IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1167

HERMAN LINDSEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

****

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PRELIMINARY STATEMENT

Appellant, Herman Lindsey, was the defendant at trial and will be referred to as the "Defendant" or "Lindsey". Appellee, the State of Florida, the prosecution below, will be referred to as the "State." References to the record on appeal will be by the symbol "R:", to the transcripts will be by the symbol "T:", to any supplemental record or transcripts will be by the symbols "SR:" preceding the type of record supplemented, to the evidence will be by the symbol “E:”, and to Lindsey's initial brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Lindsey was indicted on March 8, 2006 for first degree murder and robbery which occurred on April 19, 1994. (R:2-4) He moved to dismiss the charges for the delay in prosecution which the court denied. (R: 195-6, 208) The jury trial began on September 19, 2006. (R:227) Lindsey moved for a judgement of acquittal when the State rested; the trial court denied that motion. (T:1708-99, 1725, 1740-43) The State dismissed the robbery charge. (T:1973) The jury returned a verdict on a special form convicting him of premeditated murder, felony murder during the commission of robbery, and of being the actual shooter. (T:1953, R:374)

After the penalty phase trial, the jury recommended death with an eight to four vote. (T:2145) Lindsey moved for a new trial which the court denied. (R:345-49, 362-67) On June 19, 2007, the trial court sentenced him to death. (R:380-95) The court found three aggravators and afforded each great weight: (1) felony murder (robbery); (2) avoid arrest; and (3) prior violent felony (1988 armed robbery). No statutory mitigation was presented. Of the non-statutory mitigation offered, the trial court found: (1) Lindsey had a tumultuous childhood and lacked support and guidance from his parents (some weight): (2) Lindsey suffered physical abuse as a child (some weight); (3) Lindsey has six children and is a good and loving father (little weight); (4) Lindsey has shown compassion and generosity to his family, friends, and neighbors (little weight); (5) Lindsey obtained his GED and several certificates while incarcerated (Little weight); (6) Lindsey has been a good prisoner while incarcerated and has not been a discipline problem (little weight); (7) Lindsey has matured and become more responsible since the date of the offense (little weight); (8) Lindsey can be rehabilitated; he has an average IQ, does not suffer from a learning disability, and is not a psychopath (some weight); and (9) Lindsey displayed appropriate conduct during trial. (R:381-92). He filed a notice of appeal. (R:369)

Joanne Mazollo ("Mazollo") worked at the Big Dollar Pawn Shop. Customers had to be buzzed in since the door was kept locked at all times. (T:1182-1185) The evidence at this trial showed that the pawn shop where Mazollo worked was robbed on April 19, 1994 and she was shot in the forehead. The store's owner Gerald Singer ("Singer") spoke with her at 9:30 that morning over the telephone. When a customer alerted him that no one was working there he then called and went down to the store at 10:30 -11 that same morning. (T:1180-90) He saw Mazollo sitting in a large chair in the back room with a gunshot wound to her head. (T:1198-1200; E:393) He observed that between five to seven guns and cash from the register were missing. (T:1191-93) The safe, also in the back room, was empty; it usually held over 50 coin envelopes with jewelry in them as well as a Crown Royal bag with jewelry in it. (T:1194-96) He did not mention the Crown Royal bag to the police in 1994. He first mentioned it as the trial began in 2006. (T:1475, 1207-9)

Dr. Joshua Perper ("Perper") was the medical examiner who performed the autopsy on Mazollo. (T:1162-66) He determined that the cause of death was a single gunshot wound to her forehead which had been fired from within 6 inches of her skin. The fragmented projectile, the ripped skin, and the bruising were all evidence of this. (T:1166-67, 1171-73)

Officer Kermit Bougher ("Bougher") was the first officers on the scene. He observed the store in disarray and the register open. (T:1174-80) The police recovered a latent fingerprint on an empty stun gun box belonging to Ronald Loray ("Loray") who was a friend and roommate to Lindsey. No other prints were identified. (T:1346-60, 1210-25, 1226-61, 1464-65) Lindsey's thumb print was found on a pawn slip from a different day and under a false name. (T:1346-60)

The testimony further showed that Lindsey was married to Demeatrous Gause ("Nikki"). She occasionally lived with him as did Loray and several other individuals in an apartment. (T:1210, 1226-28) Witnesses established that Lindsey had visited that pawn shop a number of times in the days immediately preceding the crime. He had been there the day before the shooting with Loray and Alfonzer Harrold ("Harrold"). (T:1210-17) He had gone to the store with Loray and Nikki as well a day or two before shooting. Mazollo recognized and greeted him in a friendly manner when she buzzed him into the store. "He greeted her with open arms. She didn't do it as a person who didn't know you. It was "Hey, how are you doing?" (T:1226-30, 1257)

On the day of the crime, Lindsey was not at home when Nikki awoke. He walked in with Loray sometime shortly before noon. Harrold saw Loray the night of the robbery and observed that he was wearing a gold bracelet. (T:1219)

Sometime after that Nikki saw a Crown Royal bag in the closet which had jewelry in it. This was a couple of days after she had been to the pawn shop with Lindsey before the shooting. (T:1235, 1246) She did not know who put the jewelry in the closet since she did not live there all the time and a number of people lived in the apartment; she had not seen it in there before the robbery. (T:1226, 1255) Lindsey sold the jewelry from that bag sometime later when they visited a swap meet. (T:1245-46)

Mark Swan ("Simms")[1] testified that he had been in federal custody on robbery charges for twelve years. (T:1385) Lindsey was the individual who provided the police information leading to his conviction. (T:1395) He said that he met Lindsey in jail in 1994. The two men spoke over several days about Simms's robbery charges. (T:1384-90) Simms was young and bragged to look macho to the older Lindsey. Id. During the discussions, Simms related that the witness had seen his face. Lindsey admonished him that he should have handled the situation better; one should never leave a witness alive who could identify the perpetrator. Lindsey went on to say that he had killed someone in a robbery to avoid being identified. (T:1391-94) Simms later learned of Lindsey's actions helping the police against

[1]Swan is the witness's true name but the participants to this trial knew and referred to him as Simms; consequently, the State will do likewise.

him. He told the police what Lindsey had said in order to help reduce his sentence. (T:1403-9)

In a 1995 interview with Jack King ("King"), a detective with the Ft. Lauderdale Police Department, Lindsey mentioned that Loray admitted in April 1994 to robbing a pawn shop where a woman was killed. Lindsey denied participating in it. (T: 1444-71)

The State also presented a number of telephone calls from Lindsey to his friend and family which had been recorded from the jail. In those conversations, Lindsey worried about being charged with a murder, with what Nikki and Loray might say, and that they might lie on him. He consistently maintained his innocence. (T:1566-59, 1585-99, 1625-37, 1647-93)

In the penalty phase, the State presented Stephen Cadore ("Cadore") who testified about being robbed in 1988 while he worked at a Circle K. A gun went off during that robbery. He could identify noone. (T:2119)

Dr. Michael Brannon ("Brannon"), a licensed psychologist, testified about Lindsey's background and family life. There was a lot of domestic violence in his home and he was physically abused. His father was sentenced to prison and was absent from the home. Lindsey was not a psychopath and did well in jail. (T:2143-70) Dr. Lynne Rich is a neuropsychologist who evaluated Lindsey. She concluded

that some vague problems with his brain resulting in him having comprehension difficulties.(T:2282-89)

Lindsey's great aunts Dorothy Thompson and Audrey Canion, his step-father Ronald Durham, his ex-girlfriends Helena Thornton and Mecka Ervin, his grandmother Francis McLamore, his aunt Joyce Hamilton, his sister Camela Lindsey, and his children S.L. and M.L. all testified for him in the penalty phase. They said he was a good father and caring family member. (T:2160-2194) His mother Rosalind Durham described Lindsey's violent and tumultuous childhood. She described how Lindsey cared for his disabled brother and his other siblings. (T:2327-37)

Four witnesses testified to impeach Simms. Curtis Fox ("Fox") and Carl Thompson ("Thompson") testified to Simm's hostile statement to Lindsey as well as saying he was testifying against him to help himself. (T:2198-2202, 2272-2276) Robert Garcia ("Garcia") was a cellmate with Simms. Simms told him that he was testifying in order to go home to his family and to get revenge on Lindsey. He knew many details of the crime itself. Garcia told Lindsey when he later met him. (T:2312-19) Eddie Carter ("Carter") gave a statement to King in 1994 saying that Simms had admitted to the pawn store robbery and the murder of Mazollo. Carter did not remember the statement but it was read to the jury. (T:2206-21)

Finally, Lindsey testified to his upbringing, the absence of his father while he was young, and the violence in his home. He described taking care of his brother. (T:2350-2353) He denied robbing the pawn shop and killing Mazollo. He described getting information from Simms on his robbery charges. He denied ever telling Simms he had robbed or shot anyone. (T:2354-60) He admitted to being involved in the Circle K robbery in 1988 saying he went to the counter and received money from the victim while his co-defendants stood behind him with a gun. The gun went off when those two struggled. He was 15 years old at the time. (T:1260-1)

Lindsey also testified at the Spencer hearing, denying this crime. He tries to help raise his children by speaking to them over the phone. He tries to counsel other inmates as well. (SR:206-7)

Deputy Arthur Reeves ("Reeeves") testified at an oral motion for new trial. He heard Lindsey accuse Simms of giving false testimony. Simms responded by saying it was not personal, only payback. (T:2437-42)

SUMMARY OF THE ARGUMENT

1. The trial court properly allowed testimony on Lindsey's admission to killing a robbery witness since it was a party admission.

2. The trial court properly denied the motion for judgement of acquittal since there was competent, substantial evidence which was inconsistent with Lindsey's defense that he was completely uninvolved.

3. The trial court properly admitted Nikki's testimony that Mazollo knew appellant based upon her observations.

4. The trial court properly allowed the State to redact inadmissable hearsay and evidence of bad character from a tape since defendant was not the one making the comment and it did nothing to clarify his actual statement.

5. The trial court properly denied an objection to a mention of appellant having been in custody.

6. The trial court properly denied Appellant's Motion to Dismiss since the State agreed to have Carter's statement read into the record.

7. The trial court properly admitted relevant autopsy photographs into evidence.

8. The trial court properly allowed the jury to have the physical evidence during its deliberations.

9. The trial court properly denied the Motion for New Trial.

10. The trial court properly found the avoid arrest aggravating circumstance since there was substantial evidence to support it in the record.

11. The trial court gave the proper standard jury instruction on the avoid arrest aggravating circumstance.

12. The trial court properly found and instructed on the prior violent felony aggravating circumstance.

13. Lindsey's death sentence is proportional.

14. The trial court properly allowed cross examination of Lindsey since it was limited to matters related to the aggravating circumstances.

15. The trial court allowed proper impeachment of Fox.

16. The Trial Court properly weighed both the aggravating and mitigating circumstances in reaching its sentencing decision.

17. Florida's capital sentencing statute is constitutional.

18. The felony murder aggravator is not an automatic aggravating factor and is constitutional.

POINT I

THE TRIAL COURT PROPERLY ALLOWED TESTIMONY ON LINDSEY'S ADMISSION TO KILLING A ROBBERY WITNESS. (Restated)

In Lindsey's initial point he argues the trial court erred in admitting Simms's testimony because it was not sufficiently detailed to specifically link it to this particular crime. The trail court properly admitted this statement since it was both relevant and a party admission. Furthermore, the defense did not adequately preserve this issue for review. This Court should deny relief.

Simms testified that he met Lindsey in jail in 1994 when Lindsey struck up a conversation with him. (T:1388) After that meeting, they had a number of conversations together where they discussed Simms's robberies; Simms did so because he was a braggart and trying to be macho in front of an older man.[2] (T:1390-92) When Simms mentioned that a person had been shot in his robbery, Lindsey told him that he should have handled the situation better. Lindsey said that he would have killed the person and that he had had to do that. (T:1392)

The defense knew the State was calling Simms to testify to this comment. It knew the substance of the comment. The defense tried to block Simms's testimony on the grounds that Carter could no longer impeach him; that issue, however, was

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[2]Simms only characterized his behavior this way; he did not say Lindsey was bragging or acting macho.

resolved when the State stipulated that Carter's 1994 statement to the police could be read to the jury. (T:1049-54) At no point during the actual testimony did the defense object. Trial counsel only voiced an objection at the close of the direct examination when he asked the court to strike the testimony as being more prejudicial than probative. (T:1409-11)

> A contemporaneous objection is required to preserve error other than fundamental error for appellate review. *Castor v. State*, 365 So.2d 701 (Fla.1978). The objection must be both timely and "sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." *Id.* at 703. The state argues the objection in the instant case was neither timely nor sufficiently specific.

