IN THE SUPREME COURT OF FLORIDA

JOHN F. MOSLEY,

Appellant,

v. CASE NO. SC06-1408

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

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CASE SNAPSHOT

This is a double murder case. In this direct appeal, the Appellant, John Mosley, challenges his conviction for two counts of first degree murder and his one sentence to death.

Mosley murdered his paramour, Lynda Wilkes and his new baby boy, Jay-Quan. Mosley strangled Ms. Wilkes and then burned her body. Mosley suffocated Jay-Quan by stuffing him in a black plastic trash bag and leaving him to die in the cargo area of Mosley's Suburban. Jay-Quan's body has never been found.

Some fifty witnesses testified for the State and the defense. Mosley defended on a theory he did not murder either Lynda Wilkes or Jay-Quan. Mosley contended, instead, that Ms. Wilkes and the child were murdered by prosecution witness Bernard Griffin and some other unknown person.

After a jury trial, the jury found Mosley guilty of two counts of first degree murder. At the penalty phase, Mosley called two witnesses in mitigation.

At the conclusion of the penalty phase, the jury recommended Mosley be sentenced to life in prison for murdering Ms. Wilkes. The jury recommended, by an 8-4 vote, that Mosley be sentenced to death for the murder of Jay-Quan. After a Spencer hearing, the trial judge followed the jury's recommendation for both murders.

PRELIMINARY STATEMENT

References to the appellant will be to “Mosley” or “Appellant”. References to the appellee will be to the “State” or “Appellee”.

The twenty-seven volume record on appeal in the instant case will be referenced as “TR” followed by the appropriate volume and page number. References to Mosley’s initial brief will be to “IB” followed by the appropriate page number.

STATEMENT OF THE CASE

On April 22, 2004, John Mosley murdered his paramour, Lynda Wilkes. Mosley also murdered Jay-Quan Mosley, his ten month old son. On May 6, 2004, Mosley was arrested for both murders. (TR Vol. I 1).

On July 1, 2004, a Duval County Grand Jury indicted Mosley on two counts of premeditated murder. (TR Vol. I 11). Trial commenced on November 7, 2005. Mosley was represented at trial by Richard Kuritz, a 15-year member of the Florida Bar and Quentin Till, a 39-year member of the Florida Bar.

On November 18, 2005, the jury returned a verdict of guilty on both counts of the indictment. (TR Vol. IV 607-608). The penalty phase commenced on November 30, 2005.

The State called five victim impact witnesses. (TR Vol. XXI 2284-2293). The trial court instructed the jury on how it could consider victim impact evidence. (TR Vol. XXI 2283-2284). All of the witnesses read prepared statements.

Mosley presented two witnesses on his own behalf. Mosley called his mother, Barbara McKinney, to testify about Mosley's upbringing and social history. (TR Vol. XXI2296-2347) Through Ms. McKinney, trial counsel introduced photographs depicting Mosley's life.

Jeff Pace, a Navy recruiter, testified. Petty Officer Pace testified that Mosley joined the Navy Reserves after September

11, 2001. Mosley received an age waiver to join. Mosley entered the Navy Reserves in a higher pay grade than normal candidates because of his civilian education and training. (TR Vol. XXII 2357).

During boot camp, Mosley held a leadership position and was cited for his leadership abilities. (TR Vol. XXI 2360). Petty Officer Pace told the jury that Mosley was considered an asset in boot camp. (TR Vol. XXI 2360).

As a result of his incarceration, Mosley was unable to attend drills. As a result, Mosley was discharged from the Navy for unsatisfactory participation. He received an Honorable discharge. (TR Vol. XXI 2366).

After penalty phase closing arguments, the jury retired to deliberate. The jury returned a recommendation of life in prison for the murder of Lynda Wilkes. The jury returned an 8-4 death recommendation for the murder of Jay-Quan Mosley. (TR Vol. XXI 2489-2490).

At the Spencer hearing, Mosley presented two additional witnesses, Ms. Ethel Taylor and Ms. Carolyn Mosley. (TR Vol. XXV 2530-2546). Nevertheless, the judge followed the recommendation of the jury and sentenced Mosley to life in prison for the murder of Lynda Wilkes. The judge sentenced Mosley to death for the murder of Jay-Quan Mosley. (TR Vol. XXVII 2636).

In sentencing Mosley to death, the trial court found four aggravators. These were: (1) the victim of a capital felony was a person less than 12 years of age, (2) the murder was cold, calculated, and premeditated, (3) the murder was committed for financial gain, and (4) the defendant was previously convicted of a prior violent felony, specifically, the contemporaneous murder of Lynda Wilkes. (TR Vol. XXVII 2615-2622).

The court found no statutory mitigation existed but found and weighed thirty-one non-statutory mitigators: (1) the defendant was raised in a broken home (little weight); (2) the defendant was an above average achiever in high school (little weight); (3) the defendant was affected by seeing physical and sexual abuse at an early age (little weight), (4) the defendant has the love and support of his family (little weight), (5) the defendant was a good parent (little weight), (6) the defendant was good and respectful to his mother, grandmother and other family members (some weight), (7) the defendant was a good friend to many (some weight), (8) since his arrest the defendant has not been violent or exhibited homicidal behavior (little weight), (9) Mosley has the potential to be a productive inmate (some weight), (10) the defendant was a good worker and maintained steady employment through his adult life (some weight), (11) the defendant is a patriotic American citizen (little weight), (12) while in the Naval Reserves, Mosley was

never reprimanded or disciplined (little weight), (13) Mosley earned a Emergency Medical Care certificate (some weight), (14) Mosley was a volunteer worker as Recreational Coordinator for the Tenant Advisory Council (little weight), (15) the defendant completed an extensive Volunteer Basic Course program and received a diploma certificate from the Division Fire Marshall (some weight), (16) Mosley completed the Certified Nursing Assistant Program (some weight), (17) Mosley was a mentor to teenagers and helped them with school activities, homework, moral values, sports activities, and other areas (little weight), (18) the defendant is an intelligent man (little to no weight), (19) the defendant is unlikely to endanger others when serving a life sentence (little to no weight), (20) the murder was aberrant behavior (little to no weight), (21) Mosley was mentally abused as a child (little weight), (22) Mosley was a Boy Scout (little weight), (23) Mosley successfully completed law enforcement training (some weight), (24) Mosley coached neighborhood sports and recreation (little weight), (25) Mosley was an active volunteer fireman (some weight), (26) Mosley was an active member of the PTA (little weight), (27) Mosley did not flee after the murders (no weight), (28) the offense occurred over a very short period of time (little to no weight), (29) Mosley has encouraged others to remain in school (little weight), (30) the defendant demonstrated appropriate courtroom

behavior (little weight), (31) Bernard Griffin was only charged as an aide and abetter (little weight). (TR Vol. VI 984-993).

Mosley appealed to this Court. In his initial brief, Mosley raises thirteen (13) issues. This is the State's answer brief.

STATEMENT OF THE FACTS

John Mosley was thirty-nine (39) years old when he murdered Lynda Wilkes and Jay-Quan Mosley. Mosley and Lynda Wilkes were lovers. However, John Mosley was also a married man.

Mosley was married to Carolyn Mosley. They had been married for 19 years. (TR Vol. XIX 1882).

On June 27, 2003, Lynda Wilkes had a son. (TR Vol. XIII 640). She named him Jay-Quan Mosley.[1] During the time Mosley and Lynda were seeing each other, Ms. Wilkes did not see any other men. (TR Vol. XIII 620). In the eyes of Ms. Wilkes' children, Mosley and Wilkes were a couple. (TR Vol. XIII 640).

In addition to Jay-Quan, Ms. Wilkes had four other children; Marquita, age 23, Naquita, age 15, Shavaries, age 12, and Brianda, age 8. (TR Vol. XIII 639). At the time of the murder, Ms. Wilkes and her four youngest children lived at 9056 8th Avenue, in Jacksonville, Florida. (TR Vol. XIII 640).

On April 21, 2004, Mosley visited Lynda Wilkes in her home. Lynda's daughter Marquita was at home.

Ms. Wilkes and Mosley went into Ms. Wilkes' bedroom and closed the door. (TR Vol. XIII 623). Sometime later, they came out of the bedroom and Ms. Wilkes went to get Mosley some chicken for lunch. (TR Vol. XIII 623). Mosley was at Ms.

[1] Mosley's nickname is Jay. (TR Vol. XIII

Wilkes' home until at least 2:00 or 2:30 in the afternoon. (TR Vol. XIII 624).

Mosley visited Lynda Wilkes often. Ms. Wilkes' daughter, Naquita, testified that Mosley came to visit their mother about once a week. (TR Vol. XIII 641).

The following day, April 22, 2004, Ms. Wilkes was to meet Mosley around lunch time at the J.C. Penny parking lot, at the intersection of Dunn Avenue and Lem Turner Road, in Jacksonville, Florida. (TR Vol. XIII 627). Ms. Wilkes believed that she and Mosley would take Jay-Quan shopping. (TR Vol. XIII 643).

Mosley met Ms. Wilkes and Jay-Quan. Instead of going shopping, Mosley drove over to Bernard Griffin's home with murder on his mind.

Mosley had known Bernard Griffin for about three or four weeks at the time of the murders. Bernard Griffin was barely 15 years old. (TR Vol. XIII 674). Griffin met Mosley through his sister, Vickie.

Shortly after Griffin and Mosley met, Mosley asked Griffin if he could find or kill a baby. Mosley told Griffin where the baby and his mother lived. (TR Vol. XIII 681). Mosley offered Griffin money to kill the baby. Griffin told Mosley no. (TR Vol. XIII 681).

Mosley asked Griffin to kill the baby about three or four more times. Mosley showed Griffin where the baby lived. (TR Vol. XIII 681). The house Mosley showed him was off of 8th Avenue. (TR Vol. XIII 682). At trial, Griffin identified Ms. Wilkes' 8th Avenue house as the one Mosley took him too. (TR Vol. XIII 684).

On the day Mosley drove Griffin by the baby's house, Mosley told Griffin he would give Griffin a gun. [2] Griffin was to go into the house that morning, kill the baby, and kill anyone else that got in his way. (TR Vol. XIII 682).

Mosley also gave him a drawing of the target house. It was drawn on a piece of yellow tablet paper. (TR Vol. XIII 682). A similar drawing to the one Mosley gave Griffin was found in Mosley's Suburban. The drawing was introduced into evidence at trial as State's Exhibit 90. (TR Vol. XIV 857).

On April 22, 2004, the day Lynda Wilkes and Jay-Quan Mosley were murdered, Bernard Griffin skipped school. His mother and sister were home with him that morning. (TR Vol. XIII 684).

Griffin called Mosley on the phone that morning. He wanted a ride to his brother's baby's mother's house. (TR Vol. XIII 685).

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[2] Griffin had asked Mosley for a gun before to assist him in his small time drug dealing business. He never saw Mosley with a gun, however.

At 12:33 p.m., April 22, 2004, Mosley called Bernard Griffin from his cell phone. (State's Exhibit 77). Mosley would give Griffin a ride.

Griffin estimated that about 20 minutes later, Mosley picked him up. (TR Vol. XIII 740). Bernard does not remember exactly what time it was when Mosley picked him up. (TR Vol. XIII 764).

Lynda Wilkes and Jay-Quan were with Mosley when he arrived at Griffin's house. (TR Vol. XIII 686-687). Mosley was driving his Suburban.

Griffin met Mosley outside Mosley's Suburban. Mosley told Griffin, before they got into the Suburban, "there's the baby and the lady." (TR Vol. XIII 686). Griffin understood Mosley to mean the ones about whom Mosley had been talking. (TR Vol. XIII 686).

Griffin got into the Suburban. Ms. Wilkes and Jay-Quan were already in the car. Lynda Wilkes was in the front seat. So was Jay-Quan. At trial, Griffin identified Lynda Wilkes as the person he saw in Mosley's Suburban the morning of April 22, 2004. (TR Vol. XIII 687).

On the way, Griffin began to get suspicious about what Mosley was doing. (TR Vol. XIII 687). Mosley drove past where Griffin wanted Mosley to take him. Griffin did not say anything, however. Eventually, Mosley turned off on a dirt road

with a trailer on it. It was a pink trailer. They stopped back in the woods. (TR Vol. XIII 688).

Mosley stopped and got out of the car and went around to the passenger side. He told Lynda to step out of the car. She did. Ms. Wilkes was holding the baby. Mosley pretended to be looking for something in the passenger seat. Mosley then turned around and grabbed Ms. Wilkes by the neck and forced her to the ground. (TR Vol. XIII 689).

Mosley was strangling Lynda Wilkes. (TR Vol. XIII 689). She was trying to defend herself. Ms. Wilkes was kicking and scratching him. She could not say anything or scream.

Mosley did not strangle her all that long. She stopped moving. (TR Vol. XIII 689-690).

Griffin just stood there. He had never seen anything like this before. He did not try to stop Mosley. He believed Mosley could kill him too. (TR Vol. XIII 690).

After Ms. Wilkes stopped moving, Mosley got a Winn Dixie bag from the Suburban. Mosley put it over Ms. Wilkes' head. (TR Vol. XIII 691).

