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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-263

RODNEY TYRONE LOWE

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Rodney Tyrone Lowe, Defendant below, will be referred to as "Lowe" and Appellee, State of Florida, will be referred to as "State". Reference to the records follows:

> "1ROA" – Original Direct Appeal case SC60-77972 *Lowe v. State*, 650 So.2d 969 (Fla. 1994) ("*Lowe I*");
> "1PCR" – Postconviction record case number SC05-2333 *See Lowe v. State*, 2 So.3d 21, 46 (Fla. 2008) ("*Lowe II*") (remanding for a new sentencing);
> "R-RS" for instant record and "T-RS" instant transcripts for Direct Appeal from resentencing.

Supplemental materials will be designated by the symbol "S," Lowe's initial brief will be notated as "IB" and each will be followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE

On July 25, 1990, Lowe was indicted for the July 3, 1990 murder and attempted robbery of Donna Burnell ("Burnell") as she worked at the Nu-Pack convenience store. He was convicted as charged on April 12, 1991, and on May 1, 1991, sentenced to death for the murder and to 15 years for the attempted robbery. This Court affirmed. *Lowe I*, 650 So.2d 969. On October 2, 1995, certiorari was denied. *Lowe v. Florida*, 516 U.S. 887 (1995).

In March 1997, Lowe filed a motion for postconviction relief with multiple amendments/supplements. After days of evidentiary hearings[1] relief was denied, but upon rehearing and claims of newly discovered evidence, a new penalty phase was

[1] January 7-10, February 11, March 19, and April 25, 2003.

ordered. Both parties appealed. This Court affirmed the denial of postconviction relief with respect to the guilt phase and agreed a new penalty phase was required. *Lowe II*, 2 So.3d at 29.

The new penalty phase commenced on September 12, 2011. (T-RS.4 186) and on September 23, 2011, the jury unanimously recommended death. (R-RS.3 426; T-RS.21 2557-58) The *Spencer v. State*, 615 So.2d 688 (Fla. 1993) hearing was held on October 28, 2011 with Lowe opting not to present additional evidence. (R-RS.3 435-38; T-RS.22 2566; S-RS.2 172). Sentencing memoranda were filed (R-RS.3 447, 463) and on January 26, 2012, Lowe was sentenced to death on a finding five aggravators merged to four, outweighed one statutory mitigator and ten non-statutory mitigators. (R-RS.3 507-28; T-RS.22 2575-77).

STATEMENT OF THE FACTS

On direct appeal, this Court found:

> On the morning of July 3, 1990, Donna Burnell, the victim, was working as a clerk at the Nu-Pack convenience store in Indian River County when a would-be robber shot her three times with a .32 caliber handgun. Ms. Burnell suffered gunshot wounds to the face, head, and chest and died on the way to the hospital. The killer fled the scene without taking any money from the cash drawer.
>
> ***
>
> *** after Lowe had waived his *Miranda* rights *** [he] denied any involvement in the murder and eventually invoked his right to counsel. The interrogation ceased and Lowe was left alone in the interrogation room. *** The girlfriend stated to the investigators that she wanted to speak to Lowe to find out what

> happened. She also agreed to have her conversation with Lowe recorded….
>
> The girlfriend succeeded in convincing Lowe to speak to the police. *** Lowe, without prompting, told Kerby that he wanted to speak with him again. Lowe then gave the investigators a statement in which he confessed that he was the driver of the getaway car involved in the crime but denied any complicity in the murder, which he blamed on one of two alleged accomplices….
>
> At trial, the State presented witnesses who testified that, among other things, Lowe's fingerprint had been found at the scene of the crime, his car was seen leaving the parking lot of the Nu-Pack immediately after the shooting, his gun had been used in the shooting, his time card showed that he was clocked-out from his place of employment at the time of the murder, and Lowe had confessed to a close friend on the day of the shooting. The State also presented, over defense objection, the statement Lowe gave to the police on the day of his arrest. Lowe advanced no witnesses or other evidence in his defense. *** the jury returned a verdict finding Lowe guilty of first-degree murder and attempted armed robbery with a firearm as charged.

Lowe I, 650 So.2d at 971-72.

In the re-sentencing, the State re-established that on June 2, 1990, Dwayne Blackmon ("Blackmon")[2] gave Lowe a .32 caliber gun for his birthday (T-RS.18 2043-44). Lowe was having financial difficulties so he planned a robbery of the Nu-Pack store with Blackmon and Lorenzo Sailor ("Sailor"). On June 29, 1990, Lowe and Blackmon practiced shooting at trash cans in a Wabasso park (T-RS.18 2046-47) and afterwards they, along with Sailor, cased the Nu-Pak. That day they aborted the robbery

[2] Blackmon died during Lowe's postconviction litigation and his taped prior testimony was played. (RS-ROA.18 2042-43)

when Lowe, having gone inside the store with a loaded gun, saw two people inside. (T-RS.18 2048-50). Blackmon testified there had also been two girls and a boy in the parking lot then.

According to Blackmon, the threesome returned to the Nu-Pak the next day, June 30, 1990. This time Lowe and Sailor got out, but when they were about to enter, a car entered the lot causing them again to abort. Blackmon and Lowe did not discuss robbing the store after the second attempt. (T-RS.18 2051-55 2066-57).

