IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-245

EDDIE JUNIOR BIGHAM,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR ST.LUCIE COUNTY, FLORIDA,(Criminal Division)

****

AMENDED ANSWER BRIEF OF APPELLEE

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

Lisa-Marie Lerner
Assistant Attorney General
Florida Bar No.: 698271
1515 North Flagler Drive
9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

Preliminary Statement

Appellant, defendant below, will be referred to as "Bigham" or "Defendant". Appellee, State of Florida, will be referred to as the "State". Reference to the record will be by the symbol "R", to the transcript by "T", to the supplemental record by the symbol "S", and the initial brief by "IB" followed by the appropriate volume and page numbers.

Statement of the Case and Facts

The State indicted Bigham with first degree murder, kidnapping, and sexual battery on July 28, 2003. The court heard and denied Bigham's motion to suppress his statement on April 15, 2005. Jury selection began on November 1, 2004. Defendant moved for judgements of acquittal on all counts at the close of the State's case; the court granted the motion for the kidnapping and sexual battery charges and denied it for the murder charge. The jury found Bigham guilty of first degree murder. After the penalty phase, the jury returned a unanimous recommendation for death. On January 11, 2005, the court sentenced Bigham to death. A timely notice of appeal followed.

Lourdes Cavazos-Blandin ("Lulu") lived in Ft. Pierce with her husband Jose Guillermo, also known as "Oscar." (T 877-880) They lived in a very small portion of a converted garage. The unit had one bedroom and a living room/kitchen area. It had one

door and three windows. The window in the bedroom had an air conditioner in it and the other two were small windows near the ceiling. (T 1191-1194) On May 23, 2003 her mother, Olivia Cavazos, came to visit and to spend the night with them in order to attend some doctors' appointments the next day. That evening Oscar and Lulu split a twelve pack of beer and ate dinner with her mother around 9:30 PM. The two went to bed around 10:30 and made love before falling asleep. (T 880-81, 883, 894-903)

Some time later that night, Lulu dressed and went into the living room where her mother was sleeping near the front door. She asked her mother for money for a taxi to a friend's house. Lulu did not return nor did she call home the next morning, which was unusual for her. Oscar remained in the apartment until he 7:30 A.M. on May 24. (T. 885, 901-06, 926-927)

That same morning of May 24, 2003, Dennis Lewis was on his way to work when he cut into a wooded lot at the intersection of 26th St. and Avenue "D" to urinate. (T.777-778, 790-792) Behind the screen of trees blocking the lot from the street, he saw a woman lying on her back who looked like she had been dragged to the spot. He immediately left and called the police. (T 793-794)

Police officers responded to the scene and cordoned it off to avoid contamination. Officer Hurtado was familiar with the lot and noticed that the vegetation was broken and disturbed along a path from the street to the body, some 40 feet away. The

woman’s clothes were folded and placed over her face, chest, and genitalia; her purse was some 20 feet away. (T. 778, 787-789)

Tommy Garrason, senior crime scene investigator, photographed the scene and collected the physical evidence. He described the lot as heavily wooded and covered with a thick layer of pine needles; the vegetation near the street, which completely blocked the view inside the lot, was “disturbed” with branches broken and pushed apart. He too observed the drag marks in the pine needles first mentioned by Lewis. He found a single flip-flop sandal in the street and another off the street next to the lot. He described the woman’s body as being nude save for a bra which was pushed above the breasts, exposing them. A pair of jean shorts was neatly placed over her upper torso. Her legs were spread open three feet. An inside out t-shirt was laid over her lower torso. He also found a black condom wrapper in the road near the lot. (T. 812-815)

Garrason also photographed and examined the body before he moved the victim. He observed a hair laying on the shoulder area where the shorts were. Altogether, he collected five loose hairs from her body under the folded clothing, one of which had a root intact. He noticed the bra was pulled up to expose the breasts but was still hooked in the back. When he rolled the body over, he found a black condom sticking out of the anal opening. Although he tried, he was unable to retrieve fingerprints from

the objects or the body. (T. 825-26, 856-860, 865)

Eventually, the police identified Lulu. (T. 967, 1198-1201) The medical examiner Charles Diggs determined she died of strangulation between the hours of 1 and 2 A.M. on May 24, 2003. (T. 1221-1225, 1234) He explained that strangulation takes a number of minutes with unconsciousness coming on between 15 seconds and 2 minutes. He also noted a recent superficial wound to her face near her left eye. (T.1226-1228, 1243-47) As part of the autopsy, he collected a sexual assault kit from the body. There was evidence of sexual activity given the condom found in Lulu's rectum and semen was later found in both her vaginal and anal cavities. Diggs found no injuries or signs of a struggle although he explained that a person may urinate on herself when terrified or dying. (T.1228-31, 1249-50, 1252, 1157, 1184)

Earl Ritzling performed DNA analysis on the samples collected. He identified by DNA the hair found on Lulu's body as Bigham's. (T. 1131-1132) While there was no seminal fluid in the anal cavity, the fluid in the vaginal cavity belonged to Bigham alone. (T. 1103-1104, 1129-1130, 1154-1155, 1186) The seminal fluid present in large amounts inside and outside the condom, on the shorts, and on the t-shirt all belonged to Bigham. (T. 1114-1119, 1123, 1148-1149, 1154) Oscar's DNA was present, although in very small quantities, on the outside of the condom and on the t-shirt. (T. 1114, 1118-1119) The panties had a wide spread

urine stain with traces of semen belonging to her husband, Oscar (T. 1100, 1125, 1183); none of Bigham's DNA nor any fecal matter was present in the panties. The fecal matter, mixed with semen, on the t-shirt came from Lulu; it was not present on any other piece of clothing. The shirt and shorts had small blood stains on them which matched Lulu's and Bigham's DNA. Her nail clippings showed DNA from both men although the majority was from Bigham. (T. 1118-18, 1126-27, 1134-38, 1140-1143, 1183).

Ritzling testified that the most plausible scenario based upon the physical evidence was that Lulu first had vaginal sex without a condom with her husband Oscar. She then dressed, putting on her panties under her shorts since there was clear evidence of drainage of Oscar's semen into the panties, consistent with her walking while dressed. Sometime later, she urinated while still dressed and upright, getting urine on both her panties and shorts. (T. 1099-1100, 1125-27) After that, she had sex with Bigham, both vaginally and anally. The vaginal intercourse with Bigham would have naturally pushed Oscar's semen out and onto the upper region of the outside of the condom. (T. 1121, 1129-30) Bigham also ejaculated onto the pocket area of her shorts while they were inside out and pulled down based upon the spread of the stain. (T. 1123, 1154-55) He left the condom in her anus after sodomizing her. She did not stand or dress after Bigham's sodomy since neither fecal matter

nor Bigham's semen ended up on her panties or the crotch area of her shorts. (T. 1125-27, 1183) The fecal and semen stains on her t-shirt were consistent with a man wiping his penis with the shirt. (T. 1118-20, 1152) The blood dropped onto the shirt and dried without smearing from wear. (T. 1136, 1160) Again, Lulu did not wear the shirt after it was stained. In answering a defense hypothetical, Diggs said Oscar could have had anal sex with Lulu after Bigham did, with the condom still inserted in her anus, but it would have to have been within an hour of the earlier act and without her dressing. (T. 1168-71)

On July 1, 2003 Sgt. Bill Hall ("Hall") and Inv. Jeffrey Hamrick ("Hamrick") transported Eddie Bigham to the Ft. Pierce Police Department in order to conduct Bigham's interview which was videotaped. Hall read Bigham his rights from a standard form and asked him to sign a waiver, which Bigham refused to do. Hamrick observed Hall advising Bigham of his entire *Miranda* rights although the video tape only showed the second half of the advisement. (T. 40-43, 46-48, 58-59, 939, 999)

Bigham began the interview by telling the police that he met Lulu in the early morning hours of May 24th and that they consensually exchanged sex for money while at the home of his friend. The sex was vaginal intercourse and he used a black condom. He said that he did not see her after they had sex. (T. 1003-1010) He denied being in the wooded lot with her. (T. 1020)

Bigham later changed his story and admitted that he had sex with her in the woods, but said it was a second act with a second condom. (T. 1025, 1029) While he initially denied having any anal sex, he waffled and said it might have slipped in unbeknownst to him. (T. 1012, 1031) He also claimed to have seen Lulu on the street after she had left his friend's house. (T. 1040) Throughout the interview Bigham maintained Lulu was conscious, speaking, and dressing when he left her in the lot. He denied choking her. (T. 1047) Upon this the jury convicted.

During the penalty phase, Caption Richard Scheff ("Scheff") testified in the penalty phase trial about Bigham's prior murder conviction for the death of Crystal McGee. He testified that the baby died of massive blunt force trauma to the head consistent with Shaken Baby Syndrome. The child also had numerous pre-mortem bruises all over her body as well as serious burns on her buttocks, legs, and feet. Bigham was the boyfriend of Crystal's mother and was caring for her by himself when the injuries occurred. Bigham gave the police two different statements about hurting the child, neither of which was completely truthful. (T. 1494-1515) Garrason confirmed by fingerprints that Bigham was the person convicted in that case. (T. 1516)

Jose Guillermo and Yajahra Garcia, Lulu's sister, both read letters about the impact her murder had on their lives. (T. 1523-1527). Julius White, Bigham's uncle, testified Bigham was

friendly and helpful when he stayed with White's family. He thought Bigham was an all around "nice guy." (T. 1632-1640) Chaplain Jeffrey Owens told how Bigham would occasionally go to religious services in jail. (T. 1626-1632)

Dr. Riordan, forensic psychologist and neuropsychologist, testified for the defense. He prepared Bigham's psychological history after reviewing school, medical, and jail records and interviewing Bigham several times. He gave Bigham psychological tests. Riordan determined Bigham had a history of repression with bouts of depression and anxiety and had poor coping skills; he has a "pro-social personality" and does well in the prison structure. His IQ of 80 is in the low average range. Bigham has no cognitive deficits and no active psychological disorders. Riordan opined that at the time of this crime Bigham was suffering from severe stress from the death of his aunt so that he was unable to fully appreciate the nature of his conduct. During cross-examination, the court allowed the State to question Riordan about Bigham's 12 prior convictions and assaultive conduct while in prison. (T 1531-1622).

Dr. Landrum ("Landrum"), clinical psychologist, agreed with Riordan's assessment that Bigham had a pro-social personality and would do well in prison. Landrum explained that the stress Bigham spoke of experiencing around the time of the crime did not rise to the level of any disorder. He noted Bigham had never

accepted responsibility for the murder of the baby and had committed two murders in the two years he had been free of prison out of the last 29. (T. 1640-1651)

Summary of Argument

Issues I & II - There was substantial competent evidence supporting both the court's denial of the judgement of acquittal ("JOA") and the guilty verdict on premeditated murder.

Issue III - The court properly denied defense cause challenge to Juror Neese and the issue is unpreserved.

Issue IV & V - Court properly admitted expert opinion evidence and the issues were unpreserved.

Issues VI & IX - State did not commit prosecutorial misconduct in closing argument and court properly denied objection.

Issue VII – The defense was precluded properly from arguing the kidnapping and sexual battery charges.

Issue VIII - Court properly allowed State's voir dire question on when death penalty applies.

Issue X - Bigham affirmed his absence in pre-trial docket calls by not objecting at later appearance and issue is unpreserved.

Issue XI - Court properly admitted testimony regarding facts and inferences within knowledge of witness and issue is unpreserved.

Issues XII & XIII - Court's admission of hearsay testimony was not abuse of discretion given circumstances of case.

Issue XIV - Court properly allowed cause.

Issue XV - Court properly denied defense motion to suppress.

Issue XVI - Court properly allowed jury to separation since parties agreed and issue is unpreserved.

Issue XVII - Court properly gave standard premeditation instruction.

Issues XVIII & XIX - Court gave proper instruction on weighing mitigators and aggravators and issues are unpreserved.

Issue XX - Court properly admitted number of Bigham's prior conviction under facts of this case.

Issue XXI - Court properly allowed expert opinion evidence on mitigators and/or error was harmless.

Issue XXII - Competent, substantial evidence supported court's finding HAC aggravator.

Issue XXIII - Instruction given jury on burden of proof for mitigators was proper.

Issue XXIV - Court made proper and required findings to support death sentence.

Issues XXV, XXVI, & XXVIII - Court properly weighed mitigators and detailed findings in written report.

Issue XXVII - Court considered only two statutory aggravator and properly weighed all factors.

Issue XIX - Court properly considered and weighed all mitigators when imposing the death penalty.

Issue XXX - Death sentence is proportional.

Issue XXXI - Florida's death penalty statute is constitutional.

Argument

ISSUE I & II

THERE WAS SUFFICIENT TO SUPPORT BOTH THE COURT'S DENIAL OF THE JOA AND THE JURY VERDICT

Bigham contends in Issue I that the court erred in not granting a JOA on the premeditated murder charge because of a lack of evidence on the identity of the killer. He argues that although the State successfully linked Bigham to the sex acts on Lulu, that evidence does not prove that he killed her. In Issue II he contends the evidence was insufficient to prove premeditation. He argues that since there was no pre-existing animosity or relationship between Lulu and him and he made no statements regarding a plan to kill her, it was impossible for the State to carry its burden of proving premeditation. The State disputes both the accuracy of his argument and his view of the facts elicited at the trial. There is substantial competent evidence to support the jury's verdict of Bigham's guilt for the murder of Lulu. This Court should affirm the conviction.

In Pagan v. State, 830 So.2d 792, 803 (Fla.2002), this Court discussed the standard of review for the denial of a motion for judgment of acquittal:

> In reviewing a motion for judgment of acquittal, a *de novo* standard of review applies. ... Generally, an

> appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... If, after viewing the evidence ***in the light most favorable to the State***, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

Pagan, 830 So.2d at 803 (citations omitted) (emphasis added). See Boyd v. State, 910 So.2d 167, 180-81 (Fla.2005); Conde v. State, 860 So.2d 930, 943 (Fla.2003); Crump v. State, 622 So.2d 963, 971 (Fla.1993) (question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal). "Proof based entirely on circumstantial evidence can be sufficient to sustain a conviction in Florida." Orme v. State, 677 So.2d 258, 261 (Fla.1996). Contrary to Bigham's assertion that the verdict was based only on circumstantial evidence, the State's proof of his guilt rested on direct evidence.

A court should not grant a motion for judgment of acquittal unless "there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law." Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). This is obviously not the case here. Bigham argues that the fact Lulu and defendant had sex is not indicative that he killed her.

