IN THE SUPREME COURT OF FLORIDA

JASON ANDREW SIMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC07-0798

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Simpson." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following are examples of other references:

> "IX 1705": page 1705 of volume IX of the 22-volume record on appeal;
> "SE #86": State's exhibit #86; "DE" designates defense exhibits;
> "IB 27": page 27 of Simpson's Initial Brief.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations, unless otherwise noted.

Simpson characterizes his appellate claims as "arguments," whereas the State uses the more conventional term of "issues" for the claims.

STATEMENT OF THE CASE AND FACTS

The Case.

An indictment charged two counts of First Degree Murder, alleging that, on or between July 15, 1999, and July 16, 1999, Simpson murdered Archie Howard Crook, Sr., and Kimberli Kimbler, by hacking each to death with an axe. (I 22)

On Monday, January 22, 2007, jury selection commenced (XI 1), and on January 23, 2007, the jury was sworn (XIII 472) and opening statements (XIII 496) and presentation of evidence (XIII 526) commenced.

On Monday, January 29, 2007, the jury found Simpson guilty as charged

of the First Degree Murder of Archie Crook, Sr., and Kimberli Kimbler. (V 791-92; XIX 1725-27) The jury was polled, and each juror confirmed the verdicts. (XIX 1726-27)

On February 1, 2007, and February 5, 2007, the trial judge conducted penalty-phase instruction conferences with counsel. (XX, XXI) On February 6, 2007, the jury recommended the death penalty by votes of 8-4 and 9-3, (V 820-21, XXII 1976).

On March 8, 2007, the trial court conducted a Spencer hearing. (X 1752-89).

On March 22, 2007, the State filed its Memorandum in Support of Death Penalty (V 868-78), and on March 23, 2007, the defense filed its sentencing memoranda for each of the counts (V 879-89, 890-900).

On March 29, 2007, the Judge imposed the death sentence on Simpson for each count. He found the following aggravating circumstances: previously convicted of a felony and on felony probation, given great weight; previously been convicted of a felony involving the use or threat of violence to the person, given great weight; capital felony committed while the defendant was engaged in the commission of the crime of burglary, given some weight; especially heinous, atrocious and cruel, given great weight; committed in a cold, calculated, and premeditated manner, given great weight. The Judge found several non-statutory mitigators ranging from assisting law enforcement in other cases to alcoholism in the family to suicide attempts. (V 908-33, X 1791-1807)

Trial Facts.[1]

The guilty verdict was the result of about a week-long trial (See XI 1 to XIX 1725-27). The evidence incriminating Simpson included several DNA identifications, several statements to the police showing his consciousness of guilt, and another inmate testifying that Simpson confessed to him. The State elaborates.

In the morning of July 16, 1999, around 8 or 9am, Troy Crook, who was Archie Crook Sr.'s father, discovered the victims' bodies at Archie Crook Sr.'s house at 1621 Derito Drive. (XIII 527-28, 530) Troy Crook lived across the road about a football field's length away (XIII 529, 532) and had heard no disturbance at the victims' house overnight. (XIII 532-33) A rear door to his son's home was unlocked. (XIII 537) His son, Archie Crook, Sr.,[2] was found dead in the bed of his home, and Kimberli Kimbler was dead and on the floor, with one foot still on that bed. (XIII 538-39. See also XIII 591-93)

Troy Crook then yelled for Chris Howard to "come over" and Howard also observed the bodies. He told his wife that "Archie and Kim was dead," and they waited for the police outside as family members gathered. (XIII 541-42, 553-58) When Little Archie arrived at his father's house on July 16, 1999, he was visibly very upset. (XIII 566)

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[1] The State disputes a number of the facts in Simpson's brief and presents its own "Facts."

[2] At trial, some witnesses called Archie Crook, Sr., "Big Archie," and some called his son, Archie Crook, Jr., "Little Archie." Rather than refer to each's whole names to distinguish them, the State often refers to them by these nicknames.

Chris Howard testified that he lived next door to Archie Crook Sr., who was his brother-in-law. (XIII 549-50) Howard testified that on July 15th, Little Archie's friend, Shawn Smallwood, came over and wanted to cash a check. Later that night, about 9 or 10pm, he saw Little Archie and Shawn Smallwood at Big Archie's house. (XIII 550-51)[3] Howard saw no sign of any dispute at Big Archie's house that night. (XIII 565-66)

The evidence technician testified that there were some gouges in the upper railing of the bed, just above Big Archie's head. Close-up photographs of the gouges were introduced. (XIII 588) The house had not been ransacked. (See, e.g., XIII 589. See also XIV 714-15) He described blood at various places in and around the bed at the crime scene. (XIII 590 et seq.)

The medical examiner, Dr. Maragrita Arruza, testified that Archie Crook, Sr., "died of chopping wounds of the head and neck." (XV 840) A "chopping wound" is caused by a heavy instrument that has a cutting edge. (XV 842) An axe (SE #86), recovered from an area behind the victims' house, was consistent with causing the victims' injuries. (XV 844) There was an injury to Archie Crook, Sr.'s upper lip and left side of the head. He had a chopping wound on the left side of his neck behind the jaw line. (XV 842) There was a double chopping wound on the left side of his face and a superficial wound under the chin. (XV 843) His jaw was broken. (XV 843) One

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[3] Simpson's characterization (IB 6) of a victim's son and Smallwood being seen at the victims' house "roughly one or two hours before the established time of death" may imply that the time of death was precisely established. It was not.

of the wounds "by his face" severed the carotid artery, which resulted in quick faintness or unconsciousness and death. (sXV 856-57) When asked about whether "chopping fracture on the fifth cervical vertebrae," at the lower neck, could cause paralysis, the expert responded that it "could cause at least contusion at one point, yes." A superficial wound above the elbow was possibly a defensive wound. (XV 845) He had an "incise wound" on his thumb, possibly the result of "trying to grab the cutting instrument" to defend himself, but "it could be other causes." (XV 846, 859) An incise wound "is a cut that is superficial and not very deep." (XV 845)

Kimberli Kimbler also "died of chopping wounds of the head and neck."[4] (XV 840-41) She had several abrasions and lacerations and a "deep wound, chopping wound … on the right side of the face." (XV 846) Under her jaw was a "chopping wound that fractures." (XV 847) Two of her vertebrae were broken in her neck as a result of one of the chopping wounds; in other words, her neck was broken (XV 847, 847-48); it "fracture[d] bone and also impact[ed] the spinal cord at a level of the first and second vertebrae" (XV 848) and would have caused immediate death (XV 859). There was another wound under her chin. (XV 847) Her humerus, the big bone in her arm, was

[4] Simpson states that the State's theory of why Kimbler was killed was an "afterthought." While the prosecution's theory was that Big Archie was Simpson's primary target, the prosecutor argued that Simpson killed her when she tried to get away. (See, e.g., XIX 1611) Similarly, the trial judge's sentencing order found that Simpson killed her when she trial to get away, "[b]low after blow … hack[ing] at Kimberli Kimbler's head and neck. Evidenced by the defensive wounds, Kimberli Kimbler also tried to fend off the Defendant." (V 909-910. See also XV 840-49, 879-80) In contrast to an afterthought, the trial court found CCP as to Kimbler's death. (V 920-21) Indeed, it apparently was common knowledge that Kimbler was staying with Big Archie. (See, e.g., XIV 783; XV 810, 816-17)

fractured due to a chopping wound. (XV 848) She also had an "incise wound on the back of the right arm" and an "abrasion just lateral to the breast" (XV 848) and abrasions on the right side of the abdomen (XV 849). Her third finger had an incise wound consistent with being a defensive wound. (XV 849)

The medical examiner indicated that she could not determine which injury occurred first. (See XV 856, 860)

Kimbler was seven to seven and one-half months pregnant when she was murdered. (XV 850)

Evidence indicated that the killer left the murder scene through the back door. There was no sign of a forced entry. (See XIII 584-85) Kimbler's blood droplets were found near the backdoor. (XIII 596; XIV 715-16) Moving away from the back door, a chicken pen had been moved (XIII 560-61), and the police recovered clothing material that had been snagged on two barbed wires, with one of the wires above the other one. (XIII 604-605. See also XIII 558-59, 562-63) Roughly on a line from the back door, an axe was found. Some socks were also found in the area of the axe. (XIV 606-609. See also XIII 562-64)[5] Farther away but roughly still in a line from the backdoor of the victim's house, in a pile near an air conditioning unit at a church, the police seized clothing, which included a sweatshirt, sweatpants, a hat, and a pair of sneakers or tennis shoes. The church was

[5] Simpson states (IB 6) that the "white socks [were] alleged to be worn by the murderer"; while the socks were recovered in the general vicinity of the murder weapon (the axe), the State did not rely on the socks as part of its theory of the case. The pair of socks contained no blood and no identifiable DNA. (XVI 1088; XVII 1207-1208)

adjacent to, and behind, the victims' house. (XIV 610-11, 698-704, 721-33)

The clothing materials snagged on the upper and lower barbed wires were consistent with tears in the sweatshirt and sweatpants, respectively. The sweatshirt and the material on the upper barbed wire matched on 135 characteristics. The sweatpants and the material on the lower barbed wire matched on 106 characteristics. (XVII 1268-82)

Kimbler's blood was identified on the axehead. (XVI 1172-73)

Kimbler's blood was on the shoes, (XVI 1182-83; XVII 1332) which were about the same size as Simpson's shoes. (See XVIII 1417-18. See also XIX 1642)

Simpson's DNA was identified on the sweatpants and on the sweatshirt. (XVI 1185-87, 1190, 1191-93, 1195-96; XVII 1211, 1259) Kimbler's and Big Archie's blood was identified on the sweatpants. (XVI 1174 et seq.; XVII 1211) Analyzing the sweatshirt for secondary or minor contributors, Little Archie "shares the 15 allele," which was found on the sweatshirt; this allele is observed in about one-fourth of the population. (XVI 1194. See also XVII 1324-25)

Simpson's hairs were identified in the recovered clothing. (XVI 1197-98; XVII 1212) Their statistical relevance was confirmed at one in 760 billion Caucasions. (E.g., XVII 1332-33)[6]

Dr. Martin Tracey, a population geneticist and expert in molecular biology, amplified the statistical analysis of the exhibits. (XVII 1296 et

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[6] Simpson (IB 15) incorrectly dismisses the two recovered hairs as no DNA match.

seq.) For example, he confirmed that the statistical relevance of stain on the left shoulder of the sweatshirt was one in 5.1 quadrillion Caucasions (XVII 1321-22), and DNA found on the inside of the waistband of the sweatpants was attributable to Simpson at odds of "one person in six billion males" (XVII 1329-30). Odds attributable to Simpson for DNA found on the inside cuffs of the sweatpants were about one in nine billion. (XVII 1329-30)

Dr. Tracey also explained factors that cause DNA to degrade. (XVII 1327-28) he explained that perspiration from the most recent wearer of clothes can degrade the DNA from an earlier wearer. Bacteria "eat" DNA. (XVII 1332)

Big Archie's DNA was identified in Kimbler's vaginal smear. (XVII 1208-1209)

Big Archie and Little Archie shared the same YSTR DNA profile, and fingernail clippings from Kimbler were consistent with both of them. (XVI 1074-75) Biologically, a father passes YSTR DNA on to his son. (XVII 1256)

Detective Hinson had been using Simpson as a confidential source concerning a "homicide by the name of Shawn Gresham." (XIV 650) He also introduced Simpson to DEA, a narcotics detective, and an auto theft detective. (XIV 665)

On July 16, 1999, at about 8:00am, Detective Hinson heard about the double homicide on Derito Road, recognized the address, and then paged or called Simpson several times. (XIV 653, 655) At some point that morning, the Detective concluded that the address was the Crook residence and went

to the murder scene. (XIV 654-55) Simpson responded to the Detective's pages/calls about noon, and about 12:30pm the Detective went to Simpson's mother's house, where Simpson was staying. (XIV 655) Simpson was very nicely dressed, had freshly showered, and was clean. (XIV 656) However, the Detective observed a large gash on his finger and asked Simpson about it, and Simpson responded that he had gotten upset during the night and hit an electrical panel in his mother's garage, causing the cut. (XIV 656-57)[7] At trial, Simpson testified that he received the cut when he checked the electrical panel at his mother's house due to a power outage. (See XVII 1391-93) Simpson called as a trial witness an employee from the Jacksonville Electrical Authority, who testified that there was a power outage lasting a few minutes on July 16, 1999. (See 1464-70)

Detective Hinson asked Simpson if he knew anything about the murders. Hinson did not tell Simpson how the victims were killed. Simpson was calm and unemotional. (XIV 657-58) Simpson responded, "when you live by the sword you die by the sword" and shrugged his shoulders. (XIV 659-60)

At the July 16, 1999, interview, Simpson also told Hinson that Big Archie and his son had been putting the word out on him that he was snitching for the police. (XIV 659)

Detective Gilbreath testified that he showed Simpson three photographs of the killer's clothes, including two close-ups (SE #s 29, 31, and 32), and Simpson repeatedly stated that the clothes were not his. (XVII

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[7] The State disputes Simpson's suggestion (IB 12) that he told Hinson that he cut his hand due to a power outage.

1350-51) Simpson testified at trial that he did not recognize the clothes from SE #33 because of poor quality (XVIII 1409-1410, 1446), that, having viewed the actual clothing in the courtroom, the sweatshirt and sweatpants were actually his, but that Little Archie had taken them from him sometime before the murder to steal a Chevrolet Impala. (XVII 1384-90) Although Simpson did not specify the date that his clothes were taken, he indicated that he reported his conversation with Little Archie, which included Little Archie stating he wanted to "hit a lick," to Detective Hinson (XVII 1385, 1389). Detective Hinson testified that his conversation with Simpson concerning Little Archie referring to "hitting a lick" was on June 21, 1999, when Simpson contacted Hinson and indicated that "Archie" wanted to "hit a lick," that is engage in something illegal. (XIV 651) Neither the Detective nor Simpson (See also XVIII 1437-38) testified that Simpson mentioned anything about an Impala or his clothes being taken. The Detective did not know if Simpson was referring to Big Archie or Little Archie. (See XIV 651-52)

At trial, Simpson continued to deny that the hat and the shoes were his. (XVIII 1411) When shown the photographs by the police, Simpson did not equivocate and he did not complain about the quality of the photograph and he did not indicate that his dark sweats had been taken. (See XVII 1350-51)

Detective Hugh Eeason testified that on November 8, 2001, Simpson "showed up" at the sheriff's office, and when detective Bialokowski told Simpson that they needed his assistance with the Crook and Kimbler murders, Simpson initially denied knowing them. (XV 949-50) Detective Dale Gilbreath

testified that on August 14, 2002, he received DNA test results on the recovered clothing, and on September 4, 2002, he interviewed Simpson. He told Simpson that he wanted "to talk to him about the Crook and Kimbler murders, and Simpson initially responded that he did not know them. (XVII 1339-43) There was evidence that, in fact, Simpson did know the victims, and when the detectives followed-up Simpson corrected himself. (E.g., XIV 657-60, 786-87; XVII 1375-76; XVIII 1425, 1427; XV 949-51; XVII 1343-45).