On July 3, 1990, Blackmon was home in bed sick with swollen tonsils. Vickie Blackmon Tomlin ("Vickie"), Blackmon's wife at the time, was in bed with him when Patricia White Shegog ("Patricia"), Lowe's girlfriend at the time, arrived. After Vickie left with Patricia, Blackmon dressed so he could find Vickie and give her money. While driving, he saw Vickie and Patricia had been stopped by the police, so Blackmon proceeded to Lowe's home. Later, Vickie and Patricia arrived being driven by Lowe in a white car. (T-RS.18 2057-60).

Patricia lived with Lowe in June-July 1990 during which time Lowe was having financial difficulties and possessed a .32 caliber revolver and had it on July 2-3, 1990. (T-RS.17 1911-18, 1984-85). Patricia testified that on the evening of July 2, 1990, Lowe gave her the gun, and at Lowe's direction, put it under the front seat of their Mercury Topaz.

According to Patricia, on July 3, 1990, Lowe took their

White two-door Mercury Topaz to work (T-RS.17 1920-22) wearing his Gator Lumber work clothes, brown pants, tan shirt, and a baseball cap. Later, that morning, Lowe returned home between 10:00 and 11:00 AM to give her the car and she drove him back to work before going to get Vickie at Blackmon's home. (T-RS.17 1925-27) When Patricia arrived, Blackmon was in bed with his head under the covers complaining he was sick; she recognized his voice when they spoke. Shortly thereafter, Patricia and Vickie left. (T-RS.17 1928-30).

Vicki testified that between 10:30 and 11:00 AM, Patricia awakened her. While they had planned to go shopping, she had overslept and was still in bed with Blackmon. He was very sick and his tonsils were swollen. Blackmon was 6' 4," 280 pounds and would have awakened her had he arisen earlier. (T-RS.17 1985-88)

While driving together, Patricia and Vicki were stopped by the police and told their car fit the description of a car seen leaving the scene of a crime. Patricia told the officer the car had been with Lowe that morning and worried the officer might find the gun she thought was still under the front seat. Having been ticketed for a suspended license, Patricia returned to Blackmon's home to "Uncle James" to drive her to Gator Lumber. Lowe then drove Patricia and Uncle James home and returned to work. Lowe told Patricia he had taken the gun from the car the night before. (T-RS.17 1929-32).

Vickie confirmed she and Patricia were stopped by the police that morning after which they had "Uncle James" drive them to Gator Lumber and Lowe took them home. Sometime after the homicide, Patricia gave Vickie a gun wrapped in paper toweling printed with blue ducks. Vickie confirmed the .32 was the one she received and gave to Blackmon. (T-RS.17 1989-97)

Blackmon testified that he and Lowe spoke on July 3rd near 4:30 PM and that Lowe confessed he had robbed the Nu-Pack, but did not get any money. Lowe admitted he shot the clerk three times; twice in the head and once in the chest. Lowe said he shot the register, but it would not open, and that there had been a little boy in the store. (T-RS.18 2060-61).

After Blackmon received the .32 from Lowe through Vickie, he turned it over to the police and reported the incident. (T-RS.18 2065-67) The projectiles from Burnell's body came from Lowe's gun. She had been shot in the chest from less than at foot away. The projectile fired at the register was too damaged for an accurate comparison, but it had similar class characteristics as Lowe's .32. (T-RS.18 2097-2107)

Lowe left work at Gator Lumber at 9:58 AM and clocked back in at 10:34 AM on July 3rd. That morning he was driving a white Topaz (T-RS.1753-55). The last sale at the Nu-Pack that morning was at 10:07 AM and a 911 call was placed by Steven Luedtke ("Luedtke") at 10:17 AM (T-RS.14 1471-73; T-RS.15 1740-41). No

money was obtained from the register. (T-RS.14 1479-80).

When Luedtke arrived at the store, a white car, a Ford Taurus or similar model, was parked with no one inside. He averred that Lowe's Mercury looked like the car. (T-RS.13 1400-06) As Luedtke approached the front door, a black male,[3] wearing a ball cap exited and walked quickly toward the driver's door of the white car. The man was 5'8"-5'10" and weighed 150 to 160 pounds. The man was tall and thin, but shorter than Luedtke who is 6'2," and wore light colored clothing, (tan-light brown); the pants were lighter than the shirt, and the collared shirt was buttoned. Luedtke said the man wore glasses, and had a mustache and scraggly, but not full beard. (T-RS.13 1406-12, 1430-31)

Once Luedtke entered the Nu-Pack, he heard a child crying and as he approached the counter, he saw Burnell on the floor with the child kneeling by her. Burnell was "sort of" non-responsive; she was shaking with her eyes rolled back in her head. He tried to comfort her as he called 911. He noted that the white car had left the lot. (T-RS.13 1412-13, 1416-18) Luedtke assisted in making a composite drawing. Approximately a week later, Luedtke did a live line-up, but was unable to pick out Lowe. (T-RS.13 1428-29).

The forensic investigation revealed there were no signs of a struggle in the store (T-RS.13 1438). A sweating Cherry 7-UP

[3] Lowe had a mustache in June-July 1990 (T-RS.17 1983-84).

can was on the lottery table and a wrapped hamburger was in the microwave. Two of Lowe's prints were on the wrapper. (T-RS.13 1439-41; T-RS.18 2126-34). Other than the front door, all the Nu-Pack doors were locked. (T-RS.13 1445).

