examiner here. Mesick testified he received latent fingerprint lifts from Detective Suchomel and attempted to match them to known standards, without success (T 1509-11). Mesick was allowed to use digital imaging enhancement on two of the lifts and compared them to the prints from Lewis and her son, Zeffrey ("Zeffrey"). The enhancement marked 7A matched the left middle finger of Lewis and the one marked 2B matched Zeffrey's right thumb. Those prints could belong to no one other than Lewis and Zeffrey (T 1511-13, 1515-16).

On cross-examination, Mesick explained AFIS is a program that checks fingerprint lifts against a database of known prints

in Florida and produces a listing of possible matches. He visually compares the lifts against the possible matches on the computer screen. Mesick ran the first set of digitally enhanced prints through AFIS and received a number of comparisons (he does not know how many) but was not able to make an identification; none of them matched. He was given a second set of digitally enhanced prints which he did not run through AFIS. Instead, he compared them with the 28 sets of prints collected in the case and matched one to Lewis and one to Zeffrey (T 1517, 1519-23, 1528, 1533).

Defense counsel argued there was a Brady violation because he was not given the AFIS print-out of possible matches for the **first set of digital enhancements** (T 1529). He asked that the AFIS report be re-run or Mesick's testimony be stricken. Outside the jury's presence, Mesick explained that when he runs an AFIS search, it produces a list of possible matches which he views on the computer screen. AFIS gives a print-out of the possible matches and a numerical potential for them to match. He reported discarding the print-out because no identification was made which was consistent with office practice. Mesick stated that if he re-ran the same print through AFIS today, he would not get the same list of possibilities due to the addition of new prints to the system (T 1531, 1534-37).

The court denied the motion to re-run the AFIS search of the first set of digitally enhanced prints and to strike Mesick's testimony, reasoning there was no "reasonable possibility [of] generat[ing] the information today. The court noted that a print-out produced today would have different information then one produced two-three years earlier based on the entry of new prints into the system during that time. The court noted there was open discovery until speedy trial was filed and it had not been provided any material or information that would be detrimental or prejudicial to the defense. The court further concluded that no Brady material existed because the material that was generated previously could not be recaptured today (T 1547-49).

The court correctly denied the request to re-run the AFIS search or to strike Mesick's testimony. To establish a Brady violation, the defendant must allege specific facts that, if accepted as true, establish a prima facie case that:[5]

---

[5]In Strickler v. Greene, 527 U.S. 263 (1999), the Supreme Court stated there are three elements of a true Brady violation:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Strickler, 119 S.Ct. at 1948.

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991) (quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989)). See, Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999); High v. Head, 209 F.3d 1257, 1265 (11th Cir. 2000); U.S. v. Starrett, 55 F.3d 1525, 1555 (11th Cir. 1995); Jones v. State, 709 So.2d 512, 519 (Fla. 1998). When pleading a Brady claim, a defendant must show counsel did not possess the evidence, could not have obtained it with due diligence, **and** that the prosecution suppressed the favorable, material evidence. Evidence has not been suppressed, and thus, there is no Brady violation where the information is accessible equally to the defense and state, or where the defense either had it or could have obtained it through use of

---

It is clear the two standards are the same. See Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000)(reasoning "[a]lthough the 'due diligence" requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant."); High v. Head, 209 F.3d 1257 (11th Cir. 2000) (finding Strickler did not abandoned due diligence requirement of Brady); Way v. State, 760 So. 2d 903 (Fla. 2000).

due diligence. Freeman v. State, 761 So.2d 1055, 1061-62 (Fla. 2000); Provenzano v, State, 616 So.2d 428, 430 (Fla. 1993).

Further, to satisfy prejudice under Brady, a defendant must show the evidence was exculpatory and material. Way v. State, 630 So.2d 177, 178 (Fla. 1993). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. Prejudice is measured by determining whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435 (1995). "As noted by the United States Supreme Court, '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'" Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988) (quoting U.S. v. Agurs, 427 U.S. 97, 109-10 (1976)).

Boyd has failed to establish a Brady violation. First, he has failed to establish that the print-out was evidence favorable to him, i.e., that it was either exculpatory or

impeaching. To the contrary, the undisputed evidence shows that the print-out was not favorable to Boyd. It is important to remember that the print-out at issue involved the **first set** of digitally enhanced fingerprints, not used to make a match. Mesick testified the clarity of the **first set** was poor and no identifications could be made from them. It is clear the print-out did not contain favorable or exculpatory evidence. The fingerprints that were admitted into evidence, i.e., the matches to Lewis and Zeffrey, are from the **second** set of digitally enhanced fingerprints, which were never run through AFIS. See Tompkins v. State, 2003 WL 22304578 (Fla. 2003)(finding police report regarding investigation into disappearance of murder victim's friend was not **exculpatory** Brady evidence, even though it mentioned murder victim's name and provided name of possible suspect in disappearance, because there was no indication in report that victim had contact with possible suspect).

Second, Boyd failed to establish he did not know about the AFIS print-out or could not have obtained it with reasonable diligence. It was defense counsel who first raised the existence of a computer print-out, on cross-examination, demonstrating his knowledge of its existence. Further, it is clear the defense had the opportunity to depose Mesick pre-trial and could have inquired about the print-out, but chose not to.

See Haliburton v. Crosby, 342 F.3d 1233, 1239 (11th Cir. 2003)(rejecting Brady claim that State withheld fingerprint test results on knife used in separate attack that was nolle prossed six years before, reasoning State had open files policy and defendant could have requested file and obtained results).

Third, it is clear the destruction of this evidence was inadvertent and not willful. There was nothing exculpatory, in fact nothing of value, about the AFIS run.

Fourth, Boyd has failed to establish prejudice. The print-out was not material because there is no reasonable probability the outcome of the proceedings would have been different had it been disclosed. See Squires v. Dugger, 794 F.Supp. 1568 (M.D. Fla. 1992)(rejecting Brady claim based on withheld fingerprint reports from lifts found at crime scene on ground reports were not material as they would not have produced an acquittal; defense elicited from fingerprint expert that none of the prints matched defendant).

It is undisputed the print-out involved the **first set** of digitally enhanced lifts which were of poor clarity and from which no identifications or matches were made. Further, none of those prints were admitted into evidence; it was the **second set** of digitally enhanced lifts that were admitted into evidence. Because the print-out did not produce any matches and because

none of those prints were admitted into evidence, there was no reasonable probability that the result of the proceeding would have been different had it been disclosed. The print-out has no effect on the evidence presented in this case and Boyd has failed to establish a Brady violation.[6] See Guzman v. State, 2003 WL 22722404 (Fla. Nov. 20, 2003) (rejecting Brady claim based on non-disclosure of $500 reward received by State witness for testimony against Guzman because there was no reasonable probability the result of the proceeding would have been different had information been disclosed); Allen v. State, 854 So.2d 1255, 1260 (Fla. 2003) (rejecting Brady claim based on non-disclosure of hair analysis done on two hairs found on

---

[6]Even if this claim were analyzed as one involving the failure to preserve potentially useful evidence, Boyd has failed to establish a denial of due process. In Arizona v. Youngblood, 109 S.Ct. 333 (1988), the Supreme Court held that the State's failure to preserve semen samples and clothing did not violate the Due Process Clause of the Fourteenth Amendment because the defendant could not show "bad faith" on the State's part. Under Youngblood, bad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant. See Guzman 2003 WL 22722404 (rejecting due process claim for failure to preserve evidence); State v. King, 808 So.2d 1237, 1242 (Fla. 2002)(holding defendant failed to show bad faith by State in destroying hair and tissue evidence, in part, because defendant failed to show police made conscious effort to prevent defense from securing evidence); Merck v. State, 664 So.2d 939, 942 (Fla. 1995)(holding defendant failed to show bad faith in detective's failure to preserve pair of pants because he believed pants did not have evidentiary value). There was no due process violation here because the police did not intentionally destroy evidence they believed would exonerate Boyd.

victim's hand as confidence in verdict was not undermined because although hairs did not match defendant, victim could not be excluded as source).

Moreover, the court conducted a proper Richardson inquiry in this case, essentially determining the discovery violation was not substantial and that no prejudice was suffered by the defense. Initially, the State argues Boyd has failed to preserve the alleged inadequate Richardson inquiry for appellate review. It is well-established that in order for an issue to be preserved for appeal, it "must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So.2d 446 (Fla. 1993), quoting Tillman v. State, 471 So.2d 32, 35 (Fla. 1985). See Hines v. State, 425 So.2d 589 (Fla. 3d DCA 1982); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (holding in order for issue to be cognizable on appeal, it must be specific contention asserted below as ground for objection); Castor v. State, 365 So.2d 701, 703 (Fla. 1978) (noting objection must be sufficiently specific to apprize judge of putative error). Here, Boyd argued only there was a Brady violation; he failed to argue a Richardson violation. Boyd cannot complain for the first time on appeal the court conducted an inadequate Richardson inquiry.

Assuming arguendo this Court finds the issue preserved, the court conducted an adequate hearing in accordance with Richardson considering whether the discovery violation was inadvertent or willful, whether it was trivial or substantial, and whether it affected Boyd's ability to prepare his case. Richardson, 246 So.2d at 775. The court had broad discretion in determining whether the defendant was prejudiced and in determining what measure would best remedy the situation. See State v. Tascarella, 586 So.2d 154, 157 (Fla. 1991); Lowery v. State, 610 So.2d 657, 659 (Fla. 1st DCA 1993); Poe v. State, 431 So.2d 266, 268 (Fla. 5th DCA 1989). The court has discretion to determine whether a discovery violation would result in harm or prejudice to the defendant. See Barrett v. State, 649 So.2d 219, 222 (Fla. 1994); Booker v. State, 514 So.2d 1079, 1085 (Fla. 1987)(defining "abuse of discretion" -- discretion is abused only where no reasonable man could take view adopted by judge). Because the court did not abuse its discretion, this Court should not disturb that decision.

The court made implicit findings that any discovery violation was inadvertent, trivial and explicitly found that it did not prejudice the defense (T 1547-48). Finally, even if this Court determines the Richardson hearing was inadequate, it is well-established a failure to conduct a proper Richardson

hearing does not constitute *per se* reversible error and is subject to the harmless error test. State v Schopp, 653 So.2d 1016, 1019 (Fla. 1995). In determining whether a Richardson violation is harmless:

> the appellate court must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefitted the defendant. In making this determination every conceivable course of action must be considered. If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

Schopp, at 1020-21.

Applying that analysis here, it is clear any error was harmless. It cannot be argued seriously that Boyd's trial preparation or strategy would have been materially different if he had the AFIS print-out. The print-out did not contain any matches and the prints used were of poor clarity. Moreover, it would not have negated the impact of the prints that were introduced into evidence, from the second digitally enhanced

set.

The cases relied upon by Boyd do not entitle him to relief as they involve instances where the court either failed completely to conduct a Richardson hearing, see Donahue v. State, 464 So.2d 609 (Fla. 1985) (finding *per se* error in failure to conduct Richardson hearing); State v. Evans, 770 So.2d 1174 (Fla. 2000), failed to conduct an adequate one, see Blatch v. State, 495 So.2d 1203 (Fla. 4th DCA 1986), there was no prejudice or any error found harmless, see Whites v. State, 730 So.2d 762, 764 (Fla. 5th DCA 1999)(holding State's failure to disclose ballistics report did not prejudice defendant); Cox v. State, 819 So.2d 705 (Fla. 2002) (holding inadvertent discovery violation by failing to disclose defendant's statement to investigator, "I heard you found a weapon," was harmless and did not procedurally prejudice defendant), or where no Richardson violation was found, see Pagan v. State, 830 So.2d 792, 812 (Fla. 2002) (upholding finding of no Richardson violation after inquiry and in abundance of caution allowing defense to depose non-disclosed witness before he testified). Based upon this, affirmance is required.

However, if this Court finds error, such is harmless under State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). The evidence produced was Boyd's DNA under Dacosta's nails, in her

vagina, on her thighs, and in a hair found on her chest. Boyd's bite marks were found on her body. Her blood was in apartment #2 and a fiber found on her was the same as those from a rug in apartment #2. Boyd discarded Lewis's bed, although she was continuing to make payments on it. Tools similar to those to which Boyd had access were missing from Rev. Lloyd's van and were consistent with the instruments used to inflict the injuries. Boyd was identified in the van picking up Dacosta at the Texaco station. A tire tread mark found on the sheet covering her body was left by a tire consistent with those on the van. Failure to keep the AFIS print-out from a set of prints not introduced into evidence is harmless error beyond a reasonable doubt.

