IN THE SUPREME COURT OF FLORIDA

WILLIE H. NOWELL,
Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

Case No. SC06-276

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #410519
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE

Michelle Gill and her unborn child were killed on June 15, 2002. The child's father, Kelvis Smith, was shot two times in the face, but survived. (V3, R422-23).[1] Smith identified Nowell and Jermaine Bellamy as the shooters. (V3, R423). Nowell was arrested on June 21, 2002. (V3, R427). On July 16, 2002, Nowell and Bellamy were indicted on the following:

(1) First Degree Premeditated Murder;

(2) Attempted First Degree Premeditated Murder;

(3) Killing of an Unborn Child by Injury to Mother;

(4) Armed Burglary of a Structure While Inflicting Great Bodily Harm or Death;

(5) Robbery with a Firearm While Inflicting Great Bodily Harm or Death;

(6) Kidnapping While Inflicting Great Bodily Harm or Death;

(7) Kidnapping While Inflicting Great Bodily Harm or Death;

(8) Grand Theft of a Motor Vehicle;

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[1] The record on appeal begins with the number "1" at three different places: (1) the pleadings, hearings, and depositions; (2) the trial; and (3) the penalty phase. Cites to the pleadings, hearings, and depositions will be by volume number followed by "R" and the page number, i.e. "V_, R__." Cites to the trial transcript will be by volume number followed by "TT" and the page number, i.e., "V_, TT__." Cites to the penalty phase will be by volume number followed by "PPh," i.e., "V_, PPh__."

(9) Possession of Firearm by Convicted Felon (Bellamy);

(10) Possession of Firearm by Convicted Felon (Nowell).

(V3, R440-443). Bellamy's trial was severed from Nowell's. (V10, R1607-09). Addtionally, Counts 10 was severed Nowell's trial, and was dismissed when Nowell later pled to other pending charges and violations of probation. (V15, R2399).

On August 25, 2005, the trial court held a hearing on all pre-trial motions. The first motions addressed were seven motions challenging the constitutionality of sections of the death penalty. (V1, R9-12). The motions were denied. (V1, R12-13).

Nowell moved to exclude identification evidence. (V10, R1643-46). After an extensive hearing and argument, the motion was denied, and the trial judge made detailed findings. (V2, R195; V12, R1895-99).[2]

[2] Testimony at pre-trial hearing on identification of Nowell by victim Smith. The videotaped testimony of victim Kelvis Smith had been transcribed February 23, 2004, and was accepted by the trial court. (V1, R16). Defense counsel argued that Smith's identification, which had been made from a hospital bed in intensive care, was tainted by the officers saying Nowell's name before it was clearly understood that was the name Smith was signing (he was using sign language to communicate). (V1, R18). Because Smith was a suspect in a prior shooting of Nowell, the detectives had knowledge of the relationship between the two, and allegedly tainted Smith's identification. (V1, R18). Kelvis Smith and Detective Santiago testified at the hearing. (V1, R61-130; 131-153).

Nowell also moved to exclude evidence that Nowell and the co-defendant, Bellamy, had been shot two months prior to the murders in the present case, and that victim Smith was a suspect. (V11, R1681-82). After argument during the pre-trial hearings, the trial judge denied the defense motion. (V2, R208-214; V12, R1892-94).

Jury selection began on September 25, 2005. (V12, R1902). The trial proceeded, and the jury returned verdicts of guilty as charged on all counts on October 7, 2005. (V14, R2241-2253; V17-31). Nowell filed a Motion for New Trial. (V14, R2275-77).

The penalty phase began October 17, 2005. (V14, R2284; V32-35). The jury recommended a sentence of death by a margin of seven to five (7-5). (V14, R2323). Nowell filed a motion for new penalty phase. (V14, R2329-31).

The *Spencer* hearing was held December 12, 2005. (V2, R243-337).

Nowell filed a Motion for New Trial on October 13, 2005, and a Motion for New Penalty Phase on October 28, 2005. (V14, R2278-79, R2358-59). A hearing on both motions was held January 18, 2006. (V3, R339-381). The sentencing hearing was January 31, 2006. (V3, R382-421). The motions were denied. (V3, R379; V14, R2358-59). Nowell was sentenced to death for the murder of Michelle Gill. (V15, R2377-2391). He was also sentenced to life

imprisonments on Count II, Attempted First Degree Premeditated Murder; Count IV Armed Burglary of a Structure while Inflicting Great Bodily Harm or Death; Count V, Robbery with a Firearm While Inflicting Great Bodily Harm or Death; Count VI, Kidnapping While Inflicting Great Bodily Harm or Death; and Count VII, Kidnapping While Inflicting Great Bodily Harm or Death. (V15, R2365). Nowell was sentenced to fifteen (15) years on Count III, Killing of an Unborn Child by Injury to Mother. (V15, R2366), and five (5) years on Count VIII, Grand Theft of a Motor Vehicle. (V14, R2367). All sentences were consecutive.

In the sentencing order for the murder, the trial judge found four (4) aggravating circumstances:

> (1) Prior violent felony: 1994 Aggravated Battery with a Deadly Weapon: given moderate weight;
>
> (2) During a robbery or kidnapping: the jury found Nowell guilty of both: given great weight;
>
> (3) Committed to avoid or prevent arrest: given great weight;
>
> (4) Cold, calculated and premeditated: given great weight.

(V15, R2379-2383).

The trial judge found three statutory mitigating circumstances:

> (1) Extreme mental or emotional disturbance: given little weight;

(2) Inability to appreciate the criminality of conduct: given little weight;

(3) Age: age of 26 given little weight.

(V15, R2383-2385).

The trial judge found several non-statutory mitigating circumstances:

(1) Alcohol or drug problem: very little weight;

(2) Capacity for rehabilitation: very little weight;

(3) Surrendered to authorities: very little weight;

(4) Defendant is a good son and good friend: very little weight;

(5) Removed at early age from mother and raised in foster; raised by mother and step-father; victim of neglect: some weight;

(6) Suffered traumatic incident as victim of assault; sexually abused: some weight;

(7) Good employee: some weight;

(8) Received no mental health treatment: very little weight;

(9) Behaved at trial: very little weight;

(10) Will adjust to prison: little weight;

(11) Good behavior in jail: little weight;

(12) Involved in religious activities at young age: very little weight;

(13) Family and friends love him: very little weight;

(14) May have been exposed to negative influences: some weight;

(15) Society protected by sentence of life imprisonment: very little weight.

(V15, R2385-2389). Several other non-statutory mitigating factors were recognized by the trial judge but were not proven by the greater weight of the evidence.

STATEMENT OF THE FACTS

Kelvis Smith and Michelle Gill were a couple for almost eight years. (V22, TT986-87). They started living together six months after they met. (V22, TT988). Gill was pregnant with Smith's child. On June 15, 2002, Gill was seven and one half months pregnant. (V22, TT988). The couple had been living together on Hampton Drive for just over a year. (V22, TT988).

On June 14, 2002, Gill was working at Ryan's Steakhouse. (V22, TT992). She asked Smith to pick her up at 10:00 p.m. (V22, TT993). Smith borrowed his cousin's truck and picked her up at a friend's apartment. (V22, TT994, 996). They went straight home. (V22, TT997). Upon arriving, Michelle Gill went into the house first. (V22, TT998). When Smith entered the home, he saw

> two gentlemen in my house. Michelle was sitting in the floor. One gentleman had a gun pointed at her. The defendant ... pulled a gun right on me.

(V22, TT1000). The bedrooms had been "ransacked." He "never, never" kept the rooms like that. (V22, TT999). He recognized both men as Willie Nowell and Jermaine Bellamy as they were not wearing any type of mask. (V22, TT1000). Both Nowell and Bellamy were wearing gloves. (V22, TT1001). Nowell had a .45 caliber pistol in his hand. Smith recognized the caliber as "I seen a lot of guns" and guns were common in his neighborhood. (V22, TT1002). Bellamy was holding either a .32 or .38 revolver. (V22,

TT1003). Nowell held a gun on Smith as Smith looked him "right in his face." (V22, TT1021). Nowell instructed Smith to lie down, face first, in the living room. Nowell proceeded to tie up Smith with a cable cord. (V22, TT1004, 1007). With Michelle's back against the wall, Bellamy pointed his gun at her. (V22, TT1005). Nowell told Smith, he "never thought he be in my house waiting for me." (V22, TT1004). Nowell helped lift Smith. He took Smith's cell phone, wallet and car keys. (V22, TT1006-1008). Smith had $800.00 in his wallet. He had recently pawned his jewelry because he needed money. (V22, TT1008). Nowell asked Smith what was in the safe in his bedroom closet. The safe contained important paperwork and business checks. (V22, TT1011, 1012).

When Smith found out Michelle was pregnant, he decided to "change my life." He had been selling drugs, so he stared a lawn business. (V22, TT1009). Michelle smoked marijuana (prior to her pregnancy) and cigarettes. Smith asked Gill not to smoke cigarettes during the pregnancy; Gill did not smoke in his presence. (V22, TT1009-1010).

Nowell made Smith walk to the bedroom and open the safe. (V22, TT1014). The safe was empty. (V22, TT1015). Nowell and co-defendant Bellamy never removed their gloves. Nowell told Smith, "I can kill you right now. I'm wearing gloves. I touched

nothing. I did nothing." (V22, TT1015). Nowell escorted Smith to the kitchen area, then lit a cigarette and sat on a stool. (V22, TT1016, 1025). Smith asked Nowell what was going on. Nowell told him he believed that Smith had shot him. Smith told Nowell he had not shot him and Nowell knew it. (V22, TT1018, 1022). Smith had heard "through the streets" that Nowell and Bellamy had been shot. (V22, TT1019). Smith did not know who had shot Nowell and Bellamy. (V22, TT1023).[3]

Nowell and Bellamy discussed what they should do. Nowell said, "If we let them go, they going to try to kill us." (V22, TT1023). Bellamy made a slicing motion across his throat. Gill

> started begging, Chill, please don't do nothing to him. She even told him that if he didn't do nothing to me, she won't call the police after he leave.

(V22, TT1024).

Gill was "hysterical, real emotional." (V22, TT1024). Smith was told to get up and go to the back room and sit in the closet. Gill was told to do the same. (V22, TT1026). The room and the closet had been ransacked, "trash, paper, all kinds of stuff in there, falling right down on top of us." (V22, TT1026-27).

[3] The arrest warrant affidavit notes that Bellamy and Nowell were shot on April 19, 2002 but escaped from the hospital because there were open warrants on them. (V1, TT425-26).

While Smith and Gill were seated in the closet, Nowell and Bellamy "had the guns on us." (V22, TT1028). At one point, Nowell walked away, leaving Bellamy with a .38 snub-nosed revolver pointed at them. (V22, TT1029). Smith heard the engine of his truck start, and Nowell returned shortly thereafter. (V22, TT1030). Smith saw Nowell and Bellamy whisper to each other. Smith thought the two men were getting ready to leave. Then, "[I] seen both the guns come across from the side of the closet and open fire. I seen bullets coming down the wall." (V22, TT1031). Michelle Gill was "yelling, crying" when the two gunmen started shooting. (V23, TT1108).

After the "flurry of bullets," Smith looked at Michelle. She was shaking but was not saying anything. Smith yelled out, "Chill,[4] you shot her. You said you weren't going to do nothing to her. I turned my head, bam, lights out."(V22, TT1031). When Smith regained consciousness, he was still tied up and sitting in the darkness of the closet. Michelle was beside him, not moving. (V22, TT1032). Smith managed to exit the closet, but fell face first onto the bed. He knew he was hurt quite badly. "There was blood all over the bed." (V22, TT1033). Smith was shot near his right eye and in his jaw. Although there were no

[4] "Chill" is Nowell's nickname. (V22, TT988).

medical procedures conducted to remove the bullets, one eventually exited through his back. (V22, R1044).

Eventually, Smith was able to loosen one arm from the restraint and call 911. (V22, TT1033-34; 1036). Smith told the 911 operator that he needed help and that his girlfriend had been shot. (V22, TT1037).

Palm Bay police officer Foskey received an emergency call at 1:00 a.m. shooting had occurred, and the victim called 911. (V22, TT777, 778). Although his patrol car radio was open to communication between the operator and the 911 caller, Kelvis Smith, he could not hear what Mr. Smith was saying. (V22, TT778). Foskey responded to the shooting scene within minutes. He and Officer Sampson parked a few blocks away. (V22, TT779). Officers Foskey and Sampson checked the exterior of the home and did not notice anything unusual. (V22, TT779-80). Ofc. Foskey called dispatch for further information. (V22, TT780). The dispatch operator informed them that there was no more voice communication. All he could hear “was a gurgling sound coming from the victim on the phone.” (V22, TT781).

Because the victim was in need of immediate help, Ofc. Foskey kicked in the front door. (V22, TT780-81). He saw “a black male victim, a very large man, probably in excess of 400 pounds” bleeding profusely from the head and face. (V22, TT781).

Kelvis Smith was sitting on the bed. “He had a phone in his hand. He was just gurgling at the mouth.” (V22, TT814, 849). Smith’s face was completely covered in blood, “There was a steady stream of blood coming from his mouth.” Ofc. Sampson talked to Smith until rescue personnel arrived (V22, TT850), and told Mr. Smith not to talk because there was:

> a lot of blood coming out of his mouth. The only thing I could make out was a lot of gargle. If he tried to say a word, you would get a bubble of blood. I didn’t want him to choke, I didn’t want him to swallow it, I wanted to keep him conscious, I didn’t want him to do or say anything that would cause him to have blood go back down his throat.

(V22, TT871). Smith had been shot in the face and “there was so much blood and tissue on the face, I couldn’t tell how many times he had been shot.” Smith was also shot in the chest. There was “this pink bubbly blood ... hanging out of his mouth almost to the floor.” (V22, TT815). The house had been ransacked. (V22, TT817).

Ofc. Sampson stayed with Smith while Foskey searched the rest of the home. (V22, TT782). Ofc. Foskey located another victim in a closet, “a white female ... with a massive head wound.” She was fatally injured and there was “blood dripping off her.” She “was hot to the touch.” It appeared as if she had been shot in the center of her forehead with a shotgun. There were multiple gunshot wounds. (V22, TT783, 785, 786).