At the time of the murders, Simpson was staying with his mother, and his mother's telephone number was the last number on a pager recovered next to the victim's bed at the murder scene. (See XIV 734-35; XIV 655, 671, 674, 679, 681; XVII 1390-91, 1393)

Michael Durrance, a seven-time convicted felon (XV 863), testified that at the time of trial he was serving 32 years in state prison, including 15 years minimum mandatory. (XV 864) He sold drugs to Big Archie in large quantities. (XV 865-66) At one point he had a dispute with Big Archie concerning the drugs, which had been resolved. (XV 867-70) Days prior to Big Archie's death, Simpson told Durrance that he intended to rob Big Archie and that Big Archie wanted him (Simpson) to kill Durrance. (XV 871, 874) At the time, Durrance considered Simpson to be close to him but not real close. (XV 873) After the murders, Simpson came by Durrance's house and wanted Durrance to front him some drugs. Durrance told him that "he should already have some money," because he knew that Simpson had robbed Big Archie. Simpson said, "I'm the one who killed him, you know I did." He said he "waited outside for a little while, I guess until they

went to sleep, and then snuck in through a window *** the laundry window, I think."[8] Simpson said he used an axe, and hit Archie first. "Kim got up apparently startled, she tried to run for it, and he, I guess, turned on her and hit her with the axe several times." He "continued to hit her with the axe." Simpson said he could hear Archie "making gurgling noises." Simpson referred to the murders as his "wet work." Simpson was boastful. (XV 878-80) Later, Simpson returned to Durrance's home and told Durrance that the police took his DNA; he wanted to know if Durrance had told anyone about the murders. (XV 881) Durrance waited to tell the police about Simpson's statements until he thought he could use the information in exchange for leniency in his case, but by the time of Simpson's trial Durrance had received no leniency from the State. (XV 882-92) Durrance was upset when he found out that Simpson was an informant against him. (XV 892)

Durrance viewed the death of Big Archie as the loss of a client and a friend, and he said it was not unusual to to have disputes in the drug trade. (XV 895)

Simpson testified at length on his behalf. (XVII 1373 et seq.) He admitted to eight prior felony convictions and a misdemeanor involving dishonesty. (XVII 1376-77) As discussed above, Simpson claimed he cut his hand during a power outage. (Some of the details of his testimony are discussed in Issue VI infra.)

Simpson also called several of Big Archie's family members to the

[8] Therefore, Simpson's (IB 9) unqualified characterization of Durrance's trial testimony of Simspon's statement to him concerning Simpson entering through the victim's laundry room window is not entirely accurate.

stand. Brenda Cook Bennett testified that Little Archie had threatened to kill Big Archie, Kimbler, and their baby. At the time Big Archie told her that "he was just running his mouth, not to pay no attention to him."[9] (XVIII 1473) Troy Crook acknowledged that he "heard through the grapevine" "that Little Archie said that the baby Kim was going to have would not see the light of day." Detective Williams testified regarding statements that Troy Crook and Misty McNeish made to him about Little Archie's statements concerning the baby not "seeing the light of day." (XVIII 1490-91)

Simpson called Terry Thompson as a witnesses, who testified that he saw Little Archie and Shawn Smallwood on July 15, 1999, at about midnight at a gas station about three or four miles from Big Archie's house. Their demeanor "seemed pretty normal." Little Archie had no blood on him, and he was not wearing a black sweatsuit. He said that afterwards he went to "Uncle Archie's" house and received no answer at the door. (XVIII 1497-99) Detective Hinson took the stand again and testified that Simpson told him that he (Simpson) felt threatened by Detective Bialkowski (XVIII 1520-21) and that Simpson came in voluntarily for an interview (XVIII 1528).

On January 29, 2007, the jury returned its guilty verdict, and when it was polled, each juror confirmed the verdict. (XIX 1725-28) The guilty verdicts were filed with the clerk that day. (V 791-92) Subsequent events[10]

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[9] Simpson discusses (IB 10) the victim's son's statements indicating he was upset about Kim Kimbler's baby. He omits Brenda Crook Bennett's qualification that "his dad told me that he was just running his mouth, not to pay no attention to him." (XVIII 1473)

[10] The State discusses facts pertaining to Juror Cody under the sections treating Issue I through IV infra. However, at this juncture the

in the case are described in the issues that follow.

SUMMARY OF ARGUMENT

Simpson raises six issues in this direct appeal from his double murder convictions and two death sentences for the axe murders of Archie Crook Sr. and Kimberli Kimbler.

The first four issues concern Juror Cody's concern over her vote of guilty. All of the events that Simpson argues supports these claims occurred a week after the jury's unanimous guilty verdict, which all the jurors unequivocally confirmed with a "yes" in open court. In the interim, the trial court had conducted two hearings in which penalty phase instructions and evidence were discussed. The parties even entered into a penalty-phase stipulation at one of those hearings. Therefore, when Juror Cody wanted a "word" with the judge on February 6, 2007, the guilty verdict had been rendered and nothing she stated that inhered in that verdict could be used to impeach the verdict or to require further juror interviews. Indeed, her statements appeared to indicate that some of the jurors convinced the others to rely exclusively on the physical evidence, which included compelling DNA evidence; in any event, her statements on February 6, 2007, clearly concerned matters entirely internal to the jury's deliberations, thereby inhering in the verdict.

In Issue V, Simpson complains that the trial judge did not provide

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State notes its disagreement with Simpson's quotation from defense counsel's statement and the Judge's response, "Right." As will be amplified infra, Simpson takes these quotes out of context.

him with a definitive ruling on his motion in limine concerning so-called "reverse" Williams rule evidence. His issue statement contains within it the reason for denying him relief on this issue. He must obtain a ruling from the trial court to appeal. It was incumbent upon Simpson to proffer at trial whatever evidence he sought to admit and obtain a ruling when the record would be more fully developed, as the judge advised his counsel.

Issue VI complains about several prosecutor arguments to the jury. None of them was preserved through contemporaneous objection, and none and all do not constitute fundamental error, and indeed, none of them was improper. The prosecutor's arguments were grounded on the evidence.

ARGUMENT

ISSUES I THROUGH IV: DID THE TRIAL COURT REVERSIBLY ERR IN ITS HANDLING OF JUROR CODY'S POST GUILTY-VERDICT STATEMENTS?

Issues I through IV of the Initial Brief (IB 27-53) concern Juror Cody. Simpson, in essence, improperly seeks to retroactively void the jury's guilty verdict using some statements of Juror Cody concerning her inner thought processes and using her account of purely internal discussion within the jury room.

In this section, the State presents an overview of these four issues, a timeline as background for them and quotes from the trial court's written order on this matter. It also discusses applicable principles of preservation and demonstrates that Simpson has improperly inferred repeatedly that the trial court concluded that Juror Cody was timid. In the following sections, the State will address each of the issues, with this

section and the discussion in Issue I providing some additional foundation for the discussions of ensuing issues.

A. Overview of Juror Cody-related claims.

No matter how many issues into which Simpson breaks this claim, it and its permutations have no merit. None support a reversal. The convictions and death sentences should be affirmed.

Issue I improperly relies upon the statements of Juror Cody to the trial judge to argue that the jury verdict of guilty, rendered and confirmed through individual juror polling a week prior, was really not unanimous. To the contrary, the verdict had been rendered and confirmed on January 29, 2007 and Juror Cody's statements to the trial judge on February 6, 2007, inhered in the verdict, making those statements ineffectual to impeach the verdict and ineffectual to justify further inquiry. Likewise, Issue III improperly relies upon Juror Cody's verdict-inhering statements to the trial court to argue that the trial court reversibly erred in proceeding with the penalty phase. Similarly, Issue IV relies upon Juror Cody's judicially non-cognizable February 6th statements to argue that more judicially non-cognizable interviews should have been conducted. Issue II incorrectly contends that the trial judge must be reversed because he should have cleared the courtroom prior to discussing Juror Cody's concerns with her.

B. Contextual timeline.

The following timeline provides the background and context for these

issues:

1/26/07 State rested (XVII 1364);

1/26/07 Defense rested (XVIII 1529);

1/29/07 Defense reopened (XVIII 1564-84) and rested again (XVIII 1584);

1/29/07 State's first closing argument (XVIII 1590-XIX 1647), defense's closing argument (XIX 1649-75), State's second closing argument (XIX 1675-92), and jury instructions (XIX 1695-1716);

1/29/07 **At 2:50pm, jury buzzed and announced that it reached a verdict (XIX 1724); foreperson Ray Granberry handed the verdict forms to court personnel and the clerk orally published in open court the verdicts of guilty as charged as to each count, and, at the trial judge's direction, the clerk polled the jury, with each juror, including Juror Cody, unequivocally answering that these were each's verdicts; written verdicts, filed with clerk (XIX 1724-28)**;

2/1/07 Judge conducted a hearing concerning the penalty phase at which the attorneys and the judge engaged in extensive discussions concerning aggravators and mitigators, and penalty-phase jury instructions, and penalty-phase evidence (XX); at this hearing, the judge announced that the parties "hereby" stipulate that Simpson "had been previously convicted of a felony and was on felony probation" (XX 1790-91); in open court, Simpson personally confirmed the stipulation (XX 1791); the written stipulation was filed on February 1, 2007 (V 807);

2/5/07 Trial court conducted another penalty-phase jury instruction hearing (XXI);

2/6/07 After briefly discussing penalty-phase jury instructions again (XXII 1824-25), the judge announced that **Juror Cody** told his judicial assistant as she walked in the door that "she would like a word with Judge Arnold" (XXII 1826); Judge Arnold inquired of Juror Cody who indicated that "there were some questions that were unanswered before the verdict was made" (XXII 1827-28); the defense then moved for a mistrial and indicated that it will do a motion for jury interview (XXII 1828); additional discussions ensued (XXII 1828 et seq.), as detailed in the following paragraphs and issues.

Ultimately, at the end of the penalty phase, Juror Cody reiterated that the guilty verdicts were hers and that her confusion resulted from conversations with her fellow jurors. (XXII 1981)

C. Applicable preservation principles.

Principles of preservation apply to jury-related claims like Issues I through IV. See, e.g., Willacy v. State, 640 So.2d 1079, 1083 (Fla. 1994)(claim of unqualified juror; "By failing to make a timely objection, Willacy waived the claim"); Joiner v. State, 618 So.2d 174 (Fla. 1993)(requiring timely objection to preserve a claim of improperly selected jury). Cf. Arbelaez v. State, 775 So.2d 909, 920 (Fla. 2000)(defense request to "conduct 'fishing expedition' interviews with the jurors after a guilty verdict is returned" subject to principle of procedural bar in postconviction proceeding).

Pursuant to principles of preservation, it is incumbent upon the non-prevailing party below not only to timely object or timely move for a mistrial but also to timely provide the trial judge a correct reason. Without the same claim timely presented to the trial judge as in the appellate claim, the latter cannot generally be the basis of a reversal. See, e.g., Farina v. State, 937 So.2d 612, 629 (Fla. 2006)(relevancy objection insufficient to preserve appellate claim of prosecutorial misconduct; not "the specific contention asserted as legal ground for the objection ... below"); Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for "proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed,

and provide[] him an opportunity to correct it at an early stage of the proceedings'"); Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997)(argument below was not the same as the one on appeal). This principle of preservation applies even to constitutional appellate claims. See, e.g., White v. State, 753 So.2d 548, 549 (Fla. 1999)(state Constitutional due process "not raised to the trial court or to the district court of appeal during the direct appeal from his conviction"; "not preserved"); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and Chambers was not presented to the trial court … procedurally bars"); Geralds v. State, 674 So.2d 96, 98-99, 98 n. 6 (Fla. 1996) (two claims of unconstitutionality of jury instructions pertaining to death penalty proceedings).

D. Judge's Order.

The trial court's rulings were correct, as well as the following trial-court written reasoning (formatting in original):

> "It is a well settled rule that a verdict cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations." Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988). "A matter which does essentially inhere in the verdict itself involves, for instance, a juror not assenting to the verdict, a juror misunderstanding the instructions of the court, a juror being unduly influenced by the statements of his fellow-jurors, or a juror being mistaken in his calculations or judgments." Parker v. State, 336 So. 2d 426, 427 (Fla. 1st DCA 1976); Russ v. State, 95 So.2d 594, 600 (Fla. 1957). Stated more clearly, "[j]urors' claims that they were 'unduly influenced by the statements or otherwise of [their] fellow jurors' inhere in the verdict and therefore are not subject to inquiry." Defrancisco v. State, 830 So.2d 131, 133 (Fla. 2d DCA 2002) (quoting Devoney v. State, 717 So.2d 501, 502 (Fla. 1998) [quoting Marks v. State Road Dep't., 69 So.2d 771, 774-75 (Fla. 1954)]).

All of Juror Cody's statements and allegations fall within matters which inhere in the verdict itself and there was no indication that there was any external influence. See Devoney v. State, 717 So.2d 501 (Fla. 1998); Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988); Defrancisco v. State, 830 So.2d 131 (Fla. 2d DCA 2002); Walters v. State, 786 So.2d 1227 (Fla. 4th DCA 2001); Powell v. State, 414 So.2d 1095 (Fla. 5th DCA 1982). Based on the above, this Court finds that the Defendants['] Motion [for mistrial] was properly denied when made, and that the Defendant is not entitled to relief on this claim.

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In the Motion for Individual and Sequestered Jury Interview the Defendant requests permission to further interview Juror Cody as well as permission to interview the other "un-named" jurors referenced by Juror Cody. Shortly before commencement of the penalty phase, Juror Cody requested to speak with the Court. Juror Cody was brought into open court where she proceeded to inform the Court that there "were some questions that were unanswered before the verdict was made … there was a little bit of confusion as far as how you make the decision." The Court, counsel for the State and counsel for the Defendant were allowed to inquire as to the basis of Juror Cody's statements. … It is based upon this inquiry that the Defendant now seeks another interview of Juror Cody as well as an interview of other "un-named" jurors. The Defendant avers that, based on Juror Cody's statements, it appears that other "un-named" jurors shared in the confusion and/or the opinion of Juror Cody.

There is a strong public policy in Florida which mandates against juror interviews. Harbour Island Security Co. v. Doe, 652 So.2d 1198 (Fla. 2d DCA 1995); Dept. of Transportation v. Rejrat, 540 So.2d 911 (Fla. 2d DCA 1989). All of Juror Cody's statements and allegations fall within matters which inhere in the verdict itself. Devoney v. State, 717 So.2d 501 (Fla. 1998); Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988); Defrancisco v. State, 830 So.2d 131 (Fla. 2d DCA 2002); Walters v. State, 786 So.2d 1227 (Fla. 4th DCA 2001); Powell v. State, 414 So.2d 1095 (Fla. 5th DCA 1982). Juror Cody's statements expressed her thoughts, impressions, reasoning and rationale for her verdicts. Her comments did not reveal any improper external influence, but, instead, showed proper, normal, jury deliberations and thought process. "It is irrelevant whether the jurors' thoughts and beliefs were incorrect or reflect a misunderstanding or misapplication of the facts or the law. Such mistakes are beyond inquiry." Jones v. State, 928 So.2d 1178, 1192 (Fla. 2006). Accordingly, the Defendant's request for individual and sequestered jury interviews is denied. See §90.607(2)(b), Florida Statutes; Jones v. State, 928 So.2d 1178 (Fla. 2006); Devoney v. State, 717 So.2d 501 (Fla. 1998); Gould v. State, 745 So.2d 354

(Fla. 4th DCA 1999).

(V 863-64, 865-66)

On appeal, the judge's order and rules are presumed correct. See, e.g., Goodwin v. State, 751 So.2d 537, 544 (Fla. 1999)("We interpret section 924.051(7) as a reaffirmation of the important principle that the defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection"); Dragovich v. State, 492 So.2d 350, 353 (Fla. 1986)("it must be presumed that the trial judges of this state will comply with the law"). As to each issue, Simpson has failed to overcome that presumption.

E. Simpson's self-serving inference of Juror Cody's timidness.

On appeal, Simpson mistakenly and self-servingly bases appellate inferences upon his trial counsel's uncertain inference. For example in Issue I, the Initial Brief asserts:

> According to defense counsel, Juror Cody's initial jury poll indicated her timidness, as she was looking down when she stated her verdict. (ROA pg. 1830) The trial court acknowledged this fact and observation by saying 'right' after counsel's statement. (ROA pg. 1830)

(IB 29) Simpson repeats this assertion throughout the first four issues of his brief, for example, in Issue I, "timid juror who was looking down…" (IB 35); "noticeable hesitancy" (IB 36); "hesitation during polling" (IB 37). Simpson's Issue II starts with asserting that Juror Cody was "apparentl[ly] ambiguous" in her "affirmation of the verdict during polling" (IB 38) and excerpts, out of context, purported support from the transcript (See IB 38-39). Issue II (IB 43) repeats the excerpt. Issues III (IB 45) and IV (IB

48) begin with reliance upon, "Given the facts above," and "Using the facts above." Issue IV (IB 52-53) again excerpts the transcript out of context.

