IN THE SUPREME COURT OF FLORIDA

GERALD D. MURRAY,

Appellant

v.

STATE OF FLORIDA,

Appellee

Case No. SC03-1241

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE#

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Murray." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following are examples of other references:

"I 100": p.100 of volume I of the 16-volume record on appeal certified by the Duval clerk's office on September 12, 2003;

"SR1 44": p.44 of part 1 of the supplemental record on appeal;

"IB 20": p.20 of the Initial Brief dated as served October 24, 2006.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

Because the State disputes aspects of Murray's Statement of the Case and Facts (IB 1-11) as argumentative, omitting important facts, and contrary to the appellate standard in favor of the verdict, the State submits its rendition of the facts.

The subject of this appeal is circuit court case #1992-3708CFA, from the Fourth Judicial Circuit, in and for Duval County. Murray was indicted on April 9, 1992. (I 3-5) After extensive pre-trial motions hearings (III 577-VII 1224) and a May 2003 trial (XII-XVI), Murray was convicted of (III 402-404, 529-59) First Degree Murder of Alice Vest, Burglary with Assault in Alice Vest's residence, and Sexual Battery of Alice Vest (I 3-5), resulting in a jury 11-to-1 recommendation of death (III 458) and death

sentence (III 532, 537-59).

This is the third time that Murray has been convicted of these crimes and the third time that the jury has recommended death, previously by votes of 11-1 and 12-0. A 1998 trial resulted in a hung jury (Clerk's Notes 3/6/98, which appear at the front of Volume I prior to page 1). This Court reversed two of the prior convictions. See Murray v. State, 692 So.2d 157 (Fla. 1997) ("Murray I," tried in 1994) and Murray v. State, 838 So.2d 1073 (Fla. 2002) ("Murray II," tried in 1999).

Co-perpetrator Steven Taylor was also tried and convicted for this murder. Taylor's jury recommended death 10-2, and this Court upheld Taylor's conviction and death sentence in Taylor v. State, 630 So.2d 1038 (Fla. 1993).

In Issue I (IB 32), Murray states that the "hair evidence" was "in effect, the State's entire case against Murray." To the contrary, the evidence included substantial additional evidence, which the State now summarizes from the trial that began on May 20, 2003, with opening statements (XII 370).

The victim, 59-year-old Alice Vest (XII 401), lived by herself in a mobile home in the Mandarin area (See XIII 630) of Jacksonville, on the corner of Old St. Augustine Road and Plummer Grant Road (XII 402). On **Saturday, September 15, 1990**, (XII 402) she went shopping and ate at Pizza Hut with her long-time friend, Linda Engler (XII 401). After dropping by Engler's residence, the victim headed home, where the victim called Engler at about 11:30pm per their usual understanding and confirmed she (the

victim) was "home safe." (XII 402-403)

On **Sunday morning, September 16, 1990**, when Engler was unable to contact the victim, she called Scott Perry, who lived across the street from the victim, to check on her. (XII 403-404) Perry had keys to the victim's residence because he took care of her cat when she was on vacation. (XII 412) Perry, accompanied by another neighbor, Jean, saw the victim's car in the carport and found one of her doors propped open, a window screen removed, and the victim's house in disarray. Perry asked his wife to call 911. Jean apparently found the victim dead. (See XII 412-15)

The victim's naked dead body was draped half way off of her bedroom bed (XII 426), with an electrical cord still around her neck (XII 436; XIII 569-70, 577). A part of a vinyl web belt was on the floor, and the other piece of it was under the victim's body. (XII 429, 436-37, 452) The victim was beaten with a metal bar (XII 440; XIII 569), a candle stick holder, and a broken bottle (XII 440; XIII 568). Her jaw was broken in several places, (XIII 562-64) and the broken bottle was consistent with it being used to break the victim's jaw (XIII 568). She had been stabbed over 20 times. (See, e.g., XIII 577)

For the 2003 trial, the medical examiner's (Dr. Floro's) 1999-trial testimony was read (XII 544-45) and in 1999 was subjected to vigorous cross-examination (See XIII 580-96), including the use of his 1991 deposition (XIII 591-92). (See Issue X)

The medical examiner, Dr. Floro, summarized (XII 550):

> She was nude with multiple injuries to the body including the head, the neck, the chest, the abdomen and the lower -- one of the lower

> extremities. She was bloodied. There were electrical cords around her head, two of them, tied around. There were bruises. There was contusions, stab wounds in the neck, bruising of the breasts, stab wounds of the abdomen, back, upper back, lower back, bruising of the left knee area and stab wounds of the right upper thigh.

"Miss Vest died of ligature strangulation," with "multiple stab wounds as contributing factor." (XIII 556) She was strangled with one of the electrical cords (XII 436; XIII 569-70), and she could have also been strangled with one or more of the belts (XII 436-37; XIII 570-71). Some of the stab wounds were consistent with the knife, and some, with the scissors recovered at the crime scene, (XII 434-36; XIII 571-73) which was a point subject to cross and redirect examination through Floro's 1991 deposition (XIII 591-92, 596). The medical examiner could not tell "for sure" the number of assailants (XIII 595-96), but testified when asked whether it was "one person, two people, three persons, four persons" (XIII 579):

> I can't say, but this is what I can say, though, there is just too many different types of injuries on the body of Miss Vest where you have the trauma to the top, you have another trauma to the other side, a deeper instrument, stab wounds, strangulation.

The medical examiner indicated that the victim had been vaginally and anally raped. (XIII 573)

The knife, the scissors, two belts, the metal bar, the broken bottle, and a comforter recovered from the crime scene had human blood on them. (XIV 845-52) Semen was found on the comforter. (XIV 852-53) The telephone wire to the victim's home had been cut (XII 425), apparently with the victim's yard sheers (XII 407, 450).

That Sunday morning (XIII 665), the police arrived at the victim's house; they photographed and videotaped the scene and collected evidence

(XII 426-41, 480, 491-503, 517-28). The video was done first. (XIV 802) It was played for the jury. (XII 541) There were unsuccessful attempts to lift and identify fingerprints from numerous items from the crime scene. (XII 453-63; XIII 704-711, 728-29, 733) A possible explanation was that someone wiped the items after using them (XIII 712,715), and, of the roughly two hundred items processed for fingerprints, the victim's fingerprint was on one of them, a receipt (XIII 712-13).

Shoe prints recovered at several locations at the crime scene, including the victim's bed comforter/cover and the glass table top in the master bedroom, were identified as left by Britannia shoes (XII 501-503; XIII 692-96), and a shoe print on a blouse/shirt at the crime scene appeared to be from a shoe other than the Britannia design, but the expert could not be "sure" (XIII 695, 717, 719-20, 731-32, 734). The shoe prints on the cloth items were left because of the presence of some type of "contaminant"; blood, ink, food are among the possible contaminants. (XIII 697) Steve Taylor wore Britannia shoes. (XII 672) In is unknown how many people in Jacksonville wear Britannia shoes. (XIII 727)

The victim's home had been ransacked (See XII 413), in contrast to the victim's very neat housekeeping (XII 405), and items were missing from her home, including a distinctive piece of jewelry that the victim's boyfriend had given to her (See XII 409; XIV 792).

Type A blood was found in semen on a blouse and the comforter recovered from the crime scene. This was consistent with Taylor's, but not Murray's, blood. (XIV 858-860, 867, 874-75).

Dr. Joe Dizinno, an FBI analyst, testified that Murray's known pubic hairs "had the same microscopic characteristics as" hairs found on the victim's body (XIV 907) and on a white garment (XIV 906), which was found in the bathroom, which the victim kept "[v]ery clean" (XII 409, 430, 444-45). The pubic hairs were inconsistent with Steve Taylor's. (XIV 907) Dizinno discussed the numerous factors that he considers in rendering this opinion. (XIV 901-904, 917-32) This evidence is contested in Issues I through III, and it will be discussed in greater detail there.

Appellant/Defendant Murray also lived on Plummer Grant Road, down the street from the victim, who liked to work in her yard. (XII 405-407. See XIII 627-28, 631-32, 664-65)

On **Saturday** within hours before the murder and on **Sunday** within hours after the murder, Murray was observed with his friend, Steve Taylor. Murray and Steven Taylor knew each other "pretty well" (XIII 632) and "hung together" (XIII 673). On **September 15, 1990, Saturday night**, Murray asked his neighbor, Bubba Fisher, to pick up Taylor. Murray and Fisher picked up Taylor "off of Main Street." (XIII 629-30) The three of them returned to the Mandarin area and shot some pool at a bar. (XIII 628-32) They left the bar between 10:30pm and 11:15pm. (XIII 633) At **about 11:50pm**, Fisher dropped off Murray and Taylor within a mile of Murray's and Fisher's homes, "not very far." (See XIII 634-36)

"**About 20 minutes till 1:00 that evening**" (XIII 652), Juanita White, who lived about two miles from the corner of Old St. Augustine Road and Plummer Grant (XIII 648-49), heard her dog barking and, with gun in hand,

she released the animal into her yard area with a "Go get them." She saw Murray and Taylor running from the garage/barn area of her home "right across in front of the flood lights." The dog was chasing them. (XIII 651-52) Murray called Juanita White and asked her if her son, Doyle "Skip" White was home. She responded that "you know he's not" because his truck is not here. She mentioned to Murray that he was in her yard, and Murray responded, "Were you scared?" and offered to come over until her son "comes in." She said that with "two guns and a dog," she needed no more help. (XIII 653-54)

State's Exhibit 47 shows the locations of the victim's, White's, and Murray's residences, (XIV 792-93) as well as where Fisher dropped-off Murray and Taylor the night of the murder (XIII 634-35).

After dropping off Taylor and Murray in the area of the victim's and Murray's residences on Saturday, September 15th, Bubba Fisher worked in the yard on **Sunday** but he testified that he did not see Murray then or for probably a couple of weeks, even though they lived next door to each other. Murray subsequently told Fisher that he had been with Taylor, visiting Taylor's grandmother. (XIII 636-37. See also XIII 639)

Murray's brother, Cheavin, testified that in September 1990 he and Murray lived at his parent's home on Plummer Grant Road. On **Sunday** morning, September 16, 1990, he could see the police "down the street" from the residence (XIII 665), and he worked on a stereo system with Murray (XIII 671). On **Sunday** afternoon, he saw Murray with Taylor there, and when he walked up to them, "they shooed" him away. (XIII 664-65) Taylor and Murray

left town after "[t]he lady was killed." (XIII 666, 674-75) It was not unusual for Murray to leave town and not to want Cheavin around. (XIII 668)

On **February 12, 1991**, Taylor, Cheavin, and Jason Leister went to see Murray. Taylor then talked with Murray alone, and next, Cheavin and Leister "took" Taylor to a friend of Taylor's house, which was off of Main Street. While there, Taylor went in the backyard and returned with his hands dirty – "[h]e had been digging." (XIII 666-69, 679-81) Detective O'Steen testified that, on **February 12-13, 1991**, jewelry stolen from the victim was found at a house at 7145 Blocksom Street, which is off of Main Street; the items were in a plastic bag with dirt in it. (XIV 791-92) As mentioned above, on **Saturday night, September, 15, 1990**, the night of the murder, Murray and Fisher picked up Taylor "off of Main Street." (XIII 630)

On **April 8, 1992**, Detective O'Steen Mirandized Murray, who agreed to talk with O'Steen. (XIV 947-50) O'Steen told Murray that hairs from the crime scene matched his hairs, and Murray responded that the police "should have gotten the results back last year." (XV 957) Murray also told O'Steen that he heard from TV coverage of the Taylor trial that his (Murray's) hair matched hair from the crime scene, that "it didn't worry him," and that "Taylor told on himself by coming in her." Murray said, "You didn't find my come" and "You didn't find my come on no rag." (XV 958-59) Murray said that any of his hairs found in the victim's sink may have been from pulling "a bag of reefer out of my crotch and g[iving it] to Taylor." (XV 958-59) Murray did not recall "where he gave the bag of reefer to Taylor" and "went into another scenario and said, well, some of his hair could have been on

Taylor's clothes and fell off." O'Steen continued (XV 959-60):

> A He said, 'If my hair was on Taylor's clothes and Taylor took off his clothes and raping her on the bed, it would fall off.' And that's when Murray was asked how he knew Taylor had his clothes off.
>
> Q And how did he respond?
>
> A He said he just assumed that's what he was doing.

Murray denied having any kind of sexual relationship with Taylor. (XV 957) In response to a defense question, the Detective testified that hair transfer from a plastic reefer bag would be "rare." (XV 962)

Murray told the Detective that early morning, at about 1am, on September 16, 1990, Bubba Fisher dropped Taylor and himself in front of his (Murray's) house, they went to Skip White's house and then to Murray's house, where they drank beer in the garage. (XV 957-58) He said that after looking for Skip, he called Juanita White that night. (XV 963-64) Taylor left, and Murray went to bed drunk. (XV 958)

On **April 9, 1992**, the Grand Jury indicted Murray (XV 960; I 3-5).

On **November 22, 1992**, Murray escaped from the Duval County Jail (XV 967-68) with two other inmates (XV 971-72). Anthony Smith, also charged with murder, was one of them. (XV 996-97) Smith described how they escaped (XV 1001-1005).

Fleeing from the jail, they went to the Main Street Bridge, where Murray called someone on a phone, and then Murray said his mother is coming to pick them up. After waiting about 10 to 15 minutes at the rendezvous point, Murray's mother picked them up in a dark blue late model GMC or Chevrolet pickup truck. (See XV 1003-1005) Bellsouth records indicated that on November 22, 1992, a collect five-minute call was placed from a pay

phone located at the foot of the Main Street Bridge. The call was placed to 12555 Plummer Grant Road, (XV 1050-52) where Murray had been living with his parents (XIII 628; XIV 793).

Murray's mother took them to Lake City, where they stayed for about three days at a camp ground. (XV 1005-06) While at the camp ground, Smith testified that he and Murray had a conversation about Murray breaking into a house with "Steve." Murray said that (XV 1007-08)

> … Steve wants to break into this house. But Murray says he don't want to break into the house, nothing to do with breaking into a house. He says Steve got him a little bit drunker, a little bit drunker and he agreed to break into this house. *** Murray said they broke into this house, *** He said when they got inside they … realized somebody was home, a woman was home.

Murray said that after he held the knife while Taylor had sex with the woman, he knew it was his turn; "he said he didn't want to touch this woman but he was afraid if he didn't do something that Steve would laugh at him or pick on him." Murray handed the knife back to Taylor and obtained oral sex from the victim. Murray then looked around the house for "stuff to steal." (XV 1009) Murray was gone for five to 15 minutes, and when he returned, (XV 1009-10)

> Steve has stabbed the woman. He said he sees blood on the knife, and he knows Steve has stabbed the woman. He said Steve said he stabbed her about 15 or 16 times. *** Murray said the woman wasn't dead. He said apparently Steve stabbed her, she wasn't dead. He said they got an extension cord, some kind of cord, he said, and he said they strangled and choked the woman to death.

Smith said that he and Murray ended up in Mexico, where they split up. (XV 1011) On direct examination (XV 1012) and cross-examination (XV 1015, 1020), Smith discussed his criminal history. He was returned to Jacksonville, where he pleaded guilty to first degree murder, robbery, and

escape and received a life sentence. Smith agreed to testify in this case, and the State waived the death penalty. (XV 1012-14) The defense was allowed to explore the details of Smith's murder charge. (See XV 1022-26) Smith said what he did "was terrible, it should have never happened." (XV 1038) Concerning Murray's characterization of Smith's testimony about deception (IB 4), the State clarifies that Smith indicated that he has not lied, (XV 1040, 1041) nor has he previously stated that he lied (See XV 1045-46) about what Murray told him about the murder.

On **June 9, 1993**, the FBI captured Murray in Las Vegas, Nevada. (XV 969, 1055-56) At the time, Murray had in his possession a bank services identification with his photo but in the name of Doyle R. White, and a social security card under the name of Doyle Rex White, II. (XV 1056-58)

The State rested (XV 1058), and then the defense rested without putting on any evidence (XV 1080-82, 1102).

During the trial, there were inquiries about potential juror misconduct, which is the subject of ISSUE VIII and which will be addressed in detail under that issue infra.

On May 22, 2003, the jury reached its verdict of guilty as charged on all counts, and the jury was polled. (XVI 1341-46; III 402-404)

On June 19, 2003, the Court conducted the jury penalty phase. (VIII 1419 et seq.) The State introduced evidence of Murray's other violent felonies:

> 1. Murray caught Ms. Byrd and dragged her by her hair to a waiting vehicle, forced her into the back seat, held her down, and held an empty Jack Daniels whiskey bottle to her throat and stated, "Don't move, if I wanted to I could break this bottle and kill you." Murray

then began to undo his pants, she began to resist, and he threatened her again. Ms. Byrd was rescued, as a police car was behind them. (VIII 1451-56) A Judgment and Sentence for False Imprisonment was introduced into evidence. (VIII 1456-57)

2. Murray came to Mr. Millhouse's residence and knocked on the door. When Millhouse opened the door, Murray "started battering him in the face with his fist." (VIII 1459) Murray also stuck Millhouse in the face with a glass on a table. Bloodied, Murray later stated, "I f---- him up, I beat [his] ass." (VIII 1460) A Judgment and Sentence for Aggravated Battery was introduced into evidence. (VIII 1461)

3. There was a confrontation in a parking lot, in which Murray fired at a crowd and then yelled, "'I'll kill ya'll,' something to that effect." (VIII 1463-64) A Judgment and Sentence for Aggravated Assault was introduced into evidence. (VIII 1465)

The Defendant did not introduce any mitigation evidence. (See VIII 1479-82)

After counsels' arguments (VIII 1484-1525), the jury recommended a death sentence by a vote of 11 to 1. (VIII 1549-51; III 458) The Judge ordered an updated PSI. (VIII 1555) The State and the defense submitted sentencing memoranda. (III 459-69, 480-87; VIII 1579)

On June 25, 2003, at the Spencer hearing, the Judge found Murray to be an habitual felony offender for purposes of Count II, Burglary. (VIII 1573) Murray presented no mitigation evidence to the judge at the Spencer hearing. (VIII 1582-89) On June 26, 2003, the judge sentenced Murray to death. (III 537-59; IX 1601-1605). The trial judge found the following aggravating factors:

1. Prior convictions for violent felonies for (a) the false imprisonment in which he abducted the woman to his car, threatened her with a bottle and to kill her; (b) the aggravated battery in which Murray beat a man, hit him with a glass, and bragged about it; and, (c) the aggravated assault in which Murray fired at a crowd of people. The Judge gave this aggravator great weight. (III 544-45)

2. The Murder was committed during the commission of a Burglary and/or Sexual Battery; the Judge elucidated the supporting evidence and gave this aggravator immense weight. (III 545-46)

3. The Murder was committed for financial gain, which the Judge gave some weight. (III 546-47)

4. The Murder was especially heinous, atrocious, and cruel; the Judge elaborated his reasoning and gave this aggravator great weight. (III 547-49).

The judge discussed and weighed a number of mitigating factors, such as the untimely death of Murray's wife, which the Judge gave very little weight. (III 552-53) The Judge discussed and rejected two potential mitigators. (III 549-51) The Judge stated that the aggravating factors "far outweigh" the mitigating factors, (III 556-57) and indicated that he did not disagree with the jury's 11 to 1 recommendation of death. (III 557)

SUMMARY OF ARGUMENT

Murray's Initial Brief repeatedly ignores principles of appellate review by raising unpreserved claims, not developing claims, questioning the credibility of witnesses that fact-finders have accredited, and repeatedly and groundlessly assaulting the integrity of the prosecution below. Each issue in Murray's Initial Brief fails to meet his appellate burdens.