Foskey noticed one of the jalousie windows on the door was broken. (V22, TT791). The removal of the windows allowed access to the door lock. Foskey believed this was how entry was gained into the residence because the rest of the house was secured. (V22, TT790). [5]

EMT/paramedics Acevedo and Smith arrived at the scene at 1:27 a.m. (V22, TT922). Initially, the call was received as a domestic violence call. (V22, TT876, 878). Acevedo and Smith were the first medical personnel to arrive at the scene. (V22, TT879). Police informed them that the scene had been secured and it was safe to enter. (V22, TT880). Upon examining Mr. Smith, Acevedo observed "a lot of blood on his face. When we took off his shirt ... he had some kind of electric cord ... wrapped around his wrist." (V22, TT882). Since Smith was complaining about his arms hurting, Acevedo removed the cord to relieve the pain. (V22, TT883). Smith had so much blood on his face, the paramedics "couldn't really see anything." Smith repeatedly indicated his arms hurt and he could not breathe. (V22, TT884). Smith was in critical condition and Acevedo thought Smith might die. (V22, TT885). Medical personnel concentrated all their

[5] Smith testified at trial the door containing the broken jalousie window was not broken before the night he was shot. (V22, TT1039-40). The screens on the windows had been intact. (V22, TT1042).

efforts “on moving him and making sure he was staying awake with us.” (V22, TT887).

Although Smith communicated with Acevedo, Smith could not clearly answer all of Acevedo’s questions. (V22, TT894). Smith’s repetitious statements that “his arms hurt” were consistent with persons suffering from a head injury or trauma. (V22, TT895).

It was clear that victim Smith had suffered “a major traumatic event, obviously from the mouth, as well as the face, and obvious respiratory distress. (V22, TT925). Victim Smith made repetitive comments that his arms hurt and he could not breathe. (V22, TT926, 927). Kelvis’ repetitive statements were indicative of a head injury. (V22, TT928). Victim Smith did not say who had shot him nor did he indicate anyone else was injured in the home. (V22, TT931). Victim Smith was critically injured. (V22, TT933).

Smith did not recall what he said once emergency personnel arrived. (V22, TT1043-44). When Police spoke to him in the hospital, Smith used sign language to tell them Willie Nowell and Jermaine Bellamy had shot him.[6] (V22, TT1046). Smith identified Nowell and Bellamy through two photo lineups. (V22, R1047).

[6] Since Smith had a tracheotomy, he used sign language to communicate. He has a friend and a cousin who are both deaf. He only uses sign language when he has to. (V23, TT1102, 1138).

When Smith looked at the first of two photo lineups, he identified Willie Nowell. No one told him Nowell's name. He knew Nowell as "Chill Will" or "Willie." (V22, TT988, 1050). Smith also identified Bellamy from the photos in the second photo lineup. (V22, TT1052-53). A videotape showing Smith identifying Nowell and Bellamy was published to the jury. (V23, TT1093-1100).

Smith was "shocked" to see Nowell and Bellamy in his home. (V23, TT1108). Smith and Nowell grew up together and he considered Nowell a friend. (V23, TT1110). Smith had known Nowell for a long time as a friend of Smith's older brother, Dedrick Witherspoon. (V22, TT990). Nowell and Michelle Gill worked together at Ryan's Steakhouse. (V22, TT991).

Detective Mark Mynheir, Palm Bay Police Department, prepared the two photo lineups the day after the shootings. (V23, TT1143, 1145). Bellamy was in one photo lineup; Nowell in the other. (V23, TT1145, 1146). Smith, Detrick Witherspoon, and Kent Osborn were suspects in the shooting of Nowell and Bellamy that occurred earlier in the year on April 19, 2002. No arrest was made. (V23, TT1146, 1147-48). Subsequently, Nowell and Bellamy became suspects in the shooting of Smith and Gill.

Officers Santiago and Carter accompanied Mynheir when he went to interview Smith in the hospital. (V23, TT1148). Mynheir

did not tell Smith what number position Nowell was in on the lineup card, nor did he indicate that Nowell was a suspect. (V23, TT1150-51). Smith identified Nowell as the shooter by pointing to Nowell's picture on the first lineup card. (V23, TT1151). Smith pointed to Bellamy on the second lineup card. (V23, TT1152). During this videotaped interview, Smith's ability to see clearly was obscured by blood (from his wounds) and mucous collecting in his eyes. (V223, TT1153). As a result, he used sign language to communicate.

Detective Ernie Diebel, Palm Bay Police Department, also responded to Holmes Regional Medical Center to interview Smith. (V25, TT1328). Smith was "in a semiconscious state. He had two gunshot wounds to the face." (V25, TT1329). Diebel did not talk to Smith. He retrieved an electrical cord that had been tied to Smith's wrists and submitted the cord to the Crime Scene Unit. (V25, TT1335; 1336). Subsequently, Detective Diebel went to the crime scene. He noticed a vacuum cleaner that was missing the cord. (V25, TT1336-37). He also collected Smith's clothing in order to preserve it for blood evidence and gun powder residue. (V25, TT1350).

Detective Diebel had also investigated a shooting that occurred on April 19, 2002, at the home of Louise Terry. (V25, TT1338-39). Jermaine Bellamy and Willie Nowell were the shooting

victims. (V25, TT1341). No one was charged for shooting Bellamy and Nowell. (V25, TT1342). Nowell, who had been shot in the leg, was in the hospital a few days. He left the hospital against the doctor's recommendation. (V25, TT1343). Bellamy's and Nowell's shooter was never identified. Although Kelvis Smith was considered a suspect, there was "no evidence to prove it." (V25, TT1344). Detrick Witherspoon and Kent Osborn, Smith's relatives, were also considered as suspects. (V25, TT1344-45).

Willie Mae Bristol, Kelvis Smith's mother, said Smith and Gill had "a beautiful relationship." (V25, TT1361). A few days after Smith and Gill were shot and the crime scene released, family members went to Smith's home. They found empty shells in the closet where Gill and Smith were shot. (V25, TT1362-63). Ms. Bristol called the lead detective to come and retrieve the shells. V25, TT1364). Ms. Bristol did not know who was responsible for shooting her son and Ms. Gill. Although she did not know who Willie Nowell was, she knew Bellamy from the neighborhood. (V25, TT1368-69).

Terri Carter, Crime Scene Technician, took photographs and created a diagram of the shooting scene. (V25, TT1375, 1376, 1377, 1383). Carted noticed that a window and screen were broken in the porch area. (V25, TT1382). A few days after the shooting scene had been released by police, Lead Detective Folsom (V25,

TT1424) told Ms. Carter to go back and retrieve shell casings found by family members. (V25, TT1386). Carter was present when portions of dry wall were removed from the interior of the closet. (V25, TT1388).

The shell casings were sent to the lab for analysis as well as fingerprints on trash cans located at the home. There was nothing significant in any of the trash cans that linked Nowell to the shootings nor any connection to a car located on the premises. (V26, TT1432-1433). However, if a person was wearing gloves, prints would not be left behind. (V26, TT1440).

Tom Hellebrand, crime scene technician, attended the autopsy of Michelle Gill. (V26, TT1442, 1445, 1448). Hellebrand was also present at the crime scene and saw blood throughout the house. Swabbings were taken from various portions where blood existed. (V26, R1457). The evidence was sent to Wuesthoff Laboratory for DNA testing. (V26, TT1457). Nail clippings were obtained from Michelle Gill. (V26, TT1461). Hellebrand was not aware of any of Nowell's hair, blood, or fingerprints being found in Smith's residence. (V26, TT1463).

Mr. Hellebrand processed Smith's pick-up truck. (V26, TT1465). He collected latex gloves he found inside Smith's home, one by the telephone Smith used to call 911, and one found on the screened porch. (V26, TT1466, 1467, 1468). Hellebrand

observed a large amount of blood spatter on the inside of the closet door. (V26, TT1469). In addition, he observed blood on the beam of the ceiling located just outside the closet. (V26, TT1470).

John Hollister, crime scene technician, attempted to recover fingerprints from the broken window at the residence but found none. (V26, TT1493). There was a large amount of blood splatter on the interior of the closet, including above the doorway. (V26, TT1494).

On June 18, 2002, John Hollister, crime scene technician, recovered two projectiles from the closet drywall: a .32 caliber projectile and a .45 caliber projectile. (V26, TT1491).

On June 15, 2002, Mr. Hellebrand had collected shell casings and bullets from the closet and bedroom. (V26, TT1451, 1453). Those casings and the two recovered from the closet were sent to FDLE. (V26, TT1432-33). The bullets and casings were introduced into evidence. (V26, R1451, 1453; State’s Exhibits 98-112). Hellebrand also received a bullet from Holmes Regional Medical Center which had been removed from Smith and sent it to FDLE. (V26, R1449).

Omar Felix, crime laboratory analyst, Firearms and Toolmarks Unit, Florida Department of Law Enforcement (FDLE), examined evidence for identification purposes. (V26, TT1496,

1498-99). Felix examined five (5) fired .32 caliber copper jacketed bullets, three (3) fired .45 caliber copper jacketed bullets, six fired .32 caliber Winchester cases or spent casings, and five fired .45 caliber Remington cartridge cases. (V26, R1500). Felix examined these casings and determined the .32 caliber bullets and casings were all from the same .32 caliber handgun, and the .45 caliber bullets and casings were all from the same.45 caliber firearm. (V26, TT1500, 1501, 1503).

Dr. Sajid Qaiser, medical examiner, performed the autopsy on Michelle Gill. (V24, TT1240, 1244). Ms. Gill had eleven gunshot wounds to her body. (V24, TT1249). The gunshots were to her buttocks, right ring finger, right arm, abdomen, chest, breast, and head. (V24, TT1249-50). None of these gunshot wounds were close-range. (V24, TT1301). All but three of the bullets exited the body, and Michelle had entrance and exit wounds in the left buttock, right ring finger, right forearm, right abdomen, upper right arm, right breast, left abdomen and head. (V24, R1253). Three projectiles were removed from Gill's body: one that entered the right chest and lodged in the spine, one that entered the abdomen and was lodged in the pelvic cavity, and one that entered through the head and lodged in the back of the neck. (V24, R1254, 1290). The three bullets were entered into evidence. (V24, R1291; State Exhibits 76, 77, 78).

None of the bullets struck the fetus inside Ms. Gill. The fetus died from the lack of oxygen, within three to six minutes of Ms. Gill's death. (V24, R1286, 1287).

The defense called eight witnesses. Dawn Dougherty and Michelle Gill were co-workers and friends. (V27, TT1587, 1588). Dougherty and Nowell met at work, began to date, and eventually had a child together. (V27, TT1587, 1589-90). Dougherty met Kelvis Smith once, but knew him only as Gill's boyfriend. (V27, TT1587). Dougherty was working with Gill the night she was killed. (V27, TT1592).

Gill left the restaurant after 10:00 p.m. Shortly thereafter, Dougherty called Nowell to ask him for money she needed for their son. (V27, TT1598, 1599). She later went to Cleo's bar where she met Nowell shortly after midnight. (V27, TT1599-1600). Nowell gave her $100.00. (V27, TT1601, 1603, 1605). Dougherty did not notice any blood on Nowell's clothing nor did she recall what he was wearing. (V27, TT1603). The next day, she heard about the shootings at the local Burger King. (V27, TT1604). Nowell's current girlfriend, "Jackie," contacted Dougherty one month before trial about testifying in the case. (V27, TT1607).

Sallie McHellon had known Nowell for six years. She calls Nowell, "Red." (V27, TT1620-21). McHellon knew Michelle Gill

through “Big K,” “a nice, heavyset, young gentlemen.” (V27, TT1621, 1622). The night of the shooting, McHellon arrived at Cleo’s bar between 9:45 p.m. and 10:30 p.m. She saw Nowell there between 11:15 p.m. and 11:45 p.m. (V27, TT1624, 1634). When McHellon left the bar at 2:30 a.m., Nowell was shooting pool. (V27, TT1625). Nowell was wearing “a sky blue outfit. Not a dark blue, not a navy blue, but a sky blue outfit and some sneakers.” (V27, TT1625). Nowell was out of sight for about fifteen minutes, but, “Otherwise, I didn’t pay no attention. But I didn’t miss him at the time I was there, he wasn’t gone long enough for me to miss him.” (V27, TT1626). McHellon could not recall the exact date of the shooting. (V27, TT1627).

Ms. McHellon went to Cleo’s on the weekends. (V27, TT1629). She stays at Cleo’s until closing time. (V27, TT1630). Nowell and McHellon are “regulars” at Cleo’s bar. (V27, TT1631). “Jackie” would pick up McHellon to bring her to Nowell’s lawyer’s office. Jackie told her, “Red” needed her help. (V27, TT1633). The night of the shooting, McHellon was at Cleo’s “drinking and running her mouth.” (V27, TT1637).

Darrius Johnson and Willie Nowell are good friends and neighbors. (V27, TT1641). Johnson goes to Cleo’s bar on a regular basis. “Everybody” from the neighborhood “hang[s] out”

at Cleo's. (V27, TT1644). Nowell's brother, Phil Bryant, frequented Cleo's, as well. (V27, TT1656).

The shooting of Michelle Gill and Kelvis Smith was "the talk of the town." (V27, TT1645). Johnson saw Nowell at Cleo's the night of the shooting, at approximately 10:30 p.m. (V27, TT1647, 1648). Nowell was wearing a sky blue matching outfit that night. (V27, TT1648). Johnson left Cleo's at 1:00 a.m. Nowell was still there. (V27, TT1650). Since Johnson was near the front of the bar, he would have seen Nowell if he left. (V27, TT1651). Johnson believed Nowell was driving a small, 4-door gray car that evening. (V27, TT1651).

Johnson could not say what date he saw Willie Nowell at Cleo's bar nor could he state the exact date that Smith and Gill were shot. (V27, TT1653, 1654). "Jackie," Nowell's friend, contacted Johnson regarding Nowell's case. (V27, TT1656). Nowell's lawyer spoke with Johnson and discussed dates and times so Johnson was clear on what had happened. (V27, TT1657).

Taj Shepherd, a friend of Nowell's, arrived at Cleo's bar at 11:30 p.m. the night of the shooting. (V27, TT1659-60). Shepherd and Nowell played pool together and Shepherd left the bar at 1:00 a.m. Nowell was still there. (V27, TT1660). Nowell was wearing a matching, sky blue outfit. (V27, TT1661). Shepherd noticed Nowell standing by a big car, possibly a rental car. He

did not see Nowell in a small gray car. (V27, TT1662, 1665). Shepherd did not remember the date that Michelle Gill was killed. (V27, TT1664). “Jackie” drove Shepherd to speak to lawyers in this case. (V27, TT1666). Someone told Shepherd that Nowell had been shot. No one told him that Nowell thought Kelvis Smith had been the shooter. (V27, TT1669).