Mosley put Ms. Wilkes' body in the back of the SUV. (TR Vol. XIII 691). Griffin testified that, in the Suburban, Ms. Wilkes' head was positioned toward the back part of the seat on the driver's side. Her feet were toward the back of the tailgate. (TR Vol. XIII 714).

Jay-Quan was on the ground. Mosley told Griffin to get a bag from the back of the truck. (TR Vol. XIII 691). Griffin complied. (TR Vol. XIII 691). Mosley told Griffin to open the garbage bag.

Mosley placed the baby in the bag. (TR Vol. XIII 691). The baby was crying. Mosley tied the bag up and placed the bag in the back of the SUV. The baby was still crying. (TR Vol. XIII 692).

Mosley covered Ms. Wilkes and Jay-Quan up with a blue tarp that Griffin had seen in the Suburban. (TR Vol. XIII 693-694). Mosley then took Griffin to his brother's girlfriend's house. (TR Vol. XIII 693). Griffin called Mosley on this cell phone right after he was dropped off. Phone records introduced at trial show Griffin's call was made to Mosley's cell phone at 1:21 p.m., April 22, 2004. (State's Exhibit 77). Mosley did not answer Griffin's call.

Later that same evening, Mosley picked up Griffin from his house, at about 11:00 p.m. (TR Vol. XIII 695). When he got into the Suburban, Griffin noticed a bad smell. (TR Vol. XIII 696).

The pair drove out of town. Griffin saw a sign for Gainesville. Mosley had his cell phone with him. Bernard did not know where they were going. Mosley made or got a call on

the way out of town. Griffin heard a voice on the other end. It was a woman's voice. (TR Vol. XIII 697).

Mosley drove for nearly an hour. They stopped at a wooded area and went down a couple of dirt roads. They went down a road where there was a ditch with a little bridge over it. (TR Vol. XIII 698). Mosley did not want to stop there. Griffin did not say why. (TR Vol. XIII 698).

Eventually, they turned off that road and came onto another dirt road. There was a little path off to the side. Mosley backed up and got out. He told Griffin to get out. (TR Vol. XIII 698).

Mosley pulled Lynda's body out and told Griffin to grab her legs. Griffin complied. (TR Vol. XIII 698).

Griffin told Mosley he was going to throw up. Mosley told him not to worry and grabbed Ms. Wilkes' legs himself. (TR Vol. XIII 698). Griffin and Mosley had gloves on. Mosley got them from the back of the Suburban.

Mosley pulled Ms. Wilkes a couple of feet and dropped her. He went back to the Suburban and got some lighter fluid. (TR Vol. XIII 699).

Mosley poured the lighter fluid on her body. Mosley put most of the fluid on her arms, hand, and face. Mosley said he was doing that because Ms. Wilkes scratched him. (TR Vol. XIII 699).

After he poured the lighter fluid on her, Mosley lit the lady on fire. Mosley put lighter fluid on a rag, lit the rag and then threw the rag on top of Lynda's body. (TR Vol. XIII 699). Lynda's body began to burn. (TR Vol. XIII 700).

As soon as that happened, Mosley ran back to the Suburban and Bernard followed. The baby's body was still in the SUV. They came off the dirt road and started heading away from Jacksonville. (TR Vol. XIII 700). They were still going in the same direction they had been driving when they left Jacksonville.

Griffin testified they drove for a couple of hours. (TR Vol. XIII 700). They ended up on the road by a Winn Dixie. There was a Subway store nearby. It was still dark and no one was around.

Mosley parked in the back of the Winn Dixie, grabbed the bag with the baby in it and placed it into the Dumpster. (TR Vol. XIII 701).

Mosley told Bernard to put his shoes and gloves in there too. Mosley did the same. (TR Vol. XIII 701). Bernard does not remember what happened to the tarp.

On the way back, Mosley gave Bernard $100, all in twenty dollar bills. (TR Vol. XIII). They stopped at someone's apartment. Mosley asked Griffin for one of the twenties back. Bernard obliged. (TR Vol. XIII 702).

This someone turned out to be Jamilla Jones. (TR Vol. XIII 770-796). Jones was another one of Mosley's lovers. The night before, Ms. Jones talked to Mosley about 9:00 in the evening. (TR Vol. XIII 776).

Mosley told her he was at work. (TR Vol. XIII 776). Ms. Jones asked Mosley whether he could take her to a club on 103d. He told Ms. Jones he could not give her a ride because he was at work. (TR Vol. XIII 776).

Ms. Jones told Mosley she had a job interview the next day. She asked him whether he could give her some money for gas. He agreed. (TR Vol. XIII 777).

Mosley told her he would drop the money off sometime between 11:00 p.m. and 6:00 a.m., the morning of April 23, 2004. She offered to meet Mosley to get the money but he refused.

Ms. Jones tried to call Mosley again twice more after 10:00 p.m. She did not reach him. The next time she saw Mosley was just after 6:00 a.m., April 23, 2004.

At 6:07 a.m., Mosley called Ms. Jones' cell phone and told her he was outside her door. (TR Vol. XIII 778).[3] Mosley was at the door when Ms. Jones opened it. Mosley gave her $20. (TR Vol. XIII 778).

[3] Cell phone records introduced at trial showed that Mosley called Jamilla Jones at 6:07 a.m. (State's Exhibit 77).

Mosley just gave her the money and turned around and walked away. She asked him how come he did not call her back last night. Mosley told her that he was doing something for his Mom. (TR Vol. XIII 779).

When Mosley came back to the car, Mosley did not say anything. Mosley dropped Griffin off at Griffin's house. (TR Vol. XIII 703).

A day or two later, Griffin talked to Mosley. Mosley told him that he was going to change the tires out on the Suburban. Griffin thought Mosley did not want tire track evidence to link him to the murders. (TR Vol. XIII 704).

A few days later, Bernard went to the police and reported some of what happened. Eventually the entire story came out. Bernard provided information about the site where Mosley dumped Ms. Wilkes' body. He also took the police to the kill spot and to the Dumpster where he saw Mosley dump Jay-Quan's body. (TR Vol. XIII 706).

Ultimately, the police found Ms. Wilkes' body in Waldo, Florida. Ms. Wilkes' body was burned beyond recognition and a cloth, just as Griffin had described it, was found on Ms. Wilkes' body. Gasoline and acetone were detected on the burnt cloth. (TR Vol. XIV 900).

Between the time Mosley dumped Jay-Quan's body and the time Griffin assisted the police in finding the dumpster, the trash

was picked up from that Dumpster. For four days, the police searched the landfill where the trash would have been taken after it was picked up. (TR Vol. XVII 1432-1434). Jay-Quan's body was not found. (TR Vol. XVII 1435).

The medical examiner, Dr. Margarita Arruza, testified that she examined the body of Lynda Wilkes. Ms. Wilkes was identified through dental records. (TR Vol. XIV 880). Three rings were on her fingers. At the time of her death, Ms. Wilkes owned and wore three rings; a cluster ring, a diamond ring, and a gold band. (TR Vol. XIII 629).

At the time of her death, Ms. Wilkes owned and wore a black watch. (TR Vol. XIII 629). Part of a watch was also found with Ms. Wilkes' body. The watch was no longer operating. The time on the broken watch was 2:29. (TR Vol. XIV 883).

Dr. Arruza could not tell whether Lynda Wilkes was strangled to death. (TR Vol. XIV 886). Dr. Arruza could opine, however, that Lynda Wilkes died by homicide. (TR Vol. XIV 889). The parts of Ms. Wilkes' body that would be necessary to determine whether Ms. Wilkes was strangled were missing from the body. (TR Vol. XIV 887).

Dr. Arruza told the jury that in cases of manual strangulation, a person would pass out within about 10 seconds. (TR Vol. XIV 887). They would not die immediately, though. It

would take about 4 minutes of continued applied pressure to kill a person by strangulation. (TR Vol. XIV 887).

In a case where a woman was strangled, placed in the back of a car and the body would lay prone for 12 hours, it would be common for there to be a discharge of blood from the body. (TR Vol. XIV 888). The blood would not be very red, but would instead be pinkish. It would come from the mouth and nose. (TR Vol. XIV 888).

Dr. Arruza could not determine a cause of death. (TR Vol. XIV 889). However, Dr. Arruza found no evidence that Ms. Wilkes had been stabbed or shot to death. (TR Vol. XIV 893).

As to Jay-Quan, Dr. Arruza testified that if a healthy 10 month old child is placed in a sealed black plastic bag, the bag will suffocate him. He would die quickly. (TR Vol. XIV 889). Every time the child breathed in, he would be sucking the bag into this face. (TR Vol. XIV 889). Cause of death in such a scenario would be asphyxiation. (TR Vol. XIV 889).

In addition to the eyewitness testimony of Bernard Griffin, the State introduced other evidence linking Mosley to the crime, including DNA evidence, phone records, and evidence of Mosley's motive, consciousness of guilt, and efforts to cover up his crime.

First, motive. At trial, Wesley Owens testified that in December 2003, the Department of Revenue instituted child

support proceedings against Mosley. Ms. Wilkes had applied for Medicaid for Jay-Quan. (TR Vol. XV 1053). Under these circumstances, federal law requires states to seek support from the putative father.

The Department filed a petition to establish paternity and child support. The petition sought to establish Mosley as the biological and legal father and sought payment of on-going child support, retroactive child support, and provision of insurance. Department records show Mosley was personally served on December 27, 2003. (TR Vol. XV 1055).

Mosley did not respond to the petition. As a result, a final hearing was established for the purpose of seeking a default judgment. Mosley was mailed a notice of the final hearing at the address indicated on the service documents. He did not appear at the final hearing. (TR Vol. XV 1055).

On March 1, 2004, a default judgment was entered requiring Mosley to pay $35 per week for on-going child support. Mosley was also ordered to pay retroactive child support of $1000, payable at the rate of $5 a week. (TR Vol. XV 1056). Child support would continue until the child married, died, became self-supporting, or reached the age of majority. (TR Vol. XV 1056).

On March 12, 2004, Mosley filed a motion to have the judgment set aside. Mosley alleged that he was not aware that a

final hearing had been set. Mosley averred the notice of hearing was sent to the wrong address. (TR Vol. XV 1058).

Mr. Owens told the jury that a judge would have considered setting aside the judgment if Mosley had a colorable claim he did not get notice. Mr. Owens testified that if the judge would have granted Mosley's motion, the judge would have ordered the parties to undergo DNA testing. (TR Vol. XV 1058). A hearing to hear Mosley's motion was set for May 3, 2004. (TR Vol. XV 1059).

At trial, the State proceeded on a theory that Mosley killed Jay-Quan and Lynda Wilkes to avoid final judicial determination of Jay-Quan's paternity and to avoid 18 years of child support and parental responsibility. These events certainly endangered Mosley's ability to cover-up his relationship with Lynda Wilkes.

The State also presented scientific evidence that pointed to Mosley's guilt. Luminal testing conducted in the rear of Mosley's Suburban, where Mosley initially concealed Ms. Wilkes' body, revealed the possible presence of blood. (TR Vol. XIV 857. A cutting from the Suburban's carpet, where the blood was found, was collected for testing. (TR Vol. XIV 857).

Ms. Wilkes' DNA was found on the carpet cutting. (TR Vol. XVII 1518). The possibility that someone else contributed the

DNA found in the back of Mosley's Suburban is one in 680 million. (TR Vol. XIII 1518).

The State also introduced evidence that Mosley's cell phone was enroute to Ocala, just as Bernard Griffin described, in the early morning hours of April 23, 2004. At trial, the State introduced evidence that Mosley's cell phone was in use at least twice in the early morning hours of April 23, 2004 at 12:27 a.m. and 2:24 a.m. The first call was answered. The second was not.

The calls were not made from Jacksonville. Instead, the calls bounced off cell towers miles from Jacksonville, along Highway 301 and Highway 26, roads leading from Jacksonville to the places where Lynda Wilkes' and Jay-Quan Mosley's bodies were dumped. (TR Vol. XVI 1286-1288, Vol. XVII 1428).

Though Mosley attempted to imply that Griffin borrowed his cell phone and made those calls himself, there was absolutely no evidence that Mosley lent his cell phone to Bernard Griffin. Griffin testified he never borrowed Mosley's cell phone. (TR Vol. XIII 680). Moreover, Mosley undisputedly had, and used, his cell phone to call Jamilla Jones at 6:07 a.m., April 23, 2004, when he stopped by her house after he returned to Jacksonville after dumping Lynda's and Jay-Quan's bodies. (State's Exhibit 77).

Mosley also had the opportunity. The route between Bernard Griffin's house, the kill location, and the place where Mosley

dropped Bernard Griffin off after the murder was easily traversed in about 16 minutes. (TR Vol. XV 1108).

On the afternoon of April 22, 2004, the day of the murders, Mosley was supposed to be at work at 2:00 in the afternoon. He was late. (TR Vol. XVI 1371). Mosley did not arrive until 2:31 p.m. (TR Vol. XVI 1384).

