IN THE SUPREME COURT OF FLORIDA

DERRICK McLEAN,

Appellant,

v. CASE NO. SC07-2297
L.T. No. 48-2004-CF-15923-O

STATE OF FLORIDA,

Appellee.
_________________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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**STATEMENT OF THE CASE AND FACTS**

Theothlus Lewis, his wife Shirley, and his stepdaughter lived next door to Jahvon Thompson in the Silver Pine Apartments. (XIX 792) On November 24, 2005, Lewis was watching television when he heard two booms and thought it was loud music next door. (XIX 795) Lewis went next door to complain about the noise. (XIX 796) An individual he identified as McLean opened the door and ordered Lewis into the apartment at gun point. (XIX 796) McLean asked Lewis "where was the money at." (XIX 799) Lewis put his hands in his pockets and pulled the inside pockets out and told McLean that he did not have any money. (XIX 799) Lewis then observed a masked man with his neighbor Jahvon coming from the hallway area. (XIX 799) Lewis was then seated on a couch in the apartment and Jahvon was ordered to sit next to him. (XIX 802) McLean kept searching throughout the apartment while the masked person stood there, holding them at gunpoint. (XIX 802) At some point McLean grabbed a dark color, maybe blue or orange bag from a shelf. (XIX 805)

After concluding the search, McLean told the masked individual to go outside and shoot the girl next door if he saw her. (XIX 805) Meanwhile, McLean stood by the door with the gun. Lewis sensed danger from the look in his "eyes" and dove to the floor. He began crawling toward the back room. (XIX 808)

As soon as Lewis turned back around he felt a bullet go by his ear. (XIX 808) Lewis realized he had been shot in the back. (XIX 808) Lewis heard several other shots fired, maybe five or six. (XIX 808-09) After a few moments, Lewis got up and started walking towards the door. (XIX 809) Lewis observed Jahvon in the apartment with multiple gunshots in his chest.[1] (XIX 809) Lewis went to his apartment next door and his wife let him in. (XIX 810)

Lewis provided a description of McLean to the police. (XIX 811) Lewis also worked with a police sketch artist to develop a composite sketch of his assailant. (XIX 811) Lewis picked photo number five, identifying McLean as his attacker. (XIX 819) Lewis had no doubt that the individual he picked out was the shooter. (XIX 820) Lewis also made an in court identification of McLean as the shooter. (XIX 821)

Lewis has a permanent scar on his back from the gunshot wound; he also has problems breathing sometimes. (XIX, 815) Shirley Lewis testified that after Lewis had been gone for about ten minutes she wondered what was taking him so long. (XIX 862) She looked outside her apartment and observed an individual with

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[1] Orlando Police Department Officer Jacqueline Davis was the first to arrive at the scene and checked victim Thomas for a pulse. She determined he had no pulse but administered CPR until the paramedics arrived. (XIX 845) A paramedic arrived and continued CPR but the victim was unconscious and non-responsive. (XIX 850)

a ski mask and a gun walk out of the apartment next door. (XIX 861) This individual walked past Shirley and she then observed another individual, who was holding a blue bag, shoot inside the apartment next door. (XIX 862) Shirley heard "about seven" shots. (XIX 862) She ran back inside her apartment and closed the door. (XIX 862) She told her daughter to call 911. (XIX 862) After speaking to the 911 operator, Shirley heard a knock on the door. Shirley was scared and looked through the peephole and determining it was Theo, let him in. Her husband staggered in and he was bleeding from the back. (XIX 866) Shirley identified a blue bag which she believed was in the shooter's hand. (XIX 868) When she saw the bag she was about three feet from the individual holding it. (XIX 871-72)

Captain Dotson Ellis Jr., of the Orlando Police Department, was driving in an unmarked car in the vicinity of the Skyline apartments at the time of the shooting. (XX 874) Shortly after receiving notice of the shooting, Captain Ellis observed a brown vehicle leaving the apartment complex, turning on to Pine Hills Road; it passed about five feet in front of him. (XX 875) Captain Ellis activated his lights, and the brown vehicle sped up and attempted to elude him. The car screeched its tires and accelerated to 60 or 70 miles per hour northbound on Pine Hills Road. (XX 875) Captain Ellis lost sight of the vehicle, then

came upon it again after it struck another unmarked sheriff's department vehicle. (XX 876) Captain Ellis observed a black male running from the driver's side of the vehicle. (XX 876) Ellis described the person as having close cropped hair, wearing a blue shirt and dungarees or blue pants. (XX 878) Captain Ellis chased the suspect into the woods but lost sight of him after a five minute chase. (XX 879) Soon thereafter a canine officer located an individual that met Captain Ellis' description. (XX 880) During the chase, Captain Ellis heard a gunshot fired, but could not tell if the shot was specifically fired at him. (XX 885-86)

Deputy Steven Harrielson was on a perimeter for a residential burglary at the intersection of Pine Hills and Clarion Roads in a marked car. (XX 888) Deputy Harrielson heard squealing of tires from behind him and observed an older model Buick coming directly at him. (XX 889) Harrielson ran from his vehicle in an attempt to get out of the way. The vehicle struck the passenger rear end of his car. (XX 889) The crash pushed the patrol car and Harrielson was struck in the right hip and thrown 15 to 20 feet into the median. (XX 890) Harrielson got up and observed a black male wearing a dark shirt and baggy blue jeans running straight at him. (XX 890) The suspect ran west up Clarion Road. (XX 890) Harrielson observed another black male

in the front passenger seat who had a large Afro and was very thin. (XX 891) That individual was taken into custody immediately. (XX 892)

Theo Lewis was shown several photo lineups created by the Orlando Police Department. (XX 941) However, Lewis could not identify anyone out of the initial lineups, which did not include McLean's photograph. (XX 944)

On December 1st Orlando Police Department was given information on a third person involved named "Derrick." (XX 944) This suspect, Derrick, was thought to be the cousin of Maurice Lewin. (XX 944) The Orlando Police obtained this information from the father of codefendant James Jaggon and from a crime line tip. (XX 994, 945) The crime line tip implicated a person named Derrick who lived in the Rosemont area. (XX 946) The Orlando Police then created a photo lineup which included a picture of McLean. (XX 947) On December 9th, the photo lineup including McLean was presented to Lewis and Lewis identified McLean as the shooter. (XX 951) Lewis also identified McLean from a live lineup. (XX 951) When a detective asked if Lewis was sure it was McLean, Lewis answered: "yes, hell, yes." (XX 957)

Medical examiner Dr. Jan Garavaglia performed the autopsy on victim Jahvon Thompson. (XX 970, 974) The victim died from

three gunshot wounds to his chest, with some bullets traveling through the victim's arms. (XX 976) The shooter fired from the left side of the victim and was more than two feet away at the time the fatal shots were fired. (XX 982) He classified the death as a homicide, each of the gunshot wounds could have caused Thompson's death. (XX 983)

Jeffrey Brown, supervisor of the K-9 unit, testified that he and a dog searched a fenced in compound near the crash scene on November 24, 2004. (XX 1005-06) He ran a track along a sidewalk a little south of the crash scene with his bloodhound, Charlie. He recovered a pair of black and white gloves and a handgun hidden in the bushes. (XX 1008)

Eighteen year-old James Jaggon testified that he is serving a prison sentence of twenty three years as part of an agreement to testify in this case. (XX 1024) Jaggon and Maurice Lewin decided to rob Jahvon Thompson to steal the marijuana that was there. (XX 1028) Jaggon believed that it was not Jahvon Thompson, but, his father, who kept marijuana in the apartment. (XX 1027) McLean came along for the planned robbery. (XX 1029) The three headed to Thompson's apartment in Maurice Lewin's champagne colored Buick. (XX 1029) McLean was armed with a .380 caliber handgun. (XX 1030, XXI 1092) Jaggon was armed with a .45 caliber handgun that he received from Maurice Lewin. (XX

1033) Lewin drove to Thompson's apartment complex and backed into a parking space. (XX 1032) They all agreed that Jaggon and McLean would enter the apartment. There was no talk of shooting anyone at that time. (XX 1035) Jaggon wore a ski mask and McLean wore a black ball cap. (XX 1037) Jaggon knocked on the door and when Thompson answered, McLean and Jaggon rushed inside. (XXI 1046) Jaggon stood in the living room while McLean began searching the apartment. (XXI 1046) Jahvon's father was not present in the apartment. (XXI 1047) A few minutes later someone knocked on the door. (XXI 1047) McLean answered the door and pointed his gun at the person. (XXI 1048) McLean asked the individual if he had anything on him and searched him. (XXI 1048) McLean told Jaggon to leave and instructed him to shoot the "lady" that was outside the apartment. (XXI 1049) Jaggon did not shoot the lady because he did not feel there was a need to. (XXI 1049)

Lewin stayed in the car during the robbery. (XXI 1051) While Jaggon returned to the car he heard gunshots coming from the apartment. (XXI 1050) Maurice Lewin and Jaggon drove to the nearby Pizza Hut to meet McLean. (XXI 1051) McLean entered the restaurant with a blue bag. (XXI 1053) McLean had that blue bag in the apartment. (XXI 1053) When they pulled out of the Pizza Hut an officer "jumped behind us, got in a chase and crashed."