Simpson's repetition of **his** **appellate** conclusion does not make it any more accurate. To the contrary, this is the exchange between defense counsel and the trial judge on which Simpson's inferences are based:

> [DEFENSE COUNSEL]: I know the Court has overruled my objection to clearing the courtroom with press and everything. I'm concerned with her timidness and this is the juror that I think was looking down during the verdict.
>
> THE COURT: Right.

(XXII 1830) Simpson's reliance on this exchange is misplaced for several reasons: (1) If defense counsel noticed ambivalence in a juror's confirmation of her jury vote, he should have raised the matter contemporaneously with his observation, not a week later; (2) The word "Right" can mean many things, depending upon its intonation; (3) In the exchange here, the word "Right" finds nothing because of defense counsel's compound statement that preceded it, perhaps with the judge confirming that he overruled the request to clear the courtroom; (4) Even if "Right" was spoken with affirming intonation and even if it referred to the latter part of defense counsel's statement, the statement itself only indicates that defense counsel "thinks" that this is the juror who was looking down; and (5) Even if "Right" was spoken with affirming intonation, even if it referred to the latter part of defense counsel's statement, and even if, arguendo, it is assumed that this is actually a juror who was looking down during juror polling, the act of looking down does not necessarily mean that she was so timid that her unequivocal "Yes" to the question, "are

these your verdicts?" (XIX 1726) really did not mean "yes."[11]

Finally and most importantly, (6) the trial judge's order explicitly found contrary to Simpson's self-serving inference:

> On January 29, 2007, the jury returned verdicts finding the Defendant guilty as charged in both counts. The jury was polled and **all affirmatively stated** that guilty was in fact their verdict as to each count.

(V 862)

The bottomline on Simpson's appellate timid-juror assertion is that if the juror was so timid in the manner she said "yes" when she was polled that her "yes" appeared not to really mean "yes," defense counsel should have raised the matter when she was polled, not a week later. And, if it is important to a claim for the Judge to have confirmed defense counsel's observations, defense counsel should have made the confirmation clear then rather than months later in an appellate initial brief. Indeed, neither of Simpson's written pleadings that addressed Juror Cody (V 822-23, 824-25) mentioned her supposed timid demeanor during polling.

The State now addresses seriatim each of the four issues concerning Juror Cody.[12]

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[11] Further, Juror Cody's assertion of her concern on February 6, 2007, belies Simpson's characterization of her as extremely timid.

[12] Another threshold matter applicable to all of the first four issues is whether interviewing Juror Cody without swearing her in for that purpose undermines reliance upon what she says. It appears that generally a matter pertaining to jury deliberations is raised through some sort of sworn testimony. See, e.g., England v. State, 940 So. 2d 389, 402 (Fla. 2006)("judge took testimony from both the juror who allegedly made the comment and the juror who allegedly received the comment"); Boyd v. State, 910 So.2d 167, 177 (Fla. 2005)(after letter presented to judge, "trial court held a hearing concerning the allegation and heard testimony from

ISSUE I: DID THE TRIAL COURT UNREASONABLY DENY A MOTION FOR NEW TRIAL WHERE, OVER A WEEK AFTER THE GUILTY VERDICT WAS RENDERED AS UNANIMOUS, ONE JUROR SAID IT WAS NOT UNANIMOUS? (RESTATED)

A. Only a portion of Issue I was preserved.

This issue argues that because "Juror Cody stated the guilty verdict was not hers, the trial court had to either grant a mistrial or send the jury back to deliberate." (IB 27)[13] The contention that a mistrial should have been granted was apparently preserved through its arguable timely presentation to the trial judge, whereas the assertion of requiring the jury to re-deliberate its guilty verdict was not preserved through timely presentation to the trial judge. Thus, on February 6, 2007, when this matter was initially discussed, defense counsel questioned the juror

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Woods-Alcide"); Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988)("one of the jurors stated, in an affidavit a week after the trial, that she was pressured into returning a verdict of guilty by one of the jurors and that other jurors had placed the burden on Mitchell to prove his innocence"); Marks v. State Road Dep't, 69 So. 2d 771 (Fla. 1954)(discusses affidavits).

However, arguably the interviews of Juror Cody face-to-face with the judge and counsel, and in the presence of the court reporter, clerk, and public probably embued the situation the with adequate indicia of solemnity so that formally swearing Juror Cody was unnecessary to otherwise consider the content of what she said in open court.

[13] Simpson incorrectly contends (IB 38) that the State waived this issue. As discussed supra, Simpson, as the non-prevailing party, bears the burden of preserving his appellate claim by presenting it to the trial judge and demonstrating error on appeal. In contrast, the State as the prevailing party below can generally advance on appeal any argument that supports the trial judge's decision below. See, e.g., Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review, also called the "tipsy coachman" doctrine; explained that the doctrine is inapplicable where the record on appeal does not support the alternative theory); Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638 (Fla. 1999); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it").

regarding the unanimity of the verdict (See XXII 1833-36) and then as soon as the Juror exited the courtroom, defense counsel argued: "Judge, I would renew my motion for mistrial. She indicated it was not her individual vote, Judge." (XII 1839) Later, defense counsel "renew[ed]" his motion for mistrial. (XXII 1974) While the motion for mistrial, stated as such, does not clearly match the appellate claim, the immediate context of the trial motion arguably clarifies the motion, preserving this portion of Issue I.

However, Simpson's Initial Brief fails to specify where defense counsel preserved the claim that the jury should have been sent back into the jury room and the State has not found[14] in the record where that argument was presented to the trial court, timely or otherwise (See XXII 1826-40, 1910-11, 1919, 1974-75, 1980-83; V 822-23, 824-26; X 1754-58).

Simpson's issue statement (IB 27) mentions the Fifth, Sixth, and Fourteenth Amendments of the U.S. and Florida Constitutions. These claims were not presented to the trial court, thereby failing to preserve them for appeal.[15] See, e.g., White, 753 So.2d at 549; Hill, 549 So.2d at 182;

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[14] An appellant, as a threshold matter, should be required to specify where in the record on appeal each of appellate issue/claim was preserved, rather than the appellee attempting to locate arguable preservation and, as a result, asserting lack of preservation. Requiring an appellant to specify where in the record a claim was preserved or specify why it is fundamental error should be a gateway matter, the "ticket," without which there would be no appellate review of each claim. Such a requirement would enable joinder of the threshold preservation matter from the outset of the briefing, enabling its full argumentation throughout the entire briefing process.

[15] "Fundamental fairness, due process and the interests of justice" are mentioned as purported support for Simpson's motion for further juror interviews (V 824-26) but not as purported support for the claims in Issue I, and even when mentioned to the trial court, these principles are stated

Geralds, 674 So.2d at 98-99. Moreover, these claims are not developed in the Initial Brief, thereby failing to preserve them at the appellate level. See Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence, that the prosecutor engaged in improper burden shifting"; "Because Lawrence's bare claim is unsupported by argument, this Court affirms the trial court's summary denial of this subclaim"), citing Shere v. State, 742 So.2d 215, 217 n. 6 (Fla. 1999), Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999), Coolen v. State, 696 So.2d 738, 742 n. 2 (Fla. 1997); Williams v. State, 845 So.2d 987, 989 (Fla. 1st DCA 2003)(fundamental error argument not made until reply brief; "Because appellant failed to raise these issues in the initial brief, we cannot consider them"); Fernandez v. Fernandez, 727 So.2d 1108, 1109 (Fla. 4th DCA 1999)("We have not considered the appellant's additional arguments as to the ability to pay a second future purge amount, since such was raised for the first time in the reply brief"); U.S. v. Wiggins, 104 F.3d 174, 177 n. 2 (8th Cir. 1997) ("passing reference to this procedure as erroneous," but "failed to argue this point or cite any law in support of that contention").

In any event, none of the Issue I claims has any merit.

B. Issue I is meritless.

To support a mistrial, Simpson must show that "an error is so prejudicial as to vitiate the entire trial." See, e.g., England v. State,

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perfunctorily, thereby failing to preserve anything. See discussion in Issue IV infra.

940 So.2d 389, 402 (Fla. 2006)(alleged juror misconduct). "It has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity." 940 So.2d at 402, citing Thomas v. State, 748 So.2d 970, 980 (Fla. 1999), citing Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978)). See also Snipes v. State, 733 So.2d 1000, 1005 (Fla. 1999)("motion for mistrial after the jury heard that Snipes had been in jail before trial"). The trial judge's "decision on a motion for a mistrial is within the discretion of the trial judge." Snipes, 733 So.2d at 1005. Accord England, citing Doyle v. State, 460 So.2d 353, 357 (Fla. 1984).

Discretionary matters are reviewed on appeal under the reasonableness standard. See Trease v. State, 768 So.2d 1050, 1053 n.2 (Fla. 2000)("Discretion is abused only 'when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court'"), quoting Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990); Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980)("where no reasonable man would take the view adopted by the trial court").

In reaching its decision, as a general rule, factual matters found by the trial judge are entitled to deference on appeal if there is competent, substantial evidence to support the trial court's decision. See, e.g., Boyd v. State, 910 So.2d 167, 178 (Fla. 2005)(alleged juror misconduct based on external improper influence not accredited).

Therefore, Simpson bears the burden of establishing that, in the specific situation below, no reasonable person would have concluded that declaring a mistrial was not an "absolute necessity." Prior to applying this test, the State addresses the purported factual basis for this issue.

The predicate for this issue is incorrect. The jury's guilty verdict was announced, confirmed, re-confirmed, and filed **as unanimous** on Monday, January 29, 2007. The verdict of guilt had been rendered unanimously over a week prior to Juror Cody expressing her concern on Tuesday, February 6, 2007. Indeed, there is competent, substantial evidence to support the trial court's finding that "[o]n January 29, 2007, the jury returned **verdicts** finding the Defendant guilty as charged in both counts." The trial court's order continued by explaining how the jury was polled, with all the jurors indicating that the verdict was theirs. (V 862) The State elaborates.

On January 29, 2007, at 2:50pm, the jury buzzed, indicating that it reached a verdict (XIX 1724). When the jury entered the courtroom, the trial judge confirmed his understanding: "Ladies and gentlemen, I understand you have reached verdicts." (XIX 1725) The judge then examined the verdict forms and instructed the clerk to "publish the verdicts," resulting in the clerk's published declaration:

> State of Florida versus Jason Andrew Simpson. Verdict, count one: We, the jury, find the defendant guilty of first degree murder as charged in the Indictment.
>
> Foreperson, Ray Granberry. 2007, January 29.
>
> State of Florida versus Jason Andrew Simpson. Verdict, count two: We, the jury, find the defendant guilty of first degree murder as charged in the Indictment.

Foreperson, Ray Granberry.

(XIX 1725-26)

At defense counsel's request, the each juror was then polled. Each of the 12 jurors (XIX 1726-27), including Juror Cody (XIX 1726), unequivocally answered "Yes" to the question, "are these your verdicts?" The verdict forms showing the guilty verdicts were filed that same day, on January 29, 2007. (V 791-92)

Moreover, the record had been clear what the preceding jury action meant. On January 29, 2007, the same day as the jury verdict, the trial judge properly instructed the jury concerning its options for its verdict as to each of the counts and as to the meaning of its "verdict": guilty as charged, guilty of the highest offense proved beyond a reasonable doubt, or if "no offense has been proved beyond a reasonable doubt, then, of course, your verdict must be not guilty." (XIX 1709) The trial judge explained: "… deciding a verdict is exclusively your job." He continued: "Only one verdict may be returned as to each crime charged. The verdict must be unanimous. That is[,] all of you must agree to the same verdict. The verdict must be in writing and for your convenience we have prepared forms of verdict …." (XIX 1709) The trial court reminded the jury again:

> Let me remind you one more time that your verdict finding the defendant either guilty or not guilty must be unanimous. That is[,] it must be the verdict of each juror as well as the jury as a whole.

(XIX 1711) He explained that there are "no rules as far as the time for your deliberations. *** You may take as short or as long a period of time as you need to reach a verdict, …." (XIX 1715) The judge explained to the

jury that, when they have reached a verdict, they should notify the bailiff only that the verdict is reached and not the nature of the verdict. (XIX 1714)

Therefore, the trial judge properly instructed the jury that its verdicts will constitute its unanimous decision regarding guilt or innocence, and the jury subsequently rendered its unanimous verdict. The jury's verdict was announced and confirmed as unanimous in open court.

Under the foregoing circumstances, Simpson has not shown an "absolute necessity" to terminate the trial and start over, and the trial judge's determination not to declare a mistrial has not been shown on appeal to be unreasonable. Indeed, by any reasonable definition of "verdict," the verdict of guilt had been rendered unanimously prior to Juror Cody raising her concern over a week later. As such, principles of finality are invoked, making the verdict impenetrable to attack by anyone, including one or more jurors, except where there is a showing of certain improper outside influences. The rules of evidence, statutes, and case law resoundingly reflect these principles. All of them turn on the rendering of the verdict. The verdict indicates that the jury has made its decision. The timing of a subsequent phase of the case is analytically irrelevant.

Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988), rejected a claim like Simpson's, in which allegedly a juror did not agree with the verdict, thereby making the verdict supposedly non-unanimous. Mitchell affirmed the conviction of first degree murder and the death sentence. It focused on the jury verdict, not the phase of the case:

> Mitchell next argues that he should be granted a new trial because one of the jurors stated, in an affidavit a week after the trial, that she was pressured into returning a verdict of guilty by one of the jurors and that other jurors had placed the burden on Mitchell to prove his innocence. It is a well settled rule that a **verdict** cannot be subsequently impeached by conduct which inheres in the verdict and relates to the jury's deliberations. *Russ v. State*, 95 So.2d 594 (Fla. 1957); *Langford v. King Lumber & Mfg. Co.*, 123 Fla. 855, 167 So. 817 (1935); *Linsley v. State*, 88 Fla. 135, 101 So. 273 (1924). This principle has also been applied in capital cases. *Songer v. State*, 463 So.2d 229 (Fla.), *cert. denied*, 472 U.S. 1012 … (1985). Consequently, we cannot consider the juror's comments as requiring a new trial because all of the activities mentioned involve the jury's deliberations and inhere in the verdict.

Like Mitchell, Simpson's conviction and sentence merits affirmance.

Devoney v. State, 717 So.2d 501 (Fla. 1998), affirmed the District Court of Appeal's reversal of a trial court's ruling granting a new trial. There, in effect, the foreperson juror, after the guilty verdict, complained that other jurors had pressured him to vote guilty due to the defendant's prior speeding ticket, contrary to an explicit instruction from the trial judge to "totally" disregard the ticket. The foreperson in Devoney described the pressure from one of the other jurors during deliberation: "Do you--if you continue to vote not guilty, do you want to turn this man loose knowing that he's got a DUI now and a prior record? Do you want to turn him loose so as to kill somebody else?" 717 So.2d at 502.[16] In this sense, like Simpson argues here, the juror complained that it actually was not a unanimous verdict. Like here, the Devoney juror described events in the jury room in which the jurors disregarded a jury instruction. This Court essentially held in Devoney that the trial court

[16] In Devoney, the trial court accredited the juror's version of events.

erred in relying upon the foreperson's attack on the guilty verdict. Here, guided by Devoney, the trial court correctly decided that it could not lawfully rely upon Juror Cody's statements to set aside the guilty verdict.

Accordingly, Section 90.607(2)(b) provides:

> Upon an inquiry into the validity of a **verdict** or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

The operative term in this rule/statute is "verdict," not whether another phase of the case has begun.