Jackson v. State, 451 So.2d 458, 461 (Fla.1984). This was insufficiently contemporaneous to preserve this issue for trial.

Even if the issue were properly preserved, the trial court did not abuse its discretion in allowing the testimony to stand. The standard of review for a court's ruling on the admissibility of evidence is whether it was an abuse of discretion. The admissibility of evidence is within the sound discretion of the court and its ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So.2d 604, 610 (Fla.2000); Zack v. State, 753 So.2d 9, 25 (Fla.2000); Cole v. State, 701 So.2d 845, 854 (Fla.1997); Jent v. State, 408 So.2d

1024, 1039 (Fla.1981); General Elec. Co. v. Joiner, 522 U.S. 136(1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

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

This evidence was clearly relevant to a material fact at issue: whether Lindsey had committed a murder to kill a witness during the course of a robbery. It was an admission. An admission of a party-opponent is admissible as an exception to the hearsay evidence rule. § 90.803(18), Fla.Stat. (1985). It is admissible because the out-of-court statement of the party is inconsistent with his express or implied position in the litigation. An admission may be admissible if it is relevant; relevant evidence is defined as evidence tending to prove or disprove a material fact. § 90.401, Fla.Stat. (1985). Swafford v. State, 533 So.2d 270, 272-273 (Fla.1988). The defendant in Swafford was charged with the kidnaping, rape, and murder of a woman. The State presented a statement he made two months after the crime where he suggested he and another man “go get some women.” He then said he would get one in such a way that they could do anything they wanted to her and

then he would shoot her in the head so there would be no witness. When asked how he could do that, he responded that "you get used to it." This Court ruled these statements were properly admitted as admissions since from them an inference of guilt for the charged crime could be drawn. Id. The court explained:

> Numerous decisions of this Court indicate that if evidence is relevant it will be admitted and its probative value left to the trier of fact. E.g., *Brown v. State*, 473 So.2d 1260 (Fla.) (while admissibility of a statement was not challenged on appeal, the Court's discussion of it in resolving an issue of fact indicates its relevance and shows that such an admission has probative value even without specific referential facts), *cert. denied*, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985); *Jones v. State*, 440 So.2d 570, 577 (Fla.1983) (court found evidence to the effect that, prior to the time of the offense charged, the defendant had said that he was going to "kill a pig" admissible under an exception to the hearsay rule and relevant to the question of whether the defendant was guilty of the crime charged); *Johnson v. State*, 438 So.2d 774 (Fla.1983) (although the statement that Johnson would not mind shooting people to obtain money was not an admission of specific incriminating facts, it was capable of supporting an inference of guilt and was therefore properly considered), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); *Rose v. State*, 425 So.2d 521, 522 (Fla.1982) (statement that defendant "did not know what he was capable of doing" was relevant evidence tending to show guilt when considered in light of other evidence concerning the defendant's motive), *cert. denied*, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983); *Antone v. State*, 382 So.2d 1205 (Fla.) (the relevance of a statement made after a crime lay in its support of an inference concerning the defendant's knowledge of certain criminal activity), *cert. denied*, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980).

Id. Fn 2. Lindsey's statement to Simms was similar to those made in Swafford. In Swafford the statement was general as well, merely indicating that the defendant

had killed a woman before to prevent her from being a witness in the underlying felonies. Lindsey similarly admitted that he “had done it” when he told Simms to shoot robbery victims to prevent them from identifying him. This evidence was properly admitted.

This Court also held that a general statement was properly allowed into evidence as an admission in Pace v. State, 596 So.2d 1034 (Fla.1992) “In his statements to his cousin Pace expressed despair at being broke and said that he was going to remedy the condition ‘tomorrow’ by doing something ‘he hated to do.’” That statement was incriminating in the context of the evidence shown at trial. Id. 1035.

In Wyatt v. State, 641 So. 2d 1336, 1339(Fla. 1994) this Court allowed in defendant’s statement made some time after the murders that he had killed three people and could kill again. The statement provided no details of when, where, or the circumstances of a specific crime. The statement was relevant and admissible as a party admission. In Hoefert v. State, 617 So. 2d 1046, 1050 (Fla. 1993) this Court allowed Hoefert's statements that "he wished he killed" the prior battery victim as relevant to both intent and motive in the murder trial. “This Court has held admissible the statements of a defendant made either before or after the time of the crime charged, even when the testimony about the statements showed the

commission of separate crimes or wrongs or cast the defendant's character in a bad light." Id. The statements were not evidence of bad character (an objection Lindsey has not made) but were straight admissions which were relevant and properly admitted. The same is true of Lindsey's statements since they indicate that he had killed a person during a robbery in order to eliminate a witness. The trial court did not abuse its discretion in not striking the testimony.

The cases Lindsey cites are not comparable and do not further his position. The statement in Mariano v. State, 933 So.2d 111 (FLA. 4th DCA 2006) was a threat in a collateral crime and not an admission or relevant to the crime charged. Long v. State, 689 SO.2d 1055 (Fla. 1997) did not rule the statement inadmissible but reversed for insufficient evidence. In Green v. State, 190 So.2d 42 (Fla. 2nd DCA 1966) the court described the records as a shambles and almost incoherent. The defendant denied any crime. The court in Delgado v. State, 573 So.2d 83 (Fla. 2nd DCA 1990) reviewed pre-crime statements, analyzed them under Williams[3] rule evidence, and held them inadmissible; the statements were not admissions or analyzed as such. Again, the statements in Jackson v. State, 451 So.2d 458 (Fla. 1984) were not admissions but went to the defendant's bad character. Jackson said

[3]Williams v. State, 110 So. 2d 654(Fla.1959).

he had committed crimes in another state, clearly not relevant to a Florida criminal charge.

The trial court properly allowed Simms's testimony to stand. Lindsey's statement that robbery witnesses should be killed and that he had done so was an admission and highly relevant. This Court should affirm the trial court's ruling.

POINT II

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR JUDGEMENT OF ACQUITTAL.

Lindsey next argues the trial court erred in denying his motion for judgement of acquittal (JOA) because the evidence was circumstantial and failed to prove the identity of the shooter. The State disagrees as there was competent, substantial evidence supporting the court's denial.

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

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. ... Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing

> each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence.

Pagan, 830 So.2d at 803 (citations omitted). See Departing v. State, 2008 WL 4380919, 18(Fla. 2008); Boyd v. State, 910 So.2d 167, 180-81 (Fla.2005); CANDE v. State, 860 So.2d 930, 943 (Fla.2003); Crump v. State, 622 So.2d 963, 971 (Fla.1993) (question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal). When a defendant seeks a JOA, he "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974).

"Proof based entirely on circumstantial evidence can be sufficient to sustain a conviction in Florida." Ore v. State, 677 So.2d 258, 261 (Fla.1996). “However, where a conviction is based wholly upon circumstantial evidence, a special standard of review applies.” Darling v. State, 808 So.2d 145, 155 (Fla. 2002) (citing Garambulla v. State, 417 So.2d 257 (Fla. 1982)).

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to

> determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.

Darling, 808 So.2d at 155(quoting State v. Law, 559 So.2d 187, 188(Fla. 1989)). Therefore, "'circumstantial evidence can be sufficient to sustain a conviction' provided that the evidence is (1) 'consistent with the defendant's guilt' and (2) 'inconsistent with any reasonable hypothesis of innocence.'" Delgado v. State, 948 So.2d 681, 689-90 (Fla. 2006)(quoting Ore v. State, 677 So.2d 258, 261 & n. 1 (Fla. 1996)).

The evidence at this trial showed that the pawn shop where Mazollo worked was robbed on April 19, 1994 and she was shot in the forehead. The store's owner Singer spoke with her at 9:30 that morning over the telephone. When a customer alerted him that no one was working there he then called and went down to the store at 10:30 -11 that same morning. (T:1180-90) He saw Mazollo sitting in a large chair in the back room with a gunshot wound to her head. (T:1198-1200) He observed that between five to seven guns and cash from the register were missing. (T:1191-93) The safe, in the back room, was empty; it usually held over 50 coin envelopes with jewelry in them as well as a Crown Royal bag with jewelry in it. (T:1194-96)[4]

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[4]Singer said that he kept the jewelry, including that in the Crown Royal bag in the safe. The evidence showed a picture of an empty safe with no jewelry or Crown Royal bag. E: 391.

The first officers on the scene observed the store in disarray with the register open. (T:1174-80) Mazollo had a single gunshot wound to her forehead which had been fired from within 6 inches of her skin. (T:1166-67, 1171-73) The police recovered a latent fingerprint on an empty gun box belonging to Loray who was a friend and roommate to Lindsey. (T:1346-60, 1210-25, 1226-61, 1464-65) Lindsey's thumb print was found on a pawn slip from a different day and under a false name. (T:1346-60)

The testimony further showed that Lindsey had visited that pawn shop a number of times in the days immediately preceding the crime. He had been there the day before the shooting with Loray and Harrold. (T:1210-17) He had as well gone to the store with Loray and Nikki a day or two before shooting. Mazollo recognized and greeted him in a friendly manner when she buzzed him into the store. "He greeted her with open arms. She didn't do it as a person who didn't know you. It was "Hey, how are you doing?" (T:1226-30, 1257)

On the day of the crime, Lindsey was not at home when Nikki awoke. He walked in with Loray sometime shortly before noon. Sometime after that Nikki saw a **Crown Royal** bag in a closet which had jewelry in it. This was a couple of days after she had been to the pawn shop with Lindsey before the shooting. (T:1235, 1246) She did not know who put the jewelry in the closet since she did

not live there all the time and a number of people lived in the apartment; she had not seen it there before. (T:1226, 1255) Lindsey sold the jewelry sometime later when they visited a swap meet. (T:1245-46)

In a 1995 interview with King, Lindsey mentioned that Loray admitted to robbing a pawn shop where there was a killing. Lindsey denied participating in it. (T: 1444-71) Also, sometime in the summer of 1994, Lindsey spoke to Simms about Simms's robberies. He said that Simms should have killed the witness rather than leaving someone to identify him. Lindsey said he had done that himself. (T:1391-94)

The evidence clearly established that Lindsey was familiar with both the store and the person who worked there. He visited numerous times with Loray in the two days before the murder. Loray's fingerprint was on an empty gun box after the robbery. Lindsey and Loray come to the apartment together shortly after the robbery. Within a day or two of the crime, Nikki finds a Crown Royal bag with jewelry in it in Lindsey's closet. He later takes that bag and sells the jewelry. He also gives Simms advice on how to rob successfully - kill the witness. He then admits to having done so himself.

> [T]he State is not required to rebut conclusively every possible variation of events that could be inferred from the evidence, but only to introduce competent evidence that is inconsistent with the defendant's theory of events. *See* [*State v. Law*, 559 So.2d 187, 189

> (Fla.1989)]; *State v. Allen*, 335 So.2d 823, 826 (Fla.1976). Once the State introduces such evidence, it is the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. *See Law*, 559 So.2d at 189. The legal test for determining whether a JOA should be granted is “whether after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.” *Tibbs v. State*, 397 So.2d 1120, 1123 (Fla.1981).

Robinson v. State, 936 So.2d 1164, 1166(Fla.1st DCA 2006). There was competent substantial evidence which was inconsistent with Lindsey’s hypothesis of innocence of not participating in this crime. A bag just like the one stolen was found in Lindsey’s closet and he personally sold the jewelry that was in it. He told a man that he had killed a witness to a robbery. The jury then specifically found Lindsey guilty of robbery murder, premeditated murder, and being the actual shooter. The trial court properly denied the JOA. This Court should affirm.

POINT III

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY THAT MAZOLLO KNEW APPELLANT.

In his next point, Lindsey contends that the trial court committed error when it allowed Nikki to testify that Mazollo knew Lindsey. Appellant argues that this testimony was improper opinion by a lay witness. He alleges that there was no

adequate foundation laid as to why Nikki thought Mazollo knew Lindsey. The record clearly refutes these claims. The trial court properly allowed the testimony. This issue is without merit.

The record shows the following:

> Q Do you remember the clerk in the pawn shop?
> A Yes.
> Q Describe him or her for me.
> A The lady – you had to be buzzed in first off. You had to be buzzed in to get in. We entered and see a skinny. Blond hair, about shoulder length.
> Q Did it appear to you, if you can tell, that she either knew Ronnie LoRay or Herman Lindsey?
> Mr. Thomas Cazel: Objection. Conclusion.
> Mr. David Frankel: I'm asking if it appeared she knew Ronnie LoRay or Herman Lindsey.
> The Court: You may answer yes or no.
> The Witness: Yes.
> By Mr. David Frankel:
> Q Okay. And who would that be?
> A She knew Herman.
> ...
> A ... Yes, I was there. Yes, she buzzed us in. She knew Herman, he greeted the woman with open arms. She didn't do it as a person who didn't know you. It was "Hey, how are you doing?"