Prior to leaving for the night, April 22, 2004, Mosley told his relief, Rahnjeet Singh (the same person he was due to relieve the next morning at 6:00 a.m.) that he would probably be in late the following morning because he had a headache. Mosley told Mr. Singh he would probably be in around 10:00 a.m. (TR Vol. XVI 1398).

Mosley did not come in at 6:00 a.m. when he was scheduled to be at the store or even 10:00 a.m. Instead, Mosley was more than 6 hours late to work, reporting to work at 12:49 p.m. (TR Vol. XIII 1386).

Mosley did call in. Mosley told his supervisor he would be late because he did not get any sleep the night before. (TR Vol. XIII 1387).

The State also introduced evidence that Mosley did much in an attempt to cover up his crime. For instance, Mosley wrote a letter to Jamilla Jones, the woman he visited upon his return to Jacksonville the morning of April 23, 2004. Mosley asked her to say she did not see “that boy” (Bernard Griffin) with him when

he came to her house Friday morning at 6:08 a.m. Mosley "reminded" Ms. Jones it was dark and that he has tinted windows. Mosley also reminded her that he was blocking her vision from the street. Mosley wrote in his letter that Ms. Jones closed the door before he walked off. (TR Vol. XIII 784). Additionally, Mosley attempted to convince Ms. Jones that he was going to divorce his wife and that Lynda Wilkes was not his type. (TR Vol. XIII 784-785).

Mosley also tried to convince Ms. Jones that Lynda Wilkes was not murdered. Mosley told Ms. Jones that the autopsy showed Lynda Wilkes died of a heart attack. (TR Vol. XIII 785).

Mosley wrote that he wanted to "refresh [Ms. Jones'] memory as to the number and times they spoke on the day of the murders. Mosley also told Ms. Jones not to tell the police or prosecutor that he wrote her a letter. (TR Vol. XIII 787).

In addition to Mosley's attempt to mold Ms. Jones' testimony in his favor, Mosley changed all four tires on his Suburban on April 24, 2004, the day after Mosley dumped Ms. Wilkes' and Jay-Quan's bodies in separate locations. At the time, Mosley's tires were still in decent condition. Mosley was also very insistent his tires be returned to him rather than being retained by the store for disposal. When an employee failed to return the tires Mosley became aggressive and caused a

scene. (TR Vol. XVI 1261-1264). The tires were not recovered from Mosley's Suburban or home.

Shortly after the murders, Mosley visited a car wash where his cousin, Kenneth Shanks, worked and asked for stain remover. Mr. Shanks obliged.

Mosley told Mr. Shanks cousin he needed to get some Kool-Aid off the front door. Shanks did not see any stain nor did he help Mosley remove the stain. (TR Vol. XVII 1409).

Finally, the State introduced evidence, in its case in rebuttal, that Mosley attempted to establish a false alibi by attempting to "instruct" his wife on the time he got home the night of April 22, 2004 and on the fact he was home all night.

The conversation went like this:

> **Mosley**: Before they cut me off, let me say this quick. Okay. Remember the 22d when I came in about 11:30 after I had left work. Remember that was the night my mama stayed over there with you. My mama, Alexis and Amber need to write a statement and get it notarized that I was home all night Thursday, the 22d last week.
>
> **Carolyn**: Thursday
>
> **Mosley**: Okay, Yeah. Because my mom had to work late that day and she wanted to get to work early the next day. She stayed over there that day, last Thursday. I know I got off about 11:00 and then I know I went by the A.T.M. and I came home, so Alexis need to write a statement, Amber, you and my mom.
>
> **Carolyn**: Saying that you were…
>
> **Mosley**: Last Thursday, yeah, saying I was home all night. I don't know when I got—I think I got home, what, about 11:30. You can say approximately 11:30. They going to try to hold you to a time of 11:25, 11:30, 11:35. I don't remember exactly and my mom need to tell them that she stayed over that night.

> She had worked. She's tired. She wanted to get in early the next day. Her job right around the corner. (TR Vol. XIX 1930).

Mosley also put on evidence in his defense. Among the witnesses that Mosley presented, Carolyn Mosley and Alexis Mosley testified that Mosley came home about 11:30 p.m., remained home all night, and was present in the house at least between 5:15 and 6:00 a.m.

Alexis Mosley testified that on the morning of April 23, 2004, she saw her father in bed at 5:15 a.m. (TR Vol. XIX 1828). Alexis told the jury as far as she knew; her father was still in bed asleep at 5:45 when she went to catch the bus. (TR Vol. XIX 1828).

Carolyn Mosley testified that on the night of April 22, 2004, he husband came home from work as usual. (TR Vol. XIX 1891). They slept together and went to bed about 1:00 a.m. (TR Vol. XIX 1891).

Mosley was still in bed when she woke up about 5:30 a.m. on April 23, 2004. (TR Vol. XIX 1892). She left the house around 6:00 or 6:10 in the morning. (TR Vol. XIX 1899, 1910). When she left, the Suburban was still in the same place it was parked the night before. (TR Vol. XIX 1902). Mosley did not leave the house before she did. (TR Vol. XIX 1910).

Barbara McKinney testified that she was the impetus behind Mosley's decision to change all four tires on his Suburban. She

asked Mosley to change the tires because of the impending family trip to Miami for a cruise. (TR Vol. XVIII 1724).

Ms. McKinney told the jury she asked Mosley, on Friday, April 23, 2004, to replace the tires before the trip. (TR Vol. XVIII 1725). During direct examination, Ms. McKinney testified the trip was in April. (TR Vol. XVIII 1727). During cross-examination, however, Ms. McKinney admitted that the trip was not in April 2004 but instead scheduled for May 23, 2004. (TR Vol. XVIII 1729). She then claimed she wanted to visit her other son in Chipley. (TR Vol. XVIII 1738).

Mosley also put on evidence that he had been injured in an auto accident in November 2003. (TR Vol. XVIII 1694). Mosley had back, neck and shoulder pain as a result of the injury. According to Dr. Kilgore, Mosley might have pain if he lifted 200 pounds. (TR Vol. XVIII 1703). However, Mosley was physically capable of lifting 200 pounds. In Dr. Kilgore's opinion, Mosley would be able to pick up a 200 pound woman. (TR vol. XVIII 1709). Mosley would not have difficulty wrapping his hands around something, squeezing, and applying a great deal of pressure. (TR Vol. XVIII 1713).

SUMMARY OF THE ARGUMENT

ISSUE I: In Issue One, Mosley does not present a claim of error. Instead, Mosley alleges that Article 1, Section 9, of the Florida Constitution grants more "due process" than does the United States Constitution. Mosley has not identified any claim to which this "heightened" protection should be applied. Nor did Mosley allege the trial judge refused, when asked, to apply the primacy doctrine to any particular motion or objection. Finally, Mosley failed to show that, in a criminal case, Florida's due process provides more protection than its Federal Counterpart. This claim is properly denied.

ISSUE II: In this claim, Mosley alleges the prosecutor made several comments which, together, deprived Mosley of a fair trial. The comments about which Mosley complains were either not objectionable or constituted harmless error. This claim is properly denied.

ISSUE III: In this claim, Mosley alleges that the trial court erred when it admitted a tape recorded conversation Mosley had with his wife while Mosley was awaiting trial for murdering Lynda Wilkes and his son, Jay-Quan. During the conversation, Mosley sought his wife's assistance in establishing a false alibi for the day of the murder. The trial judge properly ruled the tape was admissible. This Court may affirm for two reasons.

First, Mosley waived any privilege when he called Carolyn Mosley, before the tape was offered into evidence, to testify about the substance of the conversation. The tape was also admissible because neither Carolyn Mosley nor John Mosley had a reasonable expectation of privacy in their communications. Both were aware the phone call may be monitored or recorded.

ISSUE IV: In this claim, Mosley alleges the trial court erred in refusing to grant a continuance for the purpose of securing defense witnesses, Powell and Swearingen. This claim is properly denied because Powell's testimony was inadmissible as attempted impeachment on a collateral matter. As to Ms. Swearingen, the claim is properly denied because Mosley made no showing that Ms. Swearingen was willing and available to testify or that he made diligent efforts to obtain her presence at trial. Ms. Swearingen was not subpoenaed for trial or even listed on the defense witness list. Additionally, Mosley's motion for a continuance and mistrial was untimely as Mosley waited until just before closing arguments before requesting a continuance to present Ms. Swearingen as a defense witness.

ISSUE V: In this claim, Mosley alleges the trial court erred when he allowed a videotape of the defendant in chains, shackles, and jail garb to be delivered to the jury room during its deliberations. The record refutes his claim. Indeed, the

record establishes neither the tape nor a television to view a tape was available to the jury during its deliberations.

ISSUE VI: In this claim, Mosley alleges that the jury should not have been instructed that the Wilkes murder could be considered in aggravation because there was insufficient evidence that Ms. Wilkes died before Jay-Quan. This claim is without merit because this Court has repeatedly upheld the "previously convicted of a violent felony" aggravator when the defendant killed two or more victims in the same criminal episode.

ISSUE VII: In this claim, Mosley alleges that the trial court erred in denying his motion for a judgment of acquittal because the State failed to prove Mosley murdered Lynda Wilkes. Mosley also alleges the trial judge should have granted his motion for JOA because Jay-Quan's body has never been found. According to Mosley, there is no evidence the child is even dead. When viewed in the light most favorable to the State, the State presented more than a prima facie case that Mosley was guilty of two counts of first degree murder. The trial court properly denied Mosley's motion for a judgment of acquittal.

ISSUE VIII: In this claim, Mosley alleges the trial court erred in denying his motion for a new trial because the verdict was contrary to the weight of the evidence. This issue was not

preserved because Mosley only made a bare bones motion for a new trial on the grounds he raised before this Court. Moreover, given the near overwhelming evidence of Mosley's guilt, Mosley failed to show the trial judge abused his discretion in failing to grant Mosley a new trial.

ISSUE IX: In this claim, Mosley alleges the trial judge erred in failing to give a portion of standard jury instruction 3.9 which instructs the jury it may consider whether any pressure or threat has been used against the witness that affected the truth of the witness's testimony. The record refutes his claim. The court gave this instruction as requested.

ISSUE X: In this claim, Mosley alleges that his death sentence is unconstitutional in light of the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002). This claim is properly denied because this Court has previously held that conviction for the contemporaneous murder of a second victim satisfies Ring. Overton v. State, 976 So.2d 536 (Fla. 2007) (contemporaneous murder satisfies Ring).

ISSUE XI: In this claim, Mosley alleges that this Court's comparative proportionality review of death sentences is unconstitutional. Mosley made no showing this Court's proportionality review fails to meet constitutional muster.

ISSUE XII: In this claim, Mosley presents no argument to support his allegation that his sentence of death is disproportionate. Instead, he makes a plea for mercy on the grounds that he was a mentally abused child who enlisted in the Navy after his country was attacked by terrorists on September 11, 2001. Well established case law from this court demonstrates Mosley's sentence of death is proportionate.

ISSUE XIII: This Court has already rejected this same claim, and these same arguments, in Lightbourne v. McCollum, 969 So.2d 325 (Fla. 2007) and Schwab v. State, 969 So.2d 318 (Fla. 2007).

ARGUMENT

ISSUE I

WHETHER FLORIDA'S CONSTITUTION PROVIDES MORE DUE PROCESS TO DEFENDANTS THAN THE UNITED STATES' CONSTITUTION.

In his first claim, Mosley argues that this Court should apply the "primacy" doctrine" to his case because Article I, Section 9 of Florida's constitution provides defendants more due process than does the United States Constitution. Mosley suggests this Court should ignore its own precedent that, he admits, would ordinarily govern his claims. He requests this Court to re-examine all precedent with the "new mandate that Florida's due process clause provides more protection." (IB 27).

Mosley does not identify any specific claim he asserts this "new mandate" should apply to. Nor does he point this Court to any place in the record where Mosley asked the trial court to apply more due process than that granted by the United States Constitution, and the trial court refused to do so. Instead, Mosley simply avers, vaguely, that this Court should apply heightened protections to all of the constitutional claims he raises in his brief. This Court should demur.

Mosley has presented no basis for this Court to determine that Florida's due process clause would afford relief on any particular claim where application of the Due Process Clause of

the Federal Constitution would not. For instance, Mosley does not point to any language in Florida's constitution that supports the notion that Florida's due process clause affords greater protection, on any issue raised in his brief, than its federal counterpart.[4] Nor does he point to any case law which provides support for this claim.

At least one Florida court, however, in a criminal case, has squarely addressed the issue of whether Florida's due process clause affords more protection than does the United States Constitution. In Barrett v. State, 862 So. 2d 44 (Fla. 2d DCA 2003), the defendant challenged Section 775.051, Florida Statutes, which eliminated voluntary intoxication as a defense to any criminal offense and rendered evidence of voluntary intoxication inadmissible to show the defendant lacked the specific intent to commit a crime.

Barrett alleged that, although the federal due process clause did not bar Florida from eliminating voluntary intoxication as a defense to the *mens rea* element of first degree murder, Florida's due process clause does. Barrett

[4] The Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o persons shall be . . . deprived of life, liberty, or property, without due process of law." Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." Article 1, § 9 of the Florida Constitution provides that: No person shall be deprived of life, liberty or property without due process of law….

asserted that the Florida Constitution provides broader due process protections than the Federal Constitution.