Burnell had been shot through the heart, above the left eye and through the top of her head. (T-RS.14 1485, 1492-98, 1503-05, 1508-10) The muzzle was close to her face when fired. The gunshot wound to the top of the head was fired "more or less straight on" and from close range, but not a contact wound (T-RS.14 1492-94, 1511-13, 1515-23, 1526-27, 1542)

In talking to the police, Lowe admitted he knew Burnell from another store, but did not know she worked at Nu-Pack. (T-RS.14 1576-78) Lowe admitted he left work twice on July 3rd; once at lunch time and once when Patricia called him. (T-RS.14 1583-85) When speaking to the police after he had talked to Patricia, Lowe admitted being at the Nu-Pack with Blackmon and Sailor, but claimed he did not enter the store. Lowe was driving the white Topaz. Sailor was said to have the .32 and Blackmon a .38. Sailor entered the store and Blackmon remained outside. (T-RS.14 1621; T-RS.15 1656-59) Lowe reported that no money was obtained and that Sailor told him he exchanged words Burnell who was "messin' with her baby." After looking at Sailor, Burnell turned back to the child, and "Sailor" just went up to her and shot Burnell. Next, he tried to open the register, banged on it and

shot it, but it would not open. (T-RS.15 1662-63, 1674-75, 1710-12) Lowe admitted he saw someone drive into the Nu-Pak as they were leaving. (T-RS.15 1663-64). Lowe knew the .32 was loaded on July 3rd and after the shooting, the empty casings were thrown out along the road. (T-RS.15 1691-94, 1710-12). The purpose of the robbery was to get rent money for Lowe. (T-RS.1665-67)

Retired Detective Green reported that in July 1990, Blackmon was approximately 6'1"-6'2," 240 to 260 pounds; Lowe was 5'6" or 5'7" and noticeably shorter than Blackmon; Sailor was about 5,' 120 pounds and noticeably shorter than Lowe. (T-RS.15 1760-61). Investigator Kerby testified that on the day of his arrest, Lowe had a full mustache. (T-RS.15 1717)

The prior violent felony aggravator was based on the 1987 burglary and robbery of Thomas Crosby ("Crosby") who explained that as he drove his van into his driveway, he was attacked from behind by someone who had been hiding in the van. Lowe grabbed him around the neck and put a sharp object against his neck. Crosby was told not to move or turn around and to put his keys and wallet on the dash, as Lowe said he did not want to hurt him. After complying, Lowe told Crosby to exit the van. When Crosby got out, Lowe fled in the van only to be found and pursued by the police. Lowe was arrested after crashing the van. (T-RS. 17 1961-65; 1976-77, 1865-73) Probation Officer, Richard Ambrum, testified that on July 3, 1990, Lowe was on community

control as a result of a 1987 felony conviction and had he known Lowe was in possession of guns and committing other offense, he would have been violated and faced jail time. (T-RS.18 2139-44)

Lowe's mitigation case entailed testimony of correction officers, jail chaplain, family members, witnesses to Blackmon's alleged admissions, and a mental health expert. Corrections officers reported Lowe's good behavior in jail/prison; he was a model inmate with minimal disciplinary reports (T-RS.18 2176-78, 2180, 2183-85, 2202-03; T-RS.19 2224-27, 2235-38, 2241-42, 2259-61) In jail, Lowe attended religious services with Chaplin Resinella and counseled other inmates (T-RS.18 2184, 2197-99, 2203). Warden McAndrew said Lowe would do well in an open prison population and not be a danger to others. (T-RS.19 2244-45)

Lowe's mother, Sherri Lowe ("Sherri") testified that both she and her now deceased husband, Charlie Lowe ("Charlie") were retired Kennedy Space Center employees. Lowe grew up in "humble accommodations" which were well maintained. Charlie was a hard worker responsible to his family and did many things with his family. He was strict with his family. Discipline included talking, counseling, revoking privileges, and corporal punishment involving the use of a hand or belt. Sherri described their family as average, who would do things together, many involving their church. (T-RS.19 2296-2304, 2319-20)

Charlie had a drinking problem before he joined the

Jehovah's Witnesses. When Lowe was 12-years old, Charlie and Sherri separated for about six weeks before reconciling. (T-RS.19 2301-03) After joining the church, Charlie made positive changes in his life. Together they taught their children bible studies. (T-RS.19 2304-05)

Up to middle school age, Lowe was a very quite/calm child who was not a disciple problem. He did his chores and was well behaved. When his younger sister was born, Lowe helped his mother. (T-RS.19 2306-08) However, when Lowe turned 15 or 16-years old, things changed; he rebelled over his restrictive life. When he was 17, he displayed defiant behavior and would skip school and miss curfews. In his teens, Lowe was arrested and sent to a Department of Corrections ("DOC") juvenile program. Upon his release, he lived at home and his parents tried to get him on the right path. His parents remained supportive of Lowe during his criminal cases (T-RS.19 2308-12, 2320-22, 2330-32) and after the murder, Lowe and his family remained in contact and encouraged each other. (T-RS.19 2315-17) Sherri loves her son. (R-RS.19 2318).