ISSUE I contests the admissibility of "Q-42," which contained hair collected from the victim's body at the crime scene and which Murray II had held as properly admitted in the 1999 trial, and **ISSUE II** contests the admissibility of "Q-20," which contained hair recovered from a nightgown garment at the crime scene and which Murray II had held as improperly admitted in the 1999 trial. Because of the facts of this 2003 trial were substantially similar to the 1999 trial concerning "Q-42," Murray II controls here as precedent and law of the case. Because this 2003 trial was

guided by Murray II, resulting in evidence that explained how the lotion bottle was separated from the garment, the trial court correctly ruled "Q-42" admissible. Murray's **ISSUE III** erroneously claims that Dr. Dizinno's opinions concerning consistent microscopic evidence were inadmissible. Murray's ISSUE III continues Issue I's and Issue II's self-serving inferences and innuendos contrary to principles of appellate review. For **ISSUES I, II, and III**, Murray, by telling the Detective that law enforcement should have gotten the hair analysis results back earlier, in essence, admitted that this was his hair. This not only provides additional assurance of the hairs' authenticity requisite for admissibility but also, together with the totality of all the facts of the case, renders any error harmless.

ISSUE IV erroneously argues that the indictment should have been dismissed based upon freeze-framing prior appellate-level evidentiary holdings and, like ISSUE II, ignores the "new trial" nature of this Court's prior remands. Contrary to **ISSUE V**, Murray was not entitled to depose the prosecutor and lead detective to attempt to ascertain the evidence on which the grand jury relied, and the discussion of **ISSUE VI** infra shows that the evidence was much more than sufficient to support the convictions.

ISSUE VII attacks the prosecution's peremptory challenge of an African-American but ignores that Murray is white, that the prosecutor did not peremptorily challenge two African-Americans who served on the jury, and that the trial judge accredited the prosecution's race-neutral reason.

ISSUE VIII's allegations of juror misconduct and resulting improper

judicial interviews of jurors fail to demonstrate error, and on appeal, Murray questions the very juror interviews that his counsel insisted the judge conduct and in which his counsel actively participated.

ISSUE IX attacks Florida's time-tested and constitutionally sound jury instruction on reasonable doubt. This issue was waived, and, in any event, it has no merit. **ISSUE X** ignores the legal test for the use of prior testimony in this trial, and the trial judge properly allowed the reading of the testimony of two witnesses from the 1999 trial of this case. And, in the final section, discussing **PROPORTIONALITY**, the State collects several cases that show that the death penalty in this case is proportional to other cases.

ARGUMENT

ISSUE I: WHETHER TRIAL COURT WAS UNREASONABLE IN PERMITTING THE ADMISSION OF SLIDE Q-42 INTO EVIDENCE. (RESTATED)

Issue I (IB 16-36) contests the admissibility of slide Q-42. Dr. Joseph Dizinno testified that it contained a hair with the same microscopic characteristics as Murray's pubic hair and microscopic characteristics inconsistent with co-perpetrator Steven Taylor's hair. Murray II rejected a similar claim attacking the same evidence. See 838 So.2d at 1082. Here, only a narrow portion of Issue I was preserved through Murray's 2003 arguments to the trial judge, and, Murray II controls for the reason enunciated there, See Id. at 1082-83.

A. Only a portion ISSUE I was preserved.

For the basis of all of the arguments in Issue I presented to the trial court, the Initial Brief (IB 16) cites to Murray's Motion to Exclude Any

Hair Evidence Due to Probable Tampering (II 357-61) and the trial court's order denying that motion (II 362). Neither the Motion nor defense objections (XII 513-15; XIV 898, 946) mentioned or cited to constitutional provisions or alleged prosecutorial misconduct. Therefore, other than the narrow evidentiary-rule claim of "tampering" with Q-42 based upon a purported discrepancy-in-number-of-hairs, the remaining claims stated in Issue I are unpreserved. See Farina v. State, 937 So.2d 612, 629 (Fla. 2006)(relevancy objection insufficient to preserve appellate claim of prosecutorial misconduct; not "the specific contention asserted as legal ground for the objection ... below"); Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for 'proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'"); Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997)(argument below was not the same as the one on appeal); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings); Filan v. State, 768 So.2d 1100, 1101 (Fla. 4th DCA 2000)(issue regarding section 90.803(6) held unpreserved); U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995)("raise-or-waive rule prevents sandbagging").

Accordingly, although Murray's initial brief is riddled with accusations of prosecutorial misconduct influencing Chase's 2003 trial, the record-on-appeal is undeveloped on this point because Murray failed to

pursue such a claim below. When defense counsel asked the question on cross-examination concerning Chase supposedly changing from two hairs to two "samples," defense counsel failed to ask Chase to clarify what he meant by "I believe after another testimony brought out the possibility of possibly more hairs" (V 799). What "another testimony"? Whose testimony? When was it elicited? Who brought it to Chase's attention and under what circumstances? Or, did Chase discover it on his own? The cross-examination question does not even specify when Chase became aware of the "possibility" of "more hairs." These are among the unanswered questions to which Murray is quick to self-servingly and improperly assume the answers in his favor on appeal. All prosecutorial misconduct claims are unpreserved.

B. Murray II controls.

Concerning any preserved evidentiary claim, Murray II controls, not only as precedent, but also as law of the case: Except for unusual circumstances, "the most cogent reasons," and avoiding "manifest injustice," "[t]he law of the case applies in subsequent proceedings as long as there has been no change in the facts on which the mandate was based." Engle v. Liggett Group, Inc., 945 So.2d 1246, 1266 (Fla. 2006). Therefore, to evaluate Issue I in this appeal, it is appropriate to juxtapose the operative facts of Murray II, contained within that opinion, with the facts for this appeal from the 2003 trial and conviction:

- "Murray points to the portion of the record where Detective Chase testified that he collected two hairs from the victim's body, one from her chest and one from her leg," Murray II at 1082; compare e.g., IB 16;

- ? Chase testified that he did not have a "microscope or anything to look at hairs," Murray II at 1082; compare XII 521;
- ? Chase testified that "I believe it was two hairs but I can't be positive," Murray II at 1082; compare XII 521-22 (not positive, did not stretch them out to ensure any exact number); Chase did not count the hairs (XII 521-22); see also SR1 57, 61, 66)
- ? "Chase testified that he placed the hairs in an envelope and then placed the envelope in the property room of the Jacksonville Sheriff's Office," Murray II at 1082; compare XII 519-21, 522;
- ? "That evidence was later sent to the FBI for comparison," where "Joseph DiZinno, the expert at the FBI, testified that he received … hairs from the victim's body," Murray II at 1082; compare 904-906, 908-912; see also XIV 799-80
- ? "DiZinno [testified] that he examined 'several' Caucasian hairs," but "the FBI 'doesn't count hairs so ... there could be as few as five and as many as twenty-one' hairs," Murray II at 1082; compare XIV 907-908, 915-16.

Here, as in Murray II, "[n]either the officer who collected the hairs nor the analyst who received the hairs was sure as to the exact number of hairs at issue," 838 So.2d at 1982. Here as in Murray II, "Murray's allegations amount to mere speculation, and hence the trial court did not commit error in admitting the hairs into evidence," Id. at 1083. Because of the similarity of facts in the 2003 proceedings with those in 1999, Murray II controls not only as precedent but also as law of this case.

Murray (E.g., IB 17, 20) attempts to escape Murray II's holding and law-of-the-case by arguing that there were changes in this trial regarding this evidence, but, as discussed above, because the arguments were not presented to the trial court, the record remains undeveloped and those claims are unpreserved. Indeed, Murray's self-serving inferences violate not only the presumption that the trial court's ruling admitting the evidence is correct, see, e.g., Caso v. State, 524 So.2d 422, 424 (Fla.

1988)("affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963)("All orders, judgments and decrees rendered by trial courts reach the appellate court clothed with a presumption of correctness"), but also the presumption that the prosecutor, as a constitutional-level official acted in good faith, See, e.g., State v. Rochelle, 609 So.2d 613, 617 (Fla. 4the DCA 1992)("presumption that a prosecution … undertaken in good faith … in fulfillment of a duty to bring violators to justice … burden is on the defendant to show otherwise"); Straughn v. Tuck, 354 So.2d 368, 371 (Fla. 1977)("Tax assessors are constitutional officers … actions are clothed with the presumption of correctness"); Art. 5 § 17, Fla. Const. ("state attorney shall be the prosecuting officer of all trial courts in that circuit"). Murray violates these compounded presumptions of correctness with his repeated self-serving and baseless accusations of prosecutorial and other official misconduct, where he fails to support his accusations with specific record cites to support his conclusions such as "the result they wanted" (IB 18); "[t]he State improperly attempts to mislead this Court" (IB 20); "[i]nstead of the search for the truth" (IB 21); "State's improper actions" (IB 21). Initial-Brief repetition and bravado do not elevate an accusation to anything cognizable on appeal.

C. Even if Murray II does not control, Murray must establish that the trial court's ruling was unreasonable.

Assuming for the sake of argument that Murray II does not control, on matters of evidentiary admissibility the appellate standard of review is

whether there was "a clear abuse of … discretion," Brooks v. State, 918 So.2d 181, 188 (Fla. 2005); Ray v. State, 755 So.2d 604, 610 (Fla. 2000). Therefore, Murray must meet the burden of establishing that the trial court's ruling was unreasonable. See Trease v. State, 768 So.2d 1050, 1053 n.2 (Fla. 2000)("Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court'"), quoting Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990); Canakaris v. Canakaris, 382 So.2d 1197,1203 (Fla. 1980)("where no reasonable man would take the view adopted by the trial court").

Murray II, 838 So.2d at 1082 (footnotes in original), illuminated the test, as applied here:

> In reviewing these claims, we start with the basic legal principle that 'relevant physical evidence is admissible unless there is an indication of probable tampering.' *Peek v. State*, 395 So.2d 492, 495 (Fla. 1980); *see also Dodd v. State*, 537 So.2d 626 (Fla. 3d DCA 1988). In seeking to exclude certain evidence, Murray bears the initial burden of demonstrating the probability of tampering.[8] Once this burden has been met, the burden shifts to the proponent of the evidence to submit evidence that tampering did not occur.[9]
>
> [8]*State v. Taplis*, 684 So.2d 214, 215 (Fla. 5th DCA 1996) ("The burden of one attempting to bar otherwise relevant evidence is to show a likelihood of tampering (probability) ... .").
>
> [9]*Taplis v. State*, 703 So.2d 453, 454 (Fla. 1997) ("Once evidence of tampering is produced, the proponent of the evidence is required to establish a proper chain of custody or submit other evidence that tampering did not occur."). *See also Dodd v. State*, 537 So.2d 626 (Fla. 3d DCA 1988).

Here, as in Murray II, Murray has failed to "demonstrat[e] the probability of tampering" and failed to meet his appellate burden of establishing that the trial judge was unreasonable. The State now elaborates.

D. If Murray II does not control and if the merits are reached, the record does not support the accusation that Evidence Technician Chase materially changed his testimony to fit the prosecution's theory.

On appeal, Murray falsely accuses the prosecution of deviating from the truth based upon Chase's "simpl[e] and direct[]" (IB 17), "certain" and "positive" (IB 20) testimony in Murray's 1994 trial that he collected two hairs, which purportedly changed to, in this 2003 trial, two "samples" and uncertainty. Supposedly, prosecutorial misconduct caused this change in testimony. There is enough record to show that he is wrong on all points.

In **1991**, three years prior to Murray's first trial in 1994, Chase used "samples" at his deposition in the Taylor case:

> Q [by counsel for Steven Taylor]. Were you able to recover any hair samples or fiber samples, at least that you were aware of at the time?
>
> A. Yes. I did. I took hair samples from the victim's body.
>
> Q. Samples of her hair?
>
> A. No. Samples that were laying on her.
>
> Q. Where, if you remember?
>
> A. I would have to refer to the report.
>
> Q. Okay. That's fine.
>
> A. On page 5 of the report. *** Hair fibers from the victim's left leg and chest.

(SR/XVI 1012-13) [1] Therefore, Chase has been using "samples" from the onset of litigation of this murder. If years later Chase thought he did not use the term earlier, the record demonstrates that Chase was wrong in that regard. As this Court explained in Murray II, at 1082-83, Chase was not

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[1] This Court granted the State's motion to supplement the record with this deposition, which the clerk designated as Volume XVI. The State did not move to supplement with any testimony from Chase at Steven Taylor's trial because, at that trial, in lieu of the Taylor defense calling Chase as a witness, the State stipulated to the authenticity of the hair samples contested here.

"sure as to the exact number of hairs at issue."

In addition to Chase's 1991 deposition, portions of the record 1994-onward show that he has never been certain about the specific number of hairs he collected. In Murray's 1994 trial, Chase testified (SR1 5) that he went to the murder scene on September 16, 1990. He (SR1 5-6) continued by indicating that he collected "**Some** hairs" and summarized:

> A Using tweezers I removed **hairs from the leg and the chest**, placed them in the manila envelope to secure them for processing at a later date. I also wrote on this that the hairs were from the victim's left leg and chest, the CCR number of the report. I've initialed it and put my JSO ID number also.

On cross-examination(SR1 7), he was not sure how many hairs he collected:

> A Yes, sir, **I think** it was one from the left leg and one from the chest?
>
> Q So it **would be** a total of two?
>
> A Yes.

Thus, in 1994, Chase's trial testimony indicated that the envelope did not specify the number of hairs and that Chase was uncertain about the number of hairs he collected. When pressed by defense counsel, he said it "would be" a total of two that he thought he collected.

Accordingly, in the 1998 trial, Chase again testified regarding his uncertainty (SR1 16-17) concerning the number of hairs: "I'm not sure how many exact hairs. I know there was two samples. I believe it was just two hairs, but I really don't remember." (See also SR1 18, 26-27, 28-29) Chase also acknowledged that in his 1991 deposition, he did not indicate "how many hairs … there were." (SR1 29) As part of the prosecutor's 1998 re-direct examination, Chase was asked about his discussion of the number of hairs in an August 21, **1991**, "proceeding" (SR1 44-45):

Q Now, sir, do you recall also in a prior proceeding, specifically August 21st, 1991, you were asked –

Prosecutor: Counsel, page 712.

Q 'Question: Were you able to recover any hair samples or fiber samples, at least that you were aware of at that time?' Your answer being: 'Yes, I did. I took hair samples from the victims body.' 'Question: Samples of her hair?' 'No, samples that were laying on her.' 'Question: Where, if you remember?' 'I would have to refer to the report.' 'Question: Okay. That's fine.' 'Answer: On page 5 of the report, some of the evidence that was collected from the master bedroom,' et cetera. 'Then on page 8, hair fibers from the victim's left leg and chest.' Do you recall that, sir?"

A Yes, I do.

Q Okay. Was your memory better *** August 21st, 1991, than it is today.

A Yes.

Q And was it better then than it was in 1994, sir, in terms of what you did?

A Yes.

Similarly, Chase testified in Murray II's 1999 trial that he "believe[s]" that there were two hairs but he could not be positive because he did not have a "microscope or anything to look at hairs" (SR1 57); he placed "both samples" in the one envelope (SR1 58-59).

For the 2003 trial on appeal here, Chase indicated in his perpetuated testimony that he collected with tweezers (XII 521-22) "two hair samples from the body," "one sample … from the left leg" and the other one "from the chest area" (XII 519). Chase said that it "appeared to be two hairs," but he did not count the hairs, did not stretch them out to determine the number of hairs, and did not have a microscope at the crime scene, so he could not be positive of the number of hairs. (XII 521-22) On cross-examination, as in the 1999 trial (SR1 61), defense counsel was able to lead Chase into agreeing that when he "began this case and this

investigation several years ago," he "thought" that there were two hairs and that it is now "possible" that he was correct then (XII 528).

In sum, it appears that the only times Chase has been incorrect has been in thinking that he was more certain or specific in the past than he actually was. Officer Chase was **never** certain how many hairs he put in the envelope. Chase did not materially change his testimony from 1991 to 2003. The rationale in Murray II renders the trial court's ruling reasonable, meriting affirmance.

E. Even erroneously inferring beyond the record on appeal that between trials the prosecutor made one witness aware of the content of another witness's prior testimony, this is material for impeachment but not reversal.

Overlooking, for the sake of argument, that Murray failed to preserve the claim of prosecutorial misconduct, that Chase's testimony did not materially change, and that on appeal Murray self-servingly infers that any change was caused by the prosecutor, Murray also violates the presumptions of correctness and good faith by inferring that the prosecutor, in bad faith, caused the change.

Concerning Chase's testimony that he "believe[d] another testimony … brought out possibility of possibly more hairs," as discussed above, there is no evidence that the prosecutor even made Chase aware of Dizinno's prior testimony concerning several hairs. Furthermore,

- Defense counsel was provided the full opportunity to cross-examine Chase regarding his memory and prior testimony (See V 798-801, 803-804; XII 523-25, 527-28);
- There is no indication that Chase was coerced or pressured in any way by anyone;

- There is no indication that the other testimony was in any way misrepresented to Chase;
- Whatever specifically happened would have been in the nature of refreshed recollection[2] and not an attempted introduction into evidence of prior recollection recorded, Compare §90.803(5), Fla. Stat.;
- There was no prosecution attempt to place in front of the jury the content of a prior writing or another witness's testimony under the guise of refreshing recollection;
- The witness was not improperly asked for an opinion on whether another witness told the truth;
- There was no violation of the sequestration of witness rule, Compare, e.g., Acevedo v. State, 547 So.2d 296, 297 (Fla. 3d DCA 1989)(during trial, prosecutor violated rule of sequestration; prosecutor's "discussion was brought out on cross-examination of the informant"; "facts were brought out before, and argued to, the jury"; affirmed).[3]

Moreover, it is axiomatic that sound trial preparation includes an attorney requesting a witness to review materials before the attorney calls witness to the stand. For example, concerning a witness's review of prior reports, Walton v. Turlington, 444 So.2d 1082, 1084 (Fla. 1st DCA 1984), explained, quoting Erhardt, Florida Evidence: "If the witness' memory is jogged and his testimony is based upon his independent recollection, it is immaterial what constitutes a spur to his memory." See Erhardt §613.1. Here, analogously, under the hypothetical situation of the prosecutor presenting witness Chase with another witness's prior testimony, Chase's memory that he did not remember the exact number of hairs was "jogged." Compare, e.g., K.E.A. v. State, 802 So.2d 410 (Fla. 3rd DCA 2001) (witness's memory not revived regarding prior events that proponent had

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[2] Chase's refreshed recollection is that he really never knew the exact number of hairs.

[3] And, none of the foregoing bulleted items was preserved for appeal.

burden of proving). Defense counsel could then impeach the witness by calling this preparation to the attention of the jury, and, indeed, if the witness uses materials while on the witness stand to refresh his/her recollection, opposing counsel may be able to introduce those materials. See, e.g., Garrett v. Morris Kirschman & Co., 336 So.2d 566, 570 (Fla. 1976); §90.613, Fla. Stat. ("Refreshing the Memory of the Witness"). See also Flores v. Miami-Dade County, 787 So.2d 955, 959 (Fla. 3d DCA 2001)("during the doctor's cross-examination," "excerpts of earlier testimony given to refresh the witness's recollection and were permissible for that purpose").