The Second District Court of Appeal rejected his claim. The court noted that the due process language used in the Florida and United States Constitutions is virtually identical. The court found there was no basis to conclude the Florida Constitution provides greater protections to Barrett than does the United States Constitution. Barrett v. State, 862 So. 2d at 48. *See also* Troy v. State, 948 So. 2d 635, 645 (Fla. 2006) (citing with approval to the 2d DCA's conclusion in Barrett that there is no basis to conclude that the Florida Constitution provides greater due process protections than does the United States Constitution in relation to the elimination of voluntary intoxication as a defense to a criminal offense).

Mosley has provided no sound basis for this court to find that Florida's constitution provides any more due process in his case than that granted by the United States Constitution. This Court should reject Mosley's first claim.

ISSUE II

WHETHER THE PROSECUTOR'S REMARKS DURING VOIR DIRE AND CLOSING ARGUMENT DEPRIVED MOSLEY OF A FAIR TRIAL.

In this claim, Mosley alleges the prosecutor made several remarks that acted to deprive him of a fair trial. 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. Stephens v. State, 945 So. 2d 405, 420 (Fla. 2007); Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994).

A. The State does not seek death in every case

Mosley complains the prosecutor improperly told the jury, twice, that the State does not seek death in every case. Mosley admits that no objection was made at trial. (IB 29-30).

Ordinarily, failure to lodge a contemporaneous objection bars review of the claim on appeal. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999); Urbin v. State, 714 So. 2d 411, 418 n.8 (Fla. 1998). The sole exception to this general rule is where the comments rise to the level of fundamental error. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999).

This Court has defined fundamental error as error that 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. McDonald v. State, 743 So. at 505 (Fla. 1999). Mosley has not shown that either of the comments, about which he takes issue, constitutes fundamental error.

The first comment about which Mosley complains came during voir dire when the prosecutor inquired about potential jurors' views on the death penalty. The prosecutor told the jury:

> Okay. All right. I now want to discuss the death penalty with you, and let me just tell you kind of the issue that we're looking at and as Judge Weatherby touched on this morning we all do have some idea probably of our thoughts on the death penalty. You may be for it. You may be against it and we're not seeking to find fault with anyone so please do not feel that way.
>
> The ultimate question is: Would your views about the death penalty prevent you or substantially impair your ability to perform your duties as a juror in this particular case? So as I am going through this I kind of hope that will be in the back of your mind. That's the ultimate question.
>
> We need people who can come to this courtroom with an open mind despite their preconceived notions or experiences and follow the Court's instruction with regard to the death penalty, so I's going to ask questions in that vein with the understanding again as Judge Weatherby mentioned there's only two possible penalties if the defendant is found guilty of first degree murder, the death penalty or life imprisonment without the possibility of parole.

> First of all does everyone understand that the death penalty is not sought in every first degree murder case? (TR Vol. X 184)

This Court has ruled that it is improper for the State to inform the jury that the State does not seek the death penalty in every case. This Court has concluded such a statement is irrelevant and tends to cloak the State's case with legitimacy as a bona-fide death penalty prosecution. Brooks v. State, 762 So. 2d 879, 901 (Fla. 2000).

In this case, however, the remark was made in the context of exploring potential juror's view on the death penalty. Unlike the case in Brooks, the prosecutor did not compare and contrast Mosley's case to a case where seeking death would be either inappropriate or constitutionally permissible. Brooks v. State, 762 So.2d at 901. Nor did the prosecutor attempt to legitimize the decision to seek death by explaining that it was the judgment of the State Attorney's staff, after investigation and discussion, that death was appropriate. Pait v. State, 112 So. 2d 380, 384-385 (Fla. 1959).

Even if this Court were to find this isolated comment error, there is no basis to find fundamental error. No reasonable juror would be driven to return a verdict he would not otherwise return or be unduly influenced by an isolated comment during voir dire that the State does not seek death in every first degree murder case. It is also beyond obvious, even

to a lay person, that not every murder case warrants the death penalty. Indeed, the jury rejected the State's request to recommend death for both murders and recommended Mosley be sentenced to life in prison for murdering Lynda Wilkes. Mosley failed to show this comment constituted fundamental error. Mosley's claim should be denied.

The second comment about which Mosley complains occurred during the penalty phase closing arguments twenty-one days after voir dire. The prosecutor told the jury:

> As His Honor told you and we have told you death is not appropriate and it's not sought in every first degree murder case but it is sought in this one, and his Honor again will go over with you aggravating circumstances and mitigation and he will tell you it's not a counting process. It's not does the state have more aggravators or does the defense have more mitigators. It's a qualitative process, what is heavier, what means more. That's how you decide, and as we talked about this morning you will render a recommendation for each of these murders, one for Lynda Wilkes and one for Jay-Quan. (TR Vol. XXII 2412).

Mosley failed to show this brief comment constituted fundamental error. The comment was made in the context of a legally correct explanation of the weighing process. Once again, the prosecutor did not compare and contrast Mosley's case to a case where seeking death would be either inappropriate or constitutionally permissible, nor did he tell the jury that the decision to seek death stemmed from the collective wisdom of the State Attorney's Office. Brooks v. State, 762 So.2d at 901.

It defies law and logic to argue that this comment made a difference to the jury's recommendation let alone rose to the level that a death recommendation could not have been obtained without the assistance of the prosecutor's remark. This is made manifest by the jury's split recommendation for life in prison for the murder of Lynda Wilkes and death for the murder of Jay-Quan Mosley. Mosley failed to show this comment constituted fundamental error. Mosley's claim should be denied.

B. A comparative worth argument

In this claim, Mosley alleges that two comments of the prosecutor improperly asked the jurors to compare the value of the victim's life to the Defendant's. Mosley admits that no objection was made to either comment. Accordingly, this Court may reverse only if it finds fundamental error. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999).

The first comment about which Mosley takes issue came when the prosecutor told the jury that Lynda Wilkes was a sister, a daughter, a mother, a friend, and a human being. The prosecutor went on to describe Jay-Quan as a healthy, helpless 10 month-old who had an infectious toothless grin. The prosecutor told the jury that Lynda and Jay-Quan were dead. (TR Vol. XIX 1988).

Mosley alleges it is improper to ask jurors to compare the value of the victim's life with the value of the Defendant's life. While the State does not disagree with this general

principal, the record refutes any notion that the prosecutor made any comparison at all between the value of Lydia and Jay-Quan's life and the value of John Mosley's life. As Mosley failed to show that the prosecutor made a "comparative worth argument" at all, his claim must fail.

The second comment about which Mosley complains is the same comment about which he alleged constituted improper legitimizing of the State's decision to seek the death penalty. Mosley alleges that the prosecutor made an improper "comparative worth" argument when he told the jury that "death is not appropriate and it's not sought in every first degree murder case but it is sought in this one." (TR Vol. XXII 2412).

Mosley does not offer any insight into how this statement implicitly compares the victim's life to the defendant's life. Nor does he point to any case in which this Court, or any other court, has concluded that this argument constitutes an improper "comparative worth" argument. This Court should reject this claim.

C. Bad Acts made a feature of the trial

In this claim, Mosley alleges the prosecutor improperly made the defendant's other bad acts a feature of the trial. In particular, the defendant complains that the prosecutor implied that Mosley stole a driver's license found in his car. Mosley also complains the prosecutor improperly made an issue of

Mosley's multiple extra-marital affairs. Mosley admits that no objection was made at trial. Accordingly, this Court may reverse only if it finds fundamental error. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999).

The first "bad act" about which Mosley complains is the prosecutor's argument that "This guy is driving around with other people's driver's licenses in his car." (IB 33). It was the defense, however, and not the prosecution who initially introduced the driver's license into evidence.

During the defense's case-in-chief, Mosley called Detective Romano to the witness stand. Trial counsel inquired about items found in the car. Detective Romano told the jury that a spiral notebook and a driver's license belonging to a Mr. Bowden were found in the car. (TR Vol. XVIII 1641-1650). Prior to his testimony, the State had not introduced any evidence that Mosley was in possession of someone else's license. The police did not take any steps to interview Mr. Bowden.

There were also some realtor cards found in the car. The police did not make any contact with any of the realtors. In Detective Romano's view, there was no reason to talk with the realtors. Along with a spiral notebook and the realtors' cards, trial counsel published Mr. Bowden's license to the jury. (TR Vol. XVIII 1641-1650). During closing argument, trial counsel pointed to the fact that someone's driver's license was found in

Mosley's car but the police did not investigate because they were already convinced that Mosley killed Ms. Wilkes and Jay-Quan. (TR Vol. XIX 1996).

The remark about which Mosley complains came during the prosecutor's rebuttal argument. The prosecutor noted that:

> You heard about the driver's license in the defendant's car. This wasn't in Bernard's car. Ms. Holmquist got this driver's license of some unknown person in the defendant's car. Now, Detective Romano told you that he did run him but he had nothing to do with the case. This guy is driving around with other people's drivers licenses in his car. (TR Vol. XX 2072-2073).

In context, the prosecutor's remark is directly in response to Mosley's suggestion that the police botched this murder investigation by not interviewing a person whose driver's license was found in Mosley's car. (TR Vol. XIX 1996). Because Mosley certainly attempted to imply that Mr. Bowden should have been a person of interest, the prosecutor's comments were in response to Mosley's argument that the police botched the investigation of this case. Dailey v. State, 965 So. 2d 38, 44 (Fla. 2007) (prosecutorial comment rebutting defendant's attack, during closing argument, on credibility of a witness permissible); Walls v. State, 926 So. 2d 1156, 1166 (Fla. 2006) (a prosecutor's comments are not improper where they fall into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject). This is

especially true as there was not one scintilla of evidence that linked Mr. Bowden to the murder.[5]

The second bad act about which Mosley complains is evidence of his extra-marital affairs. As Mosley admits, the defense, during opening statement, told the jury that Mosley was a philanderer who was having three extramarital affairs at the time of the murder. (IB 32)(TR Vol. XII 582-583). Trial counsel also reminded the jury during his own closing argument that while extramarital relationships are not enjoyable for a family to talk about, "we've agreed that's not what we're here to prove."

Nonetheless, Mosley claims that fundamental error occurred when the prosecutor, during his rebuttal closing argument, told the jury that "Mosley had girlfriends all over the place. One of them is trying to get child support." Mosley's argument of fundamental error must fail for at least three reasons.

First, it is clear that Mosley himself decided to be upfront about his multiple affairs in a pre-emptive attempt to lessen any adverse impact on the jury. Second, the comment about Mosley's girlfriends came in direct response to trial counsel's argument, during closing argument, designed to

[5] While Mosley himself introduced evidence regarding the contents of his car, Mosley offered no explanation why the license was in his car nor presented any evidence that Mosley "lent" his Suburban to Mr. Bowden.

convince the jury that Mosley in leading his “normal life” was an innocent man. (TR Vol. XX 2026). It is not error, let alone fundamental error to argue in direct rebuttal to a claim a defendant’s claim of innocence. Dailey v. State, 965 So. 2d 38, 44 (Fla. 2007) (prosecutorial comment rebutting a portion of defendant’s closing argument not error); Walls v. State, 926 So. 2d 1156, 1166 (Fla. 2006) (a prosecutor's comments are not improper where they fall into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject).

Finally, this Court may deny this claim because any error in this brief comment certainly did not rise to the level of fundamental error. This is especially true since the defendant, himself, brought Mosley’s affairs to the attention of the jury. In short, Mosley has made no showing the prosecutor’s comment about Mosley’s girlfriends led the jury to reach a verdict of guilty that they ordinarily would not have reached absent the comment. McDonald v. State, 743 So. 2d at 505 (Fla. 1999).

D. **The Golden Rule Comments**

The final comments about which Mosley takes issue are two comments by the prosecutor during closing argument. The first came during closing arguments when the prosecutor reminded the jury of the details of the murder. (IB 37).

While Mosley argues the prosecutor asked the jury to imagine the victim's horror, the portion of the argument about which Mosley complains has not even a hint of a "Golden Rule" violation. Instead, the prosecutor's comments were directly relevant to the premeditated nature of both murders. Likewise, the argument mirrored the testimony of both Bernard Griffin and Dr. Arruza, the medical examiner.

Bernard Griffin told the jury that when Mosley picked him up, Lynda Wilkes and Jay-Quan were already in Mosley's Suburban. They drove for a while and Mosley stopped and got out of the car and went around to the passenger side. He told Lynda to step out of the car. Mosley pretended to be looking for something in the passenger seat. Mosley then turned around and grabbed Lynda by the neck and forced her to the ground. (TR Vol. XIII 689). Mosley was strangling Lynda Wilkes. (TR Vol. XIII 689). She was trying to defend herself. Ms. Wilkes was kicking and scratching him. She could not say anything or scream. Mosley did not strangle her all that long. She stopped moving. (TR Vol. XIII 689-690). After Ms. Wilkes stopped moving, Mosley got a Winn Dixie bag from the Suburban. Mosley put it over Ms. Wilkes' head. (TR Vol. XIII 691). Mosley put Ms. Wilkes' body in the back of the SUV. (TR Vol. XIII 691). Thereafter, Mosley placed Jay-Quan in a garbage bag. (TR Vol. XIII 691). The baby was crying. Mosley tied the bag up and placed the bag in the

back of the SUV. The baby was still crying. (TR Vol. XIII 692). Mosley covered Ms. Wilkes and Jay-Quan up with a blue tarp that Griffin had seen in the Suburban. (TR Vol. XIII 693-694).