Lowe's sister, Toni, seven or eight years his junior, spoke of how her brother was there for her and how he helped her with homework and chores. They had a good relationship. (T-RS.20 2336-38) Even after his incarceration, Lowe maintained contact with Toni and counseled her. Lowe offered to help pay for her

schooling and sent her cards and gifts. Toni loves her brother and described him as very caring and wanting the best for her; Lowe continues to encourage her. (T-RS.20 2340-42)

Dr. Riebsame, a psychologist, testified that Lowe did not have any particular criminal activity before 15 years old; he did well in school and is of average intelligence. Problems started in his mid-teens in response to what was going on in the household. Lowe ran from his father's discipline and spent nights in abandoned homes or in the woods. (T-RS.20 2343-45, 2353-54) Lowe's initial criminal episodes were handled through the juvenile system, however, as he continued to get into trouble he was sent to Doshier School of Juvenile Justice for several months. After the 1987 carjacking, he was sentenced to DOC time as a youthful offender followed by community control. According to Dr. Riebsame, at 17, Lowe was homeless, shunned by his family and church. (T-RS.20 2354-55)

The 1990-91 psychological testing showed Lowe was of average intelligence with no brain impairment. (T-RS.20 2355-56, 2394-96) Dr. Riebsame's testing showed Lowe had no severe mental disorders and Lowe denied hallucinations/delusions. Lowe is not mentally ill, there is no evidence of psychosis, periods of insanity, or brain damage, and no substance abuse issues. Lowe has a depressive disorder, common for inmates, but no major personality disorder. (T-RS.20 2356-57, 2364-65, 2369, 2394-96)

Dr. Riebsame testified that he spoke to Lowe and his mother, aunt, brother and sister about Charlie's use of alcohol. All except Lowe's mother referenced Charlie's "heavy alcohol use," while Sherri minimized it. Charlie stopped using alcohol when Lowe was 12. (T-RS.20 2370, 2390). Corporal punishment was employed; Charlie would use his hand, extension cords, broom stick, or paddle to the boys' calves, thighs, and buttocks. However, Dr. Riebsame was **not** asserting the punishment was abusive; there were no beatings and he was **not** finding a cause/effect to the homicide. (T-RS.20 2374-75, 2391)

Dr. Riebsame assessed Lowe for future dangerousness. It was the doctor's opinion Lowe will **not** be dangerous in the future and certainly there is less danger as Lowe will continue to be incarcerated. (T-RS.20 2375-76, 2388-90).

Inmate Lisa Miller ("Miller") had been convicted of 12 felonies and two crimes involving dishonesty. She testified that at 14-years old, she dated Blackmon's cousin, Benjamin Carter ("Carter") (T-RS.19 2264-66, 2273) At a gathering a few months after the murder, Miller heard Blackmon arguing with Vickie and tell her "I killed one b***ch, I'll do it again" after which Blackmon told Carter some details of the Nu-Pack shooting. Miller stated Blackmon told Carter that Lowe, Lorenzo and Blackmon went into the Nu-Pack and while Lowe was getting a soda from the cooler, Blackmon shot the clerk when she hesitated.

Lowe dropped the can and fled. Miller claimed she reported this to the police over the years. (T-RS.19 2268-70; 2273-77)

Carter, also an inmate convicted of 11 felonies, noted in 1990, he had a good relationship with Blackmon and knew Lowe and Sailor. (T-RS.19 2281, 2283-86) It was Carter's testimony that Blackmon never gave any details of the Nu-Pack homicide. When Blackmon spoke of killing a woman, he was speaking in anger; this Blackmon did five or six times. The first time Blackmon spoke of killing was in 1992-93 when he was threatening Miller. Blackmon was reported to have said "you know I killed the b***ch," "you all don't f*** with me" or similar words. Carter does not know if Blackmon was being truthful and on occasion Blackmon would say Sailor killed the victim, but when Blackmon, a bully, wanted to be intimidating, he took credit. (T-RS.19 2288-91, 2294-95).

In rebuttal, Police Chief Phil Williams testified that no one ever gave him information indicating Blackmon was the shooter and received no calls from anyone claiming to be Miller. (T-RS.20 2401-02). Officer Grimmich stated that at no time between 1990 and 2003 did Miller report Blackmon shot Burnell. (T-RS.20 2405-06). Investigator Kerby knew Carter and testified the police had no suspect for Burnell's homicide until they spoke to Carter. Lowe's name had not come up before they received a call from Detective Render on July 8th about Carter's

information and they spoke to Carter personally on July 9th. Carter said Blackmon was his cousin and Carter had overheard a conversation between Blackmon and Lowe where Lowe admitted he had tried to rob the Nu-Pak and had killed the clerk. Kerby confirmed with Blackmon and talked with Lowe thereafter. Carter took Kerby and Green to Wabasso Park and showed them where Blackmon and Lowe practiced shooting. The police collected casings and projectiles. Blackmon gave the police the murder weapon he received from Lowe (T-RS.20 2409-12).

The jury rendered a unanimous recommendation for death (R-RS.3 426) and the court found the aggravation sufficient to support a death sentence and outweighed the mitigation. Lowe was sentenced to death for the first degree murder of Donna Burnell.[4] (R-RS.3 507-28; T-RS.22 2575-77).

[4] The court found aggravators: (1) under sentence of imprisonment/on community control (great weight ("wt"); (2) prior violent felony (great wt); (3A) felony murder (great wt) merged with (3B) pecuniary gain; and (4) avoid arrest (great wt); the statutory age mitigator (little wt); and non-statutory mitigators: (1) good behavior while in confinement (moderate wt); (2) family relationships (little wt); (3) creative ability no wt); (4) maturity (little wt); (5) religious faith (little wt); (6) work ethic (little wt); (7) extra-curricular sporting activities (no wt); (8) Lowe is emotionally supportive of his sister (no wt); (9) low risk of future danger (little wt); and (10) good courtroom behavior (little wt).