However, the following is: (1) the only piece of clothing that had fecal matter on it was the t-shirt which had stains consistent with a man wiping his penis on it; (2) her shorts and panties not did not have fecal matter on them from the anal sex; (3) the panties had no semen from Bigham in the crotch area which would have been there if she had dressed after the sex act; (4) the condom, with Bigham's semen inside, was still in her rectum and had not been removed by either Bigham or the woman herself; (5) the clothing was neatly folded over her nude body and over Bigham's hairs on her torso; (6) the blood stains on the back and front of the t-shirt were set and unsmeared; (7) Bigham admitted having sex with Lulu in the woods at a time just before she died; (8) he also admitted that she scratched him to get him off her; and (9) Lulu did not rise after the sex with Bigham based on the positioning of her body with her legs spread three feet apart, the inserted, used condom in her rectum and the lack of semen/fecal stains on her panties and shorts which should have been on them if she had dressed. Clearly the body's position and the condition of the clothes demonstrate that this woman did not rise from her position on the ground and dress after she had sex with Bigham. She did not remove the condom from her rectum.

A jury verdict, like all other findings of fact, is subject to review on appeal by the competent substantial

evidence test. See White v. State, 446 So.2d 1031 (Fla.1984).

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. Spinkellink v. State, 313 So.2d 666, 670 (Fla.1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" FN3 of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See Toole v. State, 472 So.2d 1174, 1176 (Fla.1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So.2d 187 (Fla.1989)(footnote omitted).

"Premeditation is defined as 'more than a mere intent to kill; it is a fully formed conscious purpose to kill'" which must exist for enough time "to permit reflection as to the nature of the act to be committed and the probable result." Green v. State, 715 So.2d 940, 943-4 (Fla.1998)(quoting Coolen v. State, 696 So.2d 738, 741 (Fla.1997)) However, premeditation may also "be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.' " DeAngelo v. State, 616 So.2d 440 (Fla. 1993) (quoting Asay v. State, 580 So.2d 610 (Fla. 1991)). Circumstantial evidence, including the manner of killing and the nature of the wounds, can be sufficient evidence to show premeditation.

Spencer v. State, 645 So.2d 377 (Fla. 1994); See Woods v. State, 733 So.2d 980 (Fla.1999); Gore v. State, 784 So.2d 418 (Fla. 2001); Conahan v. State, 844 So.2d 629 (Fla. 2003).

Strangulation, coupled with other evidence including testimony about the length of time needed to kill via this method, is sufficient to support premeditation conviction. DeAngelo, 616 So.2d 440; Johnston v. State, 863 So.2d 271(Fla.2003)(sufficient evidence to support premeditation where victim manually strangled and scratched defendant during attack); Gore, 784 So.2d 418 (sufficient evidence to support premeditation where victim manually strangled); Blackwood v. State, 777 So.2d 399 (Fla. 2000)(finding premeditation based on asphyxiation and manual strangulation where death took minutes coupled with displaced household items indicating struggle although no signs of forced sex or prior plan to kill); but see Randall v. State, 760 So.2d 892 (Fla.2000)(No premeditation where defense showed defendant used non-deadly strangulation as usual sex practice).

While Lulu and Bigham were unknown to each other before the night of the murder, the trial evidence clearly showed that Lulu was dragged from the street into the seclusion of the wooded lot where Bigham had vaginal and anal sex with her. The vegetation was disturbed and the pine needles had “drag marks” in them. She had a recent injury to her head and Bigham’s skin under her

nails.(T. 1226) Bigham confessed that she scratched him to get him off of her (T. 1015); his blood was on her shirt and shorts which were neatly folded over her naked dead body with his hair resting under. The condom he used, which still had his semen in it, was still in her rectum. The coroner testified that Lulu had bruises on her jaw and neck and that she was manually strangled with her death taking minutes during which she would have known what was happening to her. (T. 1221-8, 1243-7) She died between 1 to 2 A.M., shortly after the time Bigham admitted having sex with her in the lot. All the evidence shows Lulu never arose after Bigham had sex with her. (T. 1234, 1040-41) All of this evidence obviously meets the "competent, substantial evidence" standard required to support the jury's verdict of first degree premeditated murder and refutes Defendant's claim that someone strangled Lulu after Bigham left.

Bigham's defense theory was that Oscar killed Lulu but failed to present any evidence to support it while the State affirmatively countered it. Despite this glaring absence of evidence, Bigham repeatedly attempted to implicate Oscar for both the sodomy and murder of Lulu in both the trial and in this brief. This unsubstantiated theory of his is inherently unreasonable and completely unsupported by <u>any</u> evidence. The State's evidence, however, did contradict it. Oscar specifically testified that he did not leave the house that

night and that he “made love,” i.e. only had vaginal sex, with Lulu. Oscar testified that he never had anal sex with Lulu. Ritzling explained that Bigham having intercourse with her after Oscar would deposit a small amount of Oscar’s semen onto Bigham’s condom, thereby allowing it to travel to her anal cavity and t-shirt in the small amounts found. Cavazos substantiated that Oscar remained in the home that night. Cavazos and Garcia, Lulu’s sister, both testified on this point saying that the house was so small, Oscar could only have left if he passed directly by Cavazos to reach the door. Bigham presented no reasonable hypothesis to account for Lulu’s dead naked body, covered with his semen, hairs, skin cells, and blood, to end up in a wooded lot near his residence with a time of death shortly after he admitted to having anal sex with her in the woods which ended with her scratching him to get him off of her. The court had substantial evidence to send this to the jury and was correct in its denial of the JOA.

ISSUE III

THE COURT PROPERLY DENIED BIGHAM’S CAUSE CHALLENGE TO JUROR NEESE.

Bigham argues the court improperly allowed Juror Neese (“Neese”) to remain on the jury after he immediately informed the court he recognized Hall once the testimony began. Bigham claims he is entitled to a new trial because Neese concealed

material information which would have permitted Bigham to strike him for cause during the *voir dire.* This issue is procedurally barred since it was unpreserved and without merit.

For an issue to be reviewable on appeal, it must be properly preserved by a contemporaneous objection on the same grounds as raised on appeal or the error must be fundamental. Steinhorst v. State, 412 So.2d 332, 338(Fla.1982)(emphasis added); J.B. v. State, 705 So.2d 1376, 1378(Fla.1998). The of contemporaneous objection requirement affords both trial judges the opportunity to address and possibly redress a claimed error and prevents counsel from allowing errors to go unchallenged and later using the error to a client's tactical advantage. See Id., at 1378; F.B. v. State, 852 So.2d 226 (Fla. 2003).

"[I]n order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481, 484 (Fla.1960); see State v. Johnson, 616 So.2d 1, 3 (Fla. 1993) (stating "for an error to be so fundamental . . ., the error must be basic to the judicial decision under review and equivalent to a denial of due process").

Bigham did not preserve at trial the issue he now raises on appeal. Defense counsel did request Neese be struck for cause;

he failed, however, on at least three occasions, to request the court to conduct the three prong test outlined in De La Rosa v. State, 659 So.2d 239 (Fla.1995). (T 1223-24,1498,1740) Counsel stopped with his general cause challenge. Given that limited motion, the court's ruling was correct.[1]

A court has great discretion when ruling on a challenge for cause based on juror competency. Barnhill v. State, 834 So.2d 836, 844 (Fla. 2002). The competency of a juror challenged for cause presents a mixed question of law and fact for the trial court. Trial courts have a unique vantage point to observe jurors' *voir dire* responses and, therefore, this Court gives deference to a trial court's determination of a prospective juror's qualifications and will not overturn that determination absent manifest error. Hertz v. State, 803 So.2d 629, 638 (Fla.2001); Ault v. State, 866 So.2d 674 (Fla. 2003).

Bigham's cause challenge questioned whether Neese was qualified to continue serving as an impartial juror. Once alerted that Neese recognized Hall, the court discussed the matter with counsel and Harllee, defense counsel, conducted an extensive *voir dire*. (T 987-991). Neese stated he did not know Hall's last name but recognized him as someone who was an acquaintance. He explained he worked security at a bar five to

[1]Under Florida Statute 913.03, there *were no* grounds to strike Neese for cause.

seven years before the trial which Hall frequented. Any conversation between the two was brief, casual, and "not reflecting his type of work". Since then, he only saw Hall on the street as he drove by on business as a county inspector. Neese said he could be impartial. (T. 987-90).

Noting that nothing in Neese's responses disqualified him, the court denied the challenge for cause motion, saying: "...what he said did not show a conscious wrong answer." (T 992). Accordingly, the court found Neese could be a fair and impartial juror and thereby remain on the jury. See Mills v. State, 462 So.2d 1075 (Fla.1985) (where prospective juror's distant relationship to victim's family and acquaintance with Mills and his family did not negate his impartiality). Clearly, the court's ruling was reasonable and not an abuse of discretion.

In the event that this Court finds the issue preserved the lower court abused its discretion, Bigham failed to meet the criteria in De La Rosa. It sets a three prong test to determine if a juror's non-disclosure of information during *voir dire* warrants a new trial: (1) the moving party must show the information is relevant and material to jury service; (2) the juror concealed the information during questioning; and (3) the failure to disclose the information was not attributable to the complaining party's lack of diligence. De La Rosa at 380.

Materiality - Neese concealed nothing material in this case, intentionally or not. His relationship with Hall was minimal and remote enough that the name did not trigger his memories. Neese immediately informed the court when he recognized Hall's face.[2] The cases cited by Bigham are irrelevant since Neese's connection to Hall had nothing to do with litigation or the trial itself. Neese's casual contact with Hall years before the trial was not material information. Leavitt v. Krogen,752 So.2d 730 (Fla. 3d DCA 2000)(juror's undisclosed collection claim from more than ten years previously was not material).

Concealment - Neese's failure to remember Hall fails to meet the concealment prong of De La Rosa. Although the question posed to Neese in voir dire appeared straightforward, it was susceptible to misinterpretation particularly in terms of the minimal relationship between Neese and Hall. See Drew v. Couch, 519 So.2d 1023(Fla.1st DCA 1988). Clearly, Neese would only have remembered his tenuous connection to Hall if Hall had been physically present and specifically identified.

Diligence - The State contends Bigham did not exercise 'due diligence' and, therefore, the nondisclosure is attributable to

[2]Interestingly for the prongs of concealment and diligence, Harllee stated in his *voir dire* of Neese : "We understand the list of names was read to you very quickly and you didn't pick up on it..." (T. 990)(emphasis added)

Bigham. Hall was a police witness. On his juror questionnaire, in response to the question "Are you either a close friend of or related to any law enforcement officer", Neese answered affirmatively. At no point during *voir dire*, prior to being sworn, was Neese asked about his answer regarding the nature of his relationship with members of the police department. Furthermore, Bigham did not question Neese about possible relationship with other police officers once Neese disclosed knowing Hall. This incident fails to meet the DeLaRosa tests and, thus, does not warrant a reversal.

ISSUE IV & V

THE COURT PROPERLY ADMITTED EXPERT TESTIMONY INTERPRETING A STAIN PATTERN AND ITS FORMATION.

Bigham contends the court erred in allowing an expert witness to testify on subject matters allegedly beyond the purview of his expertise. Bigham contends in Issue IV that it was reversible error for the court to allow the forensic expert Ritzling to testify that the semen and fecal stains on the t-shirt were the result of a "single swipe." In Issue V he argues that the court committed reversible error by allowing Ritzling to testify that the pattern of fecal and semen stains found on the t-shirt could be the result of a "plunger and piston effect." These issues were not preserved nor is it fundamental error mandating reversal. Further, contrary to Bigham's

assertion, Ritzling's testimony was the opinion of an expert, not unbased "speculation," and, thus, the court properly allowed its admission.

Bigham failed to object when the State asked Ritzling, based upon his past experience, his opinion on how the stain was deposited on the shirt.[3] The State posited several questions on this subject, eliciting Ritzling's response that it was his expert opinion that a man wiping his penis off would account for the pattern of the stains. (T. 1117-1119) Counsel only objected when the State asked how many wipes would produce this stain pattern. *"That's speculation, Judge, they can't say that's the same wipe."* (T. 1119) Clearly, the objection was to Ritzling testifying about the number of wipes necessary to produce the stain, not to the cause of the stain. Immediately after, counsel objected when the State repeats that the stain is from one wipe and then requests Ritzling to interpret the stain pattern. (T. 1120) The issue is not preserved. Steinhorst, 412 So.2d at 338. Likewise, counsel did not object during Ritzling's testimony about the "plunger and piston effect," nor did he object when

[3]If the argument becomes whether this witness had sufficient expertise in wipe marks, counsel's failure to object precluded the state being notified of an alleged deficiency and from putting on evidence supporting its expert. c.f. Pope v. State, 441 So.2d 1073, 1075-6(Fla.)(finding defense counsel's agreement with state regarding witness precluded state from putting on additional evidence in support of fact challenged for first time on appeal).

the State asked questions about it. Again, the matter is not preserved. Id.

More important, Bigham failed to properly frame and specify his objection to preserve the issues he now raises in this appeal. At trial, he never specifically challenged Riztling's expertise to testify about either the pattern of the stain or the manner of it's creation. Counsel never asked for a side bar to expound upon his objection nor did he ask to take Ritzling on voir dire to challenge his expertise in this area. An objection on the (improper) ground of "speculation" does not preserve the issues of lack of expertise which is what Bigham is now raising in this appeal. The issue he raises on appeal is really whether Ritzling had the expertise to opine on how these stains came to look as they did. His objection for a lack of foundation later on does little to cure the problem since it is clearly coupled with the speculation object and does not refer to either Ritzling's qualification as an expert or insufficient facts upon which to base an expert opinion. Even in this appeal, Bigham argues that Ritzling could only form this opinion if he had personal knowledge of the crime itself. This argument completely misses the point and renders the matter unpreserved. Id.

Ritzling qualified, both in this trial and many others, as a forensic expert. (T. 1060-1088) The court allowed him to testify, without objection, as an expert. The testimony that the

stain was consistent with a man wiping his penis came in without objection. It was as an expert, using the facts presented in this case's evidence, that he rendered his opinion on the origin of the stain, followed by his opinion of how many wipes would produce it. Based solely upon the evidence he analyzed, his testimony provided the jury with an explanation of his analysis and paired it to the other trial evidence. This is the function of an expert. He explained as much in his answers. (T. 1117-1123) Bigham's real contention here is that the stains came from a single wipe, with a pattern indicating that the person doing the wipe was Bigham. That issue was not preserved.