(XXI 1054) Jaggon attempted to run away, but was arrested at the scene. (XXI 1057)

Maurice Lewin, McLean's cousin, testified that he drove the Buick and was armed with a .9 millimeter. Jaggon had a big revolver and McLean had a .380, which Lewin was familiar with. (XXI 1091-92) McLean wore gloves on the way to Thompson's apartment. [exhibit AD] (XXI 1093) McLean had a Nokia phone, and Lewin had a Samsung flip phone. (XXI 1096) McLean and Lewin agreed that they would keep an open line during the robbery. (XXI at 1098) Lewin recounted what he heard on the phone, asking where the stuff, or money as at, and, commotion, followed by "some more people done came and, um, then I heard some shots go off." (XXI 1098) Lewin heard some shots as Jaggon came running back to the car. (XXI 1098) Lewin was scared and drove off when Jaggon got in the car. He did not see McLean. (XXI 1099) McLean called Lewin and told him to pick McLean up at the Pizza Hut, which was located right outside the Sky Pines apartment. (XXI 1100)

McLean came in carrying a sports bag when he met Lewin and Jaggon at the Pizza Hut. (XXI at 1101) Lewin drove out of the parking lot but saw an unmarked police car and accelerated onto Pine Hills Road. He attempted to elude the police but ultimately hit another police car. (XXI 1101)

McLean told Lewin that he wanted to see what it felt like to shoot and kill someone. (XXI 1107) Lewin testified: "I mean, he never really told me exactly why he shot it, but he said he wanted to feel like what it feels like to shoot and kill somebody." (XXI 1107) They discussed the fact that they thought Thompson, Jahvon's father, had marijuana that they expected to steal. (XXI 1095)

Law enforcement K-9 units recovered gloves and a shirt in the woods adjacent to the car crash. (XX 925, 930) DNA recovered from the back of one batting glove matched McLean's profile at 12 loci, with the odds of someone other than McLean having that profile being "one in 1.1 quintillion Caucasians, one in 500 trillion African-Americans, or one in 32 quadrillion Southeastern Hispanics." (XXII 1290) The blue pillow sham [Exhibit 50] with reddish brown stains tested presumptively positive for blood. (XXII 1303) The largest blood stain matched the DNA profile of McLean at all loci; the odds of anyone other than McLean being the source of that DNA was "one in 28 quintillion Caucasians, one in 9.1 quadrillion African Americans, or one in 790 quintillion – or, quadrillion Southeastern Hispanics." (XXII 1292-93, 1303) McLean's DNA was also detected on the pillow sham that had been taken from the victim's apartment. (XXII 1292)

A ski mask recovered from the scene had a mixture, with the profile of Jaggon being the largest or most identifiable contributor, to "one in 32 million Caucasians, one in 1 million African Americans, and one in five million Southeastern Hispanics." (XXII 1362)

Julius Gause Jr. testified that he was asked by another homicide detective if he could locate a gun involved in an area where a police officer "had been shot at to find a gun." (XXII 1310-11) He began a search of a heavily wooded area near the corner of Clarion and Pine Hill Roads in September of 2005. (XXII 1310-11) He utilized a metal detector club and swept the woods on line; he followed them and located a gun in an area of palmetto bushes. (XXII 1312) The gun was a .380 Hi-Point, semiautomatic and was located about 15 feet from the road. (XXII 1313)

An FDLE firearms examiner determined that spent shell casings, exhibits 27, 28, 29, 30, 31, 32, 33 and 34 were all fired from the same firearm. (XXII 1328-30) He also examined bullets or projectiles recovered from the murder scene and was able to determine that those were consistent with having been fired from a .380 Hi-Point firearm. (XXII 1332-33) Only Hi-Point .380 firearms have the width of "the lands and grooves" marks that he observed on the casings. (XXII 1343-44) When he

received the .380 it was rusty and would not function properly. Exposure to the elements for six to seven months would cause that kind of rust. (XXII 1337) Due to the rust and condition of the gun, the individual characteristics did not lead to a definitive identification of this firearm as the one that fired the cartridges recovered from the scene. (XXII 1337) The gun had an empty magazine when recovered, which had a capacity of eight rounds, or, nine, if one was in the chamber. He examined a total of nine fired cartridge casings. (XXII 1338) All nine casings were fired from the same weapon. (XXII 1339)

The firearms expert was shown a photograph of McLean with a handgun, and, indicated that it was very similar to the .380 Hi-Point he examined in this case. (XXII 1340-41) It had the same overall shape and same gray stripe in both the photograph and the Hi-Point he examined. (XXII 1449)

Marilyn Nieves was McLean’s girlfriend back in 2004. She testified that McLean had a Nokia cell phone at that time and identified a cell phone in evidence as belonging to McLean. (XXII 1348) She was in charge of paying for his cell phone and was aware of its phone number [407-342-6030]. (XXII 1349) McLean told her he had lost the cell phone “in his cousin’s car” around November, December of 2004. (XXII 1352)

Detective Joel Wright testified that he recovered Nokia cell phone records from the phone recovered from the wooded area south of the crash site. (XXII 1371-72) The records indicated that there were calls between Lewin's and McLean's phones on November 24, 2004. The first call occurred at 11:06 in the morning and lasted only two minutes. The second call lasted "13 minutes and 42 seconds" and occurred at 12:33 pm. (XXII 1380) The distance from the scene of the vehicle crash to McLean's girlfriend's apartment is only 1.8 miles. (XXII 1385) He also noted that images of the semi automatic pistol were found on the Nokia cell phone recovered after the crash. (XXII 1391-92)

**PENALTY PHASE**

The State generally accepts the penalty phase summary provided by the appellant, but, adds the following.

The victim of McLean's prior armed robbery conviction testified that McLean pointed a gun to her head and took her into a backroom at Fast Check of Florida. (XXIV 1687-88) While she attempted to open the safe, McLean kept pointing the gun at her, telling her to "shut up, bitch." (XXIV 1689) Carolla Montouth begged McLean not to hurt her because she had two kids. (XXIV 1689) He ordered her into a bathroom and said "today is your lucky day, bitch, today is your lucky day, and he closed

the bathroom door." (XXIV 1689) McLean had two guns on him, a small one and a big one. (XXIV 1690)

Three victim impact statements were read to the jury. In one, Jahvon's cousin read a statement, noting that Jahvon went to church, sang in a ministries group, and excelled in "academics as well as athletics." (XXIV 1693) Jahvon was a National Honor Society recipient in both junior high and high school. He was also a member of a few junior varsity teams in baseball, football, and basketball. Jahvon was a child with a warm smile and a kind heart to everyone in his presence. He was a genuine joy to be around." (XXIV 1693)

Dr. Hyman Eisenstein admitted that McLean had a number of characteristics of someone with Anti-Social Personality Disorder. These included impulsiveness, aggressiveness and irritability indicated by repeated physical fights and assaults. (XXIV (1769) Also, McLean displayed a failure to conform to societal norms reflected by repeatedly performing acts that are grounds for arrest. (XXIV 1769) He also displayed reckless disregard for his own safety and for the safety of others as well as irresponsibility in work history and finances. (XXIV 1770) Dr. Eisenstein admitted that he found six of the seven categories or characteristics for Anti Social Personality Disorder in McLean. (XXIV 1772)

Dr. Eisenstein acknowledged that he was unaware of any medical neurological tests conducted on McLean such as a CAT, MRI, PET, or EEG scans. (XXIV 1774) Nor did Eisenstein have any medical records documenting prior injuries which might cause organic brain damage. Dr. Eistenstein also admitted that the difference between McLean's verbal and performance IQ's was not "that" significant. (XXIV 1775) Dr. Eisenstein testifies mostly for the defense in capital cases. (XXIV 1775)

Dr. Jethro Toomer administered the Kaufman Brief Intelligence Test and McLean scored 100, in the average range. Dr. Toomer testified that there was no need for further testing or assessment as to whether or not McLean might be retarded. (XXV 1827) He tested McLean and thought he had a history of substance abuse involving alcohol, marijuana and Ecstasy, but, there was "nothing to suggest dependence." (XXV 1827) Dr. Toomer admitted that McLean did not suffer from a major mental illness. (XXV 1851) McLean was "probably" in the position to conform his behavior to society's standards. (XXV 1851) Dr. Toomer was not sure what McLean's mental condition was at the time of the offense. (XXV 1851-52) Dr. Toomer only had a soft sign of organic brain injury, from the Bender Gestalt test. (XXV 1856) There was no medical testing to confirm organic brain damage. (XXV 1856-57)

Dr. Toomer acknowledged McLean met or satisfied some of the criteria for Antisocial Personality Disorder, including failure to conform to societal norms as reflected by performing acts that are grounds for arrest. (XXV 1860, 1864-65) McLean also showed reckless disregard for safety of self or others. (XXV 1863) His work history was also “sporadic.” (XXV 1863) Even though this crime was apparently planned, Dr. Toomer attempted to explain that it was also impulsive in that the planning process itself is sabotaged or impaired. (XXV 1866) Dr. Toomer had no evidence that McLean was under the influence of alcohol or drugs at the time of the offenses. (XXV 1868)

## SUMMARY OF THE ARGUMENT

**ISSUE I**--Under this Court's controlling precedent, a pre-charge lineup is not a critical or crucial stage of the proceedings entitling a defendant to legal counsel. The trial court correctly determined that McLean was *not* entitled to counsel at the time the photographic lineups were shown to Mr. Lewis or when Mr. McLean participated in the live lineup at the Orange County Jail as he was not under arrest for the charges that were ultimately filed in this case.

**ISSUE II**—-McLean's death sentence is clearly proportional. The trial court found three aggravating factors, including the prior violent felony aggravator, and no compelling mitigation.

**ISSUE III**--Since the trial court and State simply honored the request of the defense counsel for a brief in camera bench conference, any error in the procedure below was clearly "invited." In any case, McLean was given a full and fair opportunity to air his grievances against counsel during the Nelson hearing below.

**ISSUE IV**—-The trial court properly instructed the jury on the avoiding arrest aggravator. Simply because the trial court did not later find this aggravator, does not establish error in this case. The facts of this case certainly warranted an instruction on avoiding arrest.

**ISSUE V**—-This Court has repeatedly and consistently rejected challenges to Florida's capital sentencing scheme based upon the Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002).

## ARGUMENT

### ISSUE I

**WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE LIVE LINEUP IDENTIFICATION WHERE LAW ENFORCEMENT DID NOT OFFER OR PROVIDE ASSISTANCE OF COUNSEL?**

In his first issue on appeal, the appellant/defendant, Derrick McLean, argues that the trial court erred in denying his motion[s] to suppress the pre-charge photographic and live lineup identification results. McLean alleges that he was entitled to counsel when (1) the surviving victim was shown a photographic display that included McLean's photograph and (2) a live physical lineup was conducted at the Orange County Jail.[2]

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[2] The murder occurred on November 24, 2004. The surviving victim/eyewitness, Theothlus Lewis, viewed an initial photo lineup of possible suspects on November 25, 2004 (XX 940; III 296-297), and two additional photo lineups on November 29, 2004. (III 298; XX 940-941; State Ex. 7, 8, and 9) Mr. Lewis advised that none of the people in these photo lineups was the shooter. (III 298; XX 942-944; XIX 817) On December 9, 2004, Mr. Lewis viewed another photo lineup which included, for the first time, a photo of Derrick McLean. (XX 944; 949) Upon viewing this group of photos, Mr. Lewis was 90% sure that photo #3 (the photo of McLean) depicted the shooter. (III 312; XX 951; 954; XIX 817-818) Eight days later, on December 17, 2004, Mr. Lewis attended a live physical lineup at the Orange County Jail and positively identified McLean as the shooter. (III 331-332; XX 954-957; 959-960; XIX 819-820) At trial, Mr. Lewis also positively identified McLean as the shooter. (XIX 821-822)

Under section 90.801(2)(c), Florida Statutes, the eyewitness' out-of-court statements of identification are excluded from the definition of hearsay and were admissible as substantive evidence at trial.