SUMMARY OF THE ARGUMENT

Issue 1 – The trial court independently weighed the sentencing factors and did not improperly rely on the State's sentencing memorandum in sentencing Lowe to death.

Issue 2 – The aggravators were submitted to the jury properly. The trial court applied the correct law, and its findings are supported by competent, substantial evidence.

Issue 3 – The trial court applied the correct law and its decision on Lowe's mitigation is supported by the record.

Issue 4 – The record contains those materials provided for under rule 9.200(a)(1) and permits a constitutional review.

Issue 5 – Juror Simard was stricken for cause properly.

Issue 6 – The jury was not precluded from considering any mitigation offers and was instructed properly.

Issue 7 – Lowe declined an *Enmund/Tison* instruction and he was permitted to argue his claim of being a minor participant.

Issue 8 – The jury was instructed properly on sentencing options and neither the trial court nor State misled the jury.

Issue 9 – Lowe has not preserved his challenge to the testimony or argument arising from his 1987 youthful offender sentence. No fundamental error has been shown.

Issue 10 – The trial court properly excluded testimony regarding Sailor's prior criminal act and impeachment of a witness with a deceased person's affidavit.

Issue 11 – Exclusion of testimony about testing conducted on Lowe was a proper remedy for the discovery violation. There was no prejudice shown as the jury heard the expert's conclusions developed as a result of the testing.

Issue 12 – No error is shown as a result of defense counsel agreeing to the submission of a letter Lowe's mother wrote to her son which had been admitted at the original trial.

Issue 13 – The State's computer generated diagram was a demonstrative aid and properly shown to the jury.

Issue 14 – The use of a mannequin as a demonstrative aid to assist the medical examiner in his testimony was proper.

Issue 15 – Lowe's challenge to the State's closing argument is unpreserved and fundamental error has not been shown.

Issue 16 – The death sentence is proportional.

Issue 17 - Cumulative error has not been shown.

ARGUMENT

ISSUE 1

THE TRIAL COURT INDEPENDENTLY WEIGHED THE AGGRAVATING AND MITIGATING CIRCUMSTANCE

Lowe asserts the sentencing order is a verbatim adoption of the State's sentencing memorandum with respect to the aggravation and analysis sections, requiring a resentencing as the trial court did not "*personally* evaluate the aggravators and mitigators and *personally* weigh and balance them." (IB 37; emphasis in original). In support, Lowe points to some inconsistencies between the discussion of individual aggravators and mitigators and their treatment in the weighing analysis. The adoption of portions of the State's memorandum is not error. Both parties submitted memoranda and Lowe did not object to this procedure. A reading of the Order in its entirety shows that the court independently considered the evidence, made findings supported by the record, and complied with *Campbell v. State*, 571 So.2d 415 (Fla. 1990) and *Spencer*, 615 So.2d at 690-91.

A. STANDARD OF REVIEW – In *Spencer*, this Court set out the procedure the capital sentencing court must follow:

> First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after

> hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

Spencer, 615 So.2d at 690-91.

B. TRIAL COURT'S ORDER – Before analyzing the sentencing factors, the court noted it had held a *Spencer* hearing and:

> Pursuant to §921.141(3) *Florida Statutes*, this court is now required to weigh all of the aggravating and mitigating circumstances set forth by §921.141 *Florida Statutes*, including any and all non-statutory mitigating circumstances. Having heard all of the evidence introduced during the course of the sentencing proceeding, as well as the presentations made by the State and defendant, this court now addresses each of the aggravating and mitigating circumstances at issue in this proceeding:

(RS-ROA.3 508).

The court adopted most of the State's memo with respect to aggravation (R-RS.3 467-75, 480-84, 508-18). Its mitigation analysis followed Lowe's format and some of his phraseology contained in Defense List of Proposed Mitigating Circumstances. (R-RS.3 435-37, 456-60, 519-22). The court adopted much of the State's "Analysis" from its memorandum, but significantly added to it by discussing the unanimous verdict, weight assignments, Lowe's normal upbringing and exposure to moral training, and the fact he had housing and steady employment. The court assessed

Lowe's ability to make voluntary decisions knowing the consequences of his actions. It found the mitigation did not outweigh the aggravators and there was sufficient aggravation and insufficient mitigation to justify death. (R-RS.3 522-27).

C. PRESERVATION - On the day of the *Spencer* hearing, Lowe filed a list of proposed mitigator, but offered no additional evidence. (R-RS.3 435-37; T-RS.22 2566; SRS.2 172). On December 9, 2001 he filed his sentencing memo (R-RS.3 447-62) and on December 12, 2011, the State filed its memo (R-RS.3 463-500). Some six weeks later, on January 26, 2012, sentencing was announced. (R-RS.3 507-28). Lowe speculates that the court did not follow §921.141 or *Spencer* by pointing to the court's adoption of portions of the State's memorandum. This issue is not preserved. *See Blackwelder v. State*, 851 So.2d 650, 652 (Fla. 2003) (finding unpreserved issue judge "abdicated its responsibility because the sentencing order copied almost verbatim the State's sentencing memorandum" as appellant failed to object below); *Ray v. State*, 755 So.2d 604, 611 (Fla. 2000) (same). Below, Lowe did not object to this procedure, nor did he take issue with the facts presented in the State's memo even though he had it for six weeks before sentencing.