This testimony also does not constitute fundamental error given the abundance of evidence connecting Bigham with the murder. The DNA evidence positively shows that Bigham had vaginal and anal sex with Lulu after she and Oscar had sex. It also identifies the hair found resting on her chest, under the folded clothes, as his. He admits to being with her shortly before the time of death and using the condom found in her rectum. The shorts and panties had stain patterns consistent with Lulu walking around after she had sex with her husband. Neither had stains indicative of her walking or even wearing them after Bigham's sex acts on her. The urine stain on those articles of clothing had no fecal matter or any of Bigham's semen mixed with it. She had no fecal matter or semen on her

torso, which would have occurred if she had dressed after Bigham stained both her shorts and her t-shirt. The only semen in her vagina was Bigham's. It was this collection of facts on which Ritzling used to base his opinion.

Should this court decide that the issue was preserved, the court did not abuse its discretion in allowing the testimony. The standard of review for a court's ruling on the admissibility of evidence is whether it was an abuse of discretion. The admissibility of evidence is within the sound discretion of the court and its ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla.2000); Zack v. State, 753 So.2d 9, 25 (Fla.2000); Cole v. State, 701 So.2d 845, 854 (Fla.1997); Jent v. State, 408 So.2d 1024, 1039 (Fla.1981); General Elec. Co. v. Joiner, 522 U.S. 136(1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

Under this standard, the Court's ruling will be upheld "unless ... no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980); See Ford v. Ford, 700 So.2d 191, 195(Fla. 4th DCA 1997); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla.2000), citing Huff v. State, 569 So.2d 1247, 1249 (Fla.1990).

Florida Statute section 90.702 governs expert testimony.

If scientific, technical, or other specialized

> knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

The annotated code specifically says it is "permissible for the expert to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts." Pure opinion testimony does not have to meet the Frye test because it is based on the expert's personal opinion. Flanagan v. State, 625 So.2d 827, 828 (Fla.1993).

A general rule of law concerning the admissibility of expert witness testimony is that the expert, once qualified by the court as such, normally decides for himself whether he has sufficient facts on which to base an opinion. The exception to this rule is when the factual predicate submitted to the expert omits facts which are obviously necessary to the formation of an opinion. When the factual predicate is so lacking, the court may properly refuse to allow the testimony. Spradley v. State, 442 So.2d 1039 (Fla.2d DCA 1983); Johnson v. State, 314 So.2d 248 (Fla.1st DCA 1975); Huff v. State, 495 So.2d 145 (Fla.1986).

As noted above, a witness qualified as an expert has latitude in testifying about his opinion as long as it is based upon the facts in evidence. An expert witness need not have personal knowledge of the events to render an opinion explaining

the evidence based upon both his analysis and his experience as an expert in the field. Ritzling was an expert in DNA analysis and forensic science. He used his findings and the other facts brought out in the course of the trial to give an opinion to assist the jury in its decision making. As the court stated, the jury was free to accept or reject Ritzling's opinion. (T. 1120) The court properly allowed him to testify about a matter within that expertise.

ISSUE VI & IX

THERE WAS NO PROSECUTORIAL MISCONDUCT IN THE CLOSING

Bigham challenges comments made by the State during the trial. He contends that the court committed reversible error by allowing the State's attorney to argue in her closing that Bigham sexually assaulted Lulu (Issue VI) and that she was dead at the time of the sex acts (Issue IX). This Court will find the alleged incidents of misconduct are not misconduct or do not rise to the level of fundamental error. Relief must be denied.

A court has discretion in deciding the scope of a prosecutor's argument and its ruling will not be disturbed absent an abuse of discretion. See, Esty v. State, 642 So.2d 1074, 1079 (Fla.1994), cert. denied, 514 U.S. 1027 (1995). Prosecutors have wide latitude in their arguments to a jury. Counsel is allowed to draw logical inferences and to advance all legitimate arguments. Breedlove v. State, 413 So.2d 1, 8

(Fla.1982). In arguing to a jury "[p]ublic prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." Spencer v. State, 133 So.2d 729, 731 (Fla.1961), cert. denied, 372 U.S. 904 (1963). "Any error in prosecutorial comments is harmless, however, if there is no reasonable possibility that those comments affected the verdict." King v. State, 623 So.2d 486, 488 (Fla.1993); Watts v. State, 593 So.2d 198 (Fla.), cert. denied, 505 U.S. 1210 (1992). Comments which do not vitiate the whole trial or "inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant" do not require reversal. Bertolotti v. State, 476 So.2d 130, 134 (Fla.1985)

The harmless error analysis applies to prosecutorial misconduct. State v. Murray, 443 So.2d 955, 956 (Fla. 1984).

> ... prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." [c.o.] The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18 .... Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most

constitutional violations.

Id. In determining whether an error is harmless, the court must determine beyond a reasonable doubt that the comment did not contribute to the guilty verdict. Id. "In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Spencer, 645 So.2d at 383.

The State is permitted to draw inferences from the evidence. Breedlove, 413 So.2d at 8. Here it is clear that Lulu was dragged from the street, assaulted, and murdered in the wooded lot. She had an injury to her head. Before Bigham's sex with her she urinated a substantial amount while wearing her panties and shorts, indicating terror or a violent death. (T. 1251-2) Also clear is the fact Bigham committed numerous sex acts upon her while her clothes were off. With the lack of forensic evidence indicating forcible sex acts, it was entirely reasonable for the State's attorney to conclude that there was a possibility that Lulu was 1) sexually assaulted and/or 2) actually dead when Bigham sodomized her. The State's attorney was advancing a legitimate argument based upon logical

inferences from the evidence. Spencer, 133 So.2d at 731; Bertolotti, 476 So.2d at 133 The court was well within its discretion to allow this line or argument.

Bigham also asserts that the State's attorney misstated Diggs's testimony by saying Lulu was dead at the time of the sex acts and thereby denied him due process and a fair trial. Her misstatement of the testimony was not damaging given that a reasonable person might infer the same conclusions from the available facts. The jurors heard the testimony themselves and were in an excellent position to determine if the State's attorney misremembered it. An isolated misquote of testimony does not undermine confidence in the verdict. Murray, 443 So.2d at 956 (holding unpreserved error must be "so prejudicial as to vitiate the entire trial" before reversing). The court did not abuse its discretion in allowing the argument nor was the prosecutor's comment reversible error. This Court should affirm.

ISSUE VII

THE COURT PROPERLY LIMITED DEFENSE ARGUMENTS TO COUNT ACTUALLY BEFORE JURY.

Bigham next alleges the court abused its discretion by forbidding him to argue the State failed to prove the two counts of sexual battery and kidnapping it had already dismissed via the JOA. He contends this ruling is reversible error by denying him due process, a fair trial, and violating his right against

double jeopardy. This Court should find no abuse of discretion.

Appellate review is for abuse of discretion as it is within judge's discretion to determine when an attorney's argument is improper, and such determination will not be upset absent abuse of discretion by lower court judge. Watson v. State, 651 So.2d 1159 (Fla.1994) The conduct of counsel during the trial is under the supervision of the court in the exercise of its discretion. Murray v. State, 18 So.2d 782 (Fla.1944); see Esty, 642 So.2d at 1079. Discretion is abused when the ruling is arbitrary, fanciful, or unreasonable. Canakaris, 382 So.2d at 1203

Here, the court granted Bigham's JOA motion for the counts of sexual battery and kidnapping. Those charges, and the issue of proving them beyond a reasonable doubt, was no longer germane or before the jury. The court's ruling was eminently reasonable given that it ruled the state failed to meet its burden of proof with regard to those charges. Bigham suffered no harm as a result of this ruling. The court in no way restricted defense counsel's ability/latitude to argue the theories propounded by the State did not fit the facts. This Court should affirm.

However, if the argument should have been allowed, such does not undermine confidence in the verdict of premeditated murder. The State incorporates its analysis from Issues I & II to show it proved its case clearly. The jury knew it was not asked to decide sexual battery or kidnapping. It is irrelevant

why those counts were taken from it and has no impact on the valid questions of proof of the elements of murder.

ISSUE VIII

THE TRIAL COURT PROPERLY ALLOWED THE STATE'S VOIR DIRE QUESTION ON DEATH PENALTY CASES.

Bigham contends the court's overruling his objection to the State's *voir dire* question to juror Dubberly was an abuse of its discretion. He alleges that the prosecutor displayed a "personal belief in the guilt of the defendant." This issue is without merit since the prosecutor never argued or gave his personal view on Bigham's guilt.

The scope of *voir dire* questioning rests in the sound discretion of the court, and will not be interfered with unless that discretion is clearly abused. Vining v. State, 637 So.2d 921 (Fla.1994); Franqui v. State, 699 So.2d 1312 (Fla.1997). Appellate courts give substantial deference to the court's ruling, upholding it "unless the judicial action is arbitrary, fanciful, or unreasonable." Canakaris, 382 So.2d at 1203.

Cases cited by Bigham in support of his position involve explicit suggestions or argument by the prosecutor in his personal belief that the defendant was guilty. As such, they are inapplicable to this situation. Lavin v. State, 754 So.2d 784 (Fla. 3rd DCA 2000)(held prosecutor erred in stating to entire jury on prior to *voir dire* his State Attorney's Office manual

instructed him not to charge the innocent, reversed on other grounds)(emphasis added); Reed v. State, 333 So.2d 524 (Fla.1st DCA 1976)(in closing argument, prosecutor stated:"...The State doesn't prosecute someone because of their religion or their race or their nationality. We prosecute them because we believe they are guilty of crimes."); Riley v. State, 560 So.2d 279 (Fla. 3rd DCA 1990)(held variety of overzealous statements to jury in closing argument warranted reversal). Here, the prosecutor never suggested to Dubberly, nor the jury panel collectively, that he personally believed in Bigham's guilt. Brooks, 762 So.2d 879 cited by Bigham in support of his position, is misplaced. First, Brooks was reversed for a new penalty phase due to improper arguments by the prosecutor *during closing argument*. Second, the prosecutor in Brooks was cited by this Court with *numerous* indicia of improper closing argument, which comments objected to and non-objected to viewed cumulatively, deprived Brooks of a fair penalty phase hearing.[4]

[4]In Brooks the prosecutor stated that criminal defense lawyers aren't believable, Id., at 904.; argued to jury they shouldn't take the easy way out and vote for life, Id., at 903; argued aggravators far outweigh "flimsy", "phantom" mitigators, Id., at 903; used the word "executed" or "executing" at least six times and characterized defendant(s) as persons of "true deep-seated, violent character" and "people of longstanding violence" Id., at 900; and, stated: "I'm going to ask you not to show mercy or pity to these defendants. What mercy or pity did they show Darryl Jenkins that night? But if you are tempted to show the defendants mercy or pity, I'm going to ask you to show

This case does not match the level of prosecutorial misconduct recognized in Brooks.

Should this Court find the prosecutor's question improper, such error was harmless. Bigham fails to show how this question was prejudicial. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986). First, Dubberly never served as a juror since the State exercised a peremptory challenge on him. Second, Bigham takes the question out of context, giving this Court a false impression of what the attorney was trying to convey.

> MR. TAYLOR: What would be your recommendation if mitigators outweighed the aggravators? What would your recommendation be if we go through all the trial transcripts again and read everything?` Go through everything and check it out and double check, if you have to, and still come up with a verdict for the death penalty. You understood in the second phase of the trial you're not just determining guilt or innocence, you already determined that in the first part. We are talking about the second part. We are now at the point now where hypothetically you found the person guilty as charged. We are now up in the second phase. The second phase is sort of the second trial where we present aggravators, mitigators are presented. You go back in the jury room and you start the weighing process, you say what outweighs the other.
> The law in Florida –- death penalty is the laws if the aggravators in your opinion outweigh the mitigators. And then you can recommend the death penalty.
> MS DUBBERLY: Yes, sir.

---

them the same mercy, the same pity that they showed Darryl Jenkins on August 28, 1996, and that is none." Id., at 901.

> MR. TAYLOR: My question to you is, can you be fair and impartial if in your opinion the mitigators outweighed the aggravators, do you understand?
> MS. DUBBERLY: I think so.
> MR. TAYLOR: It's the option.
> MS. DUBBERLY: I think I could.
> MR. TAYLOR: Could you recommend no death penalty in that situation: In other words, if you didn't recommend the death penalty, the automatic sentence would be a life sentence?
> MS. DUBBERLY: Yes, sir.
> MR. TAYLOR: Could you do that?
> MS. DUBBERLY: Yes, sir. I could do that.
> MR. TAYLOR: And, Ms. Dubberly, you understand the State does not seek the death penalty in all cases, do you understand that?
> MS. DUBBERLY: Yes.

(T. 258-59) Accordingly, the prosecutor's comment was a re-iteration of what he stated originally - that there are distinct guilt and penalty phases. Moreover, Dubberly's non-committal comments like " I think I could" mandated such re-iteration and was clearly within parameters of *voir dire*. The phrase "the State does not seek the death penalty in all cases" does not specifically refer to homicide and can be construed as a general statement of fact in the form of a question. Finally, the jury venire clearly understood this was a death penalty case and was informed on numerous occasions on the procedure used to determine if the death penalty would apply in this case, i.e. weighing of aggravators and mitigators.

ISSUE X

DEFENDANT IMPLICITLY WAIVED HIS PRESENCE FROM UNCONTESTED DOCKET CALLS

Bigham next argues that the court erred in allowing pre-trial conferences to proceed in the absence of defendant and any written waiver of appearance in violation of state and federal constitutions and state statute. Without specifying exactly how this prejudiced him or the trial, he asserts the denial alone of this right constitutes harm. This issue is procedurally barred, without merit since defense counsel orally waived Bigham's presence, and harmless.

Florida Rule of Criminal Procedure 3.180 mandates that defendant must be physically present for all pretrial hearings unless he executes a written waiver. This Court has ruled "[c]riminal defendants have a due process right to be physically present in all critical stages of trial." Muhammad v. State, 782 So.2d 343, 351 (Fla. 2001). The standard of review for violations of this rule is a harmless error analysis. Kearse v. State, 770 So.2d 1119 (2000).

Bigham was not present for the following court appearances: (1) Defense motion to continue held on October 2, 2003 where counsel orally waived Bigham's presence (SR.3:2); (2) Defense motion to continue held on December 11, 2003 where counsel orally waived defendant's presence where State mentioned motion

for DNA sample and counsel said it was unopposed. (SR.4:6); (3) Defense motion to continue held on February 26, 2004 where counsel orally waived defendant's presence (SR.4:9); (4) Defense motion to continue held on May 6, 2004 where counsel orally waived defendant's presence(SR.4:10-11); and (5) Status conference held on August 31, 2004 where counsel orally waived defendant's presence after specifically talking to him in lock-up (SR.4:17-20). The defense continuances were all granted to allow preparation for the trial itself. The parties argued no contested issues on these dates. The defense agreed to the DNA request, which had been made in writing and filed earlier, without discussion. No witnesses, investigators, or experts appeared on these dates. The court held no critical proceedings in Bigham's absence.