Therefore, Garrett, 336 So.2d at 569, held that it was proper to use documents authored by someone else (tax forms) to refresh the witness's recollection, even while the witness is in front of the jury.

F. FBI expert Dr. Dizinno did not materially change his testimony to fit the prosecution's theory.

Murray argues (IB 17) that Dr. Dizinno changed his testimony in this 2003 trial to "fit the prosecution's theory," but he does not specify what prosecution theory and how he changed to it. Instead, Murray argues that it was not learned until this 2003 trial that an FBI technician placed Dizinno's initials on Q-42. (IB 17, 23-27) The State disagrees.

Dizinno's 2003 testimony concerning the routine functions of FBI technicians in preparing evidence was no surprise. In 1998, when he was asked a direct question on this matter, he gave a direct answer. After testifying that there were "several" hairs on slide Q-42, (See also 1999 trial, SR5 689-91) he provided this information concerning Q-42 (SR5 630):

Q Now, did you yourself put the hairs on the slides, in terms of was it done in your presence there?

A It was done by a technician who works under my supervision.

In the 1999 Murray trial, Dizinno testified similarly concerning a related slide. (See SR5 666, 684-92) To the degree that anyone inferred that Dizinno's initials on items meant per se that they were in-processed and mounted by him, they have been on notice since at least 1998 to the contrary. The record does not support any inferential leap to the accusation, "He misled everyone" (IB 25).

Therefore, in this 2003 trial Dizinno explained that, at the time of the analysis, it was standard procedure for a technician under his supervision to in-process and mount the evidence (XIV 909-910):

Q Well, you testified a minute ago that when it was received in the FBI lab it was in a sealed box, correct?

A That's correct.

Q But you actually didn't see that, did you, you didn't receive it?

A No, I did not.

Q Okay. And you didn't open that box, did you?

A I did not, a technician that works in the unit, we have technicians that work for an examiner. At that time I was working as an examiner, a technician would work for me in removing the debris from those containers, placing them on microscope slides, and then I would view the microscope slides.

Q So you didn't receive the box and you didn't open the box, and you didn't mount the slides?

A Correct.

Q Was there any other step besides beginning to look at it or was that it?

A No.

Q Okay. Who did?

A Technician that worked for me at the time, her name was Angie Moore.

Dizinno also testified, without objection, that the questioned items

were received by the FBI "in a sealed condition." (XIV 905) He knew this because all indicia showed that the evidence was opened per routine procedures at the FBI.

Murray's quotation of Dizinno's testimony in the 1998 trial is incomplete. Murray writes (IB 25):

> Q: You're the one who mounted them all?
> A: That's correct.

Instead of the above simple and direct question, in that 1998 trial, defense counsel asked a compound question:

> Q Well, I don't know, sir. You're the one who mounted them all, did you not? You took the debris, correct, out of the fold and you put them on slides and you looked at everything, correct?
> A That is correct. [additional questions regarding hair]

(SR5 636-37) The last question asked in the compound question was "you looked at everything, correct?," to which the "correct" answer was given. The context shows that counsel for Murray, in cross-examining the witness, was interested in pursuing the topic of animal hairs, and the question excerpted in Murray's brief appears to be defense counsel's sarcastic response to Dr. Dizinno's question "From which items?" In any event, Murray's counsel left this ambiguity in the record by asking the compound question.

In sum, it was customary at the time for the analyst or an FBI technician (See also XIV 940) who works for the analyst to open the submitted evidence and mount it. This does not establish any indicia of tampering, and certainly not a probability of tampering, but rather, it further fleshes out the chain of custody and provides additional indicia of

reliability.

The State disputes Murray's conclusion that "[i]t is unknown who [at the FBI] opened the box, opened the evidence, or mounted the slides." (IB 26) To the contrary, Dizinno explained (XIV 909, 913) at this 2003 trial:

> Q Okay. And you didn't open that box, did you?
> A I did not, a technician that works in the unit, we have technicians that work for an examiner. At that time I was working as an examiner, a technician would work for me in removing the debris from those containers, placing them on microscope slides, and then I would view the microscope slides.
> ***
> Yesterday in reviewing my notes I attempted to determine who created these notes. So I showed the notes to very few people who are still left in the laboratory since 1991. And everybody agreed by looking at the handwriting that it was Angie Moore's handwriting. *** Not only that, another examiner had another case that they were reviewing where Angie Moore had written the notes, and several of us looked side by side at the handwriting and it was very obvious it was her handwriting.

Accordingly, in Murray II's 1999 trial, Dizinno testified: "I think it was a woman by the name of Paula Frazier, but I'm not sure about that." (SR5 684) He repeated, I'm not sure about that." (Id.) He also indicated that at the time of the 1999 trial a technician mounting the slides was still a customary practice: "Just as if I were in the unit today ….." (Id.) Just as he did in 1998 (SR5 630), in 2003 Dr. Dizinno explained, as quoted above, that the technician worked under his supervision (See XIV 909).

Further, Dizinno explained that another FBI analyst, Blyth, (discussed at IB 28, 35) was originally assigned to this case, resulting in Blyth's initials on the box containing the exhibits, but due to the short-turnaround time of this case and apparently Blyth's unavailability at that time, Dizinno took over the case. (XIV 910) This is an example of the FBI

managing its caseload in a manner consistent with the reliability of evidence. It is not evidence of tampering.

G. Murray's case law does not assist him.

Murray's cases (IB 18-20, 29-32) either support the trial court's ruling or they are inapplicable. In any event, Murray has failed to meet his appellate burden of showing error.

Peek v. State, 395 So.2d 492, 495 (Fla. 1980) (cited at IB 19-20), stated the general principle that Murray II quoted as a basis for its conclusion indicating that Issue I is meritless. Helton v. State, 424 So.2d 137 (Fla. 1st DCA 1982)(cited at IB 20), like Peek, rejected a tampering claim. Helton, where there was a "discrepancy regarding the identifying number of the locker in which the evidence was placed and subsequently retrieved," indicated that a "somewhat imprecise" chain of custody can still be sufficient, and like here, some potentially important facts (according to the current defense appellate view) were not developed because "defense counsel did not pursue any cross examination on" it "or otherwise explore" it. 424 So.2d at 137-38 & n. 1. Armbruster v. State, 453 So.2d 833, 834 (Fla. 4th DCA 1984) (IB 20), rejected a chain-of-custody claim and cited to U.S. v. Kubiak, 704 F.2d 1545 (11th Cir. 1983), for the principle: "failure to establish a chain of custody of a marijuana sample affects only the weight of the evidence, not the admissibility."

Murray discusses (IB 29) State v. Scott, 33 S.W.3d 746 (Tenn. 2000), but he overlooks the premise for Scott's discussion is the pertinent Tennessee rule of evidence requiring, unlike Florida, "'an unbroken chain

of custody.'" 33 S.W.3d at 760. Moreover, in Scott, unlike here, there was no evidence regarding who and under what procedures hairs were mounted on slides. Instead, there, the police sent the hairs in an envelope and received them back on slides, and the appellate court was forced to guess ("apparently") that the FBI mounted the hair. Further, unlike here where the evidence was only a microscopic comparison in the context of many other incriminating facts, including for example, Murray's statement to the Detective that he should have previously obtained the results, Scott concerned "DNA evidence [that] appears to have been the keystone of the State's case," 33 S.W.3d at 755.

In Dodd v. State, 537 So.2d 626 (Fla. 3rd DCA 1988) (IB 30-31), at various junctures that some cocaine traversed, the weight of the cocaine substantially dropped without explanation. In addition to "conflicting descriptions of the bag," there were "gross discrepancies in the recorded weights." Factually, Dodd is inapplicable now, just as it was when this Court cited it for general principles in Murray II. Here, there were no "gross discrepancies."

Murray's discussion (IB 31) of Cridland v. State, 693 So.2d 720 (Fla. 3rd DCA 1997), is longer than the Third DCA's opinion, which provides no specific operative facts, but it does indicate that there was "conflicting evidence as to the quantity of the cocaine seized." Here, there is no conflict.

As mentioned supra, the constitutional cases that Murray summarily cites (IB 33-35) are entirely inapplicable because, first, this claim was

not preserved, and, second, Murray's accusations of prosecutorial misconduct are groundless and without record support.

H. Conclusion: Murray failed to meet his burden of showing a probability of tampering.

Murray's "Conclusion" (IB 35-36) would like some questions answered "during this appeal" (IB 35-36). The State respectfully submits that factual questions are answered at the trial-court level, not now. Moreover, Murray's current questions improperly shift the burden on appeal as well as his burden of showing in the trial court a probability of tampering. The State has not "refuse[d]" (IB 35) to call anyone as a witness who would illuminate the issue. Instead, Murray has failed to call anyone as a witness who would meet his burden. Murray failed here on appeal, and he failed in the trial court.[4]

I. Any error was harmless.

In the context of the totality of all of the evidence in this trial

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[4] Murray also mentions a claim in the first paragraph of his discussion of Issue I (IB 16) regarding "handwritten notes of the evidence technicians," but the claim remained undeveloped throughout this issue and thereby waived on appeal. If Murray attempts to develop this claim in his Reply Brief, the State objects, but, at this juncture, the State briefly notes that Murray has not shown that any such notes exist or what they might say. Indeed, the prosecutor indicated that, in fact, they do not exist. (I 142, IV 649-50, V 853-54, VIII 1561, XII 475-76. See also IV 721-22; XII 475-76. Compare, e.g., O'Steen's notes, I 149, IV 669, 678-79, V 815-18, 833-34, provided to Court and, to some degree, provided to defense counsel; the defense had not requested O'Steen's notes until this trial, IV 662-64; Dizinno's notes, IV 680-81, XIV 881, 906, SR6 806, provided to defense counsel; and Hanson's and Warniment's notes provided, See IV 761-63, 781-83, V 858-59; Wilson's notes, provided, XIII 739-40, 744; and, Medical Examiner Floro's file, V 855, provided to defense counsel. There was no error in refusing to provide what does not exist, and Murray has failed to demonstrate any harm.

discussed in the "Case and Facts" supra, any error admitting Q-42 was harmless. To summarize:

? The expert's testimony indicated a similarity to, or consistency with, Murray's hair;[5] it was not at the level of, for example, a scientific DNA analysis with specific astronomical numbers (See XIV 906-907, 921, 924-25, 933); therefore, any harm in erroneously admitting it was not substantial;

? Murray, in essence, admitted that the crime-scene hair was his when he responded to the Detective's statement that the hair matched Murray's by stating that the police should have gotten the results back last year (See XV 957);

? It is undisputed that Taylor is guilty of this murder (See, e.g., XV 1130, 1138, 1146)[6]; thus, the question becomes whether Murray was a co-perpetrator;

? Several weapons used in the assault and apparently more than one type of shoe print at the crime scene indicated that there was more than one assailant (XII 501-503; XIII 692-96, 695, 717, 719-20, 731, 734);

? Evidence indicated that one assailant was sloppy and another assailant was somewhat thorough in cleaning up: No useable latent fingerprints, and there even were no victim's prints on many household items where they would be expected (Compare, e.g., XII 405, 453-63; XIII 704-711, 728-29, 733; XIII 712, 715 with XII 413; XIV 845-51; XIV 852-53);

? The victim was killed sometime between Saturday 11:30pm, when she talked with Engler, (XII 402-403) and Sunday morning, when her body was discovered, (XII 403-404, 412-14, 426) and in that approximate time --

- After Murray and Taylor left a bar together at about 10:30 to 11:15PM (XIII 633), James "Bubba" Fisher dropped them off together in the vicinity of the victim's neighborhood "around" 11:50pm (XIII 633-35);

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[5] Interestingly, in Issue VI (IB 83), Murray minimizes the significance of this evidence in terms of a failure to "positively identify" the hair. The State submits that the hair was part of mutually corroborating components of the totality of all the evidence establishing Murray's guilt.

[6] Because Murray's defense conceded Taylor's guilt for this murder, the State does not enumerate the incriminating evidence against Taylor. See semen; shoes; … Taylor, 630 So.2d 1038.

- Murray was seen prowling with murderer Taylor in the general area of the victim's neighborhood Sunday at about 12:40am (XIII 648-52); and,

- Murray was with murderer Taylor later on Sunday (XIII 664-65);

? Murray left town (flight) a day or so after the murder (See XIII 636-37, 639, 666, 674-75), and, when Murray left town, he was with murderer Taylor (XIII 636-37, 666; see 674);

? Murray called Juanita White to try to cover his tracks of being seen in the area of the murder at about 12:40am, by asking White if her son "Skip" was home when evidence indicated he knew that "Skip" was not home because "Skip's" truck was not there (See XIII 653-54);

? Taylor went with others to Murray's location but spoke with Murray alone, and then Taylor was taken to a place off of Main Street where he got dirt on his hands (XIII 666-68, 679-81) and, about the same day, the victim's jewelry was found at a place off of Main, and it was in a bag with dirt (XIV 791-92);

? Murray, not Taylor, lived near the victim and therefore would know from, for example, her working in the yard, (See XII 405-407; XIII 627-28, 630-32, 664-65) that she would be home alone, especially with her car in her carport (XII 412-13);

? After his arrest on this case, Murray fled from this case and the evidence (See XV 967-68, 971-72, 996-97, 1001-1006); he was apprehended months later by the FBI in Las Vegas (XV 1055-58);

? While Murray was a fugitive from this case, he attempted to evade capture through the use of fake identifications, which he possessed when he was re-arrested in Vegas (See XV 1056-58);

? In addition to telling O'Steen that the police should have gotten the hair-match results back last year, Murray also told O'Steen that he will not find his (Murray's) semen at the crime scene and commented that Taylor left his semen in the victim (XV 958-59);

? Murray confessed to Smith (XV 1006-1010), and Smith's description of events (XV 1003) was corroborated by BellSouth records (Compare XV 1050-52 with XIV 793) and by the content of Murray's confession attempting to mitigate his involvement in this rape and murder.

ISSUE II: WHETHER TRIAL COURT WAS UNREASONABLE IN PERMITTING THE ADMISSION OF SLIDE Q-20 INTO EVIDENCE. (RESTATED)

Issue II challenges the admissibility of Slide Q-20. In this 2003 trial, the State presented evidence establishing that Q-20 contained hair

from the white nightgown garment (XIV 905), which was found at the victim's residence, the murder scene. (See, e.g., IV 702-705; XII 472-74, 479) Dr. Dizinno, as he did regarding Issue I's Q-42, testified that Murray's known pubic hair had the "same microscopic characteristics" as hair found on the garment (XIV 906); Steve Taylor's known pubic hair was inconsistent with the pubic hair on the garment. (XIV 907) Murray had also challenged the admissibility of Q-20 in the 1999 trial.

Murray II, 838 So.2d at 1083, held that for the 1999 trial "the defendant carried his burden in demonstrating the probability of evidence tampering," where "a bag of evidence initially contained a nightgown and a bottle of lotion when it was sealed, but when the bag was received by the FDLE, the lotion bottle was missing." Murray II held that in the 1999 trial the State failed to explain the "discrepancy." As detailed infra, for this 2003 trial, the State addressed Murray II's concern by showing that the garment and the lotion bottle, while initially placed in the same bag, were split into separate bags because they were being forwarded to different units within FDLE. (E.g., IV 703-713). In other words, for this 2003 trial, the State showed that actually there was no discrepancy.

A. Much of Issue II was not preserved.

Murray says (IB 37) that his three "issues" are a "denial of Due Process due to the prosecution's actions and the actions of the prosecution's witnesses" (See also IB 51-53), "the chain of custody and undisclosed testimony intentionally withheld by the prosecution" (See also IB 37-38, 40-51), and "res judicata/collateral estoppel" (See also IB 39-

40). The State contests as unpreserved all three of the ISSUE II claims except the portion contesting, on an evidentiary basis, the chain of custody of Q-20. See Farina; Harrell; Gore; Geralds; Filan; Taylor; White v. State, 753 So.2d 548, 549 (Fla. 1999)(state Constitutional due process "not raised to the trial court or to the district court of appeal during the direct appeal from his conviction"; "not preserved"); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and *Chambers* was not presented to the trial court … procedurally bars"); Frengut v. Vanderpol, 927 So.2d 148, 153 (Fla. 4th DCA 2006)("We do not address this [res judicata] issue ... not preserved"). Murray's Initial Brief (IB 51) also enumerates without further discussion several purported complaints, such as due process. Other than supposed deception, these arguments are undeveloped in Murray's Initial Brief; therefore, they are unpreserved at the appellate level.

At the trial court level, Murray has failed to show where he developed for the trial court's consideration his accusations of prosecutorial deception, "dirty pool," and the like, in contrast to the recurrence of these unsupported conclusions throughout Murray's brief. For example, Murray complains on appeal (IB 44-45) about the purported "government's underhanded tactic" of witness John Wilson's 2003 trial testimony putting the lotion bottle in a plastic bag, but defense counsel stating that he was "caught quite aghast" (XIII 738-39) is no substitute for a timely and specific objection, timely motion to strike, or timely motion for mistrial that would have alerted the trial court to inquire, consider, rule, and

develop the record, if appropriate. Indeed, instead of taking such claim-preserving steps, defense counsel asserted that he had "never deposed" Wilson (XIII 739), and even this non-preserving assertion was corrected on the record (See XIII 744-45).

At the trial court level, instead of arguing "res judicata/collateral estoppels," Murray moved to "enforce the mandate." (II 354-55. See also XII 484, XIV 762) His "Motion to Enforce Mandate" (II 354-55) simply summarized Murray II concerning the "probability of tampering" and the State's failure to meet its burden there, then concluded, without developing, that it would violate due process to allow the State to correct "that fatal error in this trial."[7]

Murray's due-process contention (IB 51) concerning discovery depositions is also unpreserved. The State has not found where such a due process argument[8] was posed to the trial court. Even on a procedural rule ground, Murray's citations (IB 44, 52) to IV 700-701 and IV 776-77 for the locations in the record where the trial court denied his request for discovery deposition do not assist his cause preserving that claim for this appeal. He asked to depose only Detective O'Steen, and on appeal he fails to develop why at that specific juncture, immediately prior to trial, he

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[7] At one point, without meaningfully invoking any legal principle, defense counsel simply argued that the trial court had to deny the State the opportunity to establish the chain of custody on Q-20 because this Court denied the State's motion for rehearing in Murray II in which the State requested an opportunity to present evidence **for that appeal**; he continued by saying "estoppel" without discussing how estoppel relates to the facts here. (See IV 696-99)

[8] As a general proposition, there is no constitutional right to discovery. See Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

should have been allowed to take that deposition and fails to develop specifically how he was harmed by the denial. See Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence, that the prosecutor engaged in improper burden shifting"; "Because Lawrence's bare claim is unsupported by argument, this Court affirms the trial court's summary denial of this subclaim"), citing Shere v. State, 742 So.2d 215, 217 n. 6 (Fla. 1999), Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999), Coolen v. State, 696 So.2d 738, 742 n. 2 (Fla.1997); Williams v. State, 845 So. 2d 987, 989 (Fla. 1st DCA 2003)("Because appellant failed to raise these issues in the initial brief, we cannot consider them"). See also U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention"); U.S. v. Williams, 877 F.2d 516, 518-19 (7th Cir. 1989) (failure to designate on appeal specific evidence contested waives the issue).[9]

Therefore, due process, res judicata, and collateral estoppel are not preserved.