ISSUE 3

THE MOTION FOR JUDGEMENT OF ACQUITTAL WAS DENIED PROPERLY (restated)

Boyd contends the court erred in not granting judgment of acquittals for sexual battery, premeditated murder, and kidnapping (IB 31, 33, 35). It is the state's position Boyd's instant challenge to the sexual battery charge is unpreserved as he merely challenged the armed portion of that charge below. Nonetheless, the court properly analyzed the evidence in favor of the State, the non-moving party, and correctly found a prima facia case had been developed for armed kidnapping and

premeditated murder. Likewise, the Court accepted the State's concession that there was no evidence of a weapon being used during the sexual battery, and set the charge at sexual battery. This Court should affirm.

In Pagan v. State, 830 So.2d 792, 803 (Fla. 2002), this Court discussed the standard of review applicable here:

> In reviewing a motion for judgment of acquittal, a *de novo* standard of review applies. ... Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence. ... Because the evidence in this case was both direct and circumstantial, it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases.

Pagan, 830 So.2d at 803 (citations omitted). See Conde v. State, 860 So.2d 930, 943 (Fla. 2003) (noting where State produced direct evidence, court's determination will be affirmed if record contains competent, substantial evidence to support ruling); Crump v. State, 622 So.2d 963, 971 (Fla. 1993).

Boyd cites cases discussing the standard of review for a circumstantial evidence case. However, as noted in Pagan, such is not the appropriate standard to be used here as the State

presented direct evidence along with circumstantial evidence of guilt. Boyd's defense was allegations of planting of evidence because he was not at the Texaco station, he did not know nor had he seen Dacosta before, and he did not kidnap, rape, or kill her. The State presented Harris who identified Boyd as being at the gas station with Dacosta and stating he was going to help her (T 548-53). Also presented was testimony establishing the chain of custody of each item collected and the inability of the police to put Dacosta's blood under the bedroom carpet and within apartment #2. Hence, direct evidence was presented in the form of Boyd's contact with Dacosta just prior to her disappearance as well as proof the State did not plant evidence. The circumstantial evidence standard announced in Johnson v. State, 863 So.2d 271 (Fla. 2003); Darling v. State, 808 So.2d 145 (Fla. 2002); and Francis v. State, 808 So.2d 110 (Fla. 2001) does not apply.

When a defendant seeks a judgment of acquittal, he "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). Further:

> The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.

> Where there is room for a difference of opinion between reasonable men as to the proof of facts from which the ultimate fact is sought to be established, or where there is room for such differences as to the inference which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal.

Lynch, 293 So.2d at 45.

Sexual Battery - Boyd argues that the judgment of acquittal should have been granted on the sexual battery charge. Such issue has not been preserved for appeal. Steinhorst, 412 So.2d at 338 (holding except for fundamental error, an issue will not be considered on appeal unless it was presented to lower court; to be cognizable, "it must be the specific contention asserted as legal ground for the objection, exception, or motion below"). Below, counsel argued against only the "armed" portion of the sexual battery (T 1772). Consequently, this challenge is unpreserved.

Assuming arguendo the merits are reached, relief is not warranted. Under section 794.011, Florida Statutes, sexual battery "means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object...." The State under section 794.011(5) had to prove that the victim was 12 years of

age or older and that the sexual battery was without the victim’s consent.

Boyd offers that the evidence could have been interpreted as being a consensual encounter and tries to distinguish Carpenter v. State, 785 So.2d 1182 (Fla. 2001) and Darling v. State, 808 So.2d 145 (Fla 2002) on the basis the affirmance of sexual battery was due to stronger evidence. (IB 32). However, such is unavailing, and in fact, supports a finding of sexual battery in this case.

Here, the State presented evidence which established that Dacosta was 21 years old, that Boyd’s semen was found in her vagina and on her right and left inner thighs, and that Boyd had not provided a sperm sample to the police. The bruising to the vaginal area was consistent with either non-consensual or consensual intercourse. Dacosta had bite marks on her arm which were inflicted by Boyd, had defensive wounds on her arms and hands, and had 36 non-penetrating wounds to her chest, arms, and head inflicted by a tool consistent with a Torx screwdriver. (T 486, 764-69, 1580, 1629-31, 1844-45). Based upon this, there was substantial competent evidence of sexual battery of a person over 12. Any conflict in the evidence was an issue for the jury to determine, hence, the court properly denied the motion for judgment of acquittal. Carpenter, 785 So.2d at 1186, 1195-96

(finding sufficient evidence shown to prove sexual battery where deceased had bruises to her body and head, but no defensive wounds and medical examiner agreed it was medically possible vaginal injuries were result of consensual or non-consensual sex).

Boyd claims the intercourse could have been consensual and the jury was left to speculate. (IB 32). Granted the medical examiner stated the vaginal injuries could have been inflicted during consensual sex, but, the defense stipulated to the medical examiner's conclusion the evidence was equally consistent with the encounter being non-consensual and Boyd told the police he did not know Dacosta (T 764-65, 1346-47). As such, it became a matter for the jury to determine whether the evidence of Boyd's semen in and on Dacosta, the antemortem, torture-like injuries and defensive wounds to the victim inflicted before death, the vaginal bruising, Boyd's DNA under her fingernails,[7] and his bite marks on her arms constitute sexual battery. Given this, even if this Court reviews the issue as a purely circumstantial evidence case, the submission of the evidence to the jury and its verdict of guilt are proper.

---

[7]It must be remembered these crimes occurred near December 5, 1998 and Boyd was not arrested until March 26, 1999. There should be no concern raised from any lack of scratches noted on Boyd.

Washington v. State, 653 So.2d 362, 365-66 (Fla. 1994) (affirming denial of judgement of acquittal on murder and sexual battery charges where evidence against defendant included his semen and hair found at murder scene, his possession of victim's watch, and proximity to victim's home).

Premeditation - In Conahan v. State, 844 So.2d 629, 635 (Fla. 2003), this Court stated:

> "Premeditation is defined as 'more than a mere intent to kill; it is a fully formed conscious purpose to kill.' " ... This purpose to kill must exist for sufficient time before the homicide "to permit reflection as to the nature of the act to be committed and the probable result of that act." .... However, premeditation may also "be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.'" ... Premeditation can be demonstrated by circumstantial evidence. ... As this Court has stated:
>
> > Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

Conahan, 844 So.2d at 635 (citation omitted).

Pointing to Kirkland v. State, 684 So.2d 732 (Fla. 1996), Terry v. State, 668 So.2d 954 (Fla. 1996) and Green v. State, 715 So.2d 940 (Fla. 1998), Boyd claims premeditation was not proven (IB 33-35). Each case is distinguishable. In Kirkland,

the defendant knew the victim, displayed no animus toward her, was "mildly retarded" and had exhibited/possessed an intent to kill before the homicide. This Court, in Terry, found there was no evidence of premeditation based upon the lack of evidence of how the shooting occurred. Terry, 668 So.2d at 964. Premeditation was rejected in Green because the defendant was of exceedingly low intelligence, there was no evidence Green possessed a knife, and there was merely an admission the victim "got crazy" after things were done to her and Green and his friends killed her. Green, 715 So.2d at 944.

There is no evidence Boyd is of low intelligence. While he and Dacosta were strangers, the murder took place in the solitude of apartment #2 following the kidnapping, rape, and torture of Dacosta. Boyd took his time with her; he secreted her to his home, raped her, bit her, used a Torx screwdriver to inflict 36 non-fatal, non-penetrating wounds to her head, chest, and arms, then used that same screwdriver to stab through her skull and penetrate her brain. This was the single, fatal wound. Clearly, Boyd was capable of inflicting superficial wounds when desired and had time to reflect on his decision to kill before using sufficient force to stab a blunt screwdriver through a grown woman's skull and into her brain. The severity and location of the fatal wound support a finding of

premeditation. See Morrison v. State, 818 So.2d 432, 452 (Fla. 2002) (finding two stab wounds to throat show premeditation); Jimenez v. State, 703 So.2d 437, 440 (Fla. 1997) (finding use of knife to stab victim multiple times in vital organs is premeditation); Crawford v. State, 146 Fla. 729, 1 So.2d 713 (Fla. 1941) (finding single stab wound through skull into brain sufficient to prove premeditation).

However, should this Court agree premeditation was not shown, such is not fatal to the conviction. Boyd was charged with premeditated murder and felony murder, and the judge instructed on both theories (R 6; T 2022-24). In Hess v. State, 794 So.2d 1249, 1261 (Fla. 2001) this Court reasoned:

> The jury found appellant guilty of both first-degree premeditated murder and first- degree felony murder. Because we find sufficient evidence of felony murder, we need not address appellant's claim that the trial court erred in denying his motion for judgment of acquittal because the evidence was insufficient to establish premeditation. See *Brown v. State*, 644 So.2d 52, 53 (Fla. 1994) ("We need not reach this issue [premeditation], however, because there was ample evidence supporting first-degree murder under a felony murder theory.").

Hess, 794 So.2d at 1261. Likewise here, the evidence supports the convictions for sexual battery and kidnapping, thus, under the rationale of Hess, it is of no moment that the court did not grant a judgment of acquittal on the issue of premeditation.

Armed Kidnapping - Boyd was charged and convicted of armed

kidnapping as defined in section 787.01(1)(a)(2) and/or (3) (R 7, 461). He argues his request for a judgment of acquittal should have been granted because the evidence showed Dacosta got into the van willingly and the State failed to show "confinement, abduction or imprisonment except that incidental to the commission of the underlying crime." (IB 37). It is also Boyd's position this Court should find kidnapping does not apply where the confinement, "is merely incidental to the infliction of bodily harm or terror." (IB 41). Contrary to Boyd's suggestion of error, the facts of this case establish armed kidnapping to accomplish a sexual battery and to inflict bodily harm/terrorize. The confinement was not merely incidental to the sexual battery nor was it incidental to the infliction of 36 non-penetrating stab and several bite wounds.

The confinement started at some point after Dacosta entered Boyd's van at the Deefield Beach Texaco Station in northern Broward County and ended at the time after her death - when she was discovered, dumped at a western Broward County warehouse in Oakland Park. During her confinement, Boyd failed to take Dacosta to her car west of the Texaco station, but instead secreted her to apartment #2 east of the station and there inflicted 36 torture-like stab wounds, bit her several times, and hit her in the head with a reciprocating saw with sufficient

force to leave a bruise of the same size and shape of the face plate of the saw. In the confines of the apartment, out of the public light of the Texaco station, he sexually battered Dacosta and caused her to bleed onto his bedroom rug, armoire, and living room floor. Boyd's actions constitute "forcibly, secretly, or by threat confining, abducting, or imprisoning [Dacosta] against her ... will and without lawful authority, with intent to commit or facilitate" the sexual battery and/or to "inflict bodily harm upon or to terrorize" her. See section 787.01(a)(2) and (3).

In Faison v. State, 426 So.2d 963, 965 (Fla. 1983), this Court was asked to determine when a "detention and confinement" are "merely incidental to and not materially different from the detention necessarily involved in the course of the" felony, which in Faison was a sexual battery. This Court recognized: "[s]exual battery is a felony, so the issue is whether the threats and force used to transport the victims, and their subsequent detention, constitute a separate crime of kidnapping. Id. In resolving the issue, this Court followed the rationale of Harkins v. State, 380 So.2d 524 (Fla. 5th DCA 1980) and State v. Buggs, 219 Kan. 203, 547 P.2d 720 (1976) and adopted the following test:

> [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to

be kidnapping the resulting movement or confinement:

> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Faison, 426 So.2d at 965-66.

The Courts agreed that moving the rape victims from the reception area to a back room or from the kitchen to the bedroom was not required for the commission of the sexual battery, thus, the kidnapping convictions would stand. If moving a victim from one room to another within the same building to commit a sexual battery is sufficient to establish kidnapping, moving Dacoasta from the Texaco station, away from her car, and into the privacy of apartment #2 is sufficient to establish kidnapping to facilitate a felony. However, if this Court finds that the intent to commit a felony was not proven, it must review the denial of the judgment of acquittal under the section of "intent to terrorize" as the State included both in the indictment. See Carter v. State, 762 So.2d 1024,1027 (Fla. 3d DCA 2000) (noting because defendant was charged under section 787.01(1)(a)(2) and (3) denial of judgment of acquittal had to be reviewed under both sections).