The State contends that Bigham did not preserve this issue for appeal by later raising his absence on these dates when he did come to court. He appeared in court, before the same judge, after these hearings occurred yet he never said anything objecting to what happened or indicating in any way that he wanted to be present at all docket calls. Through that silence, coupled with his attorney's repeated oral representations that Bigham's appearance was waived, Bigham effectively adopts and assents to the waivers. This Court found no violation of this rule when a represented defendant is absent from court, his

counsel waives the defendant's presence, and the defendant does not object to his counsel. In those circumstances a court has the discretion to decide once the defendant appears whether he acquiesces in or actually ratifies the actions taken by his counsel. State v. Melendez, 244 So.2d 137 (Fla.1971). In this manner, Bigham waived the issue for appeal. Steinhorst, 412 So.2d at 338.

These alleged violations of the rule did not thwart the fundamental fairness of the trial in any way. Any failure to comply with the rule was harmless and did not go to either Bigham's participation in the proceedings or the fairness of the prosecution. Bigham was not absent from a critical stage. This Court found harmless error for a defendant's absences from motions in limine to limit the showing of crime-scene videotape and to exclude testimony regarding defendant's involvement with prostitutes other than the victims. Since no witnesses testified at the hearing, the Court found it doubtful that defendant's input would have impacted the court's ruling, the court's ruling was correct, and defendant was present at trial when all of the witnesses testified and therefore was able to voice his concerns. Smithers v. State, 826 So.2d 916 (2002). The Court also held that a capital murder defendant suffered no prejudice from his unwaived absence from three docket calls, part of the jury selection, and part of the trial since he was present at

other critical stages of the trial. Wike v. State, 813 So.2d 12 (2002). While a defendant's absence from conference during jury selection was a due process violation, it was not reversible error since he ratified his absence when he accepted the jury. Muhammad, 782 So.2d 343. Similarly, a defendant's repeated absence from motions to continue and docket calls was harmless error since he could not have assisted his counsel in any way. Cotton v. State, 764 So2d 2 (Fla. 4th DCA 1998). Here too, any error was harmless. This Court should deny relief.

ISSUE XI

THE COURT PROPERLY ALLOWED CAVAZOS'S TESTIMONY REGARDING OSCAR LEAVING THE HOUSE.

Bigham contends the court abused its discretion in allowing Cavazos to testify that she would have heard Oscar leave during the night. He states that the defense was prejudiced since it helped undermine its theory that Oscar killed Lulu. This issue was not properly preserved and it lacks merit as well.

As discussed in Issue III previously, Bigham must make a contemporaneous, specific legal objection in order to preserve an issue for appeal unless the alleged error constitutes fundamental error. Steinhorst, 412 So.2d at 338; Archer v. State, , 613 So.2d 17, 21 (Fla. 1993) (rejecting issue where judge did not rule). Defense counsel objected to the testimony as speculation, not on the grounds that it required an opinion

and, therefore, did not preserve it for appeal.

The issue is also without merit even if this Court holds it was preserved. While Bigham argues that the question proposed a hypothetical situation calling for speculation, it really asked Cavazos her opinion on her physical surroundings and position as is shown by her response. Her answer was not speculative, but a fact based opinion given where she was in the room next to the only door to the outside. (T. 904-5) The standard of review for a court's evidentiary ruling is abuse of discretion. A court has discretion in admitting evidence and its ruling will not be reversed absent a clear abuse of that discretion. Ray, 755 So.2d at 610. The court properly exercised its discretion.

The evidence was admissible since a lay witness may testify in the form of an opinion or inference as to what he perceived if two conditions are met:

> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

§ 90.701, Fla.Stat. (1991). "Lay witness opinion testimony is admissible if it is within the ken of an intelligent person with a degree of experience." Floyd v. State, 569 So.2d 1225, 1232 (Fla. 1990). "Acceptable lay opinion testimony typically

involves matters such as distance, time, size, weight, form and identity. ...'[B]efore one can render an opinion he must have had sufficient opportunity to observe the subject matter about which his opinion is rendered.'"Fino v. Nodine, 646 So.2d 746,749(Fla.4th DCA 1994) quoting Albers v. Dasho, 355 So.2d 150,153(Fla. 4th DCA), cert. denied, 361 So.2d 831 (Fla.1978).

Cavazos's testimony was a lay opinion firmly based upon facts known to her - her sleeping patterns, her position, and the layout of the apartment. The State clearly elicited this testimony to explain her other testimony given the difficulties she had expressing herself through the interpreter. Lay witnesses are qualified to give opinions on matters within their experience and purview. Cavazos was not speculating on an event that may have occurred in a hypothetical situation, she was giving her opinion on the events of that night when she was present. The home was very small; her sleeping spot was next to the only door; the window in the bedroom was blocked by an air conditioner and the other two windows were high and covered with foil. Anyone entering or leaving the apartment would necessarily have had to walk by where she was lying. Essentially, this testimony explained her previous statement that Oscar did not leave the home that night. (T. 894-928, 1189-98) The answer was properly admitted.

Even if the evidence should not have come in, it was

inconsequential given the overwhelming evidence that Bigham killed Lulu as he finished having sex with her. Lulu never arose after the sex acts with Bigham who left his condom in her anal cavity, wiped himself on her shirt, and left his hair under the clothes he folded and placed on her body. Oscar denied ever having anal sex with Lulu while Bigham admitted it. Even the evidence of Oscar's semen on the outside of the condom supports the fact that Bigham was the last person to have sex with Lulu before she died. This Court should affirm.

ISSUE XII & XIII

DEFENSE INVITED ADMISSION OF HEARSAY TESTIMONY AND/OR IT WAS HARMLESS ERROR.

Bigham asserts that the court abused its discretion and committed reversible error in admitting hearsay testimony. In Issue XII he argues the court, over objection, improperly allowed Hall to testify to hearsay statements by Oscar and Cavazos identifying the two flip-flops found on the scene as Lulu's. In Issue XIII, he argues the court similarly allowed Hammrick to make conclusory statements based on hearsay refuting the rumor that Lulu was in a jeep with three men that night. In conclusory terms, he asserts prejudice from the first because the State mentioned the shoes in closing. Bigham claims no prejudice from Hammrick's testimony. This issue is without merit since the error was harmless although defendant did preserve it

for appellate review.

A court has discretion in admitting evidence and its ruling will not be reversed absent a clear abuse of that discretion. Ray, 755 So.2d at 610. Abuse exists only "where no reasonable man would take the view adopted by the court." Canakaris, 382 So.2d at1203; Trease, 768 So.2d at 1053, n. 2.

Regarding the identifications by Oscar and Cavazos, the prosecutor was laying a foundation to publish several photographs, previously admitted into evidence, to the jury. Both Oscar and Cavazos had already testified; both were presumably on call if needed, especially since Oscar testified again in the penalty phase. Although perhaps technically hearsay, the court made a reasonable decision to allow minor evidence to be admitted in this manner in the interests of judicial economy. (T. 967-70) Under these circumstances, the court did not abuse its discretion.

Hammrick's hearsay testimony that his investigation refuted the rumors that Lulu was with men in a Jeep is also not an abuse of discretion. The whole topic of the Jeep, the men, and Lulu came up in the first place because the defense itself elicited hearsay testimony regarding street rumors that came up during Hall's investigation. The prosecutor objected as hearsay. The court allowed the evidence in under the defense theory that the line of questions went to the quality of the investigation.

Defense counsel asked Hall if he followed up on the men specifically named in open court and he said he did not although other officers did. The information was refuted. (T. 980-7, 993-5) Hammrick, it turns out, was the officer who did follow up on the information. The prosecutor cleaned up the record by having this witness, who did the follow-up investigation, tell the jury that the rumor was false. The court did not abuse its discretion by allowing the testimony for two reasons: (1) arguably the evidence was still coming in under the "quality of investigation" reasoning and (2) to avoid the defense misleading the jury by eliciting specific names as suspects, challenging the competency of the police investigation, and then not allowing the officer to explain the truth. The defense "opened the door" for this hearsay.

Even if this Court finds an abuse of discretion, there is no resulting prejudice to Bigham. There was overwhelming evidence showing that Lulu was dragged from the street into the seclusion of the wooded lot where Bigham killed her as he finished having sex with her. The vegetation was disturbed and the pine needles had "drag marks" in them. She had a recent injury to her head and Bigham's skin under her nails. The bottom of her feet were dirty. Bigham confessed that she scratched him to get him off of her and his blood was on her shirt. Lulu never arose after the sex acts with Bigham who left his condom in her

anal cavity, wiped himself on her shirt, and left his hair under the clothes he folded and placed on her body. Oscar denied ever having anal sex with Lulu while Bigham admitted it. Even the evidence of Oscar's semen on the outside of the condom supports the fact that Bigham was the last person to have sex with Lulu before she died. This Court should deny relief on this issue.

Issue XIV

THE COURT PROPERLY EXERCISED ITS DISCRETION IN REMOVING JUROR MORRISON FOR CAUSE.

Bigham argues the court erred by excusing Juror Morrison ("Morrison") for cause based on her statement "she did not like to sit in judgement of others." This issue is unpreserved and meritless since the court struck her for her inability to set aside her views and follow the law. Hence, the court did not abuse its discretion and its ruling should be affirmed.

The standard of review of a court's decision striking a juror for cause is abuse of discretion. See Ault, 866 So.2d at 683-84; Kearse, 770 So.2d 1119; Castro v. State, 644 So.2d 987 (Fla. 1994).

The specific contention raised on appeal must have been asserted in the court to preserve an issue on appeal. Steinhorst, 412 So.2d at 338. The only exception, applied very rarely, is with an error so fundamental that it challenges the foundation of the case so as to deny due process. Id. To

preserve the issue of a cause challenge, the party opposing the challenge must re-raise his objection before the jury is sworn. Zack v. State, 911 So.2d 1190 (Fla. 2005) (absent renewal prior to jury being sworn, an objection is presumed abandoned and the party satisfied with selected jury); Ault, 866 So.2d at 683-84; Joiner v. State, 618 So.2d 174, 175-76 (Fla.1993) (requiring renewal of objection prior to swearing of jury to preserve issue since accepting jury without objection gives rise to reasonable assumption counsel now is satisfied with jury). While Bigham's counsel objected to Morrison's excusal, he did not renew his objection before the jury was sworn thereby failing to preserve the matter. (T 480, 758-59)). However, should the merits be reached, the record establishes the strike was proper.

Morrison's response regarding her impartiality while listening to guilt phase evidence was unequivocal - she could not exercise her duty to be fair and impartial juror.[5]

> MR. TAYLOR:...But anyone here have any religious or personal convictions that would not allow you to sit in judgement of another person for let's say guilt, to determine if they are guilty or innocent. Some people

[5]Immediately after Morrison's responses, the state asked: "Anyone else feel the same way as Ms. Morrison?" (T. 158) Juror Jennings indicated she felt the same way, but upon being asked whether she "could listen to the evidence and be a fair and impartial juror" Jennings unequivocally stated: "Yes." (T. 159) Accordingly, it is clear the question was not subject to any interpretation and Morrison did not seek at any point to clarify or change her position. Furthermore, Bigham did not seek to immediately rehabilitate her.

> it's taught in their religion they can't sit in judgement because of their religion, some just have strong personal believes [sic] that they cannot do that. Anybody feel that way?...And that's Ms. Morrison?
> MS. MORRISON: Yes.
> MR TAYLOR: Ms. Morrison.
> MS. MORRRISON: That's the way I was brought up in the home, never to judge. My mom's a Christian and that's the way I was raised so, yes.
> MR. TAYLOR: Because that you were raised that way then do you think that would weigh upon your mind and <u>because of that experience would not allow you to be a fair and impartial judge and juror in this case?</u>
> MS. MORRISON: <u>I would say yes</u>. It would cross my mind, I would be thinking a lot of it. I was taught there was only one Judge, so yes, you know it would impact it probably.

(T.157-58)(Emphasis added) During the questioning about the penalty phase, Morrison said she was against the death penalty and would "rather recommend life." (T.279-80). She was equivocal her responses on her ability to follow the law in deciding the penalty, first saying only "I'll try" but later saying she would.[6] (T. 280-1) It was in this context that the court granted the cause challenge. The court referred to the guilt phase questions when ruling on the challenge. " <u>Yesterday</u>, though, she

6.It is noteworthy that Morrison's unequivocal answer came just after defense counsel Harllee objected to the state's comments about polling the : "I'm going to object, that's not the law. You might be polled in the guilt phase, but on the penalty phase, you would only be polled as to whether the recommendation to the jury was the recommendation of the jury. Whether a majority of the jury voted a certain way. You would not be asked for your individual vote on the commendation for the death penalty." (T. 281) Given Morrison's responses on judging others one can conjecture that this final response resulted from her learning she would not have to openly state her verdict.

was certain she wasn't supposed to judge anybody. So I'm going to sustain the challenge for cause." (T. 479-80)(Emphasis added) Accordingly, contrary to Bigham's position that the court committed reversible error due in striking Morrison due to her views on the death penalty, the court struck Morrison for cause *specifically for emphatically stating she could not be a fair and impartial juror,* particularly in the guilt phase where she would have been required to judge the defendant's guilt.

The law clearly holds that a "juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." Ault, 866 So.2d at 683-84. See Adams v. Texas, 448 U.S. 38, 45 (1980); Lusk v. State, 446 So.2d 1038, 1041 (Fla.1984). Counsel and courts cannot always attain absolute clarity on a potential juror's views through voir dire questions. Wainwright v. Witt, 469 U.S. 412, 424-26 (1985). "[M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made unmistakably clear. ...Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Id. 424-26 (footnotes omitted) In that situation, a court is justified in excusing the juror. Bryant v. State, 656 So.2d 426, 428 (Fla. 1995); King v. State, 622

So.2d 134 (Fla. 3d DCA 1993). The relevant inquiry is whether a juror can follow the court's instructions and the juror's oath. Farina v. State, 680 So.2d 392, 396 (Fla.1996).

Here, the court watched and listened as Morrison answered questions on both guilt and penalty phase issues. From his unique vantage point, based on what he saw and heard, the trial judge determined Morrison could not be fair and impartial to both sides. She never unequivocally stated she would follow the law. (T. 157-58, 28;R.19 1124-1125, 1140-1141; R.20 1226-1228). Smith v. State, 699 So.2d 629, 635-36 (Fla.1997); Chandler v. State, 442 So.2d 171, 174 (Fla.1983) (stating "court was better able to observe [juror's] depth of conviction regarding the death penalty, [and] we defer to his estimation of her ability to serve impartially"); Witt, 469 U.S. at 424-26 (opining "deference must be paid to the trial judge who sees and hears the juror"; bias need not be proved with "unmistakable clarity"). His decision was reasonable.