D. ANALYSIS - Assuming *arguendo* this Court reaches the merits, no error occurred. The order evinces that *Spencer* and §921.141 were followed; the court independently evaluated and

weighed the sentencing factors. Lowe has not pointed to any factual findings which are unsupported by the record, but were included in the order. Moreover, Lowe conceded to the establishment of all but the avoid arrest aggravator. (RS-ROA.3 453-55) Here, he speculates that no independent findings were made, however, the order belies that charge.

Citing *Spencer* and the governing law of §921.141, the judge stated he was "required to weigh all of the aggravating and mitigation circumstances" and "[h]aving heard all of the evidence" he "addresses each of the aggravating and mitigating circumstances at issue in this proceeding." (R-RS.3 508).

Addressing "under sentence of imprisonment," the court stated: "The court makes an affirmative finding that the defendant was on supervision as a community controlee on July 3, 1990, the date of the offense." Also, the court provided it "finds this aggravating circumstance proved and gives it great weight." (RS-ROA.3 508-09) Neither statement was included in the State's memo evincing that the court independently considered, found, and weighed this factor. Also, in its "Aggravating Circumstance" section, the State did not assign any weight to the factors it offered as proven. However, as with the "under sentence of imprisonment" aggravator, the court made specific statements for the other aggravators that those factors were "proved" and weighed. (R-RS.3 511-13, 518)

The trial court did not adopt the State's sentencing memorandum with respect to mitigation (R-RS.3 475-80, 519-22). In fact, the State argued against the statutory "age" mitigator, but the court found it proven and gave it "little weight." (R-RS.3 475-76, 520) The State did not offer any weight to be assigned to the mitigation in this section, although weight was discussed in its "Analysis." (R-RS.3 480-84). The trial court made those findings. (R-RS.3 475-80, 519-22)

Significant here, the court gave this original analysis:

> The jury returned an advisory recommendation of death by a vote of 12-0. The court must give great weight to such a recommendation. This built-in deference to the jury's recommendation "honors the underlying principle that this jury's advisory sentence reflects the 'conscience of the community' at the time of the trial. The fact that the jury's recommendation was unanimous reduces the likelihood that the vote was based on emotions, layperson's inexperience, or other inappropriate considerations.
>
> The evidence establishes that the defendant received a normal upbringing, free from abuse or deprivation. The defendant was exposed to moral training both before and after his previous prison sentence. The defendant was provided housing upon release from prison and given a steady job. I find that the defendant, based on his life experiences, was able to make free and voluntary decisions with full knowledge of the consequences of his decisions. I do not believe the fact that the defendant lived a normal life during the periods of time when he was not committing a crime is any mitigation of a sentence of death for the crime committed in this case.
>
> The court finds that the mitigating circumstances presented and proved do not outweigh the aggravating circumstances of which all five have been proved.
>
> Therefore, after weighing both the proven aggravating circumstances against the defendant and the proven mitigating circumstances presented by the

> defendant, the court finds there are sufficient aggravating circumstances, and insufficient mitigating circumstances, to justify the sentence of death for the charge of first degree murder.

(R-RS.3 526-27).

In support, Lowe points to *Morton v. State*, 789 So.2d 324, 332-33 (Fla. 2001) where this Court reviewed a claim that the "resentencing judge improperly relied upon the original sentencing judge's sentencing order and essentially adopted verbatim the findings to support the aggravating and mitigating circumstances in this case." *Id.* at 332. *Morton*, cited *Patterson v. State*, 513 So.2d 1257, 1261 (Fla. 1987) wherein this Court "condemned the practice of a trial judge delegating to the State the responsibility of preparing the sentencing order." Yet, neither *Morton* nor *Patterson* assist Lowe. Here, the trial court did not delegate its responsibility nor did it rely on a prior order. Instead, it asked for memoranda from the parties, each was served on opposing counsel, and the court selected portions of the memoranda it wished to adopt as its own. As this Court recognized in *Patton v. State*, 784 So.2d 380, 388 Fla. 2000) the United States Supreme Court has stated that "even when the trial court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985).

Lowe has not cited a case where a court may not adopt the

verbiage and rationale offered by one party in support of a particular sentence. In fact the case law provides that such is acceptable where the record reflects that both sides had an opportunity to present their positions and it is clear from the record that the court followed *Spencer* even though it adopted large portions of one party's memorandum. *See Blackwelder*, 851 So.2d at 653 (finding no error in court adopting "almost verbatim the State's sentencing memorandum" where "differences between the State's memorandum and the sentencing order demonstrate that the trial judge independently weighed the aggravating and mitigating circumstances"); *Jones v. State*, 845 So.2d 55, 64 (Fla. 2003) (rejecting claim court did not engage in independent weighing given differences between State's sentencing copy and court's filed version). *See Farr v. State*, 124 So.3d 766, 781-82 (Fla. 2012) (rejecting ineffectiveness claim as sentencing order "did not simply copy" verbatim State's sentencing memo, but added testimony and included statement it had searched record and "had not found other circumstances" mitigating defendant's conduct).