With respect to Boyd’s claim the state did not show use of force in the kidnapping, the record proves otherwise. Even if Dacosta entered Boyd’s car willing under the false hope he would return her to her car, at some point when he stopped driving toward her vehicle and abducted her to apartment #2, an unlawful kidnapping commenced. The jury had sufficient evidence to determine that either on the way and/or once at apartment #2, Boyd threatened and tortured Dacosta with a Torx screwdriver and reciprocating saw, eventually killing her with one stab of the screwdriver through her skull. Because the van was not seized until four months later, and the jury was aware the reciprocating saw and Torx screwdriver were in the van that night, it could infer that Dacosta either was incapacitated by a blow to the head or threatened with the Torx screwdriver during her transportation to apartment #2 for the subsequent torture, sexual battery, and murder. Cf. Conahan v. State, 844 So.2d 629, 636-37 (Fla. 2003) (affirming kidnapping where there was evidence victim went willingly into woods with defendant, but at some point victim did not consent to confinement as evidenced by wounds).

This scenario is supported by Bedford v. State, 589 So.2d 245 (Fla. 1991). There the underlying felony, the eventual murder was not at issue as the focus was upon the intent to

terrorize and inflict bodily harm upon the victim. While in Bedford there was a confession outlining the defendant’s desire to terrorize, here, we have physical evidence of such terror and infliction of bodily harm over and above the intent to kill.

During Dacosta’s confinement, she was stabbed 36 times, but with only sufficient force to puncture the skin and cause hemorrhaging within the flesh below. This was painful and against Dacosta’s will as proven by the defenseive wounds received while trying to protect herself. She was also bitten by Boyd. These wounds were inflicted before death, while Dacosta was conscious and defending herself. (T 764-70).

Boyd’s fear that each homicide could be turned into a kidnapping with intent to terrorize is unreasonable and not supported by the law. It is well settled that the requirement that the confinement not be incidental to the underlying felony is limited to those situations where the defendant is charged with violation of section 787.01(1)(a)(2). It has not been extended to other subsections of the kidnapping statute. Boyd has not given a basis for this Court to recede from its well reasoned decisions.

As recognized in State v. Smith, 840 So.2d 987 (Fla. 2003) the first part of the kidnapping statute and that of false imprisonment describe general intent crimes, however, it is the

second section of the kidnapping statute which makes it a specific intent crime. Id. at 990 n.3. In Bedford, this Court focused upon the defendant's "specific intent to do bodily harm or to terrorize." Id. at 251. See Evans v. State, 838 So.2d 1090, 1096 (Fla. 2002) (finding kidnapping by force or threat to terrorize where defendant shot victim, threatened her and others in car not to reveal shooting upon pain of death to them and their families; shooting victim later died of her wound); Sutton v. State, 834 So.2d 332, 334 (Fla. 5th DCA 2003) (affirming aggravated battery and kidnapping with intent to terrorize conviction); Sean v. State, 775 So.2d 343, 344 (Fla. 2d DCA 2000) (noting in assessing "intent to terrorize" section of kidnapping charge, such "is left to the collective wisdom of the jury").

ISSUE 4

ADMISSION OF EVIDENCE THAT BOYD HAD BEEN CHARGED WITH A CRIME OF DISHONESTY WAS PROPER DURING CROSS-EXAMINATION OF THE DEFENDANT (restated)

Boyd contends it was error to admit a citation in his name for failure to pay a Tri-rail ticket and to cross-examine him on the matter. (IB 43). Because Boyd's residence was an issue in the case, evidence tending to establish such was relevant and admissible. This Court should affirm.

The admissibility of evidence is within the sound discretion

of the court, and the ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla. 2000); Zack v. State, 753 So.2d 9, 25 (Fla. 2000); Cole v. State, 701 So.2d 845, 854 (Fla. 1997). Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable. Trease, 768 So.2d at 1053, n. 2.

Boyd indicates the prosecutor's recollection of the opening statement was faulty and that counsel did not make Boyd's residence an issue. However, in opening, counsel stated: "But remember what the [State's] opening statement was.... On...April the 1st, 1999, we got this evidence.... We have a search warrant for Lucious' apartment where the evidence is going to show you he didn't live. The evidence is going to show that Geneva Lewis lived there." (T 467). As such, the prosecutor's recollection was correct and the location of Boyd's residence was at issue.

The December 2, 1998 Tri-Rail citation, noting the apartment #2 address was issued to Boyd three days before Dacosta's disappearance. The State advised there were other more prejudicial documents it was not offering. The defense objected on the grounds of materiality and relevance, noting the citation was "just there to trash [Boyd]", and renewed the objection when the document was presented to the jury and discussed with Boyd.

The court overruled the objection because the location was at issue.. During Boyd's cross-examination, he admitted the Tri-Rail citation was in his name at apartment #2 address (T 1202-04, 1251, 1837).

Under section 90.401, Florida Statutes, "relevant evidence is evidence tending to prove or disprove a material fact." Section 90.402, Florida Statutes provides that "[a]ll relevant evidence is admissible, except as provided by law." "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice...." Section 90.403, Florida Statutes. "A trial judge is afforded significant discretion in determining whether the prejudicial nature of evidence outweighs any relevance the evidence may have at trial." Rodriguez v. State, 753 So.2d 29, 42-43 (Fla. 2000). It is well recognized that "[a]lmost all evidence introduced during a criminal prosecution is prejudicial to a defendant." Id., 753 So.2d at 42-43 (citing Amoros v. State, 531 So.2d 1256, 1258 (Fla. 1988).

Here the citation, even more so than the Florida Power & Light bill, tied Boyd to apartment #2 as it was issued just three days prior to these crimes. It showed Boyd had access to and control of the crime scene. While generally, Boyd's counsel did not challenge testimony establishing Boyd's residence, the

defense was that the evidence was planted and that he had nothing to do with Dacosta's fate. Moreover, in opening, defense counsel stated there had been a search warrant for apartment #2, "where the evidence is going to show you [Boyd] didn't live." (T 467). Consequently, the location of Boyd's residence was at issue as the majority of the evidence linking him to the crimes charged was found in apartment #2. The State was seeking to prove Boyd lived there; it did not argue the citation showed anything, but residence. As such, the citation made out to Boyd at apartment #2 just days before the crimes was probative and proved where Boyd resided. In fact, given the timing of the citation, it was more specific than the FP&L bill which gave a general time-frame. Consequently, the court did not abuse its discretion in concluding the evidence was more probative than prejudicial given that residence was at issue.

From Roberts v. State, 662 So.2d 1308 (Fla. 4th DCA 1995), Boyd argues that the admission of the citation was error because he did not dispute that he lived at apartment #2. Yet, as noted above, there was dispute over the residence and who had access to apartment #2 during the time Dacosta's blood was deposited there. Roberts does not necessitate reversal.

Should this Court find error, such was harmless. DiGuilio, 491 So.2d at 1135. Evidence establishing guilt included DNA,

sperm, blood, hair, fingerprint bite marks, tire track, and fiber evidence from Boyd, Dacosta, Lewis, and Zeffrey along with an eye witness placing Boyd with Dacosta and proof he had access to the tools used to torture and kill Dacosta. (See all harmless error analysis in Point 2). The admission of a Tri-Rail citation pales in the light of this evidence. The admission of the citation was not the basis for the conviction. Dornau v. State, 306 So.2d 167, 171 (Fla. 2d DCA 1974) (finding admission of parking tickets harmless "in light of the totality of the state's case").

ISSUE 5

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DELINEATING THE CROSS-EXAM OF BOYD (restated)

Boyd describes his direct exam as one in which he acknowledged the charges against him, but denied any guilt. (IB 46). He asserts the court abused its discretion in overruling his objection that the State's cross-examination was beyond the scope of the direct in that it delved into: (1) his employment in the family funeral home business; (2) identifying where Lewis' mother lived; (3) showing photographs of apartment #2 and other items of evidence; (4) confirming Boyd's photograph was in the line-up; (5) recognizing the Tri-Rail citation; and (6) discussing the fingerprint card. (IB at 46-48). Because Boyd

took the stand and denied responsibility, the State was permitted to inquire into areas relevant to the crime, related events, and his credibility. The court exercised its discretion properly.

A "trial judge has wide discretion to impose reasonable limits on cross-examination." Geralds v. State, 674 So.2d 96, 100 (Fla. 1996). See Jones v. State, 580 So.2d 143, 145 (Fla. 1991); Delaware v. van Arsdall, 475 U.S. 673, 679, (1986). Limitation of cross-examination is subject to an abuse of discretion standard. McCoy v. State, 853 So.2d 396, 406 (Fla. 2003); Moore v. State, 701 So.2d 545 (Fla. 1997); Tompkins v. State, 502 So.2d 415, 419 (Fla. 1986).

The extent of cross-examination is governed by section 90.612, Florida Statutes. This Court, in Coxwell v. State, 361 So.2d 148, 151 (Fla. 1978), quoted with approval Coco v. State, 62 So.2d 892, 895 (Fla. 1953) reasoning:

> '... when the direct examination opens a general subject, the cross- examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief....'
> "

Coxwell, 361 So.2d at 151 (footnote omitted) (quoting 58 Am.Jur. Witnesses s 632, at 352 (1948)). In Geralds, 674 So.2d at 100, this Court announced, "[i]n addition to the facts and circumstances connected to the matters testified to during direct examination, section 90.612(2) provides that all witnesses may be cross-examined concerning their credibility." See Shere v. State, 579 So.2d 86, 90 (Fla. 1991) (noting "purpose of cross examination is to elicit testimony favorable to the cross-examining party...and to challenge the witness's credibility when appropriate").

Green v. State, 688 So.2d 301 (Fla. 1997), cited by Boyd, is not dispositive of the issue before this Court. In Green, the defense called an eye witness to contradict the state's witness which this Court noted had a 67 IQ, drank eight-sixteen ounce beers before and another four after the murder, and had memory difficulties. The defense witness testified she had not been drinking on the day of the crime. Hence, error was found in permitting inquiry into her prior alcoholism. Id. at 305. Such facts differ dramatically from the case at bar. The record reflects the State's examination of Boyd was limited to areas relevant to the crimes with which he was charged -- his ability to commit them and hide his involvement. The prosecutor's questions were not in the form of a closing argument nor did

they recapitulate the State's case as decried in Gonzalez v. State, 450 So.2d 585 (Fla. 3d DCA 1984). Gonzalez is diametrically opposite to the instant case.

By testifying he had nothing to do with the crimes charged, Boyd opened the door to examination not only about the crimes, but his whereabouts and demeanor before and after the time Dacosta disappeared, how he may have cleaned the crime scene, his access to and knowledge of the crime scene, evidence obtained, and police collection of standards from Boyd. In order to link Boyd and Dacosta, the State had to show Boyd had the opportunity to commit the crimes. To this end, the State showed Boyd left Lewis at her mother's home between 10:00 and 11:00 p.m. on December 4th. He did not return to the mother's home until the following morning near 9:00 a.m. As such, Boyd's knowledge of the location of the home and its proximity to the Texaco station and his apartment #2 were relevant to Boyd's ability to commit the crime as he was in the area and had time to kidnap, rape, and kill Dacosta before returning to Lewis' mother's home the next morning. Geralds, 674 So.2d at 100 (finding by denying on direct exam that he murdered the victim, defendant "opened the door to be examined or impeached with evidence that linked him to the murder").

The State was faced with a crime scene, Boyd's apartment,

which was nearly four months old and had been lived in during that entire time. Also, Boyd was claiming the evidence against him was planted. Consequently, the State offered that Boyd had cleaned the scene; he had gotten rid of the bed and cleaned the top of the carpet, and the other areas that may have been soiled. The criminalists did not see a blood stain on the top of the carpet, it was only after the bedroom furniture was removed and the rug turned over that a stain was visible. Such tested positive for Dacosta's DNA. Given the small amount of blood detected, Boyd's knowledge of cleaning bodily fluids from his work in the family funeral home was relevant. It tended to show his ability to handle dead bodies, wrap them in a manner to preclude spillage of bodily fluids, and to clean up should anything spill. Geralds, 674 So.2d at 100. Cf. Trepal v. State, 621 So.2d 1361 (Fla. 1993) (finding evidence of defendant's ability to perform acts alleged was admissible).