Also, Bigham's counsel never attempted to rehabilitate Morrison when she said she could not judge others or be a fair and impartial juror.[7] "[E]quivocation, i.e., "not sure," is

[7]While Harllee questioned Morrison later during *voir dire* it was only about her position in recommending the death penalty: Mr. Harllee: "You told us that you were brought up, I also assume, in a religious home not to judge others, but I want you to think about could there be a situation –- could there be a person so evil and violent and have committed such terrible acts

sufficient to support his excusal for cause, particularly in the absence of any attempted defense rebuttal." Morrison v. State, 818 So.2d 432, 443 (Fla 2002)(emphasis added).

In the event this Court finds an abuse of discretion and deems the excusal was for penalty issues, the conviction should be affirmed and the remand should be limited to a new penalty phase as was provided in Ault, 866 So.2d at 684. Bigham's legal analysis of this issue is incorrect. See Porter v. Crosby, 840 So.2d 981 (Fla.2003) (noting repeated finding that death is maximum penalty under statute and repeated rejection of Ring arguments). See Perez v. State, 919 So.2d 347, 377 (Fla. 2005). Bottoson and Mills predate Ault and its recognition that an erroneous excusal for cause based on death penalty issues requires only a new penalty phase, not a new trial. Moreover, the penalty phase in Florida is a sentencing proceeding under the Eighth Amendment and neither Bottoson nor Mills changed the law regarding sentencing. If Morrison was improperly excused because of her responses to penalty phase issues the remedy should be a remand limited to a new sentencing trial.

---

of murder that you do feel it would be appropriate to recommend the death penalty?" Ms. Morrison: " Yes, I do." (T. 450)

ISSUE XV

THE COURT PROPERLY ADMITTED BIGHAM'S STATEMENT.

Bigham contends the court erred in denying his motion to suppress his taped statement to the police because the videotape failed to record the first portion of the Miranda advisement. He argues that the police officers failed to advise him of his right to counsel during the interrogation, thus violating his rights under Miranda v. Arizona, 384 U.S. 436 (1996). The State asserts that the court's denial was appropriate and that this issue is without merit.

> [I]n reviewing a trial court's ruling on a motion to suppress, this Court accords a presumption of correctness to the trial court's findings of historical fact, reversing only if the findings are not supported by competent, substantial evidence, but reviews de novo "whether the application of the law to the historical facts establishes an adequate basis for the trial court's ruling." Connor v. State, 803 So.2d 598, 608 (Fla.2001), cert. denied, 535 U.S. 1103, 122 S.Ct. 2308, 152 L.Ed.2d 1063 (2002).

Parker v. State, 873 So.2d 270, 279 (Fla.2004); see Nelson v. State, 850 So.2d 514, 521 (Fla.2003)

In this case, the court held a full evidentiary hearing on the motion to suppress. At that hearing Hall, a detective with the Ft. Pierce Police Department, and Hamrick, an investigator with the State's attorney's Office, testified that on July 1, 2003 they transported Bigham to the police station for an interview. Hall said that he explained to Bigham why he was there and read him his full Miranda rights from a standard form.

Hall actually brought the exact form he used with Bigham to the court for the suppression hearing. (T. 39-42, 45-48) Hamrick confirmed that Hall read Bigham is full rights. He stated that he watched via a television monitor Hall read the rights from a form. He said Hall read the form from the beginning and included the right to have counsel present during the interview, (T. 58-61, 68) Both men said that Bigham refused to sign the form but wished to speak to them anyway. (T. 42, 49, 59-60)

The investigators videotaped this interview, wherein lies the problem. The video tape begins in the middle of Hall's reading the form to Bigham. The court watched and listened to this tape at the hearing to suppress. The tape begins: "If you cannot afford an attorney, one will be appointed for you before any questions, if you wish. If you decide to answer questions now without an attorney present, you will still have the right to stop answering before any time." (T. 74)[8] The first portion of the Miranda advisement was not captured on the tape. Hall speculates that the tape leader, which does not record, explains the partial recording. Hamrick concurs. (T 43-44, 52-55, 70-71)

The evidence that Hall read Bigham his full Miranda advisement is uncontroverted. Both witnesses directly testified

[8]In fact, Bigham does show his comprehension and knowledge of his rights because he does indeed stop the questioning when he realizes that the police believe he killed Lulu.

that Hall read the standard Miranda advisement form, including the right to counsel, to Bigham before any questioning began. The tape supports their testimony by showing Hall holding the form and finishing the reading of it. Bigham orally waived his rights and consented to the interview. Bigham contends that both of these officers perjured themselves at the hearing and later at trial. Absolutely no evidence supports that contention. Both officers testified to the same set of facts. Bigham never testified at the suppression hearing nor did he present any evidence contradicting the officers' testimonies. In Bigham's "theory" Hall recited some of the advisement, including the right to have an attorney, but supposedly (and intentionally?) left out the one part of having an attorney for the questioning. No evidence supports his position; in fact, all the evidence presented to the court directly contradicts that position. As the State argued at the hearing, police are not required to videotape interview and Miranda advisements. Recording problems do not negate the proper advisement of Bigham as testified to by both Hall and Hamrick. The court's denial of the motion to was clearly supported by all the evidence and was proper.

Even if the evidence should not have come in, it was inconsequential given the overwhelming forensic evidence that Bigham killed Lulu as he finished having sex with her. Lulu never arose after the sex acts with Bigham who left his condom

in her anal cavity, wiped himself on her shirt, left blood on her clothes, and left his hair under the clothes he folded and placed on her body. Oscar denied ever having anal sex with Lulu. Even the evidence of Oscar's semen on the outside of the condom supports the fact that Bigham was the last person to have sex with Lulu before she died. This Court should affirm.

ISSUE XVI

DEFENSE AGREED TO SEPARATION OF JURY AND ISSUE IS UNPRESERVED.

Bigham next contends that he was denied due process and a fair trial because the lower court did not sequester the jury during its deliberations in the guilt phase. This issue is unpreserved and without merit.

Florida rule of criminal procedure 3.370 governs the handling of the jury during its deliberations.

> (c) During Deliberations. Absent exceptional circumstances of emergency, accident, or other special necessity or ***unless sequestration is waived by the state and the defendant***, in all capital cases in which the death penalty is sought by the state, once the jurors have retired for consideration of their verdict, they must be sequestered until such time as they have reached a verdict or have otherwise been discharged by the court. In all other cases, the court, in its discretion, either on the motion of counsel or on the court's initiative, may order that the jurors be permitted to separate. If jurors are allowed to separate, the trial judge shall give appropriate cautionary instructions.

emphasis added). Contrary to Bigham's assertion, the court did elicit a waiver from both the State and the defense before it

allowed the jury to separate at night. It is apparent from the record that the attorneys and the judge discussed how the jury should be handled during its deliberations; they all agreed to allow the jury to go home for the evening recess. The record reflects the following:

> The Court: It's a little after five o'clock and I understand that we have agreed that – I'll ask the Jury if they are about to reach a verdict, in which case we'll wait. Otherwise, I understand everybody has agreed we can send them home for the night.
> Mr. Akins That's fine
> The Court: Okay with that State?
> Ms. Park: Yes, sir
> The Court: Okay with the defendant?
> Mr. Akins Yes, sir.

(T. 1421)(emphasis added) At the close of the following day, the court inquired how the attorneys wished to handle the jury for that evening. Not only did Bigham not object, his counsel Harllee suggested allowing the jury to separate again.

> THE COURT: Okay. The defendant is present. What do you want to do?
> MR. HARLLEE: I kind of like the approach you did yesterday, see if they are close or way apart and take it from there.
> THE COURT: Send a note in or bring them out?
> MR. HARLLEE: Note, please. You want to do the honors?
> MS. PARK: What's this one going to say?
> MR. HARLLEE: What did you say yesterday?
> MS. PARK: He didn't, he called them out.
> THE COURT: If you're close to reaching a verdict, we'll stay and wait for you; if not, we'll break until Friday morning.
> MR. HARLLEE: Okay. Sounds good.
> MS. PARK: You're close to reaching a verdict, we'll wait for you, otherwise --
> MR. HARLLEE: We'll break at five.

> THE COURT: Break at five and come back Friday morning.
> MR. UNRUH: That's fine.

(T. 1445-46) Again, both sides agreed to let the jury separate for the recess. The court followed the procedure set out in rule 3.370. Not only was the issue not preserved for appeal by an objection, it was handled properly according to Florida law.

While he cannot cite any evidence of jury misconduct, Bigham also argues that the court actually invited misconduct by its comments. Bigham misleads this Court by selectively quoting only a phrase of the court's cautionary comments to the jury. (IB 57) Throughout the trial, the court repeatedly warned the jury against discussing the case. Specifically here during the deliberations, the court told them the following:

> ... And you're under all those instructions of course. Now that you're deliberating it's even more important. Now you are allowed to discuss the case amongst yourselves, but not with anyone else or let anybody other than jurors discuss it in our presence....
> ... Again, you're not supposed to really talk amongst yourselves except when all 12 of you are there.

(T. 1422-23 [11/9/04]) The next day the court instructed: "Once again, do not discuss this case with anybody other than the other jurors. And only do that, of course, when all 12 of you are together." (T. 1447-48) The law presumes a jury will follow the court's instructions.[9] The court's comments were proper and

[9]The law presumes that the jury followed the judge's instructions in the absence of evidence to the contrary.

did not result in prejudice. This issue is without merit.

ISSUE XVII

THE PREMEDITATION INSTRUCTION WAS CORRECT. (restated)

Bigham claims the court gave an inadequate instruction regarding premeditation and should instead have given one he offered (IB at 58-61). On August 27, 2004, as one of many pre-trial motions, Bigham filed an objection to the use of the standard premeditation instruction in that it was vague as to the time necessary for deliberations and without proposing an alternatively worded instruction. (R.2: 204-5; T 19-20) The court denied that motion. (R.3: 353) When the instructions were being discussed in the charge conference, Bigham objected to the premeditation instruction, resting in his prior motion. (T 1310). The court gave the standard instruction on premeditation, fully advising the jury of the necessary elements. See Spencer v. State, 645 So.2d 377, 382 (Fla. 1994). The matter us not preserved, Bigham was not deprived of an instruction on his defense, and the standard instruction properly advised the jury

---

Burnette v. State, 157 So.2d 65, 70 (Fla.1963) (stating that an appellate court must assume that a juror, if properly instructed, will comply with the obligations of the oath and render a true verdict according to the law and the evidence); see also Crainv. State, 894 So.2d 59, 70 (Fla 2004); Sutton v. State, 718 So.2d 215, 216 & 216 n. 1 (Fla.1st DCA 1998)("applying the well-established presumption that juries follow trial court instructions").

of the elements of the crime. There was no abuse of discretion.

Since Florida law presumes the standard jury instructions correct and prefers them over special instructions, the proponent has the burden of proving the court abused its discretion in giving the standard instruction. Stephens v. State, 787 So.2d 747, 755-56 (Fla.2001). See Parker, 873 So.2d at 294; James, 695 So.2d at 1236; Elledge v. State, 706 So.2d 1340 (Fla.1997). A ruling is an abuse of discretion "where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So.2d at 1203.

The matter was not preserved because Bigham did not object on the same grounds as raised here. Below, Bigham complained as to the definition for the amount of time necessary to prove "deliberation" for premeditation, while here, he challenges when those "deliberations" must take place. Steinhorst,412 So.2d 332.

Bigham's defense was that he did not kill Lulu, but that another did. Bigham did not offer a proposed instruction an only claims now that the standard instruction fails to define that there must be reflection and deliberations before the killing. He has not claimed heat of passion or some other defense that would lessen the intent element. Given that Bigham has claimed he is not the one to have committed the crime, and the jury rejected this, he has not shown where the standard instruction hampered his defense.

It was the difference between heat of passion and premeditation that was at issue in McCutchen v. State, 96 So.2d 152 (Fla. 1952) erroneously relied upon by Bigham for support. Again, such is not the case here. Bigham's defense was that another did the killing, he only had sex with Lulu. As such, the standard instruction, with mirrors the definition of premeditation given in Blackwood, 777 So.2d at 406,[10] which remains a proper and full explanation of the law.

In Spencer, 645 So.2d at 382, this Court quoted McCutchen's definition of premeditation and reasoned the standard instruction "addresses all of the points discussed in *McCutchen*, and thus properly instructs the jury about the element of premeditated design." See Henyard v. State, 689 So.2d 239, 245, n.5 (Fla.1996)(finding standard premeditation instruction proper); Brown v. State, 565 So.2d 304, 307 (Fla. 1990). An appellate court followed this reasoning in Default v. State, 800 So.2d 647, 650 (Fla. 5th DCA 2001) when it rejected the defendant's challenge to the standard premeditation instruction

[10]"a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." .... Premeditation may "be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.'" ... Premeditation can be established by circumstantial evidence." Blackwood, 777 So.2d at 406(citations omitted).

for not instructing the jury regarding deliberations or opportunity to reflect. The court's decision rested soundly on the existing law and, consequently, was entirely reasonable.

Even should this Court decided the court erred in refusing to give a different instruction, the error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986)(noting focus of a harmless error analysis "is on the effect of the error on the trier-of fact" and the "question is whether there is a reasonable possibility that the error affected the verdict."). First, because his defense was not challenging the intent element, but was challenging the identity of the killer. Second, under any definition, strangulation, and the time it takes to actually kill someone, in this case several minutes, there is sufficient time to reflect and deliberate. Even if an instruction had emphasized the deliberation element, the evidence was plainly sufficient to support a verdict of premeditated murder.

Lulu and Bigham were unknown to each other before the night of the murder; they did not share an abusive relationship nor was there animosity between them which might give rise to a sudden rage or quarrel. Bigham did not admit to any deviant sexual practices involving strangulation. The trial evidence clearly showed that Lulu was dragged from the street into the seclusion of the wooded lot where Bigham had vaginal and anal

sex with her. The vegetation was disturbed and the pine needles had “drag marks” in them. She had a recent injury to her head and Bigham’s skin under her nails.(T. 1226) Bigham confessed that she scratched him to get him off of her (T. 1015); his blood was on her shirt which was neatly folded over her naked dead body with his hair resting under it. The coroner testified that Lulu had bruises on her jaw and neck and that she was manually strangled with her death taking minutes during which she would have known what was happening to her.(T 1221-8,1243-7) Clearly Bigham had sufficient time while he dragged her into the lot, she scratched him to get him off of her, and he held his hands around her throat for multiple minutes until she ceased struggling and breathing to deliberate on his actions and the fact that he was murdering her. This Court should affirm.