Johnson v. State, 593 So.2d 206, 210 (Fla. 1992)(capital case), cited to §90.607(2)(b), Fla. Stat. (1985), and to a number of cases in rejecting a claim based upon a foreperson's version of events within the jury's deliberations. While Johnson concerned a postconviction attack, its holding was based on the rendering of the verdict:

> This Court finds that the jury foreman's testimony is not admissible because '[i]t is a well settled rule that a **verdict** cannot be subsequently impeached by conduct which inheres in the **verdict** and relates to the jury's deliberations.' *Mitchell v. State*, 527 So. 2d 179, 181 (Fla.), *cert. denied*, 488 U.S. 960, 102 L. Ed. 2d 392, 109 S. Ct. 404 (1988); *accord* § 90.607(2)(b), Fla. Stat. (1985). This rule has also been applied in capital cases. *See Songer v. State*, 463 So. 2d 229 (Fla.), *cert. denied*, 472 U.S. 1012, 86 L. Ed. 2d 728, 105 S. Ct. 2713 (1985).

593 So.2d at 210 (footnote omitted).

Songer v. State, 463 So. 2d 229, 231 (Fla. 1985), applied Section 90.607(2)(b), to a capital case. There, the Court was presented with "the testimony of a juror at Songer's trial that she believed she could only consider the statutorily enumerated mitigating factors." "Regarding the testimony of the juror," Songer held that "the trial judge properly

determined that it was not admissible." Here, Juror Cody's statements to the trial court cannot be the basis for setting aside the jury's verdict.

The Federal Rules of Evidence Rule 606(b) is similar to the Florida provision, but more detailed. Like Florida, the federal rule focuses on the existence of a "verdict," not on whether there is another phase of the case remaining.

United States v. Pavon, 618 F. Supp. 1245, 1246 (Fla. S.D. 1985), rejected claims similar to Simpson's and relied upon the "respected precept dating from Lord Mansfield's time -- jurors may not impeach their own **verdict**. A jury has the obligation to follow the law and abide by the court's instructions, but **once that verdict is rendered**, the court may not inquire into the jury's deliberative process."

United States v. Stacey, 475 F.2d 1119, 1121 (9th Cir. 1973), rejecting a claim like Simpson's, highlighted the significance of the jury's decision, its verdict, not any additional phase of the case: "After a **verdict** is returned a juror will not be heard to impeach the verdict when his testimony concerns his misunderstanding of the court's instructions *** "[T]he [improper] inquiry would … concern the mental processes by which the jurors reached **their decision** and would therefore be barred by the nonimpeachment rule."

The decision of the jury is what controls, not whether an alleged imperfection in the implementation that system can be fixed before the next event occurs in the case. For example, if the facility of fixing an imperfection controlled, then in a non-death case, the verdict could be

attacked at any time prior to when the defendant is sent to prison.

The presence of another phase in the case in the future is irrelevant because the operative principle is protecting the jury's decision on guilt and innocence. However, arguendo, even assuming that the end of the gulit-phase or beginning of the penalty-phase of the case somehow factored into the test, this issue would still have no merit. The guilt-phase was definitely completed, and the next phase had actually begun prior to February 6, 2007,[17] when Juror Cody first expressed her concern. On February 1, 2007, the trial court conducted a hearing at which the attorneys and the judge engaged in extensive discussions concerning **penalty-phase** aggravators and mitigators, **penalty-phase** jury instructions, and **penalty-phase** evidence (XX). At this penalty-phase hearing, the judge announced that the parties "hereby" stipulate that Simpson "had been previously convicted of a felony and was on felony probation" (XX 1790-91), and in open court, Simpson personally confirmed the stipulation (XX 1791). The penalty-phase written stipulation was filed on February 1, 2007. (V 807)

On February 5, 2007, the trial court conducted another hearing concerning penalty-phase jury instructions (XXI), at which the judge announced several of the penalty-phase jury instructions he intended to

[17] The trial court's order stated that "Juror Cody did not indicate any desire to avoid her verdict until a week later, at the beginning of the penalty phase" (V 863); as timelined in the section ISSUES I THROUGH IV supra and narrated in the ensuing text above, the trial court had actually, prior to Juror Cody's initial expression of concern, conducted extensive hearings pursuant to the penalty phase, including even a penalty-phase stipulation.

give the jury, thereby essentially ruling upon which penalty-phase jury instructions the evidence supported, for example: will give jury instructions on "while engaged in the commission of the crime of burglary" (XXI 1803); will instruct the jury on "especially heinous …" (XXI 1808-1809); will not give jury instruction on "avoiding arrest" (XXI 1803) or "previous capital felony" (XXI 1803); and will instruct concerning several mitigators (XXI 1805-1807). Accordingly, when court reconvened on February 6, 2007, the judge wrapped up a couple of penalty-phase jury instruction matters (XXII 1824-26) prior to initially addressing the Juror Cody matter (XXII 1826). Subsequent to all the forgoing, Juror Cody expressed her concerns. (XII 1827)

Simpson (IB 32-33) relies upon Chung v. State, 641 So.2d 942 (Fla. 5th DCA 1994). The trial court correctly distinguished Chung:

> This Court is mindful of cases like Chung v. State, 641 So.2d 942 (Fla. 5th DCA 1994). However, this Court finds the instant case distinguishable as Chung did not involve a capital murder trial. While the jury was not officially discharged, the guilt phase portion was completed and a unanimous verdict was reached. Juror Cody did not indicate any desire to avoid her verdict until a week later, ….

(V 863) In contrast to here, where the jury had been dismissed for the day, where a week passed, and where hearings had transpired pursuant to the penalty-phase, including a consummated stipulation concerning the penalty phase, in Chung the juror's expression of the verdict not being hers flowed immediately from and within seconds of the polling of the jury. In this sense, the Chung juror's reservation was intertwined with that polling process, as if she had expressed the reservation when polled. Thus, Chung

stressed not only the fact that the jury had not yet been discharged but also that the juror said this was not her verdict "while still in the jury box," 641 So.2d at 944. Moreover, in Chung, unlike here, the trial judge reversed his own ruling. There, unlike here, the judge directed the jurors to deliberate again and then when the jury was hung, she reversed herself and attempted to reinstate the jury verdict she had, in effect, already vacated. Chung reversed the trial judge reversal of herself. By requiring the jury to deliberate again, under the distinctive courtroom facts observed by the trial judge, such as hesitation during the polling and the unbroken stream of events flowing from the jury polling, that judge had determined that the verdict was not final. Here, under any reasonable construction of the events, Juror Cody's February 6th expression was not flowing out of, and moments from, when she was polled and while she then remained in the jury box.

In Walters v. State, 786 So.2d 1227 (Fla. 4th DCA 2001)(cited at IB 27), immediately after the jury was polled and while the jury was still in the jury box, a juror expressed some reservation about the verdict. Walters held, "In this case the trial court quite correctly concluded that the thoughts expressed by this juror were inherent in the verdict and did not constitute grounds for granting a new trial."

Walters' distinguishing of State v. Thomas, 405 So.2d 220 (Fla. 3d DCA 1981), on which Simpson (IB 3334) also attempts to rely, is instructive: "In *Thomas* a juror, when the jury was polled, did not respond affirmatively that it was her verdict, which resulted in the trial court's

granting a new trial." Therefore, Thomas, 405 So.2d at 221, reasoned:

> It is clear from the record that the Court Clerk knew that the juror (Bennett) had not responded in the affirmative at the time she was polled, although the Court Reporter's notes indicate to the contrary. The trial court's failure, at the time the juror was being polled, to secure a definitive answer from her because of the failure of the Deputy Clerk to properly announce the juror's failure to respond either in the affirmative or the negative to the question as to whether or not it was her verdict, contributed to a verdict being published which was not unanimous.

Here, in contrast, Juror Cody singly and clearly responded when she was polled. Further, in Thomas, the State was the non-prevailing party below, making it incumbent upon the State to demonstrate error on appeal. It could not show that the trial court erred in concluding that it could not resolve whether the juror personally acknowledged that the verdict was hers. Here, in contrast, if the trial judge had granted a new trial based upon any statements Juror Cody made a week after clearly indicating the verdict as hers, he would have erred.

If somehow the merits of any of the U.S. constitutional rights mentioned in the Initial Brief's issue statement (IB 27) are reached,[18] they have none. First, the jury did reach a unanimous verdict, as discussed above. And, second, there is no U.S. constitutional right to a unanimous verdict. As Apodaca v. Oregon, 406 U.S. 404, 410-411 (1972), held and reasoned:

> [T]he essential feature of a jury obviously lies in the

[18] The issue statement (IB 27) also mentions the "Florida Constitution," but it does not pose any argument and does not even cite a provision. (See also table of authorities at IB iv-viii) Any such claim is unpreserved at the trial as well as the appellate level, see Lawrence, citing Shere, Teffeteller, Coolen; Williams; Fernandez; Wiggins.

> interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . .' [citing Williams, 399 U.S. 78, at 100]. A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment. As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one.

See also Ballew v. Georgia, 435 U.S. 223 (1978) (Sixth Amendment to the United States Constitution requires a jury be composed of at least six persons); Williams v. Florida, 399 U.S. 78, 86 (1970)("We hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth").

ISSUE II: DID THE TRIAL COURT REVERSIBLY ERR BY REFUSING TO CLEAR THE COURTROOM PRIOR TO INTERVIEWING JUROR CODY? (RESTATED)

After Juror Cody had informed the trial judge's judicial assistant that she wanted to have a "word" with the judge, the judge announced to the parties that "we'll bring her out and ask her what she wants." (XXII 1826) Juror Cody entered the courtroom without the other jurors being present and the judge told her that he cannot talk with her without everybody else being present. (XXII 1827) Cody said, "there are some questions that were unanswered before the verdict was made." (XXII 1827-28) The judge then held a bench conference, at which defense counsel moved for a mistrial because "there's a question of guilt." (XXII 1828) A couple of times, defense

counsel expressed concern about the victim's family in the first three rows in the courtroom, with the last time also mentioning the "press here" and characterizing the judge's comments as his "ruling" denying his request to exclude the victim's family and the press. (See XXII 1829, 1830) At one point, defense counsel also mentioned "clear[ing] the courtroom for the questioning." (XXII 1829) The trial judge and counsel for the parties then interviewed Juror Cody at some length. (See XXII 1831-39) Therefore, the captioned Issue II statement (at IB 38),[19] especially as it relates to defense counsel's request to exclude the press and the victim's family, appears to have been preserved.[20]

At the outset, the State continues to dispute self-serving inferences hostile to the trial judge's ruling. As discussed previously, see ISSUES I THROUGH IV, "E," there has been no showing that Juror Cody was "timid," "ambiguous," or "very uncomfortable" (IB 38, 38-39, 43) in rendering her verdict. Thus, although Juror Cody wished to have a "word" with the judge (XXII 1826), she then proceeded to speak openly about her concerns (See XXII 1827-39).

Simpson's reliance on Waller v. Georgia, 467 U.S. 39 (1984), and kindred cases is misplaced. Those cases do not dictate when a courtroom

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[19] Technically, it appears that the characterization of Juror Cody's in-court statements as "testimony" is incorrect. See footnote in section ISSUES I THROUGH IV supra and discussion in this issue infra.

[20] However, the constitutional provisions tacked-on at the end of this issue (IB 44) were not preserved below by defense counsel presenting them to the trial judge, See, e.g., White; Hill; Geralds, nor are they developed in the brief to preserve them on appeal, See Lawrence, citing Shere, Teffeteller, Coolen; Williams, 845 So.2d 987; Fernandez; Wiggins.

must be closed at the defendant's request, but rather they provide criteria for justifying closing it over the objection of the defendant. Thus, Waller stated the issue before it as "the extent to which a hearing on a motion to suppress evidence may be closed to the public over the objection of the defendant consistently with the Sixth and Fourteenth Amendment right to a public trial." 467 U.S. at 40-41. In sum, if Waller's criteria are met, then the Judge can constitutionally close the courtroom over the defendant's objection.

In contrast to Waller, Issue II claims that it was **error for the trial judge not to exclude the public**. Simpson's discussion ignores other rights of other parties to be present. The press has a right to attend. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 610-611, 611 n.27 (1982) (State statute that mandates "closure respecting the testimony of minor sex victims is constitutionally infirm"; "violates the First Amendment to the Constitution"; "right of access to criminal trials is of constitutional stature"; right not absolute; emphasized history of open trials and "public access to criminal trials permits the public to participate in and serve as a check upon the judicial process"). Moreover, in Florida, the victim's family also has a constitutional right to attend the trial, unless there is a showing that their presence "interfere[s] with the constitutional rights of the accused." Art. I, §16, Fla. Const. Here, speculation that Juror Cody is timid, speculation that her timidity may interfere with communicating with the court, and speculation that it prejudiced the defendant are insufficient to justify excluding the victim's

family.

In a situation analogous to this case, Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 509 (1984), reversed a trial court's closure of voir dire proceedings and sealing of the transcript. While the facts of Press-Enterprise Co. concerned a prolonged closure, its principles and holding still apply here. There, as Simpson contends should have been done here, the trial court closed the proceedings to encourage juror's candor requisite for a fair trial. The California appellate courts denied relief from the trial court's order, and the United States Supreme Court reversed. The U.S. Supreme Court discussed the long history of open trials and their presumptively open status, and reasoned that "the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." 464 U.S. at 505. Here, the concerns of a juror over her verdict is "a matter of importance ... to the criminal justice system."

Press-Enterprise Co., 464 U.S. at 508, reasoned:

> For present purposes, how we allocate the 'right' to openness as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial. No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness.
>
> The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the

> appearance of fairness so essential to public confidence in the system.
>
> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *** Closed proceedings, although not absolutely precluded, **must be rare and only for cause shown that outweighs the value of openness**.

Here, the request of a juror to speak with the judge alone and defense counsel's speculation that the juror might be timid are woefully inadequate to close the proceedings. Simpson failed to show "cause" to justify this juror interview as one of the "rare" occasions for closing the proceedings by clearing the courtroom.

Press-Enterprise Co. compared situations in which a juror's privacy interests would be weightier, such as in a trial of an alleged rape of teenage girl, "a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode." 464 U.S. at 512. This type of situation may be presented to the judge "in camera but with counsel present and on the record," later "making a transcript of the closed proceedings available within a reasonable time," or when justified, sealing the transcript or omitting the name of the juror. Id. Such a situation stands in stark contrast to the defense's speculative attempted justification here.

Put in the terms of Globe Newspaper Co. v. Superior Court, 457 U.S. at 606-607, Simpson failed to present to the trial judge or this Court, a "weighty" justification for denying access by press and public and failed to show that the denial of access was "**necessitated** by a **compelling**

governmental interest, and is narrowly tailored to serve that interest." Here, there was no weighty justification, no "necessit[y]," no "compelling" reason.

In Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378, 379 (Fla. 1987), this Court discussed Press-Enterprise Co. In Burk, the trial judge excluded the public and press from depositions. Burk summarized Press-Enterprise Co. as holding "that it was error to close the proceedings and totally suppress the transcript because there were no findings that the right to a fair trial and privacy interest were threatened and there was a failure to consider alternatives to closure of the jury selection and suppression of the transcript." Burk, 504 So.2d at 381, also discussed Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II) where "the trial court closed a forty-one day preliminary hearing wherein the state presented evidence of probable cause." Burk pointed out the U.S. Supreme Court reliance upon that preliminary hearing in California as "essential to the proper functioning of the criminal justice system." By focusing on the distinctive nature of depositions in Florida, such as their openendedness as discovery inviting irrelevant and prejudicial discussions in them, Burk, 504 So.2d at 383-84, ultimately decided against the press's right to attend pre-trial deposition. Unlike Burk, here the interviews of Juror Cody were clearly within the realm of "judicial proceedings," which Burk was careful to distinguish, 504 So.2d at 384.