However, as the trial court found, "*[i]t is undisputed at the time of the photographic and live lineups, McLean was not under arrest for any charges related to the murder/home invasion robbery that occurred on November 24, 2004.*" (X 1500) (emphasis added) Under this court's controlling precedent, Ibar v. State, 938 So. 2d 451 (Fla. 2006), a pre-charge lineup is not a critical or crucial stage of the proceedings entitling a defendant to legal counsel.[3] Id, at 469-470. Therefore, the trial court correctly determined that "Mr. McLean was *not* entitled to counsel at the time the photographic lineups were shown to Mr. Lewis or when Mr. McLean participated in the live lineup at the Orange County Jail as he was not under arrest for the charges that were ultimately filed in this case." (X 1501) (emphasis added)

Presumptions and Standard of Review:

In Schoenwetter v. State, 931 So. 2d 857, 866 (Fla. 2006), this Court summarized the applicable presumptions on appeal and standard of review as follows:

> "A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling."

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[3] Although this Court's decision in Ibar was specifically cited in the trial court's order (XX 1500), Ibar was not mentioned in McLean's initial brief.

> <u>Rolling v. State</u>, 695 So. 2d 278, 291 (Fla. 1997) (citing <u>McNamara v. State</u>, 357 So. 2d 410, 412 (Fla. 1978)). Appellate courts should accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues. See <u>Connor v. State</u>, 803 So. 2d 598, 608 (Fla. 2001).

<u>Procedural Bar</u>:

In the trial court below, the defense filed three separate motions to suppress the results of the photographic lineup and live lineup. (IX 1321-1340) The defense motions alleged that the photographic and live lineups were (1) unduly suggestive, (2) a violation of the defendant's right to counsel and (3) a violation of due process. (IX 1321-1340)

However, *at trial*, when the surviving victim, Theothlus Lewis, testified regarding the prior out-of-court photo and lineup identifications, the defense objected only on the grounds of "leading" and "hearsay." (<u>See</u> XIX 816-819) Subsequently, when Mr. Lewis was asked to identify the shooter *in court*, the defense objected "to any *in-court* identification as violating those same issues by the Court in the motion to suppress."[4] (XIX 820) In order for a claim "to be cognizable on appeal, it must

[4] Later on at trial, the defense did object to Detective Wright's testimony regarding the out-of-court lineup as "stated in the motions and that we had argument on as to the admissibility of the lineup." (XX 948)

be the specific contention asserted as legal ground for the objection, exception, or motion below." See F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003), quoting Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). The State respectfully submits that, *other than the objections on the grounds of leading and hearsay,* any other objections to Mr. Lewis' testimony regarding his prior *out-of-court* identifications were waived by the failure to timely and specifically object at trial.

Furthermore, McLean's current argument is based only on his alleged "right-to-counsel" claim. See Initial Brief at pages 25-28 (Point 1, entitled "C. Argument"). Therefore, any other prior sub-claims are deemed abandoned.[5] See Chamberlain v.

[5] The State recognizes that McLean's Initial Brief also concluded that the "presence of counsel would have prevented the *overly suggestive lineups*." (Initial Brief at page 26, emphasis added). However, McLean's initial brief did not assert any argument as to how the photographic and live physical lineups allegedly were unduly suggestive. Therefore, any perfunctory "unduly suggestive" and "due process" claims are procedurally barred on appeal. See Deparvine v. State, 995 So. 2d 351, 378 (Fla. 2008) ("Initially, we reject this claim [of error] because Deparvine . . . fails to sufficiently identify the error."). Furthermore, in Fitzpatrick v. State, 900 So. 2d 495, 513 (Fla. 2005) this Court restated its two-part test for analyzing the suppression of an out-of-court identification as: "'(1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.'" Id. at 517, quoting Rimmer v. State, 825 So. 2d 304, 316 (Fla. 2002). The trial court below thoroughly addressed these sub-issues (X 1498-1500; 1501), and the trial court's underlying,

State, 881 So. 2d 1087, 1103 (Fla. 2004) (concluding that issue was abandoned because Chamberlain failed to advance any argument on appeal regarding issue raised at trial).

Trial Court Proceedings:

Seven witnesses testified at the suppression hearing held on July 24, 2007.[6] (III 287-421) On August 27, 2007, the trial court entered a fact-specific written order denying the motions to suppress. (X 1495-1502) The trial court's order set forth the following specific findings of fact:

> On November 24, 2004, Detective Wright responded to the scene of a murder/home invasion robbery in the Pine Hills section of Orlando. Jahvon Thompson was shot and killed during this incident. Theothlus Lewis survived the gunshot wounds he received. After speaking with the officers at the scene, Detective Wright learned that Maurice Lewin and James Jaggon, two suspects, had been apprehended at another location. Both Mr. Lewis and Mr. Jaggon were interviewed and gave differing stories as to what had transpired at the scene.
>
> Detective Wright interviewed Mr. Lewis on November 25, 2004, at a local hospital. Mr. Lewis described the shooter as 5'9", 200-220 pounds, and light brown complexion wearing a black shirt with blue

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fact-specific findings are undisputed and dispositive of these points.

[6] The following witnesses testified at the suppression hearing: (1) Detective Joel Wright (III 290-335); (2) Detective Reginald Campbell (III 336-348); (3) Cassie Gray (SAO Victim's Advocate) (III 349-353); (4) Shirley [Smith] Lewis (wife of the surviving victim, Theothlus Lewis) (III 354-360); (5) Theothlus Lewis, the surviving victim (III 362-385); (6) James Weathers, Orange County Corrections Officer (III 385-392); and (7) Carlos Rodriguez, Orange County Corrections Officer. (III 393-398)

jeans. Mr. Lewis' description assisted law enforcement in creating a sketch of the alleged shooter. State's Ex. A. Detective Wright showed Mr. Lewis a lineup containing a picture of Maurice Lewin. Mr. Lewis indicated that the shooter was not included in any of the photographs.

Detective Wright showed Mr. Lewis a photographic lineup on November 29, 2004, containing photographs of individuals who may have been involved. Again, Mr. Lewis indicated that the shooter was not included in the group of photographs.

On December 1, 2004, Detective Wright spoke to Mr. Jaggon's father. During this conversation, Detective Wright learned that a person named "Derrick", Maurice Lewin's cousin, may have been involved in the shooting.

On December 6, 2004, an anonymous caller to Crimeline indicated that a person named "Derrick" was the shooter. Through further investigation, Detective Wright learned that Derrick McLean used to live with Maurice Lewin.

On December 9, 2004, Mr. Lewis and Shirley Smith attended a bond hearing for Maurice Lewin. Although neither testified at that hearing, they did have an opportunity to observe the inmates seated in the courtroom that day, including Mr. Lewin. After leaving the courtroom, Ms. Smith remarked to Mr. Lewis that one of the inmates seated in the jury box may have been the shooter. Detective Campbell, who assisted Detective Wright in the investigation and testified at the bond hearing, told them not to speak about the case. He also informed them that they would later be shown lineups to identify potential suspects.

Later that same day, Detective Wright presented Mr. Lewis with another photographic lineup for his review. Def. Ex. 1. Mr. Lewis pointed to the third photograph and said that he was 90% sure that individual was the shooter. He advised Detective Wright that he could be certain of his identification if he saw the suspect in person again. Although Mr. McLean was pictured in that photograph, Detective

Wright gave no indication to Mr. Lewis that his selection was correct or not.

Through his investigation, Detective Wright learned that Mr. McLean was on probation. He also learned that Mr. McLean had a pending domestic violence charge and an upcoming trial date at which he was expected to enter a plea. Although there was a pending criminal charge against Mr. McLean, his probation officer had not yet sought the issuance of a violation of probation warrant. On December 13, 2007, Mr. McLean did enter a plea to the domestic violence charge. Detective Wright thereafter had the violation of probation warrant served on Mr. McLean. After his arrest, Mr. McLean was taken to Orlando Police Department headquarters and interviewed about his alleged involvement in the murder/home invasion robbery. He was then taken to the Orange County Jail to be held on the violation of probation warrant.

On December 17, 2004, Detective Wright requested the corrections officers at the Orange County Jail to assemble a group of similar looking men for purposes of a live lineup. [fn 1] Mr. McLean and five other men were ultimately placed in a small room. Because of the small size of the room, not all six men could fit on the riser to be viewed at the same time. Detective Wright initially asked two men to step forward, then the next four. Mr. McLean was in the group of four men. Mr. Lewis was able to positively identify him as the shooter after observing him for 10 to 15 seconds. [fn2]

Mr. McLean was subsequently charged by indictment with First Degree Felony Murder, Attempted Home Invasion Robbery with a Firearm, Attempted First Degree Murder, Kidnapping, and Attempted Robbery with a Firearm. He filed the instant motions seeking suppression of the results of the photographic and live lineups.

> [fn 1] Although Detective Wright secured a Search Warrant/Order for Pre-arrest Physical Lineup, he did not serve the warrant/order because Mr. McLean agreed to participate in the live lineup. Def. Ex. 3, 4.

> [fn2] Defendant's exhibit 2 is a photograph of the 6 men assembled for the live lineup. This picture was taken after the men exited the viewing room. Due to the small size of the viewing room, no photograph was taken of the configuration of the six men as they stood to be viewed by Mr. Lewis.

(X 1496-1498) (emphasis added)

Thereafter, the trial court set forth the following in-depth legal analysis and supplemental factual findings:[7]

> I.
>
> Mr. McLean first argues that the presentation of the photographic and live lineups was overly suggestive and should be suppressed. The Florida Supreme Court has explained that the test for suppression of an out-of-court identification is two fold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Rimmer v. State*, 825 So.2d 304, 316 (Fla. 2002), cert. denied, 537 U.S. 1034, 123 S.Ct. 567, 154 L.Ed2d 453 (2002). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Id.* <u>If the procedures used by the police in obtaining the out-of-court identification were not unnecessarily suggestive,</u>

[7] Although the State emphatically maintains that any issue other than McLean's right-to-counsel sub-claim has been abandoned, the trial court's entire legal analysis (X 1498-1501) is included for ease of reference.

however, the court need not consider the second part of the test. *Id.*

Mr. McLean argues that the color of Mr. McLean's shirt and the background surrounding his photograph makes the photographic lineup suggestive. The photographic lineup depicts six African-American men with short hair, similar facial hair, and similar facial features. Each man is wearing a shirt, two with collars and four without. The shirt colors are gray, light blue, medium blue, dark blue and red, and patterned. The backgrounds of each photograph are very similar and add nothing to the appearance of the individuals in each photograph. Taken as a whole, the Court concludes that there is absolutely nothing suggestive about these photographs or the placement of these individuals in the lineup.