ISSUES XVIII & XIX

COURT PROPERLY INSTRUCTED JURY REGARDING AGGRAVATION, MITIGATION, AND SENTENCING

In Issue XVIII, Bigham asserts the burden of proof of beyond a reasonable doubt is necessary in determining the appropriate sentence. Anything less, he claims renders the sentence unconstitutional. Similarly, in Issue XIX, he complains that the standard jury instruction for weighing aggravation and mitigation is unconstitutional as it shifts the burden of proof

on whether mitigation outweighs aggravation.[11]

Not only did Bigham fail to preserve his challenge to the standard instructions[12], but this Court has rejected similar claims and the Supreme Court overruled State v. Marsh, 102 P.3d 445 (Kan. 2004) which was central to his unpreserved[13] "equipoise"[14] argument. Further, his reliance on out-of-state

[11]Questions of law, are reviewed *de novo,* Elder v. Holloway, 510 U.S. 510, 516 (1994).

[12]Bigham cites to record pages 70, 769, 1319-20, 1674, 1678 (IB 62, 65) to reference where he made his arguments before the court, however, they do not contain argument on these specific points and the State could not find where these specific arguments were made/preserved. See State v. Delva, 575 So.2d 643, 644 (Fla.1991) (noting instructions "are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred"). "Fundamental error is defined as the type of error which 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Globe v. State, 877 So.2d 663, 677 (Fla.2004) (citations omitted). See Battle v. State, 911 So.2d 85, 88-89 (Fla.2005). To the extent these claims may be interpreted as general objections to the statute, as he made in his multifaceted motion below ® 70-76, 174-98; T 17-22), they have been rejected consistently.

[13]Bigham does not reference where he advised the court of his "equipoise" argument and his challenge to the statute on the grounds that the jury is not given adequate guidance for sentencing (R 70-76) is not the same as the constitutional argument raised here. See Steinhorst, 412 So.2d at 338.

[14]Bigham cites to State v. Kleypas, 40 P.3d 129 (Kan. 2001) and State v. Marsh, 102 P.3d 445) (Kan. 2004). However, the United States Supreme Court recently overruled Marsh and rejected the finding that the Kansas death penalty statute was unconstitutional because it directed a death sentence when the aggravation and mitigation were balanced equally. Kansas v. Marsh, 126 S.Ct. 2516, 2525-28 (2006). Nonetheless, these cases are inapplicable. See Proffitt v. Florida, 428 U.S. 242, 245-46

cases and federal cases[15] is misplaced as those courts were interpreting foreign statutes dissimilar to Florida's.

Moreover, this Court has rejected these arguments repeatedly and should do so here. Bigham offers no persuasive authority questioning the constitutionality of Florida's capital sentencing. See Proffitt, 428 U.S. at 255-56; Rodriguez v. State, 919 So.2d 1252, 1280-81(Fla.2005); Elledge v. State, 911 So.2d 57(Fla.2005);[16] Griffin v. State, 866 So.2d 1,

---

(1976). The jury is not told death is proper if the aggravation and mitigation are in balance. Also, the defendant has at least three opportunities to obtain a life sentence: (1) the jury is reminded aggravation must be proven beyond a reasonable doubt, while mitigation is by the lower preponderance of the evidence standard, and that if aggravation is insufficient to warrant death, life must be recommended; (2) the judge independently evaluates the evidence before sentencing,; if a life sentence is imposed, even where death was recommended, the State may not appeal; (3) this Court conducts a proportionality review.

[15]State v. Wood, 648 P.2s 71, 83-84(Utah 1981); State v. Rizo, 833 A.2d 363(Conn.2003); People v. Young, 814 P.2d 834(Colo.1991); State v. Biegenwald, 524 A.2d 130(N.J.1987); Hulsey v. Sargent, 868 F.Supp 1090(E.D.Ark.1993); State v. Kleypas, 40 P.3d 129(Kan. 2001) (noting Kansas' statute is not like Florida's statute); State v. Marsh, 102 P.3d 445(Kan.2004)(same). Proffitt, 428 U.S. at 245-46, 255-56 resolved these matters when it reviewed Florida's capital sentencing and found it constitutional.

[16]This Court rejected challenges that: "Florida's capital sentencing statute fails to provide a necessary standard for determining that aggravating circumstances 'outweigh' mitigating factors, does not define 'sufficient aggravating circumstances,'... does not have the independent reweighing of aggravating and mitigating circumstances...." and "that Florida's capital sentencing scheme violates the Sixth and Fourteenth Amendments because ... the jury is not instructed as to the reasonable doubt standard for two of the three elements required to render him death-eligible-that sufficient

14(Fla.2003); Cox v. State, 819 So.2d 705, 725(Fla.2002); Freeman v. State, 761 So.2d 1055, 1067 (Fla.2000); San Martin v. State, 705 So.2d 1337, 1350 (Fla.1997) (finding no constitutional error in Florida's capital sentencing statute requiring jury to decide "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist" and holding the standard instruction did not shift the burden to the defense to prove a life sentence). Shellito v. State, 701 So.2d 837, 842-43 (Fla.1997); Fotopoulos v. State, 608 So.2d 784, 794 & n. 7 (Fla. 1992).

Issue XX

THE SUBJECT OF BIGHAM'S PRIOR CRIMINAL RECORD WAS ADMISSIBLE UNDER THE CIRCUMSTANCES OF THIS CASE

Bigham claims the court erred by permitting, over objection, the State to elicit evidence of his 12 prior non-violent convictions. Not only was this information relevant to challenge the defense expert's opinion, the defense brought it out in direct examination when Riordan notified the jury that Bigham had multiple prior convictions. The court specifically limited its consideration of aggravation to two statutory

---

aggravating circumstances exist and that mitigating circumstances do not outweigh the aggravating circumstances.... and that the jury instructions shift the burden of proof to the defendant to prove that mitigating circumstances outweigh the aggravating circumstances." Elledge v. State, 911 So.2d 57, 78-80, n.28-29 (Fla.2005).

aggravators; thus, there was no abuse of discretion.[17] Bigham failed to allege prejudice. The sentence should be affirmed.

A court has discretion in admitting evidence and its ruling will not be reversed absent a clear abuse of that discretion. Ray, 755 So.2d at 610. 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 court. Trease, 768 So.2d at 1053, n. 2.

Here, the defense penalty phase theme was that Bigham helped people, that instead of being anti-social, he was pro-social and would do well in prison. On direct examination, Riordan, the defense psychologist, noted he reviewed records from Florida Department of Corrections ("DOC") related to "**incarceration for several convictions** and St. Lucie County Jail medical records." (T 1532,1543). Noting Bigham had "been **convicted of crimes**", Riordan reported that during these terms of imprisonment, Bigham showed interest in counseling others, and saw counseling in the Scared Straight program as a way to help adolescents (T 1543-44). Riordan agreed Bigham spent a significant part of his life in prison. (T 1548). Riordan spoke

[17]The prior violent felony aggravator (second-degree murder of five-month old infant) and the heinous, atrocious, or cruel aggravator. (R 444).

about Bigham's incarceration when he was 21 years old and an event from 1979 (T 1552-53). He believed he had sufficient information "from all of [Bigham's] time in prison" to render an opinion as to how he would do in prison, based in part on the disciplinary reports ("DR"), which he characterized as non-violent;[18] he found Bigham received, on average, a DR once every three years. Bigham's involvement in prison programs - the pro-social aspect of Bigham's character- helped mitigate one of the DR reports he received (T 1558-59). Respecting Bigham's rehabilitation potential, Riordan's report indicated Bigham had successfully completed rehabilitation programs and received satisfactory ratings in those he attended "throughout **all the years [] in prison**." (T 1564). Riordan opined Bigham was not an anti-social personality. (T 1559-60, 1570).

When the State question Riordan on Bigham's account of the death of the five-month old child (second-degree murder conviction) he said: "... although I touched on the **various convictions** that he had, I don't specifically recall what he may have said about that one....Yes, I believe I touched on all of the – **all of the convictions** he had without necessarily getting to any particular emphasis or extended interview on any of those **particular convictions**."(T 1607) Riordan agreed that a disregard

[18]On cross-examination, Riordan admitted some of the DR's were for unarmed assault and fighting. (T 1615)

for others' rights, by committing crimes, was a factor in determining an anti-social personality. The state's follow-up question, citing the doctor's report, addressed the number of Bigham's convictions. The defense objected on relevancy grounds given its waiver of the mitigator of lack of significant prior criminal history. (T 1610). The State argued the question went to the finding of a pro-personality, not an anti-social one, and to show Bigham was more anti-social than pro-social. (T 1610-11). The court denied the motion for mistrial, and permitted the inquiry into the number of crimes, but no details.

Riordan confirmed that Bigham had "approximately twelve" convictions, and did not dispute that Bigham lost 180 hours of gain time for two DR's charging unarmed assault; another 30 days for fighting; and another 90 days for three DR's for verbal threats to inmates/guards.(T 1615) On further questioning on an anti-social personality disorder, Riordan opined:

> ...he has characteristics that are – that I would say would be the opposite to anti-social personality concept. . . . – **I'm not saying that he doesn't have any aspect of what may be considered anti-social personality disorder.** Obviously he's been convicted a number of times and has a history of anti-social behavior; I mean, that's not an issue. What he didn't have were various other aspects that are – that generally are considered in the formulation of an anti-social personality disorder. (T 1619-20)

The cases Bigham offers to support his claim of error do not address the testing of a defense expert's opinion based on a

review of the defendant's entire criminal history. In Geralds v. State, 601 So.2d 1157(Fla.1992); Mikenas v. State, 367 So.2d 606 (Fla.1978); and Miller v. State, 373 So.2d 882 (Fla.1979) this Court precluded using evidence of non-violent criminal history to rebut the waived mitigator of lack of prior criminal history. Here, Bigham's dozen criminal convictions are relevant to both rebutting the claim of a pro-social personality and to the claims of "positive correction adjustment/inability to make positive adjustment while not incarcerated." As such, the evidence was admitted properly. See Johnson v. State, 608 So.2d 4,10-11(Fla. 1992) (finding exam of defense expert regarding defendant's prior criminal history even with waived mitigator of no prior criminal history was proper as it was relevant to basis for the expert's opinion and tended to rebut his conclusions); Muehleman v. State, 503 So.2d 310 (Fla.1987)(same); Parker v. State, 476 So.2d 134, 139(Fla.1985) (opining "[w]e find that it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis."). This Court should find no abuse of discretion.

Furthermore, any disclosure of the number of convictions is inconsequential. Riordan testified on direct about Bigham's multiple convictions and life in prison, but then reiterated the same information on cross-examination without prompting. Hence, the jury already knew about the multiple convictions. Moreover,

the court instructed the jury on the only aggravating facts they could consider, limiting it to only the prior violent felony and HAC aggravators. The fact that the jury learned Bigham has 12 convictions is inconsequential in light of the foregoing evidence. There has been no abuse of discretion.

ISSUE XXI

COURT PROPERLY ALLOWED EXPERT OPINION ON MITIGATORS.

Bigham argues the court erred in allowing expert witness Landrum to opine that certain facts were mitigators. He does not, however, assert any harm or prejudice resulted from this opinion testimony. This testimony was by an expert in the form of an opinion and was properly admitted.

A court has discretion in admitting evidence and its ruling will not be reversed absent a clear abuse of that discretion. Ray, 755 So.2d at 610; General Elec. Co., 522 U.S. 136 (stating that all evidentiary rulings are reviewed for "abuse of discretion"). Abuse exists only "where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So.2d at 1203. The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford, 700 So.2d at 195.

The State also incorporates its discussion on expert opinion detailed in Issue IV. An expert may render opinions as long as they are based upon the facts and his expertise and experience. Florida rule of evidence 90.703 reads:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact." The annotated statute specifically says that the "unmistakable trend of authority" allows opinion upon ultimate facts. "The modern tendency is to make no distinction between evidential and ultimate facts subject to expert opinion.

West's F.S.A. 90.703. Florida courts have followed suit. Fino, 646 So.2d at 749 (opinion testimony on ultimate issue admissible if it assists trier of fact in determining what occurred).

The limitations on this trend exist only when government witnesses may mislead the jury into believing that they have additional undisclosed knowledge upon which they base their opinion. "[S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." United States v. Young, 470 U.S. 1, 18-19(1985). This Court was concerned with that exact issue where a detective opined on the defendant's guilt in Martinez v. State, 761 So.2d 1074 (Fla. 2000). Landrum did not imply in any way that he had additional information other than what had come into evidence; rather, he was giving his expert opinion, based

on the facts and his expertise, designed to assist the jury in its decision making. Landrum agreed with Riordan and the defense theme that Bigham's good adjustment to prison was mitigating. (T. 1650) This testimony produced no prejudice and the court was reasonable in allowing it. This Court should deny relief.

ISSUE XXII

THE COURT'S FINDING OF THE HAC WAS PROPER

Bigham maintains the court erred in finding the heinous, atrocious, or cruel aggravator, arguing it was based on speculations that Lulu: (1) was conscious when strangled; (2) knew she was going to die; and (3) was terrified. Contrary to Bigham's position, the court had sufficient competent evidence supporting its findings. The HAC aggravating circumstance should be affirmed along with the death sentence imposed.

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

competent substantial evidence supports its finding," quoting Willacy v. State, 696 So.2d 693, 695(Fla.), cert. denied, 522 U.S. 970 (1997). See Gore, 784 So.2d at 432.

In finding the HAC aggravator, the court reasoned:

> The victim here died from strangulation. The Medical Examiner testified that she could have lost consciousness from 15 seconds to two minutes into the crime. The Defendant argues that this is too short a time to meet the requirements of this aggravator. The State points out that "fear, emotional strain, and terror of the victim during the events leading up to the murder may be considered in determining whether this aggravator is satisfied, even where the victim's death is almost instantaneous." . . . Photographs introduced show signs of struggle and there was evidence that the victim urinated in her underwear. There was evidence that the victim scratched the Defendant and suffered a blow to her face. It is reasonable to believe that the victim was in pain and knew she was being strangled and was going to die.

(R 444).