In Bundy v. State, 455 So.2d 330, 337 (Fla. 1984), like here, the trial judge denied a defense counsel request to close courtroom proceedings

because of a concern regarding prejudice. However, there, unlike here, the concern over prejudice concerned the "admissibility of the bite-mark evidence and expert comparison testimony," a matter much weightier than a defense counsel's passing thoughts that a juror might be timid. Bundy upheld the trial court denial of the defense request. A fortiori, the trial court denial here should be upheld.

Bundy collected extensive case law and described the onerous test that a litigant must meet to justify clearing the courtroom. Subsequent to Bundy's trial, as the Bundy opinion discusses, this Court adjusted to developing United States Supreme Court case law and announced a "somewhat relaxe[d] ... test for the propriety of closure of pretrial proceedings and temporary sealing of records" and concluded that even under the new test, the "trial court's refusal to close hearings does not appear on the record to have been an abuse of discretion." 455 So.2d at 338.

Bundy summarized the "relaxed test" of Miami Herald Publ. Co. v. Lewis, 426 So.2d 1 (Fla. 1982):

> [O]ne who seeks to close a pretrial proceeding or seal the record thereof in a criminal case must establish: (1) that closure is necessary to prevent a serious and imminent threat to the administration of justice; (2) that no alternative measure is available, other than a change of venue, to protect the defendant's right to a fair trial; and (3) that closure would be effective in protecting the rights of the accused without being broader than necessary to accomplish this purpose.

455 So.2d at 338. Simpson's counsel failed to satisfy any of these criteria.

Moreover, in order to prevail over the rights of the victim's family to remain in the courtroom through the proceedings pursuant to Article I,

§16, Fla. Const., the speculation of defense counsel was woefully insufficient. Farina v. State, 680 So.2d 392, 395 (Fla. 1996), is instructive:

> Farina also notes that the trial court overruled his objection that victims and their families were seated in the first two rows in front of the jury box. He argues that this was prejudicial because the jurors and prospective jurors could see the families become emotional or embrace. Victims do, however, have a constitutional right to be present at court proceedings. Art. I, § 16, Fla. Const. Farina has not demonstrated prejudice from jurors seeing these victims or family members. The jurors undoubtedly could have seen the families' emotions or embraces even if they were seated at other locations in the courtroom. Thus, we find no merit to this issue.

See also Booker v. State, 773 So.2d 1079, 1095 (Fla. 2000)(rule of sequestration of witnesses competing with right of family member to be present in court; "to be granted relief based on this type of issue, a party must establish prejudice"; held an abuse of discretion to exclude the witness, but harmless); Gore v. State, 599 So.2d 978, 986 (Fla. 1992)("no abuse of discretion in allowing this witness to be excluded from the rule of sequestration"; "presence of Roark's stepmother in the courtroom during the trial did not prejudice Gore. Ms. Roark was not a material witness for the State"); Sireci v. State, 587 So.2d 450, 454 (Fla. 1991)("We reject Sireci's complaint that it was improper to allow the wife and son to remain in the courtroom after their testimony. Article I, section 16(b) of the Florida Constitution guarantees victims of crimes, including the next of kin of homicide victims, the right to be present at all crucial stages of criminal proceedings, to the extent that it does not interfere with the constitutional rights of the accused"). Compare Hall v. State, 579 So. 2d 329, 331 (Fla. 1st DCA 1991)("We do not construe Article I, section 16(b),

of the Florida Constitution to permit victims or their families to actively participate in the conduct of the trial by sitting at counsel table or being introduced to the jury").

Here, Simpson has failed to demonstrate any prejudice from allowing the victim's family, or the press, to remain in the courtroom while Juror Cody was interviewed. To the contrary, the record shows that she said what was on her mind for pages of transcript. (XXII 1831-39)

Further, under other authorities discussed in these four issues, the inhering content of Juror Cody's statements to the trial court make them a nullity and, in any event, certainly not sufficiently weighty to justify excluding the public, the press, or the victim's family.

ISSUE III: DID THE TRIAL COURT REVERSIBLY ERR BY ALLOWING THE TRIAL TO PROCEED TO THE JURY PENALTY PHASE? (RESTATED)

On appeal in Issue III, Simpson argues (IB 45) that "it was error to force the juror to go forward to the penalty phase of the trial without fully resolving the issue of the juror and their apparent disagreement with the verdict." According to Simpson (IB 45-46), forcing Juror Cody to decide the penalty phase "effectively forced Ms. Cody into having to find Appellant guilty … and forced the jury into suppressing their doubts of guilt into a finding of guilt, subsequently rending a recommendation for death." Simpson continues (IB 46-47) by arguing that, while its doubts regarding guilt were still unresolved, the jury was exposed to Simpson's prior criminal record, a matter they would not have heard in the guilt phase.

Simpson's appellate-level creativity in Issue III was not matched at the trial level. The trial court did not have the "benefit" of Simpson's appellate arguments. Therefore, this issue was unpreserved at the trial court level. See Farina, 937 So.2d at 629 (relevancy objection insufficient to preserve appellate claim of prosecutorial misconduct; not "the specific contention asserted as legal ground for the objection ... below"); Harrell, 894 So.2d at 940 (three components for "proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'"); Gore, 706 So.2d at 1334 (argument below was not the same as the one on appeal). Defense counsel asserted none of the foregoing reasons to the trial judge. Instead, as close as the State has been able to find to this claim, defense counsel contended that "I don't think we can proceed penalty-wise if there's a question of guilt and she's [Juror Cody] raised it" (XXII 1828), but defense counsel did not argue that the jury and the guilt-phase would be contaminated by the penalty phase, as he now argues on appeal. None of Issue III is preserved.[21]

However, if the merits of Issue III are reached, it has none. Simpson has failed to establish that the trial judge was unreasonable in rejecting arguments he did not make at the trial court level or that the events about which he complains vitiated the entire trial.[22]

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[21] The "Fifth, Sixth, and Fourteenth Amendment rights of the U.S. and Florida Constitutions" (IB 44-45) were not presented to the trial court in conjunction with any claim in Issue III. They are not preserved below.

[22] Simpson fails to discuss a standard of review. Since he appears to

A fundamental flaw in Issue III is that it assumes that the guilty verdict had not been effectively rendered. It had. Prior to Juror Cody raising her concern, a week earlier the guilty verdict had been announced in open court; had been confirmed through polling at which each juror, including juror Cody, explicitly, distinctly, and unequivocally endorsed the guilty verdict; and, filed in written form with clerk. See discussions in "ISSUES I THROUGH IV" section and in Issue I supra. Further, as discussed supra, in the week between (a) the announced, confirmed, and filed guilty verdict, and (b) Juror Cody's expression of concern, the trial court had conducted two penalty phase hearings, at which jury instructions and a stipulation was resolved for the penalty phase. The guilt phase had been completed.

Accordingly, Simpson has failed to muster any authoritative support for the creativity in Issue III.

Simpson (IB 46-47) argues that the presentation of his criminal history prejudiced the jury. Simpson overlooks, however, that he testified in the guilt phase of the trial and admitted at that time to eight felony convictions and a misdemeanor crime of dishonesty. (XVII 1376-77) In the guilt phase, there was also evidence that Simpson was entangled in networks of known criminals, including dangerous ones, which placed him in a position to be a snitch for the police. (See, e.g., VIII 1429-33, 1438-39,

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be arguing that the judge should have stopped the trial, the applicable standard would appear to be the same as for the denial of a mistrial. See Issue I supra. Simpson would, therefore, need to establish that the trial judge was unreasonable and that the events vitiated the entire trial.

1451-52; XIV 650-53, 688-89) Further, in the guilt phase Simpson admitted to being a "drug addict," although he claimed to be "recovering." (XVIII 1434) Simpson's defense was built on his involvement with criminals and crime. In other words, any penalty-phase "prejudice" due to evidence of Simpson's prior criminal history was substantially redundant to the "prejudice" already incurred in the guilt-phase, including through his own testimony. See Snipes v. State, 733 So. 2d 1000, 1005 (Fla. 1999) (witness indicated that defendant had been in jail pending trial; "Snipes asserts that the motion [for mistrial] should have been granted because his pretrial incarceration was not relevant to any issue and because this information undermined the presumption of innocence and raised an inference that he was especially dangerous or had committed other crimes"; affirmed in part because jury would already know this information due to the tried charge of murder); Ferguson v. State, 417 So. 2d 639, 642 (Fla. 1982)("Archie stated that the defendant knew Joe Swain (the person who allegedly orchestrated the killings) because 'the first time ---- my first time in prison, all three of us was together'"; no request for jury instruction; insufficient for mistrial). Cf. Cox v. State, 966 So. 2d 337, 356 (Fla. 2007)(no Strickland prejudice where essentially same prejudicial evidence otherwise presented, curative instruction).

ISSUE IV: DID THE TRIAL COURT REVERSIBLY ERR BY REFUSING TO GRANT INDIVIDUAL, SEQUESTERED INTERVIEWS OF ALL THE JURORS BASED UPON JUROR CODY'S STATEMENTS? (RESTATED)

A. Only a portion of Issue IV was preserved.

This claim (IB 48-53) contends that the trial court should have

granted defense counsel's oral and written motions to interview all of the jurors because of Juror Cody's statements to the trial court. In terms of additional interviews of any jurors prior to the jury considering penalty phase evidence, this claim was not preserved in the trial court. In terms of interviewing all of the jurors near the end of the penalty phase and after the penalty phase, the claim arguing that additional interviews should have been conducted[23] was preserved. The State elaborates.

As timelined and discussed supra, on February 6, 2007, Juror Cody indicated to the trial judge's judicial assistant that she wanted to have "a word" with the judge. (XXII 1826) Juror Cody indicated that there were "unanswered" "questions" "before the verdict was made." (V 1827-28) At that point defense counsel moved for a mistrial, not for additional juror interviews. The judge indicated that "you're not at that point yet" and explicitly asked defense counsel if "we" should ask Juror Cody more questions now or later. (XXII 1828) Defense counsel responded:

> I think we need to do it now, Judge. If the Court is inclined to deny the motion for mistrial, I'd do a motion for jury interview and specifically ask **her** questions. I don't think we can proceed penalty-wise if there's a question of guilt and she's raised it.

(XXII 1828) Counsel and the judge then discussed parameters of interviewing Juror Cody. (XXII 1829-30. See also Issue II supra.) The interview of Juror Cody ensued, including some questioning by defense counsel. (XXII 1831-38)

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[23] However, any appellate reliance on Fla.R.Crim.P. 3.575 (See IB 49, 50) was not preserved. "[A]pplicable Florida Rules of Criminal Procedure" (V 824) is no more specific that objecting to the admissibility of evidence based upon "applicable rules of evidence," both failing to provide the trial judge with requisite specificity for preservation.

The Judge then asked counsel if they have "[a]nything further," to which defense counsel responded, "No, sir." (XXII 1838) At this point, defense counsel renewed his motion for mistrial but did not request additional interviews, and the trial judge indicated that defense counsel "may make a further inquiry later or may not." (XXII 1839-40) Some penalty phase jury instructions (XXII 1840-42), penalty phase opening statement (XXII 1842-43), and penalty phase evidence from several witnesses (XXII 1843-1900) ensued. Immediately prior to the last penalty-phase witness testifying, defense counsel "request[ed] a juror interview," and defense counsel thanked the trial judge for his indicated intent at that time[24] to interview all the jurors. (XXII 1910-11) When the jury retired to deliberate on the penalty, defense counsel "renew[ed]" his "motion to individually question each juror before they're discharged today" (XXII 1974). After the jury returned its death recommendations, defense counsel again moved orally (XXII 1982) and in writing (V 824-26) to interview the other jurors. In sum, there was no motion to interview the jurors prior to the commencement of presenting the penalty phase evidence to the jury, and any such appellate claim is unpreserved for appeal.

The State also notes that Issue IV perfunctorily attempts to invoke the Fifth, Sixth, and Fourteenth Amendment "rights of the Florida and U.S. Constitutions." (IB 48) While, subsequently, some argument is developed

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[24] In the midst of the penalty phase, the prosecutor presented the trial judge some case law "as to the potential issue this morning," and the trial judge indicated that he would consider the issue further. (See XXII 1919-20)

concerning the Fourteenth and Sixth Amendments of the U.S. Constitution (IB 50), the State has found no argument in Issue IV of the Initial Brief concerning the Fifth Amendment or the Florida Constitution, thereby failing to preserve these claims at the appellate level. See Lawrence, citing Shere, Teffeteller, Coolen; Williams, 845 So.2d 987; Fernandez; Wiggins.

Simpson's post-trial motion contended that "fundamental fairness, due process and the interests of justice" support providing additional juror interviews. (V 824-26) However, it failed to specify which constitution and which provisions, thereby failing to preserve constitutional claims below. See, e.g., White; Hill; Geralds.

In any event, Simpson was not entitled to any more interviews of any jurors.

B. Issue IV is meritless.

The trial court's ruling and order denying further juror interviews were correct and merit affirmance. The trial court ruled:

> There is a strong public policy in Florida which mandates against juror interviews. Harbour Island Security Co. v. Doe, 652 So.2d 1198 (Fla. 2d DCA 1995); Dept. of Transportation v. Rejrat, 540 So.2d 911 (Fla. 2d DCA 1989). All of Juror Cody's statements and allegations fall within matters which inhere in the verdict itself. Devoney v. State, 717 So.2d 501 (Fla. 1998); Mitchell v. State, 527 So.2d 179, 181 (Fla. 1988); Defrancisco v. State, 830 So.2d 131 (Fla. 2d DCA 2002); Walters v. State, 786 So.2d 1227 (Fla. 4th DCA 2001); Powell v. State, 414 So.2d 1095 (Fla. 5th DCA 1982). Juror Cody's statements expressed her thoughts, impressions, reasoning and rationale for her verdicts. Her comments did not reveal any improper external influence, but, instead, showed proper, normal, jury deliberations and thought process. "It is irrelevant whether the jurors' thoughts and beliefs were incorrect or reflect a misunderstanding or misapplication of the facts or the law. Such mistakes are beyond inquiry." Jones v. State, 928 So.2d 1178, 1192 (Fla. 2006). Accordingly, the Defendant's request for individual and

> sequestered jury interviews is denied. See §90.607(2)(b), Florida Statutes; Jones v. State, 928 So.2d 1178 (Fla. 2006); Devoney v. State, 717 So.2d 501 (Fla. 1998); Gould v. State, 745 So.2d 354 (Fla. 4th DCA 1999).

(V 865-66)

Here, contrary to Simpson's contention (See IB 52-53),[25] Juror Cody never alleged that the jury was subjected to any external influences. Instead, at one juncture, she indicated that within the jury "there was a little bit of confusion." (XXII 1831) She explained that "other jurors" had persuaded her "to just look at the physical evidence," that the physical evidence was more valuable. (XXII 1835-37) She said that if she considered "all the people that came in and testified," she would "have a different decision." (XXII 1838) She later reiterated that her confusion was due to what other jurors said during the deliberations. (See XXII 1980-81) All these are matters internal to the jury deliberations and thereby inhere in the verdict. They do not justify further juror interviews, which would have essentially been prohibited "'fishing expedition' interviews" in search of external influences. Cf. Arbelaez v. State, 775 So.2d 909, 920 (Fla. 2000)(postconviction proceeding).

As discussed under Issue I, Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988), rejected a claim like Simpson's, in which allegedly a juror did not agree with the verdict, thereby making the verdict supposedly non-unanimous. Mitchell affirmed the conviction of first degree murder and the

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[25] As elsewhere, Simpson relies (See IB 52-53) on his improper and ungrounded inference that Juror Cody timidly confirmed her verdict when polled. See discussion in section "E" of "ISSUES I THROUGH IV" supra.

death sentence. As there, "we cannot consider the juror's comments as requiring a new trial because all of the activities mentioned involve the jury's deliberations and inhere in the verdict." Therefore, Juror Cody's comments cannot be considered, and other jurors' comments, if they had been interviewed, could not be considered either. The trial court merits affirmance when it denies interviews based on allegations that cannot be considered because they inhere in the verdict.