The inconsistencies[5] Lowe references in its weighing do not

[5] Lowe points to inconsistencies between: (1) giving the age mitigator "little weight" then "little to no weight" (R-RS.3 520, 525; (2) giving moderate weight to the good behavior while in confinement, but later finding it "not mitigating" in Lowe's case and giving it little to no weight in the weighing section; and (3) initially giving "family relationships" and "maturity"

show abdication by the judge and do not hamper this Court's review as any inconsistencies are *de minimis*. "Not particularly mitigating" or "not mitigating," but giving the factor little to no weight is a minor difference at best. Likewise, changing a moderate weighted mitigator to little weight does not make a significant difference in the overall calculus, especially given the highly aggravated minimally mitigated case here. Had the court been more precise with the weights assigned, the result of the sentencing would not have been different. This is particularly true where Lowe's original sentence was based on similar mitigation, but only two aggravators of prior violent felony and felony murder. *Lowe I*, 650 So.2d at 976-77.

However, should this Court find error, it should be limited to the sentencing order as the alleged error has no impact on the jury's recommendation. Any remand should be limited to the preparation of a new sentencing order.

ISSUE 2

THE AGGRAVATORS FOUND WERE SUBMITTED TO THE JURY PROPERLY AND ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE (restated)

Lowe asserts the court erred in submitting to the jury and in finding as aggravators: (1) on community control; (2) prior violent felony; and (3) avoid arrest. He maintains he was

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little weight, but in the weighing finding them "not particularly mitigating" or "not mitigating" but entitled to little to no weight.

denied fundamental fairness under the principle of former jeopardy where the State had not sought the community control, avoid arrest, and pecuniary gain aggravators in the original sentencing. The law provides that this is a new proceeding and aggravators not sought originally may be applied on re-sentencing. Further, not only did Lowe agree that all but the avoid arrest aggravators were proven, but the record shows the proper law was applied and competent, substantial evidence supporting the aggravators found. This Court should affirm.

A. STANDARD OF REVIEW – This Court has stated:

> When reviewing a trial court's finding of an aggravator, "it is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job." *** Rather, it is this Court's task on appeal "to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding."

Williams v. State, 37 So.3d 187, 195 (Fla. 2010)

B. COMMUNITY CONTROL – Lowe asserts the community control aggravator does not apply as he was given a youthful offender sentence and was put **in a** "community control **program**" instead of being put "**on community control**." On February 24, 1989, Lowe was admitted to community control for his robbery conviction. Lowe conceded this aggravator was proven. (R-RS.3 455; R-RS.4 66-70, 73-76 – St. Exs. 46, 48; T-RS.18 2139-40).

1. PRESERVATION – Lowe's only complaint below was the weight to be given as he was a minor when he committed the felony. (R-RS.3 455). This matter is not preserved. *Steinhorst v State*, 412 So.2d 332, 338 (Fla. 1982) (opining "for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). While no error exists here, Lowe should not be permitted to use "gotcha tactics" by agreeing below, and complaining on appeal. *Achin v. State*, 387 So.2d 375, 377 (Fla. 4th DCA 1980)

2. ANALYSIS – Lowe admits there is little difference in the definition of "community control" under the youthful offender and felony sentencing statutes.[6] In reality, there is no substantive difference. Lowe was convicted of robbery as an

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[6] Section 948.001(3), Fla. Stat. (1987) provides:

"**Community control**" means a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of ***an offender*** is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced.

Section 958.03(2), Fla. Stat. (1987) provides:

"***Community control program***" means a form of intensive supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of ***the offender*** is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced.

adult. While he was given a youthful offender sentence, such does not mean he does not fall under the dictates of "under sentence of imprisonment/on community control" for purposes of capital sentencing. Lowe has not pointed to a case where the definition of two supervisory programs is the same, but because one is called a "community control ***program***" and the other merely "community control" they are deemed different.

The intent of the Legislature was to recognize the aggravating nature of a murder committed while the defendant was under sentence of imprisonment. See *Trotter v. State*, 690 So.2d 1234, 1237 (Fla. 1996) (finding "community control" aggravator did not violate *ex post facto* clause as "[c]ustodial restraint has served in aggravation in Florida since the 'sentence of imprisonment' circumstance was created, and enactment of community control simply extended traditional custody to include 'custody in the community.'") Here, both "community control" and youthful offender "community control program" are defined the same and are custodial restraints. Irrespective of whether Lowe was in a "community control program" or on "community control" he qualifies for the aggravator.

3. HARMLESS ERROR – Even if error is found, such is harmless. Lowe's original sentencing was affirmed based on the felony murder and prior violent felony aggravation. *Lowe I*, 650 So.2d at 977. Now the avoid arrest aggravator applies. Hence,

the result of the sentenceing would not be different even were this Court to strike the community control aggravator. *See Reynolds v. State*, 934 So.2d 1128, 1158 (Fla. 2006) (applying harmless error where aggravator found improperly)

C. PRIOR VIOLENT FELONY[7] – It is Lowe's position the prior violent felony aggravator does not apply as his conviction was for robbery without a weapon for which he received a youthful offender sentence, and the crime was not life-threatening. The record shows the crime was violent and the aggravator proven.

1. PRESERVATION - This issue is not preserved as Lowe conceded below the existence of the aggravator. (RS-ROA.3 453) *Steinhorst*, 412 So.2d at 338.