Moreover, the fact that Mr. McLean was the only person in common in both the photographic and live lineups does not make them unnecessarily suggestive. Mr. Lewis reviewed a photographic lineup on December 9, 2004, after having already looked at two different lineups. He was 90% sure that photograph #3 (the photograph of Mr. McLean) depicted the shooter. Eight days later, on December 17, 2004, Mr. Lewis attended the live lineup at the Orange County Jail and identified Mr. McLean as the shooter. There was no evidence presented at the suppression hearing that Mr. Lewis re-reviewed the photographic lineup shortly before viewing the live lineup. Nor was there any evidence presented that Detective Wright or any other member of law enforcement told Mr. Lewis that the person he identified on the photographic lineup was included in the group of men comprising the live lineup. Indeed, law enforcement never made any comment to Mr. Lewis after his identifications of Mr. McLean in both the photographic and live lineup.

Applying the rules set forth in *Rimmer* to the instant case, the Court concludes that Mr. Lewis' out-of-court identifications of Mr. McLean were not obtained by any unnecessarily suggestive procedure employed by law enforcement.

II.

Mr. McLean next argues that he was entitled to have legal counsel present when the photographic lineup was shown to Mr. Lewis and when the live lineup was conducted at the Orange County Jail. ***It is undisputed at the time of the photographic and live lineups, Mr. McLean was not under arrest for any charges related to the murder/home invasion robbery that occurred on November 24, 2004.***

**The law is well settled that a pre-arrest photographic or live lineup is not a critical or crucial stage of the proceedings entitling a defendant to legal counsel. *Ibar v. State*, 938 So.2d 451 (Fla. 2006). See also, *Kirby v. Illinois*, 406 U.S. 682, 688-91, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (holding that a lineup conducted after a defendant's arrest, but before arraignment, indictment or formal charges is merely investigatory in nature; therefore, the defendant is not entitled to presence of counsel at such a lineup)**; *State v. Jones*, 849 So.2d 438, 442 (Fla. 3rd DCA 2003), rev. dismissed, 889 So.2d 806 (Fla. 2004) (video-taped lineup identification was a critical stage in the proceedings that triggered right to have counsel present); *United States v. Ash*, 413 U.S. 300, 321, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973) (Sixth Amendment does not grant right to counsel at photographic displays conducted by the government post-indictment).

**Therefore, Mr. McLean was not entitled to counsel at the time the photographic lineups were shown to Mr. Lewis or when Mr. McLean participated in the live lineup at the Orange County Jail as he was not under arrest for the charges that were ultimately filed in this case.**

III.

Lastly, Mr. McLean argues that the photographic and live lineups should be suppressed based upon a violation of his due process rights. He argues that the totality of the circumstances, including the comments made by Mr. Lewis and Ms. Smith at Mr. Lewin's bond hearing, resulted in a violation of his

> due process rights. <u>The Court concludes that there were no irregularities in the lineup procedures used by law enforcement and that Mr. McLean was not entitled to legal counsel at the time</u>. Further, the fact that Ms. Smith and Mr. Lewis had a conversation about the inmate seated in the jury box during Mr. Lewin's bond hearing adds nothing when considering whether the lineup procedures were unnecessarily suggestive, particularly since no one ever told Mr. Lewis who to select from the lineups and no one ever indicated to Mr. Lewis that his selections were correct or not. <u>The fact that Mr. McLean's appearance is very similar to the sketch made after the shooting based upon Mr. Lewis' description of the shooter also suggests that the lineup procedures and subsequent identifications were not in any way flawed</u>. Having considered the testimony of all the witnesses and the exhibits in evidence, the Court concludes that Mr. McLean's due process rights were not violated in this case.
>
> Accordingly, it is ORDERED AND ADJUDGED that the Defendant's Motion to Suppress Evidence Results of Photo and Live Lineups as Unduly Suggestive, Motion to Suppress Evidence Results of Photo and Live Lineups: Violation of Right to Counsel and Cumulative Violations of Due Process, and Motion to Suppress Evidence Results of Photo and Live Lineups as a Violation of Due Process are hereby DENIED.

(X 1496-1502) (emphasis added)

<u>Analysis</u>:

Assuming, *arguendo*, that McLean's alleged denial-of-right-to-counsel claim has been preserved for appeal,[8] the trial court properly denied the defense motions to suppress.

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[8] During Detective Wright's testimony on the out-of-court lineups, the defense objected as "stated in the motions and that we had argument on as to the admissibility of the lineup." (XX 948; <u>See</u> <u>also</u> XX 949-952) The trial court announced that the

The investigative, pre-charge display of a photo lineup to Mr. Lewis did not implicate any right to counsel, at all. McLean was not present at the pre-charge photographic display,[9] McLean did not assert any alleged right to be present, and McLean was not "in custody" (either on the homicide case or, for that matter, on the unrelated V.O.P. case either) at the time of the photo lineup. As the trial court verified:

> THE COURT: I want to make sure I didn't miss this. At the time he showed the photo lineup to Mr. Lewis, he hadn't even been taken into custody on the V.O.P. violation?
>
> MR. MCCLELLAN [Defense Counsel]: No, Your Honor, he wasn't in custody at that point.

(III 409) (emphasis added)

McLean did not have any right to counsel when the surviving victim/eyewitness viewed the investigative, pre-charge photographic display. Indeed, more than 35 years ago, the Supreme Court ruled that even a *post-indictment* photographic display *does not* give rise to any right to counsel at the viewing of a photo array. See U.S. v. Ash, 413 U.S. 300, 321 (1973).

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ruling on the motion to suppress "stands" and overruled the defense objection. (XX 948)

[9]As confirmed at the suppression hearing:

> THE COURT: Your client is not present when the photo lineup is shown to the witness, right?
> MR. MCCLELLAN [Defense Counsel]: Right. (III 408) (emphasis added)

In Ash, 413 U.S. at 321, the Court held that a defendant has no Sixth Amendment right to counsel when a witness views a photographic display in order to identify the perpetrator. The Court in Ash further noted that:

> [a] substantial departure from the historical test would be necessary if the Sixth Amendment were interpreted to give Ash a right to counsel at the photographic identification in this case. Since the accused himself is not present at the time of the photographic display, and asserts no right to be present . . ., no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.

Ash, 413 U.S. at 316-317.

In State v. Jones, 849 So. 2d 438, 440-41 (Fla. 3d DCA 2003), the Third District, en banc, followed Ash and held that Jones did not have a right to counsel when a witness viewed a videotaped lineup. Although acknowledging Jones in his initial brief, McLean simply concludes, without further explanation, that "the presumptions and reasoning relied on by the Court in Jones" [are] "based on a flawed interpretation of United States v. Ash, 413 U.S. 300 (1973)." (Initial Brief at 25) Immediately thereafter, McLean attempts to draw an analogy to an isolated excerpt from Traylor v. State, 596 So. 2d 957 (Fla. 1992), (Initial Brief at 25-26), to support his claim. However, McLean fails to mention that both Jones and Traylor were cited in this

Court's subsequent decision in Ibar, the same case that the trial court relied upon and McLean conspicuously avoids.

In Ibar, three victims were shot to death in a Miramar home and a video surveillance camera captured the crimes on videotape. Police took frames from the videotape and produced a flyer that was sent to other law enforcement agencies. Three weeks after the murders, the Miramar police were notified that the Metro-Dade Police Department had a man [Pablo Ibar] in custody who resembled the photo on the flyer. Ibar was in custody at the Metro-Dade Police Department on a separate and unrelated charge. Ibar alleged that he was "in custody" at the time the Miramar police arrived at the Miami-Dade homicide unit with a warrant requiring Ibar to participate in a lineup. Ibar requested that his counsel be present for the lineup, but the police told him that they did not want to wait for his counsel to arrive and they proceeded without counsel. The State maintained that Ibar was not in the custody of the Miramar police on the triple homicide and had not been charged on these crimes; and, therefore, Ibar's right to counsel had not been triggered.

In Ibar, this Court painstakingly unraveled and rejected the virtually identical claims now raised by McLean under both

the Sixth and Fifth Amendments. As this Court cogently explained in Ibar, 938 So. 2d at 469-470:

> "Under the state constitution, a defendant's right to counsel's presence applies at each crucial stage of the proceedings; under the federal constitution, defendant is entitled to counsel at each critical stage of the proceeding." State v. Jones, 849 So. 2d 438, 441 (Fla. 3d DCA 2003) (citing Smith v. State, 699 So. 2d 629, 638 (Fla. 1997)); see also Traylor v. State, 596 So. 2d 957, 968 (Fla. 1992). Although "[i]t is well settled that viewing a post-charge/arrest live lineup is a critical or crucial stage," Jones, 849 So. 2d at 441, **a pre-charge lineup is not a critical or crucial stage because formal proceedings have not actually begun**. The United States Supreme Court has stated that the formal proceedings begin when the government makes a commitment to prosecute, which occurs when the defendant is arraigned, indicted, or formally charged. See Kirby v. Illinois, 406 U.S. 682, 688-91, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972) (plurality opinion) (holding that a lineup conducted after a defendant's arrest, but before arraignment, indictment, or formal charges is merely investigatory in nature; therefore, the defendant is not entitled to presence of counsel at such a lineup). When the government makes a formal commitment to prosecute, the Sixth Amendment right to counsel attaches. See id. at 689 ("It is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified."). **The pre-arrest investigatory lineup in this case was not a "critical stage" of the proceedings because when the lineup was conducted, it was not apparent that the government had decided to prosecute Ibar for the triple homicide.**
>
> **Ibar maintains that his arrest in Dade County on unrelated charges established that he was "in custody" or "under arrest." The right to counsel when an accused or suspect is "in custody" or "under arrest" applies when there is an official interrogation, in which case the Fifth Amendment right to counsel is triggered and Miranda [n5] warnings are given**. See Sapp v. State, 690 So. 2d 581, 585 (Fla. 1997). An

> official interrogation refers to words or actions that are reasonably likely to elicit an incriminating response from the suspect. See Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). **A prearrest investigatory lineup does not elicit any response from the suspect; therefore, it is not an interrogation and the Fifth Amendment right to counsel is not triggered.**

Ibar, 938 So. 2d at 469-470 (emphasis added).

Here, as in Ibar, the pre-arrest investigatory lineup was not a "critical stage" of the proceedings. Furthermore, McLean's excised reference to Traylor must fairly be viewed in context. In Traylor, this Court stated, in pertinent part:

> . . . a prime right embodied by the Section 16 Counsel Clause is the right to choose one's manner of representation against criminal charges. [n23] In order for this right to have meaning, it must apply at least at each crucial stage [n24] of the prosecution. For purposes here, a "crucial stage" is any stage that may significantly affect the outcome of the proceedings. Because a prime interest [n25] that is protected is the right of the individual to exercise self-determination in the face of criminal charges, **prosecution begins [n26] under the Counsel Clause when an accused is charged with a criminal act**, as set out below. [n27]
>
> **Once the defendant is charged--and the Section 16 rights attach--**the defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel. At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver. Any waiver of this right must be knowing, intelligent, and voluntary, and courts generally will indulge every reasonable presumption against waiver of this fundamental right. [n28] Where the right to counsel has been properly waived, the State may proceed with the stage in issue; but the waiver applies only to the present stage and

> must be renewed at each subsequent crucial stage where the defendant is unrepresented. [n29]

Traylor v. State, 596 So. 2d at 968 (emphasis added)(footnotes omitted).