John Phillip Bryant, Nowell’s brother, knew Kelvis Smith and Michelle Gill. (V27, TT1673-74, 1675). Bryant was with his girlfriend, Vonda Jefferson, when she received a phone call about the shooting. (V27, TT1677-78). Bryant saw Nowell wearing a sky blue outfit. Bryant and Nowell went to Theresa Speakman’s house, a friend of Nowell’s. (V27, TT1681). Shortly thereafter, Bryant, Nowell, and a friend, Mark Lundy drove around town, drinking and smoking, “that’s what we do.” They drove around until 9:00 p.m. (V27, TT1683). Bryant and Nowell went to Cleo’s bar at 10:00 p.m. (V27, TT1684). They walked to Cleo’s from their parents’ house. (V27, TT1695). Bryant stayed outside the bar, while Nowell played pool. Bryant saw Dawn Dougherty arrive. She got out of her car, spoke to Nowell briefly, and left. (V27, TT1687). Nowell remained in the poolroom the whole time. (V27, TT1689). Bryant left Cleo’s to visit his girlfriend at 1:15 a.m. Nowell stayed behind at Cleo’s bar. (V27, TT1688-89). Bryant did not see any stains on Nowell’s clothing. (V27, TT1690).

Bryant spoke to Dawn Dougherty as she walked into Cleo's bar. Bryant knew who Dougherty was because he worked with her at Ryan's Steakhouse. (V27, TT1693). Neither Nowell nor Bryant was working at Ryan's when the shootings occurred. (V27, TT1694).

Willie Nowell testified that he was wearing a blue outfit the night of the shootings. (V27, TT1714). He said he did not shoot Michelle Gill and Kelvis Smith on June 15, 2002. (V27, TT1715). On April 19, 2002, he was shot in the leg by an unknown assailant. He was hospitalized for twelve days. (V27, TT1716).

Nowell stayed with relatives after he left the hospital. Since he was not able to walk, he used a wheelchair. Eventually, he went to his girlfriend's house, Carol Smith, in Orlando. (V27, TT1717-18). Carol rented a gray Marquis for Nowell to use to drive to Melbourne. (V27, TT1719). Upon arriving, he spent time with his brother, and took his child's mother to the store. Nowell and his brother spent time at a friend's house, Tonya Speakman. (V27, TT1719). After leaving, Speakman's son joined Nowell and his brother as they drove around town. They were smoking marijuana. (V27, TT1720). Nowell dropped his brother off at their parents' house at 7:30 p.m. (V27, TT1721). Nowell briefly stopped by his baby's house to speak with the child's mother. He returned to his parents' house at 8:00 p.m. (V27, TT1721). Nowell, his brother, and a friend, Mark, drove around

town. (V27, TT1722). Eventually, Mark was dropped off, and Nowell parked the car in front of his parents' house. He and his brother walked to Cleo's bar at 10:00 p.m. (V27, TT1723). He played pool for two hours. (V27, TT1723-24). Nowell's brother remained outside. (V27, TT1724). "Dawn" came to Cleo's to see him and he walked out to her car. (V27, TT1736). Nowell did not leave Cleo's bar until after 1:00 a.m. (V27, TT1724). He walked back to his parents' house. (V27, TT1725). He drove around with Isha and Karnethia Gillis. (V27, TT1725). They stopped at a Mobile gas station to buy drinks and cigars.[7] (V27, TT1726, 1733-34).

Nowell worked with Michelle Gill at Ryan's Steakhouse. He left Ryan's in December 2001. He testified he did not know Gill was pregnant nor did he know where Gill and Smith lived. (V27, TT1726). Nowell has known Kelvis Smith for along time. (V27, TT1731). Nowell was not with Jermaine Bellamy on the night of June 14, 2002. (V27, TT1728-29).

Nowell did not remember if he was with Jermaine Bellamy on April 19, 2002, when he was shot in the driveway of a friend's house. (V27, TT1730). He left the hospital before police came to talk to him. (V27, TT1731).

[7] The defense published a videotape from the Mobile gas station showing the time between 2:14 a.m. and 2:18 a.m. on June 15, 2002, with Nowell on the videotape. (Defense Exhibit 2) (V27, TT1711-12).

Nowell had “no idea” who shot him. He would have told Palm Bay police if he knew who was responsible. (V27, TT1734). Nowell called “Jackie,” a good friend, to help him get his witnesses together. (V27, TT1736). Nowell does not know why Smith blamed him for the shooting. (V27, TT1738).

Penalty Phase. Nowell presented four witnesses. The State presented none.

Maria Bryant, Nowell’s mother, was sixteen years old when Willie Nowell was born in Melbourne, Florida. (V32, PPh125, 126). She already had one child when she met Nowell’s father. (V32, PPh127). Bryant picked fruit for a living and lived with an older couple. (v32, PPh128). Bryant was 15 years old when she met Willie Nowell, Sr., who was 29 years old. She dated an older man because she wanted security and support. (V32, PPh129). She did not marry Nowell, Sr. He “beat me for breakfast, lunch and dinner. Jumped on me by beating me up, punching me around, kicking me, dumping me.” When she reported this abuse to the police, she was told an adult needed to sign for her. She suffered many head injuries. She never saw a doctor or went to a hospital. (V32, PPh130). Bryant and Nowell, Sr., lived together after Willie, Jr. was born. Occasionally, Willie’s father played with him, but Bryant provided the food and emotional needs.

(V32, PPh131). Bryant did the best she could raising Willie, Jr., gave him “a lot of love.”

Appellant went to the hospital when he was younger due to the abuse Bryant suffered while pregnant. (V32, PPh133-34). He weighed a little over two pounds at birth. He was constantly sick, so she took him to the hospital. (V32, PPh134). Appellant was a small boy and had developmental problems. (V32, PPh136). Because his head was “real big,” he could not hold it up and often fell off the couch onto the floor. (V32, PPh136). Bryant took Appellant to the hospital at six months of age. He was undernourished and underweight. (V32, PPh137, 193). When he was two years old, Appellant was in the hospital and Bryant was pregnant. She was ill and did not visit Appellant on a particular day. When she arrived at the hospital to see him, he had been placed in foster care. (V32, PPh138, 139). Appellant remained in foster care until age five. (V32, PPh140). Bryant visited him as often as she could. (V32, PPh141).

Bryant married in 1979. Her husband became a father figure to Willie. (V32, PPh142). Appellant’s stepfather did not discipline him, but Bryant used a belt on him. (V32, PPh143, 193). She loved him and wanted him to do the right thing. (V33, PPh194). Appellant started school at age five. He did “very well” and always went to school. (V32, PPh145, 198). At one

point, he spent one year with his grandmother in the Bahamas when “he was putting me through some different changes I could not handle right then.” (V32, PPh146).

Appellant played the drums in his church and helped other members out, as well. (V32, PPh146). At age thirteen, Appellant and his sister snuck out of the house with their father’s car keys and went riding. Appellant started spending nights with an older woman, Alma Jean. (V32, PPh147-48). Alma Jean gave Appellant money, shoes, clothes, anything he wanted. Bryant suspected Alma Jean and Appellant were engaging in sexual intercourse. (V32, PPh149). Bryant was in the system as abusing Appellant. She did not report to police the suspected sexual encounters between this older woman, Alma Jean, and her thirteen-year-old son, Appellant. (V32, PPh149-50). At age sixteen, Appellant spent most of his time at Alma Jean’s. (V32, PPh150). Bryant never sought psychological help for her son. (V32, PPh151).

Alma Jean attacked Appellant with a bottle, from his neck down to his buttocks area. (V32, PPh151-52, 187). Mrs. Bryant did not know how the injuries occurred. “I only go by what Willie told me and what I seen.” (V33, PPh201). Appellant convinced Bryant not to report the attack to the police. (V32, PPh152, 201).

Appellant was a good, young man before age thirteen. He was respectful, and helped other people. (V32, PPh158). He grew up in a three bedroom home, and shared a room with his brother. (V33, PPh183). Appellant fathered five children with different woman. He never married any of them but he is a loving father to all of his children. (V32, PPh159, 160). Bryant did not know how he supported his children. (V33, PPh198).

Mrs. Bryant took her children to visit her family in the Bahamas during summer vacations. (V33, PPh192). Willie had friends who were bad influences. He listened more to his friends than he did his own mother. (V33, PPh196, 197).

Nowell played football and played drums in the band. (V33, PPh201, 202). He never acted in any manner that indicated mental retardation. (V33, PPh204). Mrs. Bryant said he did not showed sign of any mental illness, “If he was, I don’t know.” (V33, PPh204-05). Appellant dropped out of high school in the ninth grade. (V33, PPh206).

Pastor Ronald Green and Willie Nowell grew up together. (V33, PPh207, 208). Nowell’s home was a second home to Green. He would spend the night, “they would take care of me.” Nowell’s family attended Green’s church. Nowell’s stepfather, John Bryant, is a deacon in the church, “prominent members of the ministry.” (V33, PPh209, 215). The Bryant home was “the fun home

... a loving family, very family oriented. The family is a very close-knit family." (V33, PPh210, 218). Willie was funny, out-going, and very respectful. (V33, V210-11). He did not see Nowell's family abuse him, "nothing that any other parent wouldn't chastise their kids for." (V33, PPh213). Willie sung in the choir, played drums, and attended Sunday school. (V33, PPh215). When Nowell and Green were thirteen years old, their lives took different paths and they saw each other only occasionally. Nowell was always polite and respectful. (V33, PPh216). The Bryants were good to their son, provided a clean home, there was not a shortage of anything. (V33, PPh218-19). Nowell never complained of any abuse. (V33, PPh219). There was no indication of any mental impairment. (V33, PPh219). Nowell understood the difference between right and wrong, and understood the consequences of his actions. (V33, PPh220). Nowell never indicated he was depressed or wanted to harm himself. (V33, PPh220).

Lisa Gates, manager at Ryan's Steakhouse, hired Nowell to work at the restaurant. (V33, PPh227-28). Nowell "was the best cook I ever had." No one compared to his efficiency, his cleanliness, his organization. Nowell worked for Ryan's on and off. Gates would always rehire him, "When you have someone that good ... and your business depends on it, you do what you have

to do." (V33, PPh229). Nowell was not just a good cook. "He was good for everybody." (V33, PPh231). Nowell was well-liked by the patrons and had a loving relationship with his mother and stepfather. (V33, PPh236, 237). Nowell knew Michelle Gill from work. They were friendly with each other and took "smoke breaks at the same time." (V33, PPh240). Nowell could have run the restaurant. (V33, PPh242). He knew the difference between right and wrong, otherwise, she would not have had him around the restaurant. (V33, PPh244).

Carol Smith was Nowell's supervisor when he worked as the head cook for the Department of Corrections.[8] (V33, PPh246, 248). He was a role model for other inmates, "he took pride in his work." (V33, PPh248, 249). After Nowell was released from DOC in 1998, they began a romantic relationship and had a child together. (V33, PPh250). Nowell and their son are very close. (V33, PPh251). Nowell "has a good heart." He treated her well and was respectful. (V33, PPh252). Nowell supported his son by buying him the things he needed. Smith did not ask for child support. (V33, PPh254). Nowell is smart and could accomplish anything he put his mind to. (V33, PPh255). He has no indications of mental illness. (V33, PPh258).

[8] Nowell was employed at the Central Florida Reception Center, Orlando, Florida. (V33, TT247, 248).

Dr. William Riebsame, psychologist, conducted a forensic evaluation on Nowell. (V33, PPh262, 268). He met with Nowell on three occasions in 2004 and spent a total of fifteen hours with him, including interviewing and test-taking time. (V33, PPh270, 301). Dr. Riebsame reviewed all police reports, depositions, school and medical records, and prison records. He interviewed Nowell's parents. (V33, PPh268, 269). He focused on Nowell's intellectual ability, personality characteristics, and emotional characteristics. (V33, PPh270). The MMPI (Minnesota Multiphasic Personality Inventory) results were valid. There was no indication of malingering, exaggerated mental illness, or that of an emotionally disturbed individual. (V33, PPh271, 272). Nowell is rational and his memory is "quite good." Information provided by Nowell was verified with school records and was consistent. (V33, PPh272). Nowell did not indicate he had any involvement with this offense. (V33, PPh273).

Medical records indicated Nowell was born prematurely after a violent physical altercation occurred between his mother and father. (V33, PPh273). He returned to the hospital several times due to lack of growth, constant vomiting and pneumonia. In 1977, at age two, he was placed in foster care. (V33, PPh274).

Nowell was arrested and convicted several times as a juvenile. (V33, PPh276). Nowell adjusted to the prison

environment. (V33, PPh279). School records for Nowell's last year in school reflect grades from C's to F's. (V33, PPh281). The results from Nowell's Wide Range Achievement Test (WRAT) indicate he is reading on a seventh grade level. The Shipley Institute of Living Scale, an IQ test, indicated an IQ score of 74, "quite low," which is in the borderline range. An IQ of 100 is the average. (V33, PPh282). A mentally retarded person would have an IQ score of 69 or below. (V33, PPh283). Nowell's IQ score of 74 is not "an accurate estimate of his IQ ... he is not someone with a borderline IQ. I anticipate his IQ is probably low average to average range." Nowell was not wearing his glasses, which he needs, for portions of the test. (V33, PPh283). Nowell's neuropsychological test results did not indicate any kind of neuropsychological deficits, brain damage, or brain abnormality. (V33, PPh284).

Nowell self-reported being placed in a learning disabled classroom in elementary school. (V33, PPh284). He tested in the average or above-average range in the Wisconsin Card Sorting Test and the Trail-making test. (V33, PPh284).

Nowell self-reported a history of drug and alcohol abuse. Dr. Riebsame diagnosed a learning disorder or disability which was consistent with Nowell's self-report of placement in a learning disabled classroom. (V33, PPh285). Dr. Riebsame

diagnosed attention deficit hyperactivity disorder, based on his test results as well as his history. Nowell has exhibited a pattern of limited attention span, impulse behavior, poor judgment, and disruptive behavior, since early childhood. He did not have any psychological treatment. (V33, PPh286).

Nowell also has antisocial personality disorder. However, Nowell exhibits signs that are not consistent with antisocial behavior. He has relatives and friends that stay in contact with him in jail. Employers spoke very highly of him. He is close with his mother and stepfather. (V33, PPh293).

Due to his attention deficit disorder, he does not think in a logical or rational manner. (V33, PPh293). Sometimes his reactions are appropriate and sometimes they are not. If alcohol and drugs are used, there is further impulsivity and impaired judgment. (V33, PPh293).

Nowell was a victim of physical and sexual abuse. He reacts impulsively to survive. (V33, PPh287-88). The sexual abuse (committed by Alma Jean Small) occurred from age twelve to age seventeen. (V33, PPh290). When Nowell wanted to end the relationship with Ms. Small, she violently attacked him. (V33, PPh290).