(T. 1230, 1257)

§ 90.701, Fla.Stat.(2000) permits a lay witness to testify in the

form of an inference and opinion where:

> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the

> witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
> (2) The opinions and inferences do mot require a special knowledge, skill, experience, or training.

Lay witness opinion testimony is admissible if it is within the ken of intelligent person with a degree of experience. Floyd v. State, 569 So.2d 1225 (1990). Opinion testimony of a lay witness is only permitted if based on what the witness has personally perceived. Nardone v. State, 798 So.2d 870 (Fla. 4th DCA 2001); Beck v. Gross, 499 So.2d 886, 887 (Fla. 2nd DCA 1986). Courts generally allow a witness to testify as to the emotions manifested by another and observed by him. See McArthur v. State, 351 So.2d 972(Fla. 1977); Shiver v. State, 564 So. 2d 1158, 1159–60 (Fla. 1st DCA 1990) (In murder prosecution, no abuse of discretion to admit lay opinion testimony that "I knew there was going to be trouble …. It wasn't a friendly feeling," and that defendant "looked like he was going to get revenge on somebody.").

The decision whether or not to allow lay witness opinion testimony is within the discretion of the trial court. Hughes v. Canal Ins. Co., 308 So.2d 552 (Fla.3d DCA 1975). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused

only where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So. 2d at 1203; Trease, 768 So.2d at 1053, n. 2. The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997).

Both prongs of § 90.701 are satisfied here. Nikki saw the facial and physical reactions Mazollo expressed when Lindsey walked in. She heard her words. She described those for the court, thus providing the foundation for her statement. Recognition of one person by another is a basic human reaction which others routinely comprehend and encounter. Nikki's testimony did not require specialized skill, training or knowledge. Further, she could not have readily, and with equal accuracy and adequacy, communicated to the jury what she perceived. There was no other way for Nikki to adequately convey the information to the jury other than saying "she knew him." See Zack v. State,753 So.2d 9 (Fla. 2000) (holding witness's testimony as to her "impression" of the defendant's relationship with his step-father proper because witness had observed them interact over a period of time). Witnesses may testify about another's mental state so if Nikki's description of Mazollo's reaction is somehow deemed to be an "opinion," it would still be permissible. Occhicone v. State, 570 So. 2d 902, 906(Fla. 1990)(affirming

admission of lay witnesses' opinions relating to defendant's state of intoxication or lack thereof).

In Shiver, 564 So.2d 1158 the court allowed testimony about defendant's anger, noting that "a witness may testify that a person was angry, threatening, or pretty mad," because "it is practically impossible to describe another's appearance in such a manner as to convey to a jury an accurate picture of the emotions shown by him at the time." Id. at 1160. Like Shiver, the alleged "opinion" testimony by Nikki is also simply a description of her observation of Mazollo's mental state at the time. Lindsey's reliance on Kight v. State, 512 So.2d 922(Fla. 1987) is misplaced because those statements related to an undisclosed intention or motive. There, defense counsel sought to elicit the victim's "interpretation" of what the co-defendant meant when he was talking to the defendant. Defense counsel wanted to show that the co-defendant was urging or encouraging the defendant to cut the victim's throat and that the co-defendant's ambiguous statement to the defendant was interpreted by the victim as a dare to kill him. This Court held that the testimony was inadmissible under § 90.701 because the defendant failed to establish that the victim could not have otherwise communicated his perceptions concerning the co-defendant to the jury. To the contrary, the record showed that the victim adequately explained that the co-defendant placed his hand over the

defendant's hand and pressed the knife against the victim's throat while making the statement, which adequately conveyed the victim's opinion to the jury and therefore, there was no need for the victim's interpretation of the statement. Nikki never gave "interpretation" of what someone said. This issue is without merit and this Court should affirm.

POINT IV

THE TRIAL COURT PROPERLY ALLOWED TAPE'S REDACTION TO AVOID IMPROPER HEARSAY AND BAD CHARACTER EVIDENCE. (Restated)

Lindsey next asserts that the trial court erred by allowing the State to redact portions of his statement to the police in 1995. This redaction was only one of many on this tape, was not part of Lindsey's statement, did not clarify or explain his actual statement, and was inadmissable hearsay. The trial court did not abuse its discretion in allowing the redaction nor was it error. This issue is without merit.

The State wished to admit portions of a taped statement Lindsey had given King in a 1995 interview. In that statement, Lindsey was discussing both the pawn shop robbery/murder as well as other robberies. The State played the portions of the tape where Lindsey stated that Loray admitted to robbing the pawn shop with

another person and a woman was killed.[5] Lindsey's denial of involvement was also admitted into evidence. (T:1268-1306, 1444-71) The trial court agreed to redact the portion where King mentioned Simms's involvement in a different robbery; Lindsey did not agree or adopt that statement, only saying that he either did not know or could not remember. (T: 1283-84) The statement was King's, not Lindsey's, and did nothing to explain, clarify, or give context to the remainder of Lindsey's actual statement. Lindsey spoke about Loray's actions and his own lack of involvement; the jury heard those portions of the tape. (T:1280-28)

The defense wished to admit King's question, arguing completeness. (T:1274) The trial court agreed with the State's contention that the question was inadmissable evidence of Simms's bad character. The court also correctly pointed out that the comment was inadmissable hearsay. (T:1275-80) The court properly excluded this evidence and did not abuse its discretion in so ruling.

As addressed in the previous claim, the admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion. Tanzi, 964 So. 2d 106. See Thomas v. State, 748 So.2d 970, 982 (Fla. 1999)(trial judge is afforded wide discretion regarding the admissibility of evidence and a ruling

[5]Lindsey reported that Loray said "they" robbed a pawn shop. (T:14696-71)

admitting or excluding evidence will not, generally, be reversed unless there has been a showing of an abuse of discretion); Sexton v. State, 697 So.2d 833 (Fla. 1997).

Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered to prove the truth of the matter asserted. Banks v. State, 790 So. 2d 1094, 1097 (Fla. 2001). King's comment or question was clearly hearsay; Lindsey wanted it admitted to show that it was true, i.e. Simms was involved in an armed robbery to show that he was more likely to have committed the one at bar. The court properly excluded it.

The rule of completeness is codified in § 90.108(1), Fla.Stat., which provides in pertinent part:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously.

The purpose of the rule is to avoid the potential for creating misleading impressions by taking statements out of context. Larzelere v. State, 676 So.2d 394, 401(Fla. 1996). Under this rule, once a party "opens the door" by introducing part of a statement, the opposing party is entitled to contemporaneously bring out the remainder of the statement in the interest of fairness. Id. at 401-02. However, the rule of completeness is not absolute, and a trial court may exercise its discretion to

exclude irrelevant or inadmissable portions of a recorded statement. Id.; Layman v. State, 728 So.2d 814, 816(Fla. 5th DCA 1999). The determination of whether the remainder of a prior recorded statement should be introduced into evidence in interest of fairness falls within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. Mendoza v. State, 700 So.2d 670 (Fla. 1997).

The redacted "statement" was actually part of King's question about Simms committing a robbery other than the pawn shop robbery. Lindsey did not say it nor did he adopt it so it did not, and could not, clarify the rest of his statement about Loray's involvement in the pawn shop robbery and shooting. The statement was hearsay regarding an unrelated bad act by Simms, both adequate grounds to exclude it. Additionally, Lindsey's exculpatory statement that he was not involved and that Loray and another person were responsible did come before the jury; the excluded portion added nothing to that. In Dessett v. State, 951 So.2d 46 (Fla. 4th DCA 2007) the trial court redacted a portion of defendant's statement regarding a co-defendant's drug use. The defendant wanted the comment to show the crime was a drug deal gone wrong rather than a robbery. The court ruled the statement was not required to correct a misleading impression. The jury heard an exculpatory statement supporting his defense and this statement did not expand or clarify it. In

Schreiber v. State, 973 So.2d 1265(Fla. 2nd DCA 2008) the court held an opposing party is entitled to have a portion of the statement introduced only insofar as it tends to explain or shed light upon the part already admitted. It upheld the redaction of a portion of defendant's statement, although exculpatory, which was independent of the other defense theory of innocence; the taped statement presented was not misleading or confusing. In Christopher v. State, 583 So.2d 642 (Fla. 1991) the defendant's exculpatory hearsay statement, through the testimony of his daughter, was inadmissable since it was made several days after the other statement and did nothing to explain the earlier conversation. The trial court's ruling was proper and not an abuse of discretion. This Court should affirm.

POINT V

THE TRIAL COURT PROPERLY DENIED OBJECTION TO MENTION OF APPELLANT HAVING BEEN IN CUSTODY.

Lindsey next argues that the trial court erred in allowing evidence that he was in custody in 1994 and 2006 because it was irrelevant, evidence of prior bad acts or character, and unduly prejudicial. The trial court properly weighed the relevance of this evidence against its prejudicial impact when it allowed the evidence. No testimony of uncharged crimes, arrests, or prison sentences came in.

The court also read limiting instructions on this issue to the jury. This Court should deny relief on this issue.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion. Tanzi v. State, 964 So. 2d 106 (Fla. 2007). Under the abuse of discretion standard, "[d]iscretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Trease, 768 So.2d at 1053 n. 2.

Before allowing the evidence, the court heard extended arguments from the parties. Lindsey's 1994 incarceration would come out during Simms's testimony. The State argued the fact that Lindsey and Simms were in jail when the conversation took place was necessary to explain its context and went to its believability. Custody explained why these two men were having a conversation, why the conversation focused on Simms's criminal activities, and the motivations each had in both talking to each other and then the police. The defense maintained it was highly prejudicial. The court specifically weighed the relevance against the prejudice. It pointed out that the information could be used to show Simms's motive to lie and to testify against Lindsey as well as Lindsey's motivation to talk

to Simms at all; the custodial status was “inextricably intertwined” in the testimony. To limit any potential prejudice, the trial court specifically forbad any mention of other crimes or arrests and decided to give a limiting instruction. (T:1049-88)

In playing the taped jail conversations from 2006, the fact Lindsey was in jail was also inescapable. In those conversations, the State wished to have the jury hear Lindsey worrying about a detainer being placed on him, what Nikki and Loray might say, and why he could not contact them himself. The trial court found those facts relevant and observed that the jury might speculate wildly if the tapes were not explained, thus creating more prejudice. Again, the court forbad the State from presenting information about any crimes or even that he was in prison rather than jail. (T:1086-90)

The jury heard evidence that Lindsey was in custody in 1994 and then again in 2006. For neither occasion did they learn the nature of any arrest, pending charge, or conviction. Both parties had questioned the jury during voir dire about an arrest not being the same as a conviction. The trial court read a limiting instruction after testimony of the 1994 incarceration and again for the 2006 one. (T:1431, 1565) The judge offered further instruction but the defense declined.

(T:1607-20) Juries are presumed to follow the instructions given them. Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932 (Fla. 2000).

No evidence of prior bad acts or bad character came in against Lindsey. The jury heard only that he was in jail for something and heard nothing about any collateral crimes. The State did not seek to present this evidence to tarnish Lindsey but rather to elucidate the evidence from Simms and the tapes. The trial court, after carefully weighing the proffered evidence, found the fact that he was in jail was relevant to the testimony in which it was contained. Thus, this case is distinguishable from those cited by Lindsey. The trial court neither erred nor abused its discretion in allowing this evidence to come before the jury. Relief should be denied.

POINT VI

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS.

Lindsey argues that the trial court erred in denying his Motion to Dismiss due to an 11 year delay in indicting him. He claims actual prejudice from that delay since his witness Eddie Carter failed to remember reporting to the police a statement by Simms he overheard. Contrary to his assertions, Lindsey did not

suffer actual prejudice and, thus, was not entitled to relief. The trial court properly denied the motion.

The standard of review on a motion to dismiss is an abuse of discretion. State v. Balezos, 765 So. 2d 819, 822 (Fla. 4th DCA 2000) (observing that a trial court's decision to grant a motion to dismiss will not be reversed absent an abuse of discretion); United States v. Sigma Int'l, Inc., 196 F.3d 1314, 1321 (11th Cir. 1999), citing United States v. Pielago, 135 F.3d 703, 707 (11th Cir. 1998) (noting that denials of motions to dismiss an indictment are reviewed for abuse of discretion); United States v. McMutuary, 217 F.3d 477, 481 (7th Cir. 2000) (noting that a district court's decision to deny a motion to dismiss an indictment for prosecutorial delay is reviewed for an abuse of discretion).