Since a *post-indictment* photo array does not give rise to any right to counsel, Ash, 413 U.S. at 321, a *pre-charge* photo array certainly does not give rise to any greater right to counsel.

Next, as to the pre-charge live lineup, McLean, like the defendant in Ibar, was *not "in custody" on the homicide case at the time of the live lineup*; and a pre-charge lineup is not a critical or crucial stage of the proceedings entitling a defendant to legal counsel. See Ibar, 938 So. 2d at 469-470; See also Kirby v. Illinois, 406 U.S. 682, 688-91, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972). As the trial court reasoned and explained:

> **The law is well settled that a pre-arrest photographic or live lineup is not a critical or crucial stage of the proceedings entitling a defendant to legal counsel.** *Ibar v. State*, 938 So.2d 451 (Fla. 2006). See also, *Kirby v. Illinois*, 406 U.S. 682, 688-91, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (holding that a lineup conducted after a defendant's arrest, but before arraignment, indictment or formal charges is merely investigatory in nature; therefore, the defendant is not entitled to presence of counsel at such a lineup)

(X 1500) (emphasis added)

At page 26 of his Initial Brief, McLean cites to Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967), a case which involved a *post-indictment* lineup. In Gilbert, the lineup occurred 16 days after the defendant's indictment and after the appointment of counsel, who was not notified. And, although McLean acknowledges Kirby v. Illinois, 406 U.S. 682, 688-91, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), (Initial Brief at 27), McLean then fails to note that this Court, in Ibar, specifically recognized Kirby as "holding that a lineup conducted after a defendant's arrest, but before arraignment, indictment, or formal charges is merely investigatory in nature; therefore, the defendant is *not* entitled to presence of counsel at such a lineup." Ibar, 938 So. 2d at 469 (emphasis added).

Next, at page 27 of his Initial Brief, McLean once again selectively cites to Traylor. In Traylor, this Court noted that the section 16 right to counsel attaches as provided in rule 3.111, Florida Rules of Criminal Procedure, "at the earliest of the following points: when [the defendant] is formally charged with a crime *via* the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance." Traylor, at 970. Contrary to McLean's self-serving interpretation, the Sixth Amendment right to counsel did

not attach at the time of the pre-charge live lineup, as this Court unambiguously concluded in Ibar:

> **Furthermore, the Sixth Amendment right to the assistance of counsel is "offense specific" and applies only to the offense or offenses with which the defendant has actually been charged, and not to any other offense he may have committed but with which he has not been charged.** See, e.g., Hendricks v. Vasquez, 974 F.2d 1099 (9th Cir. 1992); West v. State, 923 P.2d 110 (Alaska Ct. App. 1996) (holding that the fact that the right to the assistance of counsel has attached in a particular case does not entitle the defendant to demand representation in connection with factually and legally unrelated matters in which the state has made no accusation and taken no adversary action); State v. Williams, 922 S.W.2d 845 (Mo. Ct. App. 1996) (holding that in a murder prosecution, the defendant's Sixth Amendment right to counsel for an unrelated murder had not attached where no formal proceedings had been brought against him for that murder). **At the time Ibar was subjected to the live lineup, he had not been charged for the triple homicide and his Sixth Amendment right to counsel had not been triggered. Therefore, the trial court properly denied Ibar's motion to suppress**.

Ibar, 938 So. 2d at 470 (emphasis added).

McLean's reliance upon State v. Burns, 661 So. 2d 842 (Fla. 5th DCA 1995), State v. Smith, 547 So. 2d 131 (Fla. 1989) and Sobczak v. State, 462 So. 2d 1172 (Fla. 4th DCA 1984), is clearly misplaced. In Burns, 661 So. 2d at 846, the defendant was arrested for DUI and the Fifth District's analysis involved determining, *inter alia*, whether an attorney had been appointed "as soon as feasible" after custodial restraint. In Sobczak, the defendant had already been arrested and had attended his

first appearance before the judge issued the order compelling him to appear in a live line-up. In Smith, the defendant was arrested and at his first appearance, Smith indicated that he would retain his own attorney. After the hearing, Smith was asked to stand in a lineup but refused. Several days later, without notice to Smith, the State obtained an *ex parte* court order compelling the defendant's appearance at a lineup later that day. Smith was not represented by counsel at the hearing or at the lineup. Prior to the lineup, Smith stated that he did not know who his attorney was. Concluding that it could not "countenance an *ex parte* court hearing requesting a lineup against a criminal defendant *already in custody*," this Court held the lineup should have been suppressed on due process grounds. Id. at 134.

Smith, Burns, and Sobczak are inapplicable here. In this case, McLean is like the defendant in Ibar -- McLean was not "in custody" on the homicide case, McLean had not been detained on the homicide case, nor charged nor arrested on the homicide case, nor had he been to a first appearance on the homicide case. Here, as in Ibar, any alleged right to counsel had not attached at the time of the live lineup. See Kirby, 406 U.S. at 689-90 (no right to counsel for a pre-indictment line-up).

In Ibar, the defendant's right to counsel had not attached at the time Ibar arguably tried to invoke it. Essentially, Ibar's attempt was a nullity. In this case, McLean, like the defendant in Ibar, was not "under custodial restraint" for the homicide case at the time of the lineup. As in Ibar, the mere fact that McLean was being held on an unrelated criminal case does not mean that he was "in custody" on the homicide. See also Gethers v. State, 838 So. 2d 504, 507 (Fla. 2003) ("when a defendant is serving time in jail on one charge and a separate jurisdiction issues a detainer for another charge, there is no formal, definitive mandate to hold the defendant in relation to the detainer . . . [o]nly if the prisoner is subject to release but is being held because a detainer has been lodged can it be said that the prisoner is in custody pursuant to the detainer").

Further, to the extent that McLean arguably suggests any Fifth Amendment claim, it likewise is without merit. When Detective Wright initially met with McLean, he informed McLean that he was arrested for the violation of probation, but the officers were "there to talk to him about the murder," and Detective Wright advised McLean of his *Miranda* rights [Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)] prior to the interview. (See III 318-319) Although a warrant order had been issued for a pre-arrest physical lineup,

McLean agreed to stand in a lineup; and, therefore, McLean was never informed of the warrant or the specifics of the order.[10] (III 320-322, 406) And, although it was intended that the men in the lineup would repeat a particular phrase ["Where is the money?" (III 320), there was a sound system problem and, therefore, that [voice exemplar] was not done. (III 332)

No Fifth Amendment right is implicated by a compulsory live line-up and accompanying voice exemplar. In United States v. Wade, 388 U.S. 218 (1967), the U.S. Supreme Court held that a suspect could be compelled to participate in a lineup and to repeat a phrase provided by the police so that witnesses could view him and listen to his voice. The Court explained that requiring his presence and speech at a lineup reflected "compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have." Id. at 222-223 (suspect was "required to use his voice as an identifying physical characteristic"). See also State v. Trottman, 701 So. 2d 581 (Fla. 5th DCA 1997)

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[10] McLean is not entitled to relief on his "in custody" claim simply because a warrant/lineup order had been issued and McLean was not told about it. In Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1997), the defendant agreed to go to the police station for questioning, but he was not told that an arrest warrant had been issued. This Court noted that *the sole fact that police had a warrant for Davis's arrest at the time he went to the station did not conclusively establish that Davis was "in custody."*

(concluding that the trial court erred in granting defendant's motion to suppress a voice identification made by the victim during a pre-arrest interview and finding no Fifth Amendment violation, under Wade, and no Sixth Amendment or Section 16 right to counsel at this pre-arrest stage). In this case, as in Ibar, 938 So. 2d at 470, no Fifth Amendment privilege against self-incrimination was implicated by requiring the defendant to participate in a live line-up.

McLean's last-cited case, Mansfield v. State, 758 So. 2d 636 (Fla. 2000), provides no support for his argument on appeal. (Initial Brief at 28) Mansfield involved the suppression of the defendant's statements and this Court determined, *inter alia*, that Mansfield was "in custody" for purposes of Miranda. As previously noted, Detective Wright gave Miranda warnings to McLean prior to interviewing him on the homicide case. (III 318-319)

Finally, in light of Mr. Lewis' independent in-court identification of McLean as the shooter (XX 951), co-felon James Jaggon's independent in-court identification of McLean, as his armed accomplice inside the murdered victim's apartment (XX 1036; XXI 1048-1050; 1058-1059), and his cousin Maurice Lewin's testimony linking him to the crimes, error, if any, was harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

## ISSUE II

**WHETHER APPELLANT'S DEATH SENTENCE IS PROPORTIONATE?**

McLean next challenges the propriety of the death sentence imposed in this case. McLean claims that Jahvon's murder is not among the most aggravated or least mitigated, and that his sentence is disproportionate compared to other capital cases. The State disagrees.

A proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences, to insure that the death penalty is being uniformly imposed. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

The record reveals that McLean, as part of the home invasion robbery/murder trio came equipped with a gun, a set of batting gloves, and a mask. James Jaggon, who knew Jahvon, wore the mask. McLean ransacked Jahvon's apartment searching for drugs and money. McLean did not find any money, but did leave with a pillow sham filled with marijuana. Jahvon and Theothlus sat on the couch, James pointing a gun at them to ensure they

remained seated. When the robbery was concluded, McLean told James Jaggon to run back to the car where Maurice was waiting.

McLean then went over to the front door, and paused for a brief moment. Jahvon and Theothlus were still seated in the nearby couch. Theothlus told McLean he did not know what was going on, but he had a wife and three kids. He looked into McLean's eyes. Theothlus believed McLean was about to shoot him; he dove to the floor toward the rear of the apartment. Undeterred, McLean opened fire, striking Theothlus in the back. McLean then turned his gun on Jahvon and began shooting. Jahvon would die from multiple gunshot wounds, any one of which would have caused his death.

After the conclusion of the penalty phase, the trial court found three aggravating circumstances and gave one "moderate weight" and two "great weight". The trial court found that Mclean had been on probation for approximately 20 months when he committed the murder [for armed robbery] and gave it moderate weight. The trial court gave great weight to McLean's prior armed robbery conviction, finding as follows:

> 2. <u>The defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.</u>
>
> The state has proven beyond and to the exclusion of every reasonable doubt that the defendant was convicted of the attempted robbery of Carolla Montouth on February 25, 2002. Montouth testified that she was

working at Fast Check of Florida on that date. She arrived before 10:00 in the morning to open up the business. As she entered through the first set of doors, the defendant came up behind her, pointed a gun in her face and forced her through the second set of doors towards the safe. The defendant continually told her to shut up and open the door to the safe. She begged him not to hurt her because she had children. Ms. Montouth entered the wrong code on the safe sending an alarm to the security company. The defendant continually asked why it was taking so long to open the safe. When she gave a reason for the delay, the defendant stated "shut up bitch." He continually pointed the gun at her. Becoming frustrated with the delay, the defendant told Ms. Montouth to get into the bathroom. Just before closed her in the bathroom, the defendant stated "today is your lucky day, bitch, today is your lucky day." He then left the business without ever gaining access to the contents of the safe.