Dr. Riebsame concluded that Nowell has several mental health problems but does not suffer from a mental illness. (V33,

285, 305). Due to Nowell's attention deficit disorder, hyperactivity, and his learning disorder, his ability to conform his conduct to the requirements of the law is impaired. (V33, PPh294). He suffered from an emotional disturbance at the time of the crime. (V33, PPh294).

Dr. Riebsame interviewed Nowell's mother for one hour but did not interview any other people in preparing for this case. (V33, PPh301). Nowell's mother said, "she favored the rod ... she would whoop him with a switch." Nowell told Dr. Riebsame his mother used belts and extension cords. (V33, PPh302). She told Dr. Riebsame that Nowell was involved in his church at an early age. (V33, PPh303). Although Nowell's choices were impulsive, he did not lack the ability to make appropriate choices. (V33, PPh304). He knows the difference between right and wrong. (V33, PPh305). Nowell is capable of making a plan. (V33, PPh309). There was no evidence of significant brain abnormality or neuropsychological impairment. (V33, PPh311). There is no medical or psychological solution to modify Nowell's antisocial personality disorder. Although Nowell is not likely to re-offend, "there is no guarantee." (V33, PPh317).

John Bryant, Nowell's stepfather, testified he has been in Nowell's life since he was four years old. (V33, PPh319-320). Bryant and Nowell have a mutual nurturing and loving

relationship. (V33, PPh321). When Nowell was thirteen, he became defiant and started a relationship with Alma Jean Small. He moved in with Ms. Small when he was seventeen years old. (V33, PPh322, 323). Ms. Small "lured" Nowell to her house by buying him named-brand clothing and shoes. (V33, PPh329). Mr. Bryant did not call police on Ms. Small because he did not think she was hurting Nowell or causing serious problems. (V33, PPh329). Had he been aware of the sexual abuse perpetrated by Ms. Small, Bryant would have called police. (V33, PPh330). After Ms. Small stabbed him, Nowell recuperated elsewhere, but Bryant could not recall where. Eventually, Nowell returned home for a short time. (V33, PPh324). Willie was a good son. Bryant spent quite a bit of time with him. Bryant and Nowell also worked together at Ryan's Steakhouse for awhile.[9] (V33, PPh325). Nowell did not have any problems with other employees at Ryan's. (V33, PPh326).

Mr. Bryant preferred to discipline Nowell by talking to him and taking away privileges. Mrs. Bryant preferred corporal punishment, "but she didn't mean anything by it." (V33, PPh327). Nowell never told Bryant that his mother abused him. Nowell never showed signs that he suffered from a mental illness. (V33,

[9] Mr. Bryant has worked at Harris Corporation for twenty-six years. He worked at Ryan's for a short time to make extra money after his children were grown. (V33, TT319, 326).

PPh328). Nowell is smart and could accomplish anything he put his mind to. (V33, PPh328-29).

Alma Jean Small, currently incarcerated, lived with Nowell when she was thirty years old.[10] Nowell "was living on the streets" before he came to live with her. (V33, PPh334, 336). Small provided him with food and a place to sleep, but not clothing. (V33, PPh339-40). Small knew the Bryant family. There was some suggestion that Nowell had difficulties at home. (V33, PPh340). Nowell began living with Ms. Small when he was sixteen years old. (V33, PPh341).[11] He was going to school when she met him. Mr. and Mrs. Bryant did not give her any financial support for Nowell. (V33, PPh341). They did not object to Nowell living with her. (V33, PPh342). Nowell was good with her son. Nowell taught him to read and write, and took him to ball games and the park. (V33, PPh343).

Ms. Small would not say if she injured Nowell with a bottle when he was seventeen years old. Although she saw blood, she did not know if he was seriously injured. She had gotten into an argument with Nowell. Their relationship ended when she went to prison. (V33, PPh345).

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[10] Ms. Small is now forty-one years old. She has been convicted of three felonies. (V33, TT336, 343).

[11] Ms. Small refused to answer whether or not she had sexual intercourse with Nowell. (V33, TT341).

Deputy Patrick Ford, Brevard County Correctional Officer, is the Master Control operator for the Justice Center, the area where defendants are transported through the courthouse from the Brevard County jail. (V33, PPh348, 349). Nowell was not a problem defendant and was very respectful. (V33, PPh350).

***Spencer* hearing.** Appellant testified at that hearing, as did Jackquelyn Davis, a friend of Nowell; Maria Bryant, Nowell's mother; and Terri Sirois, defense private investigator.

Appellant testified that he grew up with "a little bit of hard living." (V2, R255). He was in a foster home at times with Ida Mae Spencer who had other foster children. He did not know anything about his biological father except that he went "to prison or something like that." (V2, R256). When Nowell was around 13-14 years old, he started staying with Alma Jean Small, a woman 31 years old. (V2, R257). He was 15 years old when they began a sexual affair. (V2, R258).

Nowell's mother, Mrs. Bryant, was on Dilantin because she had the shakes from all the times Nowell's biological father beat her. (V2, R274). Notwithstanding, Nowell had a great relationship with her and his step-father. (V2, R285). His mother married John Bryant, who was a good role model for Nowell. Mr. Bryant was a deacon in the church. Nowell attended

church until he started hanging out on the streets. (V2, R275). He used to sing in the choir and play drums. (V2, R276).

Nowell was disciplined at home to extent he would "call it nowadays" as abuse. (V2, R276). He had been "whooped" with a belt with buckles but was never bruised or cut. (V2, R277).

Nowell had never been diagnosed with Attention Deficit Disorder ("ADD") until Dr. Riebsame evaluated him before his murder trial. (V2, R259). He would take advantage of counseling in prison. (V2, R259). Nowell had been in prison before, and went to vocational culinary arts training. He also took GED classes and completed Tier programs for substance abuse. (V2, R260). Nowell only completed the 9th grade, and had to withdraw from school after that because he went to prison. (V2, R272). The only problems he ever had in prison was one fight when he was in youth offender camp and that he smoked cigarettes. (V2, R261). He also bet $5.00 on a football game one time and lost commissary privileges. (V2, R262).

Nowell's children were very important to him. He has five children, from three different mothers. (V2, R281). He visited all his children. (V2, R263). He also provided for the children financially. (V2, R264).

Nowell had seen people stabbed, had witnessed drive-by shootings, and was shot one time. (V2, R266). He worked at

Ryan's Steak House at the time of the murder. (V2, R269). Nowell knew victim Gill from Ryan's. She was a very good person. (V2, R270). Nowell was sorry for Gill's death. (V2, R271). Nowell turned himself in when he heard about Gill's murder, even though he had nothing to do with it. (V2, R273). He saw himself on TV and knew the police were looking for him. (V2, R274).

Nowell had a rough childhood and made a lot of wrong decisions in his life. He asked the court to spare his life for the sake of his children. (V2, R277).

Jackquelyn Davis met Nowell after he was incarcerated. She visited him at the jail quite frequently. (V2, R288). She felt that Nowell was a caring and concerned person. (V2, R289). Davis had a son that was very rebellious, and Nowell talked to him. (V2, R289). Davis assisted defense counsel by going into the black neighborhood to help find witnesses. (V2, R290). No one would speak to the investigator because she was a "strange face," i.e., white. (V2, R291). Once she located the witnesses, she also gave them rides to depositions if they did not have transportation. (V2, R291).

Maria Bryant loves her son, the Appellant. Nowell is close to his sisters and brothers. Mrs. Bryant does not believe Nowell committed the crime. Nowell was a good child. He was in and out of the house, but "my home will always be home." Mrs.

Bryant did not believe Nowell would kill victim Gill because the victim was nice to her and Nowell. (V2, R312). She did not know anything about a rift between victim Smith and Nowell. (V2, R313). Mrs. Bryant hopes the State finds the real killer. (V2, R313).

Terri Sirois did the investigative work for Nowell in this case. (V2, R317). Nowell was always extremely kind and easy to deal with. (V2, R319). Nowell never knew his biological father. (V2, R321). Nowell first saw his picture on the DOC website. Mr. Bryant, the step-father, was a wonderful man, and adopted Nowell and his sister. Mr. Bryant always purchased the same clothing and shoes for Nowell as he did his own children. (V2, R 321). Sirois does not believe in the death penalty. (V2, R324).

The State presented victim impact testimony from victim Smith (V2, R294-305) and Willie Mae Bristol, victim Smith's mother and the grandmother of the child victim Gill was carrying. (V2, R75-81). Gill was like a daughter to Mrs. Bristol (V2, R307).

During the testimony of Smith, defense counsel asked whether Bellamy gave an order to shoot the victims. Victim Smith answered that Nowell asked Bellamy, "Do you know if we release him, that they will try to kill us." (V2, R304). Bellamy made a motion across his neck. Mr. Smith knew they were

going to try to kill them because they were not wearing masks and anybody on the street would know what that means. (V2, R305).

SUMMARY OF ARGUMENTS

Point I: The trial judge properly evaluated the reasons given by the State for a peremptory challenge which the defense alleged was racially motivated. The conclusion by the trial court, which turns primarily on the credibility of the reasons given, is not clearly erroneous.

Point II: Nowell claims the prosecutor's comments denied him a fair trial. There was no objection to many of the comments cited as improper. When there were objections, some of the objections were not contemporaneous with the comment cited. Insofar as there were no objections, any error was not fundamental. When there were proper objections, the trial judge did not abuse his discretion in overruling the objections and denying motions for mistrial. The comments were fair comments on the evidence or were not improper. Error, if any, was harmless.

Point III: Nowell claims the prosecutor's comments denied him a fair penalty phase. Some of the objections were not contemporaneous with the comment cited. Insofar as there were no objections, any error was not fundamental. When there were proper objections, the trial judge did not abuse his discretion in overruling the objections and denying motions for mistrial. Error, if any, was harmless.

Point IV: The claim based on *Ring v. Arizona*, 536 U.S. 584 (2002) has no merit, and this Court has repeatedly rejected similar arguments. Nowell was convicted of a prior violent felony and the murder occurred during the commission of both robbery and kidnapping.

Point V: The State proved the "avoid arrest" aggravating circumstance beyond a reasonable doubt. Nowell knew the victims and stated they could identify him if they were allowed to live. The sentence of death is proportional to other death cases. The trial judge properly found four aggravating circumstances which outweighed the statutory and non-statutory mitigating circumstances.

ARGUMENT

POINT I

THE TRIAL COURT'S RULING ON JUROR ORTEGA IS NOT CLEARLY ERRONEOUS.

Nowell claims the trial judge erred in allowing the State to use a peremptory challenge on Juror Ortega because the State's reason for striking the juror was not race-neutral.

Under settled Florida law, a trial court's denial of a challenge to a peremptory strike is reviewed under the clearly erroneous standard. *Melbourne v. State*, 679 So. 2d 759, 764-65 (Fla. 1996) (stating that the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous); *Rodriguez v. State*, 753 So. 2d 29, 41 (Fla. 2000) (reaffirming that, because the validity of a peremptory challenge turns primarily on an assessment of credibility, the trial court will be affirmed on appeal unless it is clearly erroneous). The trial court properly applied that standard, and there is no basis for reversal.

The record shows the following exchanges between Juror Ortega and the attorneys:

The following exchanges took place on Monday, September 25, 2005:

BY PROSECUTOR PARKER:

Q How about Mr. Ortega, do you believe in the death penalty?

A I'm not crazy about it but if it needs to be used in certain cases.

Q When you say you're not crazy about it, can you be a little more specific?

A Well, I mean they have to be proven guilty of a serious crime.

THE COURT: I'm sorry, sir, you need to speak up a little bit.

A They have to be guilty of something great for that. For instance, say a serial killer, somebody who kills every time and he's like, he just has no feelings whatsoever, I don't think a person like that should be in the public.

Q Do I understand you that if it weren't a serial killer, you don't think you can recommend the death penalty even though, under the law that is provided to you by the Court and the facts that we have in front of us, it would call for the death penalty?

A If it was proven, yes.

Q You could do that?

A Yes.

Q Mr. Kozaitis believes in his heart that the burden of proof beyond a reasonable doubt during the guilt phase, I can buy that but I think there needs to be an absolute burden before I could recommend the death penalty. Do you believe that?

A It has to be just seriously like proof there. If it's a reasonable doubt, yeah.

Q If it's beyond and to the exclusion of a reasonable doubt, you could follow that law?

A Yes.

Q Even in the penalty phase?

A Yes, sir.

Q Do you want to do it?

A I don't think it's something I would be first in line to do, but if I was chosen for it.

(V17, R168-170).

BY DEFENSE ATTORNEY CHANG:

Q Thank you. Mr. Ortega, to use your words, sir, you're not crazy about the death penalty. I don't know what you mean by that. How do you feel about that?

A Like one of the other people said, there have been some people that have been sentenced and later on found them innocent of the crime that they were sentenced to. That's what I mean.

Q It's concerning and that's why we go through this long, laborious process. We've taken up your valuable time today, we've taken you from your family, your work, spending time asking you these boring questions but that's why we spend the time. Our system, I believe, is one of the best in the world. We go through this process. Is it perfect? No, we make mistakes.

I guess my question is, you seem somewhat neutral about the death penalty, that's fine, you're entitled to your opinion, there's no right or wrong answer. If we go through the process, the State presents their proof and you follow the law as the Court instructs you, would you have any hesitation in recommending a sentence of death if you deemed it's appropriate?

A Yes, if I deem it is appropriate.

Q Let's turn it around. If, after they present all of their evidence, would you have any hesitation

recommending a sentence of life if you deemed it appropriate?

A Yes.

Q You wouldn't have any problems doing that. Let me go one step further. You've also heard the charges in this case, first-degree premeditated murder. As a matter of fact, the judge read off eight charges, all relatively serious. She also read a long list of witnesses.

What about after hearing every single one of those witnesses and they haven't convinced you beyond a reasonable doubt, where that line lies for you that Mr. Nowell committed any of these crimes, somebody got killed, would you have any hesitation finding that man behind me not guilty and walk out of this courtroom?

A I don't understand.

Q I mean, we're here talking about the death penalty, right?

A Right.

Q We don't get to that issue unless you believe Mr. Nowell committed first-degree premeditated murder. If you find that the State proved their case, you need to decide life or death, you don't even get to first-degree premeditated murder. Can you follow the law and find Mr. Nowell guilty of all of these charges?

A No.

Q You can't? Why?

A You said we're skipping all of the other things.

Q No. When you came in this morning, the Court read you the eight charges against Mr. Nowell. First-degree murder is one that jumps out, kidnapping charges, armed burglary charges, grand theft charges, all these charges. The Court read you a long list of

witnesses, a bunch of police officers, medical examiner, other people.