Lindsey's Motion to Dismiss came under the Due Process Clause of the U.S. Constitution.

> The Due Process Clause protects against an oppressive delay. United States v. Lovasco, 431 U.S. 783, 789, 52 L. Ed. 2d 752, 97 S. Ct. 2044, reh. denied, 434 U.S. 881, 54 L. Ed. 2d 164, 98 S. Ct. 242 (1977). However, the purpose of the clause is not to afford wide-ranging protections based on shallow claims of prejudicial delay. MacDonald, supra, at 456 U.S. 19, 71 L. Ed. 2d 711, 102 S. Ct. 1508 (Marshall, J., dissenting). The intended application of due process notions is a narrow one, although prevention of oppressive actual prejudice to the defense caused by the passage of time is the central concern of due process in a delayed arrest or indictment setting. Id. at 456 US at 8, 71 L. Ed. 2d 704, 102 S. Ct. 1502; State v. Griffin, supra, at 695. Proof of actual prejudice does not make valid a due process

> assault on delayed arrest or indictment. Rather, it merely makes such a claim ripe for adjudication. Lovasco, supra, at 431 U.S. 789, 97 S.Ct. 2048.

Howell v. State, 418 So. 2d 1164, 1167 (Fla. 1st DCA 1982). The Howell court then adopted the test specified in United States v. Townley, 665 F.2d 579, 581-582 (5th Cir. 1982) which said:

> Thus, in evaluating an asserted due process violation based on preindictment delay, Lovasco and Marion require us "to consider both the reasons for the delay and the prejudice to the accused."… Further, the accused bears the burden of proving the prejudice and, if the threshold requirement of proof of actual prejudice is not met, the inquiry ends there…. Once actual prejudice is shown, it is necessary to engage "in a sensitive balancing of the government's need for an investigative delay… against the prejudice asserted by the defendant."… The inquiry turns on "whether the prosecution's actions violated 'fundamental conceptions of justice' or the community's sense of fair play and decency."… "Inherent in the adoption of a balancing process is the notion that particular reasons are to be weighed against the particular prejudice suffered on a case-by-case basis."

Some Florida courts have interpreted this as requiring both actual prejudice and state misconduct. "The validity of Hurd's alleged due process violation depends on whether the State's action was motivated by an improper purpose and whether Hurd suffered any prejudice." State v. Hurd, 739 So. 2d 1226, 1227 (Fla. 2nd DCA 1999).

In 1994, several months after the murder, Carter gave a statement to the police claiming to have overheard a conversation between Reginald and Mackey

Holston and a tall man he later identified as Mark Simms where Simms allegedly admitted to this murder. (T:61-69, 114-128, 1492-93) At the time of the trial in 2006 Carter did not remember overhearing any conversation or giving a statement to the police. (T:69-109) Reginald Holston was available locally but could not be interviewed before the hearing of the motion since Lindsey demanded a speedy trial; he refused to allow time to explore Holston's memory of whether such a conversation occurred or what was said. (T:61-69, 165-66) Furthermore, the State agreed to allow the defense to read in the transcript of Carter's statement as evidence to the jury so the jury would have that information despite Carter's utter lack of memory. Lindsey specifically and personally waived the presentation of such evidence as well as his right to call Carter personally. (T:1724-31)

In order to be entitled to relief, Lindsey, "bears the initial burden of showing actual prejudice." Rogers v. State, 511 So.2d 526, 531 (Fla. 1987). Further, the showing of actual prejudice must be based on "substantial evidence and not mere speculation." Id. Lindsey cannot meet this burden. For instance, in Scott v. State, 581 So.2d 887 (Fla. 1991) the defendant established that critical evidence had been lost:

> ...investigative reports and statements taken from witnesses during 1978 and 1979 were lost and were unavailable; reports of polygraph examinations of witnesses made at the time were no longer available; records reflecting the results of fingerprint analysis were no longer

> available; the report of the original detective assigned to the case and the report of the first officer on the scene were lost and were not available; the report of the evidence technician in this case, made in October of 1978 and identifying the evidence collected, was missing; numerous reports prepared by another police officer who participated in the investigation were not available; and a report concerning a potential suspect who had allegedly confessed was lost.
> In addition, evidence associated with other cases was intermingled with the Pikuritz evidence and some evidence known to have been in the Pikuritz evidence file was lost. The sheriff of Collier County in 1978 interviewed and hypnotized two witnesses and made a tape of those hypnosis sessions; that tape was lost and one of the witnesses had died.

Scott, 581 So.2d at 890. Also, the police had evidence of a viable alibi for Scott. It was undisputed that the state attorney would not go forward with the prosecution in 1979 due to existence of an intact alibi. Id. Scott was also deprived of presenting evidence that another person, Phillip Drake was responsible for the murder and the state had in its possession hair samples of the victim which for some unexplained reason had not tested for five years. Id. None of these factors are present in the instant case.

Lindsey had the opportunity to find and to interview additional witnesses to this purported admission by Simms but consciously chose not to do so; rather, he chose to force the State to trial within the statutory time period. (T:39-50) His attorney got the State to agree to read Carter's entire statement to the jury. Lindsey, however, consciously waived his right to present this evidence. Finally,

King testified that Carter gave a statement in 1994 saying that Simms had admitted this killing. (T:1492-93) He cannot show actual prejudice, especially since his actions prevented the jury from fully learning the details of this evidence. Lindsey's claim he has been prejudiced by the pre-indictment delay must be denied summarily. Scott; Fleming v. State, 624 So.2d 797(Fla.1stDCA 1993)(rejecting claim of prejudicial pre-indictment delay as state could not have avoided delay due to difficulty in solving crime); Evan v. State, 808 So.2d 92 (Fla. 2001)(rejecting claim six year delay in prosecution amounted to prejudicial pre-indictment delay because no evidentiary support for claim that key witnesses became unavailable and evidence became stale); State v. Ingram, 736 So. 2d 1215, 1217 (Fla. 5th DCA 1999)(same). This Court should deny relief.

POINT VII

THE TRIAL COURT PROPERLY ADMITTED AUTOPSY PHOTOGRAPHS INTO EVIDENCE.

Lindsey contends that the trial court erred in allowing an irrelevant and prejudicial photograph into evidence. Contrary to those assertions, the photograph was relevant, having been used by the coroner to explain his observations and conclusion. The trial court conducted a proper weighing process and did not abuse its discretion in admitting it. This issue is without merit.

The admission of photographic evidence is within the trial judge's discretion and a ruling on this issue will not be disturbed unless there is a clear showing of abuse. Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995). See Davis v. State, 859 So.2d 465, 477 (Fla.2003); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9 (Fla. 2000); Jent v. State, 408 So. 2d 1024 (Fla. 1981). Even gruesome photographs are admissible "[a]bsent a clear showing of abuse of discretion by the trial court." See Rose v. State, 787 So. 2d 786, 794 (Fla. 2001); Gudinas v. State, 693 So. 2d 953 (Fla. 1997).

In Doorbal v. State, 2008 WL 382742 (Fla.2008) this Court explained:

> "The test for admissibility of photographic evidence is relevancy rather than necessity." Crime scene photographs are considered relevant when they establish the manner in which the murder was committed, show the position and location of the victim when he or she is found by police, or assist crime scene technicians in explaining the condition of the crime scene when police arrived. This Court has upheld the admission of autopsy photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds.
>
> However, even where photographs are relevant, the trial court must still determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jur[ors] and [distract] them from a fair and unimpassioned consideration of the evidence." In making this determination, the trial court should "scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point."

> Douglas v. State, 878 So.2d 1246, 1255 (Fla.2004) (citations omitted) (alterations in original) (quoting Pope v. State, 679 So.2d 710, 713 (Fla.1996); Czubak v. State, 570 So.2d 925, 928 (Fla.1990); Marshall v. State, 604 So.2d 799, 804 (Fla.1992)). The admission of photographs will also be upheld if they are corroborative of other evidence. See Czubak v. State, 570 So.2d at 928.

Id. at 28-29.

Under the abuse of discretion standard, appellate courts may substantial deference to the trial court's ruling and will uphold it "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris, 382 So.2d at 1203; Trease, 768 So.2d at 1053 n.2. This standard is one of the most difficult for an appellant to satisfy. Ford, 700 So.2d at 195.

In a pretrial motion, Lindsey objected to *all* of the autopsy photographs, saying he would stipulate to the cause of death. (T:1146-50) The State wished to use a close up of the wound (exhibit a/b) and a full face view (Exhibit c/d). (T:1151) There was also a photograph of Mazollo in a chair (Exhibit e/f). (T:1153) The trial court limited the State to using only the full face view which came in as State’s 1. . (T:1156, 1168) The medical examiner used that photograph to explain several of his observations and to support his conclusion that it was a contact wound. It explained why a portion of a projectile was recovered from the wound as opposed to the entire thing. He opined that the bullet hit the hard surface of the

skull and fractured. The wound on the forehead demonstrated that as well as showing how close the shot was to the head. He explained how gas entering the head cavity caused the skin to rip as shown in the photograph. The bruising around the eyes demonstrated the bullet damage. (T:1169-72) Clearly this photograph was relevant and necessary. The basic test for admissibility of photographs is relevance. Haliburton v. State, 561 So.2d 248 (Fla. 1990). The record shows that the probative worth of the photographs admitted in the instant case outweighed any prejudice and there is no merit to Lindsey's argument to the contrary. Furthermore, he makes conclusory allegations of prejudice. This Court should deny relief.

POINT VIII

THE TRIAL COURT PROPERLY ALLOWED THE JURY ACCESS TO THE PHYSICAL EVIDENCE DURING ITS DELIBERATIONS. (Restated)

Lindsey asserts that the trial court erred when it sent back photographs of Mazollo’s wounds. He asserts that the State Attorney specifically requested the court to send these two photographs. He argues that by doing so the court emphasized these exhibits over the other evidence in the case. Lindsey is factually incorrect. Additionally, the court’s action was neither error nor an abuse of discretion. This Court should deny relief.

As the court was sending the jury back to deliberate it said:

> And the remaining jurors, you'll take your notebooks, your instructions, and the extra page that we gave you, and then we'll send back the evidence and a copy of – a copy of the indictment in a little while once we sift through everything.

(T:1912-13) After the alternates were released, the defense objected to the evidence going back; it did not object to specific items of evidence but to all the evidence going back. The State did not request any evidence go back. The court responded: "And I had already told them that we would be sending it back shortly, so – but let's – but I understand you've made your objection." (T:1922-23) The State attorney alerted the court to two court exhibits which should not go back to the jury. (T:1923) Those exhibits were the photographs detailing the wounds. (E:23-26) As the record clearly shows, the court sent all the exhibits back to the jury. The exhibits included photographs of the store, print cards, the pawn slip, and empty boxes. (E:384-411) No one piece of physical evidence received more emphasis than another.

Florida Rule of Criminal Procedure 3.400 grants the trial court the discretion to send items of evidence ("things") to the jury. The rule makes absolutely no mention of the necessity of the jury making a request. The rule encapsulates the law already existing in Florida.

> It is the general practice, both in civil and criminal cases, in the absence of statutory provision to the contrary, to permit the jury to take to the jury room on their retirement, all articles introduced in evidence which, in the opinion of the trial judge, will aid the jury in their deliberations; what articles should be so taken being ordinarily in the discretion of the trial court. Phillips v. State, 156 Ala. 140, 47 South. Rep. 245; Hopkins v. State, 9 Okla. Cr. 104, 130 Pac. Rep. 1101, Ann. Cas. 1915B 736, Note 742, citing many cases.

Lamb v. State, 90 Fla. 844, 849, 107 So. 530 (Fla. 1925). The standard of review is abuse of discretion. Routh v. Williams, 141 Fla. 334, 193 So. 71, 73(Fla. 1940).

> It is well settled that new trial will not be granted because jury was permitted to carry with them to the jury room articles introduced in evidence which would aid them in their deliberations unless it can be shown that the jury received testimony therefrom other than that adduced at the trial, and that such additional testimony was prejudicial. Vasquez v. State, 54 Fla. 125, 44 South. Rep. 739; Bell v. State, 32 Tex. Cr. 436, 24 S.W. Rep. 418; Spencer v. State, 34 Tex. Cr. 238, 30 S.W. Rep. 46, 32 S.W. Rep. 690; State v. Dixon, 131 N.C. 808, 42 S.E. Rep. 944; People v. Page, 1 Idaho 102; People v. Gallagher, 75 App. Div. 39, 78 N.Y.S. 5, affirmed in 174 N.Y. 505, 66 N.E. Rep. 1113; People v. Hower, 151 Cal. 638, 91 Pac. Rep. 507; State v. Teale, 154 Iowa 677, 135 N.W. Rep. 408.