Ms. Montouth was significantly terrorized by the defendant during the attempted robbery. Montouth broke down in tears during her testimony at the penalty phase when asked to look at and identify the defendant as the person who previously robbed her. So traumatized was she defense counsel stipulated that the defendant was the person who victimized Ms. Montouth February 25, 2002.

In addition to the robbery of Ms. Montouth, the State has proven beyond and to the exclusion of every reasonable doubt that the Defendant was contemporaneously convicted of the attempted first degree murder of Theothlus Lewis. Where two victims are involved in the same criminal incident, and a violent crime occurred against a separate victim, the contemporaneous conviction can be used to establish this aggravator. *King v. State*, 390 So. 2d 315 (Fla. 1980); *Pardo v. State*, 563 So. 2d 77 (Fla. 1990); *Stein v. State*, 632 So. 2d 1361 (Fla. 1994); *Francis v. State*, 808 So. 2d 110 (Fla. 2002). Thus, the court can and does consider this contemporaneous conviction as a prior felony involving the use or threat of violence to another person.

> Considering either the attempted robbery of Ms. Montouth or the contemporaneous conviction for the attempted first degree murder of Mr. Lewis, the court finds the existence of this aggravating circumstance and gives it great weight.

(XI 1769-70) (emphasis added)

The court also gave great weight to the contemporaneous home invasion robbery which was committed with the murder and attempted murder. The court found:

> 3. The crime for which the defendant is to be sentenced was committed while he was engaged in or was an accomplice in the commission of or an attempt to commit a home invasion robbery.[11]
>
> The State has proven beyond and to the exclusion of every reasonable doubt that the defendant committed the capital felony during the course of committing or attempting to commit a robbery of Jahvon Thompson's home. Based upon the facts discussed previously, the court finds the existence of this aggravating circumstance and gives it great weight.

(XI 1770) (emphasis added)

The trial court found the existence of two statutory mitigating factors despite the fact that the evaluating doctors conducted less than a thorough evaluation, failed to take into consideration key factors of McLean's life, and were unable to make a connection between their conclusions and McLean's conduct on the day of the crimes. Thus, while each mitigating

[11] The trial court found the State also proved the financial gain aggravator but merged it into the instant aggravator -- murder in the course of a felony. (XI 1770-71)

circumstance was found, the judge gave them “little weight”. (XI 1772-75) In pertinent part, the trial court found:

> . . . According to Dr. Eisenstein, the test results revealed that the defendant is of average intelligence; however, they also revealed some processing deficiency in the left hemisphere of the defendant’s brain as compared to his right hemisphere. Thus, Dr. Eisenstein diagnosed the defendant with organic brain impairment even though he had no medical records or diagnostic studies to confirm any brain injury. Additionally, other tests, along with the defendant’s family history, obtained by speaking to the defendant and his half brother, Lloyd Lewin, revealed a borderline personality disorder. Dr. Eisenstein concluded that the defendant suffered from an emotional disturbance and was not malingering.
>
> In making the diagnosis of borderline personality disorder, Dr. Eisenstein testified that he found that the defendant fit the category of frantic efforts by the defendant to avoid real or imagined abandonment, even though the doctor had a limited history of the defendant and was unable to obtain collateral information. Additionally, he found that the defendant met the category of a pattern of unstable and intensive personal relationships, even though he was aware that the defendant had been in a relationship with his girlfriend for five years. He also found the defendant fit the category of impulsivity in terms of the defendant’s relationships and job instability, even though he did not confirm the defendant’s employment record or the reasons the defendant left his jobs and was aware of the defendant’s five year relationship with his girlfriend. Finally, Dr. Eisenstein admitted the defendant met six of the categories for antisocial personality disorder, but did not diagnosis him as such based upon the defendant’s background, family history and testing that was conducted.

* * *

Although the defendant was 28 years old at the time of the murder, Dr. Toomer opined that the defendant emotionally functioned at the level of someone in their teenage years as he is impulsive and unable to consider consequences before making decisions. He found that the defendant had a history of substance abuse, but nothing that suggested dependence. Additionally, Dr. Toomer testified that there was a likelihood of underlying organic impairment, but further testing, such as a neuropsychological evaluation, was needed to confirm such a diagnosis.

Even though Dr. Toomer concluded that the defendant suffered from borderline personality disorder, he also opined that the defendant was not mentally retarded, was of average intelligence, had no major mental illness, was not insane at the time of the offense and was in the position to conform his behavior to society's standards. Further, although Dr. Toomer opined that the defendant was impulsive and unstable, he testified that he was aware that the defendant had been in a relationship with his girlfriend for five years and was employed at the time of the offense. Finally, Dr. Toomer opined that the defendant had antisocial personality traits.

In essence, Dr. Eisenstein and Dr. Toomer conclude that the defendant suffers from a borderline personality disorder, not a major mental illness. While they both discussed how this disorder effects [sic] a person's conduct, the court fails to see any connection between their descriptions and the defendant's conduct on the day of the murder. The evidence suggests that the murder and home invasion robbery did not occur as a result of any extreme mental or emotional disturbance. Rather, the evidence shows that the defendant made very deliberate choices and decisions that day. He participated in the planning of the robbery with James and Maurice. He brought a gun, mask and gloves to the scene. He ransacked Jahvon's apartment and left with a bag full of marijuana. The defendant was able to escape capture on the day of the murder by running through the woods. Along the way, he discarded his shirt, batting gloves, cellular telephone and guns. Obviously, he knew that

> he committed a crime and did everything he could to distance himself from it. These actions themselves demonstrate a very clear thought process. Thus, the court finds that this mitigator was reasonably established but gives it little weight. (Emphasis added).
>
> 2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> As noted previously, Dr. Toomer testified that the defendant suffers from a borderline personality disorder that impaired his ability to appreciate the criminality of his conduct. For the reasons set forth in the preceding discussion, the court finds that this mitigator was reasonably established but gives it little weight.

(XI 1772-75) (emphasis added)

The trial court also found a large number of non-statutory mitigating circumstances falling into six categories: (1) mental health issues; (2) substance abuse issues; (3) disparate treatment of codefendants; (4) family; (5) brain injury; and (6) miscellaneous factors. "No weight" or "little weight" was given to each category. (XI 1775-79) A review of the order, illustrates the rationale behind the court's reluctance to assign additional weight to these circumstances. For example, "Dr. Toomer administered a test to assess the defendant's substance abuse history. The results of that testing suggested a history of alcohol and drug abuse, but no dependence. Despite this history, there was no evidence that the defendant was under

the influence of alcohol or drugs leading up to the home invasion robbery and murder or at the time of the crime itself." (XI 1776) Regarding brain injury, "[t]he defense argued that the defendant suffers from organic brain damage or dysfunction caused by being hit in the head by a baseball bat as a child. Dr. Eisenstein and Dr. Toomer testified that there were factors in their evaluations of the defendant that indicated the existence of organicity. However, there was no direct proof of an actual brain injury since the defendant did not receive any medical treatment at the time." (XI 1778) Moreover, McLean had a normal or average IQ despite the asserted existence of brain damage or injury. (XI 1772, 1774)

The trial court did not ignore the testimony presented but fully explained why it assigned the designated weight to the mitigation found. McLean's suggestion to the contrary should be rejected.[12]

The jury recommended by a vote of 9 to 3 that McLean be sentenced to death. The trial court gave this recommendation "great weight" and sentenced McLean accordingly. (XI 1779) This case, which involves three aggravating factors, including the

[12] McLean's reference to a possible pre-trial plea which would have spared him the death penalty is of no consequence. McLean did not plead guilty and therefore cannot claim any benefit from pre-trial plea negotiations. The State is obviously convinced this is a death case. Any suggestion to the contrary (Initial Brief at 44), should be disregarded by the Court.

prior violent felony aggravator, and no compelling mitigation, is comparable to the following cases in which the death penalty has been affirmed by this Court on proportionality review. In Shellito v. State, 701 So. 2d 837 (Fla. 1997), a twenty-year-old defendant was convicted in a shooting death. In Shellito, the trial court found two aggravators (prior violent felony conviction and pecuniary gain/commission during a robbery), and non-statutory mitigation consisting of alcohol abuse, a mildly abusive childhood, difficulty reading, and a learning disability. In Melton v. State, 638 So. 2d 927 (Fla. 1994), the defendant committed murder during the course of a robbery. The trial court found two aggravators, no statutory mitigators, and two non-statutory mitigators which were assigned little weight. In Sliney v. State, 699 So. 2d 662 (Fla. 1997) the death penalty was found proportional where the two aggravating circumstances of commission during a robbery and avoid arrest were found and weighed against two statutory mitigators (age and lack of criminal history), and a number of non-statutory mitigators. See also Singleton v. State, 783 So. 2d 970, 979-80 (Fla. 2001) (sentence was found proportional where two aggravators were found, including prior violent felony conviction; three statutory mitigators were found, including defendant's age (69), impaired capacity, and extreme mental or emotional disturbance;

and several nonstatutory mitigators were found, including that defendant suffered from mild dementia); Hurst v. State, 819 So. 2d 689, 701-02 (Fla. 2002) (affirming death sentence where defendant robbed fast food store and two aggravators outweighed mitigation); Mendoza v. State, 700 So. 2d 670 (Fla. 1997) (affirming death sentence based on the aggravators of prior violent felony conviction and a murder committed during a robbery); Hayes v. State, 581 So. 2d 121, 126-27 (Fla. 1991) (affirming the death penalty after the trial court found the "committed for pecuniary gain" and "committed while engaged in armed robbery" aggravators, the "age" statutory mitigator, and the "low intelligence," "developmental learning disability," and "product of a deprived environment" non-statutory mitigators).

McLean argues that aggravation in this case is not "overwhelming" and that the only aggravator that should be given weight is the "felony-murder" aggravator; he further seems to suggest that the prior violent felony aggravator should be dismissed. (Appellant's Initial Brief at 32) McLean's argument fails as this Court has affirmed where only the single aggravator of prior violent felony existed. See LaMarca v. State, 785 So. 2d 1209 (Fla. 2001); Ferrell v. State, 680 So. 2d 390 (Fla. 1996); Duncan v. State, 619 So. 2d 279 (Fla. 1993). Moreover, this Court has held the prior violent felony

aggravator is among "the most weighty in Florida's sentencing calculus". Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002).