In contrast, the defense did contest and preserve in the trial court the admissibility of the Q-20 evidence based on the law-of-evidence's tampering principles (IV 778: arguing a missing bag and an additional bag; objection renewed at XII 431, 433), which the discussion now addresses.

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[9] Because the Initial Brief frames the issues, the State objects if Murray attempts to develop claims in his Reply Brief.

B. In this 2003 trial, in contrast to the 1999 trial of Murray II, the defense failed to meet its burden of establishing a probability of tampering.

In Issue I supra, the State does not argue that Q-42 is automatically admissible here because of Murray II, but rather, Q-42's admissibility depends upon the facts presented to the trial court in 2003. Similarly, in Issue II, the State contends that the admissibility here of Q-20 depends upon the facts presented to the trial court in 2003, in contrast to Murray's position that Q-20 is forever inadmissible because of Murray II.

Murray II's analysis began with the premise, "[a]ccording to the record on appeal," 838 So.2d at 183; the State submits that the record on appeal for this 2003 trial provides the basis for affirmance here. Here, unlike Murray II, the "discrepancy was … explained," and, moreover, here, where a missing portion of the chain of custody was filled-in with additional testimony, there was actually no such discrepancy. Therefore, here Murray has failed to show that the trial court's ruling was unreasonable under the applicable abuse-of-discretion standard of appellate review. Compare Brooks, Ray with Trease, Huff, Canakaris.

It was clear by April 30, 2003, about three weeks prior to the trial on review here, that the State intended to pursue the admissibility of the nightgown hair (Q-20) (IV 619-20). As a result, the trial court conducted an evidentiary hearing on May 12, 2003, regarding the admissibility of that hair evidence. (IV 701-779). The trial judge correctly (and reasonably) ruled at the end of the hearing that, concerning the discrepancy discussed in Murray II, "the State has explained … to my satisfaction" so that the State will be allowed to proceed at trial with "testimony concerning the

admissibility of it. *** We're back to square one." (IV 776-77) During the trial, the trial court elaborated, contrasted the fuller 2003 facts with the limited record in the 1999 trial of Murray II, which "left something up in the air," and ruled that the "discrepancy doesn't exist" and that "there has been no tampering in this case." (XII 486-87) The evidence supported the trial court's ruling.

At the pre-trial evidentiary hearing, evidence showed that on September 16, 1990, Officer Laforte recovered the "nighty" (white garment) and the bottle of lotion from the victim's residence, the murder scene. (IV 702-703) [10] The nightgown garment was placed in a bag that also contained the lotion bottle. (IV 706-709. See IV 737-39) On that same day, those items were put in the property room at the Jacksonville Sheriff's Office. (IV 703)

Subsequently in September 1990, (IV 740-41) Officer Powers and Detective O'Steen brought those items to FDLE in the same bag, which was still sealed with Jacksonville Sheriff's Office tape. (IV 704-707, 709, 727-28) The bag had LaForte's initials on it. (IV 707) When they arrived at FDLE, they[11] opened the bag, designated as SE/A at the pre-trial

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[10] State's Exhibit 26D was a photograph showing the nightgown and the lotion bottle at the crime scene. (IV 705, 736) Ultimately, a video of the crime scene (SE/61), including where the nightgown and the lotion were found there, was played for the jury. (XII 540-44; XVI 1195-96)

[11] The State disputes the factual assertions at IB 49-50 as well their supposed significance. Powers testified that he and O'Steen ("we") opened the outer bag (IV 708) and a moment later indicated that specifically he (Powers) opened it (IV 709). He testified that at FDLE the evidence was re-bagged, on which he (Powers) put his initials (IV 712, 714-15, 726). Powers vaguely recalled that FDLE opened one or more of the inner bags (See IV

evidentiary hearing, [12] (IV 708, 709, 727) and split up the two items, i.e., the garment and the lotion because each one had to go to a different location at FDLE: one to serology, and one for latent fingerprinting. (IV 712-13, 739-40, 745) So, at FDLE the nightgown was put in one bag and the lotion was put in another bag, SE/C. (IV 705, 708-709, 728-29, 738-40). The big bag (SE/A), after it was opened and contents removed, and the garment were placed in SE/B. (IV 709-10, 712-13, 740, 744-45) O'Steen authenticated the form he used (SE/E) to submit the evidence to FDLE. (IV 737)

At the pre-trial evidentiary hearing, Katherine Warniment testified that she worked at the FDLE crime lab, and she received bag SE/B sealed with FDLE tape (IV 752, 753). When she opened SE/B, in addition to a white garment, it contained a second brown paper bag, which was SE/A. (IV 753-54, 757-58) The white garment was "within the innermost brown paper bag." (IV 754) There was no lotion bottle in SE/B. (IV 754) After opening SE/B, she "performed trace evidence recovery upon its contents" (IV 752), and then she sealed it up; at the time of the hearing her seal was still there with her initials on it. (IV 755) At the hearing, other than some additional stickers, labeling, and the FBI tape, it was in the same condition as when

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716-17. See also IV 738-39: #s 54 & 55). Accordingly, O'Steen testified that Powers opened the outer bag. (IV 739-40) The consistent gravamen of Powers and O'Steen's testimony is that they went to FDLE with the bag containing the garment and the lotion bottle where the outer bag was opened to separate the garment and the lotion bottle because those items were going to separate sections of FDLE.

[12] The State's Exhibits will be referenced as "SE" followed by a slash and any letter or number designation. Therefore, for the pre-trial evidentiary hearing, "SE/A" is State's Exhibit A, as marked at the pre-trial evidentiary hearing.

she closed it. (IV 755-56. See also IV 761) She never received any hair sampled from Taylor or Murray. (IV 756)

At the pre-trial evidentiary hearing, Diane Hanson, of FDLE, testified that she handled SE/B before and after Warniment performed her trace evidence recovery. (IV 763-76) On October 16, 1990, when Hanson received SE/B, it was sealed, and she forwarded it to Warniment sealed. (IV 764-65) On October 18, 1990, she received it back from Warniment, it had been opened but contained Warniment's initials. (IV 765) Hanson identified her initials on SE/B (IV 765) as well as on the smaller bag containing the garment (IV 769). She described the configuration of the bags regarding SE/B: An outer bag, an inner brown bag, which also contained another brown bag containing the white garment. (IV 769-70, 775-76) She did not handle SE/C, which contained the lotion bottle (IV 766).

During the above-described events, law enforcement had not obtained known hair samples from Taylor or Murray, which were submitted to FDLE February 19, 1991. (IV 741)

For the trial, the bags were referenced with letters different from those used at the pre-trial hearing, but the essential facts supporting the integrity of the evidence remained the same. For example, Officer LaForte testified at trial: initially, "the nighty … was placed into 28C. 28C was then placed into 28B along with the lotion." (XII 471-72. See also XII 446-49, 479, 507-509) Powers testified that when he and Detective O'Steen brought #28B to FDLE, it was sealed with JSO tape and reiterated for the jury why and how the lotion and the nightgown were split-up at FDLE and

resealed. (XII 492-98, 509) On October 16, 1990, Dr. Warniment received "six items for trace evidence recovery," including "a sealed brown paper bag containing a white garment." (XIV 815-16) It was identified by an FDLE tracking number (XIV 815-16), and Diane Hanson hand carried it to the microanalysis (Warniment's) section (XIV 816). When asked if there was any change or alteration to the debris fold other than obviously being opened by the FBI, she responded: "It still bears my original tape seal and my initials on that seal." Warniment said that it appears as it did when it left her possession, except for "additional initials and pink and blue sticker." (XIV 826)

At trial, FBI analyst Dr. Dizinno, in addition to his opinion concerning Q-20 containing "several Caucasian pubic hairs" with "microscopic characteristics" like Murray's pubic hair and unlike Taylor's (XIV 906-907), testified that his initials are on Q-20. (XIV 905) Q-20 contained hairs from a white garment, which was in a sealed condition when the FBI received it. (XIV 905) When asked on cross-examination how many people handled the hairs, he indicated that he and his technician handled them in the lab. (XIV 932)

In sum, for this 2003 trial, Murray failed to present any evidence of tampering and certainly nothing approaching his burden of establishing a probability of tampering. And, if somehow the burden shifted to the State, it was more than met by the showing how and why the lotion bottle was separated from the garment, in contrast to the record on appeal this Court had before it in Murray II.

C. The trial court's decision to deny a last-minute deposition does not constitute reversible error.

On May 12, 2003, Murray's defense counsel did ask the trial court for an opportunity to depose Detective O'Steen, which the trial court denied at that time (IV 700-701). However, as discussed above, Murray's due process claims concerning depositions (IB 51-53) are unpreserved, and Murray's appellate claim concerning his discovery request is unpreserved by his failure to develop the point on appeal.

Further, in April and May 2003, Murray wanted to adhere to the trial date of May 19, 2003, at all cost, thereby creating the situation about which he now complains. He thereby waived this claim. See White v. State, 446 So.2d 1031, 1036 (Fla. 1984)(invited error applied to the submission of a chart; "cannot at trial create the very situation of which he now complains and expect this Court to remand for resentencing on that basis"); Behar v. Southeast Banks Trust Co., 374 So.2d 572, 575 (Fla. 3d DCA 1979)("One who has contributed to alleged error will not be heard to complain on appeal"), citing Hawkins v. Perry, 1 So.2d 620 (1941); Board of Public Instruction of Dade County v. Fred Howland, Inc., 243 So.2d 221 (Fla. 3d DCA 1970).[13] The State elaborates.

On April 3, 2003, the trial court calculated and discussed with counsel the importance of the post-Murray II 90-day speedy-trial period and set a 10-day window for any motions. (III 580-89) On April 28, 2003, the Judge,

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[13] In citing "invited error" cases here and in other issues, the State does not concede that there was any error but rather, their broader principle applies: The defense should not be heard on appeal on a matter that it created or contributed-to in the trial court.

responding to defense counsel, explained that the driving force behind the schedule between then and the scheduled May 19, 2003, trial date is "ya'll want to try this May 19th" (IV 598). On April 30, 2003, the Judge told the lawyers that, other than jury schedules, he will always be available and that he planned nothing else for the week of May 12th other than moving the case towards trial. (IV 603). The Judge reiterated that "we're going to trial week of May 19th, I don't have any choice." (IV 618) On May 12, 2003, in denying the defense request to depose O'Steen, the Judge emphasized the impending trial date. (IV 701) On May 13, 2003, the Judge elaborated with an offer to the defense of an opportunity to depose witnesses, which the defense failed to pursue (V 813-14):

> THE COURT: If y'all can agree on a deposition schedule you're certainly free to take all the depositions you want to. But y'all are going to have to do it by agreement, I'm not going to order anybody with now less than a week to trial, I'm not going to order anybody to appear for depositions on such short notice. And, if this case was to proceed in an orderly fashion as a new case would where you have new evidence, then certainly we would have time to do all that but y'all had made the decision you want your trial next week and you will have it. (V 810)
>
> And the Court is certainly willing to give you every day, hour, minute, months and years you need to get ready to try this case. But I'm under an order of the Supreme Court State of Florida to try this case in a time period. And absent motion to continue from the defendant because he feels he's not sufficiently prepared for trial we will try this case. But I can assure you if he were to make a motion to continuance because you don't think you have what you need to try this case, I will grant it. ***

The defense declined the Judge's offer to continue the case by stating that a motion to continue would not be in Murray's best interest due to the

trial court's rulings on other requests. (V 814)[14] Because the defense declined this proposed remedy for its complaint, it cannot be heard to complain on appeal. See Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974)("where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity … will not warrant reversal").

Therefore, there was no adverse ruling and there is no showing that an actual harm incurred; instead, the trial court afforded to the defense the opportunity to conduct depositions, which the defense did not consider as very important. In this appeal, any harm is speculative and therefore not a basis for reversal. See Overton v. State, 801 So.2d 877, 896 (Fla. 2001)("record does not indicate that defense counsel requested the continuances so that he or the defense expert could consult with the lab in Virginia"); Rainey v. Roesall Corp., 71 So.2d 160 (Fla. 1954)("Court advised plaintiffs' counsel that the motion was not sufficient and indicated that counsel might 'like to redraft' which offer was refused"; under facts of case, no abuse of discretion to deny continuance). See also State v. Raydo, 713 So.2d 996, 997-1000 (Fla. 1998)(speculative harm; claim unpreserved); Brundige v. State, 595 So.2d 276, 277 (Fla. 3d DCA 1992)(defendant's decision not to display his voice rendered the trial

[14] Subsequently, on May 20, 2003, after jury selection, the defense moved for a continuance due to another matter (XII 367). Also, on May 15, 2003, the defense filed an "emergency" motion for the defense to conduct some DNA testing (II 289-93) and indicated that it would take four to six weeks for the testing to be completed (V 883-84). The defense wanted any resulting continuance "charged to the State" (V 884, 888) which the judge denied (V 888). These are not presented as issues on appeal.

court's ruling unreviewable), as cited approvingly, 713 So.2d at 998.

In any event, under all the circumstances, the trial court's ruling denying a last-minute request for a deposition was reasonable and therefore merits affirmance in the context of events surrounding the May 12, 2003, request to take Detective O'Steen's deposition, as discussed in the preceding paragraphs and as continued now. See Overton v. State, 801 So.2d 877, 895 (Fla. 2001)(decisions regarding discovery and continuances are reviewed under the abuse of discretion standard); Trease; Canakaris.

Here not only did the Judge invite Murray to work with the prosecutor to "take all the depositions you want," (V 810; see also V 813-14), also **nearly three weeks prior to trial**, by April 30, 2003, Murray was on notice that the State intended to present multiple witnesses to introduce Q-20 in this trial. (IV 618-20) Indeed, on April 30, the defense even acknowledged that it had previously realized State's intent concerning Q-20. (IV 619) At the April 30 status conference, the defense made no inquiry concerning the evidence that the State intended to submit to establish admissibility of Q-20, and the defense requested no additional depositions. (See IV 600-24) The defense waited until about two weeks later and only one week prior to trial, on May 12, 2003, to request an "opportunity to depose Mr. O'Steen." (IV 700) At the May 12, 2003, hearing concerning the admissibility of Q-20, the State called as witnesses Officer Powers (IV 702-32), Detectives O'Steen (IV 735-50, Warniment (FDLE) (IV 751-61), and Hanson (FDLE) (IV 763-73), and at which defense counsel had the benefit of full cross-examinations **prior to trial**. Also, there was extensive discovery prior to

this trial (See, e.g., IV 638; XIII 584, 589, 591, 744).

Concerning the chain of custody of the nightgown garment, Murray failed to show the trial court and on appeal that he could have learned anything important on direct examination of O'Steen at a deposition that he did not learn, or could have learned through due diligence, in his cross-examinations of O'Osteen and the other witnesses during the pre-trial evidentiary hearing or through the extensive discovery.

Murray cites (IB 43, 52) to Scipio v. State, 928 So.2d 1138, 1140-41 (Fla. 2006). There, a witness testified at deposition concerning, and explicitly re-assured defense counsel on, a matter directly pertinent to the defense of the identity of the assailant, that is, concerning whether there was a gun under the victim's body. At the trial, the witness testified that he had been previously mistaken and that the object was actually a pager, rather than a gun. The prosecutor had not apprised the defense of the material change in that witness's testimony from the deposition. Here, in contrast to Scipio, the prosecutor, weeks prior to trial, told defense counsel of his intent to do exactly what he did, that is, to adequately address Murray II's coverage regarding "the hair and nighty" (IV 619; see also IV 694). Appellant cites (IB 52) to State v. Evans, 770 So.2d 1174 (Fla. 2000), which Scipio explains also involved a very significant change in a witness's version concerning a critical fact (from not observing the shooting to observing it); there, the prosecutor was apprised of the change a month prior to trial but the prosecutor failed to notify the defense. Here, well-before trial, the prosecutor alerted the

defense of its intent to explain why there is no discrepancy concerning the garment and the lotion bottle. Further, Appellant has failed to show in the record specifically how and when Wilson supposedly misrepresented anything.

The State submits that the trial judge's handling of the defense's passing request to take O'Steen's deposition was reasonable, meriting affirmance.

D. Murray has failed to show that there was a violation of the doctrines of res judicata or collateral estoppel.

Murray mentions (IB 39-40) "res judicata/collateral estoppel" as a claim under ISSUE II. He argues that Murray II forever prohibits the introduction into evidence of Q-20. The following discussion assumes, arguendo, that res judicata and collateral estoppel were preserved in the trial court. Murray is wrong for several reasons.

First, the plain words of Murray II are that it remanded for a "new trial," 838 So.2d at 1087, which is precisely what the trial court did here. Indeed, Murray took advantage of this 2003 new trial, including filing many new motions and including contesting the admissibility of Q-42, which had been upheld as admissible in Murray II.

Murray II reversed due to error admitting DNA evidence and, for the trial court's guidance on re-trial, "deem[ed] as worthy of comment," 838 So.2d at 1081-82, several other issues, including Q-42, discussed under Issue I, and Q-20, discussed here in Issue II. See also, e.g., Ramirez v. State, 651 So.2d 1164, 1166, 1168 (Fla. 1995) (Ramirez II); Elledge v. State, 911 So.2d 57, 61 (Fla. 2005), citing Elledge v. State, 706 So.2d 1340 (Fla. 1997) as "*Elledge IV*"; Jackson v. State, 599 So.2d 103 (Fla.

1992)(reviewing fourth trial after two prior reversals and a mistrial; affirmed conviction). The trial court followed this Court's Murray II guidance and correctly applied it.

Second, res judicata is not applicable within the same case, as here. See Fla. DOT v. Juliano, 801 So.2d 101, 105 (Fla. 2001)("Where successive appeals are taken in the same case there is no question of res judicata, because the same suit, and not a new and different one, is involved").

Third, the principle of res judicata is also inapplicable here because its applicability also requires a final judgment. See Denson v. State, 775 So.2d 288, 290 n.3 (Fla. 2000)("final judgment on the merits is conclusive of the rights of the parties and constitutes a bar to a subsequent action or suit involving the same cause of action or subject matter"). Here, there was no "final judgment on the merits."

Fourth, as Juliano discussed, even in law of the case, which Murray does not raise and therefore fails to preserve, "a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case," 801 So.2d at 106. In 2003, the facts regarding Q-20 were different because they explained how and why the lotion bottle was separated from the garment.

Defense counsel argued below that this Court's denial of the State's Motion for Rehearing in Murray II, in which the State requested an opportunity to clarify the lotion and the bottle's separation, barred the State from re-addressing the matter in the 2003 trial (IV 696-97). However, as the trial court pointed out (IV 697), the rehearing motion sought to

avoid the reversal of Murray II; it did not speak to evidence adduced at this 2003, future trial. Further, this Court's denial, without opinion, of the rehearing motion did not include any arguably binding facts.

Although Murray never develops a collateral estoppel argument in his brief, thereby failing to preserve it, the principle of collateral estoppel is premised upon there being a prior final judicial determination of an issue and is thereby inapplicable here. See, e.g., Stogniew v. McQueen, 656 So.2d 917, 920 (Fla. 1995); Standefer v. U.S., 447 U.S. 10, 23 (1980)("estoppel doctrine … is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct"). Accordingly, State v. McBride, 848 So.2d 287, 289 (Fla. 2003)(IB 39: cited as "McBridge"), discussed collateral estoppel in terms of a prior final judicial determination on the same matter. Here, there was a remand for a new trial, not finality.