Dr. Arruza testified that in cases of manual strangulation, a person would pass out within about 10 seconds. (TR Vol. XIV 887). It would take about 4 minutes of continued applied pressure to kill a person. (TR Vol. XIV 887).

Dr. Arruza also opined that if a healthy 10 month old child is placed in a sealed black plastic bag, the bag will suffocate him. He would die quickly. Every time the child breathed in, he would be sucking the bag into this face. (TR Vol. XIV 889).

As is clear from the portion of the argument about which Mosley complains, the prosecutor's argument tracked Griffin's and Dr. Arruza's testimony almost exactly. (IB 36-38). Mosley invites this Court to find error by reading something into the prosecutor's argument that is not there. This Court should refuse Mosley's unsupported invitation.

The second and final comment about which Mosley complains came during the prosecutor's closing penalty phase argument. The prosecutor argued that Lynda Wilkes did not go unconscious right way, that she was on the ground looking at a man she trusted, knowing that she was going to die. (IB 39).

Mosley complains this comment was an improper attempt to appeal to the juror's sympathy. (IB 39). Mosley also alleges this comment sought to have the juror's imagine Lynda Wilkes' anguish.

Neither of these comments was improper. First, the comment was directly relevant to the HAC aggravator argued by the State as to the murder of Lynda Wilkes. The trial court instructed the jury on the HAC aggravator. (TR Vol. XXII 2469). A victim's suffering and awareness of his or her impending death certainly supports the finding of the heinous, atrocious, or cruel aggravating circumstance. Cox v. State, 819 So. 2d 705, 720 (Fla. 2002). Moreover, this Court has consistently upheld the HAC aggravator when the defendant murders the victim by strangling her to death. Doyle v. Singletary, 655 So. 2d 1120, 1121 (Fla. 1995) (noting that murder by strangulation has consistently been found to be heinous, atrocious and cruel because of the nature of the suffering imposed and the victim's awareness of impending death).

The prosecutor's comments were directly related to an aggravator upon which the jury was instructed. Moreover, contrary to Mosley's claim, there was simply no golden rule violation in this comment. The court should deny Mosley's claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN RULING THAT THE RECORDED CONVERSATION BETWEEN MOSLEY AND HIS WIFE WERE ADMISSIBLE.[6]

In this claim, Mosley alleges the trial court erred in admitting into evidence a taped recorded conversation between Mosley and his wife, Carolyn. The conversation at issue occurred when Mosley called his wife from jail. In that conversation, Mosley attempted to persuade Mrs. Mosley to establish a false alibi for April 22, 2004, the night he dumped Lynda and Jay-Quan's bodies some twelve hours after he murdered them.

On appeal, Mosley alleges that admission of the recorded phone call violated the husband–wife privilege outlined in Rule 90.504, Florida Statutes. (IB 49). Mosley avers that because no one else was present during the conversation and both Mosley and his wife, Carolyn, intended the conversation to be confidential, their conversation was protected by Florida's husband-wife privilege. (IB 51).

Prior to trial, trial counsel filed a motion *in limine* to exclude the conversation. Trial counsel listed numerous grounds for its exclusion, including that admitting the substance of his

[6] Mosley cites to "evidence" which is not contained in the record on appeal. (IB 46-48). Mosley alleges he will move to supplement the record with several depositions but he has apparently failed to do so.

telephone call would violate Mosley's: (1) right to be free from unreasonable search and seizure, (2) right to counsel, (3) right to privacy, (4) right to communicate with friends and family, (5) Florida's Security in Communications law as outlined in Chapter 934, Florida Statutes, (6) right to consent before a telephone conversation is recorded, (7) right to residual right to privacy, (8) First Amendment communication rights, and (9) rights under the due process and equal protection claims of both the United States and Florida constitutions. (TR Vol. III 451-470). Conspicuously absent from the written motion was any claim the admission of the conversation would violate section 90.504, Florida Statutes. (TR Vol. III 451-470).

A hearing on the motion was held on October 31, 2005. (TR Vol. VIII 1444). At the hearing, counsel raised an additional basis for exclusion of the evidence. Counsel claimed that admitting the conversation would violate the marital privilege outlined in Section 90.504, Florida Statutes. (TR Vol. VIII 1461). Trial counsel admitted that inmates were warned before they began their conversation that phone calls may be recorded. (TR Vol. VIII 1400). Defense counsel also informed the court that inmates were provided with a handbook when processed into the jail facility. Although inmates are not required to read it, the handbook warns inmates that phone calls may be recorded. (TR Vol. VIII 1459). The Court deferred ruling on the motion.

On November 3, 2005, an additional hearing was held on the motion. (TR Vol. IX 1582). The trial court inquired of defense counsel about the statutory privilege. (TR Vol. IX 1593). Trial counsel alleged that Mosley had an expectation of privacy in the communication with his wife. The trial court questioned counsel about whether Mosley had a reasonable expectation of privacy in his communication when there was no dispute that each call contains a warning that the call will be monitored or recorded.

The first portion of the tape was played to the court for the purpose of establishing the exact warning given to each inmate when he made a phone call. The tape warned both parties that "This call is subject to monitoring and recording." (TR Vol. IX 1598-1600).

After both parties presented argument on the motion, the court took the motion under advisement. (TR Vol. IX 1604). Ultimately, the court denied the motion. (TR Vol. XIX 1878, 1947).[7]

At trial, trial counsel called Mosley's wife, Carolyn Mosley. Trial counsel questioned Ms. Mosley about the telephone call she received from Mosley about a week after the murder.

[7] Apparently, the trial court informed the parties that he was denying the defense motion at a sidebar. The parties then discussed the ruling later in the proceedings. (TR Vol. XIX 1878, 1974).

(TR Vol. XIX 1887). Ms. Mosley told the court that Mosley wanted her to write down what she remembered about April 22-23, 2004. She testified that Mosley requested she write the information down because he knows she is absentminded and tends to forget things. (TR Vol. XIX 1888). She believed that Mosley was simply telling her to write things down so she would remember. (TR Vol. XIX 1888). Ms. Mosley did not believe her husband was telling her what information she should remember, such as when he got home from work, what time he woke up the next day, that his mother stayed overnight, or anything about the Suburban. He may have told her to remember who was at the house. (TR Vol. XIX 1889).

The Court should deny this claim for two reasons. First, Mosley waived any privilege in his communication when he called his wife to testify about the substance of his conversation.

This Court has held that a holder of the spousal privilege may waive the privilege. See Bolin v. State, 650 So. 2d 19, 21 (Fla. 1995) (Bolin I). A waiver occurs where the holder of the privilege consents to the disclosure of the protected communication. Woodel v. State, 804 So. 2d 316, 323 (Fla. 2001). *See also Section 90.507, Florida Statutes* (privilege is waived if holder of privilege discloses any significant part of the communication).

In this case, it was Mosley, and not the State, who called Carolyn Mosley to the witness stand. Mosley did not limit his examination to matters that Ms. Mosley observed on April 22 or April 23, 2004. Taylor v. State, 855 So. 2d 1, 27 (Fla. 2003) (privilege not waived if defendant husband calls his wife to the stand but does not inquire about the substance of the privileged communications.) Instead, Mosley questioned Mrs. Mosley about the substance of their conversation, specifically Mosley's directions to her to write down what happened on April 22-23, 2004. (TR Vol. XIX 1888). Mosley also questioned her about the absence, at least in her mind, of any "coaching" about details that would establish his alibi. (TR XIX 1888-1889). The tape was played after Ms. Mosley testified during the State's case in rebuttal. (TR Vol. XIX 1929-1930).

By calling Ms. Mosley to testify and by eliciting testimony about the substance of Mosley's phone call to her, Mosley waived the privilege. This Court may deny this claim on this ground alone. Kerlin v. State, 352 So. 2d 45, 52 (Fla. 1977) ("Waiver occurs by failure to assert the privilege by objection or a voluntary revelation by the holder of the communication, or a material part thereof."); *Section 90.507, Florida Statutes* (privilege is waived if holder of privilege discloses any significant part of the communication).

This Court may also deny this claim because Mosley and his wife were well aware the call was subject to monitoring or recording. Accordingly, neither Mosley nor his wife had a reasonable expectation of privacy in their telephone conversation.

Section 90.504, Florida Statutes, provides that a spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife. Section 90.507, Florida Statutes, provides, in pertinent part, that a person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication.

When read together, both rules make clear that communications between husband and wife are not privileged if the person asserting the privilege did not have a reasonable expectation of privacy at the time of the conversation. In this case, Mosley clearly had no reasonable expectation of privacy because he knew the phone call was subject to monitoring and recording.

In his initial brief Mosley cites to this Court's 1985 decision in Koon v. State, 463 So. 2d 201 (Fla. 1985). (IB 50). This case is inapposite to the case at bar.

In Koon, the phone call at issue was a call made on November 21, 1979. During the conversation, Koon allegedly admitted killing a witness against him that same night. The witness, Joseph Edward Dino, had been scheduled to testify against Koon on federal counterfeiting charges. Id. at 202-203. Koon was not in custody at the time of the phone call.

The State sought to call the wife and elicit the substance of Koon's admissions made during the phone call. The state also sought to elicit the substance of Koon's admissions to her in a subsequent, apparently in-person, conversation. The State contended Koon had waived the privilege when he also told his mother-in-law and his son that he killed Dino.

This Court found that Koon and his wife both intended their communication to be privileged and made the communications when they had a reasonable expectation of privacy. This Court concluded that Koon did not waive the privilege by telling someone else the same information he relayed to his spouse. Koon v. State, 463 So. 2d 201, 204 (Fla. 1985).

Koon does not dictate this Court's disposition of Mosley's third claim on appeal. Koon spoke to his wife over private lines. Mosley spoke to his wife from the jail. Koon had a

reasonable expectation of privacy because there was no evidence he knew someone else would be listening to, monitoring, or recording his calls. Mosley, admittedly, knew that his calls were subject to monitoring and recording.

In light of the fact that Mosley and his wife were well aware that their phone conversation was subject to monitoring and recording, neither had a reasonable expectation of privacy during their conversation. (TR Vol. XIX 1929). Accordingly, Mosley's attempt to persuade his wife, over the jail telephone, to provide him with an alibi for the night of the murder does not fall within Florida's marital privilege. Taylor v. State, 855 So. 2d 1, 27 (Fla. 2003)(suggesting jail conversations between husband and wife would not privileged if conversations were taped or overheard by third parties); Proffitt v. State, 315 So. 2d 461, 465 (Fla. 1975)(privileged character of the communication was lost when spouses were speaking in a manner and place where they had a reasonable chance of being overheard, and they knew of that possibility at that time); Johnson v. State, 730 So. 2d 368 (Fla. 5th DCA 1999)(no error in admitting recorded conversation between Johnson and his wife that occurred in a police interview room and there was some evidence that one or both spouses believed their conversation may be monitored because it was "inconceivable that the parties had a reasonable expectation of privacy.").

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR A CONTINUANCE AND FOR MISTRIAL WHEN A DEFENSE WITNESS DID NOT APPEAR FOR TRIAL.

In this claim, Mosley alleges the trial judge abused his discretion when he denied Mosley's motion for a continuance or mistrial when two defense witnesses, Billy Powell and Wanda Swearingen, did not appeal for trial. A trial judge's decision to deny a defense motion for a continuance is reviewed under an abuse of discretion standard. Scott v. State, 717 So. 2d 908, 911 (Fla. 1998); Gorby v. State, 630 So. 2d 544, 546 (1994).

Likewise, a ruling on a motion for mistrial is within the sound discretion of the trial court. A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial. Mendoza v. State, 964 So. 2d 121, 131 (Fla. 2007). When the standard of review is abuse of discretion, the trial court's ruling should be sustained unless no reasonable person would take the view adopted by the trial court. Huff v. State, 569 So. 2d 1247 (Fla. 1990).

A. Billy Powell

Mosley alleges the trial judge abused his discretion when he refused to grant Mosley a continuance, or alternatively to declare a mistrial, to allow Mosley to procure the testimony of Billy Powell, Bernard Griffin's probation officer. According to

Mosley, Powell would have testified that Bernard Griffin told him that he took the blame for a crime - possession of cocaine- that he did not commit in order to protect his cousin.

After the State had inquired of Mr. Griffin on direct examination, trial counsel sought to proffer certain testimony he wished to elicit from Bernard Griffin. (TR Vol. XIII 715). Along with evidence of Griffin's alleged involvement in the passing of counterfeit currency, trial counsel sought to inquire about Griffin's alleged statement to Probation Officer Powell.

During the proffer, trial counsel asked Griffin whether he told his probation officer, Billy Powell, that he was not guilty of the crime for which he had pled guilty but was, instead, taking the charge for his cousin. Griffin testified that he did not. (TR Vol. XIII 716-717). Griffin told the trial court he was guilty of the crime. (TR Vol. XIII 716-717).