McLean also seems to suggest that because the aggravating factors of heinous, atrocious or cruel and cold, calculated and premeditated are not among the circumstances found his sentence is not proportionate. Although this Court has acknowledged the relevance of these factors in a proportionality review, this Court also recognized that their presence or absence is "not controlling." Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Of course, this Court has upheld a number of death sentences as proportionate when neither HAC nor CCP were applied. See Taylor v. State, 855 So. 2d 1, 32 (Fla. 2003), cert. denied, 541 U.S. 905 (2004); Bryant v. State, 785 So. 2d 422, 437 (Fla. 2001); Sliney v. State, 699 So. 2d at 672, cert. denied, 522 U.S. 1129 (1998); Ferrell, 680 So. 2d at 391, cert. denied, 520 U.S. 1123 (1997); Vining v. State, 637 So. 2d 921, 928 (Fla. 1994).

McLean cites several cases in his brief in an effort to establish his death sentence is disproportionate. However, these cases are distinguishable from McLean's and offer no reason for this Court to vacate the death sentence imposed below.

In Terry v. State, 668 So. 2d 954 (Fla. 1996) the murder took place during the course of a robbery; however, the

circumstances surrounding the actual shooting remained unclear. This Court characterized Terry as a "robbery gone bad" and could not "determine on the record . . . what actually transpired immediately prior to the victim being shot." Terry, 668 So. 2d at 965. Further in Terry, the prior violent felony aggravator was based upon a contemporaneous conviction.

Here, the facts are clear as to what transpired prior to the murder. McLean, after robbing Jahvon's apartment, coldly attempted to murder Theothlus as he dove for his life, and did murder hapless young Jahvon simply because "he wanted to see what it felt like to shoot and kill somebody." (XXI 1107) No evidence even suggested that either man was armed or posed a threat to McLean.

As to the prior violent felony aggravator, this is not a case like Terry, but, rather is a case where the aggravator represents an actual violent felony committed by McLean. Thus, Terry does not support McLean's proportionality argument.

In Johnson v. State, 720 So. 2d 232 (Fla. 1998), the evidence demonstrated that the murder of one man and the attempted murder of another occurred during a robbery precipitated by a debt owed by one of the victims. Evidence was presented indicating the murder victim resisted. In Johnson,

the court gave substantial weight to at least one of Johnson's mitigators.

Here, both victims were compliant. Moreover, there is evidence that McLean simply wanted to know what it was like to kill someone, a very callous motivation. Moreover, there was no mitigator that was afforded substantial weight as in Johnson. Consequently, Johnson is not a proper "comparator," and cannot support McLean's argument.

In Jones v. State, 963 So. 2d 180 (Fla. 2007), evidence was presented that there was a fight between Jones and his victim. The jury recommended death by a vote of seven to five. This Court compared the Jones case to Terry, where the circumstances surrounding the shooting were unclear and evidence supported a theory of a "robbery gone bad." Jones, 963 So. 2d at 187-88.

The facts here establish that the victims did not fight or resist McLean. McLean, in this case, apparently shot and murdered for his own crude self-gratification. Further, in the instant case the jury's recommendation was not one vote shy from a life recommendation but a nine to three death recommendation. Consequently, Jones does not support an argument that McLean's sentence is disproportionate.

Hess v. State, 794 So. 2d 1249 (Fla. 2001), is another case McLean cites where the facts surrounding the robbery and murder

were unclear. In Hess, there were two aggravators, during the course of a robbery and prior violent felony. The prior violent felony aggravator was based on sexual offenses committed against Hess's nieces after the murder. The victims' mother testified extensively in support of Hess, including testimony that she and her daughters forgave Hess. Further in Hess, this Court found "[p]articularly noteworthy is evidence that [Hess] has a history of learning disabilities, was considered ten years behind his chronological age, was considered borderline retarded during his school years and was placed in special education classes as a result of his mental or emotional infirmities." Hess, 794 So. 2d at 1267.

Once again, the facts of the instant murder are clear. And, the victim of the prior violent felony still remains traumatized because of McLean's action. Here, there is no evidence of low intelligence, both doctors finding McLean to be of average intelligence. (XI 1772, 1774) Thus, Hess does not support McLean's proportionality argument.[13]

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[13] Woods v. State, 733 So. 2d 980 (Fla. 1999) is also easily distinguished. Woods, a man of limited mental ability murdered out of his confusion and frustration over the purchase of an automobile. Similarly, in Sinclair v. State, 657 So. 2d 1138 (Fla. 1995) the defendant was a man of limited intelligence who murdered a cab driver during a robbery. The only aggravator that existed was during the course of a robbery. Here, there are three valid aggravators and a man of average intelligence.

After the robbery was completed, McLean callously murdered 16 year-old Jahvon and attempted to murder Theothlus. Both men were unarmed, were compliant and posed no threat to McLean. When Maurice asked McLean why he shot Jahvon and Theothlus, he simply replied "he wanted to see what it felt like to shoot and kill somebody." (XXI 1107) McLean's sentence for his crimes is supported by three aggravating circumstances. The mitigation urged was weak, and in instances was sparsely supported by the evidence presented. McLean's sentence is proportionate.

## ISSUE III

**WHETHER THE TRIAL COURT ERRED IN CONDUCTING AN IN CAMERA BENCH CONFERENCE AT THE SPECIFIC REQUEST OF DEFENSE COUNSEL?**

McLean asserts that he was improperly excluded from a bench conference wherein the defense counsel briefly described her efforts to pursue a potential alibi defense on his behalf. The State disagrees.

First, there was no objection lodged to the procedure proposed by defense counsel below. Consequently, this issue has not been preserved for appeal. Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999) ("If the error is not properly preserved or is unpreserved, the conviction can be reversed only if the error is 'fundamental.'") (citing Chandler v. State, 702 So. 2d 186, 191 (Fla. 1997), cert. denied, 523 U.S. 1083, 118 S. Ct. 1535, 140 L. Ed. 2d 685 (1998)). In fact, without conceding error in this case, the State notes that more than mere waiver, this claim would fall under the invited error doctrine. It was the defense counsel who asked that the prosecutor and defendant be excluded from any specific response on the issue of whether or not counsel was investigating an alibi defense.

"Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." Goodwin v. State, 751 So. 2d 537, 544 n.8 (Fla. 1999).

See San Martin v. State, 705 So. 2d 1337, 1347 (Fla. 1997) (party may not invite error and then complain about it on appeal). Since the trial court and State simply honored the request of the defense counsel for a brief in camera bench conference, any error in the procedure below was clearly "invited."

In Roberts v. State, 510 So. 2d 885, 890 (Fla. 1987), this Court determined that the defendant and trial court's absence from a jury view did not require reversal. The Court noted that the error, if any, was invited:

> It is apparent from the above discussion that neither the defendant nor the trial judge were present at the view. However, under the circumstances, we cannot agree with Roberts that the trial court's absence mandates per se reversal under *McCollum*. We view the above excerpt as an acknowledgement of an express waiver by defense counsel of the presence of both the defendant and the trial court. Roberts points to the comma between the words "of" and "Your Honor" in the last italicized sentence quoted above, contending that the words "the defendant" were left out of the transcript. We have been informed of no motion to correct the record and without such correction the only reasonable reading of the sentence in question is as an acknowledgement by counsel of his express waiver of the trial court's presence at the view.
>
> Roberts contends that even assuming his trial counsel waived the judge's presence, he did not acquiesce in or ratify this waiver. See *Garcia v. State*, 492 So.2d 360 (Fla.), *cert. denied*, 479 U.S. 1022, 107 S. Ct. 680, 93 L. Ed. 2d 730 (1986); *Amazon v. State*, 487 So.2d 8 (Fla.), *cert. denied*, 479 U.S. 914, 107 S. Ct. 314, 93 L. Ed. 2d 288 (1986). **We find such acquiescence or ratification unnecessary under**

> **<u>the circumstances present in this case and hold that defense counsel's express waiver of the trial court's presence at the jury view was adequate. To hold otherwise would allow Roberts to benefit from this clearly invited error.</u>**

(emphasis added). <u>See</u> <u>also</u> <u>Randolph v. State</u>, 853 So. 2d 1051, 1067 (Fla. 2003) (appellate counsel not ineffective for failing to challenge defendant's absence from in chambers discussion of jury instructions where defense counsel waived defendant's presence and therefore the issue was not preserved for appeal).

As in <u>Roberts</u>, the defendant should not benefit from the procedure employed below at the behest of his defense attorney. McLean voiced no objection to the procedure proposed by his attorney below. Under similar circumstances in <u>Rodgers v. State</u>, 934 So. 2d 1207, 1216 (Fla. 2006), this Court found no error, or a waiver of the alleged error, when an attorney asked to discuss an alleged conflict with co-counsel outside of the defendant's presence. This Court stated:

> We also find that Rodgers waived the right to be present at the hearing in the judge's chambers. Although criminal defendants have a due process right to be physically present at all critical stages of a trial, see *Muhammad v. State*, 782 So. 2d 343, 351 (Fla. 2001), this right may be waived by the defendant. Rodgers was advised that the in-chambers hearing would address his counsel's internal disagreement and that his counsel believed it was in Rodgers' best interest for him not to be at the hearing. Rodgers then agreed to wait in the waiting room of the judge's chambers so that he would not hear the discussion. We find no error in Rodgers' absence from the hearing in chambers.

Rodgers, 934 So. 2d at 1216. See also Carmichael v. State, 715 So. 2d 247, 249 (Fla. 1998) ("Under his proposed scenario, however, a defendant could sit silently on this right throughout the jury selection process, await the trial's conclusion, and then--in the event of an adverse outcome--raise the issue on appeal for the first time. The price of such an 'ambush'--i.e., a new trial--is prohibitively steep in terms of resources and delay--and basic fairness.").

As in Rodgers, McLean was present in the courtroom and failed to voice any concern or objection to the procedure proposed by his defense attorney. He was given a full and fair opportunity to voice his grievances. Indeed, at the end of the brief bench conference with the judge, the judge asked McLean if he had anything to add regarding his claims regarding counsel's alleged deficiencies. (III 269)

Aside from invited error or waiver, the State notes that McLean's apparent absence from a brief bench conference did not amount to exclusion from a "critical stage" of the proceeding. Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) ("a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."). McLean was in fact "present" in court

during the hearing at issue. He had a full and fair opportunity to air his grievances. McLean offers nothing that he could have added during the conference wherein defense counsel briefly stated her efforts to pursue an alibi defense. Indeed, McLean does not even take issue with the underlying decision not to remove or replace defense counsel. See e.g. Kormondy v. State, 983 So. 2d 418, 436 (Fla. 2007) (even if counsel was deficient in failing to object to defendant's absence from conference, Kormondy failed to demonstrate prejudice or how his presence would have altered any decision which could have resulted in a life sentence); Vining v. State, 827 So. 2d 201, 218 (Fla. 2002) ("In relation to this claim, Vining has failed to show how he was prejudiced by his absence during the pretrial and pre-penalty phase proceedings, nor has he asserted how he could have made a meaningful contribution to counsel's legal arguments during these preliminary proceedings.")