Murray (IB 39) quotes part of Tibbs v. Florida, 457 U.S. 31 (1982), concerning government perseverance, but he omits the crucial next sentence: "For this reason, when a reversal rests upon the ground that the prosecution has failed to produce **sufficient evidence** to prove its case, the Double Jeopardy Clause bars the prosecutor from making a second attempt at conviction," 457 U.S. at 42. Murray II did not reverse due to insufficiency of evidence. Moreover, Tibbs reasoned that a reversal like Murray II's "affords the defendant a second opportunity to seek a favorable judgment," provides an opportunity for the State's case to be "even stronger during a second trial than it was at the first," while also

perhaps, as a practical matter, weakening the State's case through weakening memories; for example, here in 2003 defense counsel was able to incorrectly suggest to officer Chase, concerning Issue I, that he (Chase) changed to "samples" after the first trial. Indeed, Tibbs, 457 U.S. at 39-40, explicitly approved of fully retrying a Defendant after a reversal, quoting North Carolina v. Pearce, 395 U.S. 711, 720 (1969). See also Hopt v. People, 104 U.S. 631, 634-35 (1882)(jury instruction error; "express an opinion upon it [] in order to prevent a repetition of the error upon another trial"; new trial ordered).

E. There was no prosecutorial deception; instead, the 2003 proceedings clarified and provided details of the chain of custody and the defense risked pursuing at trial the "red herring" bottle.

In the two sections of the Initial Brief at IB 41-45 and IB 45-51, as in many other places, Murray ignores principles of appellate review by incorrectly assuming that claims were preserved and by repeatedly questioning the credibility of witnesses who fact-finders below have accredited: for example, he calls into question the veracity of O'Steen's and Power's testimony[15] (IB 42, 49-51), and he questions Wilson's[16] (IB 45-

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[15] Concerning O'Steen and Powers, Murray ignores the fact that O'Steen and Powers testified about separating the evidence in 2003 after Murray II indicated that the separation was, indeed, important.

The State disputes Murray's assertion (IB 50) that "Warniment contradicted both Powers and O'Steen." There was no contradiction. Instead, Warniment testified that the broken JSO seal was from the original outer bag, in which LaForte had originally placed the garment and the lotion and which was opened to separate the garment and the lotion at FDLE. (Compare IV 752-54, XIV 820-21 with XII 448, 496-97, 511-12)

Murray states (IB 50) that "the sealed box came from JSO." O'Steen testified that the evidence was in "big boxes" (plural). (XIV 787-88. See also XII 493) Murray overlooks the crucial facts detailed supra that the

47) and again Dizinno's[17] (IB 47-49) memory or integrity. Indeed, under this Issue, he even erroneously makes a jury-type argument attacking Dr. Floro. (See IB 51). Further, Murray, as he does elsewhere in the Initial Brief, erroneously infers prosecutorial misconduct (E.g., at IB 43, 44, 45, 52). Regardless of the number of times Murray repeats his conclusory accusations, the prosecution did not mislead the defense. What appeared to be "discrepancies" (IB 41) were explained by facts, not "explained away" (IB 41) in a pejorative sense.

Pressing his ambush theme,[18] Murray argues (IB 44) on appeal that "[w]hen defense counsel asked how they would do it [establish the

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garment and bottle evidence was originally gathered by the JSO, placed in the same bag, but split into two bags by the JSO at FDLE, and the resulting bags were sealed. Murray says that "Hanson never got the lotion bottle," but she was in serology and the purpose of splitting off the bottle was to send it to the latent section, i.e., to Wilson. Indeed, Wilson testified that he ultimately examined for fingerprints about 200 items, including the lotion bottle. (XIII 704, 713).

[16] Ignoring for the moment the bottle's insignificance that became apparent at the May 12, 2003, evidentiary hearing, the State notes Murray's allegation (IB 46) that Wilson never testified regarding the lotion bottle in "any of the first three trials." Murray fails to cite the record in this appeal for this statement, and the State objects to it as outside of the record here. (As an aside, the State invites Appellant, for his personal education, to review the 1999 trial transcript to determine the accuracy of his statement.)

[17] Murray in Issue II regurgitates much of what he argued in Issue I concerning Dizinno. For example, he again (at IB 48) omits the compound part of the question at SR5 636. At this juncture, the State simply cross-references its discussion of Dizinno supra and reiterates that Dizinno has testified that the evidence was in-processed at the FBI by a tech under his supervision per their standard procedures at the time.

[18] Interestingly, on appeal Murray is quick to accuse the prosecution of "ambush," yet on May 15, 2003, the defense filed and argued an "emergency" motion to conduct DNA testing (II 289-93); the prosecutor studied the motion (See V 883, 885) as it was being discussed in court (V 883-888); ultimately the prosecutor did not object to the motion's request to conduct the DNA analysis (V 887).

admissibility of Q-20], the State referred counsel only to Detective O'Steen …." The record does not support this assertion. Instead, ignoring for the sake of argument that the State has no duty to explain to the defense specifically how it will prove its case, the prosecutor explicitly told defense counsel on April 30, 2003, that the State "will present witness**es** [plural] regarding that issue of the hair and the nighty" and then reiterated that "witness**es**" (plural) will be involved. (IV 619) Further, before the pre-trial evidentiary hearing began on May 12, 2003, the prosecutor even specified that, in addition to O'Steen, Officer Powers and Katherine Warniment would also be called regarding the issue. (IV 694) The prosecutor also indicated that Officer LaForte might testify "tomorrow," although it appears unnecessary. In response, the defense did not argue that it needed to depose Powers, Warniment, or LaForte, but rather, argued, among other things, that Murray II must be followed and that the prosecution had told the defense that "O'Steen would be able to assist" regarding the chain of custody and then requested only to depose O'Steen (IV 694-701) even though the defense at that time knew that the State also intended to rely upon additional witnesses.

Concerning John Wilson and the plastic-bagged lotion bottle (IB 44-47), as discussed above, the plastic bag containing the lotion bottle became insignificant, except to show that no fingerprints were lifted from the bottle (XIII 708) and except to the degree that defense counsel attempted to make it significant as a "red herring." Appellant has failed to show where John Wilson or the prosecutor misstated or misrepresented anything.

Indeed, during this 2003 trial, defense counsel stated that he had not deposed Wilson, but he, in fact, had conducted that deposition in 1999 (XIII 738-39, 744). The State provided enormous discovery in this, and accomplice Steven Taylor's, case, yet it is no fault of the State that the defense had not prior to this trial asked Wilson a direct and simple question about the plastic bag. Hence, there was no "ambush" (IB 43, 52).

F. Any supposed error was harmless.

Much of the preceding discussion has also suggested that any supposed error was harmless. For example, Murray had the "discovery" benefit of an extensive pre-trial evidentiary hearing with full defense cross-examination. Furthermore, the incriminating evidence in this case was far more extensive than the hairs attacked in this issue, as bulleted at the end of Issue I supra and narrated in the Statement of Facts supra, for example, Murray, in essence, admitting that the hairs found at the crime scene were his.

ISSUE III: WHETHER RULINGS CONCERNING THE TESTIMONY OF FBI EXPERT DR. DIZINNO WERE UNREASONABLE. (RESTATED)

Issue III (IB 53-68) presents multiple issues concerning the testimony of Dr. Dizinno that hairs recovered from the victim's body (that is, Q-42, XV 907) and the garment (that is, Q-20, XIV 906) "had the same microscopic characteristics as" Murray's known pubic hairs.

A. Most of Issue III is not preserved, see Farina; Harrell; Gore; Geralds; Filan; Taylor, or is moot.

Defense counsel expressly conceded that Dizinno could testify that the hair is "consistent" (XIII 750), thereby waiving any such appellate claim

(See IB 53, 54, 55). Although there is no error here, this Court has held that an express waiver bars appellate review of even fundamental error. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("The only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction"), citing Armstrong v. State, 579 So.2d 734 (Fla. 1991).

Murray (IB 54) points to where he objected to Dr. Dizinno's testimony based on Frye-unreliability (XIV 896), but the objection was so general it said nothing. It did not specify what protocols should be required and why they are necessary for Frye-testing. Murray (IB 55) also mentions his Twelfth Motion in Limine (II 365-66), but it focused only on excluding Dr. Dizinno from testifying "that it is rare that two hairs match and/or assigning a probability that the hairs found are that of the Defendant," (See also XIII 749-50, XIV 756-57), and given the defense's concession of his qualification to testify regarding consistency (XIII 750), it appears that the defense objection was continuing to attempt to exclude Dr. Dizinno's "rare" testimony.

Moreover, Murray fails to show where the judge ruled adversely on any motion or objection pertaining to Dizinno's anticipated testimony that it was "rare" that he could not distinguish hairs from separate individuals. Instead, "moot" is handwritten on the defense motion (II 365). Accordingly, during the trial, the Judge expressly reserved ruling until he heard Dizinno's specific conclusion and whether there is a scientific basis for it. (XIV 756-57) For this reason alone, this claim is procedurally barred.

See Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994) ("reserved ruling ... apparently never issued a ruling ..., procedurally barred").

Murray argues (IB 56) that the "trial court allowed Dizinno to testify that it was 'rare' that he could not distinguish between hairs," but he (IB 56, 57) cites to XIV 888 for the "rare"-related evidence that he now contests, which was part of counsels' voir dire of Dizinno, not part of Dizinno's testimony in front of the jury. Murray has failed to show where Dizinno actually testified to "rare" (or "two times out of thousands and thousands," IB 56) in front of the jury, again rendering this claim "moot" (See jury testimony at XIV 876-80, 899-933, 936-44).

Murray's complaint (IB 56-57) that Dr. Dizinno "surreptitiously provided his own statistics" overlooks that this was responsive, and without timely objection, to defense counsel's question on voir dire concerning what the witness meant by "rare that we cannot distinguish between microscopic characteristics of hair from two different individuals by side by side comparison." (XIV 888-89) Therefore, this claim targets testimony that was not admitted into evidence (before the jury), and it is thereby not only moot but also unpreserved and waived by the defense's elicitation of that voir-dire testimony. See also Rivers v. State, 792 So.2d 564, 566 (Fla. 1st DCA 2001)("defense counsel initially preserved the issue with a timely and specific objection"; "counsel subsequently waived the right to challenge the issue on direct appeal by preemptively introducing the evidence of the prior adjudication during direct examination"); White; Behar.

Murray now on appeal discusses (IB 56, 59-60) 1997 and 2002 articles but fails to show where he provided them to the trial court. This argument is not preserved. See also Spann v. State, 857 So.2d 845, 852 (Fla. 2003)("trial objection was limited to the expert testimony on the issue of distortion or intentional disguise, … Spann's argument here … handwriting expert testimony in general should be barred"; "not properly preserved").

In contrast to Murray's current appellate narrative (IB 59-60) of a DOJ investigation and citations to 1997 and 1998 reports, during the 2003 voir dire of Dizinno in the trial court, Murray referred to 2003 and 2000 newspaper articles (XIV 884-85), which defense counsel had not even fully reviewed when he argued them to the trial court and consequently "withdrew the question" (XIV 885). Later, the defense argued that Dizinno's testimony did not meet "the Frye standard" and, after a confusing preface (See XIV 897), stated that he does not intend to "go any further regarding Mr. Malone on whether or not the FBI lab was under investigation at the time that these hairs were in the laboratory or at least that examiner was in the laboratory." (XIV 896-97).[19] Therefore, even though the Judge then concluded that he would not permit the defense "to go into that area" of the "Malone matter" because it involved the investigation of one person and "didn't have anything to do with Dr. Dizinno or the techniques, protocols that he used," (XIV 897) the defense had already abandoned this claim,

[19] Murray (IB 59, 60) seems to complain on appeal that the trial court misapprehended his argument by limiting its consideration to Malone, but he overlooks that the trial court's comments responded to the defense's discussion that included reference to Malone (See XIV 897).

rendering it unpreserved.

Murray in one sentence (IB 58) throws in "Due Process" and Crawford v. U.S., 541 U.S. 36 (2004). Any such claims were not presented below and therefore are unpreserved, and, as undeveloped now, their non-preservation is compounded.

Later in Issue III, in the "Blythe" section of the Initial Brief, Murray (IB 66-68) returns to the FBI investigation and assumes that Dizinno's lab was under investigation. Murray tenders no record cite and fails to demonstrate that anything relevant was excluded. He attempts (IB 66-67) to invoke a statute and constitutional provisions not preserved in the trial court and not meaningfully argued on appeal. He (IB 66) slings more mud through dehors record, dehors relevancy, dehors preservation references to "Kathleen Lundy" in the ballistics section, the resignation of a DNA technician, and some statistics supposedly associated with a 2006 U.S. Supreme Court case cite, where actually, that Court denied certiorari, See Napier v. Indiana, 546 U.S. 1215 (2006). The multiple "dehors" continue with Murray's attempted invocation (IB 68) of case law concerning "actual or threatened prosecution." Murray then incorrectly infers (IB 67) that all these matters were brought to the attention of the trial court when he states that he "was not allowed to effectively cross-examine Dizinno on these allegations." To the contrary, these matters are unpreserved for appeal.

Similarly, Murray's arguments concerning Chester Blythe (IB 61, 63-64) and alleging violations of his constitutional rights (IB 66) were not

presented to the trial court and therefore, are unpreserved.

B. It was reasonable to allow Dr. Dizinno to opine regarding the microscopic consistency and inconsistency.

As discussed supra, the appellate standard of review for the admissibility of evidence is abuse of discretion, which turns on the reasonableness of the trial court's ruling. Assuming, arguendo, that Murray preserved for appeal a claim contesting Dr. Dizinno's opinions that were actually admitted into evidence, each of their admissions was reasonable.

There was no error in allowing Dizinno to testify concerning consistency between Murray's pubic hair and Q-42 and Q-20. See Ramirez v. State, 651 So.2d 1164, 1168 (Fla. 1995)("State is not precluded from introducing Ramirez's knife into evidence and presenting testimony that the wounds on the victim were **consistent** with that knife"; reversed because expert opined "that … Ramirez's knife was the ***only*** knife in the world that could have been used in the murder"). Here, comporting with Ramirez, Dizinno expressly testified in response to defense counsel's cross-examination in front of the jury (XIV 924-25):

> Q In hair examination, first of all, we can't say that it is Mr. Murray's hair, right?
>
> A That's correct. We cannot exclude him as the hair, but hair comparings are not a means of absolute personal identification. So I can't say that that hair came from Mr. Murray to the exclusion of all others.

Defense counsel hammered the point as his last question to the witness (XIV 933):

> Q *** it is not an exact science and we can't say it's exclusively somebody, are these the reasons why?

> A We certainly can't say that these questioned hairs from the white garment and from the body of Alice Vest came from Gerald Murray to the exclusion of all others.

In contrast to Dizinno's testimony, the Frye test concerns novel scientific evidence. See Ramirez v. State, 651 So.2d 1164, 1166 (Fla. 1995)("expert opinion testimony concerning a new or novel scientific principle"); Spann v. State, 857 So.2d 845, 852 (Fla. 2003)("Forensic handwriting identification is not a new or novel science"). For example, here Dizinno himself has testified in this case in 1994 (SR5 591-92), 1998 (SR5 634-35), and 1999 (SR5 675-76) that the hairs at issue were consistent with Murray's pubic hairs. Thus, by the time that Dizinno testified in this 2003 trial, he had been qualified as an expert in "human hair and fiber analysis" about 30 times. (XIV 897-98). Here, the defense was afforded the opportunity to contest Dr. Dizinno's conclusions with their own expert's analysis (See I 113-15; V 872-73, 876), but the defense rested without presenting any evidence (See XV 1080-82, 1102).

McDonald v. State, 952 So.2d 498 (Fla. 2006)(rejecting an ineffective assistance of counsel claim), is on point:

> Agent Allen conducted only a microscopic and visual comparison of the hair evidence. Visual and microscopic hair comparison is not based on new or novel scientific principles and, therefore, does not require a *Frye* analysis. *See Jent v. State*, 408 So.2d 1024, 1029 (Fla. 1981).

See also Bundy v. State, 455 So.2d 330, 336 (Fla. 1984)("expert concluded that the human hairs found on the pantyhose had the same characteristics as Bundy's and could have come from him"); Peek v. State, 395 So.2d 492, 494 (Fla. 1980)("hair samples obtained from appellant were consistent in microscopic appearance to the hair found ... at the scene of the crime").

Murray argues (IB 55) that there were no "written protocols," and although protocols were mentioned to the trial court (XIV 896), Murray failed to argue then why they might be important to the admissibility of this evidence.[20] Indeed, the test for the admissibility of evidence is whether it is sufficiently reliable for the jury to hear it. Protocols could be relevant, but there is no per-se protocol test for "consistency"-level opinions.

C. Appellant has not shown that Dr. Dizinno misled the trial court into improperly limiting cross-examination.

Much of the section of the Initial Brief at IB 57-63 repeats many of the self-serving inferences and groundless accusations that have been discussed under ISSUES I and II supra.[21]

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[20] Similarly, Murray attempts, at the last minute, to throw into the mix, in the last sentence of this section of Issue III, (IB 57), "all the hair evidence has been destroyed" and a lack of note keeping. However, he does not develop these arguments here and he did not present these arguments to the trial court as part of his argument that he says preserved this Issue (See XIV 896). He is incorrect concerning Dizinno, whose notes were presented and referenced (XIV 881-82, 906, 929-33, 914-15; SR6 806). See also footnote in Issue I supra concerning notes of other witnesses. All of the hairs collected from the crime scene were not destroyed. (See, e.g., VI 1072-76) The State also disputes Murray's repeated characterization of flawed DNA testing. While there have been some problems with testing in the history of this case, the Judge excluded DNA results in this 2003 trial because somehow some crucial photographs were lost in a prior record on appeal, and those photographs concerned DNA that was consumed in the testing process. (See VI 1087-90, 1159-61; II 300-307. See also II 367 concerning hairs "consumed during testing")

[21] In "g" at IB 62, Murray violates several appellate principles. This paragraph of the Initial Brief contains no cite whatsoever to the record below, rendering it totally unsupported, and the State objects if Murray attempts to add untimely support in his Reply Brief. The State guesses that the matter referenced in "g" was discussed at XIV 933-35, but then the Initial Brief would be summarily reaching a conclusion that defense counsel explicitly announced to the trial court he decided he would not pursue

In 2003 Dizinno did not "confess[]" (IB 58) to anything. Instead, when previously he was asked who placed his initials on items or opened them up, he indicated an assistant under his supervision and in accord with routine procedure at the time. (SR5 630, 666, 669, 684-86; XIV 909)

If the merits of the unpreserved claims concerning the DOJ/FBI investigations are reached, they have none.[22] Murray failed to meet his relevancy-burden of showing the trial court that an investigation of one part of the "FBI lab" or on one analyst, Malone, implicates the ability or bias of another part of the lab or another analyst. In the trial court, the defense assumed, without establishing, that the "FBI lab" was one monolithic organization. Compounding his error on top of his error, Murray erroneously attempts to make this Court the evidentiary fact-finder when he, without record-support, asserts that he has "demonstrated the general sloppiness of the FBI laboratory" (IB 67). Instead of proffering evidence to the trial court with competent evidence relevant to reliability or bias, the defense mentioned in passing "newspaper articles" (XIV 884-85) and fruitlessly fished for relevant information in its voir dire of the witness

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there. Therefore, this argument was abandoned, and the 2003 record was not developed on this matter.