The trial court refused to allow inquiry into the specifics of the cocaine arrest, Griffin's conversation with Mr. Powell or anything related to counterfeit currency. (TR Vol. XIII 721). The court allowed trial counsel to inquire about any deals the State made with Griffin on any past or pending charges. The Court also granted Mosley's request to inquire into Griffin's pending charge for underage possession of tobacco, a violation of a municipal ordinance. (TR Vol. XIII 724).

After the state had rested, trial counsel informed the trial court the defense wished to call Probation Officer Billy Powell to testify. Trial counsel also informed the court that Powell had skipped out on his subpoena. (TR Vol. XIX 1850). Trial counsel averred that Powell's testimony would impeach Griffin's proffered testimony that he did not tell Officer Powell that he pled guilty to a crime that he did not commit in order to take the "fall" for his cousin. (TR Vol. XIX 1850).

The trial court ruled Powell's testimony was inadmissible because the supposed impeachment material was a collateral matter. (TR Vol. XIX 1851). Accordingly, the trial court denied Mosley's motion for a continuance and for a mistrial. (TR Vol. XIX 1851-1852).

On appeal, Mosley contends he had the right to call Billy Powell to impeach Griffin's testimony. Mosley alleges Powell's testimony was relevant to show that Griffin was a liar who had a history of falsely shifting the blame in criminal cases. Mosley claims this inference was important because his theory of defense was that someone else committed the murder and Bernard Griffin was "framing" Mosley, an innocent party. (IB 55, 56).[8]

[8] Mosley offers no theory for this hearsay statement's admissibility except as a prior inconsistent statement.

This Court should deny this claim for two reasons. First, any relevancy of Powell's intended impeachment testimony was rendered moot when the trial court ruled the details of Griffin's cocaine conviction and sentencing was not admissible.[9] It is axiomatic that one cannot call a witness to contradict another witness's trial testimony when that testimony that was never heard by the jury.

This Court may also deny Mosley any relief because even assuming the trial court should have allowed Mosley to elicit Griffin's denial he told his probation officer he pled guilty to crime he did not commit in order to protect his cousin, Powell's testimony went to a collateral matter. Impeachment on a collateral matter is not proper. Caruso v. State, 645 So. 2d 389, 394 (Fla. 1994) (reiterating well-established rule that "if a witness is cross-examined concerning a collateral or irrelevant matter, the cross-examiner must 'take' the answer, is bound by it, and may not subsequently impeach the witness by introducing extrinsic evidence to contradict the witness on that point").

While Mosley contends Powell's testimony is relevant to show that Bernard Griffin is framing Mosley to protect either himself or the true murderer, Mosley has failed to offer any logical link between Griffin's decision to take the fall for a

[9] Mosley does not challenge this ruling on appeal.

loved one on a relatively minor charge and Griffin's decision to come forward to testify that Mosley murdered Lynda Wilkes and Jay-Quan Mosley in his presence. This is especially so since there was no evidence that Griffin had any motive to murder two people he did not even know. Moreover, there was simply no evidence introduced at trial that pointed to a person, other than John Mosley, as the real murderer. This Court should deny this claim.

B. Wanda Swearingen

Just prior to closing arguments, trial counsel informed the trial court that Mosley, himself, wanted trial counsel to call Wanda Swearingen, a woman who, according to trial counsel, allegedly told Detective Romano that she observed and played with Jay-Quan in the arms of another black male at about 2:45 p.m., on April 22, 2004. (TR vol. XIX 1941).[10] Ms. Swearingen was on the State's witness list. (TR Vol. XIX 1942). Trial counsel told the trial court that Ms. Swearingen's listed address was around the corner from Ms. Wilkes' house. Despite

[10] At a hearing after trial, the State informed the court that Ms. Swearingen did not report that she saw Jay-Quan in the arms of another black male at about 2:45 on April 22, 2004. What Ms. Swearingen actually said was that she saw a black male with a baby, with whom she played. Ms. Swearingen stated that, after seeing Mosley's picture on the news, she thought the man was John Mosley. The State noted that the evidence showed that Mosley was at work at the time Ms. Swearingen allegedly saw Mosley. As such, the State averred Ms. Swearingen would not have helped Mosley's case because she never identified the baby as Jay-Quan. (TR Vol. XXIII 2504).

this, trial counsel told the court the defense was unable to locate her. There is nothing in the record that shows she was ever served with a subpoena or was even listed on the defense witness list.

Trial counsel announced that Mr. Mosley wanted him to move for a mistrial and a continuance in order to continue their search for Ms. Swearingen. (TR Vol. XIX 1942). The court denied the motions. (TR Vol. XIX 1942).

To prevail on his motion for continuance, the defendant was required to show: (1) prior due diligence to obtain the witness's presence; (2) that substantially favorable testimony would have been forthcoming; (3) that the witness was available and willing to testify; and (4) that the denial of the continuance caused material prejudice. Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996). This Court should affirm because, at the very least, Mosley failed to show prior diligence in seeking to obtain the witness’s presence or that the witness was willing and available to testify.

Mosley waited until each side had rested their case before requesting a continuance to obtain the testimony of a witness. Moreover, Mosley failed to outline any of his efforts to locate the witness except to “pull JEA records and hospital records”, neither of which, on their face, seemed to have any bearing on the ability to locate Ms. Swearingen. There was no evidence

that Mosley sought the assistance of the State or the court to locate or procure the witness's attendance.

Additionally, Mosley failed to present any evidence that Ms. Swearingen was available and willing to testify. Indeed, when asking for the continuance, Mosley made no claim that additional time would allow the defense to locate and procure the witness's presence. Both logic and law must allow a trial judge to deny a continuance to procure the presence of a witness when the defense makes no showing that additional time could actually produce an available and willing witness. Mosley's claim should be denied. Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996) (a judge does not abuse his discretion in denying a motion for a continuance if the party seeking to call the witness does not meet the requirements to prevail on a motion for continuance).

ISSUE V

WHETHER THE TRIAL COURT ERRED IN INCLUDING A VIDEOTAPE OF THE DEFENDANT IN CHAINS, SHACKLES, AND JAIL GARB AMONG THE MATERIALS DELIVERED TO THE JURY ROOM IN VIOLATION OF ITS OWN ORDER.

In this claim, Mosley alleges the trial court improperly allowed a video to be sent to the jury room during its deliberations. The video at issue was a videotape depicting the defendant's "walk over" to the jail.

During the walk-over, a member of the media asked Mosley about his "fifteen year old" accomplice. Mosley replied "What 15 year old?" The reporter then pressed the point, asking "Your accomplice. They said you have an accomplice, a 15 year old accomplice. Is that true?" Mosley replied "I have no idea." (TR Vol. XV 1046).

Trial counsel objected to the tape on several grounds, one of which was that Mosley was in jail garb, handcuffs and shackles. (TR Vol. XV 1047). The court ruled the tape would be admitted into evidence.

To remedy counsel's concerns about the jury seeing Mosley in jail garb, the court ruled that the jury could hear the audio portion of the tape would not be allowed to actually view the tape. The court directed the State to turn the television around or drape it in a manner which would shield Mosley's garb and shackles from the jurors' view. The Court also ruled the

tape would not be sent into the jury room. The Court noted that if, at the conclusion of the trial, the jury wanted to hear it again, they would play it again. It would not be sent back to the jury room. (TR Vol. XV 1051).

Before this Court, Mosley alleges that "[u]nfortunately, it appears that the trial court forgot to remove the television and videotape from the evidence and materials delivered to the jury deliberation room." (IB 59). Mosley does not cite to anywhere in the record that supports his claim the videotape was taken into the deliberation room.

The State can find nothing in the record which supports the notion that the trial judge sent the videotape at issue to the jury room after he ruled that he would not. Instead, the record specifically refutes Mosley's claim.

During a post-trial hearing on Mosley's motion for a new trial, the "walk over" video tape was discussed. (TR Vol. XXVI 2589). In response, the State asserted, and the court agreed, that no television was sent back to the jury room. (TR Vol. XXVI 2589). The court noted that neither the "walk over" tape nor a television was sent back to the jury. (TR Vol. XXVI 2589-2590).

The court went on to state "that tape never went back for them [the jury] to be able to see that, because of my ruling that I made, that they could not see it." (TR Vol. XXVI 2590).

The court noted as well that the jury had not requested to hear the tape again. (TR Vol. XXVI 2590).

This Court should decline Mosley's tacit invitation for this Court to comb the record to find any clue that the trial judge violated his own order. This is especially true since the record refutes any notion that the tape was viewed by the jury during its deliberations.

It is the defendant's burden to show error occurred in the trial court. Goodwin v. State, 751 So. 2d 537 (Fla. 1999) (defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection). By failing to cite to any place in the record on appeal that supports his claim and by simply ignoring a portion of the record that refutes his claim, Mosley failed to bear his burden to show error in the trial court. Id. at 544.

Even if the video had gone back to the jury room, any error would be harmless. Mosley did not stand trial in jail garb, shackles or handcuffs. He does not contend that he did. The most the video would have shown is that, at some point, Mosley was arrested and held in custody for the murder of Lynda Wilkes and Jay-Quan Mosley.

However, it was the defendant, himself, that put evidence before the jury of Mosley's dramatic arrest. During the defense

case in chief, Mosley called Detective Carney to testify. (TR Vol. XVIII 1608- 1620).

Detective Carney told the jury that Mosley was arrested by a SWAT team on May 6, 2004. Mr. Mosley was cooperative. The team surrounded Mosley's house with an overwhelming police presence. They set up around his house, called him out through a bullhorn and told him to come out with nothing in his hands. Mosley was arrested without incident. (TR Vol. XVIII 1608-1620).

Mosley's argument on appeal is that allowing the jury to view a defendant in jail garb burdens the presumption of innocence. However, it was Mosley, himself, who put on evidence that he was arrested for the murder of Lynda Wilkes and Jay-Quan Mosley by a SWAT team. As such, Mosley cannot show that a brief view of his jail garb and shackles, if it even occurred, denied him of a fair trial.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN EFFECTIVELY RULING THAT A DOUBLE MURDER CONSTITUTES A "PRIOR VIOLENT FELONY" FOR THE PURPOSE OF FLORIDA'S CAPITAL SENTENCING STATUTE.

In this claim, Mosley alleges it was improper for the trial court to find that Mosley was previously convicted of a violent felony because the murders occurred almost simultaneously. Mosley avers that under these circumstances there is no previous conviction. Mosley contends there was insufficient evidence whether the child or mother died first. (IB 63). This claim is appropriately denied.[11]

Section 921.141(5)(b), Florida Statutes, provides the following as a statutory aggravating circumstance: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." This Court has repeatedly held that when a defendant is convicted of multiple murders, arising from the same criminal episode, the contemporaneous conviction as to one victim supports a finding of the prior violent felony aggravator as to

[11] Mosley appears to also argue that it is improper to automatically apply the "previous violent felony" aggravator in a double murder case. (IB 61). Nothing in the record suggests that the trial court applied the aggravator automatically or excused the prosecution from proving the aggravator beyond a reasonable doubt. As such, the real issue before this Court is whether the evidence and case law support the trial judge's finding, based on Mosley's conviction for the murder of Lynda Wilkes, that Mosley had previously been convicted of a violent felony. It clearly does.

the murder of another victim. Bevel v. State, 33 Fla. L. Weekly S 202 (Fla. March 20, 2008). *See also* Winkles v. State, 894 So. 2d 842, 846 (Fla. 2005) (finding that each murder in the indictment to which defendant pled guilty constituted a prior violent felony conviction as to the other murder conviction); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (noting that one of the aggravating factors found was prior violent felony based on the contemporaneous murders of the two victims); Francis v. State, 808 So. 2d 110, 136 (Fla. 2001) (finding that trial court correctly found that murder conviction as to one victim aggravated the murder conviction as to other victim, and vice versa).

The evidence at trial supported a finding by the trial court that Mosley murdered both Lynda Wilkes and Jay-Quan Mosley in the same criminal episode. Accordingly, there is competent substantial evidence to support the trial court's finding that Mosley was previously convicted of a violent felony, in particular, the murder of Lynda Wilkes.

ISSUE VII

WHETHER THE TRIAL JUDGE ERRED IN DENYING THE DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PROVE ITS CASE BEYOND A REASONABLE DOUBT.

In his seventh claim, Mosley alleges the trial court was obligated to grant his motion for a judgment of acquittal

because the defendant had a reasonable hypothesis of innocence that the State did not overcome. (IB 65). According to Mosley, the defendant had alibis for the crimes and the case was entirely circumstantial save, of course, for an eyewitness. (IB 65).[12]

The standard of review is *de novo*. McDuffie v. State, 970 So. 2d 312, 332 (Fla. 2007). In conducting its review, this Court must consider the evidence and all reasonable inferences from the evidence in a light most favorable to the State. Id.