Likewise, Boyd's admission that he lived in apartment #2 as confirmed by a recent Tri-Rail citation was probative of his access to and control of the crime scene. The State incorporates its analysis in Issue 4 as additional argument of the relevance of this evidence. Boyd's confirmation that the crime scene photographs and evidence were accurate also undermined the claim of evidence tampering. In the same vein,

Boyd’s access to the van seen picking up Dacosta and to the tools which were consistent with her injuries, are all relevant to rebutting his denial of guilt. With respect to the questioning of Boyd about the collection of his photograph and fingerprints, such established that the State did not tamper with them and rebutted any claim that the State planted evidence. Because Boyd denied guilt and asserted evidence was planted, the State was authorized to question him thoroughly on all aspects of his behavior related to the crime and the evidence produced against him. Geralds, 674 So.2d at 100. See Chandler v. State, 702 So.2d 186, 196 (Fla. 1997) (agreeing cross-exam is not confined to identical details testified to on direct).

Should this Court conclude the cross-examination improperly exceeded direct, such should be found harmless under DiGuilio, 491 So.2d at 1135. Boyd’s bite marks and DNA were found in and on the victim, her DNA was found in his apartment #2, the wounds were inflicted using tools consistent with those Boyd had, he was seen with Dacosta at the time of her disappearance, and fiber, tire marks, and fingerprints linked him to Dacosta’s murder. Any erroneous expansion of the cross-examination did not contribute to the conviction. (see harmless error analysis - Issue 4).

ISSUES 6 AND 7

THE COURT DID NOT ABUSE ITS DISCRETION BY NOT CONSIDERING THE REPORTS OF DOCTORS SHAPIRO AND BLOCK-GARFIELD IN DETERMINING THAT BOYD WAS COMPETENT AND BY NOT ORDERING ANOTHER COMPETENCY HEARING PRIOR TO AND AFTER SENTENCING. (restated).

Boyd contends the court abused its discretion by not considering the reports of Dr. Shapiro and Dr. Block-Garfield in determining Boyd was competent, and by not ordering another competency hearing prior to and after sentencing. This Court will find Boyd's first claim is unpreserved for appellate review. Boyd never introduced the reports of Dr. Shapiro and Dr. Block-Garfield into evidence at the competency hearing and did not even argue that the court should consider them as evidence (ST 1, 79-191). To the contrary, defense counsel expressly requested the court **not consider** the reports of Drs. Shapiro and Block-Garfield (ST 192-93). Consequently, Boyd cannot argue, for the first time on appeal, that the court abused its discretion by not considering the reports. See Steinhorst, 412 So.2d at 338. Moreover, counsel's explicit request that the court **not consider** these reports renders Boyd's argument an impermissible "gotcha" tactic. See Berkman v. Foley, 709 So.2d 628, 629 (Fla. 4th DCA 1998) (noting "courts will not allow the practice of the 'Catch-22' or 'gotcha!'

school of litigation to succeed"); <u>Chatmon v. Woodard</u>, 492 So.2d 1115, 1116, n. 2 (Fla. 3d DCA 1986) (same).

Turning to the merits, it is clear the court did not err in failing to consider these reports. The background of this issue is as follows. On September 25, 2000, Boyd's counsel filed a "Motion for the Appointment of Experts pursuant to Fla.R.Crim.P. 3.210" to evaluate Boyd's competency to stand trial (R 239-241). The court granted the motion, appointing Drs. Haber and Block-Garfield to examine Boyd (R 242). On October 17, 2000, the defense filed a motion requesting a competency hearing, alleging Boyd had previously indicated a desire to waive the penalty phase, which prompted counsel to have Boyd examined by Dr. David Shapiro, to determine Boyd's competency to waive the penalty phase (R 253-264). Attached to the motion was a copy of Dr. Shapiro's report indicating Boyd was **not competent**. Boyd was then evaluated by the two court-appointed experts, Drs. Haber and Block-Garfield. While Dr. Block-Garfield agreed Boyd was incompetent to waive the penalty phase, Dr. Haber concluded Boyd was competent (both reports were attached to the motion). Based on the conflicting opinions, Boyd's counsel requested a competency hearing.

A competency hearing was held on March 26, 2001, at which Dr. Haber was the only witness. He evaluated Boyd on October

10, 2000, for his competency to proceed to trial and his evaluation included a psychological interview, a mental status examination, a competency examination and an interview covering family, social and economic background (ST 185, 187). Dr. Haber, who has performed more than 2,000 competency examinations, opined that Boyd: appreciated the seriousness of the charges against him; appreciated the range in nature of possible penalties; could co-operate with defense counsel and disclose pertinent facts for the defense; could behave properly; was anxious/ready to go to trial; is very alert, co-operative, soft-spoken, well-oriented, and intelligent; and had considerable experience and knowledge about criminal matters (ST 186-88). Dr. Haber concluded Boyd was competent to proceed to trial and to waive penalty phase (ST 188-89). He explained that Boyd had deep religious beliefs and convictions (ST 188). Boyd also had substantial experience with the criminal justice system, having been previously acquitted in three felony trials involving kidnaping, rape and first-degree murder (ST 188). Based upon Boyd’s intelligence, knowledge of the system, outstanding trial record, and strong faith, Dr. Haber could well understand Boyd’s decision to be confident that he would succeed again (ST 188-89). He believed that Boyd’s decision was subject to reconsideration depending upon what happened at guilt phase

(ST 189).

On cross-examination, the State elicited that Boyd had been acquitted on five separate cases, including charges of sexual battery, armed kidnaping, armed sexual battery, murder, grand theft and aggravated battery (ST 189-90). Dr. Haber re-iterated that Boyd could re-visit whether to waive the penalty phase if, in fact, he was convicted by the jury (ST 190).

After defense counsel and the State indicated that no other evidence would be presented, the court commented that it had reviewed Dr. Block-Garfield's report which came to a dramatically different conclusion (ST 192). The court noted that given the absence of Dr. Block-Garfield from the proceeding, it was at a loss to even consider her report (ST 192). In response, defense counsel stated "it was not by whim or speculation that Mr. Boyd and I have not presented Drs. Shapiro and Garfield." (ST 193). He explained that there was a serious mis-communication between Dr. Shapiro and Boyd due to cultural differences (ST 192). According to the defense, Dr. Shapiro was taken aback by the strong religious faith and background of a "fallen-away southern black Baptist," who would not contemplate conviction (ST 180, 192). Dr. Shapiro believed Boyd was suffering from some religious delusional thinking and based his incompetency conclusion on that (ST 181). Defense

counsel further noted Dr. Block-Garfield's report relied heavily upon the findings of Dr. Shapiro (ST 193). Hence, they were not presenting either report and asked the court not consider them. Boyd agreed it was his desire to be found competent (ST 193).

The State agreed the reports of Drs. Shapiro and Block-Garfield strained the outer bounds of common sense (ST 193-95). The State noted it was incomprehensible for Dr. Shapiro to conclude Boyd was not sane because he was relying upon his religious belief system, considering how well it had worked for him over ten years with a large number of acquittals (ST 194). The State noted Dr. Shapiro's testing showed Boyd was competent to stand trial, that he understood better than 90 percent of the people in the State Attorney's Office how the adversarial process works, who's on what side, and everyone's prospective roles (ST 194).

The court noted it had observed and interacted with Boyd for 10 months and never had any doubts about his competency. It also commented Dr. Block-Garfield's report was not in the "traditional tone" that he was used to seeing in these matters. The court was not aware of any legal difference between competency to stand trial versus competency to waive penalty phase and would not segregate one piece of the case from the other. Based upon the testimony presented and argument of

counsel, the court concluded Boyd was competent to proceed to trial. It further noted it would re-visit the issue if appropriate, although it had no reason to believe Boyd would not be competent in the future (ST 195-96).

On appeal, Boyd argues the court abused its discretion by not considering the reports of Drs. Shapiro and Block-Garfield, and by not further inquiring into Boyd's competency, including calling witnesses on its own. In support of his argument, Boyd cites only to rules 3.210(b) and 3.212(a), Florida Rules of Criminal Procedure and Pate v. Robinson, 383 U.S. 375, 385-86 (1966). Rule 3.210(b) and Pate are immediately distinguishable as they govern when a court must order a competency evaluation or hearing. A court is not required to order a competency evaluation or hearing **unless** it has reasonable grounds to believe the defendant may be mentally incompetent. Fla.R.Crim.P. 3.210(b). That is **not** an issue here because the court granted both defense requests for a competency evaluation and a competency hearing. The issue here centers on the court's handling of the competency hearing. Further, while rule 3.212(a) gives the court the right to call experts as witnesses, it does not require it do so. This Court will find the trial judge properly conducted the competency hearing here and did not abuse his discretion in finding Boyd competent.

The test Florida courts use to determine a defendant's mental competency **to stand trial** "is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational, as well as factual, understanding of the proceedings against him." Hill v. State, 473 So.2d 1253, 1257 (Fla. 1985) quoting Dusky v. United States, 362 U.S. 402 (1960). See Mora v. State, 814 So.2d 322, 327 (Fla. 2002). Where there is conflicting expert testimony presented on the issue of competency, it is the court's responsibility, as fact-finder in such proceedings, to resolve the disputed factual issue. Fowler v. State, 255 So.2d 513, 514 (Fla. 1971); King v. State, 387 So.2d 463 (Fla. 1st DCA 1980). Moreover, the court is not bound by the expert testimony:

> The reports of experts are "merely advisory to the [trial court], which itself retains the responsibility of the decision." Muhammad v. State, 494 So.2d 969, 973 (Fla.1986) (quoting Brown v. State, 245 So.2d 68, 70 (Fla. 1971), vacated in part on other grounds, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972)), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987). And, even when the experts' reports conflict, it is the function of the trial court to resolve such factual disputes. Fowler v. State, 255 So.2d 513, 514 (Fla. 1971). The trial court must consider all evidence relative to competence and its decision will stand absent a showing of abuse of discretion....

Hunter v. State, 660 So.2d 244, 247 (Fla. 1995). See Hardy v. State, 716 So.2d 761, 764 (Fla. 1998)(reasoning where there is

conflicting expert testimony regarding competency, it is judge's responsibility to consider evidence and resolve factual disputes; decision will be upheld absent showing of abuse of discretion); Carter v. State, 576 So.2d 1291, 1292 (Fla. 1989) (same).

Here, the evidence presented at the competency hearing, i.e., Dr. Haber's testimony, was undisputed that Boyd was competent to proceed to trial and to waive the penalty phase. Consequently, it cannot be said the court abused its discretion in finding Boyd competent. Further, the court did not abuse its discretion by not considering the reports of Drs. Shapiro and Block-Garfield and not calling them as witnesses. The reports were not evidence and the defense specifically requested the court not consider them. Moreover, the court was free to ignore the reports even if they had been introduced into evidence, which is quite likely considering that they strained the bounds of common sense, as the State noted. Dr. Shapiro's report acknowledges Boyd was pleasant, co-operative, aware of what transpires during a penalty phase, aware of the charges against him, their seriousness and had a great deal of confidence in his defense counsel (R 256). However, he found Boyd delusional because he believed God had appeared to him in dreams and had assured him he would be found not guilty (R 256).

Dr. Block-Garfield also found Boyd to be alert, pleasant, well-oriented, articulate, with logical thought processes (R 263). She noted he was somewhat guarded, but readily answered questions and made every effort to present himself as normal as possible. Dr. Block-Garfield found Boyd was "deliberately very careful" to avoid verbalizing neologisms, grandiose delusions or religious preoccupation as he stated the other doctor had thought him crazy (R 263). Boyd was able to state the charges against him and understood what transpires during a penalty phase, but was not willing to acknowledge the possibility of a guilty verdict as he denied any involvement in the crime and believed he would be acquitted (R 263). Boyd did not want a penalty phase because he was sure he would be acquitted (R 264). Boyd based his belief on the confidence he had in his attorney's representation, and indicated if he were convicted, he would do what needed to be done and would accept the penalty phase (R 264).