The totality of the evidence suggests Lulu was conscious when the strangulation began, struggled against her attacker, and was in terror. The attack commenced by the road where the police found a sandal and a black condom wrapper, as well as drag marks. (T 812-13, 819-20, 856). Her shirt had dirt on the outside and her feet were dirty. (T 844-45, 1226-27) Experts noted a person will urinate in response to a terrifying situation. The evidence from the panties and shorts showed her urine and semen from Lulu's husband, but none from Bigham. (R 1099, 1124-26, 1184, 1253-55). While the criminalist could not

tell if the urine stain was pre or post-mortem, he said it was consistent with Lulu urinating while up-right. Other evidence showed that she did not dress or move after having sex with Bigham. (T 814, 1156-57)

Bigham admitted using a black condom when having sex with Lulu in the woods, and that she scratched him in order to get him off of her.[19] (T 1008-10,1015,1018,1025). After being accused of the sexual battery murder, Bigham noted in a cocky fashion, the police "never will be able to pin this on me." (T 1055-58). DNA testing confirmed that Lulu had Bigham's DNA under her fingernails and that the sample was larger than could be obtained through casual contact. Bigham's blood on the shirt supported Lulu scratching him, although the criminalist could not confirm a struggle. (T 1140, 1185-86). The coroner reported that Lulu was strangled and had a superficial injury to her face. The facial injury by itself "wouldn't do any other harm" and would not have rendered her unconscious. Generally, it would take 15 seconds to two minutes for a strangulation victim to lose consciousness. During this time, a person would be aware of what was happening to her. (T 1221-28, 1248).

This Court has repeatedly stated that fear, emotional strain, mental anguish or terror suffered by a victim before

[19]This Court will recall that Bigham's arrest did not take place until some five weeks after Lulu's murder. (T 776, 937)

death is an important factor in determining whether HAC applies. See James v. State, 695 So.2d 1229, 1235(Fla.1997); Pooler v. State, 704 So.2d 1375, 1378(Fla. 1997). Further, the victim's knowledge of his/her impending death supports a finding of HAC. See Douglas v. State, 575 So.2d 165(Fla.1991); Rivera v. State, 561 So.2d 536, 540(Fla.1990). In evaluating the victim's mental state, common-sense inferences from the circumstances are allowed. See Swafford v. State, 533 So.2d 270, 277 (Fla.1988)).

"[S]trangulation when perpetrated upon a conscious victim involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." Sochor v. State, 580 So.2d 595, 603 (Fla.1991), rev'd on other grounds. Sochor v. State, 112 S.Ct 2114 (1992). This Court has held that death by strangulation is nearly *per se* heinous, see Bowles v. State 804 So.2d 1173, 1178-79(Fla.2001); Mansfield v. State, 758 So.2d 636, 645(Fla.2000). In Barnhill, 834 So.2d 836 this Court found "HAC aggravating factor applies in physically and mentally torturous murders which can be exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." "HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of

impending death." Id. at 849-50.

Here, substantial, competent evidence supports the court's findings for the HAC aggravator. A finding that the struggle/attack commenced near the street was a reasonable inference given the evidence. Moreover, evidence of a struggle includes the drag marks, Lulu scratching Bigham, and her dying at the spot where the sex happened. The fact that she urinated while standing, lost her shoe near a black condom wrapper, and scratched Bigham to get him off her all show that Lulu was conscious and afraid throughout the attack. Further, because she did not move after having sex, it is reasonable to find that her death occurred shortly thereafter by strangulation.[20] Such supports HAC. See Huggins v. State, 889 So.2d 743,770(Fla.2004) (upholding HAC where injuries would not cause unconsciousness, thus supporting inference victim conscious when strangled).

Bigham's reliance on Bundy v. State, 471 So.2d 9 (Fla.1985) and DeAngelo, 616 So.2d at 442-43 is misplaced. In Bundy, the coroner could not determine cause of death or the attendant circumstance, thus, there was no evidence supporting HAC. Also,

[20]Bigham argues there is no evidence of consciousness and suggests she may have been unconscious due to drugs. However, Bigham admits Lulu scratched him to get him off and the coroner did not find any wounds which would have caused unconsciousness other than the strangulation. A reasonable inference is Lulu was aware of her situation and impending doom. See Conde, 860 So.2d 930(affirming HAC where victim conscious as evidence by her striking defendant during the attack)

in DeAngelo, the victim had a head injury and drug use, indicating she was not conscious. The evidence is this trial was very different as noted above. None of the other cases Bigham cites undermine the State's argument. The court's conclusions rested on reasonable inferences from the forensic and record evidence as delineated above. The totality of the evidence shows Lulu was conscious as the attack commenced and inferring such is reasonable. The law does not require that she be conscious at the moment of her death. Substantial, competent evidence from Bigham's confession and forensic evidence support the court's finding Lulu was conscious, struggling, and in fear at the time Bigham strangled her. The Court should affirm.

ISSUE XXIII

THE JURY WAS GIVEN A PROPER, CONSTITUTIONAL INSTRUCTION ON THE PROOF NECESSARY FOR MITIGATION

Here, Bigham maintains that the standard instruction[21] informing the jury it may consider mitigation only when "reasonably convinced" of its existence is unconstitutional because: (1) Jury Instruction Committee, not the Legislature, set the standard; (2) it imposes an incorrect standard and (3) the standard of proof unconstitutionally limits consideration of

21 He challenges the instruction: "mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." (T 1676).

mitigation.[22] While Bigham challenged the constitutionality of section 921.141, he did not object to the instructions used (R 206; T 1482-4). The matter is unpreserved[23] and meritless.

Bigham claims that the phrase "reasonably convinced" in defining the standard of proof violates the separation of powers doctrine. This doctrine is intended to preserve the system of checks and balances built into the government as a safeguard against the encroachment or aggrandizement of one branch at the expense of another. Buckley v. Valeo, 424 U.S. 1,122(1976). Surely, the judiciary has the power to promulgate standard instructions effectuating the legislative intent.

Under section 921.141(1), both parties may put on evidence relevant to the nature of the crime and character of the defendant including evidence related to aggravating and mitigating circumstances. Under sec. 921.141(2), the jury must determine the existence of sufficient aggravating circumstances, the existence of sufficient mitigating circumstances outweighing the aggravators, and whether the defendant should be sentenced to life imprisonment or death. Thus, to guide the jury's

22 The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. See James, 695 So.2d at 1236; Kearse, 662 So.2d at 682.

23 To preserve for review a challenge to a jury instruction, an objection must have been raised below or an alternate instruction offered. See San Martin, 705 So.2d at 1350; Hodges v. State, 619 So.2d 272 (Fla.1993). If an issue is not preserved, fundamental error must be shown. Steinhorst.

determination whether aggravators and/or mitigators exist, the State must prove the aggravator beyond a reasonable doubt, but the defendant need only reasonably convince the jury the mitigators exist. Robertson v. State, 611 So.2d 1228 (Fla. 1993); Walls v. State, 641 So.2d 381 (Fla. 1994). The State's burden is higher than the defendant's and, logically, jurors must be reasonably convinced of a fact before they may use it as a basis for advising the court of the appropriate penalty. The promulgation of this instruction does not violate the separation of powers doctrine, but gives effect to the legislative intent.

The standard instructions for mitigation are proper and reflect the law accurately. Walls, 641 So.2d at 389 (reaffirming instruction on mitigation was upheld repeatedly by this and federal courts). This Court found the standard penalty phase instructions properly describes Florida law. See Jackson v. State, 502 So.2d 409,410 (Fla.1986). The "reasonably convinced" standard advises the jury correctly and is a proper instruction. Walls, 641 So.2d 389-90.

The instruction does not limit the jury's consideration of mitigation but requires it to look at all the evidence, both aggravating and mitigating, to determine what facts have been established. If the jurors are convinced a mitigating fact exists, they must assume it established. Clearly, the jury is not precluded from considering all mitigation presented.

Logically, only a mitigator which has been established should be considered in rendering an advisory opinion and those which do not exist should have no bearing upon the sentence. Without some burden of proof for mitigation, the advisory sentence would be meaningless. Because the jury instruction describes the law accurately, this Court should affirm.

Issue XXIV

THE COURT MADE THE REQUIRED FINDING TO IMPOSE THE DEATH PENALTY

Bigham complains the court failed to find sufficient aggravating circumstances to justify death. The State disagrees, and submits the judge made the requisite findings for the aggravating and mitigating factors and completed the appropriate analysis. The death sentence should be affirmed.

Under subsection 921.141(3), Florida Statutes (1993), the court must weigh the aggravation and mitigation, and if it finds death the appropriate sentence, put in writing its finding as to the facts "(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Bigham failed to cite a case where this Court has overturned a death sentence because the phrase "sufficient aggravating circumstances exist" to justify the death sentence was missing. Rather, he offers Rembert v. State,

445 So.2d 337 (Fla. 1989) and Terry v. State, 668 So.2d 954 (Fla.1996). Neither support his claim as both are proportionality cases, not decisions on the sufficiency of the sentencing order or its failure to include the subject phrase.

This Court reviews written orders imposing death, not for the use of talismanic incantations, but for their content outlining the aggravation and mitigation found, the weight assigned each, and the reasoned weighing of those factors in determining the sentence. To comply with section 921.141(3), the judge "must (1) determine whether aggravating and mitigating circumstances are present, (2) weigh these circumstances, and (3) issue written findings." Layman v. State, 652 So.2d 373, 375(Fla. 1995). As provided in Bouie v. State, 559 So.2d 1113, 1115-16(Fla.1990) the written justification of a death sentence "provides 'the opportunity for meaningful review' in this Court.... Specific findings of fact based on the record must be made... and the trial judge must 'independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed.'" Further delineating the details needed for a meaningful review, this Court required each statutory and non-statutory mitigator be identified, evaluated to determine if it were mitigating and established by the evidence, and to assess the weight each proven mitigator deserved. Ferrell v. State, 653

So.2d 367, 371 (Fla.1995); Campbell v. State, 571 So.2d 415(Fla.1990); Trease, 768 So.2d at 1055(receding in part from Campbell and holding court may assign mitigator no weight). The sentencing order in Ferrell was found lacking because the court had not set forth its factual findings and rationale for imposing the death sentence in other than conclusory terms. Ferrell, 653 So.2d at 371. Such is not the case here.

The sentencing order meets the dictates of Campbell and section 921.141; the court discusses each aggravator and mitigator and provides its findings (R 443-47). After finding the aggravators proven beyond a reasonable doubt (R 443-4423), the judge addressed the mitigation, assigning weight to each. (R 444-47). Only after this, did the court balance the various factors before imposing death (R 447). The appropriate analysis being done, the sentence should be affirmed.

It is presumed the court follows the instructions it gave the jury. See Groover v. State,640 So.2d 1077, 1078 (Fla. 1994); Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988). Here, the court instructed the jury properly regarding its sentencing duty including that the jury first had to determine "whether sufficient aggravating circumstances exist, to justify the imposition of the death penalty" (T 1673-74, 1678) and based on these instructions the judge is presumed to have followed, found sufficient aggravating circumstances existed to justify death.

The Court should reject the claim that death is improper absent the "talismanic" phrase that "sufficient aggravating circumstances exist" to justify the death penalty.

ISSUE XXV, XXVI, XXVIII

COURT PROPERLY WEIGHED AND ANALYZED MITIGATION

Bigham argues that the court abused its discretion by improperly weighing the factors in mitigation. In Issue XXV he contends that the court based its analysis on a life in society rather than life in prison when evaluating "good prison adjustment." In Issue XXVI he argues the court minimized his "childhood problems" by comparing them to the majority of the population rather than focusing solely on Bigham. Finally, in Issue XXVIII he maintains the court was just wrong in not assigning more weight to "helping others" mitigator. Each of these is without merit.

A weight assignment is reviewed under the abuse of discretion standard. Cole, 701 So.2d at 852; Globe, 877 So.2d at 676; Francis v. State, 808 So.2d 110, 141 (Fla.2001)(noting that the weight to be assigned to a mitigating factor lies within the sound discretion of the trial court); Mansfield v. State, 758 So.2d 636 (Fla.2000); Campbell, 571 So.2d at 420. Appellate courts give substantial deference to the court's ruling, finding abuse only if it is unreasonable. Canakaris, 382 So.2d at 1203.

While aggravators must be proven beyond a reasonable doubt,

Geralds, 601 So.2d at 1163; State v. Dixon, 283 So.2d 1, 9 (Fla.1973), mitigating factors are "reasonably established by the greater weight of the evidence." Campbell, 571 So.2d at 419-20; Nibert v. State, 574 So.2d 1059, 1061 (Fla.1990)(finding judge may reject claimed mitigator if record contains competent substantial evidence to support decision). In analyzing mitigation, the trial judge must (1) determine if the facts alleged as mitigation are supported by the evidence; (2) consider if the proven facts can mitigate the punishment; and if the mitigation exists, (3) determine whether it is of sufficient weight to counterbalance the aggravation. Rogers v. State, 511 So.2d 526, 534(Fla.1987), cert. denied, 484 U.S. 1020(1988). The court “must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factor, it is truly of a mitigating nature.” Campbell, 571 So.2d at 419. See Trease, 768 So.2d at 1050 (receding from Campbell to extent court may assign no weight to mitigators.) Whether a mitigator is established lies with the judge and “[r]eversal is not warranted simply because an appellant draws a different conclusion.” Sireci v. State, 587 So.2d 450, 453(Fla.1991), cert. denied, 503 U.S. 946(1992);Stano v. State, 460 So.2d 890, 894 (Fla.1984). Resolution of evidentiary conflicts is the court's duty; “that determination

should be final if supported by competent, substantial evidence." Id. Also, the relevant weight assigned a mitigator is within the sentencing court's province. Campbell, 571 So.2d at 420. See, Alston, 723 So.2d at 162(finding sentence within court's discretion where detailed order identified mitigators, and weight assigned each); Bonifay, 680 So.2d at 416.

The court followed the law by detailing its findings in a written sentencing memo, specifically analyzing and weighing each factor. Its decision in assigning weight was not random or capricious but done in light of all the facts of this particular case. The court saw a man who had been in prison his entire adult life, save a few years. Within those few years, he had managed to commit 15 felonies, two of them murders. The court just stated the obvious in its sentencing order; prison had not rehabilitated him or improved his impulse control given the convictions and DRs. Behaving himself while incarcerated was good, but worth little weight given the context of Bigham's life and crimes. The same is true regarding "childhood problems." The court did not accord them more weight since Riordan said they were not severely traumatic or unusual.

The court gave more weight to Bigham's help of others. However, the evidence for this mitigator consisted of Bigham giving a ride to a woman, assisting his cousin who intervened when a husband attacked his wife, telling jail authorities of a

suicide risk, befriending a non-English speaking inmate, and seeking revenge for a cousin's rape. (T 1546-7, 1555) While these actions may be laudable, they were in the context of a 47 year life span with multiple convictions including two murders. "Saving people" is hardly an apt descriptor for them either. The court did not abuse its discretion in either assigning them the weight it did or in its analysis and weighing them against the factors of the two murders and the HAC. This court should affirm.