Ordinarily, a trial court properly denies a motion for judgment of acquittal if the conviction is supported by competent, substantial evidence. Baugh v. State, 961 So. 2d 198, 204 (Fla. 2007).[13] There is sufficient evidence to sustain a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the

[12] Mosley suggests that the fact the State had an eyewitness in this case does not defeat his argument that this case is entirely circumstantial because the eyewitness's credibility was "inherently suspect." Moreover, he notes that Mosley had "alibis" for the time of the murder. However, conflicts in the evidence and credibility of the witnesses have to be resolved by the jury. A trial judge cannot grant a motion for judgment of acquittal based on evidentiary conflict or witness credibility. Sapp v. State, 913 So. 2d 1220, 1223 (Fla. 4th DCA 2005)(citing to Hitchcock v. State, 413 So. 2d 741, 745 (Fla. 1982)).

[13] Direct evidence is that to which the witness testifies of his own knowledge as to the facts at issue. Circumstantial evidence is proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist." Davis v. State, 90 So. 2d 629, 631 (Fla. 1956).

existence of the elements of the crime beyond a reasonable doubt. Banks v. State, 732 So. 2d 1065 (Fla. 1999).

In a case consisting entirely of circumstantial evidence, however, a motion for judgment of acquittal should be granted if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Orme v. State, 677 So. 2d 258, 262 (Fla. 1996). In meeting its burden, the State is not required to "rebut conclusively, every possible variation of events" which could be inferred from the evidence, but must introduce competent evidence which is inconsistent with the defendant's theory of events. Darling v. State, 808 So. 2d 145, 155-156 (Fla. 2002). Once the State meets this threshold burden, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. Id.

While Mosley does not directly say so, his argument centers on the notion that this is a case consisting entirely of circumstantial evidence.[14] (IB 65). Contrary to Mosley's contention, this is not a circumstantial evidence case.

[14] While Mosley does not cite to any supporting case law, Mosley claims a JOA should have been granted because the defendant had a reasonable hypothesis of innocence that the State did not overcome. (IB 65). Accordingly, without directly saying so, Mosley seems to be arguing that this case is entirely circumstantial.

The State presented the testimony of an eyewitness, Bernard Griffin, who saw Mosley kill Lynda Wilkes and Jay-Quan Mosley. The same witness saw Mosley dump the bodies and burn Lynda Wilkes' body beyond recognition. A case is not entirely circumstantial when there is an eyewitness to the murder. Larkins v. State, 655 So. 2d 95, 95 (Fla. 1995). *See also* Fitzpatrick v. State, 900 So. 2d 495, 506 (Fla. 2005) (noting that the special standard of review applicable to circumstantial evidence cases did not apply because the State presented direct evidence in the form of eyewitness testimony.").

The State also introduced DNA evidence to demonstrate that Linda's blood was found in Mosley's Suburban. When the State introduces DNA evidence linking the defendant to the murder, the case is not entirely circumstantial. Fitzpatrick v. State, 900 So. 2d 495, 506 (Fla. 2005) (finding the case was not wholly circumstantial because the State presented direct evidence in the form of DNA evidence and eyewitness testimony.").

Given that this is a case in which the State presented direct evidence that Mosley killed Linda Wilkes and Jay-Quan Mosley, this Court does not have to determine whether the State introduced evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Instead, the sole determination this Court must make is whether there was competent, substantial evidence for the jury to make such a

determination. *See* Darling, 808 So. 2d at 156. There clearly was.

As outlined, in detail, in the statement of facts, the State presented competent, substantial evidence to support the convictions. Bernard Griffin testified Mosley planned the murders well in advance. Griffin told the jury he witnessed the murders and was present when Mosley burned Lynda Wilkes' body and dumped the garbage bag containing Jay-Quan's body in a Dumpster in Ocala, Florida. A medical examiner testified that given Bernard Griffin's description of how Mosley placed Jay-Quan in a sealed black garbage bag, Jay-Quan would have died very quickly. Telephone records place Mosley enroute to Ocala, Florida on the night that Griffin told the jury Mosley dumped the bodies. The State presented evidence of Mosley's motive, opportunity, and ability to carry out the murders.

The State clearly introduced competent, substantial evidence from which a rational finder of fact could find Mosley guilty of two premeditated murders beyond a reasonable doubt. This Court should deny Mosley's claim. Banks v. State, 732 So. 2d 1065 (Fla. 1999)(there is sufficient evidence to sustain a conviction 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).

ISSUE VIII

WHETHER THE TRIAL JUDGE ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE THE GUILTY VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

The standard of review for this issue is an abuse of discretion. Stephens v. State, 787 So. 2d 747 (Fla. 2001). In order to demonstrate an abuse of discretion, the non-prevailing party must establish that no reasonable person would take the view adopted by the trial court. *See* Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

This claim may be denied for two reasons. First, it was not preserved for review. None of the arguments that Mosley presents on appeal were raised in Mosley's motion for a new trial. Instead, Mosley's argument for a new trial on the grounds that the verdict was contrary to the weight of the evidence consists of one sentence: "The verdict is contrary to the weight of the evidence." (TR Vol. V 907). Such a bare bones motion does not preserve this issue for appeal. Stephens v. State, 787 So. 2d 747 (Fla. 2001).

This Court may also deny this claim because Mosley failed to show the trial court abused his discretion. Mosley is simply incorrect when he alleges that the State's case rested "almost completely" on the testimony of Bernard Griffin. While Bernard Griffin did provide key eyewitness testimony, the State

introduced much evidence that corroborated Bernard Griffin's testimony, evidenced Mosley's consciousness of guilt, and detailed Mosley's failed attempt to cover up his crimes.

Mosley has failed to show the trial judge abused his discretion in denying his motion for a new trial. This Court should reject Mosley's claim.

ISSUE IX

WHETHER THE TRIAL JUDGE ERRED IN DENYING THE DEFENDANT'S REQUEST FOR THE STANDARD JURY INSTRUCTION WHICH CONCERNS PRESSURE OR THREAT AGAINST A WITNESS.

In this claim, Mosley alleges the trial judge erred in denying Mosley's request for the standard jury instruction which concerns pressure or threat against a witness. (IB 71). In support of his claim, Mosley points to volume 17, page 1595-1596 of the record of trial where the defense requested the instruction and the court denied the request. (IB 71). Mosley alleges it was error to deny the instruction because the "failure to give this instruction was indeed 'prejudicial to the point of causing a miscarriage of justice.'" (IB 72).

This Court need not look to any of the cases cited to in Mosley's brief to resolve this claim. Instead, this Court need only look to the record.

This is so, because the trial judge, at the request of the prosecutor, reconsidered defense counsel's request to give the

standard instruction concerning pressure or threat against a witness and granted the defense counsel's request. (TR Vol. XIX 2097). The jury was instructed that in determining the reliability of a witness, it could consider, *inter alia*, "[h]as there been any pressure of threat used against the witness that affected the truth of the witness's testimony." (TR Vol. XIX 2116).

It is axiomatic that this Court cannot find error because of the failure of a trial judge to give a requested instruction when the record demonstrates, unequivocally, that the requested instruction was actually given. This claim should be denied.

ISSUE X

WHETHER FLORIDA'S DEATH PENALTY SCHEME VIOLATES DUE PROCESS, THE SIXTH AMENDMENT, AND THE DICTATES OF RING V. ARIZONA AND ITS PROGENY.

In his tenth claim, Mosley avers that Florida's capital sentencing scheme violates due process, the Sixth Amendment and the United States' Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002). Mosley points to several aspects of Florida's capital sentencing statute about which he takes issue.

Mosley first alleges that Florida's capital sentencing statute violates the dictates of Ring because Ring requires the aggravators to be charged in the indictment and proven beyond a reasonable doubt. (IB 77) This Court has consistently held

that Ring does not require that aggravating circumstances be charged in the indictment. Blackwelder v. State, 851 So. 2d 650, 654 (Fla. 2003). *See also* Porter v. Crosby, 840 So. 2d 981 (Fla. 2003).

Next, Mosley alleges that Ring and its progeny demand that the jury, and not the judge, make the necessary findings of fact to determine eligibility for the death penalty, as well as the ultimate question of whether death shall be imposed. (IB 77).

Mosley's claim must fail because, in his case, death eligibility was determined by the jury, unanimously, beyond a reasonable doubt, when it found Mosley guilty of the contemporaneous murder of Lynda Wilkes. Doorbal v. State, 837 So. 2d 940, 963 (Fla.2003)(rejecting Ring challenge when defendant was charged and convicted of contemporaneous crimes by unanimous jury). Moreover, as noted in Frances v. State, 970 So. 2d 806, 822 (Fla. 2007), this Court has rejected a similar Ring claim in over 50 cases.

Mosley also claims that Florida's capital sentencing statute is constitutionally infirm because Florida does not require a special interrogatory verdict form requiring jurors to identify which aggravators they found to exist beyond a reasonable doubt and the vote as to each aggravator. (IB 77). Mosley cites to State v. Steele, 921 So. 2d 538 (Fla. 2005) in support of his claim. (IB 77).

However, in Steele, a majority of this Court ruled that a trial court departs from the essential requirements of law, in a death penalty case, by using a penalty phase special verdict form that details the jurors' determination of the applicable aggravating factors. State v. Steele, 921 So. 2d at 540. The trial court's denial of Mosley's request for a special verdict form was in accord with established case law of this State.

Mosley next alleges the Sixth Amendment requires juries to unanimously find the existence of aggravating factors and to unanimously recommend that death be imposed. (IB 78) This same claim was rejected by this Court in Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) (rejecting Frances' argument that Ring requires a unanimous death recommendation or the jurors to find the aggravating circumstances unanimously). *See also* Coday v. State, 946 So. 2d 988 (Fla. 2006)("This Court has repeatedly held that it is not unconstitutional for a jury to be allowed to recommend death on a simple majority vote".).

Mosley also alleges that the standard penalty phase jury instructions unconstitutionally shift the burden to the defendant to show that life is the appropriate sentence. Mosley also complains the instructions result in a presumption of death. (IB 78).

This Court has already rejected the same claims Mosley presents here. This Court has repeatedly rejected the argument

the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence. Williams v. State, 967 So. 2d 735, 761 (Fla. 2007). *See also* Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005) (rejecting the claim that the standard jury instructions impermissibly shift the burden to the defendant to prove that death is not the appropriate sentence). This Court has also repeatedly rejected the notion that the standard penalty phase jury instruction creates a presumption of death. Walton v. State, 847 So. 2d 438, 444 (Fla. 2003) ("Walton's claims relating to the constitutionality of Florida's death penalty scheme - that Florida's death penalty statute shifts the burden to the capital defendant during the penalty phase, presumes that death is the appropriate punishment and imposes an unconstitutional "automatic aggravator" when a defendant is prosecuted under a theory of felony murder--have been rejected by this Court numerous times and are entirely devoid of merit.")

Next, Mosley argues that Florida's standard penalty phase instructions are unconstitutionally vague because they fail to provide proper guidance on the weighing process. Mosley also claims the instructions are vague because they do not sufficiently define each of the aggravating factors. Mosley does not point to any particular aggravating factor instruction he believes is not sufficiently defined.

In any event, this Court has consistently rejected this claim as well. Proffitt v. Florida, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (upholding constitutionality of Florida's death penalty statute against multiple challenges, including challenge based on vagueness and overbreadth of aggravating and mitigating circumstances and the lack of guidance for the jury in weighing such factors).

Finally, Mosley alleges that Florida's capital sentencing scheme is unconstitutional because it: (1) does not have independent reweighing of aggravating and mitigating factor as required by Proffitt v. Florida, (2) violates due process by being the only state in the nation to allow the death penalty to be imposed by a majority vote, and (3) fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment. Mosley's claims have been consistently rejected by this Court. Miller v. State, 926 So. 2d 1243, 1260 (Fla. 2006) (finding these same claims to be without merit).

In any event, Mosley's sentence of death satisfied the requirements of the Sixth Amendment and the dictates of Ring because one of the aggravating factors found to exist was that Mosley had previously been convicted of a violent felony, specifically the contemporaneous murder of Lynda Wilkes. This Court has consistently held that Ring will not act to disturb a

death sentence when one of the aggravating circumstances is a "prior violent felony" conviction. Bevel v. State, 33 Fla. L. Weekly S 202 (Fla. Mar. 20, 2008) (denying Ring challenge when one of the aggravating factors found to exist was a prior violent felony, specifically the contemporaneous murder of a second victim). This Court should reject Mosley's tenth claim.

ISSUE XI

WHETHER THIS COURT'S COMPARATIVE PROPORTIONALITY REVIEW OF DEATH SENTENCES IS UNCONSTITUTIONAL.

Mosley alleges this Court's proportionality review in every capital case is constitutionally infirm because this Court limits its proportionality review to cases in Florida where a death sentence has been imposed. Mosley suggests, instead, that this Court should include a review of cases, in every state and federal court, in which a death sentence has been imposed, in which the death penalty was sought but not imposed, and in which the death penalty could have been sought, but was not.