Despite these statements, Dr. Block-Garfield found him incompetent, concluding he had "psychological difficulties" and did not wish to be perceived as incompetent so he gave lip service to the questions (R 264). She opined that serious weight should be given to the delusional statements he had made to Dr. Shapiro (R 264). Thus, Dr. Block-Garfield's conclusion

was based, not on what Boyd said to her during his interview, but rather, on what he said to Dr. Shapiro. The court agreed Dr. Block-Garfield's report was not in the "traditional tone" it was used to seeing and noted it did not have a question about Boyd's competency given their 10 month interaction. Thus, even if these reports had been introduced into evidence, the court's rejection of them would have been an appropriate exercise of its discretion. See Mora (upholding court's competency finding even though there was conflict in expert testimony); Bryant v. State, 785 So.2d 422 (Fla. 2001); Watts v. State, 593 So.2d 198, 202 (Fla. 1992)(noting that where there is a conflict in expert testimony, the responsibility to resolve the dispute rests with the trial court as fact finder); Castro v. State, 744 So.2d 986, 989 (Fla. 1999)("although there was conflicting testimony regarding Castro's competency, it was the function of the trial court to resolve this dispute"). It is also important to point out that Boyd was not being treated for any mental illness, was not medicated and his appearance and representations did not indicate that he was incompetent. See e.g. Kent v. State, 702 So.2d 265, 267 (Fla. 5th DCA 1997).

Boyd further argues, under Issue 7, that the trial court abused its discretion by not ordering a competency hearing prior to and after sentencing. "A presumption of competence attaches

from a previous determination of competency to stand trial." Durocher v. Singletary, 623 So.2d 482, 484 (Fla.), cert. dismissed, 114 S.Ct. 23 (1993). See also Slawson v. State, 796 So.2d 491 (Fla. 2001)(noting that presumption of competence attached from trial and court did not abuse its discretion in finding defendant competent to waive collateral counsel and proceedings). Once a defendant is declared competent, the trial court is required to conduct another competency proceeding only if a bona fide doubt is raised as to the defendant's continued competence. Hunter v. State, 660 So.2d 244, 248 (Fla. 1995). Here, Boyd has failed to demonstrate that a bona fide doubt was raised as to his continued competence requiring the trial court to conduct another competency hearing.

Prior to the penalty phase, Boyd's counsel moved to withdraw because Boyd was not co-operating with the investigation into mitigation. An in camera proceeding was held on February 19, 2002, at which defense counsel explained that Boyd was not co-operating with the psychologist who was appointed to investigate any mental health mitigators (T 2123). The court conducted a colloquy with Boyd wherein he agreed that he had discussed these matters with his attorneys and that his attorneys were trying to prepare for penalty phase in his best interest (T 2123). Boyd explained that he hadn't fully understood why it was necessary

for him to co-operate with his psychologist until that morning (T 2125). Boyd agreed that now that he knew what was expected of him and why, he would co-operate (T 2126). Thereafter, on March 11, 2002, defense counsel renewed its request to withdraw because Boyd was still not co-operating with Dr. Shapiro (T 2158). In discussing Boyd's opposition, defense counsel noted that Dr. Shapiro had provided a follow-up letter, stating that he could not render an opinion on Boyd's competency but had grave concerns about it considering the way Boyd answered questions during testing (T 2158). The court conducted another colloquy with Boyd reminding him that he had agreed at the in camera proceeding that it was in his best interest to allow investigation into the mental health mitigators and had agreed to do so (T 2160). Boyd understood that he had the right to explore these things but agreed he wanted to go forward without the information on competency and family history (T 2160-61). He stated he had spoken with Dr. Shapiro as deeply as he wanted and believed it was in his best interest to go forward without this information (T 2163). The State noted that Dr. Shapiro had believed there was a competency issue before trial which Dr. Haber disputed (T 2164). Nothing new was presented supporting such a notion. The court denied the defense request, reasoning that Boyd understood the nature and consequences of his decision

and that his decisions were deliberate and informed (T 2167). The court ruled that the defense would present as much family history mitigation and mental health mitigation as Boyd wished to present (T 2168).

The trial court did not abuse its discretion by not ordering a second competency hearing. There was nothing presented prior to sentencing which raised a bona fide doubt as to Boyd's continued competence. Dr. Shapiro could not render an opinion on Boyd's competency and pointed to nothing different from his first report to support his grave concerns. Further, nothing in the trial court's observations gave it reasonable grounds to question the competency finding. See Hall v. State, 742 So.2d 225, 230 (Fla. 1999)("no reason to believe that mentally retarded defendant who was found competent to stand trial did not remain competent to proceed to resentencing"). It is important to remember Boyd did not waive all mitigation, just the presentation of certain mitigation (See Issues 8, 9, 10, 15). Boyd has failed to support his claim by pointing to any evidence of changed circumstances.

Moreover, nothing new was presented post-sentencing raising a bona fide doubt as to Boyd's continued competence. Defense counsel alleged that Boyd's thinking was a manifestation of mental illness but agreed with the trial court that not one of

the reports came back with a mental illness (T Vol. 30 2487-2488). The trial court correctly noted that the totality of the circumstances, including Boyd's demeanor and behavior during the several years of trial, indicated that Boyd remained competent (T Vol. 30 2488). Again, the record shows that Boyd presented nothing new or different showing there was a bona fide doubt as to his continued competency.

Pate v. Robinson, 383 U.S. 375 (1966), relied upon by Boyd, is completely distinguishable. In that case, the defense contended at Robinson's murder trial that he was insane both at the time he killed his wife and up to the trial. Four witnesses testified without contradiction that they believed him to be insane. The record also revealed that Robinson had a long history of disturbed behavior commencing with a childhood head injury. He had been hospitalized on several occasions for psychiatric disturbances. And he had shot and killed his son and tried to commit suicide several years prior to killing his wife. The Supreme Court concluded this evidence was sufficient to raise a claim that Robinson was incompetent to stand trial even in the face of his apparent mental alertness at trial and therefore held it was error for the trial court to fail to conduct a competency hearing.

Conversely, here, the court conducted a competency hearing

prior to trial and determined that Boyd was competent to proceed to trial and to waive the penalty phase. Unlike the defendant in Robinson, there was no evidence that Boyd had a long-standing mental illness. Boyd's demeanor and behavior throughout the trial was consistent with his continued competence. Simply put, nothing was presented at trial, sentencing or post-sentencing calling the trial court's decision into doubt.

ISSUES 8, 9, AND 15

THE DICTATES OF KOON v. DUGGER AND MUHAMMAD v. STATE ARE NOT APPLICABLE HERE AS BOYD DID NOT WAIVE MITIGATION (restated)

Boyd alleges Koon v. Dugger, 619 So.2d 246 (Fla. 1993) and Muhammad v. State, 782 So.2d 343 (Fla. 2001) apply to the instant matter. He asserts mitigation was waived, thus, the court erred in not holding a colloquy in conformance with Koon (**Issue 8**), in not following the dictates of Muhammad (**Issue 15**), and in giving great weight to the jury's sentencing recommendation in violation of Muhammad (**Issue 9**). Because Boyd did not waive all mitigation, neither Koon nor Muhammad control. The appropriate discussions regarding his decisions were held with Boyd, and the court applied the correct law. This Court should affirm.

Issue 8 - Here, Boyd points to defense counsel's reference to the fact that witnesses were "flown in from various parts of

the United States", but does not identify them. (IB 58-59). In Koon, this Court addressed the situation in which a defendant waives the entire mitigation presentation against counsel's advice. Under those circumstances, the court must be advised of the defendant's decision, conduct an inquiry during which counsel reveals the mitigation discovered, and the defendant confirms he does not want such presented. Koon, 619 So.2d at 250. Conversely, where a defendant merely disagrees with the mitigation counsel wishes to offer and demands a more limited presentation, Koon does not apply, but Mora v. State, 814 So.2d 322 (Fla. 2002) does.

In Mora, this Court addressed a situation similar to the one presented here, where Mora refused to permit counsel to discuss the mitigation case with his elderly siblings. The judge misapplied Koon by making it a "prohibition against **waiving any possible mitigation** without counsel's full investigation of all possible mitigation." Mora, 814 So.2d at 332-33. Because Mora wished to present certain mitigation, but not other evidecene, Koon was found not to apply. Mora, 814 So.2d at 333.

Here, the record reflects there were numerous discussions with Boyd regarding his cooperation and intent to present mitigation from mental health doctors and family/friends (T 2097, 2121-26, 2138-68, 2215-38). On March 11, 2002, the

defense advised the court Boyd was not cooperating with Dr. Shapiro and there was disagreement on the family history matter. (T 2159-60). The court and Boyd had the following discussion:

> THE COURT: The two issues that Dr. Ongley brings up are the things that we talked about a few weeks ago; one is the mental competency issue and the other one is getting some family history issues.
>
> ... a few weeks ago you thought it was in your best interest not necessarily to get into either of those things at your request. When we met in the jury room and discussed the matter, you indicated that in light of the situation that you were going to give your lawyers the opportunity to go forward to investigate some of those things, and then based on what Dr. Ongley tells me now that you may not have provided all the information they wanted to see.
>
> ...
>
> THE DEFENDANT: ... I didn't want them to.
>
> ...
>
> THE COURT: And that if you choose to, in effect, direct your lawyers to go forward without exploring those or at least even exploring them in the depth that your lawyers want, that I will accommodate your request if satisfied that you understand that what you're doing is something that is conscious a decision that you have made after reflecting on it. That's my intent. So, just to make sure that you understand because there's nobody in these proceedings that suffers any consequences other than yourself. So, I hope you know where the Court is coming from when I make this inquiry.
>
> So, can I be assured that you have discussed these matters recently with your lawyers, maybe even as recently as this morning, I don't know?
>
> THE DEFENDANT: Yes, sir, that's correct.

THE COURT: And would it be your direction to them and ultimately to me to go forward and allow them to present what they're going to present without any additional information or the depth of the information particularly as it relates to family records or family history that they may have wished to have gone into?

THE DEFENDANT: That's correct, Judge.

...

THE COURT: Now, as far as Dr. Shapiro, you had the opportunity to speak to Dr. Shapiro, and did you speak to Dr. Shapiro as deeply, if you will, or superficially as you wanted to?

THE DEFENDANT: That's correct, Judge.

THE COURT: I mean nobody told you or forced you, don't talk to this guy or just talk to him a little or this or that, nobody guided you as to what you were going to say to him?

...

THE DEFENDANT: No, sir.

THE COURT: And can I be satisfied that the dialog you had with Dr. Shapiro was the dialog you wanted to have with him and on the level that you wanted to have with him?

THE DEFENDANT: That's correct, Judge.

...

THE COURT: Knowing all these things, do you feel that it's in your interest to have us go forward at this time with that information and no additional information, so to speak?

THE DEFENDANT: That's correct, Judge.

(T 2160-63).

During the March 12, 2002 discussion, defense counsel

advised:

> Some of [the mitigation witnesses] are here, Judge, and we want to call them and make a record, but others have not come because of the communications from Lucious who said, you know, I'm not going to let my lawyers call you and I don't want you to testify and I don't want my family involved in this. So they are not here. They're taking him at his word, but his mom is here and his brother is here.

(T 2216-17).

The court permitted Boyd, his counsel, family, and friends to reconsider the mitigation decision in hopes of appealing to him and cleared the courtroom so they could confer in private (T 2221-25). Following this discussion, Boyd announced he would present Pastor Chester Matthews (T 2226). Further discussions took place which included Boyd being notified of the statutory and possible non-statutory mitigation. Boyd noted his mitigation would cover areas of mitigation, and the court found that Boyd had made his decision knowingly and voluntarily in selecting his mitigation witnesses (T 2231-38) After Pastor Matthews testified in mitigation (T 2240-59), Boyd took the stand on his own behalf, explained his position to the jury, expressed his innocence, and alleged police evidence planting (T 2260-88). Before the defense rested, Boyd was given another opportunity to discuss his strategy with counsel (T 2290).

Through counsel, family and court, Boyd was advised fully of the import of a mitigation presentation and opted to present

mitigation. Hence, he did not waive mitigation in its entirety, and a Koon colloquy was not required. Mora, 814 So.2d at 333.

Issue 15 - It is Boyd's position that the court erred in not following the procedure outlined in Muhammad, 782 So.2d at 363-64. (IB at 95-98). He again asserts there was a waiver of mitigation. However, as noted above, there was no such waiver.