Let's say the State calls their witnesses, an officer gets on the stand and says I think Mr. Nowell did it. An eye witness gets on the stand and says I think Mr. Nowell did it. An eye witness gets on the stand and says I think Mr. Nowell did it. For whatever reason, they haven't convinced you that you think he did it. Serious charges. Can you follow the law and find him not guilty if the State has not met their burden?

A Yeah, I mean if they have proven it to me, yes.

Q What if they haven't?

A I guess I would have to waive what is given me.

Q The Court is going to talk about Mr. Nowell, as he sits here right now he is presumed to be innocent, presumed not guilty. Right now, without hearing anything, how would you vote, guilty or not guilty?

A It would be hard because I have to have the evidence.

(V17, TT181-184).

BY DEFENSE ATTORNEY CHANG:

Q Mr. Ortega, let me go back to you, going back to presumption of innocence, and it's not a trick question. If any citizen were accused of stealing a $2 bottle of aspirin, it's not the most difficult decision in the world, maybe he stole it, maybe he didn't, not quite sure, we'll let him go. This case is a different case, it's a first-degree premeditated murder case. My question to you is, if the State fails to convince you or anybody else beyond every reasonable doubt that Mr. Nowell committed this crime, do you have the courage to find him not guilty if that's what the law dictates?

A If that's what the law dictates.

Q Even though somebody got killed?

A It has to be proven to me.

Q And if they haven't?

A Then he gets to go.

Q Are you sure about that?

A Yeah.

Q No reservations?

A No.

Q Thank you, sir.

(V17, TT194).

BY PROSECUTOR PARKER:

Q Mr. Ortega, do you understand, does everybody understand that Mr. Nowell seated here in this courtroom today, he is innocent of any allegation, any crime, as he sits here in front of you. Do you understand that?

A Yes, sir.

Q So, if you were asked to render a verdict right now this very minute based on what you know about this case, the lack of evidence that the State presented, your verdict has to be not guilty. Do you understand that?

A Yes, sir.

Q Do you understand that I don't have to prove that he is not guilty? If you're not convinced that the evidence that I presented is sufficient to convince you beyond a reasonable doubt that he is guilty of the crimes for which he is charged, there can be no question in your mind, he walks out of here. Does everybody understand that? I don't care what he's charged with, I don't care if he's charged with killing the president, he walks out of here. Does

everybody understand? This is America. Does anybody have a problem with that?

Mr. Ortega, you got a problem with that?

A I don't have a problem with that.

(V17, TT194-195).

The following questioning took place two days later, on Wednesday, September 28, 2005:

BY PROSECUTOR PARKER:

Q Anybody else feel that they are judging the person?

Mr. Ortega, how come?

A I just feel like it's just a heavy burden, something like that..

Q It is a heavy burden.

A And since Monday it was hard to think about it.

Q I imagine it's been weighing on everybody's mind since Monday, welcome to court.

(V19, TT500-501).

Q Mr. Ortega, what do you think? Will your conscience, your deep-seeded belief based on the situation you find yourself in, do you think it will override the rules that are given to you by the judge or can you follow the law and the rules and put your conscience aside?

A It will be tough to.

Q It will be tough.

A I have to follow it the way it was.

Q Even if you didn't like it?

A Even if I didn't like it.

(V19, TT502).

Q Mr. Ortega, difference between beyond a reasonable doubt and beyond all doubt, do you see a distinction?

A Yes.

Q Do you feel comfortable with that?

A Yes.

(V19, TT503).

Q First row, did anybody not vote in the last national election? Mr. Ortega, you did not. Anybody else in the second row, anybody not vote in the last national election? Ms. Duff, you did not.
How about the third row?

A (No response.)

Q Ms. Duff. Man, you had Bush up there, the one everybody wants to hate. What's that other guy's name? I forget. How come?

A I'm not registered right now. I moved back from another state and I didn't register, I plan on it.

Q Mr. Ortega, come on?

A I was too busy with work.

(V19, TT521).

BY MR. PARKER:

Q Hardest decision, Mr. Ortega?

A Taking over a store I wasn't ready to take over.

Q Was that a positive decision on your part?

A Yeah.

Q Everything worked out?

A Yeah, I had to retrain myself but it worked out.

Q How would you describe yourself?

A Hard working, nice, quiet guy.

Q If chosen on this jury, are you so quiet that everybody is going to make their decisions around you?

A Oh no.

Q Any police contacts, any way where you feel like you were mistreated by them?

A No.

(V19, TT536-537).

BY DEFENSE ATTORNEY MAWN:

Q How about the nature of the charge, does it bother anyone to sit on this type of a case? Okay, we have Ms. Barczewski, Ms. Mansur, Mr. Ortega, Ms. Loshelder. And when I say bother, I mean it upsets you to some extent that you're having some concerns.

Let's just work from the premise that every juror will take their responsibility seriously, realize this may be somewhat of a stressful time for them for the week or two weeks that you're in trial, let's assume we will all have those type of feelings.

(V20, TT595).

Mr. Ortega, in your line of work did you ever have an opportunity to be confronted by someone?

A Yes.

Q In a situation where you felt threatened?

A No.

Q Just a happy customer or something?

A Yeah.

Q Nothing where you felt that the police were needed?

A The only time where the police were needed was like somebody stealing something from the store, which happens.

Q Sure, on a regular basis?

A It happens.

(V20, TT623).

The trial judge addressed challenges to the jurors. The defense accepted Juror Ortega, but the State used a peremptory strike (V20, TT641). Defense counsel requested a race-neutral reason and the following occurred:

MR. MAWN: Your Honor, if I may, on behalf of Mr. Nowell, the Defense would object to the striking of Mr. Ortega. I need to point out that Mr. Ortega is probably of Hispanic background. He is dark-skinned, he is the only dark-skinned male other than Mr. Bisnath who is on the jury

I believe Mr. Nowell had a respective panel with possibly three people of color, I'm thinking of Ms. Castro-DeLeon, Mr. Bisnath, who may be and I apologize, I don't know his background, I want to say he is of Indian descent, I could be wrong but he is a person of color.

Mr. Ortega is a protected minority class being Hispanic. Mr. Nowell is a black male and we are respectfully requesting race-neutral reasons for the striking of Mr. Ortega.

THE COURT: Mr. Parker?

MR. PARKER: I apologize, Judge, is Mr. Ortega of the class that the Appellant is? I can't recall now whether Slappy speaks to that issue, because he's black he is objecting to striking any minority group from the panel.

THE COURT: I have to look it up.

MR. MAWN: I could share my knowledge of that, Judge. My understanding is that even a juror who is white can challenge any striking if it's based on race grounds, so there's no particular class. In other words, a white person still has the opportunity to raise a Neil challenge, a black male has the opportunity to raise a Neil challenge, any group, that's the Defense's position and I believe that's the status of the law.

THE COURT: I think Mr. Mawn is probably correct on that issue, Mr. Parker. I haven't reviewed it recently.

MR. PARKER: Well, I haven't, either. But in an abundance of caution, I think the Court should accept that position.

My reasons are two-fold. Number one, as I look at it, he appears young and of a similar age to the Appellant. I would think that Mr Ortega would relate to the Appellant based on age.

Second of all, I noted that his wife works for Devereux, which is a childcare nurturing facility.

I am concerned, based on philosophies within the family, that he may not be able to follow the law when it comes to the actual, in any phase of this particular proceeding.

THE COURT: What specific answers did he give that would warrant that concern? I don't recall any specific answers that would raise that concern about following the law.

MR. PARKER: There is no specific answers. But following the law, I would argue, is what we use to

determine whether or not a cause challenge is granted, whether or not that person can follow the law.

My race-neutral reason is, in spite of the fact that he said he could follow the law, I don't particularly like him, I don't think he is going to be the kind of juror that I would like. And for those reasons which were race-neutral, I'm asking the Court to proceed with allowing me my peremptory challenge.

I believe the Court would have to find, under those circumstances, those aren't reasonable, correct me if I'm wrong, Counsel, whether or not those are unreasonable reasons to strike him peremptorily.

MR. MAWN: Judge, I need to preserve this issue, and I understand Mr. Parker's objections.

Our position is those are not race-neutral, that's not a reflection in any way on Mr. Parker's character.

I'm just simply stating, on behalf of Mr. Nowell, Mr. Ortega has a sister who is in law enforcement. That would normally be something that the State of Florida -- or involved in law enforcement, that would normally be a characteristic that would be somewhat more state-oriented.

He's a hard-working individual, he works in retail at a 7-Eleven, he said he would follow the law, even if he didn't like it. There is nothing that I heard that would indicate he wouldn't support the State's position.

Our only suggestion is that he happens to be a person of color, so we object to the State's grounds.

MR. PARKER: And this is why, because we have peremptoral challenges, the problem I have with it is, in the past it's not like somebody's face. The problem is, well, listen, you can't strike anybody from now on because of race. All minorities have a right to sit, they have a right to sit, can't strike them because of race.

My reason for striking him is that he's young and appears to be the same or similar age as the Appellant, that's my first reason. I think that's sufficient for a peremptory challenge, whether or not it goes for cause for his inability to actually follow the law.

I think he would associate himself with the Appellant because of his age. I think he looks at the Appellant and says, you know, that could be me. As a result, it's going to be more difficult for him, if not impossible, to actually do what's asked of him in terms of following the law.

For that primary reason that I'm asking that he be stricken, that peremptory challenge, I don't want to confuse it with a cause challenge unless the Court finds that my race-neutral reason is not reasonable.. Certainly, that's within the discretion of the Court.

THE COURT: Let me pull up Slappy. Are there any others after Slappy that I need to review on this issue?

MR. MAWN: Neil v. Slappy.

THE COURT: Do you happen to have the citation?

MR. MAWN: If the Court would allow me the opportunity, I could go into my notes.

THE COURT: I would like to review it so I can make sure I follow the law on this issue.

MR. MAWN: I need for the record to state the following, that the victim in this case, Mr. Kelvis Smith, is of the same age as Mr. Ortega, as well. He is also a black male.

Our position is that the State's reasons for striking, that there would somehow be sympathy toward Mr. Nowell but also be valid reasons for keeping him on because a young, black male of similar age was shot.. With the Court's permission, I'll look for the case law.

THE COURT: Is Neil N-E-I-L or Neal?

MR. PARKER: N-E-I-L, I believe.

THE COURT: I'm just doing the search since I don't have the citation. State v. Neil; and State v. Slappy.

MR. MAWN: Judge, I have a case that the Court may wish to review. Again, these cases are very old, I'm using a notebook that may be outdated. The simple blurb on it states --

THE COURT: What's the name of the case? Wright v. State, 586 So.2d 1024. The holding is both juror and Appellant were black males, same age. They say that is an invalid race-neutral reason for striking. Juror not making eye contact with attorney is also not a valid race-neutral reason. One of the reasons that the State of Florida suggested is the same age.

MR. MAWN: Reed v. State cited at 560 So.2d 203. A feeling about the juror is an invalid reason to strike. Does the Court have the Neil cite?

THE COURT: Yes, 457 So.2d 481.

MR. MAWN: Thank you.

MR. PARKER: Dorsey v. State, a Supreme Court case, 868 So.2d 1192.

THE COURT: Thank you

MR. PARKER: December 18th of 2003.

THE COURT: Got it. It was on my list, I hadn't gotten down to that one yet, I'm trying to review these.

I'm sure that's not going to help you, Mr. Parker.

MR. PARKER: May not. They also cite Hernandez v. New York, 1991.

THE COURT: Must be a United States Supreme Court case.

MR. PARKER: Correct.

THE COURT: What's the cite?

MR. PARKER: Hernandez v. New York at 500 U.S. 352, 111 S.Ct. 1859, 500 U.S. 352, 114 L.Ed. 2d 395 (1991). They cite Batson, when they say once the opponent of a peremptory challenge must establish a prima facie case of racial discrimination, step 1. That has not been done showing prima facie case of racial discrimination.

Burden of production shifts to proponent of the strike to come forward with a race-neutral explanation. The mere fact that a person appears to be, and I will admit, appears to be Hispanic and has a Hispanic name, I don't believe is enough to make out a prima facie case for racial discrimination.

Says the burden would shift to me and then I would have to come forth with a race-neutral explanation, step two.

If the race-neutral explanation is tendered, the trial court must then decide, step 3, whether the opponent of a strike has proved purposeful racial discrimination.

The second step of this process does not demand an explanation that is persuasive or even implausible. At the second step of the inquiry, the issue is the facial validity of the prosecutor's explanation, unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. That's citing Hernandez v. New York.

THE COURT: Are you citing Hernandez v. New York?

MR. PARKER: Basically.

THE COURT: So that's a Florida Supreme Court case.

MR. PARKER: That's the footnote and I just read you a cite from Hernandez, the Supreme Court case. There's an awful lot of discussion in there about it, Judge.

THE COURT: But the opening paragraphs discuss the State's race-neutral reason for striking the two Hispanic-speaking Latino perspective jurors and that he doubted their ability to defer to official translation of anticipated Spanish language testimony.

MR. PARKER: I would suggest it's distinguishable because therein the State has created a, what's the word I'm looking for? I would have to engage in a series of strikes that would indicate an intent to strike all Hispanic males. In that case there were two Hispanic males and that would, I think, establish State's intent to engage in that kind of peremptory strike. In this case I have not stricken Mr. Bisnath who is clearly a man of color. I don't see any others.

THE COURT: I believe the only three are, as Mr. Mawn had indicated, Ms. Castro-DeLeon and Mr. Bisnath and I'm not even, I would have to see Mr. Ortega again. I don't recall him necessarily being dark-skinned, he might be a little darker than you, Mr. Mawn.

MR. MAWN: For the record, I'm a white Caucasian male. My impression of Mr. Ortega is that he is Hispanic and the State can comment on that, Judge. Obviously, we looked at the same person.

I also need to point out, there was a Mr. Martinez who was also on the jury.

THE COURT: He was a State cause challenge.

MR. MAWN: He was stricken for cause and again, we're not contesting that particular strike. I'm just saying there were four people of color that we had out of fifty. One was stricken for cause.

MR PARKER: Pattern is the word I'm looking for, Judge, is the State engaging in some pattern.

MR. MAWN: Our position is that the pattern needs to start somewhere. The first strike, if it's not based

on race-neutral grounds, should be overturned. It doesn't matter if you do it one time or fifty times, the question really is, are you doing it for nonrace-related reasons.

MR. PARKER: Once we passed Mr. Bisnath, your Honor, and clearly Mr. Bisnath is older than the Appellant. I think, certainly under those circumstances, then it's credible credence that the State's position that we're striking him because of his age and the potential to identify with the Appellant would be because of age.

MR. MAWN: Would the Court look at Wright v. State?