[22] Moreover, as People v. Renteria, 2005 Cal.App. Unpub. LEXIS 11995 (California Unpublished Opinions, Cal. 5th app. Dist. 2005), points out:

> One of the authors of this study [that Murray cites on appeal], however, subsequently published another study which summarized his previous findings, …, and concluded microscopic hair comparison analysis was reliable under both the Kelly/Frye and Daubert tests. (Houck et al., Locard Exchange: The Science of Forensic Hair Comparisons and the Admissibility of Hair Comparison Evidence: Frye and Daubert Considered (Mar. 2, 2004) Modern Microscopy Journal, pp. 6-8.)

(See XIV 882-84). A little later, defense counsel indicated that he had nothing else to present to the trial court regarding the investigation, and the judge reasonably ruled that the defense had not established any link between the purported investigation and this witness (See XIV 897).[23]

Concerning Murray's claim that it was error for the trial court to prohibit the defense from asking Dr. Dizinno about an investigation of the FBI's DNA lab, Defense counsel, in essence, admitted to the trial court that this topic was an afterthought, (See XIV 899) and like the alleged investigation into Malone, defense counsel raised the matter through a newspaper article (XIV 884: "April 28, 2003, article discussing the FBI undergo broader inquiry on DNA analysis"), then withdrew the question until he could "review it further" (XIV 885). A little later, when defense counsel briefly mentioned the matter again to the trial court without elaboration (See XIV 899), there was no proffer of any details whatsoever of the investigation, including how it supposedly concerned any practice or personnel over which this witness had any authority when and where he was a supervisor. The trial court reasonably denied the request to slur the witness with irrelevant matters in front of the jury. Indeed, Dizinno was promoted. (XIV 883-84)

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[23] As represented by an officer of the Court, the State addresses Rogers v. State, 957 So. 2d 538, 552-553 (Fla. 2007). Rogers mentioned a criticizing-FBI-report as "at most" constituting an impeachment matter. However, there, unlike here, the report concerned the unit (DNA) that did the scientific testing. Further, as applicable here, Rogers reasoned that the impeachment would have made no difference, given the inconclusive nature of the evidence and given the other evidence in the case. See supra Statement of Facts and bulleted facts in harmless section of ISSUE I.

Also, Appellant Murray summarily suggests (IB 60) that, as a result of the investigation, written protocols were created in the unit in which Dizinno conducted the 1991 analysis, yet he fails to cite any support in the record for his assumption. Further, even if this were true, any improvement in processing techniques does not mean that the former processing procedures failed to meet evidentiary-admissibility muster.

D. "Chet (Chester) Blythe" is inconsequential.

Even though he failed to present them to the trial court, rendering them unpreserved, somehow Murray believes that a Tennessee case and an Indiana case that he presents on appeal (IB 63-64) concerning Chester Blythe have a relevant bearing upon the accuracy of Dr. Dizinno's microscopic analysis. Accordingly, the record is undeveloped concerning whether "Chet Blythe" (IB 63) or "Chuck Blyth" (XIV 910) or "Check Blythe" (Id.) is actually "Chester Blythe" (IB 63-64). The record is undeveloped whether the two examples Murray discusses have anything whatsoever to do with any of Dr. Dizinno's analyses. Indeed, assuming, contrary to appellate principles, that this is the same Blythe and that the two cases at IB 63-64 are contemporaneous with Dizinno's analyses here, it is plausible that they are consistent with Dizinno's voir dire testimony concerning "rare" and "ten to 15 percent that have not been confirmed" (XIV 886), which the defense failed to develop further in the trial court. In any event, the record is clear that "Check Blythe never examined the evidence in this case" (XIV 910).

E. Harmless error.

Murray concludes (IB 68) that the "errors described herein were clearly harmful." To the contrary, no relevant evidence was presented to the trial court and excluded by it, and the exclusion of the Murray's assumed relevant evidence was harmless as a matter of law, especially in light of the compelling case showing Murray guilty of this heinous murder, as narrated in the Statement of the Facts and bulleted in the last section of Issue I supra, including, for example, Murray's statement to Detective O'Steen concerning the hair-match that the police "should have gotten the results back last year" (XV 957).

ISSUE IV: WHETHER THE TRIAL JUDGE ERRED BY DENYING MURRAY'S MOTION TO DISMISS THE INDICTMENT.

Issue IV contends (IB 69) that the trial judge erred by denying Murray's Motion to Dismiss (II 196-26) on the ground that evidence on which the indictment was based has been excluded. This Issue also argues (IB 77-79) double jeopardy due to the retrials in this case. Assuming arguendo that the Motion was timely,[24] it appears that the Motion otherwise preserved these two claims and that the trial judge's Order ruled on them; however, these claims are meritless even when reviewed do novo. Murray provides no legal support for his conclusions concerning the failure to record grand jury proceedings and interviewing grand jury witnesses (See IB

[24] Because it was filed years after Murray I and months after Murray II, the State does not concede that the Motion was timely. See §905.05, Fla. Stat. ("challenge or objection to the grand jury may not be made after it has been impaneled and sworn"; exception where "person who did not know or have reasonable ground to believe, at the time ...").

69-70), and as such, he has not met his appellate burden to show error, see Lawrence; Shere; Teffeteller; Coolen; "interviews" concerning grand jury proceedings are also the subject of Issue V infra.

Concerning the evidentiary support for the indictment and Murray's attempt (IB 70-73, 75-76) to summarize weaknesses in the State's evidence,[25] the State disputes Murray's multitude of factual conclusions (at IB 71) in which he fails to cite to the record, and the State objects to Murray's factual assumptions, such as his assumptions (at IB 71-72, 76-77) of what was presented to the grand jury. Also, Murray ignores the fundamental principle that probable cause can be grounded upon evidence that is inadmissible at trial. And Murray ignores the fact that his incriminating statements to Detective O'Steen were made prior to the indictment. (Compare April 8, 1992, XIV 947-50, XV 956-60, 964 with April 9, 1992, I 3-5, XV 960).

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[25] Murray notes (IB 75-76) that he filed a "sworn" motion to dismiss to which the State did not respond in writing. The State has five responses. First, pro se motions filed while represented by counsel are nullities and counsel's motion to dismiss was not sworn at all (See II 196-212). Second, even Murray's pro se motion (II 213-36) was not validly sworn, but rather, contains a non-notarized "oath" (II 236). Third, the gravamen of Murray's motion was not pursuant to Rule 3.190(c)(4), but rather, pursuant to 3.190(b), Fla.R.Crim.P., thereby not requiring a factual response under oath. Fourth, the trial court, when it denied Murray's motion in 2003, had the records from three previous trials that were replete with sufficient sworn testimony requiring the denial of any "(c)(4)" motion, including, for example, the multiple sworn testimonies of Anthony Smith and Detective O'Steen regarding Murray's incriminating statements. Accordingly, fifth, neither the motion filed by Murray's counsel nor Murray's pro se motion contains the allegation essential to a "(c)(4)" motion, that is, that "[t]here are no disputed facts"; therefore, if somehow a motion is otherwise construed as pursuant to "(c)(4)," it was facially insufficient, thereby not requiring a sworn factual response.

Murray's narrative also ignores the trial court's extensive 2003 pre-trial hearings (V 883-VII 1213) and resulting comprehensive order (II 300-307) in which it found, e.g., that the DNA evidence "would assist the jury in determining a fact in issue." (II 303-304) The trial court excluded DNA results for this 2003 trial because this particular DNA from the crime scene is no longer testable and photographs of it were lost in the record on appeal "through no fault of the State or defense," "thereby denying [Defendant] the ability to challenge the State's evidence." (II 304-306)

Murray totally ignores the case on which the trial court's denial relied (II 194). State v. Schroeder, 112 So.2d 257 (Fla. 1959), reversed a trial court "order quashing the indictment." The grand jury indictment was based upon information privileged by the attorney-client relationship. Schroeder, 112 So.2d at 259-61, also citing Prevatt v. State, 184 So. 860 (Fla. 1938), and Mercer v. State, 24 So. 154 (Fla. 1898), is on point: "Nothing is contained in either the Constitution or statutes requiring evidence to be submitted before the grand jury as a prerequisite to a valid presentment or indictment. *** [A] court for the purpose of quashing an indictment will never inquire into the character of the evidence that influenced a grand jury in finding such indictment." Accord Johnson v. State, 157 Fla. 685, 695 (Fla. 1946)("legality of an indictment or information may not be challenged by plea in abatement or motion to quash alleging that the indictment or information is based on insufficient evidence … or the action of the prosecuting officer in presenting the information"). See also, e.g., Fla. Stat. § 905.24 ("Grand jury proceedings

are secret"); Fla. Stat. § 905.27 ("Testimony not to be disclosed; exceptions"); Reed v. State, 113 So. 630 (Fla. 1927)("Grand jury's action is ex parte and its function is inquisitorial and accusatorial"); Rogers v. State, 511 So.2d 526, 531 (Fla. 1987)("Even assuming arguendo that this grand juror was biased … subsequent guilty verdict rendered any resulting error presumptively harmless").[26]

In contrast to the cases discussed and cited above, Murray (IB 73) cites to U.S. v. Alzate, 47 F.3d 1103 (11th Cir. 1995), which is inapplicable here because there, the prosecutor's failure to disclose information was material to the trial jury's verdict. Alzate did not concern the grand jury. Murray (IB 76) cites to two additional cases, which are inapplicable jurisdictionally as well as logically.

Here, the indictment was rendered years prior to Murray I and Murray II, and neither Murray I nor Murray II held that all DNA results were suppressed for all time, but rather, a specific test was excluded under the facts presented to this Court in those appeals. Here, in fact, as outlined above, the trial judge did not exclude DNA results because of any prima facie showing of unreliability of the test results. And, here, Murray ignores all of the other incriminating evidence against him, such as his pre-indictment statement to O'Steen.

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[26] See also State v. Grady, 281 So.2d 678, 681-682 (Miss. 1973)("proper time to test the sufficiency of the evidence to support any indictment is when the case is tried on its merits"); Traylor v. State, 165 Ga. App. 226, 228 (Ga. Ct. App. 1983)("sufficiency of the evidence introduced before the grand jury is a question for determination by the grand jury, and not by the court"); State v. Chandler, 45 La. Ann. 49, 53-54 (La. 1893)(court erred in going behind the indictment).

Schroeder's precedential value is buttressed by sound separation-of-powers principles, in which, under Florida's Constitution, the bases of a grand jury indictment is a matter within the province of the state attorneys' offices. See Fla. Stat. §§27.03, 27.18, 905.19. And in Florida, the State Attorney's Office is a distinct constitutional arm of state government, See Art. 5 § 17, Fla. Const.; Office of State Attorney v. Parrotino, 628 So.2d 1097, 1099 n. 2 (Fla. 1993) ("judicial attempt to interfere with the decision whether and how to prosecute violates the executive component of the state attorney's office"). See also, e.g., State v. Cotton, 769 So.2d 345 (Fla. 2000) ("strict separation of powers doctrine"; "State's broad, underlying prosecutorial discretion").

Double jeopardy, the other claim in Issue IV (IB 77-80), is meritless. See ISSUE II supra; Murray II; Ramirez, 651 So.2d 1164; Elledge, 911 So.2d 57; Jackson, 599 So.2d 103; Tibbs, 457 U.S. 31; Pearce, 395 U.S. 711; Hopt, 104 U.S. 631.[27] See also Lockhart v. Nelson, 488 U.S. 33 (1988)(rejected double jeopardy claim; prosecution sought to remedy prior defect on retrial by using another conviction that had not been pardoned; "high price indeed for society to pay were every accused granted immunity from punishment

[27] Because Murray's accusations regarding Chase, O'Steen, Powers, and Wilson are addressed at length supra under ISSUES I, II, and III, the State does not address the repetition of the accusations in Issue IV (IB 79-80). Further, Murray asserts "further prejudice[]" (IB 80) due to the death of a witness and the medical examiner's health resulting in their prior testimony being read; these matters are discussed in Issue X, but the State notes at this juncture, that "prejudice" in a case is not per se improper, as all incriminating evidence is prejudicial to the defendant, and these witnesses have been subjected to Murray's cross-examination multiple times in the trial context.

because of any defect sufficient to constitute reversible error"); Stroud v. U.S., 251 U.S. 15 (1919) (no double jeopardy violation to retry defendant on same charge after reversed on appeal due to government's confession of error; affirmed re-trial).

Indeed, even erroneously assuming that Murray's accusations of prosecutorial misconduct riddling his Initial Brief had any validity, it still is not a violation of double jeopardy to retry him. See Gore v. State, 784 So.2d 418, 426-427 (Fla. 2001)("Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the State from retrying a defendant who succeeds in getting his conviction set aside"; distinguished case in which prosecutor goaded defense to move for mistrial), citing Lockhart v. Nelson; Ruiz v. State, 743 So.2d 1, 9-10 n.11 (Fla. 1999) (double jeopardy did not bar State from retrying defendant despite the fact that prosecutors "attempted to tilt the playing field and obtain a conviction and death sentence"); Keen v. State, 504 So.2d 396, 402 n.5 (Fla. 1987) (double jeopardy did not prevent a retrial of defendant arising from prosecutorial misconduct).

Accordingly, Murray fails to show how any of the cases he cites (IB 77-80) control a re-trial after an appellate holding concerning the admissibility of evidence. To the contrary, authorities have repeatedly upheld or otherwise validated such re-trials, as discussed above.

ISSUE V: WHETHER THE TRIAL COURT ERRED BY DENYING MURRAY'S MOTIONS TO INTERVIEW ALL GRAND JURORS AND TO DEPOSE THE PROSECUTOR AND DETECTIVE O'STEEN AS WITNESSES TO THE GRAND JURY PROCEEDINGS. (RESTATED)

Issue V claims that the trial court should have allowed Murray to

interview the lead trial prosecutor in this case and the lead detective concerning what they observed of the grand jury proceedings. Actually his Motion (II 251-52) requested depositions of those officials. Another Motion (II 249-50) requested authorization to interview "each grand jury member." Murray has not shown where he presented to the trial court his appellate assertion of due process (IB 81) for this issue, and it is not developed here, rendering due process unpreserved in the trial court, See Farina; Harrell; Gore; Geralds; Filan; Taylor; White; Hill, and unpreserved here, See Lawrence; Shere; Teffeteller; Coolen; Wiggins; Williams (7th Cir. 1989). Further, neither motion filed in the trial court presented any justification for the "interviews" other than "to further justice as outlined in §905.27" (II 249, 251). "Justice" **specifies** nothing, rendering ISSUE V unpreserved in its entirety. See, e.g., Castor v. State, 365 So.2d 701, 703 (Fla. 1978)("objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal").

On the merits, if reached, ISSUE V has none. On appeal, this claim presents as its sole justification for the "interviews" the search for whether, "in light of this Court's rulings in Murray I and Murray II" (IB 82), there was "any competent evidence presented to the Grand Jury" (IB 81). However, as discussed in ISSUE IV supra, the grand jury's probable cause determination and the prosecutor's grand jury function are beyond Murray's inquiry. Put in terms of Section 905.27's "justice", Murray has failed to show how deposing the lead prosecutor and the lead detective

would further "justice" when the probable-cause factual basis of the indictment is beyond his purview. Indeed, Minton v. State, 113 So.2d 361, 365 (Fla. 1959), indicated that "mere surmise or speculation" is insufficient to justify "lift[ing] the veil of secrecy from the grand jury proceedings," even where the allegation is trial testimony inconsistent with grand jury testimony, not alleged here.

Murray summarily also states (IB 82) that the trial court ruled that he had shown good cause to obtain grand jury testimony and that therefore the burden shifted to the State. The State has several responses. First, Murray has failed to meet his appellate burden by not citing to the record for this assertion, and the State objects to it on that basis. Second, Murray fails to show where he preserved for appeal this burden-shifting argument by presenting it to the trial court. Third, if the trial court ruled that Murray showed good cause, in light of the prevailing public policies protecting grand jury secrecy and the separation of prosecutorial powers, see ISSUE IV supra, it erred; there was no showing that the grand jury proceedings contained any exculpatory evidence; there is no "cause," especially given the misadventures on which this would take the judiciary. And, fourth, Murray fails to show how any alleged burden to produce grand jury testimony per se allows him to depose witnesses to the grand jury proceeding, including the prosecutor and grand jurors.

ISSUE VI: WHETHER THERE WAS SUFFICIENT EVIDENCE TO CONVICT MURRAY OF THE OFFENSES CHARGED IN THE INDICTMENT.

Issue VI argues (IB 82-83) that the "only evidence" in which the State attempted to put Murray at the murder scene was the "hair evidence" and the

"incredible testimony of a jailhouse informant." Defense counsel's motions for judgment of acquittal (XV 1064, 1106-1108), although cursory, made similar arguments. On the merits, this issue has none.

Because Smith testified in this trial as he did in the 1999 trial, Murray II, 838 So.2d at 1087, is on point, meriting affirmance: "In this case, the State submitted direct evidence that Murray confessed to a co-escapee. Based on our review of the record, there was competent, substantial evidence upon which the jury could return a first-degree murder verdict. Thus we find that the trial court properly rejected this motion."

Under the appellate standard of review, all of the evidence is considered, even evidence that is ultimately considered to have been erroneously admitted. See Lockhart v. Nelson, 488 U.S. at 337-42 (reversed Eighth Circuit Court of Appeals' holding that determined sufficiency without inadmissible evidence). In considering all of the evidence, it is viewed so that "every conclusion favorable to [the verdict] that a jury might fairly and reasonably infer from the evidence," Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). See also, e.g., Reynolds v. State, 934 So.2d 1128, 1145-46 (Fla. 2006)(summarizing principle; collecting cases); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("fact that the evidence is contradictory does not warrant a judgment of acquittal since ...").

Murray's self-serving assumptions and conclusions (at IB 84-85), would throw away the vantage point of the trier of fact in observing Smith's demeanor as he testified. For example, Murray errs in his own favor when he argues (IB 84) that Smith accused "the prosecutor [of being] unethical in

the handling of the investigation…." Smith's conclusory accusation was not directed at this case, but rather his own (Smith's) case. (See XV 1034)

Here, as in Orme v. State, 677 So.2d 258, 262 (Fla. 1996), evidence placed the Defendant at murder-and-rape scene. Murray essentially "acknowledged he was present at the scene," Orme, through his statements to O'Steen by describing incriminating crime-scene evidence against Taylor and by Murray futilely attempting to explain away pubic hair recovered at the crime scene, indeed, recovered from the nightgown garment and the victim's naked body. Orme exhibited his consciousness of guilt through "inconsistencies in his stories," while Murray's lame pubic-hair stories showed his consciousness of guilt, as did his fleeing twice, and, while in flight, taking additional steps to conceal himself with fake IDs. Murray was seen with Taylor as he fled the first time, and immediately before and after the murder, and it was conceded at trial that Taylor was involved in this murder (See, e.g., XV 1130, 1138, 1146). Murray was even seen with Taylor prowling in the area of the victim's residence at about 12:40am the night of the murder. Murray, through his association with Taylor, was tied to the victim's dirtied jewelry. And, of course, Murray told Smith that he (Murray) held the knife on the victim while Taylor had sex with her and that he (Murray) at knife-point had sex with her, scavenged to steal from the victim's home, and participated in strangling the victim.