ISSUE XXVII

COURT DID NOT USE NON-STATUTORY AGGRAVATOR.

Bigham next argues that the court committed reversible error by allegedly using the victim's character as a non-statutory aggravating circumstance in violation of both the state and federal constitutions. This argument is factually incorrect and, as such, is without merit. The court properly weighed the mitigating and aggravating factors in reaching its decision. This Court should affirm that decision.

In his sentencing memorandum, Bigham specifically included a non-statutory mitigating factor regarding the victim's character or behavior, arguing "the victim in this case was a willing participant in the criminal activity." (R. 393) Citing Wournos v. State, 676 So.2d 972 (Fla. 1996), the State correctly argued in its response that here the victim assumed no risk of

suffering bodily harm by her conduct and that this mitigator does not apply when the killer surprises the victim with deadly force. (R. 427) The only evidence that Lulu was prostituting herself for drugs came from Bigham's self-serving justifications. The court analyzed this mitigator in light of the evidence and found that it was not proved. A scant few lines after, the court launched into its combined analysis and weighing of all the aggravators and mitigators where it wrote the comments in issue here. The court was responding to Bigham's contention that the victim somehow contributed to her own death. In discussing her "bad choices" the court maintained that she did not harm others or put herself in danger. The fact that the court was referring to the just concluded discussion about Bigham's proposed non-statutory mitigator is seen in the last line. "There is no indication that she did anything to bring this awful death upon herself." (R.447) Furthermore, the court stated that it "has considered nothing in aggravation in this case other than ... [the] two items" of prior violent felony and HAC. (R. 444) Rather than being nonstatutory aggravators, these items are simply facts. Also, the facts support all of the aggravators found by the court beyond a reasonable doubt. Parker v. State 641 So.2d 369,377(Fla.1994)(rejecting claim that non-statutory aggravation was considered where court merely recited facts, all of which supported the factors found).

In the event that this Court decides that the court in fact used this point as an aggravator, it is harmless error in light of the other aggravators and mitigators found. Altogether the court found six mitigating factors and two aggravators. The court gave "less than great but more than slight weight" to the nature of the crime, which would of course include the nature of the victim. Bigham's violent past of killing people garnered the greatest weight. (R. 443-4) See Allen v. State, 662 So.2d 323, 331(Fla. 1995)(finding harmless error where sentencing order specifically provided imposition of death sentence was based solely on statutory aggravating factors). Bigham has not shown harm arising from these observations. This Court should affirm.

ISSUE XXIX

COURT PROPERLY WEIGHED AND ANALYZED MITIGATING FACTORS

Bigham argues the court erred in essentially ignoring mitigating evidence of his good prison behavior, "protecting and saving" people, and mental problems by giving it so little weight. Again, he is factually incorrect and misstates the nature of the mitigation itself. The court properly considered and weighed all the factors in rendering its decision.

A weight assignment is reviewed under the abuse of discretion standard. Cole, 701 So.2d at 852; Globe, 877 So.2d at 676; Francis, 808 So.2d at 141(noting that the weight to be assigned to a mitigating factor lies within the sound discretion

of the trial court); Mansfield, 758 So.2d 636; Campbell, 571 So.2d at 420. Appellate courts give substantial deference to the trial court's ruling, finding abuse only if it is unreasonable. Canakaris, 382 So.2d at1203; Trease, 768 So.2d at 1053, n. 2. The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford, 700 So.2d at 195.

The court specifically discussed and assigned weight to each of the factors Bigham mentions. His behavior in prison and his helping others each received "a little" weight. The evidence showed that Bigham had become institutionalized and responded well to imposed structure. It also showed, however, that his assaultive nature still manifested itself while in correctional settings. (T. 1613-15) This evidence provided the basis for the court's comment that his conduct "seems to offer little reason to choose life imprisonment." (R. 444) Bigham also overstates the facts of helping others. The evidence showed that: he befriended a non-English speaking inmate; he once gave a ride to a woman; he assisted with household chores while he stayed at people's houses for free; and he sought to avenge an attack on a female relative. (T. 1532-57, 1635-7) While this behavior is laudable, it hardly rises to a pattern of "saving" people. The court was justified in assigning "a little" weight to it.

The court gave more weight to Bigham's mental health history and status, assigning them "some weight." (R. 445) This

assignment was reasonable in light of the fact that Bigham's IQ of 80 is in the average range, his mental status was not a causative factor for the murder, and he had no diagnosis of any active psychological disorder. (T. 1557-72, 1596, 1622, 1640-51) Additionally, both doctors testified that any stress or lack of coping skills related back to Bigham's childhood and personality, thereby justifying the court paraphrasing the mitigators as showing "an unfortunate childhood."

The court's written findings clearly shows that it weighed and considered all mitigating factors. Its decision was reasonable based upon the evidence and was not an abuse of discretion. Additionally, the court plainly said the fact Bigham killed two people in the short time he was ever free of prison carried the greatest weight. Consequently, any perceived overlooking or weighing of these factors had no impact on the appropriateness of the sentence. This court should affirm.

ISSUE XXX

THE DEATH SENTENCE IS PROPORTIONAL

Bigham asks this Court to find his death sentence not proportional because it is not the least mitigated. Contrary to his position, the judge and jury rejected that premise[24] in light

24 A review of the mitigators shows duplication in many respects, although the court found the mitigation existed, as well as the finding the sole statutory mitigator of age (47 years old), with the Court commenting: "This is proven. It is

of the totality of the circumstances. This Court has affirmed death sentences under similar circumstances. See Johnston v. State, 863 So.2d 271, 286 (Fla. 2003); Ocha v. State, 826 So.2d 956, 966 (Fla.2002); Singleton v. State, 783 So.2d 970, 979 (Fla.2001); Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1996); Geralds v. State, 674 So.2d 96, 105 (Fla. 1996).

"To determine whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases where a death sentence was imposed. Pearce v. State, 880 So.2d 561, 577 (Fla. 2004)." Boyd, 910 So.2d at 193. See Urbin v. State, 714 So.2d 411, 416-17 (Fla. 1998); Terry v. State, 668 So,2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but it is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla.1990); Fitzpatrick v. State, 900 So.2d 495, 526 (Fla.2005). This Court's function is not to re-weigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So.2d 6 (Fla. 1999).

Neither Crook v. State, 908 So.2d 350 (Fla.2005) nor

---

hard to see why this is mitigating, but the court gives it some weight." (R444-47).

McKinney v. State, 579 So.2d 80 (Fla. 1991) further Bigham's position. First, Crook was highly mitigated with great support for mental health issues, both statutory and non-statutory. Such is not the case with Bigham's penalty phase presentation. Second, McKinney is a single aggravator case, while here both the prior violent felony aggravator (murder of an infant child) and HAC have been proven beyond a reasonable doubt. The State reincorporates its answer to Issue XXII here. Moreover, even if HAC is stricken, given the existence of the weighty aggravator, prior violent felony,[25] the sentence would remain proportional. See LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978); Butler v. State, 842 So.2d 817, 832-34 (Fla. 2003); Blackwood, 777 So.2d 399; Cardona v. State, 641 So.2d 361 (Fla. 1994).

Here, the jury convicted Bigham of the first-degree premeditated strangulation murder of Lulu after they had sexual relations. For the strangulation murder, the State asked for and proved HAC. Also, the jury learned that Bigham previously had been convicted of second-degree murder and aggravated child abuse of an infant as a result of a fractured skull, bruising to her face, and burns to her buttocks and feet. Lulu's murder

25 See Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (finding HAC and prior violent felony aggravators are weighty factors); Porter v. State, 788 So.2d 917, 925 (Fla. 2001) (announcing that the prior violent felony and CCP aggravators are weighty).

occurred just one month after Bigham was released from prison on the second-degree murder conviction.

It is Bigham's complaint that the 47 mitigators the court found, cannot be deemed "little or nothing in mitigation." (IB 94). The State disagrees that in this case there were 47 different and distinct mitigators as Bigham would have this Court find. In stead, there are six mitigators, groupings or sets of mitigating component parts. The groups were formed because the "component parts" were "essentially the same," "showed the same trait," "related to mental status," showed "childhood problems," or "medical problems." The court gave the same weight to each component part or the group mitigator.

Bigham points to the mitigation grouping of adjustment to incarceration which contains: positive correctional adjustment; only verbal DR's; good institutional adjustment; good previous prison record; and good jail behavior. Yet these were grouped together, "because they are essentially the same." It was also noted Bigham's conduct in prison "has not translated into good conduct under freedom...." (R 444). This grouping does not rise to the "extreme mitigation" discussed in Crook.

It appears Bigham takes issue with the weighing of the mitigation that he watched after an allegedly mentally impaired inmate, although the record shows only that the Haitian inmate did not speak English well. (IB 95). However, the weight

assigned is within the court's sound discretion. Trease, 768 So.2d at 1055. Likewise, this Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing. Bates, 750 So.2d at 14-15. Moreover, the assisting of a fellow inmate does not make this case the most mitigated in light of the overall circumstances of this case, including the strangulation murder of a hapless victim, allegedly prostituting herself for drugs, committed one month after Bigham's release from prison on his second-degree murder charge. Geralds, 674 So.2d at 105(affirming sentence with HAC and felony murder-robbery and both statutory and nonstatutory mitigation was afforded little weight).

Similarly, the mental mitigation offered was rejected, in part and diminished in weight, as having no influence or impact upon the instant murder. In fact, defense psychologist, Dr. Riordan, admitted that Bigham's mental state was not a causative factor in the murder. Further, Dr. Riordan was unable to diagnose an active psychological disorder. It is noteworthy that Bigham, a 47 year old man, is not claiming mental retardation and continues to point to his childhood experiences from ages five to fourteen, to mitigate the instant murder. Bigham is a recidivist who has prayed on the weak (drug addicted woman and helpless infant) and not learned from his years in prison for the murder of the infant. In light of the mitigation

and the totality of his case, the sentence is proportional.

Contrary to Bigham's challenges to the court's recognition and weighing of the grouped mitigation of adjustment to prison, assisting others, non-statutory mental health issues, and age, the appropriate review was conducted. Such complied with the dictates of Trease, 768 So.2d at 1055 and Campbell, 571 So.2d at 415. A proper review may be conducted. Under that review, this Court will find the sentence proportional.

The sentence in Johnston was found proportional. There, two aggravators were established for the strangulation murder, prior violent felony and HAC, and one statutory mitigator and 26 non-statutory mitigators were found. Johnson, 863 So.2d at 286. This Court has upheld other cases with two aggravators and both statutory and non-statutory mitigation. See Ocha, 826 So.2d at 966 (agreeing that two statutory aggravators, prior violent felony (murder) and HAC for strangulation far outweighed 14 non-statutory mitigating factors and finding sentence proportional); Singleton, 783 So.2d at 979 (finding sentence proportional based on prior violent felony conviction; three statutory mitigators were found, including defendant's age (69), impaired capacity, and extreme mental or emotional disturbance; and several nonstatutory mitigators were found, including that defendant suffered from dementia); Pope v. State, 679 So.2d 710 (Fla. 1996) (finding proportionality for stabbing with prior violent

felony and pecuniary gain, both statutory mental mitigators in addition to nonstatutory mitigation of intoxication and defendant acted under the influence of mental/emotional disturbance); Spencer, 691 So.2d at 1065 (affirming sentence for killing wife based on prior violent felony and HAC, despite existence of two statutory mental mitigators-extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct and number of nonstatutory mitigating circumstances including drug and alcohol abuse, paranoid personality disorder, sexual abuse by father, honorable military record, good employment, and ability to function in structured environment); Geralds, 674 So.2d at 105 (affirming sentence with HAC and felony murder-robbery and both statutory and nonstatutory mitigation afforded little weight).

POINT XXXI

FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL

Bigham contends his sentence violated Ring v. Arizona, 536 U.S. 584 (2002). Continuing, he maintains that under Ring, the jury must make a unanimous determination of death eligibility, and the aggravators must be contained in the charging document. (IB 97-98). According to Bigham, the jury proceedings fail because the jury renders a non-unanimous advisory sentencing recommendation which does not require proof of death eligibility

beyond a reasonable doubt, the normal rules of evidence did not apply, and no notice is given. While he recognizes this Court's rejection of such arguments in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), he submits this Court failed to consider that a criminal statute must be construed strictly and that death eligibility does not occur until there has been a finding of sufficient aggravation and insufficient mitigation. In the alternative, Bigham suggests that if Bottoson remains the law, with death eligibility occurring at time of conviction, then §921.141, Fla. Stat. violates the Eighth Amendment of the United States Constitution because it does not provide for the required narrowing of the class of persons subject to the death penalty. (IB 98-99). The State disagrees.

Repeatedly, this Court has rejected Bigham's arguments (IB 96-99; R 174-201). While questions of law, are reviewed *de novo,* Elder, 510 U.S. at 516, Bigham has offered nothing new to call into question the well settled principles that death is the statutory maximum sentence, death eligibility occurs at time of conviction, Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence. Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death is maximum penalty and repeated rejection of arguments aggravators

had to be charged in indictment, submitted to jury and individually found by unanimous jury). See Perez v. State, 919 So.2d 347, 377 (Fla. 2005) (rejecting challenges to capital sentencing under Ring and Furman); King v. Moore, 831 So.2d 143 (Fla. 2002). Florida's capital sentencing is constitutional. See Proffitt, 428 U.S.at 245-46, 251 (finding Florida's capital sentencing constitutional under Furman); Hildwin v. Florida, 490 U.S. 638 (1989)(noting Sixth Amendment does not require case "jury to specify the aggravating factors that permit the imposition of capital punishment in Florida"); Spaziano v. Florida, 468 U.S. 447 (1984); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003). Moreover, Bigham has two prior violent felony convictions, second-degree murder of an infant and aggravated child abuse. This Court has rejected challenges under Ring where the defendant has a prior violent felony conviction. See Robinson v. State, 865 So.2d 1259, 1265 (Fla. 2004) (announcing "prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring"); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting "prior violent felony" aggravator justified denying Ring claim). Relief must be denied and Bigham's convictions and sentences affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____

LISA-MARIE LERNER
Assistant Attorney General
Florida Bar No.: 698271
1515 N. Flagler Dr 9th Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Jeffrey L. Anderson, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on September 6, 2006.

_____
LISA-MARIE LERNER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on September 6, 2006.

_____
LISA-MARIE LERNER