THE COURT: Yes, I had that out just a minute ago.

MR. MAWN: Because my notes seem to indicate that would be an invalid reason for a strike.

THE COURT: It says that the prosecutor cannot base it's use of a peremptory challenge to exclude perspective juror on the basis that the juror would be partial to the Appellant because they were both African-Americans.

MR. PARKER: I agree with that, that's clearly not a race-neutral reason.

THE COURT: That was in the heading.

MR. MAWN: Judge, I'll need to pull that case. Again, I'm dealing with headnotes that I have which really have been in this book for many years. And I apologize, I have not read the case but it seems to suggest that both jurors and Appellant were black males of the same age and that may have been a reason for the strike.

MR. CHANG: Judge, If I may interject, Mr. Parker wants to say that his race-neutral reason is because the juror is at a relatively young age and he could relate to Mr. Nowell of similar age.

I would like to point out that the surviving victim in this case, Mr. Smith, is approximately the same young age, as is the deceased victim in the case who was a

young individual. So he could certainly also relate to the surviving victim as well as the deceased victim based on age.

THE COURT: In the Wright case, Mr. Wright, an African-American, timely objected after the State peremptorily excused three African-American members of the venire, and the trial court properly exercises its discretion or required the State to explain the challenges. This part of the procedure was spelled out in Slappy and it goes on to explain where the burden shifts.

While the reasons need not rise to the level justifying a challenge for cause, they nevertheless must consist of more than the assumption that the venireman would be partial to the Appellant because of their shared race.

In Wright it says, the State explained its challenge of venire member by saying that Salter "would be able to identify himself more with the Appellant, since they are both black males of essentially the same age." Alternative ground explaining that there had been no eye contact between Salter and the prosecutor and "I felt uncomfortable about that.."

Maybe you can help me out with this, Mr. Parker, left on the jury from yesterday that includes several males, were any of those males that were not of color youthful in similar ages? For the record, I don't have those juror questionnaires because we handed out all three copies to the three attorneys.

MR. PARKER: For cause, Mr. Ricciardi, we all agreed that he couldn't do it because he recalled the event. His wife was pregnant at the time.

THE COURT: I'm sorry, the ones that were not excused.

MR. CHANG: The only young person remaining on the jury would be Mr. Collins.

MR. PARKER: That's correct.

THE COURT: I will, at this time, exercise my discretion and find that the State's race-neutral

> reasons are reasonable from their point of view and allow that strike to remain.
>
> MR. MAWN: On behalf of Mr. Nowell, please note our objection.

(V20, TT641-655).[12]

The State recognizes that Hispanic is a group which qualifies as a cognizable class. *State v. Alen*, 616 So.2d 542, 455 (Fla. 1993).

The procedure to be followed when there is a challenge to a juror in a cognizable class is threefold. Step 1 requires:

> a) a party must make a timely objection on the basis of race;
>
> b) the party must show that the venireperson is a member of a distinct racial group; and
>
> c) the party must request that the court ask the striking party its reason for the strike.
>
> If these initial requirements are met the court must ask the proponent of the strike to explain the reason for the strike.

Melbourne v. State, 679 So. 2d 759, 763-764 (Fla. 1996). Step 2 requires the proponent of the strike to come forward with a race-neutral explanation. Step 3 requires the trial judge to determine whether the explanation is facially race-neutral. In

[12] The State notes that the statement in the Initial Brief that "Later in the trial, it was learned that Mr. Ortega was a 2000 graduate of the University of Florida" is not correct. (Initial Brief at 9, 52). Mr. Collins was a graduate of the University of Florida, and this fact was revealed after Mr. Collins and the prosecutor inadvertently talked to each other in the restroom. (V22, TT915). There is nothing in the record that Juror Ortega had any involvement with this case after he was excused.

the third step, the court's focus is on the genuineness of the explanation, not its reasonableness. If the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. *Melbourne,* 679 So. 2d at 765.

The explanation will be deemed race-neutral for step 2 purposes as long as no predominant discriminatory intent is apparent on its face. If the explanation is not facially race-neutral, the inquiry is over; the strike will be denied. *Melbourne,* 679 So. 2d at 764. Peremptory challenges are presumed to be exercised in a nondiscriminatory manner, and the trial court's assessment of credibility will be affirmed unless clearly erroneous. *Melbourne,* 679 So. 2d at 764.

Applying these principles to this case, the procedure was closely followed and the trial judge determined the reasons given by the prosecutor were race-neutral. Those reasons included age and philosophy. A peremptory challenge based on age is permissible as a race-neutral reason. *Saffold v. State*, 911 So.2d 255, 256 (Fla. 3rd DCA 2005). A juror's equivocation about the death penalty or "discomfort with" the death penalty is likewise a race-neutral reason. *Morrison v. State*, 818 So.2d 432, 443-444 (Fla. 2002), *citing San Martin v. State*, 717 So.2d 462, 467-68 (Fla. 1998), and *Walls v. State*, 641 So.2d 381, 386 (Fla. 1994). For example, in *Floyd v. State*, 850 So.2d 383,

393-395 (Fla. 2002), a juror gave an equivocal answer regarding his views on the death penalty. This Court held that basing a peremptory challenge on an equivocal response about the death penalty was race-neutral. *Floyd*, 850 So.2d at 395). *See also Farina v. State*, 801 So. 2d 44, 50 (Fla. 2001) (juror voiced hesitancy about the death penalty); *Cobb v. State*, 825 So. 2d 1080, 1083 (Fla. 4th DCA 2002)(juror's age and "liberalism").

Nowell has failed to demonstrate that the trial judge's credibility-based decision regarding the genuineness of the prosecutor's race-neutral reason was clearly erroneous, and the presumption of a nondiscriminatory exercise of a peremptory challenge has not been overcome. This court has repeatedly stated that it "must rely on the superior vantage point of the trial judge, who is present, can consider the demeanor of those involved, and can get a feel for what is going on in the jury selection process." *Files v. State*, 613 So. 2d 1301, 1305 (Fla. 1992).

The trial court properly applied settled Florida law and found that the State's reasons for the peremptory challenge were not pretextual, but rather were genuine. That is the decision that the trial court must make in evaluating an objection to a peremptory challenge, and the trial court committed no error. *Floyd v. State*, 850 So. 2d 383, 394-95 (Fla. 2002); *Farina (Anthony) v. State*, 801 So. 2d 44, 50 (Fla. 2001); *Smith v.*

State, 699 So. 2d 629, 636-37 (Fla. 1997) (rev'd on other grounds). There is no basis for relief.

POINT II

THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION BY OVERRULING OBJECTIONS AND DENYING THE MOTION FOR MISTRIAL DURING THE GUILT PHASE CLOSING ARGUMENTS

Nowell claims the prosecutor made improper arguments that denied him a fair and impartial trial and were so harmful or fundamentally tainted that the only remedy is a new trial. The control of prosecutorial comments to the jury is within the trial court's discretion, and the standard of review is whether the trial judge abused his discretion. *Conde v. State*, 860 So. 2d 930, 950 (Fla. 2003). This Court has stated that "we respect the vantage point of the trial court, being present in the courtroom, over our reading of a cold record." *Smith v. State*, 866 So. 2d 51, 64 (Fla. 2004).

Golden Rule. Nowell's claims the prosecutor violated the prohibition against "golden rule" arguments in several instances. The transcripts show the following regarding this issue:

> MR. PARKER (Prosecutor): The judge will instruct you that when the defendant takes the stand you are to apply the same rules in judging that witness's credibility as anyone else's credibility.
>
> Was Mr. Nowell honest with you? Was he honest when he implied that he didn't know Mr. Bellamy? I suggest to you, that's not true. I was, on the 19th of April of this year when I got gunned down at 2254 Washington Street and by all accounts was lying in the driveway of that house, not blocks away, not blocks away from Mr. Bellamy, in the driveway while Mr Bellamy was in

the house. Both of them gunned down. Is that just happenstance? Is that just fortuitous?

I'm walking along the street and I happen to get gunned down with Jermaine Bellamy. And oh, yeah, we just happen to get picked out of a photographic lineup by Kelvis Smith, we just got picked out of a hat. Shame on Mr. Smith. He doesn't like us, so he's going to accuse us with this. He wants you to believe that a human being in the community would just say, Hum, who do I want to pay? Ladies and gentlemen, that's just nonsense, nonsense.

Michelle Gill speaks to you through the evidence. Michelle Gill tells you about that evening and early morning hours before she died. And along with the testimony of Mr. Smith, Michelle tells you this, I was pregnant, approximately seven months, I had a viable child in me. It was Kelvis's child. I worked at Ryan's Steakhouse where I've worked for years.

I worked with Willie Nowell. Willie knew me, he knew Kelvis. I didn't hurt Willie. I didn't threaten him. I didn't point a gun at him. I didn't call him names. There's nothing to suggest that that poor sole [sic] did a thing other than work and go home and carry her child.[13]

Counsel would have you believe because there was marijuana, shame on her. Well, let's just excuse the slaughter that occurred in that closet. Let's just say, You know what, Mr. Nowell? We forgive you. She smoked some pot. Please don't do that. Please don't do that.

And what the evidence tells us for Ms. Gill is that when they got home that night, there were these two men who came through the back porch area. You've seen the photographs, you've seen the broken glass, you've seen how they came through the back door, you saw how they got in the house.

[13] The bolded sections are the sections cited in the Initial Brief.

(V29, TT1881). There was no objection to the section cited in the Initial Brief. This argument was not Golden Rule argument and did not ask the jury to put themselves in the victim's shoes. This argument was a fair comment on the testimony of Nowell who testified he did not know Smith, and on the theory of defense that Smith was the only witness and was making up his testimony. Gill's relationship to Nowell was relevant to the fact she and Smith knew him and could identify him. An attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence. *Miller v. State*, 926 So.2d 1243, 1254 (Fla. 2006); *Craig v. State*, 510 So.2d 857, 865 (Fla. 1987). Arguing a conclusion that can be drawn from the evidence is permissible fair comment. *Mann v. State*, 603 So.2d 1141, 1143 (Fla. 1992).

Nowell's next cite pertains to the following:

> MR. PARKER: In the face, the gun, the gun. What was Mr. Nowell and Mr. Bellamy thinking when they entered the house with the gun? What were they thinking when they put the gloves on, Mr. Nowell having a skull cap. What were these people thinking when they traveled to this house? What were they thinking when they broke the glass to get in? What were they thinking when they drew down on two unarmed people, one of them a woman, Michelle Gill. What were they thinking?
>
> When we look at their actions, they asked Mr. Kelvis Smith to lie down in the living room area. They tied him up with cord. He did, he laid down. Why did he do that? He had a gun in his face.

> **What was Michelle Gill doing? What was in her mind? She was crying, begging, she was begging. Michelle Gill, what was going on in her mind? I'm going to die. Ladies and gentlemen, if she didn't think she was going to die when they first walked in, when they herded those two people into that closet, let there be no doubt that those people knew what their fate was.**
>
> **Let there be no doubt when the hand came across the throat, their fate was sealed and it was sealed in their presence, and Mr. Smith and Ms. Gill could do nothing but wait for it to happen. Nothing, except think about being killed, think about being killed. To think about her** unborn child. For Mr. Smith to think about his inability to help her.
>
> This isn't TV, this really happened. This really happened. No reason for it, not any kind of reason for it, no justification.
>
> Was Mr. Nowell justified because he thought Mr. Smith was the one that shot him? You know, Mr. Nowell is justified in going to the police. We're a land of laws. See, Mr. Nowell and Mr. Bellamy, that's not what they said to themselves, and we know that because they filed no police report.
>
> MR. CHANG: Objection. Facts not in evidence.
>
> MR. PARKER: Arguing state of mind based on their actions, Judge. I think that's fair.
>
> THE COURT: I'll overrule the objection.

(V29, TT1884). There was no objection to the section cited in the Initial Brief. Although defense counsel did object to "facts not in evidence;" this was in reference to Mowell's not filing a police report. To preserve an issue, a litigant must first make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, there must be a specific contention asserted as legal ground for the

objection. *Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005). Furthermore, the portion cited was proper argument as to premeditation and was a fair comment on the evidence.

The final alleged "golden rule" violation occurred when the prosecutor argued:

> Mr. Smith on that night, throughout the period of time that he had to watch and listen and fear in that house, and look at those guns and watch in fear at what was taking place, would he ever forget that Mr. Willie Nowell was the man, along with Mr. Jermaine Bellamy, who shot them to pieces in that closet? No. No. No. No one, no one would forget that. No one could make that mistake.
>
> **What did he say? What is another reason why this is going to be imprinted in his mind forever? I saw the bullets coming down the wall. I saw them coming down the wall. Can you imagine? I can't even imagine that. He must have been terrified, along with his girlfriend. Will he ever forget? Is he equivocal? No.**
>
> **Does he have a college degree? No. By his own admission he understands what goes on in the streets. But by his own admission he's been in trouble before with the law. Welcome to Mr. Smith's world.**
>
> **Mr. Smith's world where Willie Nowell and Jermaine Bellamy can take a .45 caliber handgun and a .32 caliber handgun and walk you into a closet and shoot her eleven times.** Use your own recollection. I believe the medical examiner said eleven wounds, somewhere around seventeen holes, perforation holes in her body. By his own testimony the logic is those two bullet holes in the head caused pretty much immediate death. The other wounds did not.
>
> **What was Michelle Gill thinking when the first bullet struck her? The second bullet? The third --**
>
> MR. CHANG: I'm going to object. May we approach?

THE COURT: Counsel, approach the bench.

(Whereupon, a bench conference was had, out of the hearing of the Jury.)

MR. CHANG: Judge, again I know it's argument but he doesn't need to stress what she's thinking in terms of mental state. Second of all, he's again appealing to the jury's emotions and playing on their sympathy.

THE COURT: Mr. Parker?

MR. PARKER: I think what's going on in their minds is crucial to this particular case. Now, the evidence is the evidence. I should be allowed to argue that.

THE COURT: I'll overrule the objection. I don't think it's fair for you both to be arguing on the same case.

MR. CHANG: Judge, this is the third time we would renew our motion for mistrial. Mr. Parker kept on raising the issue --

THE COURT: I've overruled your objection. Your motion is denied.

MR. CHANG: Thank you.

(Bench conference concluded.)

(V29, TT1895-96). There was no contemporaneous objection to the first bolded section which Nowell now alleges was improper argument, and the objection to what Gill was “thinking” was an objection to sympathy, not a “golden rule” objection as raised in the brief. The trial judge did not abuse his discretion in overruling the objection. The argument paled in comparison to the facts, and the argument was not designed to invoke sympathy. Michelle was shot eleven times while trapped in a closet. The

prosecutor is allowed to argue the facts of the crimes. In any case, the objection was raised at the third bullet, and the impact of eleven bullet shots was completely lost.