Reaves v. State, 826 So.2d 932, 943-944 (Fla. 2002), summarized the principles of the law and rejected a claim, like this one, that essentially alleged that the jury did not follow the judge's instructions, in Reaves by one juror allegedly "attempt[ing] to discuss guilt prematurely." It explained that the only two instances in which juror interviews would be permitted is where there were "allegations which involve an overt prejudicial act or external influence, such as a juror receiving prejudicial nonrecord evidence or an actual, express agreement between two or more jurors to disregard their juror oaths and instructions."[26] Reaves cited to Baptist Hosp. of Miami v. Maler, 579 So.2d 97, 99 (Fla. 1991), which clarified that "Jurors may not even testify that they misunderstood the applicable law." Therefore, misunderstanding the law is not included within "overt prejudicial act" that could justify interviewing jurors.

Reaves cited to a number of additional applicable cases:

> *Sims v. State*, 444 So.2d 922, 925 (Fla. 1983)('A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of

[26] Here, there has been no showing of such an "express agreement."

> its misunderstanding or not following the instructions of the court. Such misunderstanding is a matter which essentially inheres in the verdict itself. . . . Therefore the court did not err in refusing to allow further questioning of the juror."); *see also Devoney v. State*, 717 So. 2d 501, 504 (Fla. 1998) (discussions of matters which the jury was explicitly instructed to disregard does not constitute an overt act of misconduct that would permit inquiry into the verdict); *Johnson*, 593 So.2d at 210 (questioning the jury foreman about misunderstandings of the jury instructions during their deliberations in the penalty phase of a capital case is testimony which 'essentially inheres in the verdict' and hence is inadmissible).

Accordingly, Reeves' conclusion applies here: "Consequently, as Reaves has not sufficiently alleged any fact which involves an overt prejudicial act that would necessitate a new trial, the trial court was correct in prohibiting juror interviews."

In Hyde & Schneider v. United States, 225 U.S. 347, 382-383 (1912),

> The motion for a new trial set forth that the verdict was the result of an agreement between certain of the jurors who believed all of the defendants should be convicted and certain jurors who believed that all of the defendants should be acquitted, by which agreement the acquittal of Benson was exchanged for the conviction of Hyde and the conviction of Schneider for the acquittal of Dimond. And this was brought about, it is contended and argued, as the result of what 'under the circumstances amounted to coercion by the court.'

Hyde held that "the testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors and can receive no corroboration." Here, everything that Juror Cody indicated concerned matters that "essentially inhere in the verdict." Where, generally public policy "mandates against juror interviews" (XXII 865), Simpson was not entitled to a further probe into such jury-internal matters.

Marks v. State Road Dep't, 69 So. 2d 771, 774-775 (Fla. 1954),

adopted the following from an Iowa case:

> [A juror's] affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast.

Here, Juror Cody's in-court statements during the judge's and counsels' interview of her "may not be received" to require any further action, even if they could be interpreted as indicating that she did "did not assent to the verdict" or "misunderstood the instructions of the Court" or "was unduly influenced by the statements or otherwise of his fellow-jurors."

Johnson v. State, 593 So.2d 206, 210 (Fla. 1992)(capital case), rejected a postconviction claim based upon what the jury foreperson said "about jury pollings during deliberations and the jury's understanding of the court's instructions" and reasoned that the foreperson's statement "'essentially inheres in the verdict' as it relates what occurred in the jury room during the jury's deliberations." Such juror testimony is inadmissible. Johnson "caution[ed] against permitting jury interviews to support post-conviction relief for allegations such as those made in this case." Here, Juror Cody's statements cannot be used to impeach the jury verdict, and if the trial judge had not, in effect, heeded this Court's caution and had improperly granted additional juror interviews, the product of those interviews would not be competent or admissible evidence upon which to base any judicial decision regarding the jury verdict.

Accordingly, Duckett v. State, 918 So. 2d 224, 231 (Fla.

2005)(capital case; postconviction) citing Johnson v. State, 593 So.2d at 210, held that "Duckett is not entitled to juror interviews because his allegation involves the verdict itself and relates to the jury's deliberations."

As discussed in Issue I, supra, Section 90.607(2)(b), Fla. Stat., declares jurors incompetent to testify concerning matters that inhere in the verdict, and the applicable federal rule of evidence and applicable federal case law are instructive and indicate that Juror Cody's comments are insufficient to justify any further judicial action, including additional interviews. See Federal Rules of Evidence Rule 606(b); United States v. Pavon, 618 F. Supp. 1245 (S.D. Fla. 1985)(policies of "freedom of deliberation, the finality of verdicts, and the protection of jurors"; denied the defense motion for "a new trial, or at the very least, an investigation into the possibility of jury misconduct" Here, the trial court properly denied the defense request for additional investigation; United States v. Kelley, 461 F.3d 817, 831 (6th Cir. 2006)(cited approvingly to Pavon, discussed the distinction between the dynamics of jury deliberations and "impermissible external or extraneous influence," and rejected a claim based upon the jury improperly considering the defendant's failure to testify; relied upon Federal Rule of Evidence 606(b), reasoning that "evidence regarding a juror's thoughts about the trial …is incompetent and cannot be admitted"; collecting cases from "sister" courts); Davis v. United States, 47 F.2d 1071 (5th Cir. 1931)(rejected a claim based upon jurors allegedly disregarding the trial

judge's jury instruction not to hold against the defendant that he did not testify).

Farmers Co-operative Elevator Asso. v. Strand, 382 F.2d 224, 230-31 (8th Cir. 1967), concerned an "affidavit of one of the jurors to the effect that the jurors discussed the likelihood of insurance coverage and its effect and that they gave inadequate consideration to and misinterpreted the court's instructions." Defendant "asked that the members of the jury be summoned for examination" and also moved for a new trial. Here, and there, the trial court properly denied such request to examine the jurors based upon one juror's allegations of matters inhering in the verdict (and the motion for a new trial).

In United States v. Stacey, 475 F.2d 1119, 1120-1121 (9th Cir. 1973), "[w]ithin twenty minutes after the verdict was returned, Stacey's counsel met with three of the jurors and was told that, had they known that intent to defraud was an element of the offense, they would have acquitted Stacey." The jurors elaborated on their misunderstanding. The federal Court of Appeals affirmed the trial court's denial of a defense request to interview the jurors further via depositions. It reasoned:

> After a verdict is returned a juror will not be heard to impeach the verdict when his testimony concerns his misunderstanding of the court's instructions. *Walker v. United States*, 298 F.2d 217, 226 (9th Cir. 1962). This rule does not violate a defendant's constitutional rights. *See Stein v. New York*, 346 U.S. 156, 178-179, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953).

475 F.2d at 1121 (footnote omitted). Here, at most for Simpson, Juror Cody expressed her confusion concerning jury instructions. Her statements were not the basis for attacking the jury's verdict; therefore, as in Stacey,

interviews of additional jurors were properly denied.

Based on the forgoing authorities, Simpson's reliance (IB 50-51) upon Pozo v. State, 963 So. 2d 831 (Fla. 4th DCA 2007), is misplaced. Pozo, unlike here, concerned an allegation of harassment of jurors by the sherrif's office, that is, "evidence of actual prejudice resulting from **external** juror influence." There was no such allegation here. Instead, Juror Cody told the trial court about matters entirely internal to the deliberations, that is, matters that inhere in the jury's verdict.

Compare, e.g.: Russ v. State, 95 So. 2d 594, 601 (Fla. 1957)("facts alleged …, if established as true, … of such character as to raise the presumption of prejudice. They show that the jury in its deliberation considered statements of fact not properly before it"); Mattox v. United States, 146 U.S. 140 (1892)(prejudicial newspaper article read to jury).

For all the foregoing reasons and authorities, as well as those discussed by the trial judge, his decision not to allow further juror interviews merits affirmance. And, although unnecessary, the judge's decision was further validated at the end of the penalty phase by Juror Cody's re-re-affirmation of her guilty verdict. (See XXII 1980-81)

ISSUE V: DID THE TRIAL COURT REVERSIBLY ERR BY FAILING TO DEFINITIVELY RULE ON THE DEFENSE'S PRE-TRIAL MOTION IN LIMINE REGARDING THE ADMISSIBLITY OF REVERSE WILLIAMS RULE EVIDENCE?[27] (RESTATED)

This issue (IB 53-54, 55) states that the trial judge made no definitive ruling on Simpson's pre-trial motion in limine, styled as "Motion for Pre Trial Ruling on Admissibility of 'Reverse' Williams Rule Evidence" (IV 714-16, 722-24) [28] "U/A" Is written on the order accompanying a copy of the motion (IV 725), indicating that the trial judge took the motion under advisement (See clerk's notes for Jan 05 2007 at the beginning of vol. V). Because on its face this claim alleges that there is no trial court ruling to appeal, this claim fails to state a claim cognizable on direct appeal. Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994), is on point:

> In his next claim, Armstrong argues that the trial judge erred in failing to grant his pretrial request for a Magnetic Resonance Imaging (MRI) test to determine whether Armstrong had a brain tumor,

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[27] Simpson's issue statement confuses two different legal principles: reverse Williams Rule evidence and impeachment evidence. The nature of Reverse Williams Rule evidence is, through evidence of someone else committing one or more very similar crimes, to show that someone else committed the crime being tried. On the other hand, impeachment evidence targets undermining the believability of the other side's witness. Issue V argues that the judge did not rule on Simpson's motion in limine, which was limited to "Reverse" Williams Rule evidence (See IV 722-24). Nevertheless, the topic of impeachment arose at the hearing on the motion in limine and the trial judge properly addressed the topic commensurate with the level of details with which the defense presented.

[28] The State does not fully address the correctness of the trial judge's oral preliminary rulings because they are not contested on appeal. Instead of claiming that the trial judge's rulings were incorrect, this issue claims that the judge did not rule. If Simpson's Reply Brief attempts to contest the content of the judge's rulings, the State objects. Such a claim would be a different issue than the one presented in the Initial Brief.

> a fact which could have been used in mitigation. The record reflects that, at the pretrial competency hearing, four experts testified regarding Armstrong's competency to stand trial: three testified that he was competent to stand trial; one testified that he was incompetent to stand trial because of his inability to read and write and that an MRI might be helpful in identifying this deficit and other defenses. The trial judge reserved ruling on this issue and apparently never issued a ruling. Consequently, this issue is procedurally barred. *Richardson v. State*, 437 So.2d 1091 (Fla. 1983) (failure to obtain ruling on motion fails to preserve issue for appeal); *State v. Kelley*, 588 So. 2d 595 (Fla. 1st DCA 1991) (same).

Indeed, as the trial judge did here, it is common for trial courts, in their discretion managing a case,[29] to take motions in limine under advisement, essentially awaiting the full evidentiary context and a possible predicate to be fleshed out at trial. At that point, the record would be developed for a proffer to preserve any appellate claim based upon the trial court's ruling.

On January 5, 2007, the trial judge provided a pre-trial hearing on the motion in limine (IX 1674-95), but defense counsel could only tender vague facts of dark clothing and home invasion robberies[30] by multiple perpetrators using non-axe weapons such as guns and not involving a homicide. (See IX 1676, 1678, 1681-82)[31] In contrast, the facts presented

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[29] Compare Dickey v. Circuit Court, Gadsden County, 200 So. 2d 521, 527 (Fla. 1967)("Mandamus lies to require the performance of **nondiscretionary** official action").

[30] Compare, e.g., victims' house in this case not ransacked, purse still on table. (XIV 714-15).

[31] Part of the so-called reverse Williams Rule evidence also consisted of Simpson going with Griffis to Wal-Mart "to buy clothes that were similar to the ones used in this crime, black sweat pants and black sweat shirts." (IX 1678) At best for Simpson, this evidence may have implicated another suspect as an accomplice **with Simpson** in this murder. As to this evidence, the judge left the door open for the defense to pursue this line of questioning on cross-examination. (See IX 1679) Similarly, Griffis'

to the Judge for this case consisted of an axe murder involving drug disputes, not robbery (See, e.g., IX 1682-83) and involved a single perpetrator, Simpson (See IX 1683-84). The proposed evidence concerned events occurring from 1996 to 1998, in contrast to this July 1999 murder. (IX 1687) Some of the proposed reverse Williams Rule evidence did not even involve a home; one of them was a "burglary to a sporting goods store." (IX 1684) Moreover, Simpson posed supposedly similar incidents through apparently the self-serving and inadmissible hearsay of his statements to Lieutenant Wahl. (See IX 1674-76, 1680-81, 1688)

When defense counsel amplified the proposed evidence as also including a red hat and clothes swapping between Simpson and Simpson's accomplices in the robberies, the judge queried defense counsel: "How are we going to keep the jury from knowing your client was committing these other crimes with them? I guess we're not." Defense counsel then vaguely indicated that he did not intend to use the evidence in his case-in-chief, "only if Durrance and Griffis testify to what I think they're going to testify." Defense counsel continued by placing further conditions on his use of the evidence by stating if that happened, then it would be Simpson's decision "as to whether I call those witnesses or not. But we've had that discussion, judge." The Judge then indicated he would not limit the defense's "cross-examination to anything that's relevant. Anything relevant to their bias and motive towards your client or any rewards they're getting

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admission that he, Simpson, and Little Archie prepared for and attempted a home invasion would have harmed Simpson more than assisted him. (See IX 1685-86)

is certainly going to be admissible." (IX 1691)[32] He ruled that Simpson's statements to Lieutenant Wahl concerning others' crimes are hearsay. (IX 1691-92, 1693)[33] Concerning any police reports of other crimes, the Judge said that he did not know and "[w]e'll have to cross that bridge when you decide how you're going to put your case on." The Judge cautioned that the similarities of others' crimes would need to be more than simply black clothing. (IX 1692-94) The Judge reiterated that the defense "would have to convince me that there's sufficient similarity *** and then I will make the decision." (IX 1694) To the degree that the judge awaited further details to rule, he was reasonable, supporting affirmance. See Trease v. State, 768 So.2d 1050, 1054 (Fla. 2000)("Having failed to demonstrate the relevancy of the sought-after testimony by way of proffer, Trease cannot now claim error"), citing Finney v. State, 660 So.2d 674, 684 (Fla. 1995) ("Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result."); Lucas v. State, 568 So.2d 18, 22 (Fla. 1990) (holding that a party's failure to proffer what a witness would have said

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[32] For support for the judge's distinction between reverse Williams Rule evidence and impeachment, see McDuffie v. State, 970 So.2d 312, 325 (Fla. 2007). The State does not elaborate because Simpson only claims that the judge did not rule. He does not challenge the content of the rulings.

[33] For support for the judge's exclusion of hearsay, see Crump v. State, 622 So. 2d 963, 969 (Fla. 1993)("evidence here concerning the detective's interviews is hearsay that does not fall within one of the hearsay exceptions. The substance of the interviews does not constitute reverse *Williams* rule evidence because it would not have been admissible had the other suspect been on trial for the present offense. Thus, the trial court properly excluded these statements").

on cross-examination renders an alleged trial court error in the exclusion thereof unpreserved).

Ultimately, at the time of the pre-trial hearing, defense counsel explicitly stated, "I understand" and "I understand the ruling" (IV 1695); on appeal, the defense should be bound by its understanding. There was no complaint that laid the groundwork for Issue V.