Lamb, 90 Fla. at 849; Castillo v. Visual Health And Surgical Center, Inc., 972 So.2d 254 (Fla. 4th DCA 2008).

This Court, and others, have made careful distinctions between testimonial evidence and physical evidence in this area. As noted above, the statute specifically refers to “things” which this Court interpreted as physical evidence. Transcripts and depositions are not physical evidence or “things.” Barnes v. State,

970 So.2d 332, 336 (Fla. 2007). Trial counsel objected to the physical evidence being given to the jury since the transcripts of the testimony was not also given. (T. 1922) That is simply not the law. The jury heard the testimony in open court; they already had that evidence. Providing them the opportunity to examine the physical evidence ensured that they could consider that evidence on par with the testimonial evidence. The discussion in Barnes concerned providing the jury with a *transcript* of a portion of the testimony. The Court ruled that by doing so, one portion of the testimony would be emphasized over the rest. The present case only involves actual physical evidence. This Court should deny relief.

POINT IX

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL.

Lindsey also argues that the trial court improperly denied his motion for new trial based upon newly discovered evidence. He further asserts that the court incorrectly deemed the motion untimely and the evidence not newly discovered as recantation. The State agrees that the motion was timely and the evidence was newly discovered; it, however, maintains that this Court should uphold the trial court's conclusion that the evidence would not have resulted in an acquittal.

Both Lindsey and Simms were inmates in the Broward County Jail around the beginning of February 2007, after both the guilt and penalty phase trials were complete but before the Spencer hearing and sentencing had occurred. The two men encountered each other in the presence of Deputy Arthur Reeves. Reeves testified in March 2007 that:

> I heard inmate Herman, who is sitting over there (indicating), ask inmate Swan why did he get on the stand to testify, like that, make false allegations[6] against him. He stated that it was not personnel [sic], it's pay back.
> Q Okay. Who said that?
> A Swan.
> Q Swan said it's nothing personal, it's pay back?
> A Yes.

(T: 2442) The defense brought this to the court's attention, put Reeves on the stand on March 14, 2007, and made an oral motion for a new trial based upon newly discovered evidence. That motion was clearly timely since under the revised law Lindsey had until ten days after the sentence was pronounced. The evidence was newly discovered since evidence the testimony was false had not existed before or during the trial. Lindsey essentially argues Simms recanted his trial testimony. However, the trial court found that it was impeachment and cumulative so it was unlikely to result in an acquittal; consequently, it denied the motion.

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[6]The State recognizes that the trial court paraphrased this testimony in its order and overlooked including the notion of "false testimony"in it. R: 365.

To get relief under a claim of newly discovered evidence, Lindsey must show:

> ... the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." If this test is met, the court must next consider whether the newly discovered evidence is of such a nature as to probably produce an acquittal on retrial.

Wright v. State, 857 So.2d 861, 870-71 (Fla. 2003) (citations omitted).

> To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial."
>
> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. The trial court should also determine whether the evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. Where, as in this case, some of the newly discovered evidence includes the testimony of individuals who claim to be witnesses to events that occurred at the time of the crime, the trial court may consider both the length of the delay and the reason the witness failed to come forward sooner.
>
> "[I]n conducting a cumulative analysis of newly discovered evidence, we must evaluate the newly discovered evidence in conjunction with the evidence submitted at trial and the evidence presented at prior evidentiary hearings. While recantation testimony can be newly discovered evidence, courts regard it as "exceedingly unreliable." In reiterating that recanted testimony can be newly discovered evidence this Court ruled that the trial judge is required to

> review "all the circumstances of the case" while bearing in mind that recanted testimony is "exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true." A court may grant a new trial only when it is satisfied that the recanted testimony is of such a nature that a different verdict would probably result.

Jones v. State, 709 So. 2d 512, 521-22 (Fla. 1998). (citations omitted).

Lindsey had presented four witnesses, all jail inmates, who testified during the penalty phase that Simms apparently had some animosity toward Lindsey and that he was testifying to better his own position.[7] The trial court concluded that Reeves's testimony fell into the same category of evidence, merely impeaching Simms's motive. The judge did not view the statement as an acknowledgment Simms completely fabricated his testimony that Lindsey had made any statement to him about robberies and witnesses. The trial court heard all five witnesses and made a finding based upon that evidence that this testimony was unlikely to change the outcome of the trial. (R:362-66) In so doing, the trial court did not abuse its discretion. This Court should affirm.

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[7]The State recognizes that the prosecutor specifically asked the inmate witnesses if Simms had admitted to lying or making up the statement. T:2203, 2278, 2319, 2322.

POINT X

THE TRIAL COURT PROPERLY FOUND THE AVOID ARREST AGGRAVATING CIRCUMSTANCE.

Lindsey contends the trial court erred in finding the avoid arrest aggravator. He argues that the State failed to prove the sole or dominant motive for Mazollo's killing was to eliminate her as a witness, the necessary standard for a non-law enforcement victim. Contrary to Lindsey's opinion, the record clearly established the necessary facts to support the trial court finding this aggravator.

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148(Fla. 1998) reiterated the standard of review, noting that it "'is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.'" Id. at 160 (quoting Willacy v. State, 696 So. 2d 693, 695(Fla. 1997)(footnotes omitted)).

When the trial court found this aggravating factor, it stated:

2. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. Sec. 921.141(5)(e), Fla.Stat. (1994).

The State proved beyond a reasonable doubt that the Defendant murdered Joanne Mazollo for the purpose of avoiding or preventing a lawful arrest for robbery. The State presented evidence that the Defendant had been in the pawn shop before the date of the murder, and had dealt with the victim on at least three prior occasions. On one of those occasions, the Defendant provided his fingerprint on a pawn slip. The Defendant's ex-wife testified that she accompanied the Defendant to the pawn shop several days before the murder and that Joanne Mazollo greeted the Defendant in a familiar manner indicating she recognized him. The circumstantial evidence clearly establishes that the Defendant's motive for the murder of Joanne Mazollo was to avoid arrest for the robbery. *See Derrick v. State*, 641 So.2d 378, 380 (Fla. 1994)(finding that the aggravating factor was supported where the evidence showed that the victim knew the defendant from previous encounters and that the defendant told a friend that he stabbed the victim to keep him quiet).

The State also presented the testimony of Mark Swan (also known as Mark Simms) at the guilt phase of this case. Mr. Swan testified that he and the Defendant were housed together in the Broward County Jail 12 years ago, and that the Defendant told Mr. Swan that he should have killed the victim of his robbery because "you can't leave any witnesses" and he, the Defendant, had to kill someone for that reason (paraphrased). The Defendant made numerous attempts at the penalty phase to attack Mr. Swan's credibility and motive to testify. First, the Defendant presented the testimony of Curtis Fox and Carl Thompson that they overheard a conversation between Mr. Swan and the Defendant during which Mr. Swan stated that he only testified against the Defendant because "you got to do what you got to do to free yourself" (Paraphrased). However, on cross-examination both witnesses stated that they did not know whether Mr. Swan's trial testimony was truthful or untruthful, and that Mr. Swan never indicated that he had fabricated his testimony. Second, the Defendant presented the testimony of Robert Garcia, who shared a cell with Mr. Swan, and testified that Mr. Swan testified against the Defendant because of a deal with the State to shorten his own sentence. However, on cross-examination Mr. Garcia stated that Mr. Swan

> never told him the he testified untruthfully. Finally, the Defendant presented a statement given by Eddie Carter in 1994 that he overheard Mr. Swan state that [he] was the person who shot Joanne Mazollo; however, Mr. Carter testified that he does not remember giving that statement, and no other evidence even indicates that Mr. Swan was at the scene of the murder. Because there was no indication from any defense witness that Mr. Swan was testifying falsely at the guilt phase, the Court has taken Mr. Swan's trial testimony into consideration. However, even without considering Mr. Swan's testimony, the circumstantial evidence in this case clearly establishes that the Defendant's motive for the murder of Joanne Mazollo was to avoid arrest.
>
> The jury found by special verdict that the Defendant, not his accomplice in the robbery, was the actual shooter of Joanne Mazollo. As stated above, the evidence at the guilt phase established that Joanne Mazollo suffered a single gunshot wound to her forehead while she was seated passively in a chair. There was no indication whatsoever that the victim struggled or resisted, or that any other crime was committed against her. The inevitable conclusion is that Defendant intentionally and fatally shot Joanne Mazollo solely because she would have been able to identify the Defendant to police. Simply put, there is absolutely no evidence that Joanne Mazollo would have been murdered except for the fact that the Defendant wished to avoid arrest for the robbery. It is clear to this Court that avoiding arrest was the Defendant's sole or dominant motive for murdering Joanne Mazollo. *See Bell v. State*, 841 So.2d 329, 336 (Fla. 2002); *Connor v. State*, 803 So.2d 598, 610 (Fla. 2001); *Alston v. State*, 723 So.2d 148, 160 (Fla. 1998).
>
> This aggravating factor has been proven beyond a reasonable doubt and it is afforded great weight.

(R:382-384) The State contends that the trial court's detailed Sentencing Order thoroughly and lucidly sums up the elements and caveats of the avoid arrest aggravator and applies the law correctly to the facts of this case. Its findings are supported by substantial, competent evidence and should be affirmed.

The mere fact that the victim knew and could identify a defendant, without more, is insufficient to prove this aggravator. Consalvo v. State, 697 So.2d 805, 819 (Fla. 1997); Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992); Davis v. State, 604 So.2d 794, 798 (Fla. 1992). However, this Court has also held the avoid arrest aggravator can be supported by circumstantial evidence through inference from the facts shown. Consalvo, 697 So.2d at 819; Swafford v. State, 533 So.2d 270, 276 n.6 (Fla. 1988). This factor may be proved by circumstantial evidence from which the motive for the murders may be inferred. Preston v. State, 607 So. 2d 404, 409 (Fla. 1992)(kidnapping and murder of store clerk after robbery sufficient to prove aggravator). Furthermore, an express statement by the defendant as to his intentions is not required. Routly v. State, 440 So.2d 1257, 1263 (Fla. 1983).

In this case, there is competent, substantial evidence which supports the trial court's finding of the avoid arrest aggravator. Both Harrold and Nikki testified that Lindsey frequented the pawn shop where Mazollo worked on a number of occasions, including repeated visits within a day or two of the murder. Mazollo treated him as a known acquaintance. (T:1210-17, 1226-30, 1254-60) In addition to looking at merchandise, he actually pawned an item on yet another visit. (T: 1355-60, 1478-81) The jury found Lindsey guilty of being the actual shooter in

finding him guilty of premeditated murder as well as felony murder during the course of a robbery. (T: 1953-57) There was no evidence of a struggle with Mazollo; she was seated in a chair with no defensive wounds, no bruising or cuts other than those caused by the one close contact gunshot wound to her forehead. (T:1171-73, 1185-90, 1198-1200) Finally, Lindsey admitted to Simms both that he had killed a witness in a robbery to avoid her identifying him as well as his general philosophy that robbery witnesses should be killed to avoid arrest. (T:1391-94, 1423-27) Given these facts presented during the guilt phase, Lindsey's sole motive in killing Mazollo was to eliminate her as a witness against him in the pawn shop robbery.

In Derrick v. State, 641 So.2d 378, 380 (Fla. 1994) this Court upheld the avoid arrest aggravator where the evidence showed that the victim knew Derrick from previous encounters and he admitted the killing to prevent the man from identifying him. This case's factual scenario provides no other possible motive for the killing and, thus, is different from those in Bell v. State, 841 So.2d 329 (Fla. 2002)(where Bell said he killed the victim out of anger for his sexual advances) and in Green v. State, 975 So.2d 1081 (Fla. 2008)(evidence showed Green mentally ill and operating under pyschotic delusions and that the murder may have been done in self-defense).