Mosley argues that the failure to engage in this multifaceted analysis deprives every capital defendant of a meaningful proportionality review, denies due process, results in "unusual" punishments in derogation of article I, Section 17 of the Florida Constitution and creates the risk that the imposition of the sentence will be arbitrary. (IB 84-85). Mosley claims that the "Constitution does not stop at the state

line." (IB 84). In support of his position, Mosley cites to the September 2006, ABA report and this Court's decision in Simmons v. State, 934 So. 2d 1100, 1122 (Fla. 2006).[15]

Mosley has presented no convincing argument or persuasive authority that should persuade this court to ignore decades of its own precedent. For instance, while Mosley cites to the ABA report to support his claim, this Court has consistently held that there is nothing in the report that would cause this Court to recede from its past decisions upholding the facial constitutionality of the death penalty. Rutherford v. State, 940 So. 2d 1112 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006); Diaz v. State, 945 So. 2d 1136, 1146 (Fla. 2006).

Likewise, while Mosley implies that this Court's holding in Simmons v. State, 934 So. 2d 1100 (Fla. 2006) renders this Court's current proportionality review unconstitutional, nothing in Simmons requires this Court's proportionality review to include cases where the death sentence was neither sought nor imposed. Certainly, Simmons provides no support for the notion

[15] This Court in Simmons v. State, 934 So. 2d 1100, 1122 (Fla. 2006) set forth the standard for determining whether death is a proportionate penalty as requiring a consideration of the totality of the circumstances of the case and a comparison of the case with other capital cases. "However, this proportionality review is not a comparison between the number of aggravating and mitigating circumstances." Id. at 1122 (quotations omitted).

that this Court must examine every death case and potential death case from every state and federal court in the nation. In Simmons, this Court held:

> The Court performs a proportionality review to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution. See Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). "The death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.'" Clark v. State, 609 So. 2d 513, 516 (Fla. 1992) (quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973)). In deciding whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases.

Simmons v. State, 934 So. 2d 1100, 1122 (Fla. 2006). As is clear from the language of Simmons, this Court looks properly only to other capital cases in Florida when conducting its proportionality review.

Finally, Mosley's argument that the "Constitution does not stop at the state line" ignores the settled law holding that proportionality review is not constitutionally required in the first place.[16] Pulley v. Harris, 465 U.S. 37 (1984); Barbour v. Haley, 471 F.3d 1222, 1231 (11th Cir. 2006); Garcia v. State, 492 So. 2d 360, 368 (Fla. 1986); State v. Henry, 456 So. 2d 466, 469 (Fla. 1984).[17] Mosley's claim should be denied.

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[16] To the extent that Mosley relies on a Fourth DCA case and a California case on pages 86-87 of his brief, those cases are clearly distinguishable from the extreme facts of this case.

[17] While Mosley acknowledges that the United State Supreme Court in *Pulley v. Harris*, 465 U.S. 37 (1984) has determined that a comparative proportionality review is not constitutionally

ISSUE XII

WHETHER THE DEFENDANT'S DEATH SENTENCE FOR THE MURDER OF JAY-QUAN MOSLEY WAS DISPROPORTIONATE.

In his twelfth issue on appeal, Mosley argues his death sentence is disproportionate. In deciding whether death is a proportionate penalty, this Court considers the totality of the circumstances of the case and compares the case with other capital cases. See Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Guiding this Court's proportionality review, in every case, is the notion that the death penalty is reserved for the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973).

In the instant case, death is a proportionate sentence. The evidence in this case clearly supports a finding the death of Jay-Quan Mosley at the hands of John Mosley is one of the most aggravated and least mitigated of cases.

In support of his claim, Mosley alleges the evidence presented in mitigation coupled with the 8-4 vote for death render his death sentence disproportionate. (IB 90). Mosley points out that prior to the murders, he lived a law abiding

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required, Mosley suggests that this decision should be overruled. Respectfully, this Court has no authority to overrule a decision of the United States Supreme Court. Marshall v. Crosby, 911 So. 2d 1129, 1135 (Fla. 2005); Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001).

life and these "few minutes" of April 22, 2004 "are in aberration in the defendant's life and character." (IB 90).

In sentencing Mosley to death, the trial court found four aggravating factors had been proven beyond a reasonable doubt: (1) the victim was under the age of 12 when he was murdered (great weight), (2) the murder was cold, calculated, and premeditated (great weight), (3) the murder was committed for financial gain (great weight), (4) the defendant has previously been convicted of a violent felony, specifically the murder of Lynda Wilkes (great weight). (TR Vol. VI 979-984). On appeal, Mosley does not challenge the sufficiency of the evidence as to any of the four aggravators found by the trial court.[18]

In mitigation, the trial court found no statutory mitigators. (PCR Vol. VI 984). The trial judge considered thirty one non-statutory mitigators offered by trial counsel for the court's consideration before sentencing and assigned weight to each one. (TR Vol. VI 984-993). On appeal, Mosley makes no challenge to the trial court's consideration of the offered mitigation or the weight given to each non-statutory mitigator.

The trial court found the aggravators far outweighed the mitigating circumstances. The trial court also found that death

[18] In his sixth claim on appeal, Mosley raised a legal challenge to application of the prior violent felony aggravator in cases where a contemporaneous murder forms the basis for the aggravator, and the order of death cannot be determined.

is the appropriate penalty for Jay-Quan's murder. On June 30, 2006, the trial court sentenced Mosley to life in prison for the murder of Lynda Wilkes and to death for the murder of Jay-Quan Mosley. (TR Vol. VI 994).

In making his argument that Mosley's death sentence is disproportionate, Mosley cites to only one case. He asks this Court to compare the instant case to Johnson v. State, 720 So. 2d 232, 238 (Fla. 1998). (IB 90). In Johnson, this Court reversed Johnson's death sentence, finding that under the circumstances, death was not a proportionate sentence.

The instant case bears not the slightest resemblance to the Johnson case. In Johnson, the defendant was twenty-two years old at the time of the murder. Mosley was just four months short of his 40th birthday. (TR Vol. I 1).

In Johnson, the trial court gave substantial weight to at least one of Johnson's mitigators. In Mosley's case, the trial court gave substantial weight to none of the mitigation offered, some weight to nine mitigating circumstances and little to no weight to the rest.

In Johnson, the court did not find the murder was cold, calculated, and premeditated. Here, the court found that Jay-Quan's murder was cold, calculated and premeditated. Indeed, the Court found the murders had been planned for several days if not a few weeks. (TR Vol. VI 980-981). This Court has noted

that CCP is one of the most weighty aggravators in Florida. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) (noting that CCP is one of the most serious aggravators set out in the statutory sentencing scheme).

In Johnson, the evidence demonstrated that the murder of one man and the attempted murder of another occurred during a robbery allegedly precipitated by some sort of debt owed by the victims. Mosley murdered two victims who were helpless; one because she was taken completely by surprise by Mosley's attack and the other, because he was just ten months old when Mosley stuffed him into a garbage bag, sealed the top, and threw him in Mosley's suburban to suffocate to death.

While Johnson is not a proper "comparator", there are cases to which this Court can look in deciding whether Mosley's sentence to death is proportionate. For instance in Carter v. State, 980 So. 2d 433 (Fla. 2008), this Court affirmed two death sentences when Carter planned and then executed the murder of his former girlfriend, Elizabeth Reed and her new boyfriend, Glenn Pafford. Carter also murdered Reed's eldest daughter, Courtney, when she awoke, went into the living room, and saw Carter holding a gun. The jury recommended death for the murder of Glenn Pafford by a vote of 9-3, death for the murder of Elizabeth Reed by a vote of 8-4, and life in prison for Courtney's murder, most likely because the jury concluded that

Carter did not enter Reed's home with the intent to kill Courtney.

The trial court found three aggravators, each of which was afforded great weight: (1) Carter was previously convicted of a capital offense (the other two contemporaneous murders); (2) the murders were committed while engaged in the commission of a burglary; and (3) the murders were cold, calculated, and premeditated (CCP). The court found no statutory mitigators and seventeen nonstatutory mitigators.[19] The court accorded all seventeen of the nonstatutory mitigators "some" weight.

This Court found Carter's sentence proportionate. This case is strikingly similar to Carter. In Carter, this Court

[19] The Court found in non-statutory mitigation that: (1) Carter was raised in a broken home; (2) Carter was an above-average achiever in high school and college; (3) Carter was president of a club that helped others at Oklahoma State University; (4) Carter had a distinguished military record in the United States Air Force for almost four years; (5) Carter was a good employee with supervising responsibilities and had a consistent work record from a young age; (6) Carter was a good son with the strength to reconcile with his father, who abandoned him; (7) Carter was a good brother who protected his sister during her early years; (8) Carter saved a child's life while working as a lifeguard; (9) Carter was a loyal friend who made friends easily; (10) Carter had a close relationship with his nephew, Jacob; (11) Carter worked for a living in Kentucky while avoiding the police; (12) Carter demonstrated potential to be a productive inmate while in Duval County Jail; (13) Carter had the support of family and friends; (14) society can be protected by life sentences without parole; (15) Carter offered to plead guilty for three consecutive life sentences; (16) Carter resisted adopting the racist traits of his father and has had positive race relations throughout his life; and (17) Carter had a good relationship with Reed and her children prior to the murders. Carter v. State, 980 So.2d 433 (Fla. 2008).

found that the murder was a cold blooded, premeditated multiple murder. In the instant case, Mosley planned the murder of his paramour and his ten month old son for days if not weeks. (TR Vol. VI 980-981).

In Carter, the court found no statutory or mental mitigation and the same is true in the case at bar. Carter's non-statutory mitigation included a difficult childhood, service in the Air Force and a good employment record, all of which practically mirror the non-statutory mitigation in Mosley. Carter committed a domestic murder as did Mosley. As was the case in Carter, the evidence refutes any notion that Mosley killed his lover and his young son in the heat of a domestic dispute.

Like Pinkney Carter, Mosley planned the murder, equipped himself with the tools he needed to effect his plan, and carried out his plan with deadly efficiency. This Court should affirm. *See also* Lynch v. State, 841 So. 2d 362 (Fla. 2003); (death sentence proportionate for the planned double murder of a mother and child when court found one statutory mitigator and eight non-statutory mitigators); Dennis v. State, 817 So. 2d 741 (Fla. 2002) (death proportionate for murder of former girlfriend and new boyfriend, despite extreme emotional disturbance, when court found the murders were CCP); Way v. State, 760 So. 2d 903 (Fla. 2000) (death sentence proportionate when 38 year old defendant

murdered his wife and 15 year old daughter and court found three aggravating factors, two statutory mitigatators and six non-statutory including difficult childhood, military service, good employment record, peaceful character, hearing and mental impairments; and good behavior in prison); Lindsey v. State, 636 So. 2d 1327 (Fla. 1994) (death sentence proportionate when 65 year old defendant murdered his former girlfriend and her brother); Porter v. State, 564 So. 2d 1060 (Fla. 1990)(death sentence proportionate when Porter murdered his ex-girlfriend and her lover and facts of crime demonstrated the murders were cold-blooded premeditated double murder).

This Court has upheld similar murders on proportionality grounds and should do the same for the cold-blooded and senseless murder of Jay-Quan Mosley. Mosley's twelfth claim on appeal should be denied.

ISSUE XIII

WHETHER LETHAL INJECTION IN FLORIDA IS UNCONSTIUTIONAL.

In his final claim, Mosley alleges that lethal injection is unconstitutional. (IB 91). Mosley bases his constitutional challenge on two grounds. First, Mosley claims that execution by lethal injection is *per se* unconstitutional. Second, Mosley challenges the current Department of Correction Lethal Injection Protocols on Eighth Amendment grounds.

Mosley alleges he properly preserved this issue for appeal and points to volume 5, page 957 of the record of trial. (IB 91). Mosley, at least in part, is mistaken.

In his motion below, Mosley did not raise a *per se* challenge to lethal injection. (TR Vol. V 957-959). Instead, Mosley challenged only the three drug protocol used by the Department of Corrections to carry out an execution by lethal injection.

This Court's jurisprudence is clear. A party must present the same specific question to both the trial court and appellate court for review. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."); Woods v. State, 733 So. 2d 980, 984 (Fla. 1999); Archer v. State, 613 So. 2d 446, 448 (Fla. 1993). As Mosley failed to raise a *per se* challenge in his motion to the trial court, Mosley failed to preserve this claim for appeal.

Mosley did preserve his claim that the current three drug protocol violates the proscription against cruel and unusual punishment. This Court's decision in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007) precludes relief. This Court, in both Lightbourne and Schwab v. State, 973 So. 2d 427 (Fla. 2007) ruled that Florida's lethal injection procedures do not violate

the Eighth Amendment. Moreover, on April 16, 2008, the United States Supreme Court, in Baze v. Rees, 128 S.Ct. 1520, 170 L.Ed.2d 420, 2008 U.S. LEXIS 3476, 76 U.S.L.W. 4199 (2008) concluded that Kentucky's three drug protocol, a protocol that essentially mirrors Florida's protocols, did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Mosley's claim should be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Mosley's convictions and sentence to death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ryan Thomas Truskoski, P.O. Box 568005, Orlando, Florida 32856-8005 this 10th day of July 2008.

/s/ Meredith Charbula

_____
MEREDITH CHARBULA
Assistant Attorney General

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.

/s/ Meredith Charbula

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MEREDITH CHARBULA
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