In Muhammad, this Court was faced with a defendant who waived mitigation in its entirety and whose request to waive his penalty phase jury was denied. Nonetheless, the court informed the jury that its recommendation would be given great weight, considered mitigation provided during the Spencer hearing, and imposed a death sentence. Muhammad, 782 So.2d at 361-63. This Court remanded for a new sentencing upon a finding "the trial court erred when it gave great weight to the jury's recommendation in light of Muhammad's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence." Id. at 361-62. This Court reasoned, "[b]ecause of the possibility that during resentencing proceedings before the trial court Muhammad will continue in his refusal to put on mitigating evidence, it is appropriate for this Court to consider what prospective procedures should apply on resentencing." Muhammad, 782 So.2d at 363. These procedures

were addressed to the situation "where the defendant is **<u>not challenging</u>** the imposition of the **<u>death penalty and refuses to present mitigation evidence</u>**." <u>Id.</u> (emphasis supplied).

Here, however, Boyd placed before the jury evidence in mitigation in the form of his own testimony and that of Pastor Matthews. In fact, in closing argument, his counsel argued for the statutory mitigator of lack of significant criminal history, good and helpful inmate, religious/leads Bible reading group, good leader, and loving family/caring siblings (based on family members in court each day). Further, counsel suggested there was no need to sentence Boyd to death, because there was no possibility of parole. (T 2367-71). The court instructed the jury on the statutory mitigator of no significant prior criminal history and the "catch all" instruction (T 2373). As such, there was no basis for providing an alternate means of presenting mitigating factors to the jury as outlined in <u>Muhammad</u>.[8] Boyd did challenge the imposition of the death

[8]While a PSI was ordered, there was no requirement to do additional investigation of items contained therein as <u>Muhammad v. State</u>, 782 So.2d 343 (Fla. 2001) does not apply. (IB at 97). Moreover, there are numerous references where the PSI investigator was thwarted due to Boyd and his brother's refusal to assist. Likewise, while Boyd asserts the record "reflects no effort by the state" to reveal its possession of mitigating evidence, the prosecutor was under no obligation to gather mitigating evidence and there has been no allegation that the State had in its possession evidence of a mitigating nature that

penalty and did present mitigation. Thus, under the scenario outlined in Muhammad, Boyd does not qualify for such extraordinary procedures. Consequently, the court did not have to employ the Muhammad procedure and cannot be faulted for not doing so. There is no proof of constitutional infirmity and the record is sufficient for this Court to evaluate proportionality. Muhammad, 782 So.2d at 364.

Issue 9 - Here, it is alleged the court erred in giving great weight to the jury's sentencing recommendation in spite of noting it would follow Muhammad. (IB 59-60). The court's reference to Muhammad occurred on May 21, 2001 (ST 205) nearly a year before the penalty phase and more than a year before sentencing. In fact, it was before Boyd decided to present mitigation, albeit not the mitigation counsel seemed prepared to offer.

As noted in Mora, 814 So.2d at 332-33, a defendant does not have to put on every piece of mitigating evidence possible, but instead, he may select the evidence he wishes to offer. Even in Muhammad, this Court made it clear that the necessity for determining the weight to give to the jury's verdict was based on the "failure of Muhammad to present any evidence in mitigation." Muhammad, 782 So.2d at 362.

---

was not turned over in discovery. Id. at 363-64, n. 11.

Boyd's reference to Ross v. State, 386 So.2d 1191 (Fla. 1980) is misplaced in that there the judge found "it was bound by the jury's recommendation of death." Such is vastly different from giving a recommendation great weight where the jury heard mitigation. Similarly, the State respectfully disagrees with the inference that this Court created in Muhammad where it cited Tedder v. State, 322 So.2d 903, 910 (Fla. 1975) and discussed giving great weight to jury life recommendation while merely citing Grossman v. State, 525 So.2d 833, 840 (Fla. 1988) for the requirement the judge must make an independent determination of aggravators and mitigators. Muhammad, 782 So.2d at 362. In Grossman, this Court considered if the failure to inform the jury its recommendation would be afforded great weight somehow undermined the jury sense of responsibility. Grossman, 525 So.2d at 839. In rejecting that contention this Court stated: "We have also held that a jury recommendation of death should be given great weight. Ross v. State, 386 So.2d 1191, 1197 (Fla. 1980); LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978)...." Grossman, 525 So.2d 839-40, n.1.

Again, because Boyd gave a mitigation presentation, his suggestion that Muhammad applies and establishes error is misplaced. This Court must reject such a claim and affirm.

ISSUE 10

IT IS WITHIN THE DEFENDANT’S PROVINCE TO WAIVE MITIGATION (restated)

Boyd questions whether it is the counsel or client who has the final decision on which witnesses to call in a capital penalty phase. He posits that the client does not have the right to “ineffective assistance”, thus, if the client decides to be represented, then it is counsel who determines the witnesses to present. From this, he reasons his waiver of mitigation was invalid and the sentence is unreliable. Here again, Boyd’s reliance upon cases leading up to and discussing Muhammad and Koon, is misplaced as there was not a complete waiver of mitigation. To the extent that his claim can be viewed as one of ineffective assistance, the record has not been developed in this respect and the issue should be left to collateral proceedings. Lawrence v. State, 691 So.2d 1068, 1074 (Fla. 1997) (noting claims of ineffective assistance are not cognizable on direct appeal); Wuornos v. State, 676 So.2d 972 (Fla. 1996).

To the extent Boyd is asserting the court erred in its handling of the mitigation issue, the standard of review is abuse of discretion. Spann v. State, 857 So.2d 845, 854 (Fla. 2003) (reviewing court’s Koon colloquy for abuse its discretion). However, to the extent Boyd is asking this Court to reassess its line of cases permitting clients direct what

mitigation/witnesses should be presented, the question is one of law. Pure questions of law are reviewed under the de novo standard. Execu-Tech Bus. Sys. v. New Oji Paper Co., 752 So.2d 582 (Fla. 2000).

Preliminarily, it must be noted that the exact issue presented here was not raised below. As such, the issue of whether it is Boyd or his counsel who decides what mitigation to present has not preserved. Steinhorst, 412 So.2d at 338.

The record reflects that for over a year, counsel and Boyd discussed mitigation, the possibility of waiving it, and his competency to do so. Without question, counsel investigated, at the minimum, Boyd's mental health issues and background. Equally clear is Boyd's level of cooperation at different junctures. At some points, family members were taking their direction from Boyd and ignoring counsel's demands. Eventually some family members made themselves available to testify in mitigation, and were involved in helping Boyd decide to present mitigation. Ultimately, Boyd testified and presented Pastor Matthews in mitigation.

This case is governed by Mora, 814 So.2d at 333 and guided by Hamblen v. State, 527 So.2d 800 (Fla. 1988). The State disagrees with Boyd's characterization of the case as one where counsel were treated as "captive counsel, duty bound not to

exercise their independent judgment" and where he "had a constitutional right to ineffective assistance of counsel." (IB 65).

Boyd points to Jones v. Barnes, 463 U.S. 745, 753 n.6 (1983), Wainwright v. Sykes, 433 U.S. 72, 93 (1977) and their quoting of the ABA Model Rules of Professional Conduct.[9] In Jones v. Barnes, 463 U.S. at 752-53, the Supreme Court was asked to determine whether it was *per se* ineffective assistance of appellate counsel to fail to argue non-frivolous issues.[10] While Wainwright v. Sykes, 433 U.S. at 93 involved a trial issue, it was not dealing with the direction the defense should take, but merely the mechanics of preserving a trial error. It was to the mechanics of fulfilling the client's wishes that Chief Justice Burger was referring in his concurrence. Id. at 93. However,

---

[9]Taking Boyd's argument to its logical conclusion, the quoted Supreme Court passages would require this Court to find that when represented by counsel, has no voice and surrenders everything to counsel, except to decide whether to plead guilty, waive a jury, and testify. This, in itself would be a violation of an attorney's ethical duties to consult with his client and develop strategies after consultation. This Court should reject Boyd's request for the development and implementation of such a draconian rule. Moreover, deciding what mitigation to present is more akin to deciding how to plead rather than testing the evidence of guilt.

[10]A defendant's influence over capital appellate issues is different given this Court's duty to review proportionality. A defendant is not given the option of waiving an appeal or counsel. Ocha v. State, 826 So.2d 956, 964-65 (Fla. 2002).

neither stand for the proposition that once counsel is appointed, the defendant has no say in how the defense is mounted. Instead, both recognize counsel must consult with and assist his client in achieving defense objectives. At the minimum, such should include whether mitigation will be put on and the scope of that evidence. Surely it is within a defendant's right as "captain of his ship" to say which area of his life he wishes to reveal in mitigation. See Nixon v. Singletary, 758 So.2d 618, 625 (Fla.) (noting "defendant, not the attorney, is the captain of the ship."), cert. denied, 531 U.S. 980 (2000); Mora, 814 So.2d at 333 (finding defendant may preclude counsel from contacting family members).

Reference to Dickey v. McNeal, 445 So.2d 692 (Fla. 5th DCA 1984) does not support reversal or a reevaluation of this Court's longstanding recognition the defendant may waive mitigation. Dickey attempted to use a speedy trial demand and its attendant rules "as a "defense" to a criminal prosecution" and stop counsel from preparing for trial. Id. at 696. Such was not the case here. The record reflects there was ample investigation and counseling about mitigation. Ultimately, it was not a question of if there would be a mitigation presentation, but what such would entail.

It is Boyd's suggestion Klokoc v. State, 589 So.2d 219 (Fla.

1991; Farr v. State, 656 So.2d 448 (Fla. 1995); and Hamblen should be read to require counsel to disregard his client's directions when it comes to presenting mitigation. Boyd argues Hamblen and Faretta v. California, 422 U.S. 806 (1975) cannot stand for the proposition that a defendant can "compel counsel to fail to present mitigation" and permitting the client to dictate will render meaningless the penalty proceedings and appellate review (IB 72-73). This Court has addressed the situation where an attorney's responsibility to his client at trial may conflict with the client's wishes. Such issue was resolved by Mora, 814 So.2d at 333-34, where this Court rejected the judge's reading of Koon which resulted in Mora having to decide whether he wished to be represented by counsel and have the family history mitigation foisted upon him versus having to proceed without counsel, but be able to choose not to present certain mitigation. This Court recognized counsel would have to bend to his client's wishes.

Similarly, the differences in Hamblen, Farr, and Klokoc were discussed in Ocha v. State, 826 So.2d 956, 964-65 (Fla. 2002), where this Court found Klokoc and Hamblen consistent and stated:

> ...At Klokoc's request, the public defender moved to dismiss his mandatory direct appeal.... This Court denied the motion stating: "[C]ounsel for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with

> diligent appellate advocacy addressed to both the judgment and the sentence." ... Thus, *Klokoc* reiterates this Court's interest in ensuring that every death sentence is tested and has a proper basis in Florida law.
>
> This proposition is not, as Ocha maintains, inconsistent with our *Hamblen* opinion. *Hamblen* and its progeny operate under the premise that a competent defendant may direct his own defense at trial. See *Farr v. State*, 656 So.2d 448, 449 (Fla. 1995). However, on appeal, this Court must examine Ocha's death sentence to ensure the uniform application of law, evidentiary support, and proportionality. *See Alston*, 723 So.2d at 160. To facilitate the Court's duty, *Klokoc* requires that the defendant have appellate counsel. Therefore, it is not inconsistent for Ocha to waive his right to present mitigating evidence at the trial level, yet have appellate counsel appointed against his wishes. Because Ocha presents no cognizable reason for this Court to recede from our holding in *Hamblen*, we deny his requested relief.

Ocha, 826 So.2d at 964-65.

For similar reasons, Muhammad offers Boyd no relief. In Grim v. State, 841 So.2d 455 (Fla. 2003), the defendant waived mitigation and the state presented aggravation to the jury. On appeal, he argued the court should have ordered mitigation presented through a “special counsel” as suggested in Muhammad. This Court rejected the claim finding:

> In *Hamblen v. State*, 527 So.2d 800 (Fla. 1988), we determined that a defendant cannot be forced to present mitigating evidence during the penalty phase of the trial. We reasoned that "all competent defendants have a right to control their own destinies" within the ambit of the rights, responsibilities, and procedures set forth in the

> constitution and statutes. *Id.* at 804. We therefore continue to hold that a trial court should not be required to appoint special counsel for purposes of presenting mitigating evidence to a penalty phase jury if the defendant has knowingly and voluntarily waived the presentation of such evidence. *See Nixon v. Singletary*, 758 So.2d 618, 625 (Fla.) ("[T]he defendant, not the attorney, is the captain of the ship."), *cert. denied*, 531 U.S. 980, 121 S.Ct. 429, 148 L.Ed.2d 437 (2000); *Koon v. Dugger*, 619 So.2d 246 (Fla. 1993); *Farr v. State*, 621 So.2d 1368 (Fla. 1993).