In *Hutchinson v. State*, 882 So.2d 943, 954 (Fla. 2004), the defendant claimed the prosecutor was making improper "golden rule" arguments. This Court stated that:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985); *see also Robinson v. State*, 610 So.2d 1288, 1290 (Fla. 1992). The prosecutor in this case acted properly in asking the jury to make reasonable inferences from the evidence presented at trial.

As in *Hutchinson*, the prosecutor here was drawing reasonable inferences and not asking the jury to place themselves in the place of the victim.

Improper arguments. Second, Nowell claims the arguments regarding the co-defendant's involvement (V29, R1886), and that the victims were "caged" are improper comments. (V29, TT1888). There was an objection only to the second statement, after which Nowell moved for a mistrial based on that statement and previous comments. (V29, TT1889-90).

The first argument involved the following:

> MR. PARKER: Why weren't there any fingerprints? Let's look at what they were thinking, let's look at what they did to come to that conclusion. They didn't want any fingerprints. No fingerprints. Why is there no DNA? We admit it. Guess what? Mr. Nowell and Mr. Bellamy didn't bleed in that house. None of the

> testimony suggests that. **None of the testimony suggests that Mr. Bellamy got any closer to Ms. Gill than to hold a gun on her while she whimpered and begged.**
>
> MR. CHANG: Your Honor, I object. Arguing facts not in evidence. Move to strike.
>
> THE COURT: Overruled.

(V29, TT1886). This comment was a fair comment on the testimony of Kelvis Smith regarding Michelle's actions while they were in the closet. These facts were in evidence. Nowell does not cite any case to support his position, and the only objection to this evidence was that the facts were not in evidence. Smith testified that Michelle Gill was "begging" and was "real hysterical, real emotional." (V22, TT1024). He also testified Michelle Gill was "yelling, crying" when the two gunmen started shooting. (V23, TT1108). There were facts in evidence, and this argument was a fair comment on those facts.

Next, the prosecutor argued:

> And the cut cord on the vacuum cleaner consistent with the cord that was recovered at the hospital, consistent with the cord Mr. Smith says he was tied with. Why did they do that? Why did they need the cord when they had the guns? I suggest to you that that action constitutes their state of mind because all they wanted to do at that time is shoot the fish in the barrel, and that's what they did. They were **caged in essence, caged human beings** --
>
> MR. CHANG: Judge, objection. May we approach?
>
> THE COURT: Counsel, approach.

(Whereupon, a bench conference was had, out of the hearing of the Jury.)

MR. CHANG: Judge, I can let Mr. Parker get away with some emotional stuff, but when he starts talking about slaughter, caged human beings and herding them like cattle, all those references and metaphors are inappropriate at this time.

If he wants to talk about they were shot and murdered and so on -- but these metaphors are inappropriate and they're designed to invoke sympathy. He is playing on the sympathy of the jury, he's not talking about the facts of the case.

There are other ways he can refer to the shooting, the murder, the killing, I think those are appropriate terms, but the metaphors are just inappropriate.

MR. PARKER: Judge, they may indeed be colloquialisms for what actually occurred, and I think that I can argue those facts to the jury.

THE COURT: What about caging? That's a metaphor used inappropriately.

MR. PARKER: I'll get away from that.

THE COURT: I'll partially sustain the objection.

MR. PARKER: I understand.

MR. MAWN: Your Honor, at this time Mr. Nowell would move for a mistrial based on the comments of the State of Florida. The problem is that the State of Florida has been continuously making an emotional appeal to the jury to convict as opposed to using the evidence at hand and arguing persuasively from that evidence.

Our position now is that he has gone to the point where the jurors cannot fairly look at this evidence in a rational way. Our position is that Mr. Nowell cannot receive a fair trial.

THE COURT: Mr. Parker?

> MR. PARKER: Judge, I've argued the evidence in a very clear and concise way. I see nothing that indicates that I've stepped over the line. I'm following the mandate of the court.
>
> THE COURT: I will deny the motion.
>
> (Bench conference concluded.)

(V29, TT1888-90). The trial judge did partially sustain the objection, and it appears that the portion that the trial judge sustained was the reference to "caging." The argument was not improper. "Caging" would be an accurate description of how Smith and Gill were treated. *See Brooks v. State*, 762 So.2d 879 (Fla. 2000)(victim did nothing to deserve being "shot like a rabid dog on the driveway of his home" proper argument and based on inference from evidence). They were both tied and bound, then the 475-pound Smith ordered into a closet with a 7-month pregnant Gill. This description was a fair comment on the evidence.

Religious reference. Third, Nowell alleges the prosecutor improperly made an improper religious argument. (V29, TT1893). There was no objection to this argument. The argument was:

> Now, much to do has been made about Mr. Smith's identification. Thank you, **God,** that you make the determination about what occurred involving the identification. I don't get to make that decision, the judge doesn't, the Defense counsel doesn't, you make that decision.
>
> Did Mr. Smith know Willie Nowell and Jermaine Bellamy? First question. The testimony that came before you is that he did, not only from Mr. Smith but from all the other witnesses who testified.

> The women at Ryan's Steakhouse. Man, they have no axe to grind. Did Kelvis know Willie Nowell? Did Willie Nowell know him? Yes. That question is answered unequivocally yes.
>
> Does Mr. Smith have some reason to lie, such an overpowering motivation to lie to you about who did this to him and to his pregnant girlfriend that he would lie to you? The overwhelming, overwhelming answer is no, he has no reason to lie. Even if he believed he was mistaken, he has no reason not to tell you that, because by his own testimony, I want the right people.

(V29, TT1893). There was no objection. The reference to "God" was so fleeting that even defense counsel did not find it offensive.

Fundamental error. Trial counsel made no objection, or contemporaneous objection, to many of the comments. These issues are not preserved for review and thus not cognizable on appeal. *See Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997); *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996). The only exception to this procedural bar is where the prosecutor's comments constitute fundamental error. *Bonifay v. State*, 680 So. 2d 413, 418 n.9 (Fla. 1996). Fundamental error is defined as the type of error which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Kilgore*, 688 So. 2d at 898. *See Walker v. State*, 707 So. 2d 300, 316 (Fla. 1997) ("imagine" the suffering of the victims reflects a poor choice of words, but is harmless beyond a reasonable doubt); *Zack v. State*, 911 So. 2d 1190, 1207-1208 (Fla. 2005)

(using the term "imagine," does not rise to the level of fundamental error or "reach down into the validity of the trial itself"); *Farina v. State*, 937 So.2d 612, 626-634 (Fla. 2006)(religious argument); *Bonifay v. State*, 680 So.2d 413 (Fla. 1996)(biblical references; use of word "exterminate").

Nowell has failed to show these issues were error, much less fundamental. *See Hodges v. State*, 885 So.2d 338, 368 (Fla. 2003) citing *Maddox v. State*, 760 So.2d 89, 94 (Fla. 2000)(heavy burden on defendant to establish fundamental error).

Harmless error. The only arguments which were properly preserved were the "caged" comment and that Michelle "whimpered and begged." Both of these comments were fair comments on the evicence. Error, if any, was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129, 1139 (Fla. 1986).

POINT III

THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION BY OVERRULING OBJECTIONS AND DENYING THE MOTION FOR MISTRIAL DURING THE PENALTY PHASE CLOSING ARGUMENTS

Nowell claims a new penalty phase is required because the prosecutor made improper arguments.

The first comments were:

> Justice, you hold justice in your hands. Justice is, we tried to capture this notion of justice and we focused on a statue of a woman who's blindfolded, and in one hand she holds a set of scales to balance and in the other hand she holds a sword, interpreting that as some sort of fairness balanced with swiftness. Justice requires firmness, harshness, and that's what it requires.
>
> There are words in our common day that we hear every day. We hear the word death, death has an ominous meaning to it. We're afraid of death. Nobody wants to die.
>
> **We hear the word mercy. Mercy is a word that makes us feel good, we want to be the kind of person that can grant mercy, that's capable of doing that. Justice grants mercy when mercy is applicable.**
>
> **In this particular case and as I speak and as Defense counsel speaks, I ask that you keep in your minds eye whether mercy is a part of justice in this case.**
>
> **I submit to you it is not, because mercy was not granted to Ms. Michelle Gill. There was no mercy when Mr. Nowell and Mr. Bellamy stood at the opening of that closet. There was no mercy when Mr. Nowell and Mr. Bellamy had the opportunity to dispense mercy, when they had the opportunity to see Ms. Gill, to see that she was pregnant, to see her crying, to see her begging. When they had an opportunity to see that she was aware that her only means of safety and protection was in that very same closet with his hands tied**

behind his back, they were able to see that no one had a weapon other than the killers, they were able to see this.

And yet, in spite of that scene, in spite of those moments, Mr. Nowell, while those two helpless human beings, seated in a closet, disengaged from the rest of the world, no hope --[14]

MR. MAWN: Objection. May we approach?

THE COURT: Counsel, approach.

Whereupon, a bench conference was had, out of the hearing of the Jury.)

MR. MAWN: Counsel for the State of Florida is now appealing to the emotions of the jury. This is not one of the enumerated aggravators. They're going into the heinous, atrocious and cruel argument, which is not going to be provided for the--

MR PARKER: It does not. I'm talking about their cold and calculated and premeditated manner of killing, when faced with the circumstances they proceeded.

THE COURT: I'll overrule your objection.

MR. MAWN: Cold, Judge, doesn't mean cold-hearted. It means, it's a different definition than what the State is arguing.

THE COURT: I understand I'll overrule your objection.

(Bench conference concluded.)

At the charge conference, defense counsel requested an instruction on "fairness and mercy." (V34, PPh371; Proposed Instruction K). The State objected to the instruction (V34, PPh372). The trial judge overruled the objection and gave the instruction. (V34, PPh374; V35, PPh514). The prosecutor's

[14] Comments cited in Initial Brief as error are in bold.

comment was a fair comment on the instruction. In fact, defense counsel argued mercy in his closing statement (V35, PPh478, 507).

Furthermore, the objection made was not to the "mercy" part of the prosecutor's argument, but was only made after the prosecutor referred to Smith and Gill as "two helpless human beings, seated in a closed, disengaged from the rest of the world, no hope—." (V35, PPh443-444). There was no contemporaneous objection to the "mercy" portion of the argument, and this issue is not preserved for appeal. *Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005). Finally, this argument was relevant to the coldness of the defendant and was relevant to the cold, calculated, and premeditated aggravating circumstance. *See Lugo v. State*, 845 So.2d 74, 78 (Fla. 2003).

The second argument cited by Nowell was when the prosecutor commented on the jury instruction on "fairness and mercy":

> Finally, you may consider anything. You may consider all other evidence presented during the trial or penalty phase proceeding which, in fairness and mercy, you find to be mitigating, in fairness and mercy.
>
> **Mercy. State asks that you recommend mercy if mercy is warranted. And mercy wasn't given in this case, not by Mr. Nowell, not by Mr. Bellamy. There was no mercy there, none whatsoever.** Thank you.
>
> MR. MAWN: Objection. May we approach?
>
> THE COURT: Counsel, approach.

(Whereupon, a bench conference was had, out of the hearing of the Jury.)

MR. MAWN: The Defense is moving for a mistrial, based on the comments of the State of Florida indicating that mercy is inappropriate. I would cite Urbin vs. State at 714 So.2d 411. It's basically blatantly impermissible according to this case because it's inflammatory. In that particular case the prosecutor indicated the following: We attempted to show this defendant mercy. If you attempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jackson Hicks And that was not, then the same prosecutor used almost the identical argument, which was prohibited in Brooks vs. State cited at 762 –

THE COURT: You need to give me the cases. I can't --

MR. MAWN: I understand, Judge. I'm moving for the mistrial based on that argument.

THE COURT: Mr. Parker, do you wish to be heard?

MR. PARKER: My argument is according to the facts and the instructions of this Court. And I didn't argue in terms of a, I argued that the State suggests that you should give mercy where mercy is warranted. There was no mercy granted in this situation I see that as distinguishable, I see that as acceptable. It's not a feature of my argument.

THE COURT: I'm going to deny your motion at this time.

MR. MAWN: Yes, your Honor.

(Bench conference concluded.)

This was a fair comment on the jury instruction the judge was going to give and was not of the type cited in *Urbin v. State*, 714 So.2d 411 (Fla. 1998), in which the prosecutor argued to show the defendant the same mercy he showed the victim. The argument made by the prosecutor was more like the argument in

Lukehart v. State, 776 So.2d 906 (Fla. 2000), that the jury should not be swayed by sympathy, or the argument in *Zack v. State*, 753 So.2d 9 (Fla. 2000), that the jury needs to put sympathy aside. *See also Lugo v. State*, 845 So.2d 74, 80-81 (Fla. 2003); *Kearse v. State*, 770 So.2d 1119, 1129 (Fla. 2000). Even if this could be construed as a "mercy" argument, it was not error. *See Conahan v. State*, 844 So.2d 629, 640-41 (Fla. 2003).

Next, Nowell complains that the prosecutor improperly argued the "avoid arrest" aggravator:

> I believe the Court will read to you the instruction involving the third aggravating circumstance. That the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> **Eliminating your witness is nothing more than an attempt to prevent a lawful arrest. See, it's different for you all. Imagine the, imagine the fear that this man had when he heard that this Kelvis Smith lived.**
>
> MR. MAWN: May I approach?
>
> THE COURT: Counsel, approach
>
> (Whereupon, a bench conference was had, out of the hearing of the Jury.)
>
> MR. MAWN: Although the State of Florida was attempting to correct the problem, the State has violated the Golden Rule by putting the jury in the position of possibly being victimized by the killer, Mr. Nowell. The State was catching themselves and then attempted to correct that problem. But it's apparently a Golden Rule violation.

(V35, PPh449). The trial judge instructed the jury that the prosecutor improperly used the word "imagine" and the jury should disregard that term. (V35, PPh451). Contrary to the allegation by defense counsel, this was not a "golden rule" violation. The golden rule asks a juror to put himself in the shoes of the victim. The prosecutor simply made a gratuitous comment about how surprised the defendant must have been when he learned victim Smith survived two gunshots to the head. This argument went to whether the murder of Gill was to eliminate a witness and avoid arrest: the fact one of the witnesses survived was certainly relevant. Furthermore, the curative instruction corrected any problem the prosecutor created by using the word "imagine." *See Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985).