A case more similar to this is Thompson v. State, 648 So.2d 692 (Fla. 1995) wherein the defendant robbed his former employers of $1500.00 and jewelry, after which, he murdered the company bookkeeper and his assistant. The last entry in the ledger, dated that same day, was for a check payable to the defendant in the amount of fifteen-hundred ($1,500.00) dollars. Thompson's jailhouse confession was presented to the jury. This Court held:

> To establish the avoid arrest aggravator in this case, "the State must show that the sole or dominant motive for the murders was the elimination of . . . witnesses." *Preston v. State*, 607 So. 2d 404, 409 (Fla. 1992), cert. denied, 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993). "This factor may be proved by circumstantial evidence from which the motive for the murders may be inferred." *Id*. Once Thompson had obtained the $ 1,500 check from Swack and Walker, there was little reason to kill them other than to eliminate the sole witnesses to his actions. This factor is clearly supported by the evidence. We also reject Thompson's argument that the pecuniary gain aggravator does not apply in this case and that this factor is inconsistent with the avoid arrest aggravator. There is ample evidence in the record to prove that Thompson benefitted financially from these murders. Furthermore, we have previously held that it is proper for a trial court to utilize both the pecuniary gain and avoid arrest aggravators. *See Preston*, 607 So. 2d at 409.

Thompson, 648 So.2d at 695.

In Jennings v. State, 718 So.2d 144, 151 (Fla.1998) this Court concluded that the avoid arrest aggravator was properly found where: the victims knew the defendant and could identify him; the defendant did not use a mask, and stated that if he ever committed a robbery, he would not leave any witnesses; there was no

evidence of resistance; the victims were confined to a freezer and the defendant could have eliminated any threat by simply closing and securing the freezer door. The Court also considered Jennings's "manner of killing ... that could [not] be considered reactionary or instinctive and further supports the finding that the dominant motive for killing at least two of the victims was to avoid identification." Id. Similarly in Farina v. State, 801 So.2d 44 (Fla. 2001) this Court upheld this aggravator where: defendant was known by the employees of the business he robbed; he visited it shortly before the robbery; he wore gloves and came with weapons; he received the money without resistance; he moved the victims to a confined area and then executed them; and he had made statements about eliminating witnesses. Id. 55. The evidence was quite similar in this case where Lindsey: knew the victim; made repeated visits to the store shortly before the robbery; came in with a gun; left no fingerprints; executed the victim with a single contact shot to her forehead; and then made comments about killing a witness to avoid identification. Additionally, the victim was directed or went to sit in a chair in a back room and there is no physical evidence of any resistence by her. This is competent substantial evidence which supports the avoid arrest aggravator.

A review of the cases discussing this aggravator makes it clear that all that is required to sustain finding it is proof that avoidance of arrest be the dominant or

sole motive in the killing, which can be inferred from the circumstantial evidence established at trial. Furthermore, there need not be a statement by the defendant as to his motivation. In fact, this court has repeatedly upheld the avoid arrest aggravator where there has been no statement of the defendant's intentions. See Knight v. State, 746 So.2d 923 (Fla. 1998) (noting court found if sole motive for the murders had been only financial gain, the defendant's purpose would have been accomplished upon the receipt of the money and get-away car without killing victims); Raleigh v. State, 705 So.2d 1324, 1329 (Fla. 1997) (finding witness elimination was dominant basis for murder of second victim, not involved in the drug trade as was the intended victim, where victim had let defendant in the home, directed him towards first victim who defendant had come to kill, and heard shots fired); Routley, 440 So.2d 1257; Thompson, 648 So.2d 692. Moreover, circumstantial evidence and reasonable inferences therefrom may be used to establish the avoid arrest aggravator. Consalvo, 697 So.2d at 819; see also Card v. State, 803 So.2d 613 (Fla. 2001)(avoid arrest aggravator upheld where victim knew defendant when he robbed her business and then kidnapped and murdered her). Given Lindsey's statements about witness elimination and that there was no other reason for killing Mazollo (there was no physical evidence indicating that she offered any resistance), it is clear the single execution style gunshot to the forehead

was done to assure a easy escape from the scene and to avoid arrest. Hence, this Court should affirm the finding of the avoid arrest aggravator based on the fact that the proper law was applied and the factual findings are supported by substantial, competent evidence. Lindsey's sentence should be upheld.

POINT XI

THE TRIAL COURT PROPERLY GAVE THE STANDARD JURY INSTRUCTION ON THE AVOID ARREST AGGRAVATING CIRCUMSTANCE.

Lindsey claims the trial court erred in refusing a special instruction modifying the language of the standard jury instruction on the avoid arrest aggravator. He says that since Mazollo was not a law enforcement officer, he was entitled to a pinpoint instruction that the sole or dominant motive for the killing was witness elimination.

The decision on whether to give a particular jury instruction is within the trial court's discretion, and, absent "prejudicial error," such decisions should not be disturbed on appeal. Goldschmidt v. Holman, 571 So.2d 422, 425 (Fla.1990); see Alston v. State, 723 So.2d 148, 159 (Fla.1998) (holding trial court did not abuse its discretion in denying defendant's request for a special jury instruction); James v. State, 695 So.2d 1229, 1236 (Fla.1997) (stating that a trial court has wide discretion in instructing the jury and that the court's rulings on the instructions

given to the jury are reviewed with a presumption of correctness). In the present case, the trial court gave jurors the standard avoid arrest instruction. In doing so the trial court did not abuse its discretion in denying Lindsey's request for an alternative jury instruction.

Lindsey asked the court for a special jury instruction for both the robbery/felony murder and the avoid arrest aggravator (with each specifying the jury had to find the dominant motive for the killing). Most of the discussion centered on the robbery related instruction. (T:2247-58) As discussed before, the jury had already returned a special verdict form specifically finding Lindsey guilty of felony murder (robbery) and of being the actual shooter. As detailed in the preceding issue and incorporated here, there was sufficient evidence to prove the shooting was done to eliminate Mazollo as a witness.

Because standard jury instructions are presumed correct and are preferred over special jury instructions, the proponent has the burden of proving the court abused its discretion in giving the standard instruction. Stephens v. State, 787 So.2d 747, 755-56 (Fla. 2001). See Parker v. State, 873 So.2d 270,294(Fla. 2004); James v. State, 695 So.2d 1229, 1236 (Fla. 1997); Elledge v. State, 706 So.2d 1340 (Fla. 1997). A ruling is an abuse of discretion "where no reasonable man would

take the view adopted by the trial court." Canakaris, 382 So.2d at 1203. See Trease, 768 So.2d at 1053, n. 2.

This Court has affirmed the validity of the standard jury instruction for the avoid arrest aggravator. See Davis v. State, 698 So.2d 1182, 1192(Fla.1997) (rejecting defendant's argument that this Court's construction of avoid arrest aggravator be incorporated into jury instruction because standard jury instruction was legally adequate); Whitton v. State, 649 So.2d 861, 867 n. 10 (Fla.1994) (concluding that standard jury instruction for avoid arrest aggravator was not vague and did not require a limiting instruction in order to make this aggravator constitutionally sound); Griffin v. State, 866 So.2d 1, 16 (Fla.2003); Sweet v. Moore, 822 So.2d 1269, 1274 (Fla.2002); Hannon v. State, 941 So.2d 1109(Fla. 2006). The trial court properly gave the standard instruction on avoid arrest. It was not misleading or vague. There was no abuse of discretion. Relief should be denied.

POINT XII

THE TRIAL COURT PROPERLY FOUND AND INSTRUCTED ON THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE.

Lindsey next argues that the prior violent felony aggravator should not apply since he personally did not engage in life threatening behavior. That stance is not

the law in Florida. Lindsey personally and actively participated in an armed robbery and pled guilty, as an adult, to that armed robbery. The jury properly considered this aggravator and the trial court properly found it as an aggravating factor.

In Lewis v. State, 398 So.2d 432, 438 (Fla. 1981) this Court discussed the meaning of Fla. Stat. sec. 921.141(5)(b) saying: "Only previous conviction of 'another capital felony or of a felony involving the use or threat of violence' will satisfy § 921.141(5)(b). This subsection refers to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." It is the crime which must be life threatening, not necessarily the behavior of the defendant; his behavior must have some level of violence or threat but need not be life threatening. In Williams v. State, 967 So.2d 735, 762 (Fla. 2007) this Court upheld this aggravator for an indecent assault conviction since it was a life threatening crime under the case law and defendant used threats and minimal force (laying her on the bed) on the victim although the force itself was not life threatening. The requirements for this aggravator were also satisfied when defendant burgled an apartment with the intent to rape and his contact with the victim consisted of clamping his hand over her mouth, verbally threatening her, and then pushing her to the floor on his way out. Rose v. State, 787 So.2d 786, 800 (Fla. 2001). Lindsey's reliance on Mahn v.

State, 714 So.2d 391 (Fla. 1998) is misplaced since the prior conviction consisted of a simple purse snatching where the defendant was only the driver of the car; he had no contact with the victim.

Lindsey's prior conviction for armed robbery involved both violence and direct contact with the victim. He, along with two other male teenagers, planned an armed robbery of a convenience store. He went into the store, went up to the counter, and contacted the clerk. The other two came in with a gun. The clerk handed the robbery money to Lindsey. At some point during the robbery, the two co-defendants struggled over the gun and it went off. All three men then left. He admitted to participating in an armed robbery where he and his co-defendants directly and overtly confronted an unarmed victim. (T:2361-62) Lindsey was the individual who did that direct confrontation. The crime, armed robbery, was life threatening. Lindsey had direct contact with the victim. His behavior, which consisted of joining with two other men, using a gun, and demanding money, involved both threats and violence.

Additionally, the trial court noted that:

> the instant offense was committed in 1994, only six years later. During those six years, the Defendant served two and one half years in prison for the armed robbery and three years for a grand theft. Also during those six years, the Defendant was arrested for trafficking in cocaine, dealing in cocaine, and resisting arrest without violence. The

> Defendant was on probation for those offenses at the time of the instant offense.

R:385. Conviction of a prior violent felony was an appropriate aggravator in this case. This Court should affirm.

POINT XIII

LINDSEY'S DEATH SENTENCE IS PROPORTIONAL (restated)

Here, Lindsey asserts that his sentence is not proportional. He again challenges the avoid arrest aggravator and the weight assigned the prior violent felony aggravator. (IB:69) Additionally, he points to the trial court's finding that rehabilitation of Lindsey is possible and claims here that such a finding precludes the imposition of the death penalty under State v. Dixon, 283 So.2d 1, 7 (Fla. 1973) (IB 70). Contrary to Lindsey's claim, the sentence is proportional and should be affirmed.

"As death is a unique punishment, it is necessary to engage in a proportionality review to consider the totality of the circumstances in a case and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Bowles v. State, 804 So.2d 1173, 1184 (Fla. 2001); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).

Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases to ensure uniformity. Urbin v. State, 714 So.2d 411, 416-17 (Fla. 1998); Terry v. State, 668 So.2d 954 (Fla. 1996). The Court's function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14-15 (Fla. 1999).

Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So.2d 450, 453 (Fla. 1991), cert. denied, 503 U.S. 946 (1992); Stano v. State, 460 So.2d 890, 894 (Fla. 1984). Resolution of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id. Similarly, the relevant weight assigned each mitigator "is within the province of the sentencing court." Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990), receded from in part, Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) See also, Buzia v. State, 926 So.2d 1203, 1216 (Fla.) (reviewing weight assigned aggravators under an abuse of discretion standard) cert. denied, 127 S.Ct. 184 (2006); Alston v. State, 723 So.2d 148, 162 (Fla. 1998) (finding where detailed sentencing order identified mitigators, weight assigned each is within court's discretion); Cole v. State, 701 So.2d 845, 852 (Fla. 1997)(deciding

mitigator's weight is within judge's discretion, subject to abuse of discretion standard); Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996)(same).

To the extent Lindsey challenges the avoid arrest and prior violent felony aggravators, the State reincorporates its answer to **Points X and XII** in support of the trial court's findings. Those aggravators were supported by substantial competent evidence as shown in the State's answer. However, the pith of Lindsey's complaint here is that the trial court gave each too much weight. Such a challenge is viewed for abuse of discretion. See Frances v. State, 970 So.2d 806, 816 (Fla. 2007) (noting the weight to be accorded an aggravator is within the discretion of the trial court) Buzia, 926 So.2d at 1216; Sexton v. State, 775 So.2d 923, 934 (Fla.2000); Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000). The prior violent felony aggravator has been described as a weighty aggravator. Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (finding prior violent felony aggravator a weighty factors); Porter v. State, 788 So.2d 917, 925 (Fla. 2001) (same). Here, it was proven that Lindsey pled guilty, as an adult, to the prior armed robbery and the evidence was that he personally and actively participated in the crime. As such, the trial court cannot be said to have abused her discretion in assigning the matter "great weight."