In sum, Defense counsel "understood" the "ruling," and the Judge's guidance concerning the purported reverse Williams Rule evidence was co-extensive with the level of detail that the defense provided. The Judge did not refuse to rule on all aspects of the motion, and for those aspects of it on which he did not rule, he reasonably awaited context and further details from the defense.[34] Therefore, even overlooking, for the sake of

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[34] Moreover, although not raised on appeal, the trial judge's insistence on similarities beyond similarities in color of clothing was reasonable. For example, Rivera v. State, 561 So.2d 536, 540 (Fla. 1990), upheld the trial court's exclusion of proffered evidence. In contrast to here, there the details of the proposed evidence were submitted to the judge for a ruling. There, the non-similarities included no similarities concerning manner of death; condition, location, and disposition of the bodies. "The only alleged similarities were that both Staci and Linda were riding bicycles when they were abducted; they were both asphyxiated; their bodies were found in the same general area; and pantyhose was discovered in the vicinity of their bodies." In other words, where abductions are similar (from bicycles), where the manner of death is similar (asphyxiated), where the incidents were in the same area, and where there is a link in clothing (pantyhose) associated with the crimes, the similarities are insufficient. Here, there were no deaths at all in the supposed similar crimes, the weapon was different, the defense did not clarify any geographical proximity to this murder, and dark clothing and a hat for nighttime crimes are not as distinctive as panty hose. As in Rivera, here, on a preliminary basis, "the trial court did not abuse its discretion in excluding the proffered evidence." See also England v. State, 940 So.2d 389, 405 (Fla. 2006)(stipulation limiting the evidence); Huggins v. State, 889 So.2d 743, 762 (Fla. 2004)("Huggins asserts a theory of relevancy based largely on

argument, this issue's facial claim of no ruling being fatal to bringing it on appeal, see Armstrong, this issue still has no merit.

Although unnecessary to resolving this issue, the record is clear that the defense had opportunities prior to the evidence phase of the trial that begged for any doubts regarding the trial judge's position on the motion in limine to be resolved. Immediately prior to jury selection, defense counsel, the prosecutors, and the judge discussed a variety of pre-trial matters. (See XI 4-20) Defense counsel even brought up a motion in limine he had filed "months ago" on which he said the judge had only partially ruled. That motion sought to "prohibit the State from eliciting testimony." (XI 12) However, the defense did not raise the motion in limine that is the subject of Issue V during any of this discussion. Similarly, between the end of jury selection and the beginning of opening statements, counsels and the judge discussed several anticipated trial matters (See XIII 472-96), including experts (XIII 482-83), marking exhibits (XIII 483-84), such as exhibits to which the defense had no objection (XIII 484), a crime-scene model that the prosecution intended to use (XIII 486-87), and yet the defense failed to even mention the motion in limine that is the subject of this issue. If the motion had not been resolved sufficiently for the defense, then defense counsel would have pursued it.

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facts that were never proffered to the trial court"; "trial court is correct in its conclusion that the Lewis and Larson murders were quite dissimilar"), discussing Gore v. State, 784 So.2d 418, 432 (Fla. 2001), Kimbrough v. State, 700 So.2d 634 (Fla. 1997), Crump v. State, 622 So.2d 963 (Fla. 1993), Rivera v. State, 561 So.2d 536, 539 (Fla. 1990), and State v. Savino, 567 So.2d 892, 894 (Fla. 1990).

In conclusion, on its face Issue V fails because it concedes that the defense failed to obtain a ruling. Even if the analysis delves into the hearing on the motion in limine, the judge's rulings were reasonably measured and co-extensive with the level of detail and level of vagueness the defense tendered. In a word, at the time, the defense "understood" the rulings. On appeal, the defense should be bound by whatever understanding it grasped.

ISSUE VI: DID THE UNOBJECTED-TO STATEMENTS OF THE PROSECUTOR IN ARGUMENTS TO THE JURY CONSTITUTE FUNDAMENTAL ERROR? (RESTATED)

In this issue, Simpson attempts to escape the contemporaneous objection rule by arguing that several prosecution arguments to the jury constituted fundamental error. (IB 55-61)

"[C]onsiderable latitude is allowed in arguments on the merits of the case. Logical inferences from the evidence are permissible." Spencer v. State, 133 So.2d 729, 731 (Fla. 1961). Accordingly, Merck v. State, 32 Fla. L. Weekly S 789, 2007 Fla. LEXIS 2271 (Fla. 2007), recently summarized applicable law:

> Attorneys are permitted wide latitude in closing arguments but are not permitted to make improper argument. *Gore v. State*, 719 So.2d 1197, 1200 (Fla. 1998). Closing argument is an opportunity for counsel to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Counsel must contemporaneously object to improper comments to preserve a claim for appellate review. Unobjected-to comments are grounds for reversal only if they rise to the level of fundamental error. The Court considers the cumulative effect of objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial. *Brooks v. State*, 762 So.2d 879, 898-99 (Fla. 2000). A trial court has discretion in controlling opening and closing statements, and its decisions will not be overturned absent an abuse of discretion. *Dufour v. State*, 905 So.2d 42, 64 (Fla. 2005). We look

at the closing argument as a whole to determine whether that discretion was abused.

Simpson has failed not only to demonstrate fundamental error but also any error whatsoever. All of the prosecutors' statements were proper.

At the outset, it should be noted that the judge properly instructed the jury that it is the sole judge of the credibility of witnesses and the reliability of the evidence (XXII 1960-61; XIX 1705-1709) and that the arguments of counsel are not evidence (XVII 1590).

The first statement Issue VI targets is the following: "struck blow after blow until he left their lifeless and bleeding bodies gurgling on the floor." (XVIII 1591. See also XII 1937-38) This statement was based on the evidence. George Michael Durrance testified that Simpson boasted to him about the murder and hearing Big Archie gurgling:

> Q How did this defendant describe what took place inside that bedroom at Archie Crook, Sr.'s house?
>
> A Some of the details I remember is him saying that you could hear Archie making gurgling noises and referred to it as wet work, something like that.
>
> Q He referred to it as his wet work?
>
> A Wet work, yes, sir.
>
> Q How was he acting when he was telling you this?
>
> A Boastful.

(XV 880)

Moreover, the medical examiner described the multiple hacking injuries inflicted on the victims. Archie Crook, Sr., "died of chopping wounds of the head and neck." (XV 840) There was an injury to Archie

Crook, Sr.'s upper lip and left side of the head. He had a chopping wound on the left side of his neck behind the jaw line. (XV 842) There was a double chopping wound on the left side of his face and a superficial wound under the chin. (XV 843) One of the wounds "by his face" severed the carotid artery. (XV 856-57) He had an "incise wound" on his thumb, possibly the result of "trying to grab the cutting instrument" to defend himself, but "it could be other causes." (XV 846, 859) Kimberli Kimbler also "died of chopping wounds of the head and neck." (XV 840-41) She had several abrasions and lacerations and a "deep wound, chopping wound … on the right side of the face." (XV 846) Under her jaw was a "chopping wound that fractures." (XV 847) Two of her vertebrae were broken in her neck as a result of one of the chopping wounds; in other words, her neck was broken (XV 847, 847-48); it "fracture[d] bone and also impact[ed] the spinal cord at a level of the first and second vertebrae" (XV 848) and would have caused immediate death (XV 859). There was another wound under her chin. (XV 847) Her humerus, the big bone in her arm, was fractured due to a chopping wound. (XV 848) She also had an "incise wound on the back of the right arm" and an "abrasion just lateral to the breast" (XV 848) and abrasions on the right side of the abdomen (XV 849). Her third finger had an incise wound consistent with being a defensive wound. (XV 849)

Accordingly, for example, Chris Howard testified about the extensive blood at the scene. (XIII 554) Their bodies were "cold," that is, that is they were lifeless. (See XIII 554-56) The evidence technician testified concerning multiple injuries that he observed and blood spatter at the

murder scene, and photographs were introduced into evidence. (XIII 590-96)

Therefore, the evidence supported argument that blow after blow was struck until they were left gurgling at the scene. The prosecutor's argument was proper.

The comments Simpson targets here were more directly supported by the evidence than those in Rogers v. State, 957 So.2d 538, 549 (Fla. 2007)(ineffectiveness claim):

> *** she could feel the pain of the knife going through her body and could feel the pain of the knife as it was twisted and pulled out of her body, and then he did it again.

Rogers held that "These arguments were not improper because they were based upon facts in evidence--the victim was stabbed twice, she struggled with her assailant, and she remained alive for at least a short period of time after being stabbed." 957 So.2d at 549. See also, e.g., Pagan v. State, 830 So. 2d 792, 813 (Fla. 2002)("reference to a camouflage jacket in testimony introduced during trial. Thus, reference to a camouflage jacket during closing argument was not in error"); Gorby v. State, 630 So.2d 544, 547 (Fla. 1993)("prosecutor's comments simply drew the jury's attention to evidence of the expert's experience and qualifications…").

Simpson (IB 57, 58, 60) cites to Urbin v. State, 714 So.2d 411 (Fla. 1998), but there, unlike here, the prosecutor "literally put[] his own imaginary words in the victim's mouth, i.e., "Don't hurt me. Take my money, take my jewelry. Don't hurt me." Id. at 421. In Urbin, unlike here, the prosecutor also called the defendant's mother the "mistress of excuses" three times, and, unlike here, implored the jury: "If you are tempted to

show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jason Hicks on September 1, 1995, and that was none." Urbin does not apply here. Instead, here the prosecutor's comments were directly grounded upon the evidence.

Simpson complains (IB 57) about the prosecutor's reliance upon the victim's blood "speak[ing] the truth about who it was that wielded that axe inside that bedroom." (XVIII 1593) While, as Simpson argues, his DNA was not found in the bedroom where the victims were murdered, Simpson's DNA was identified on items of clothing on which the victim's blood was also identified. Thus, the prosecutor's argument continued: "Their blood, his pants. His DNA scattered across all of that clothing. It speaks the truth about what happened back in July of 1999 and it's the truth that this defendant cannot escape but he can't admit it either." (XVIII 1593) Therefore, Simpson was linked to the murder through the victim's blood. The victim's blood "speaks the truth … " as the prosecutor argued. The comment was based on the evidence.

Simpson argues (IB 57) that the prosecutor misrepresented that Archie Crook Jr. was eliminated as a suspect. Essentially, on appeal Simpson attempts to improperly advance a jury argument to this Court that there was some evidence suggesting that it was possible for Archie Crook Jr. to have committed the murders. The context for the prosecutor's argument was that the son cooperated with the police, and he was eliminated as a suspect. This argument was based on the evidence, in contrast to Simpson's behavior.

(See XVIII 1597-XIX 1605. See also XIV 694, 718-20, 745-46, 797-98) Indeed, Detective Williams explicitly testified that initially Archie Crook Jr. was a suspect but after speaking to several witnesses and interviewing him, he eliminated Archie Crook Jr. as a suspect. (XVIII 1494)

Simpson contends (IB 57-58) that there was "[n]o evidence" linking him to the recovered shoes and that, therefore, the prosecutor's argument at "ROA pg. 1622" was false. He then contends (IB 58) that the prosecutor improperly argued that "the DNA evidence showed that Appellant was the last to wear the clothes found at the church and linked to the crime scene." Simpson, not the prosecutor, is incorrect. To the contrary, the prosecutor argued the shoes in the context of the other clothing found in a pile with the shoes and containing Simson's and the victims' DNA and argued Simpson as the last wearer in that same context:

> [XIX 1621] So let's examine this DNA evidence. Let's talk about this DNA evidence. These blood drops. These blood drops on that path leading out the back door of the house.
>
> Kimberli Kimbler's blood. You heard the testimony. I'm not getting into the one in 470 trillion or one in 5 quadrillion numbers that we're talking about. You heard from Dr. Tracey, to the exclusion of every other person on the face of this earth, Kimberli Kimbler's blood dripping off the axe as this defendant walked out the door. The axe itself. Again, to the exclusion of every other person on the face of this Earth, Kimberli Kimbler's blood, the same blood that had dripped off the axe on to the floor as the defendant made his way from this pool of blood that he created, walking out the back door, off the deck, out past the chicken pen, through the barbed wire, to then discard the axe in the woodline.
>
> Her blood on the floor and on the murder weapon. We know, without any doubt whatsoever, ladies and gentlemen, that axe killed Archie Crook, Sr. and Kimberli Kimbler. We know that's a fact.
>
> These sneakers found behind that [XIX 1622] air-conditioning unit. Her blood. Her blood from this defendant's wet work on his

shoes. To the exclusion of every other person on the face of this earth. Those sweatpants. Scattered with bloodstains. Her blood and Archie Crook, Sr.'s blood covering the sweatpants, multiple stains from when he took that axe and hacked them to death.

You saw the pictures, you saw the blood on the wall, you saw the blood on the venetian blinds, you saw it scattered across the bed. Their blood identified their killer, their blood, his clothes, to the exclusion of every other person on the face of this earth. His DNA. Not blood. Skin, hairs, white crusty mucous like substance on the shoulder. His DNA. Three different samples or types of DNA recovered from stains recovered from trace evidence, recovered from swabbing those sweatpants to try to find out who the wearer was. Who was the last person to wear these clothes. All belonging to one person, excluding every other person on the face of this earth, that man right there (indicating). His DNA littered that clothing. Their blood, his hairs. Their blood, his skin. Their blood, his mucous.

[XIX 1623] There is no doubt, ladies and gentlemen, when you review that evidence in its entirety and consider how that evidence got there, there is only one person who wore those clothes during the commission of this crime and that is this defendant. That is this defendant.

Now, consider that stain for a second. Not only is the skin and the hairs consistent, but consider the stain on his sweatshirt. I just want to talk about this briefly. Right here, right over on the left shoulder front. What does it consist of? Is it consistent with somebody in haste, after their escaping from a crime scene after they've committed this horrible act, this rush of adrenaline, their blood is flowing, they're running from the crime scene, hastily disrobing and pulling that shirt off over his head and in the process wiping saliva, mucous, snot, whatever that white crusty stain is, off his face inadvertently and leaving it there with the pile of clothes because he's worried about that blood, he's not worried about what he may be leaving behind at this point in time. Because remember this is a new science back in 1999.

Today everybody knows about DNA. CSI is on TV [XIX 1624] every night of the week. Back in 1999 CSI was in non-existence. It was not commonplace that you could actually identify clothing that you wore based upon this DNA because the STR DNA technology had made it more sensitive, more discriminating, more valuable as a tool to identify the killer in this case.

Moreover, while Simpson was on the witness stand, the prosecutor compared the shoes Simpson was wearing at trial with the shoes recovered with the

clothing containing Simpson's DNA and the victims' DNA. (XVIII 1417-18. See also XIX 1642) The prosecutor's argument was grounded on this comparison as well as the compelling DNA evidence.

Further, a DNA expert testified concerning the effects of sequential wearers of clothing. (XVII 1327-28) He explained that perspiration from the most recent wearer of clothes can degrade the DNA from an earlier wearer. Bacteria "eat" DNA. (XVII 1332) And, Durrance testified that Simpson boasted to killing the victims (XV 778-81), so, since the killer was the last person to wear the clothes, including the shoes, Simpson would have been the last person to wear the clothes, and Simpson wore the shoes during the murders. The prosecutor's argument was grounded on the evidence.

Simspon complains (IB 58-59) that the prosecutor characterized Durrance as "honest and forthright," "smart," and "credible" and then Simpson improperly makes a jury-type argument that there was evidence that impeached Durrance. The prosecutor is allowed to submit to the jury, who watched the witness on the stand, that the witness was credible. The prosecutor's argument is "within the permissible bounds of advocacy," Rogers v. State, 957 So.2d 538, 548 (Fla. 2007). Here, the prosecutor's comments regarding Durrance's believability was in the context of discussing Durrance's criminal history, desire for leniency, and delay reporting Simpson's confession to him. (XIX 1606-1608) The prosecutor argued that Durrance was "honest and forthright" about how reporting Simpson's confession would have resulted in Simpson snitching to the police about his (Durrance's) criminal activities. (XIX 1607. See also XV 883-

84)[35] Concerning Durrance's intelligence, the prosecutor then argued that Durrance is "savvy in the criminal justice system," (XIX 1608) given Durrance criminal history and attempts to work out a deal for leniency, which the evidence supported (See XV 885-87).