In Reynolds v. State, 934 So.2d 1128, 1146 (Fla. 2006), the defendant attacked scientific evidence as "tainted and inconsistent," but other evidence incriminated him. Here, Murray attacks evidence that incriminated

him, but the totality of the evidence, as summarized in the Statement of Facts and as bulleted in the Harmless Error section of ISSUE I supra provided ample evidence for affirmance. See also Bundy v. State, 455 So.2d 330, 334-37 (Fla. 1984), flight jury instruction abrogated Fenelon v. State, 594 So.2d 292, 294 (Fla. 1992)(evidence, which included microscopic hair comparison and flight, sufficient to support murder convictions).

The evidence in Long v. State, 689 So.2d 1055, 1058 (Fla. 1997), (cited at IB 83, 85) and Horstman v. State, 530 So.2d 368 (Fla. **2nd DCA** 1988) (IB 83, which erroneously attributes the case to this Court), pale to the abundant facts incriminating Murray of this murder. Compare, e.g., Braggs v. State, 815 So.2d 657 (Fla. 3d DCA 2002), disapproved on other ground State v. Ruiz, 863 So.2d 1205, 1206-1207 (Fla. 2003), which distinguishes Long.

ISSUE VII: WHETHER APPELLANT DEMONSTRATED THAT THE TRIAL COURT'S FINDING THAT THE PROSECUTOR PROVIDED A RACE-NEUTRAL REASON FOR PEREMPTORILY CHALLENGING AN AFRICAN-AMERICAN JUROR WAS CLEARLY ERRONEOUS. (RESTATED)

Murray, a white male (I 1,8; III 560), attacks (IB 85-89) the judge's ruling that the prosecutor's reason for peremptorily challenging prospective juror #26, Mr. Jones, an African American (XI 333), was race-neutral (XI 336). While the trial judge initiated the discussion of Mr. Jones (XI 333), it appears that the defense did contest the prosecutor's challenge (See XI 333, 336), and the defense did "renew[]" its "previous objections" (XI 338).

As general principles, "peremptory challenges are presumed to be exercised in a nondiscriminatory manner," Farina v. State, 801 So.2d 44, 50

(Fla. 2001), and "[b]oth parties have the right to peremptorily strike 'persons thought to be inclined against their interests,'" San Martin v. State, 705 So.2d 1337, 1343 (Fla. 1997), quoting Holland v. Illinois, 493 U.S. 474, 480 (1990). A party must preserve its objection to a peremptory challenge by observing the steps outlined in Melbourne v. State, 679 So.2d 759 (Fla. 1996). If the trial judge believes the genuineness of an explanation for the strike, an appellant, including Murray, has the burden of establishing that "the trial court's decision, which turns primarily on an assessment of credibility, ... [is] clearly erroneous," Farina, 801 So.2d at 50. Murray has failed to meet his burdens.

Here, where the trial court observed the prosecutor's interaction with all of the jurors including Mr. Jones, where the prosecutor did not challenge two other African Americans (XI 334), who sat on the jury and participated in the verdicts and 11-1 recommendation of death (Compare XI 334 with XVI 1345 and VIII 1551), and where the prosecutor provided a trial-court-accredited race-neutral reason for the strike (XI 333-34, 336), Murray has failed to meet his appellate burden.

Here, as in Reed v. State, 560 So.2d 203, 206 (Fla. 1990), the defendant is white and two African-Americans were seated on the jury. There, the defendant failed to prevail on appeal. Likewise, Murray should fail. See also Reed v. State, 875 So.2d 415, 421 (Fla. 2004)(rejecting ineffective assistance of counsel claim). Accordingly, U.S. v. Dennis, 804 F.2d 1208, 1211 (11th Cir. 1986), concluding that under all of the facts, there was no "inference of purposeful discrimination," relied heavily on

the fact that the prosecutor did not strike two African-Americans from the panel. See also U.S. v. Ochoa-Vasquez, 428 F.3d 1015, 1047 (11th Cir. 2005)(unchallenged presence of six Hispanic jurors and the government's "anti-pattern" striking manner vitiates Ochoa's Batson claim"); U.S. v. Allison, 908 F.2d 1531, 1537 (11th Cir. 1990)("unchallenged presence of three blacks on the jury undercuts any inference … seating of some blacks on the jury does not necessarily bar a finding of racial discrimination, but it is a significant fact").

Moreover, the prosecutor's race-neutral explanation was entirely accurate. The prosecutor stated:

> Your Honor, I believe he said -- for the record I believe he said he agreed with the two questions that were posed by Mr. de la Rionda [the other prosecutor] except his initial impression about the death penalty when he was asked if he was for or against it he depends and also refused to give a numerical response to Mr. Block's [defense counsel's] questions, and I believe his initial reaction on the word depend that would give us the challenge.

(XI 333-34) Accordingly when Mr. Jones was initially asked for his opinion on the death penalty, he equivocated:

> [PROSECUTOR}: All right. How do you feel about the death penalty?
>
> THE PROSPECTIVE JUROR: Well, the way I feel about it whether he or she guilty or not guilty I don't have anything against it whether he or she guilty or not guilty. I don't- you know, that's the way I feel about it right here. He or she guilty or not guilty I don't know.

(X 137) Then, later, Mr. Jones would not give a number (XI 280-81, 283):

> [DEFENSE COUNSEL]: ... Let's talk about the death penalty. … {W]hat I want you to do is rate from one to five with zero being I support it but I am not that strong on it and five being … I strongly advocate the death penalty … where would you put yourself?
>
> ***
>
> [DEFENSE COUNSEL]: Jones?
>
> THE PROSPECTIVE JUROR: I agree but I don't have a number.

As the prosecutor explained, the combination of Mr. Jones' initial equivocation combined with his refusal to give a number are in fact, on their face, race neutral. The trial judge's accreditation of the prosecutor's reason as genuine is entitled to great deference on appeal. See Reed, 560 So.2d at 206 ("Only one who is present at the trial can discern the nuances of the spoken word and ... demeanor ").

In sum, Murray has failed to show that the trial judge's decision to sustain the peremptory was clearly erroneous. Issue VII should be rejected.[28]

ISSUE VIII: WHETHER THE TRIAL COURT ERRED IN NOT DECLARING A MISTRIAL DUE TO ALLEGED JUROR MISCONDUCT. (RESTATED)

Issue VIII alleges several juror-misconduct related grounds, much of which was not preserved. See Willacy v. State, 640 So.2d 1079, 1083 (Fla. 1994)("Willacy claims that Clark was under prosecution when selected as a juror"; "By failing to make a timely objection, Willacy waived the claim").

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[28] Issue VII also mentions (IB 86-87, 89), without any legal or conceptual discussion, the refusal of the trial court to grant the defense an additional peremptory. Consequently, any claim based upon the denial of an extra peremptory is unpreserved. See Lawrence; Shere; Teffeteller; Coolen. In any event, the Judge reasonably found that Mr. Vaccaro was sincere when he said he could follow the law (XI 310-15, 336-37), meriting affirmance. See, e.g., Blackwood v. State, 946 So.2d 960, 968 (Fla. 2006)(postconviction claim; "jurors indicated that family members had been involved with the criminal justice system as victims, Blackwood has nonetheless failed to support his claim of bias"; "each juror ultimately expressed that he or she could put their feelings aside"); Bolin v. State, 869 So.2d 1196, 1200 (Fla. 2004)("merely answers prompted by the questions rather than the fixed beliefs of the jurors"); Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984)("prospective juror who was a prison correctional officer and who had heard conversations about the offense"; "test ... is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence ... and the instructions").

Further, to support a mistrial Murray must show that "an error is so prejudicial as to vitiate the entire trial." See, e.g., England v. State, 940 So.2d 389, 402 (Fla. 2006)(alleged juror misconduct; no abuse of discretion). To the degree that anything was preserved for ISSUE VIII, it does not rise to this level.

Chronologically, the first allegation giving rise to claims in Issue VIII (IB 92-93) concerned **Juror Starkey** talking with witness Bubba Fisher. In the middle of the State's case-in-chief, the prosecutor brought this to the court's attention, as relayed to him by the witness. (XII 531-32) Fisher had not yet testified at the trial. (Compare XIII 626) Witness Fisher was put under oath and interviewed. Fisher was not sure of the juror's last name. (XIII 609-10) Four or five years ago, Fisher worked under the juror for about a year or so. Fisher said when he ran into the juror, they talked about how they were "doing," just said "hi, that was it." They did not discuss the case, and they did not each ask why the other was there. No one else was around during the conversation. When Fisher was half-way finished with a cigarette, the juror left to go eat. (XIII 610-14) Defense counsel requested that the juror be interviewed (XIII 615),[29] and the judge discussed the matter with Juror Starkey,[30] who said that he did talk with someone today but he did not know his name, that the man had

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[29] The interview on this matter is not contested in Issue VIII. Instead, the judge's interview concerning the jurors praying is a claim within this issue. (See IB 91, 93-94, 95)

[30] Rule 3.575, Fla.R.Crim.P., was effective January 1, 2005, after this 2003 trial, See Amendments to the Fla. Rules of Criminal Procedure, 886 So.2d 197, 198 (Fla. 2004)("Motion to Interview Juror, provides the following procedure for interviewing jurors ***").

worked in the service department with him for "not for very long" (XIII 617-18, 620-21). There were no other jurors around, they talked for five, six minutes (XIII 619-20), and they did not talk about the case or its facts (XIII 621-22). Juror Starkey assured the Judge that he could follow the Court's instructions on the law in weighing the witness's testimony and he would not "automatically believe or disbelieve him" because of their past relationship. (XIII 622) After a short recess, defense counsel said he has no motion concerning Juror Starkey (XIII 623-24). Fisher took the stand in the trial and the defense raised no objection or motion for mistrial regarding the Starkey-Fisher chat (See XIII 626). And Murray has not shown where there was even an adverse ruling. Therefore, the claim (IB 92-93) concerning the Starkey-Fisher conversation was unpreserved below. See Willacy; Rooney v. Hannon, 732 So.2d 408, 410 (Fla. 4th DCA 1999)("Where a lawyer knows of an incident potentially compromising the jury before a verdict is returned, but fails to object or alert the court until after the verdict is announced, the incident may not be raised as a ground for a new trial"); Miller v. Pace, 71 So. 276, 277 (Fla. 1916)("should have been raised and objected to before verdict"); Armstrong, 642 So.2d 730 ("apparently never issued a ruling ... procedurally barred"). Moreover, other than stating some of the facts, no legal argument is made in the Initial Brief (See IB 92-93), rendering the claim undeveloped and unpreserved on appeal. See Lawrence; Shere; Teffeteller; Coolen. In any event, such a claim would have no merit because Juror Starkey said, in reaching a verdict, he could set aside his knowledge of Fisher. See, e.g.,

Blackwood, 946 So.2d at 968; Lusk, 446 So.2d at 1041; Doyle v. State, 460 So.2d 353, 356-357 (Fla. 1984)(juror told Doyle's attorney, "Good luck. You're going to need it"; no error in the trial judge's refusal to grant a mistrial); England v. State, 940 So.2d 389, 401-402 (Fla. 2006)("witness claimed that he overheard one juror say to another juror 'he's guilty' in reference to England"; "left to the sound discretion of the trial judge"; affirmed). Thus, Murray has failed to demonstrate here or to the trial court that Starkey's prior knowledge of Fisher vitiated the entire trial.

Immediately after defense counsel said he has no motion concerning Juror Starkey, Defense counsel then discussed the matter of **Juror Ramsey** (XIII 623-24), which had initially arisen while the court was dealing with Juror Starkey (See XII 531-34), and moved for a mistrial "based on the original questioning to Mr. Ramsey" (XIII 624). The Judge interrupted the trial to inquire concerning a report that Juror Ramsey thought he knew Detective O'Steen, (XII 534) who had not yet been called as a witness (Compare XIV 786). The trial judge and defense counsel asked Ramsey a few questions. (XIII 598-606)[31] Ramsey explained that it did not dawn on him that he might know O'Steen until the name was repeated during the trial. "It just clicked." (XIII 599, 602) Ramsey explained the non-personal nature of his acquaintance with the person he thought was O'Steen. (See XIII 589-600) The witness, Detective T.C. O'Steen, was presented in open court and Ramsey stated "It's not him." (XIII 606)

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[31] As in the Starkey-Fisher chat, the interview on this matter is not contested in Issue VIII.

On appeal, Murray claims that a mistrial should have been declared or juror Ramsey should have been replaced with an alternate juror because Ramsey "did not disclose that he knew police officers during jury selection, and he was clearly discussing the case with other jurors." (IB 93; see also IB 94) Concerning the alleged non-disclosure, the Initial Brief fails to cite to the record for where Juror Ramsey specifically indicated that he knew no one in law enforcement, therefore rendering this claim unpreserved at the appellate level. See Williams, 877 F.2d at 518-19 ("Neither this court nor the United States Attorney has a duty to comb the record in order to discover possible errors").

Further, Roberts v. Tejada, 814 So.2d 334, 339 (Fla. 2002), quoting DeLa Rosa v. Zequeira, 659 So.2d 239 (Fla. 1995), explained that allegations of juror non-disclosure are subject to a three-part test:

> First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

To establish the first prong here, where there is no indication whatsoever that Ramsey intended to mislead anyone, an appellant must show that "the omission nonetheless prevented counsel from making an informed judgment-which would in all likelihood have resulted in a peremptory challenge," DeLa Rosa v. Zequeira, 659 So.2d at 242. Here, Murray made no such showing to the trial court, and the defense had used all of its peremptory challenges (See XI 335-36).

Accordingly, the defense's initial concern about Ramsey was over other

jurors mistakenly believing that Ramsey knew an officer (XIII 606-607. See also XIII 624), and the defense did not initially request Ramsey's removal or initially move for a mistrial (See XIII 607-608). Thus, when the prosecutor and the trial judge initially invited the defense to request that Ramsey be excused, the defense declined (XIV 775-76). Indeed, given the remoteness of the relationship between Ramsey and the unknown officer, it is understandable that it did not occur to Ramsey to mention it to any court personnel until it finally dawned on him during the trial when "it just clicked" during lunch (XIII 602; see also XIII 599). Compare, e.g., Blackwood v. State, 946 So.2d 960, 968 (Fla. 2006)(Jurors' "family members had been involved with the criminal justice system as victims," but postconviction claim rejected because "failed to support his claim of bias"; no "basis upon which counsel could have reasonably challenged any of the jurors for cause").

Moreover, the defense's extreme equivocation concerning Ramsey's posture should not be the basis of any appellate remedy, such as requiring a new trial. Initially the defense wanted a mistrial (XIII 607), then it said that it is not moving for a mistrial (XIII 607-608), then the defense moved for a mistrial on the ground that Ramsey had communicated with other jurors (XIII 624), then the defense explicitly refused the Judge's offer to request Ramsey's removal (XIV 775), then the defense wanted the Judge's proposed jury instruction and wanted Ramsey and the other jurors removed (XIV 776). In the midst of all this defense willy-nilliness, cf. Waterhouse v. State, 792 So.2d 1176, 1188 (Fla. 2001)(willy-nilly leaping back and

forth between the choices of self-representation and appointed counsel), the Judge astutely observed, "great deal to say about nothing." (XIV 775) Subsequently, the Judge did instruct the jury that Ramsey had mentioned to two lady jurors that he thought he knew a witness but it turns out that he did not know any witness. (XIV 785-86). There was no objection when the instruction was given. (See XIV 785-86) The trial judge's handling of the matter was imminently reasonable, meriting affirmance. See Doyle v. State, 460 So.2d at 356-357.

If the merits are reached concerning the defense's eventual motion for mistrial based upon Ramsey mentioning something about O'Steen to two other jurors, the State disputes Murray's conclusion (IB 93) that Ramsey "was clearly discussing the case with other jurors." To the contrary, Ramsey testified that he mentioned O'Steen to two other jurors because he "needed to speak to the bailiff" about it when he returned from lunch (XIII 602). Ramsey did not discuss the case, but rather he said (XIII 603): "I told them that I was familiar with the name and that I thought it was O'Steen but because you kept saying O'Steen I think it's a guy in my neighborhood."

If a "venire member's expression of an opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel," Johnson v. State, 903 So.2d 888, 897 (Fla. 2005), citing Brower v. State, 727 So.2d 1026, 1027 (Fla. 4th DCA 1999), then certainly the mere expression by a juror that he might know a witness is likewise insufficient to "taint" anyone, especially after the Judge informs the entire jury that the juror's belief was mistaken.

Here, even if Ramsey had known O'Steen, he told the trial judge that he would make his "own decision" concerning whether O'Steen is believable as a witness (XII 600-601). Murray has failed to establish that Ramsey's casual knowledge of O'Steen and attendant communications vitiated the entire trial. The trial judge was reasonable; he did not abuse his discretion. See Blackwood v. State, 946 So.2d at 968; Lusk v. State, 446 So.2d at 1041. See also McDonough Power Equip. v. Greenwood, 464 U.S. 548, 555-556 (1984)("To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give"; appellant must "show that a correct response would have provided a valid basis for a challenge for cause").

The remaining Issue VIII claims spring from events that occurred between the guilt phase and the penalty phase of the trial.

Murray appears to claim (See IB 90) that it is per se reversible error for **Juror Starkey** to have communicated with Director Mackesy. This is not the law. See, e.g., Doyle; England. Murray has failed to demonstrate that the subsequent proceedings were vitiated. Instead, the trial court reasonably addressed the situation and merits affirmance. Prior to the jury penalty phase, (VII 1225) the prosecutor brought it to the trial judge's and defense counsel's attention that Director Mackesy, an official in the Sheriff's Office, told him that one of the jurors had come to his (Mackesy's) residence after the guilty verdict. (VII 1230-31) As a result, the trial judge took testimony from Mackesy (VII 1231-48), who testified he

is a Sunday School teacher and that, after the guilty verdict, Juror Starkey approached him requesting spiritual guidance regarding the death penalty (VII 1237,1240) and that Starkey told him that "they" had asked a bailiff for permission to pray and were allowed to pray (VII 1241). Defense counsel moved for a mistrial (VII 1248) and requested an inquiry of the juror (VII 1249). The judge and all counsel inquired of Juror Starkey, (See VII 1257-66) resulting in two interruptions for **defense counsel** probing too deeply into the jury room (See VII 1263, 1264).

Starkey indicated that he did not discuss any facts of this case with Mackesy (VII 1252, 1256) and that prayer was not used to influence their verdict (VII 1257). Instead, one gentleman said a "short prayer *** [j]ust for guidance" on each of two days (VII 1254-55, 1263). On defense counsel's questioning, Starkey said that none of the jurors was hesitant about praying, "it was mutual consent." (VII 1263) After questioning Starkey, the Judge asked the defense, "What, if anything, do you want me to do concerning Mr. Starkey?," to which defense counsel responded that he asks that Starkey "be stricken from the panel" and that he wants a mistrial. The State consented to replacing Starkey with an alternate. (VII 1267-68) The Judge then replaced Starkey, (VII 1272) and Starkey did not participate in the 11 to 1 jury recommendation of death (VIII 1550-51). Starkey was excused after he spoke with Mackesy, which was after the guilt phase and prior to the penalty phase, so Murray has not established that the Mackesy-Starkey conversation had any impact on any proceedings.