McLean never again broached the subject of alibi and raised no objection when the court queried him about not testifying at the conclusion of the guilt phase. (XXIII 1473-74) The trial court advised McLean that his attorneys had announced their intention to rest without calling any witnesses. (XXIII 1473) McLean indicated that he had discussed testifying with his two trial attorneys and that they had answered all the questions he

had about the matter. He told the court he understood his right to testify but wanted to exercise his right to remain silent. (XXIII 1473-74)

As the transcript reflects, McLean was given an opportunity to address the court at the conclusion of the State's case at the point the defense rested. His failure to complain about the lack of an "alibi" defense at that time, clearly indicates that he and his attorneys had resolved the issue to his apparent satisfaction. See Davis v. State, 703 So. 2d 1055, 1059 (Fla. 1997) ("Davis's silence after hearing what his attorney had been doing to ready the case for trial would lead one to believe that Davis felt his concerns had been heard by the judge and his lawyer and he was content to proceed."). Under the circumstances, McLean has not established error, much less an error requiring reversal of his convictions in this case.

Finally, the State notes that aside from waiver or invited error, under the circumstances, the State questions whether or not the trial court was even obligated to hold a Nelson inquiry. McLean's written letter only generally complained of failure to communicate, provide him discovery, and, failure to press for his release on bond. (IX 1309) These generalized complaints about his attorneys' conduct do not implicate any legitimate concerns over whether or not counsel was in fact rendering

ineffective assistance. The specific complaint regarding a potential alibi defense only arose in open court. Such complaints expressed by McLean in this case, pressuring him to take a plea, trial strategy [alibi] and an alleged lack of communication do not suggest that counsel is incompetent. Consequently, a Nelson inquiry was not necessary.

In Morrison v. State, 818 So. 2d 432, 441-442 (Fla. 2002) this Court extensively analyzed the types of complaints which do not trigger the need for a full Nelson inquiry, stating:

> Most recently, in *Sexton v. State*, 775 So. 2d 923 (Fla. 2000), this Court addressed a similar issue where the defendant claimed that the trial court erred in failing to adequately address the defendant's request for new counsel, and said: In the present case, it does not appear that [the defendant] made a formal allegation of incompetence entitling him to a *Nelson* hearing. . . . Because [the defendant] was merely noting his disagreement with his attorney's trial strategy and preparation and was not asserting a sufficient basis to support a contention that his attorney was incompetent, we find this point on appeal to be without merit.
>
> Accordingly, in the instant case, Morrison did not make a formal allegation of incompetence entitling him to a *Nelson* hearing. Although Morrison did make several requests to replace his counsel, the claims contained in the letters submitted to the trial court centered principally around Morrison's dissatisfaction with the amount of communication between him and counsel. A lack of communication, however, is not a ground for an incompetency claim. *See Watts*, 593 So. 2d at 203; *Parker*, 570 So. 2d at 1053. Morrison also expressed displeasure with counsel's refusal to provide copies of legal documents and efforts in contacting witnesses. These complaints can best be described as general complaints about his attorney's

trial preparation, witness development, and trial strategy. *See Dunn*, 730 So. 2d at 312. As this Court repeatedly has stated, a trial court does not err in failing to conduct a *Nelson* inquiry where the defendant makes such general complaints and is not clearly alleging incompetence. *See Davis*, 703 So. 2d at 1058-59; *Gudinas*, 693 So. 2d at 962 n.12; *see also Dunn*, 730 So. 2d at 311-12.

Moreover, as stated in *Lowe*, a trial judge's inquiry into a defendant's complaints about his or her attorneys "can only be as specific and meaningful as the defendant's complaint." 650 So. 2d at 975. While the trial court did not conduct a full *Nelson* inquiry in the present case, the court did inquire of defense counsel concerning the pro se motions to suppress (which included Morrison's complaints regarding counsel), at a hearing on June 26, 1998. Not only did Morrison not persist in his complaints about counsel when given the opportunity to do so at the June 26 hearing, but, following that hearing, which occurred almost three months before trial, Morrison made no further motions or complaints until after the trial was over. *See Davis*, 703 So. 2d 1055 at 1059 ("Davis's silence after hearing what his attorney had been doing to ready the case for trial would lead one to believe that Davis felt his concerns had been heard by the judge and his lawyer and he was content to proceed."). The one question Morrison did still have concerned his uncle Fred Austin not testifying, but this too was explained to Morrison. Given the opportunity to raise anything further, Morrison was silent. The court had every reason to assume that Morrison's concerns had been addressed and alleviated by the inquiry that occurred and the explanations given to him.

As the record indicates, the court made sufficient inquiry to determine whether there was reasonable cause to believe that counsel was not rendering effective assistance. Because Morrison was merely noting his disagreement with his attorney's frequency of communication, trial strategy, and trial preparation -- and was not asserting a sufficient basis to support a contention that his attorneys were incompetent -- we find Morrison's claim is without merit.

Since McLean's complaints related to the alleged lack of communication and disagreement over strategy, under Morrison the trial court was under no obligation to even conduct a Nelson inquiry. Consequently, McLean should be precluded from contending that the inquiry into his general complaints was defective or that the brief bench exchange between the trial court and his defense attorney outside of his presence entitles him to a new trial.[14]

In conclusion, McLean offers nothing that he could have added had he been present during the brief bench conference addressing a potential alibi. McLean did not object to the in camera bench conference review requested by his defense attorney. Indeed, as counsel noted for the trial court, they did make efforts, although futile, to investigate an alibi defense. Finally, at no further point during the pretrial or

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[14] Even if this Court were to find error in excluding McLean from the bench conference, any such error is clearly harmless. McLean was offered a full and fair opportunity to air his grievances below. The fact he was not present at the bench for a single brief discussion, did not render prejudice him or render his trial unfair or unreliable. See Jackson v. State, 983 So. 2d 562, 576 (Fla. 2008) ("To justify not imposing the contemporaneous objection rule, 'the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'") (citation omitted) See Finney v. Zant, 709 F.2d 643, 646 (11th Cir. 1983) ("Any error by reason of Finney's absence during trial was harmless beyond a reasonable doubt."), overruled on other grounds, Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986).

trial stage did McLean express dissatisfaction with counsel or raise the alibi issue. Thus, we can assume that the issue was resolved to the satisfaction of McLean below.

## ISSUE IV

**WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AVOIDING ARREST AGGRAVATOR UNDER THE CIRCUMSTANCES OF THIS CASE?**

McLean next argues that the trial court erred in instructing the jury on the avoiding arrest aggravator. Since the judge did not ultimately find this aggravating circumstance, McLean argues it was error to instruct the jury on it. McLean's argument lacks any merit.

"This Court has held that '[d]ecisions regarding jury instructions are within the sound discretion of the trial court and should not be disturbed on appeal absent prejudicial error.'" Coday v. State, 946 So. 2d 988, 994 (Fla. 2006) (quoting Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1990)). See also James v. State, 695 So. 2d 1229, 1236 (Fla. 1997) (The "trial court has wide discretion in instructing the jury, and the court's decision . . . is reviewed with a presumption of correctness on appeal."). The trial court did not abuse its discretion in instructing the jury on the avoiding arrest aggravator. There is clearly evidence to support the instruction in this case.

This Court is not generally receptive to claims of reversible error based upon instructing the jury on an aggravating factor that the trial court later does not find. In

Davis v. State, 928 So. 2d 1089, 1132 (Fla. 2005) this Court stated:

> Davis alleges that the trial court erred in allowing the jury to consider the avoiding or preventing a lawful arrest aggravator when the trial court found that this aggravating circumstance did not exist. This Court has previously rejected this same issue. *See Pace v. State*, 854 So. 2d 167, 181 (Fla. 2003) ("The fact that the state did not prove this aggravator to the trial court's satisfaction does not require a conclusion that there was insufficient evidence . . . to allow the jury to consider the factor.") (quoting *Bowden v. State*, 588 So. 2d 225, 231 (Fla. 1991) Therefore, this claim is denied.

Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990) (the trial court is required to instruct on all aggravating and mitigating circumstances "for which evidence has been presented.") (citing Fla. Std. Jury Instr. (Crim.) at 78, 80).

In this case, not only was instructing the jury on this circumstance entirely proper, but, the evidence was sufficient for the trial court to find, and weigh this aggravator.[15] That the trial court did not do so, simply inured to the benefit of the appellant.

This was not a robbery gone bad, the victims were compliant and helpless when McLean shot them. McLean had found the

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[15] "To establish the avoid arrest aggravator, '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.'" Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994).

marijuana he had been seeking and was standing in the doorway preparing to leave when he fired the fatal shots from a close distance. See Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994) ("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."). McLean did not wear a mask or otherwise disguise his appearance. Significantly, McLean instructed his accomplice Jaggon, to shoot the lady they had seen earlier when entering the apartment. (XXI 1049) This evidence strongly suggests that McLean intended to eliminate any potential witnesses to his crimes. See Willacy v. State, 696 So. 2d 693, 696 (Fla. 1997)

While circumstantial, the facts certainly suggest, if not clearly establish, that witness elimination was McLean's motive for the murder and attempted murder. Consequently, the trial court did not abuse its discretion in instructing the jury on the avoiding arrest aggravator.

## ISSUE V

**WHETHER THE SUPREME COURT'S DECISION IN RING V. ARIZONA RENDERS FLORIDA'S CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL?**

This Court has repeatedly and consistently rejected constitutional challenges to Florida's capital sentencing scheme based upon the Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). See Hernandez v. State, 2009 Fla. LEXIS 149 (Fla. Jan. 30, 2009) ("We have not receded from these decisions, and we do not recede from them now."); Coday v. State, 946 So.2d 988, 1005-1006 (Fla. 2006). Moreover, McLean was convicted of contemporaneous felonies, rendering Ring inapplicable to his case. See Rodgers v. State, 948 So. 2d 655, 673 (Fla. 2006); Smith v. State, 866 So. 2d 51, 68 (Fla. 2004); Jones v. State, 855 So. 2d 611, 619 (Fla. 2003). McLean has offered this Court no compelling reasons to depart from this well settled precedent.

## CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the convictions and sentences imposed below.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. mail to George D.E. Burden, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 and to Kenneth Lewis, Assistant State Attorney, 415 North Orange Avenue, Orlando, Florida 32801, this 16th day of March, 2009.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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