Last, Nowell claims that the following argument required a mistrial:

> The photographs of the house. Nice place. The testimony from the parents. Good folks. We love our child. We didn't teach him, we taught him right. The stepfather, and thank God for the stepfather, good man, giving man, nurturing. And Willie chose a different path, and he chose it at a young age. And we know that because the doctor testified that he does well when he's in confinement. He did well when he was confined as a boy. He did well when he was confined for five years for aggravated battery. **But there's no guarantees that during confinement he won't kill again if you make him mad**.
>
> The age of the defendant at the time of the killing. That's another mitigating circumstance that you will be asked to consider, his age. Did his age in and of itself create a circumstance where he should be

forgiven this act, that he should mitigate against this act?

MR. MAWN: Your Honor, may we approach?

THE COURT: Counsel, approach.

(Whereupon, a bench conference was had, out of the hearing of the Jury.)

MR. MAWN: The Defense is moving for a mistrial based on the Prosecutor's statements that there is no guarantee that the defendant ill kill again. It's improper prosecutorial argument.

MR. PARKER: It's the evidence, it's the evidence in this case.

THE COURT: Dr. Riebsame testified to that?

MR. MAWN: Yes, Judge, but it's improper to argue that.

THE COURT: Even if there was testimony in the case, that would support that argument?

MR. MAWN: Yes

THE COURT: May I see your case?

MR. MAWN: I'm citing the cases that I have at this point, North vs. State. Concern over the possibility that one day the defendant could be pardoned if he's not sentenced to death is not a proper consideration.

MR. CHANG: Teffeteller vs. State, 439 So.2d 840, talks about the prosecutor made an argument, "Don't let him kill again."

THE COURT: That's different, that's not the same thing.

MR. PARKER: I'm not pleading with the jury, don't let him go so he could kill again. I'm quoting the doctor, the doctor said there's no guarantee.

> THE COURT: I will deny the motion for mistrial. But Mr. Parker, you need to stay away from that.

(V35, PPh463). There was no contemporaneous objection to this comment. Even if there were, the prosecutor was repeating the testimony from the defense expert, Dr. Riebsame. (V33, PPh312). Nowell presented extensive testimony about how well he did in prison and how he would was a model inmate. These factors were even found in mitigation. (V15, R2385, 2387, 2388). In fact, one of the mitigating factors proposed was that "society can be protected by a sentence of life imprisonment." (V15, R2388). The trial judge gave this very little weight. Dr. Riebsame's testimony that Nowell was anti-social and there was no guarantee he would not kill in prison was relevant to this mitigating circumstance and fair game for argument in closing.

Fundamental error. As to the comment to which no objection was made, the issue is not preserved for appeal. As such, the error must be fundamental error in order to require a new penalty phase. *See Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997); *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996). The only exception to this procedural bar is where the prosecutor's comments constitute fundamental error. *Bonifay v. State*, 680 So. 2d 413, 418 n.9 (Fla. 1996). Fundamental error is defined as the type of error which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Kilgore*, 688 So. 2d at 898. *See Walker v. State*, 707 So. 2d 300, 316 (Fla. 1997); *Doorbal v. State*, 837 So. 2d 940, 958-959 (Fla.

2003)("no mercy" comments do not rise to the level of error such that the jury's recommendations of death could not have been made without reliance upon them); *McDonald v. State*, 743 So.2d 501, 505 (Fla. 1999); *Davis v. State*, 604 So. 2d 794, 797 (Fla. 1992) (holding that comment by prosecutor during penalty phase closing argument that "it might not be a bad idea to look at [the knife] and think about what it would feel like if it went two inches into your neck" was improper, but it was not so egregious as to undermine jury's recommendation). *See also Cohahan v. State*, 844 So.2d 629, 641 (Fla. 2003)(unobjected-to comments, viewed in conjunction with objected-to comments, did not deprive defendant of fair penalty phase hearing); *Evans v. State*, 808 So.2d 92 (Fla. 2001).

Harmless error. As to the comments which were properly preserved: error, if any, was harmless. *See Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985) (finding that although prosecutor's comments exceeded proper bounds of argument, misconduct not so outrageous as to taint validity of jury's recommendation). *State v. DiGuilio,* 491 So. 2d 1129, 1139 (Fla. 1986).

POINT IV

THE TRIAL JUDGE DID NOT ERR IN FINDING THE FLORIDA CAPITAL SENTENCING STATUTES CONSTITUTIONAL

Nowell claims the Florida capital sentencing statutes are unconstitutional pursuant to *Ring v. Arizona,* 536 U.S. 584 (2002). The State first notes that the trial judge found not only that Nowell was convicted of a prior violent felony, but also that the murder occurred during the commission of both robbery and kidnapping. *See Doorbal v. State*, 837 So. 2d 940, 963 (Fla.) (rejecting *Ring* claim where aggravating circumstances found by the trial judge were Appellant's prior conviction for a violent felony and robbery), *cert. denied*, 539 U.S. 962, 123 S. Ct. 2647, 156 L. Ed. 2d 663 (2003); *Gamble v. State*, 877 So. 2d 706, 719 (Fla. 2004) (finding death sentence was not invalid where jury found Appellant guilty of first-degree murder and the felony of armed robbery); *Grim v. State*, 841 So. 2d 455, 465 (Fla. 2003) (explaining that Appellant was not entitled to relief under *Ring* where aggravating circumstances of multiple convictions for prior violent felonies and contemporaneous felony of sexual battery were unanimously found by jury); *Kormondy v. State*, 845 So. 2d 41, 54 n.3 (Fla. 2003) (explaining that Appellant was also convicted by jury of violent felonies of robbery and sexual battery, that murder was committed during course of burglary, and that death sentence could be imposed

based on these convictions by the same jury); *Lugo v. State*, 845 So. 2d 74, 119 n.79 (Fla. 2003) (attributing denial of relief on *Apprendi/Ring* claim to rejection of claims in other postconviction appeals, unanimous guilty verdicts on other felonies, and "existence of prior violent felonies").

Second, this claim has no merit. This Court has previously addressed this claim. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), and denied relief. *See also Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003).

POINT V

THE TRIAL JUDGE DID NOT ERR IN FINDING THE MURDER OF MICHELLE GILL WAS COMMITTED TO AVOID ARREST; THE SENTENCE OF DEATH IS PROPORTIONAL.

Nowell claims the trial judge erred in finding the aggravating circumstance that the murder was to avoid arrest. The trial judge made the following findings:

> **(C) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest. §921.141(5)(e), Fla. Stat. (2001).**
>
> In order to establish this aggravator for a murder where the victim is not a law enforcement officer, the intent to avoid arrest must be very strong. *Farina v. State*, 801 So. 2d 44, 54 (Fla. 2001); *Rodriguez v. State*, 753 So. 2d 29, 47-48 (Fla. 2000); *Consalvo v. State*, 697 So. 2d 805, 819 (Fla. 1996). The evidence must prove that witness elimination was the sole or dominant motive for the killing. *Id*. Mere speculation on the part of the State that witness elimination was the dominant motive is insufficient. *Farina*, 801 So. 2d at 54; *Consalvo*, 697 So. 2d at 819. However, the State may prove this aggravator with circumstantial evidence without direct evidence of the defendant's thought process. Id. In considering this aggravator, it is significant that the defendant knew the victim. This aggravator may be established even if an arrest was not imminent at the time of the murder. *Consalvo*, 697 So. 2d at 819.
>
> The surviving victim, Kelvis Smith, testified the Defendant and his co-defendant (Jermaine Bellamy) had conversations with each other and Smith regarding avoiding detection. The Defendant stated to Smith he had worn gloves and had not left a mark anywhere in the victims' home. Smith also testified that both the Defendant and Bellamy wore hats which completely covered their heads and hair. The Defendant told Smith "the only reason you are alive is because of Michelle," indicating the Defendant made the decision

to kill Michelle Gill sometime during the commission of the crimes.

Before the murder, the Defendant and Bellamy discussed what to do next. Smith testified the Defendant said if we let Smith go, he'll kill us, after which Bellamy held up his right hand and made a motion across his throat. Smith testified he then believed the Defendant and Bellamy were going to kill them. Smith also testified that Michelle Gill told the Defendant and Bellamy "if you don't do anything, I won't call the police." Kelvis Smith and Michelle Gill were told by the Defendant to get into a closet. The Defendant then left the room where the victims were being held and started Smith's truck, which indicates the Defendant was making preparation to flee. Shortly thereafter, the Defendant returned, and both he and the co-defendant began firing several shots at both victims. The Court finds the above facts demonstrate that the Defendant's sole or dominant motive for killing Michelle Gill was to eliminate her as a witness. The evidence is undisputed that Kelvis Smith knew the Defendant well. It is also undisputed that Michelle Gill and the Defendant knew each other, as they worked together at Ryan's Steakhouse in 2002. - There is no doubt that if Michelle Gill had survived, she could have identified the Defendant. While Defendant argues that the facts support retaliation as a motive for the murder, the facts only support retaliation as a motive for the attempted murder of Kelvis Smith. There was no evidence of any retaliatory motive for the murder of Michelle Gill.

Kelvis Smith testified before the Court on numerous occasions; during pre-trial hearings, and during the guilt and penalty phases of this trial. The Court also viewed the videotape of Mr. Smith in the hospital identifying the Defendant as one of the shooters. Kelvis Smith was consistent in his testimony, and never wavered from his version of the facts. The Court finds the testimony of Kelvis Smith credible. This aggravating factor has been proven beyond all reasonable doubt. The Court gives this aggravating circumstance great weight.

(V15, R2380-81).

This Court's review of claims regarding whether an aggravating circumstance applies is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports his finding. *Hutchinson v.* State, 882 So. 2d 943, 958 (Fla. 2004). The trial court order is supported by competent, substantial evidence. Each of the factors cited by the trial judge are supported by the evidence and case law.

This Court recently wrote on the "avoid arrest" aggravating circumstance in three cases: *Reynolds v. State*, 934 So. 2d 1128, 1156-1159 (Fla. 2006); *Schoenwetter v. State*, 931 So. 2d 857, 873-874 (Fla. 2006); and *Buzia v. State*, 926 So. 2d 1203, 1209-1211 (Fla. 2006). In both *Reynolds* and *Schoenwetter*, one of the factors to consider was that the victim(s) knew the defendant, who was not wearing a mask. In *Buzia*, one of the factors was that even though Buzia had disabled the victim and could have walked away with his stolen items, he killed the victim. In other cases, this Court has found it significant that the victims knew and could identify their killer, whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant. *See Parker v. State*, 873 So. 2d 270, 289 (Fla. 2004)

(*quoting Farina v. State*, 801 So. 2d 44, 54 (Fla. 2001)). Furthermore, "[e]ven without direct evidence of the offender's thought processes, the arrest avoidance factor can be supported by circumstantial evidence through inference from the facts shown." *Swafford v. State*, 533 So. 2d 270, 276 n.6 (Fla. 1988); *see also Preston v. State*, 607 So. 2d 404, 409 (Fla. 1992).

Considering the facts and case law, the State proved this aggravating circumstance beyond a reasonable doubt. Victims Smith and Gill knew Nowell because Smith worked with him. Nowell was not wearing a mask. He stated that the victims could identify him if they weren't killed. Both victims were tied and disabled in a closet before the shooting began.

Proportionality. Although not raised by the defense, the State addresses proportionality. The trial court found four aggravating circumstances:

(1) Prior violent felony – moderate weight;

(2) During a robbery or kidnapping – great weight;

(3) Avoid arrest – great weight;

(4) Cold, calculated and premeditated – great weight.

(V15, R2379-2383). The trial court found three statutory mitigating circumstances:

(1) Extreme mental or emotional disturbance: ADHD, substance abuse, learning disabilities, anti-social personality disorder - little weight;

(2) Unable to appreciate the criminality of his

conduct: alcohol and substance abuse – little weight;

(3) Age: 26 – very little weight.

(V15, 2383-84). The trial court found the following non-statutory mitigating circumstances:

(1) Alcohol of drug problem – very little weight;

(2) Capacity for rehabilitation – very little weight;

(3) Voluntarily surrendered - very little weight;

(4) Good son and good friend - very little weight;

(5) Removed at early age from mother and raised in foster home, no father, victim of neglect – some weight;

(6) Victim of assault and sexual abuse – some weight;

(7) Good employee – some weight;

(8) No psychological or psychiatric treatment - very little weight;

(9) Appropriate behavior at trial - very little weight;

(10) Will adjust well to prison life – little weight;

(11) Exhibited good behavior in jail - very little weight;

(12) Religious activities at young age - very little weight;

(13) Family and friends care for defendant - very little weight;

(14) Exposed to negative influences during life – some weight;

(15) Society adequately protected by life sentence - very little weight.

(V15, R2385-2389).

This case is proportional to other similarly-situated death-sentenced defendants. *See Buzia v. State*, 926 So. 2d 1203, 1209-1211 (Fla. 2006)(murder of husband, attempted murder of wife; four aggravators, mitigation of drug abuse/mental mitigation); *Floyd v. State*, 850 So.2d 383 (Fla. 2003)(shot mother-in-law in face; three aggravators, mitigation of courtroom behavior, good prisoner); *Evans v. State*, 838 So.2d 1090 (Fla. 2003)(shot brother's girlfriend in chest; two aggravators, mitigation of drug/alcohol abuse, abused childhood, good work habits, good prison behavior); *Anderson v. State*, 863 So.2d 169 (Fla. 2003)(shot two bank tellers, one survived; four aggravators, ten nonstatutory mitigators); *Hurst v. State*, 819 So. 2d 689, 701-02 (Fla. 2002) (robbed fast food store and two aggravators outweighed mitigation); *Franqui v. State*, 804 So. 2d 1185, 1198 (Fla. 2001) (defendant murdered law enforcement officer during bank robbery; three aggravators: pecuniary gain, prior violent felony, and avoid arrest, minor nonstatutory mitigation); *Farina v. State*, 801 So. 2d at 56 (holding death penalty was proportionate where defendant was a major participant in an armed robbery, had cold, calculated, and premeditated plan to eliminate any witnesses, but did not have a significant prior criminal history); *Jennings v. State*, 718 So. 2d 144, 154 (Fla. 1998) (aggravators of CCP, committed during

armed robbery to avoid arrest, but defendant had no significant history of prior criminal activity).

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the convictions and sentences and deny all relief.

Respectfully submitted,

BILL McCOLLUM
Attorney General

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BARBARA C. DAVIS
Florida Bar No. 0410519
Assistant Attorney General
Office of the Attorney General
Daytona Beach, FL 32118
(386) 238-4990
Fax - (386) 226-0457

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Robert R. Berry and Gregory W. Eisenmenger,** Eisenmenger, Berry & Peters, P.A., 5450 Village Drive, Viera, Florida 32955, this _____ day of January, 2007.

_____
Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

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Assistant Attorney General