With respect to Lindsey's suggestion that the finding that he could be rehabilitated and that this some how bars the imposition of the death penalty is not supported by the case law. This Court has never barred the imposition of the death penalty merely because there was a mitigation finding that the defendant could be rehabilitated. See Douglas v. State, 878 So.2d 1246, 1262, 1254 (Fla. 2004) (noting mitigator that defendant could be rehabilitated was found, but concluding death sentence proportional); Anderson v. State, 863 So.2d 169, 179, 187-88 (Fla. 2003) (same); Griffin v. State, 820 So.2d 906, 914, 916 (Fla. 2007) (same); Derrick v. State, 641 So.2d 378, 379, 381 n.4 (Fla. 1994) (same). This Court should reject Lindsey's suggestion otherwise.

Moreover, in this case, the trial court considered, found, and weighed Lindsey's evidence of rehabilitation capability. As such, his reliance upon Cooper v. Dugger, 526 So.2d 900, 902 (Fla. 1988) is misplaced. As this Court reasoned in Griffin:

> We dispose first of Griffin's argument and reliance upon *Cooper v. Dugger*, 526 So.2d 900 (Fla. 1988), to support his assertion that the trial court failed to consider the evidence of his potential for rehabilitation. While *Cooper* does in fact stand for the rule that a defendant's potential for rehabilitation is a significant factor in mitigation, 526 So.2d at 902, it is distinguishable from the current case. In *Cooper*, the trial court conducted a **sentencing hearing with the mistaken belief that the defendant could only present evidence of statutory mitigating evidence**. *See id.* Consequently, the defendant was not allowed to present evidence of his rehabilitation

> potential, a nonstatutory mitigating factor. See id. Nor was the jury allowed to consider the rehabilitation factor in its deliberation. *See id.* On appeal, the Court vacated the sentence and remanded for a new sentencing hearing to allow the defendant to present his potential for rehabilitation as a nonstatutory mitigating factor. *See id.* at 903. Here, there was no such controversy and Griffin was allowed to present both categories of mitigating evidence, including his potential for rehabilitation.

Griffin, 820 So.2d at 913-14 (emphasis supplied). Because the trial court in Simmons v. State, 419 So.2d 316, 320 (Fla. 1982) and Valle v. State, 502 So2d 1225, 1226 (Fla. 1987) made the same error of excluding evidence of rehabilitation potential as the court made in Cooper, as such, under Griffin and the facts of the instant case, neither Simmons nor Valle lend support to Lindsey's position here. Based on the trial court's understanding that Lindsey's rehabilitation potential was mitigation of some weight, Lindsey has not shown any error under Campbell.

Based on the foregoing, the trial court's findings of the following aggravation, mitigation, weight assignment, and balancing of the sentencing facts remains valid. Here, the court found three aggravators and afforded each great weight: (1) felony murder (robbery); (2) avoid arrest; and (3) prior violent felony (1988 armed robbery). No statutory mitigation was presented. Of the non-statutory mitigation offered, the trial court found: (1) Lindsey had a tumultuous childhood and lacked support and guidance from his parents (some weight): (2) Lindsey suffered physical abuse as a child (some weight); (3) Lindsey has six

children and is a good and loving father (little weight); (4) Lindsey has shown compassion and generosity to his family, friends, and neighbors (little weight); (5) Lindsey obtained his GED and several certificates while incarcerated (Little weight); (6) Lindsey has been a good prisoner while incarcerated and has not been a discipline problem (little weight); (7) Lindsey has matured and become more responsible since the date of the offense (little weight); (8) Lindsey can be rehabilitated; he has an average IQ, does not suffer from a learning disability, and is not a psychopath (some weight); and (9) Lindsey displayed appropriate conduct during trial. (R: 381-92). This Court has affirmed death sentences under circumstances similar to those here, and should do so again.

Lindsey points to Johnson v. State, 720 So.2d 232, 238 (Fla. 1998); Terry v. State, 668 So.2d 954 (Fla. 1996); and Thompson v. State, 647 So.2d 824 (Fla. 1994) to support his claim that the sentence is not proportional. His reliance upon these cases is misplaced. Johnson is distinguishable because its has merely two aggravating factors and reduced weight was given the prior violent felony aggravator. The reduced weight was given to the conviction for aggravated assault committed by Johnson against his brother, Anthony, where Anthony stated the assault was based on a misunderstanding and he was not injured. Further, this Court found the aggravating factor less weighty because it was based on the

contemporaneous felonies committed by a co-defendant. Johnson, 720 So.2d at Here, however, there was three aggravators, one of which, the prior violent felony aggravator, was based on Lindsey's personal actions in his 1989 armed robbery conviction where he admitted to his personal and active participation in the crime. (R: 384). Based on the facts of this case, there is no basis to reduce the weight of this aggravator and proportionality should be found. Similarly, in Terry, the prior violent felony was based on a contemporaneous felony (aggravated assault with an inoperable gun) committed by the co-defendant. Terry, 668 So.2d at 965. This is not the case here, as Lindsey's prior violent felony conviction occurred before the instant murder and was committed personally by Lindsey.

Thompson, 647 So.2d at 826-29 does not assist Lindsey in his proportionality analysis. While the trial court found four aggravating factors, this Court vacated three of them leaving only the felony murder aggravator and substantial mitigation. That is not the case here. The trial court found the prior violent felony, avoid arrest, and felony murder aggravators and for the reasons asserted previously, those aggravators should be affirmed. Moreover, while nine non-statutory mitigating factors were found they were given some to little weight. While the facts of Terry did not rise to the level of the most aggravated and least mitigated of cases, such is not the case here. In fact, under similar circumstances,

even where the avoid arrest aggravator is not considered, this Court has found proportionality.

The State relies upon Shellito v. State, 701 So.2d 837, 845 (Fla. 1997) (finding death sentence proportional in a shooting death where trial court properly found two aggravators, prior violent felony conviction and pecuniary gain/commission during a robbery, and nonstatutory mitigation consisting of alcohol abuse, a mildly abusive childhood, difficulty reading, and a learning disability); Mendoza v. State, 700 So.2d 670, 679 (Fla. 1997) (concluding sentence was proportionate for 25 year-old defendant who killed a robbery victim with a single gunshot and upon a finding of two aggravators of prior violent felony and pecuniary gain and little weight to defendant's history of drug use and mental health problems); Pope v. State, 679 So.2d 710, 716 (Fla. 1996) (affirming death sentence for murder and robbery of neighbor/girlfriend that involved aggravation of pecuniary gain and his prior violent felony, and mitigation of both statutory mitigating circumstances of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct, and several nonstatutory mitigating circumstances); Lowe v. State, 650 So.2d 969, 976 (Fla. 1994) (affirming sentence based on two aggravating factors, prior violent felony and felony murder, which

outweighed the one statutory and four nonstatutory mitigators);[8]; Melton v. State, 638 So.2d 927, 930-31 (Fla. 1994) (finding sentence proportionate for shooting of victim during armed robbery of pawn shop; murder involved two aggravating factors of prior violent felony conviction and pecuniary gain and two nonstatutory mitigating factors of the defendant's good conduct in jail and difficult family background). From the totality of the circumstances Lindsey's death sentence is proportional.

POINT XIV

THE TRIAL COURT PROPERLY ALLOWED CROSS EXAMINATION OF LINDSEY ON MATTERS RELATED TO THE AGGRAVATING CIRCUMSTANCES.

Lindsey next argues the trial court erred in allowing the State to cross examine him regarding his knowledge of the victim and his actions during the crime. He merely asserts prejudice by saying he was forced to criticize the jury for its guilty verdict; nowhere does he explain how he or the penalty phase trial were actually prejudiced. The State maintains that the court properly allowed cross examination and did not abuse its discretion in so ruling.

§ 90.612, Fla. Stat. states:

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[8]Recently, this Court affirmed the granting of a new penalty phase based on newly discovered evidence undermining the trial court's rejection of two mitigating factors. Lowe v. State, case number SC05-633 (Fla. Nov. 6, 2008).

> (2) Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters.

The statute specifically allows witnesses to be cross examined on all matters affecting their credibility and also invests the trial court with discretion to broaden the subject matter of the examination. See Jones v. State, 580 So.2d 143, 145 (Fla. 1991); Payne v. State, 356 So.2d 12 (4th DCA 1977). The general rule was outlined in Padgett v. State, 64 Fla. 389, 397, 59 So. 946, 949 (1912):

> the well established rule that a party has no right to cross-examine a witness except as to facts and circumstances connected with matters testified about on his direct examination. . . . While this is true, we bear in mind that a wide range should be allowed on the cross-examination of a witness when the questions propounded seek to elicit the motives, interest, or animus of the witness as connected with the cause or the parties thereto, upon which matters he may be contradicted by other evidence. Likewise, considerable latitude should be permitted in the propounding of questions on cross-examination which seek to test the memory or credibility of the witness. . . The conduct of the cross-examination generally and . . . the range which it shall be permitted to take rests in the sound discretion of the trial court.

In criminal cases the state "is not to be confined strictly to the subjects" of the direct examination when cross-examining the accused. Thomas v. State, 249 So.2d 510 (Fla.3rd DCA 1971)(latter limited to disallow comment of right of silence). The scope of cross-examination rests largely within the trial court's discretion. U.S. v. Moseley, 450 F.2d 506 (5th Cir.1971); Bettker v. U.S., 405 U.S. 975; Hudson v.

U.S., 387 F.2d 331 (5th Cir. 1967); Sanders v. State, 707 So.2d 664 (Fla. 1998); Louette v. State, 152 Fla. 495, 12 So.2d 168 (1943). The control of the scope of cross-examination lies with trial judge and is not subject to review except for a clear abuse of discretion. McCoy v. State, 853 So.2d 396, 406 (Fla.2003); Boyd v. State, 910 So.2d 167 (Fla. 2005); Ho Yin Wong v. State, 359 So.2d 460 (3rd DCA 1978).

A substantial part of Lindsey's strategy during the penalty phase involved attacking Simms's credibility and his testimony about Lindsey's statement on killing a robbery witness. As discussed previously, he put on four witnesses specifically for this purpose, directed at defeating the avoid arrest aggravator. The State began by asking him when he first met Mazollo, directly on point. The State needed to prove this aggravator and examination of this witness regarding the facts supporting it and defendant's conversation with Simms was relevant and necessary. The trial court agreed and allowed cross examination limited to the avoid arrest issue. (T:2355-57) The State limited its questions to those areas, not getting into the broader facts of the case. (T:2355-61) Additionally, Lindsey merely claims prejudice without more. The relevance of the examination clearly outweighed whatever prejudice may have existed. The trial court did not abuse its discretion in allowing this examination. This Court should affirm.

POINT XV

THE TRIAL COURT ALLOWED PROPER IMPEACHMENT OF FOX.

In this issue Lindsey contends the trial court erred in allowing the State to question Fox about the nature of his prior convictions as well as the type of charges on which he was awaiting trial. He further argues the error was prejudicial but does not fully explain his position. The State's position is that the questions were proper impeachment to show witness bias. Even if the impeachment was error, it was harmless beyond a reasonable doubt. Lindsey is not entitled to relief on this point.

During the penalty phase, the defense presented four inmates to testify to comments Simms made when he encountered Lindsey in a holding cell. Fox was one of those inmates. During his testimony the following exchange occurred:

> Q Mr. Fox, what are you currently charged with?
> MR. CHRISTOPHER POLE: Objection, Your Honor. Improper impeachment.
> THE COURT (JUDGE E. O'CONNOR): Overruled.
> BY MR. DAVID FRANKEL: Q What are you currently charged with?
> A I've been sentenced on attempted armed burglary and attempted armed robbery, and right now I'm going to trial for possession of firearm and attempted murder.
> Q Okay. And you are in front of Judge Backman, so you are considered a violent criminal career; isn't that correct?
> MR. CHRISTOPHER POLE: Objection. Improper impeachment.
> THE COURT (JUDGE E. O'CONNOR): Overruled.
> BY MR. DAVID FRANKEL: Q You've previously been sentenced as a career criminal; is that right?

A Habitual Offender.
Q Habitual Offender. And you're doing a thirty year sentence?
A Yes, sir.
Q And you got a couple of other charges still pending, and you have possession of firearm by convicted felon and attempted murder?
A Yes, sir.
...
Q And you have no idea whether Mr. Sims' testimony was truthful or untruthful?
A No.
Q He never said like I'm going to make anything up?
A Not to me.
Q He just said he had to do what he had to do?
A Yes.
Q That's all?
A Yeah.