Concerning the jurors praying twice, the short, innocuous, and result-

neutral nature of the prayer renders reasonable the trial court's denial of a mistrial. See also Rushen v. Spain, 464 U.S. 114, 118-119 (U.S. 1983)("virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote"; "ex parte communication between trial judge and juror" can be harmless). Indeed, as the Judge pointed out in his Order (III 428), it is part of the fabric of our society to ask for divine guidance in our governmental functions. See Marsh v. Chambers, 463 U.S. 783, 792 (1983)(upholding "Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State"). See also March v. State, 458 So.2d 308 (Fla. 5th DCA 1984)("The sessions of this court are opened daily with … a prayer"). There was no harm and the trial judge's actions handling the situation were reasonable, see Doyle; England; Murray has presented no entire vitiation or "absolute necessity" justifying a mistrial, England; and therefore the trial court merits affirmance.

Murray concludes (IB 94) that "it was clear that the jurors came to an agreement that they would find the Defendant guilty in exchange for a life sentence." The ultimate 11-1 death-vote refutes Murray's allegation. And, indeed, after taking testimony from bailiffs,[32] the Defendant, and the prosecutor, (VII 1299-1319) the trial judge undertook very measured

[32] The bailiffs' testimony was not definitive. One bailiff only heard "bits and pieces" and could not recite it verbatim (VII 1299). He recalled someone asking if everyone is comfortable with life and others answering "yes." (VII 1297) Another bailiff testified that he did not overhear any conversations in the jury room. (VII 1300-1301) The Judge's Order summarized the results of the juror interviews and reasonably explained why the overheard comments were unreliable. (III 428-29)

interviews of the jurors, in which they indicated that there were a couple of prayers for general guidance in their deliberations, and that, during their deliberations on guilt, there was no deliberation concerning their sentence recommendation.[33] Each indicated that his/her verdict was based upon the evidence establishing Murray's guilt beyond a reasonable doubt. (See VII 1347-90) The Judge rendered an extensive order, exuding reasonableness. (III 422-30) Therefore, as buttressed by the jurors' actual vote for death, there was no deal. They all denied such a deal, as the trial court found (III 429).

See also Street v. State, 636 So.2d 1297, 1301-1302 (Fla. 1994)("four jurors heard someone utter[] the word 'guilty'" when "passing the jury in a hallway"; trial judge inquired; affirmed), citing Scull v. State, 533 So.2d 1137 (Fla. 1988)(trial judge adequately conducted individual voir dire of jurors to determine whether they were improperly influenced by witnessing jury foreman embrace victim's mother); Hutchinson v. State, 882 So.2d 943,

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[33] Murray states (IB 94) that "one juror testified that he had discussions with another juror about the death penalty." The State clarifies that Juror Ramsey told the trial judge: "There was a conversation, I don't recall if anybody, I mean, by each person saying that they would or wouldn't." He continued (VII 1376-77) by stating that "[w]e read the document and the punishment would be either life imprisonment or the chair. And that's as much as I recall." Regarding the query whether any juror stated that he/she only intended to vote for life, Ramsey responded, "I can't say specifically that I recall that, no." (VII 1377) Defense counsel was invited to ask questions of the juror but he declined. (VII 1378) Concerning Juror Joyce (IB 94), he indicated that there was no agreement. (VII 1359) Somehow Murray infers (IB 94) from a juror's expression of discomfort concerning the death penalty that the jurors minimized the significance of their verdict. Quite the contrary, the comment was in the context of "apprehension" about their role (VII 1359-60), indicating their conscientiousness.

956-57 (Fla. 2004) ("jurors met for lunch at a nearby restaurant. A patron ... told them that she hoped they were sitting on the Hutchinson case and that she hoped they would hang him"; judge inquired of the jurors "about their ability to be impartial"; affirmed); England, 940 So.2d at 401-402 ("one juror say to another juror 'he's guilty'"; "did not abuse his discretion in accepting the jurors' testimony and denying ... mistrial").

The State disputes Murray's claim (IB 91-92, 93-94, 95) that he is entitled to a reversal because of the jury interviews regarding the jury praying. The defense participated in, and encouraged, the inquiries of jurors (See VII 1239-46, 1247-48, 1257-66, 1350-51, 1361-63, 1370-71) and even moved for juror interviews (III 412-14) and complained about delaying conducting them (VII 1283-84). The Judge even warned that the interviews could adversely impact the defense or the State, which defense counsel said he understood. (VII 1284) The defense even assisted in fashioning the questioning (VII 1323-33), and after the interviews, defense counsel attempted to marshal the results to the benefit of his client. (See VII 1390-93) This appellate claim appears to be defense hindsight that it did not get the result it wanted from the interviews, as defense counsel commented afterwards: "Your Honor, obviously did not turn out the way I expected it to." (VII 1390) Thus, Murray not only failed to preserve the claim by not timely objecting, he affirmatively waived this claim by being fully and openly committed to the interviews and fully participating in them. See Arbelaez v. State, 775 So.2d 909, 920 (Fla. 2000)(claim concerning jury interview subject to principle of procedural bar in

postconviction proceeding). See also Lucas; Armstrong (waiver); Behar v. Southeast Banks Trust Co., 374 So.2d 572, 575 (Fla. 3d DCA 1979)("One who has contributed to alleged error will not be heard to complain on appeal"), citing Hawkins v. Perry; Board of Public Instruction of Dade County v. Fred Howland, Inc. Indeed, Section 90.607(2), Fla. Stat., the rule of evidence that declares a juror as incompetent to testify as to matters essentially inhering in the verdict, also provides for an opportunity to object. Here, there was no such objection.

If the merits regarding the interviews are reached, the State submits that given the entire situation in the trial court, the judge's interviews were reasonable, thereby meriting affirmance. Here, it is obvious that the trial judge carefully considered and weighed the options in assuring that extraneous matters, such as prayer, did not bias the jury towards guilt or innocence (See, e.g., III 423-26) and that the defense's motion for, and persistence seeking, juror interviews in spite of the judge's admonitions, were crucial to the Judge's reasonable determination. Accordingly, the trial court analyzed (III 423-24) the application of a leading case in the area, Baptist Hosp. of Miami v. Maler, 579 So.2d 97 (Fla. 1991), and substantially limited the inquiry to whether there was prayer, its extent, and whether there was "express agreement between two or more jurors to disregard their oaths and instructions," Baptist Hosp.; these matters "constitute[d] neither subjective impression nor opinion, but … overt act[s]." See also Singletary v. Lewis, 619 So.2d 351, 354 (Fla. 1st DCA 1993) ("Singletary's argument [against the interviews] ignores the fact

that the trial court found no juror misconduct … whatever inquiry was made concerning the effect upon other jurors can be ignored as unnecessary and irrelevant"); Rushen v. Spain, 464 U.S. 114, 120-121 (1983) ("testified that, upon recollection, the incident did not affect her impartiality").

For his jury interview claim, Murray (IB 92, 94, 95) cites to Keen v. State, 639 So.2d 597 (Fla. 1994). Here, unlike there, defense counsel requested and participated in the interviews, and even objected to delaying them. Here the trial judge limited his inquiry into whether there had been an improper influence upon their deliberations, rather than Keen's inquiry into "how" an improper matter "affected their decision-making process." Further, Keen did not reverse based upon the interviews, but rather the interviews "compounded" another error. Murray (IB 91) also cites to State v. Hamilton, 574 So.2d 124 (Fla. 1991), which supports the trial court's actions here. A State appeal, Hamilton reversed an order granting a new penalty phase. There, the defense alleged to the trial judge that a magazine with a provocative ad was brought into the jury room. Hamilton held that under its facts a judicial inquiry into the magazines was unnecessary, but "commend[ed] the [trial] court for conducting the hearing anyway in light of the fact that it obviously entertained serious doubt about the juror misconduct," 574 So.2d at 130. Hamilton reasoned that it was permissible to interview towards "establishing [the harmlessness] that jurors were not overly distracted by the magazines," Id. Hamilton.

ISSUE IX: WHETHER THE TRIAL COURT REVERSIBLY ERRED WHEN IT INSTRUCTED THE JURY ON AN "ABIDING CONVICTION OF GUILT." (RESTATED)

Defense counsel did not object to the trial court's standard jury

instruction concerning reasonable doubt (XV 1073, 1087-88), and when the trial court announced how it would respond to the jury's question regarding "abiding conviction of guilt," defense counsel stated, "Very good" (XVI 1339). This issue is not only unpreserved, see, e.g., Coday v. State, 946 So.2d 988, 995 (Fla. 2006)("did not object to the use of the standard instruction on premeditation … not preserved for appellate review"); Castor v. State, 365 So.2d 701, 703 (Fla. 1978)("timely and explicit objection" required to preserve re-instruction error); White v. State, 753 So.2d at 549 (state Constitutional due process, unpreserved); Hill v. State, 549 So.2d at 182 (due process and Chambers barred on appeal), it was affirmatively waived, see Lucas, 645 So.2d at 427, citing Armstrong, 579 So.2d 734 (Fla. 1991).

If somehow the merits are reached, under de novo appellate review, the language in the standard jury instruction concerning "abiding conviction of guilt" is constitutional. See Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course"); Esty v. State, 642 So.2d 1074, 1080 (Fla. 1994)("'Taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury'"), applying Victor. Because the instruction here did not contain the troublesome language of Sullivan v. Louisiana, 508 U.S. 275 (1993), citing Cage v. Louisiana, 498 U.S. 39, 41 (1990)(troublesome terms of "grave uncertainty" and an "actual substantial doubt"), Victor and Esty control, not Sullivan. Similarly, Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir. 1978), is not

applicable here because, there, unlike here, the jury instruction shifted the burden to the "defendants to establish doubt in the jurors' minds."

ISSUE X: WHETHER THE TRIAL COURT ERRED BY ALLOWING THE PRIOR TRIAL TESTIMONY OF THE MEDICAL EXAMINER AND JUANITA WHITE TO BE READ TO THE JURY. (RESTATED)

A. Medical Examiner Dr. Floro.

ISSUE X contests the 2003 reading of Dr. Floro's testimony from the 1999 trial of this case. It argues that Taylor was "denied due process because he could not properly cross-examine the doctor " (IB 96) and that Taylor was prejudiced because the jury knew "there was a prior trial" (IB 97).[34] To the degree that any of the ISSUE X claims are preserved, allowing the reading of Floro's prior testimony was reasonable.

The defense objected to reading-back Dr. Floro's testimony because of what it believed to be "changes in his testimony" and because it wanted to "challenge" him some more (IV 656), but the defense failed to **specify** anything that a 2003 cross-examination would add. At the pre-trial hearing, when the trial judge expressed concern "to make sure that this jury doesn't think there was a prior trial in this case," defense counsel agreed that the prior trial could be referenced as "prior proceedings." (V 852) Subsequently, defense counsel was granted a "continuous objection as to Mr.

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[34] ISSUE X does not contest Dr. Floro's unavailability due to his heart condition (See I 156-59, V 835-49).

ISSUE X also mentions (IB 97), in passing and without developing any legal argument, the purported inability of the 2003 read-back to designate injuries in photographs, rendering such a claim unpreserved on appeal. See Lawrence; Shere; Teffeteller; Coolen. In any event, Murray failed to show the trial court and this Court anything specific that was misleading, and the resolution of this matter at the trial (See XII 537-38) was reasonable, meriting affirmance.

Floro," but he specified no ground whatsoever. (See XII 367) During the 2003 read-back of Floro's prior trial testimony (XII 545-XIII 597), the trial court scrutinized the testimony to assure that it did not reference a "prior trial" (See XIII 585-87), there was no contemporaneous specific objection provided to the trial court, and there was even an explicit waiver of the claim of prejudice-due-to-jury-awareness-of-prior trial as the defense admitted "that straighten[ed] it out" (XIII 587). Later in the trial and after Floro's prior testimony was read, defense counsel moved for a mistrial because it he was "starting to agree" with Murray that "it's clear ... this was a prior trial" (XIII 660-61), but, even at this untimely juncture, he equivocated and failed to specify anything within Floro's testimony from which Murray drew his "clear" conclusion.

Therefore, Murray did not preserve for appeal either of the appellate claims of additional-cross-examination or disclosure-of-prior-trial.[35] See Happ v. Moore, 784 So.2d 1091, 1100 (Fla. 2001)(preservation principle applies to application of section 90.804, Fla. Stat.); Ibar v. State, 938 So.2d 451, 464 (Fla. 2006)(prior trial testimony read to jury; "objection at trial is not the same as ..."; "not properly reserved for our review"); re "that straighten[ed] it out," Lucas; Armstrong.

Even if, arguendo, Murray's appellate claims are considered, they have no merit. Murray has failed to show that the trial court's ruling on this matter of the admissibility of evidence was unreasonable. See Brooks; Ray.

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[35] Accordingly, the defense did not timely present to the trial court the claim that cross-examination regarding semen was impeded; the defense waited until after the jury trial. (See VIII 1566-68)

Colina v. State, 634 So.2d 1077, 1081 (Fla. 1994), rejected a claim very similar to Murray's desire for additional cross-examination of Dr. Floro and concluded: "We find that Colina had a full opportunity to confront this witness in the first trial and that the trial judge properly applied section 90.804 in declaring Castro unavailable." Holland v. State, 773 So.2d 1065, 1074 (Fla. 2000), upheld introduction of the prior trial testimony of a medical examiner. Thompson v. State, 619 So.2d 261, 265 (Fla. 1993), reasoned that, as here, an "opportunity at the prior proceeding to cross-examine the witness" is key. Indeed, Murray's brief, in groundlessly[36] ascribing motives that the record does not support (IB 99), highlights the prior opportunities he has had to cross-examine the witnesses, including Dr. Floro (IB 98), in prior proceedings. See also Perez v. State, 536 So.2d 206, 208 (Fla. 1988)(discussing authorities); Ibar v. State, 938 So.2d at 464 (prior "judicial proceeding"); Penalver v. State, 926 So.2d 1118, 1134-1135 (Fla. 2006); State v. Abreu, 837 So.2d 400 (Fla. 2003)(showing of unavailability required). The one case that Murray cites (IB 97), Douglas v. Alabama, 380 U.S. 415 (1965), is not applicable to a situation, like here, in which the witness is unavailable and subject to cross-examination in the prior proceeding.

B. Juanita White.

Concerning reading back the 1999 trial testimony of Ms. White,[37] who was

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[36] In ISSUES I through III supra, the State has disputed Murray's assertions concerning the changes in Chase's, Wilson's, and Dizinno's testimony.

[37] Juanita White's 1999 trial testimony was read to the jury in this

deceased in 2003 (II 275), a defense motion argued that her testimony is "more prejudicial than probative" and asserted the prejudice from White "getting her gun and dog to protect her," (II 329. See also IV 654) and defense counsel renewed the motion immediately prior to the 2003 read-back (XIII 646). Therefore, among the appellate claims (IB 99-100), this is the only one preserved below. See Happ; Ibar, Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994)(evidence that "Lindsey ... drove his car onto the sidewalk to within several feet of them"; "Because Lindsey failed to object ... and on the ground now argued, he failed to preserve this issue for review").

White's testimony (XIII 647-49) showed probative (and relevant) facts, including, linking Murray to the murder in time (the night of the murder), space (about 2 miles from the murder scene), accomplice (with Taylor), and under circumstances showing a consciousness of guilt (ran away and then called with a bogus cover story). As such, the evidence was reasonably, see Brooks; Ray, introduced. Moreover, the evidence did not indicate that she retrieved her gun because of any fear of Murray. (See XIII 650-54)

McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980)(murder conviction affirmed; identity), upheld the admissibility of witnesses' testimony that put the defendant "in the immediate area where the crime was committed at the approximate time of its commission" even though it showed that the "person who attempted to gain entrance to their [the witnesses'] homes met the general description of appellant." Like here, the "sole relevance" of

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2003 trial, yet Murray did not contest the admissibility of the content of that testimony when he appealed from the 1999 trial. See Murray II.

the evidence was not "to point up bad character or the criminal propensity of an accused." Here, the relevancy of White's evidence to the crime was even more compelling than in McCrae. In addition to Murray's 12:40am prowling with the murder co-perpetrator in the area of the murder, he attempted to "cover his tracks" with his phone call to the witness in which the witness responded to Murray's query regarding her safety by reminding him of her gun and dog (XIII 654). See also Shellito v. State, 701 So.2d 837, 839, 840-41 (Fla. 1997)("same night (in the early hours of September 1), police raided the apartment. Shellito jumped out a window and ran but was stopped by a police dog"; upheld admissibility); Fenelon v. State, 594 So.2d 292, 293 (Fla. 1992)("testimony of Betty George that she saw Fenelon running near the area of the shooting with the handle of a black gun protruding from his pocket"; disapproved flight jury instruction but counsel can still argue properly admitted flight as incriminating).

If somehow the merits are reached concerning Murray's unpreserved claim that White's testimony misleadingly made it appear that Murray and White lived closer to each other than they actually did, Murray (IB 100) fails to cite to any record supporting his conclusion. Also, contrary to Murray's appellate assertion, White testified to a distance of about two miles (XIII 648-49) and she referred to a diagram that showed the interrelationships of various landmarks (XIII 649).

ISSUE XI: WAS THE DEATH SENTENCE IN THIS CASE PROPORTIONAL?

Recognizing that this Court independently reviews whether death is the appropriate punishment, the State submits that the death sentence was

proportional, where the jury recommended death by a vote of 11 to 1 (VIII 1550-51), and the trial judge found the aggravating factors of (1) three prior violent felonies; (2) during the commission of a Burglary and/or Sexual Battery; (3) for financial gain; and (4) especially heinous, atrocious, and cruel (HAC). The Judge weighed several mitigating circumstances, such as the untimely death of Murray's wife; loving man and very good with her children; lack of education and little contact with his father; and, part of Murray's mental history (III 544-56).

Taylor v. State, 630 So.2d 1038 (Fla. 1993)(during burglary and/or sexual battery, financial gain, HAC), upheld the co-perpetrator's death sentence, and unlike Taylor, Murray's aggravators include three prior violent felonies, and Murray has shown no sign of being mentally slow.

Here, two of the most serious aggravators apply: HAC and prior violent felony, and this Court has "upheld death sentences where the prior violent felony aggravator was the only one present," Buzia v. State, 926 So.2d 1203, 1216 (Fla. 2006)(additional aggs). Moreover, Murray's aggravator is weighted with three prior violent felonies. England v. State, 940 So.2d 389, 408-409 (Fla. 2006)(8-4, felony probation, prior violent felony, during robbery, and HAC), stressed the seriousness of HAC and then collected several pertinent cases, also applicable here. See also Hoskins v. State, 32 Fla.L.Weekly S159, 2007 Fla. LEXIS 668 (Fla. 2007)(3 aggravators, including HAC; collecting cases); Everett v. State, 893 So. 2d 1278, 1288 (Fla. 2004)(prior felony/under sentence, during sexual battery/burglary, HAC; several mitigators; citing cases); Gordon v. State,

704 So.2d 107, 116-17 (Fla. 1997)(4 aggravators, including HAC; "medical examiner opined that the doctor could have been rendered unconscious from the first blow to the head"); Bertolotti v. State, 476 So.2d 130 (Fla. 1985)(body ... in her home, repeatedly stabbed with two knives; "naked from the waist down ... intercourse "; "strangled and beaten"; three prior violent felonies, murder occurred during robbery, HAC; no mitigation).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death, and if somehow it is held that reversible error occurred in the 2003 trial on any issue other than insufficiency of the evidence for all counts, the State submits that the proper remedy is remand for retrial.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on November 5, 2007: Richard R. Kuritz, Esq., 200 E Forsyth St., Jacksonville, Florida 32202-3320.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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