Grim, 841 So.2d at 461-62.

There is no basis for the claim of an unreliabe sentence. Boyd presented mitigation, counsel argued against aggravation and for mitigation, and a sentencing memorandum was filed.[11] The court ordered a PSI and considered all record evidence in its sentencing order (R 546-55). Any suggestion counsel were ineffective (IB 75) is not cognizable here. Lawrence, 691 So.2d at 1074. Because Boyd did not waive mitigation in its entirety, neither Koon nor Muhammad apply, instead Mora controls. Having failed to give a basis for this Court to recede from Mora, relief must be denied.

ISSUE 11

---

[11]At the March 27, April 10, and May 29, 2002 Spencer and final status hearing, Boyd was advised by the court he could present anything from witnesses to documents to photographs in mitigation and given additional time to consider what he wished to do or if he wished to do. (T2407-29, 2434-58, 2475-89). Boyd refused on each occasion and in fact refused when contacted for the PSI (T2442, 2453.

THE FELONY MURDER AND HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING FACTORS ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE (restated)

This issue has three subclaims: (1) the HAC aggravator should not have been found; (2) because a JOA sould have been granted for the sexual battery and Kidnapping, the felony murder aggravator should not have been found, and (3) should an aggravator be stricken, a single aggravating factor cannot support a death sentence. Both the HAC and felony murder aggravators were established and are supported by substantial, competent evidence.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. 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). See Gore v. State, 784 So.2d 418,

432 (Fla. 2001).

HAC - The court found HAC stating:

> The evidence at trial indicated that Mr. Boyd stabbed Ms. Dacosta in the chest 36 times with an instrument consistent with the design of a torque (sic) screwdriver. The injuries to Ms. Dacosta's chest consisted of superficial puncture wounds, which did not penetrate the sternum. The injuries to the chest occurred in a pattern, indicating that Mr. Boyd inflicted the wounds at the same time.
>
> While Mr. Boyd repeatedly stabbed Ms. Dacosta, she was conscious and struggling against her assailant, as reflected by the defensive wounds about her hands and arms. The evidence indicates that the defensive wounds to Ms. Dacosta's arms were caused by the same instrument which caused the wounds to her chest. These wounds were in addition to the bite marks evidence on her hands.
>
> Not one of the 36 wounds to Ms. Dacosta's chest, nor any of the defensive wounds to her arms and hands, was sufficient to cause her death. Ms. Dacosta died only when Mr. Boyd plunged the instrument, most likely a torque (sic) screwdriver, through her skull, penetrating her brain.
>
> The manner in which Mr. Boyd murdered Ms. Dacosta indicates, at the very least, a complete disregard for the suffering of another human being. The evidence indicates that Ms. Dacosta was aware of her impending death, as she fought against Mr. Boyd, though the pain and fear, and suffering that Mr. Boyd inflicted with each of the 36 blows to her chest, and up until the fatal blow to her brain.
>
> This Court finds that the actions of Mr. Boyd were conscienceless, pitiless and unnecessarily torturous to Ms. Dacosta....
>
> The State has proven this aggravating factor beyond a reasonable doubt....

(R 547-48).

According to Dr. Alexandrov, the 36 superficial wounds to Dacosta's "chest, arms, and head are consistent with ... a Torx driver" and the injuries on her hands & arms are consistent with defensive wounds. Also, these wounds were inflicted before death. The doctor noted defensive wounds/abrasions to the back of Dacosta's hands and arms most likely inflicted as she was trying to protect her head (T 764-70). Dr. Perper concurred that the 36 superficial stab and defensive wounds to the chest/breast, arms, hands, eye area, and temporal lobe were consistent with a Torx screwdriver and were obtained before death (ST 447-48, 461) These injuries would cause pain and induce fear as she was conscious during the infliction of the defensive wounds (ST 452-53). Within a reasonable degree of medical certainty, the chest wounds and those to her hands and arms were inflicted when Dacosta was alive, conscious, and attempting to fend off her attacker (ST 470-71).

Dr. Perper's testimony alone undercuts Boyd's reliance upon Zakrzewski v. State, 717 So.2d 488 (Fla. 1993) and Diaz v. State, 28 Fla.L.Weekly S687 (Fla. Sept. 11, 2003). Both deal with a situation where it could not be said that the victim was aware of her impending death. Such is not the case here. The record reveals Dacosta was alive when the superficial wound

inflicted. Her defensive wounds prove she was conscious and fighting off Boyd. As such, Dacosta was aware of her fate unlike this Court's finding of the victims in Zakrzewski and Diaz.

Drs. Alexandrov and Perper establish that the court's HAC finding is supported by competent, substantial evidence. As explained in Guzman v. State, 721 So.2d 1155 (Fla. 1998):

> The HAC aggravator applies only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. ... The crime must be conscienceless or pitiless and unnecessarily torturous to the victim. ... The HAC aggravating circumstance has been consistently upheld where the victim was repeatedly stabbed.

Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998) (citations omitted). Here, Dacosta was stabbed repeatedly while conscious. Such caused her pain as evidenced by her attempts to defend herself. Eventually, Boyd inflicted the fatal blow by stabbing her in the head with the screwdriver breaking through her skull and penetrating her brain. HAC has been proven on this evidence. See Owen v. State, 862 So.2d 687, 698 (Fla. 2003) (affirming HAC based upon multiple stab wounds); Duest v. State, 855 So.2d 33, 47 (Fla. 2003); Brown v. State, 721 So.2d 274, 277 (Fla. 1998).

Felony Murder - Boyd references his Issue 3 as support for

the claim the felony murder aggravator should not have been found. For the reasons presented in the State's answer to Issue 3, the sexual battery and armed kidnapping convictions should be affirmed. Based upon those conviction, the aggravator was proven beyond a reasonable doubt, the court's finding of the aggravator is supported by substantial competent evidence. Davis v. State, 703 So.2d 1055, 1061 (Fla. 1997) (concluding contemporaneous conviction for sexual battery warrants finding of felony murder aggravator).

Single Aggravator cases - The Defendant suggests this Court should strike at least one aggravator and find a single aggravator will not support a death sentence. For support he points to section 921.141(2)(a) and (3)(a), Florida Statutes wherein the statute refers to "sufficient aggravating circumstances", i.e, denotes a plural factor. He later states that "[o]ne of the two aggravating circumstances used in sentencing appellate was improperly found", but he does not state which one.

In 1973, this Court was called upon to determine if Florida's death penalty statute was constitutional. State v. Dixon, 283 So.2d 1, 2-3 (Fla. 1973), superseded by statute as stated in State v. Dene, 533 So.2d 265 (Fla. 1988). Before this Court in Dixon was the exact language at issue here.

Interpreting the statute, in light of a challenge that the aggravators were vague and did not "provide meaningful restraints and guidelines for the discretion of judge and jury," this Court stated: "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided...." Dixon, 283 So.2d 1, 8-9. Based upon this interpretation, a single HAC aggravator sentence was affirmed in LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978). Since then, this Court has affirmed several single aggravator cases where there was little mitigation, thus, should an aggravator be stricken, the death sentence remains proper as Boyd's mitigation in minimal. See Butler v. State, 842 So.2d 817, 832-34 (Fla. 2003); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Cardona v. State, 641 So.2d 361 (Fla. 1994), denial of postconviction relief reversed, 826 So.2d 968 (Fla. 2002). This Court must affirm.

ISSUE 12

PHOTOGRAPHS OF THE VICTIM WERE ADMITTED PROPERLY DURING THE PENALTY PHASE (restated)

Boyd maintains the admission of autopsy photographs (State

Exhibits B-2, G-5, H-6, D-7)[12] in the penalty phase over his objection was reversible error. (IB 84-85) Defense counsel did not obtain a ruling on his objection to B-2 and no argument was presented against the admission of State Exhibit H-6. Hence, those claims are unpreserved. Still, all were admitted properly and used by the medical examiner to explain the wounds inflicted which went to the contested HAC and felony murder aggravators.

Review of the admission into evidence of autopsy photographs is for abuse of discretion. Philmore v. State, 820 So.2d 919, 930-31 (Fla. 2002); Mansfield v. State 758 So.2d 636, 648 (Fla. 2000); Gudinas v. State, 693 So.2d 953, 963 (Fla. 1997). Even gruesome photographs will not be found inadmissible "[a]bsent a clear showing of abuse of discretion by the trial court." Rose v. State, 787 So. 2d 786, 794 (Fla. 2001). "[P]hotographs will be admissible into evidence 'if relevant to any issue required to be proven in a case.'" Wilson v. State, 436 So.2d 908, 910 (Fla. 1983). See Mansfield 758 So.2d at 648; Gudinas, 693 So.2d at 963; Adams v. State, 412 So.2d 850 (Fla. 1982); Welty v. State, 402 So.2d 1159 (Fla. 1981). Even gruesome photographs are admissible if they fairly and accurately represent a fact at issue, Preston v. State, 607 So. 2d 404, 410 (Fla. 1992), or

[12]For ease of reference, the letter indicates the initial identification of the evidence (T 2188-99) and the number indicating is the final designation.

when they show the condition and location of the body when found or illustrate a witness' testimony, assist the jury in understanding the testimony, or bear on issues of the nature and extent of the injuries, the cause of death, nature and force of the violence used, premeditation or intent. Rose, 787 So. 2d at 794 (noting "autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial."); Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000); Pangburn v. State, 661 So. 2d 1182, 1188 (Fla. 1995).

> Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments.... It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused.

Henderson v. State, 463 So. 2d 196, 200 (Fla. 1995).

During the guilt phase, the parties stipulated to the medical examiner's testimony including the cause and manner of death, type of wounds, weapon used to inflict the wounds, and whether certain wounds were defensive. In order to secure the stipulation, the parties agreed the State would admit into evidence only three body diagrams and a composite of autopsy photographs showing only the hands and arms, but if a penalty

phase were necessary, a different standard would apply (T 758-61, 764-65).

For the penalty phase, the State sought to introduce autopsy photographs showing the chest, arms, hands, and head in order to prove HAC. While the defense objected to three photographs, B-2, D-7, and G-5, they were admitted into evidence (T 2188-99; ST 446). No ruling was obtained on the objection to B-2. Instead, the parties went onto the next piece of evidence. (T 2188). The challenge to B-2 is unpreserved, because Boyd failed to obtain a ruling on it. Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994)(finding claim procedurally barred where judge heard motion, but never ruled); Richardson v. State, 437 So.2d 1091 (Fla. 1983).

Similarly, while Boyd asserts he objected to H-6, the record establishes he was seeking to bar G-5 and made no argument against H-6. After the prosecutor explained what G-5 and H-6 depicted, defense counsel stated: "My objection is that G -- I'd rather have H than G. H shows the close-up of the wounds themselves, the location, the mid-chest, and the pattern. Whereas G shows the trash bag over her head and her pubic hair which has nothing to do with the injuries on her chest." (T 2191-92). Here, Boyd argues that G-5 and H-6 were not admissible because they did not tend to establish either

aggravator found in this case. Such argument is different than the one made below. Because it was not raised previously, the issue is not preserved. Steinhorst, 412 So.2d at 338 (holding except for fundamental error, an issue will not be considered on appeal unless it was presented to lower court in same terms as asserted on appeal).

Also, Boyd attempts to connect the issue of admissibility of the photographs with the construction noise heard in the courtroom during a portion of Dr. Perper's direct examination (IB 86). This issue was not raised with the judge. While there was a motion for mistrial due to the noise, it was not linked to the propriety of the use of particular autopsy photographs which had been admitted (ST 446-54) by the time the defense objected to the "distracting" nature of the noise (ST 455). Hence, the matter as argued has not been preserved. Steinhorst, 412 So.2d at 338.

Moreover, the circumstances of the objection were modified only after the court made an observation about the jurors' reactions. The initial objection raised by defense counsel, Dr. Ongley was: "For the record, the sound is so **distracting** --" (emphasis supplied). Boyd's other counsel, Mr. Laswell interjected that it sounds like a "Sawzall or masonry drill" and Dr. Ongley added the court should look at the jurors' reactions.