(T:2201-3)

§ 90.610, Fla.Stat. allows a party to impeach a witness with certain prior convictions. In general, the impeachment is restricted to determining if the existence of a conviction, and if so, how many times. Fotopoulos v. State, 608 So. 2d 784, 791 (Fla. 1992); Fulton v. State, 335 So. 2d 280, 284 (Fla. 1976). The prosecutor is not allowed to delve into the nature of a defendant's prior convictions or the circumstances surrounding them. Green v. State, 720 So. 2d 1150 (Fla. 1998). The scope of cross-examination is within the discretion of the trial court and it may permit, or decline to permit, a witness upon cross-examination to be interrogated as to indictments or charges, before conviction, against him, of

criminal offenses. This discretion is not subject to review on appeal or writ of error, unless abused. Wallace v. State, 41 Fla. 547, 26 So. 713 (1899).

Florida Statute § 90.608(2) allows a witness to be impeached to show his bias. This Court has allowed a state witness to be impeached with the nature of his pending charges in order to show his bias under this particular evidence code section. See Breedlove v. State, 580 So.2d 605, 607-08 (Fla.1991). In Dessaure v. State, 891 So.2d 455, 469-70(Fla. 2004) this Court held the State's questions concerning defense witnesses's life sentences and immunity from perjury sanctions were relevant and admissible for demonstrating the clear potential for bias against the state since the same office prosecuted them. The witnesses arguably had motive to commit perjury at trial and the state's questions about the mandatory life sentences were relevant to demonstrate the lack sanctions for their committing perjury. Similarly here, Fox was being prosecuted by the same State Attorney office which was trying Lindsey. Fox had just received a thirty year sentence. He also admitted that an inmate should not cooperate with the State and he disapproved of the practice. T: 2201. The trial court did not abuse its discretion in allowing the State to elicit the witness's bias against both the state and Simms.

Even if the court erred in allowing the impeachment, any error was harmless. The focus of a harmless error analysis "is on the effect of the error on the

trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id. Lindsey presented four inmate witnesses attacking Simms's credibility. The fact that all were in custody came out. Two witnessed Simms's interaction with Lindsey in the holding cell and his reaction to their inquiries after Lindsey left. Fox was one of those witnesses. The other was Thompson who testified that he witnessed Simms comment negatively about Lindsey and say it was all about him (Simms). T: 2275. Garcia was Simms's cellmate in jail. Simms made a statement that the only reason he was testifying for the State was to go home to his family and for revenge for Lindsey's cooperation with the State against him in 1994. (T:2313-16) Carter testified that he had no memory of making any statement to the police regarding an admission by Simms to being involved in a robbery-homicide of a pawn shop. His 1996 statement to the police detailing Simms's confession to robbing a pawn shop and killing the witness was read into the record. (T: 2203-2228) Thus, the defense attacked Simms's credibilty with all of these witnesses, all of whom were incarcerated. Fox's testimony was substantially similar to Thompson's. The defense impeached Simms's credibility and bias against Lindsey multiple times. Any error in the State's impeachment of Fox was harmless beyond a reasonable doubt. This Court should deny relief on this issue.

POINT XVI

THE TRIAL COURT PROPERLY WEIGHED BOTH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES IN REACHING ITS SENTENCING DECISION. (Restated)

Lindsey argues that the trial court failed to independently weigh the aggravating and mitigating factors in imposing the death sentence but rather simply adopted the jury's recommendation. The State disagrees. The trial court independently and adequately weighed all the evidence and only then imposed the death penalty.

Under §921.141(3), Fla. Stat, notwithstanding the jury's recommendation, the court must weigh the aggravation and mitigation, and if it finds death the appropriate sentence, put in writing its finding as to the facts "(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." In its sentencing order the trial court said:

> This Court has heard and thoroughly reviewed all evidence presented in the guilt an dpenalty phase of the trial. In addition, this Court has had the benefit of a Pre-Sentence Investigation Report, as well as sentencing memoranda filed on behalf of the State and the Defendant. ... This Court is now required to give individual consideration to each aggravating and mitigating circumstance presented by the parties...
> This Court has now considered and discussed all aggravating and mitigating circumstances presented by the respective parties. In evaluating and weighing the aggravating factors against the mitigating

> factors, this Court understands that the process is qualitative, not simply quantitative. Accordingly, this Court looks to the nature and quality of the established aggravating and mitigating factors. This Court finds that the great weight of the significant aggravating curcumstances that have been proven beyond a reasonable doubt far outweigh the weight given to the mitigating curcumstances that have been established.

R:382, 394. The trial court clearly did an appropriate and independent weighing process.

Review of orders imposing death sentences have not been for talismanic incantations, but for the content outlining the factual findings as to aggravation and mitigation, the weight assigned each, and the reasoned weighing of those factors in determining the sentence. This Court explained that to comply with §921.141(3), the judge "must (1) determine whether aggravating and mitigating circumstances are present, (2) weigh these circumstances, and (3) issue written findings." Layman v. State, 652 So.2d 373, 375 (Fla. 1995). As provided in Bouie v. State, 559 So.2d 1113, 1115-16 (Fla. 1990) the written order provides for meaningful review, and must contain factual findings and show the sentencing court independently weighed the aggravators and mitigators to determine the appropriate sentence of life or death. This Court requires each statutory and non-statutory mitigator be identified, evaluated to determine if it is mitigating and established by the evidence, and deserved right. Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995). See Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (holding court may assign

mitigator no weight). The sentencing order in Ferrell was found lacking because the court had not set forth its factual findings/rationale in other than conclusory terms. Ferrell, 653 So.2d at 371. Such is not the case here. The order meets the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990), Bouie, and §921.141 as each aggravator and mitigator was discussed, weighed, and factual findings set out. Only then did the court balance the factors before imposing the sentence. The court completed the proper analysis.

Additionally, this trial court's order and weighing process differed significantly from that in Ross v. State, 386 So.2d 1191(Fla. 1980). There the trial court stated that it was bound by the jury's recommendation which compelled it to sentence the defendant to death. In vacating the death sentence this Court stated:

> The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed. ... The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation.

Id. 1197-98. Such was not the situation in this case. The trial court followed the correct standard and weighing process. Its sentencing order should be affirmed.

POINT XVII

FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL. (Restated)

Lindsey maintains that Florida’s capital sentencing is unconstitutional because: (1) it does not comply with the dictates of Ring v. Arizana, 536 U.S. 584 (2002); (2) it permits the jury to be instructed that its recommendation is advisory in contravention of Caldwell v. Mississippi, 472 U.S. 320 (1985); (3) the finding of the felony murder aggravator may not be “sufficient aggravating circumstances” to justify the death sentence; (4) the statute provides for a death recommendation based upon a majority vote; (5) it does not require the jury to make a finding that the aggravations outweighs the mitigation beyond a reasonable doubt. This Court has rejected such challenges and has upheld the constitutionality of Florida capital sentencing scheme. This Court should affirm.

Ring V. Arizona - While questions of law, are reviewed *de novo*, Elder v. Holloway, 510 U.S. 510, 516 (1994), Lindsey has offered nothing new to call into question the well settled case law on the impact of Ring on Florida’s capital sentencing and the principles that death is the statutory maximum sentence, death eligibility occurs at time of conviction, Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), and that the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the

appropriate sentence. Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death is maximum penalty and repeated rejection of arguments aggravators had to be charged in indictment, submitted to jury and individually found by unanimous jury). See Coday v. State, 946 So.2d 988, 1005-06 (Fla. 2006)(reaffirming Ring does not render Florida capital sentencing scheme unconstitutional and rejects the challenge based on permitting majority death recommendations) Buzia v. State, 926 So.2d 1203, 1217 (Fla. 2006) (reaffirming Ring does not invalidate Florida's death penalty and concluding that the finding of a prior violent felony conviction satisfies Ring); State v. Steele, 921 So.2d 538 (Fla. 2005) (finding Ring does not require a finding that the Florida capital sentencing scheme is unconstitutional and does not require jury findings on aggravating circumstances) Perez v. State, 919 So.2d 347, 377 (Fla. 2005) (rejecting challenges to capital sentencing under Ring and Furman); King v. Moore, 831 So.2d 143 (Fla. 2002); Whitfield v. State, 706 So.2d 1 (Fla. 1997) (finding majority death recommendations are constitutionally permitted).

Florida's capital sentencing is constitutional. See Proffitt v. Florida, 428 U.S. 242, 245-46, 251 (1976) (finding Florida's capital sentencing constitutional under Furman); Hildwin v. Florida, 490 U.S. 638 (1989)(noting Sixth Amendment does not require case "jury to specify the aggravating factors that permit the

imposition of capital punishment in Florida"); Spaziano v. Florida, 468 U.S. 447 (1984); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003). Moreover, Lindsey has a prior violent felony (robbery) conviction which supports the prior violent felony aggravator and establishes further compliance with Ring. This Court has rejected challenges under Ring where the defendant has a prior violent felony conviction. See Robinson v. State, 865 So.2d 1259, 1265 (Fla. 2004) (noting "prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring.") (citing Owen v. Crosby, 854 So.2d 182, 193 (Fla. 2003)); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting "prior violent felony" aggravator justified denying Ring claim). Relief must be denied and Lindsey's convictions and sentences affirmed.

Likewise, Lindsey's challenges to the instructions regarding the standard of proof for mitigation and the balancing of the aggravation and mitigation have been rejected. In Williams v. State, 967 So.2d 735 (Fla. 2007), this Court stated:

> ...this Court has repeatedly rejected the argument that the standard penalty phase jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence. *See, e.g., Elledge v. State*, 911 So.2d 57, 79 (Fla. 2005); *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla. 2002). This Court in Sweet further rejected a claim of error where a trial court failed to instruct the jury that "it was required to find beyond a reasonable doubt that the aggravators outweighed the mitigators before recommending a sentence of death."

> *Id.* at 1275. Finally, in *Bogle v. State*, 655 So.2d 1103, 1108 (Fla. 1995), we rejected the claim that a jury instruction which provides that a mitigator may be considered if the jury is reasonably convinced of its existence erroneously restricts the evidence that a jury may consider in mitigation. Accordingly, we reject these claims.

Williams, 967 So.2d at 761. Lindsey has offered nothing requiring reconsideration of this settle matter.

Caldwell v. Mississippi - This Court has rejected challenges to the statute under Caldwell. A Caldwell error is committed when a jury is misled regarding its sentencing duty so as to diminish its sense of responsibility for the decision. "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). This Court has recognized the jury's sentencing role is merely advisory, and the standard instructions adequately and constitutionally advise the jury of its responsibility; "the standard jury instruction fully advises the jury of the importance of its role, correctly states the law, [] and does not denigrate the role of the jury." Brown v. State, 721 So. 2d 274, 283 (Fla. 1998)(citation omitted). See Burns v. State, 699 So. 2d 646, 654 (Fla. 1997) (holding instruction correctly states law and advises jury of importance of its sentencing role), cert. denied, 522 U.S. 1121 (1998); Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992) (finding Caldwell does not control Florida law on capital

sentencing); Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988) (rejecting claim standard jury instruction is unconstitutional under Caldwell or applicable to Florida death cases). The jury was instructed adequately and in compliance with constitutional dictates. The statute is not implicated by Ring or Caldwell. The Court should affirm.

POINT XVIII

THE FELONY MURDER AGGRAVATOR IS NOT AN AUTOMATIC AGGRAVATING FACTOR. (restated)

It is Lindsey's position that the felony murder aggravator is unconstitutional under both the Florida and United States Constitutions because it does not genuinely narrow the class of persons eligible for the death penalty and it does not justify the imposition of a more severe sentence compared to other defendants found guilty of murder. This Court has rejected these arguments previously, and Lindsey has not offered any basis to revisit those decisions.[9]

It is well settled that the felony murder aggravator is not an automatic aggravating factor. The enumerated felonies in the agravator are fewer than in the substantive crime of felony murder, thus, it narrows the class of those to whom the

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

aggravator may be found to apply. As a result, this Court, has repeatedly found this aggravating factor, and its attendant instruction, constitutionally sound.. See Blanco v. State, 706 So. 2d 7 (Fla. 1997)(finding that eligibility for the felony murder aggravator is not automatic); Johnson v. State, 660 So. 2d 637, 647-48 (Fla. 1995) (citing Lowenfield v. Phelps, 484 U.S. 231 (1988)); Hunter v. State, 660 So. 2d 244, 253 & n.11 (Fla. 1995) (same); Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989) (upholding Florida's felony murder aggravator against constitutional challenge), cert. denied, 497 U.S. 1032 (1990); Johnson v. Dugger, 932 F.2d 1360 (11th Cir. 1991) (same). Lindsey has offered nothing to support overturning this well settled case law. His conviction and sentence should be affirmed.

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Jeffrey L. Anderson, Esq. Office of the Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on April 14, 2008.

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LISA-MARIE LERNER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on April 14, 2008.

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LISA-MARIE LERNER