The sole case that Simpson cites (IB 59) concerning his bolstering argument is Gorby v. State, 630 So.2d 544 (Fla. 1993), but Gorby rejected the bolstering claim in that case. Likewise, it should be rejected here. In Gorby, to counter a defense attack on an expert, the prosecutor highlighted the evidence of the expert's qualifications. Here, to counter a defense attack on Durrance, the prosecutor highlighted specific aspects of Durrance's testimony that showed that he was "honest and forthright." In any event, Durrance's demeanor was displayed for the trier of fact to observe and make up its own mind, as the trial judge had instructed.

Simpson complains (IB 59) that the prosecutor argued that Simpson was "betraying a friend." However, the context of the prosecutor's argument is that Durrance's trial testimony is not betraying a true friend because "he's betraying a friend who had already betrayed him, and he [Durrance] comes forward and hopes he may gain, may earn some leniency from the State of Florida." (XIX 1607) In fact, evidence was admitted showing that Simpson did betray a friend. Simpson's information to the police contributed to a wiretap order, which resulted in Durrance's March 2001 arrest and resulted in a case in which Durrance was ultimately convicted and sentenced to 32

[35] Durrance did not discover that Simpson had provided the police information about his (Durrance's) drug activities until a lapse of substantial time after Simpson's confession to him. (See XV 884-85, 893)

years in prison. (See XV 885-87, 892) Prior to Simpson betraying Durrance, he considered Simpson a "friend," which he characterized as "close" but not "real close" (XV 872, 873, 874-75, 895), and even after Durrance was arrested, Simpson did not know that Durrance knew of Simpson's betrayal, so Simpson still treated Durrance as his "friend." (XV 894)[36]

Simpson argues on appeal (IB 59) that the prosecutor improperly indicated that Simpson lied to the police, when Simpson testified that he misunderstood the police's questions of him. There was evidence supporting the view that Simpson did, in fact, lie to the police. The police testified that Simpson initially denied knowing the victims (XV 949-50; XVII 1343), when, in fact, the evidence is clear that Simpson did know them (E.g., XIV 657-60, 786-87; XVII 1375-76; XVIII 1425, 1427). Therefore, the prosecutor was entitled to argue that there was no misunderstanding but rather a lie. (See XIX 1641-42)

Finally, Simpson claims (IB 60): "The State continued, implying that the clothes found near the church were his (ROA pg. 1636)," when Simpson freely admitted that the clothes were his and said that Archie Crook Jr. borrowed the clothes. Simpson's "free" admission was only after the clothes were linked to him and the murder through his and the victim's DNA. What the prosecutor actually said at XIX 1636 was as follows: "And, of course, denied ownership of these clothes, which we know is absolutely untrue." In

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[36] Simpson testified that they were not friends but rather "[m]ore of associates." (XVIII 1425) The test for proper argument is whether there is evidence to support the argument not whether there is also evidence that conflicts with the argument.

contrast to Simpsons' statement to the police denying ownership of the clothes, the prosecutor's statement was absolutely true. Detective Gilbreath testified that he showed Simpson three photographs of the killer's clothes, including two close-ups (SE #s 29, 31, and 32), and Simpson repeatedly stated that the clothes were not his. (XVII 1350-51) Simpson did not equivocate with the detective nor did he ask to study the photographs further. He simply, flat-out denied that the clothes were his. At trial, after the DNA evidence tied Simpson to the killer's clothes, Simpson weaved the tale about lending the clothes to Archie Crook Jr. The prosecutors argument was grounded on, and a fair comment on, the evidence. It was not improper at all.

Simpson (IB 60) cites to Pacifico v. State, 642 So.2d 1178, 1183 (Fla. 1st DCA 1994), which illustrates the propriety of the comments here. In Pacifico, the prosecutor repeatedly attacked the defendant's character directly, without linkage to the evidence, using terms such as "sadistic, selfish bully," a "rapist," and a "chronic liar," 642 So.2d at 1183. Here in contrast, the prosecutor referenced Simpson's specific statements that conflicted with other evidence. Here, each of the prosecutor's arguments was directly grounded upon the evidence.

Moreover, especially in light of the compelling scientific evidence amassed against Simpson, none of the prosecutor's comments rise to the level of fundamental error.

See also Franqui v. State, 699 So.2d 1332, 1334 (Fla. 1997("allegedly inflammatory comments made during the state's opening statement received no

objection and therefore are unpreserved"; "Chin-Watson's brief statement, even if improper, was harmless beyond a reasonable doubt), citing Stein v. State, 632 So.2d 1361, 1367 (Fla. 1994) (finding brief humanizing comments do not constitute grounds for reversal); Jones v. State, 652 So.2d 346, 352 (Fla. 1995)("prosecutor's reference to the 'assassination' of Mrs. Nestor was made in connection with a discussion of possible mitigation: 'What can explain what is in mitigation of an assassination of Dollie Nestor.' As noted by the trial court in overruling the objection, assassination was a reasonable characterization of the first-degree murder of Mrs. Nestor"; "Even if it were not, use of the term was not so prejudicial as to warrant a mistrial"), citing Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985) (prosecutor's statements that people were afraid and that defendant "executes" people were fair comment on evidence and were not so inflammatory or prejudicial as to warrant a mistrial); Mann v. State, 603 So. 2d 1141 (Fla. 1992)("She is arguing and suggesting to you on the witness stand because this man is a child molester and a pervert, that his actions are somehow more excusable than a person that is not a child molester and a pervert. … This is actually the best she can do"; "prosecutor made these statements to negate the psychologist's conclusion that the statutory mental mitigators applied to Mann. Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment").

SUFFICIENCY OF EVIDENCE FOR FIRST DEGREE MURDERS AND PROPORTIONALITY OF DEATH PENALTY.

The State adds this section because this Court conducts an independent review of sufficiency of evidence and death-penalty proportionality.

Sufficiency of evidence for first degree murder.

In determining the sufficiency of all of the evidence, it is viewed so that "every conclusion favorable to [the verdict] that a jury might fairly and reasonably infer from the evidence," Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). See also, e.g., Reynolds v. State, 934 So.2d 1128, 1145-46 (Fla. 2006)(summarizing principle; collecting cases); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("fact that the evidence is contradictory does not warrant a judgment of acquittal since ...").

Simpson confessed to Durrance (XV 876-81), rendering the evidence sufficient for First Degree Murder. See, e.g., Murray v. State, 838 So. 2d 1073, 1087 (Fla. 2002); Lamarca v. State, 785 So.2d 1209, 1215 (Fla. 2001)("Appellant's statement, five months before the murder, that he intended to kill the victim constitutes direct evidence of his 'fully formed conscious purpose to kill'"), citing Norton v. State, 709 So.2d 87, 92 (Fla. 1997); Meyers v. State, 704 So. 2d 1368, 1370 (Fla. 1997) ("Because confessions are direct evidence, the circumstantial evidence standard does not apply. . . ."); Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988) ("We disagree that the case was circumstantial, since Hyzer and others testified that Hardwick had confessed to the murder or told others

of his plans in advance of the killing. A confession of committing a crime is direct, not circumstantial, evidence of that crime").

Moreover, here, although unnecessary to sustain the convictions in light of Simpson's confession, there was compelling DNA evidence recovered on clothing linked to the murders, including Simpson's DNA on the killer's sweatpants and the killer's sweatshirt (XVI 1185-87, 1190, 1191-93, 1195-96; XVII 1211, 1259) and Simpson's hairs among the killer's clothing (XVI 1197-98; XVII 1212), and multiple indicia of consciousness of guilt through Simpson's initial denial of knowing the victims (XV 949-50; XVII 1343), when, in fact, the evidence is clear that Simpson did know them (E.g., XIV 657-60, 786-87; XVII 1375-76; XVIII 1425, 1427); Simpson's denial that the recovered killer's clothing items were his (XVII 1350-51); his freshly injured hand (XIV 656-57);[37] and, his mother's telephone number where he stayed as the last number on the victim's pager (See XIV 734-35. See also XIV 655, 671, 674, 679, 681; XVII 1390-91, 1393). See, e.g., Bundy v. State, 455 So.2d 330, 334-37 (Fla. 1984), flight jury instruction abrogated Fenelon v. State, 594 So.2d 292, 294 (Fla. 1992)(evidence, which included microscopic hair comparison and flight, sufficient to support murder convictions); Reynolds v. State, 934 So.2d 1128, 1146-47 (Fla. 2006)(defendant's story regarding his injury inconsistent with other evidence; defendant's car parked near victim's residence; "pubic hair found

[37] Simpson offered a conflicting story at trial concerning a power outage. (See XVII 1391-93) He produced an electric-company employee at trial in an attempt to support that story, but the outage only lasted a few minutes. (See 1464-70)

at the crime scene matched a hair sample taken from Reynolds"; "admission during an interview with law officers that he had a heated argument with Danny Privett"; defendant's false denial of ever being at victim's residence; defendant washing clothes, which were found to be strongly bleached; confession to inmates; "significant DNA evidence presented by the State demonstrating that Reynolds' blood was scattered over both inside and outside portions of the trailer"), citing Orme v. State, 677 So.2d 258, 261-62 (Fla. 1996) (holding that case involving evidence such as eyewitness testimony placing the defendant at the scene, acknowledgment by the defendant of a dispute with the victim and theft of the victim's purse, and DNA evidence suggesting that the defendant had engaged in sexual relations with the victim could not be deemed entirely circumstantial); Thorp v. State, 777 So. 2d 385, 390 (Fla. 2000)(held evidence sufficient; "DNA evidence indicates that Thorp was with the victim and had sexual intercourse with her the night of the murder"; cellmate testified that Defendant said he and another man "did a hooker"; "Thorp was seen with injuries and blood on his clothes on the night of the crime, injuries that could be consistent with a physical struggle with the murder victim who had considerable bruises and abrasions on her body even if she did not bleed extensively").

Proportionalty of death penalty.

Recognizing that this Court independently reviews whether death is the appropriate punishment, the State submits that the death sentence was proportional, where this was a double murder, the jury recommended death by

votes of 8-4 and 9-3, and the judge found the following aggravation (V 908-33):

1. The crime for which the defendant is to be sentenced was committed while he had been previously convicted of a felony and on felony probation. Great weight.

2. Defendant has previously been convicted of a felony involving the use or threat of violence to the person. Simpson was actually convicted of Grand Theft in 1999, but the circumstances of the felony included pointing a gun at that victim and telling him to get down on the ground or he would blow his brains out. When the victim attempted to look at Simpson's face, Simpson told him that if he tried to look again, he would blow the victim's head off. Simpson bound the victim's hands and feet. (See also XXII 1843-51) Great weight.

3. The capital felony was committed while the defendant was engaged in the commission of the crime of burglary. Some weight.

4. The capital felony was especially heinous, atrocious and cruel. Great weight. The trial judge elaborated by detailing the medical examiner's testimony regarding the multiple chopping wounds inflicted upon each of the victims and their defensive wounds. (See V 913-14, 918-20) It is also noteworthy that there were chopping-type gouges in the bed railing immediately above Archie Crook Sr.'s head. (See XIII 588)

5. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner. Great weight. The trial judge pointed to Durrance's testimony regarding Simpson's intent to murder Archie Crook

Sr., approaching the victim's home in the dark of night dressed in black and wielding an axe, waiting outside the home until the lights were out, and entering the home and chopping the victims to death with the axe. (V 915, 920)

In contrast, the trial judge found no statutory mitigation. (V 921-22) He found several non-statutory mitigators ranging from assisting law enforcement in other cases to alcoholism in the family to suicide attempts. (V 908-33, X 1791-1807)

Thus, this case involves the most serious aggravators of prior violent felony, HAC, and CCP. See, e.g., Lynch v. State, 841 So. 2d 362, 377 (Fla. 2003)("both HAC and CCP are 'two of the most serious aggravators set out in the statutory scheme'").

Comparing this case to others in which this Court has upheld the death penalty, it is proportionate here. For example, recently Bevel v. State, 2008 Fla. LEXIS 443 (Fla. March 20, 2008), collected a number of cases in which the death penalty was upheld for more than one murder. In Bevel, like here, the Defendant committed a double-murder, there were no statutory mitigators, and the jury vote was 8 to 4[38] for the murder of one of the victims. Here as in Bevel, the prior violent felony applied due to the double murder as well as an earlier felony (there, attempted robbery). Several cases on which Bevel relies also support the death penalty here:

> We have previously held the death penalty to be proportionate in

[38] In Bevel, the vote was 12 to 0 for the other victim, compared with 9-3 here. In light of the other similarities with Bevel and cases it cites, the difference in the second vote is not dispositive.

> cases involving multiple murders where the only aggravating circumstance was a prior violent or contemporaneous felony and the mitigation was minimal. *See Lindsey v. State*, 636 So.2d 1327, 1329 (Fla. 1994) (finding death proportionate in a double homicide case, where the only aggravator was based on prior violent felony convictions, including a prior second-degree murder conviction for the first count and the contemporaneous first-degree murder conviction for the second count, and minimal nonstatutory mitigation including the defendant's poor health); *see also Porter v. State*, 564 So.2d 1060, 1062 n.2, 1064-65 (Fla. 1990) (finding death proportionate in a double homicide case, where two aggravators, prior violent felony and contemporaneous felony, and no mitigation were found). In addition, the Court has held that the death penalty was proportionate in a single aggravator case, based on two prior violent felony convictions, attempted sexual battery and kidnapping, and minimal nonstatutory mitigation, including appropriate courtroom behavior (very little weight) and mental disorders (very little weight). *See LaMarca v. State*, 785 So. 2d 1209, 1216-17 & n.4 (Fla. 2001) (noting that proportionality was supported by the fact that LaMarca committed the murder soon after being released from prison on the prior violent felony convictions); *see also Ferrell*, 680 So. 2d at 391 [Ferrell v. State, 680 So. 2d 390 (Fla. 1996)](finding death proportionate where the only aggravator was a prior violent felony conviction for second-degree murder (weighty) and a number of nonstatutory mitigating circumstances that were all assigned little weight).

Like Bundy v. State, 455 So. 2d 330, 350 (Fla. 1984), the "victims were murdered while sleeping in their own beds," and they were gruesomely murdered.

Like here, Lynch v. State, 841 So.2d 362, 377 (Fla. 2003), involved a double murder and CCP, HAC, and prior violent felony, and committed during a felony. Further, there like here, the trial court found several nonstatutory mitigators, but unlike here, the court found one statutory mitigator. Lynch cited to additional applicable cases:

> *Smithers v. State*, 826 So.2d 916, 931 (Fla. 2002) (upholding death sentence in double homicide where two aggravators, previous felony and HAC, two statutory mitigators, and seven nonstatutory mitigators were applicable to second victim); *Morton v. State*, 789 So.2d 324, 328-29 (Fla. 2001) (upholding death sentence in double homicide

> where three aggravators, CCP, avoiding arrest, and committed while engaged in a felony, two statutory and five nonstatutory mitigating factors were applicable to one victim); *Robinson v. State*, 761 So.2d 269, 272-73 (Fla. 1999) (upholding death sentence where trial court found three aggravating factors, pecuniary gain, avoiding arrest, and CCP, two statutory mitigating factors, and eighteen nonstatutory mitigating factors)

841 So.2d at 378.

Like Perez v. State, 919 So. 2d 347, 378 (Fla. 2005), there were multiple cutting-type wounds supporting HAC, and there was doubt concerning the sequence of the wounds, but some wounds were defensive. As in Perez, the Defendant made a statement concerning the victim "gurgling in her blood."

In England v. State, 940 So.2d 389, 408-409 (Fla. 2006), like here, there was a 8-4 jury recommendation, and aggravators of felony probation, prior violent felony, HAC, and during another felony. Like here, the judge found no statutory mitigation. Moreover, here CCP applies and there are two murders. England held the death penalty proportional. It is proportional here.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on March 24, 2008: Frank J. Tassone, Esq. & Rick A. Sichata, Esq.; 1833 Atlantic Blvd; Jacksonville. FL 32207.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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