On this accounting alone, counsel moved for a mistrial (ST 455). When the State offered to explain the construction noise, counsel declined, stating he did not want to put emphasis on it (ST 456). It was only after the court interpreted the jurors' reactions as "somewhat more recoiling from the photographs than the sound" did the defense note it was not just the noise but that it was coming at a time when the photographs were being displayed involving screwdrivers and Sawzalls. (ST 456-57). After a short recess, the defense changed its position. Now the "**distracting**" nature of the noise was not the issue, but the emotional aspect to it "somewhat reminiscent of a dentist with a drill kind of grinding away." The court agreed to recess if the noise started again (ST 460). The record does not reflect further construction noise during Dr. Perper's testimony. (ST 460-79). Given the evolution the defense argument and the fact there was no further construction noise, the issue is unpreserved, but at worst not a factor in the trial.

Turning to the merits, the State sought the felony murder and HAC aggravators. Boyd challenged the appropriateness of both factors. Hence, the State was required to put on sufficient evidence to prove them beyond a reasonable doubt. Boyd references Almeida v. State, 748 So.2d 922 (Fla. 1999) and its discussion that an autopsy photograph would be inadmissible

if the subject the exhibit went to was not at issue. However, because Boyd challenged both aggravators the State sought, the photographs were material and probative of the aggravation sought. (R 529-2; ST 438-2).

Thompson v. State, 619 So.2d 261 (Fla. 1993) is distinguishable because the autopsy photographs were of the victim's post-trauma dissection. Such is not the case here. The State introduced photographs which were of Dasosta's visible wounds, not of a dissection. Hoffert v. State, 559 So.2d 1246, 1249 (Fla. 4th DCA 1990) is distinguishable because it is not a death case where the State is required to prove the HAC nature of the victim's death. As such, the infliction of a fatal brain injury after the victim has suffered over 40 other stab wounds, bites, and abrasions is an issue for the jury in the penalty phase where it might not be in a second-degree murder case.

Exhibit B-2 - The State noted there were no pictures of the defensive wounds depicted in B-2 (T 2188). Dr. Perper explained the injuries to DaCosta's right forearm were consistent with being produced by a screwdriver and were defensive wounds obtained as a person wards off an "assaultive weapon." (T 2296). The doctor noted Dacosta would have been conscious when she received these wounds (ST 2300). Conde v. State, 860 So.2d 930, 955 (Fla. 2003) (relying on defensive wounds to establish victim

was alive during attack to support HAC); Duest v. State, 855 So.2d 33, 46 (Fla. 2003) (affirming HAC where there was evidence of defensive wounds); Nibert v. State, 508 So.2d 1, 4 (Fla. 1987) (finding HAC where stabbing victim had defensive wounds). Here, the medical examiner used the photographs to identify the defensive wounds which had not been seen by the jury before and affirmed that such were inflicted while Dacosta was conscious and fighting her attacker. State's B-2 was admitted properly in support of HAC.

Exhibit D-7 - The defense objected to D-7 (showing the chest and fatal head wound, blood on the sheet and plastic bag, and decomposing face), because it did not address the manner of death and the injuries were visible in F-4. The prosecutor pointed out a different wound was shown in F-4 and it was the pattern injury which was of import to established the cruel nature of the murder. (T 2188-89). During Dr. Perper's testimony, he explained that D-7 showed decompositional changes as well as injuries to the temporal right parietal area with brain matter showing. He opined that the 36 chest stab wounds would not cause death, but the one to the brain would as exhibited in D-7. (ST 454) The doctor averred that the wounds to Dacosta's chest, arm, hands, and head region were not fatal except for the one which entered her brain. Although he could

not say for how long Dacosta survived after the brain injury, it probably was less than hours. (ST 462). While uncertain of the order, Dr. Perper believed the 36 stab wounds to the chest area were done a one time, the four to the eye were done together, and the "cluster of the four in the head penetrating the brain was done at one time. (ST 465-66). This discussion must be considered in light of the testimony that defensive wounds were received as Boyd sat astride Dacosta stabbing at her and she was able to free her right arm and try to fend off his blows to her chest and head region (ST 470-71).

Exhibits G-5 and H-6 - G-5 depicted the 36 stab wounds to Dacosta's chest area and H-6 showed a close-up of the area. B-2 showed defensive wounds to Dacosta's arms, G-5 and H-6 exhibited the 36 stab wounds to her chest area, and D-7 depicted the head injuries. From these photographs, Dr. Perper was able to explain to the jury the injuries Dacosta received, the possible timing of her death, the fact she was alive when many of the wounds were inflicted based upon the defensive wounds received, and could describe the attack and death Dacosta endured. Taken together, the exhibits show the brutal, torturous nature of enduring 36 stab wounds to the chest, breast, and sternum, and around the eye and about the head while conscious and fighting. Boyd's guilt was determined in part on sketches of the location

of the superficial and fatal wounds. In the penalty phase, the jury was required to consider whether the killing was met HAC. To assess that, photographs were necessary to show the actual clusters of superficial stab wounds inflicted while Dacosta was trying to defend herself and before the fatal brain injury was received. There was no error in confronting Boyd with his handiwork. Henderson, 463 So. 2d at 200. Together, the challenged photographs and other exhibits proved HAC and felony murder. Any prejudicial effect is outweighed by the probative value.

ISSUE 13

THE DEATH SENTENCE IS PROPORTIONAL (restated)

It is Boyd's position the sentence is not proportional. However, this Court has affirmed death sentences under circumstances similar to those here, and should do so again.

Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases to ensure uniformity. Urbin v. State, 714 So.2d 411, 416-17 (Fla. 1998); Terry v. State, 668 So.2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it

with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). The Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14-15 (Fla. 1999).

Here, the court found the HAC and felony murder aggravtors, mitigation of (1) no significant history of prior criminal activity (medium weight); (2)religion (minimal weight); (3) good jail record (minimal weight); (4) family and friends care for/love Boyd (minimal weight); (5) good family (minimal weight); (6) remorse (minimum weight). For sexual battery, Boyd received 15 years and life for armed kidnapping to run consecutive to the death sentence. (R 546-55). Boyd's reliance upon Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988) is misplaced as there the statutory mental mitigators of extreme mental or emotional disturbance the capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired. Also, conspicuously absent was the HAC aggravator. As such, the facts of Fitzpatrick was distinguishable. Here there was one statutory mitigatory of lack of criminal history and five non-atatutory mitigators of minimal to minimum weight. Likewise, Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988) does not assist Boyd. There the

prior violent felony and felony murder aggravators were found to be outweighed by the defendant's age (17 at the time) marginal intelligence, horrific homelife, his "youth, inexperience, and immaturity" as well as extensive use of drugs. Boyd has no such mitigation, he was a mature man working in his family business and doing odd jobs for Rev. Lloyd. There is no evidence he had low intelligence or used drugs. The facts of Livingston are distinguishable from the instant case.

Jackson v. State, 575 So.2d 181 (Fla. 1991) is distinguishable from this case. In Jackson, this Court considered an Enmund and Tison[13] issue, i.e., the relative culpability of co-defendants in an armed robbery and concluded that it was unproven that Jackson was the triggerman and that his state of mind was sufficient to subject him to the death penalty under a felony murder theory. Id., at 190-93. Such is not the case here. There are no dueling co-defendants, everything done here was done by Boyd. In Kramer v. State, 619 So.2d 274, 278 (Fla. 1993) this Court focused on the mitigation of "alcoholism, mental stress, severe loss of emotional control" and discribed the case at its worst as "nothing more than a spontaneous fight, occurring for no discernible reason, between

[13]Tison v. Arizona, 481 U.S. 137 (1987) and Enmund v. Florida, 458 U.S. 782 (1982).

a disturbed alcoholic and a man who was legally drunk. This case hardly lies beyond the norm of the hundreds of capital felonies." Such cannot be said for the facts here. Boyd abducted Dacosta when she was vulnerable - it was near 2:00 a.m. and she had run out of gas - and he secreted her to his apartment where he methodically tortured her with a screwdriver and raped her. When he was done he stabbed her through the skull, cleaned the crime scene, wrapped her body in plastic and dumped it miles from his apartment. Such does not show the severe loss of emotional control at issue as mitigation in Kramer. Boyd's cases do not call into question the proportionality of his sentence.

The court took into consideration Boyd's good jail record and religious beliefs which was based on Matthews testimony. It is not for this Court to reweigh that mitigation. Bates, 750 So.2d at 14.

The State relies on Mansfield v. State, 758 So.2d 636, 647 (Fla. 2000) (finding capital sentence proportional based on HAC and felony murder-sexual battery aggravators and five non-statutory mitigators); Davis v. State, 703 So.2d 1055, 1061-62, (Fla. 1997), (affirming death penalty HAC and felony murder-sexual battery and and slight nonstatutory mitigation); Geralds v. State, 674 So.2d 96, 105 (Fla. 1996) (affirming death

sentence with aggravators of HAC and felony murder-robbery and both statutory and nonstatutory mitigation was afforded little weight); Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1996) (affirming death sentence based on two aggravators -- prior violent felony and HAC even in light of two statutory mental mitigators -- extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of conduct and several nonstatutory mitigating circumstances); Lemon v. State, 456 So.2d 885, 888 (Fla. 1984) (upholding death penalty for stabbing death of victim where HAC and prior violent felony aggravators found to outweigh statutory mitigator of emotional disturbance). Further, even if only HAC remains, death is proportional. Butler, 842 So.2d at 832-34; Blackwood, 777 So.2d at 412-13; Cardona, 641 So.2d at 361; LeDuc, 365 So.2d at 152.

ISSUE 14

THE COURT EXERCISED ITS DISCRETION PROPERLY IN ASSESSING AND WEIGHING MITIGATION (restated)

Boyd takes issue with the weighing of the non-statutory mitigator of (1) good family; (2) religious beliefs, and (3) jail record (IB 93-95). This claim is meritless as the court followed the dictates of Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000).

This Court in Campbell v. State, 571 So.2d 415 (Fla. 1990),

established relevant standards of review for mitigating circumstances: 1) whether a circumstance is truly mitigating in nature is a question of law and subject to *de novo* review; 2) whether a mitigator has been established is a question of fact and subject to the competent, substantial evidence test; and 3) the weight assigned to a mitigator is within the judge's discretion. See Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000); Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding an established mitigator may be assigned "little or no" weight); Mansfield v. State, 758 So.2d 636 (Fla. 2000); Alston v. State, 723 So.2d 148, 162 (Fla. 1998); Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996).

The suggestion the sentencing order violates the dictates of Morgan v. State, 639 So.2d 6, 13-14 (Fla. 1994) and Mines v. State, 390 So.2d 332, 337 (Fla. 1980) is unsupported. The court did not abdicate its sentencing responsibility and reject mitigation based upon a guilty verdict. Instead, the court gave less weight to Boyd's offer of "good family" as mitigation because it did not keep him from committing brutal acts upon Dacosta. It cannot be said that no reasonable person would take the position the court did in assessing minimal weight to this fact. See Tompkins v. State 2003 WL 22304578, 12 (Fla. 2003)

(accepting rejection of "good family" mitigator); Anderson v. State, 841 So.2d 390, 408 (Fla. 2003) (affirming death sentence where judge gave minimal weight to "good family" mitigator); Chavez v. State, 832 So.2d 730, *767, n.44 (Fla. 2002) (noting court gave "good family" mitigator some weight); Bell v. State, 841 So.2d 329, 333 (Fla. 2002) (assigning little weight to "good family" mitigator).

Like the "good family" mitigator, other courts have given minimum weight to the religion and good jail record mitigation. See Doorbal v. State, 837 So.2d 940, 952 (Fla. 2003) (giving little weight to religious and good courtroom behavior); Chavez v. State, 832 So.2d 730, 767 (Fla. 2002) (assigning very little weight to good jail conduct); Hurst v. State, 819 So.2d 689, 699 (Fla. 2002) (finding harmless rejection of religious beliefs mitigation); Gudinas v. State, 816 So.2d 1095, 1099 (Fla. 2002) (according very little weight to religious beliefs); Reese v. State, 768 So.2d 1057, 1058 (Fla. 2000) (assigning good jail record minimal weight); Banks v. State, 700 So.2d 363, 368 (Fla. 1997) (finding no abuse its discretion in rejecting religion as mitigation). Boyd has not shown an abuse of discretion and this Court must affirm.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the convictions and sentence of death.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

____
LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Gary Lee Caldwell, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on May 19, 2004.

____
LESLIE T. CAMPBELL

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced

proportionately on May 6, 2001.

____
LESLIE T. CAMPBELL