2. ANALYSIS - The record refutes Lowe's claim that the robbery was not violent. The facts were that Crosby was grabbed from behind by Lowe who had been hiding in Crosby's van. Lowe put something sharp up against Crosby's neck, which Crosby thought may have been a knife (T-RS.17 1961-64) and instructed Crosby not move or turn around as he did not want to hurt him. Crosby complied with Lowe's demands and Lowe fled with the van. (R-RS.4 66-70, 73-76 – State Exs 46, 48; T-RS.16 1865-71; T-RS.17 1964-65; T-RS.17 1976-77; T-RS.18 2139-40). The court

[7] He properly cites *Henyard v. State*, 689 So.2d 239 (Fla. 1997) for the proposition that juvenile dispositions do not qualify as prior violent felonies. However, although 17, Lowe was charged and convicted as an adult. (R-RS.4 66-70, 73-76; State Exs 46, 48; T-RS.18 2139-40).

relied on these facts in finding the aggravator. (R-RS.3 509-11)

As provided in *Gonzalez v. State*, 136 So.3d 1125, 1150 (Fla. 2014), "[w]hether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime." (*quoting Spann v. State*, 857 So.2d 845, 855 (Fla. 2003)). Also, "any evidence showing the use or threat of violence to a person during the commission of such felony would be relevant in a sentence proceeding." *Delap v. State*, 440 So.2d 1242, 1255 (Fla. 1983). *See Gore v. State*, 706 So.2d 1328, 1333 (Fla. 1998) (finding prior violent felony aggravator proven where defendant was found "crouching behind the front seat of a woman's car with a loaded gun and a police scanner").

Crosby was accosted by Lowe who put a sharp object to his neck accompanied by demands for property. Such is a threat of violence involving a weapon which implies Crosby would be hurt if he did not comply. Also, this Court has held that robbery is *per se* a crime of violence for this aggravator. *Simmons v. State*, 419 So.2d 316 (Fla. 1982). This Court should affirm.

D. AVOID ARREST AGGRAVATOR – Lowe submits that the avoid arrest aggravator was not supported by the facts. Contrary to Lowe's position, the State established the aggravator as avoid arrest was the dominant factor in the killing based on the facts surrounding the murder and Lowe's recognizing Burnell. The court applied the law correctly and its findings have record support.

1. THE COURT'S ORDER – The trial Court found:

(1) Lowe knew the victim; (RS-ROA.14 1572-73, 1576-78; RS-ROA.15 1701-03)[8]
(2) Lowe was on community control and knew he would return to prison if he were violated for committing another robbery; (RS-ROA.14 1569; RS-ROA.16 1865-71; RS-ROA.18 2141-44);
(3) there was no evidence Lowe wore a mask of gloves as his fingerprints were found at the scene and Steven Luedtke noted Lowe wore just a ball cap and glasses; (RS-ROA.13 1409-11, 1439-42, 1453-57; vol.18 2132-34);
(4) no signs of a struggle; no evidence Burnell resisted and her "three year old nephew was with her at the time of the attempted robbery *** [c]ommon sense dictates that the victim would not have attempted to resist an armed robber while caring for a toddler at the time" (RS-ROA.13 1368, 1438)
(5) Lowe killed Burnell "before attempting to remove any money from the cash register" and Burnell never activated the silent alarm button located next to the cash register; (T-RS.13 1373-74; T-RS.14 1477-78)
(6) site of victim's body indicates she was not behind the register when shot; (T-RS.13 1369-71, 1443-45)
(7) no money was gotten from the register; register was giving audible signal indicating keys had been depressed in wrong order and Lowe was never able to open the register; (T-RS.14 1477-80; T-RS.15 1710-12)
(8) cash drawer shot trying to open it; (T-RS.14 1470)
(9) positioning of "body and the fact that the hold-up alarm was never activated shows that [Burnell] was shot before the defendant made any attempt to obtain money;" (T-RS.13 1373-74)
(10) victim shot execution style suffering three gunshots, top of head, above left eyebrow, and to the heart. "Only one of these injuries did not show evidence of a close-in gunshot – the injury to the top of her head;" Given trajectory, "the victim was almost certainly bending over at the time she was shot; The wound to the top of Burnell's head was incapacitating; (T-RS.14 1492-1515, 1517-24)
(11) Lowe said Burnell "was bent over at the time she was shot, although he attributed that information to

[8] The record cites supplied establish record support, competent, substantial evidence for the trial court's findings.

> Lorenzo Sailor rather than himself;"[9] (T-RS.15 1662-63) (12) stippling on glasses and shirt showed gun was no more than 12 inches from target; "defendant fired both the bullet into the victim's eyebrow and into her chest from a range of less than 12 inches;" (T-RS.14 1492-1515, 1517-24; RS-ROA.18 2103-06)

(R-RS.3 514-17).

Continuing, the court set out the law focusing on Lowe's motivation; *Jennings v. State*, 718 So.2d 144, 151 (Fla. 1998), noting witness elimination must be the sole or dominant motivation; *Gore v. State*, 706 So.2d 1308 (Fla. 2007), and in absence of direct evidence, circumstantial evidence of intent may be used; *Farina v. State*, 801 So.2d 44 (Fla. 2001).

> The evidence establishes beyond a reasonable doubt that there was no reason for the defendant to kill Donna Burnell other than to prevent her from identifying him as the perpetrator of the robbery. The defendant was unaware that she was working at the store and was therefore surprised to see her behind the counter. Since he knew her from a previous store which he used to frequent, she could identify him, especially since he was not wearing a mask or gloves. He knew that he was on community control for robbery and that if he committed another robbery he would return to prison. Therefore, he murdered Donna Burnell to eliminate that possibility. The evidence shows that there was no evidence of a struggle and

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[9] The trial court quoted Lowe's statement:

He say he went in the store and ah if we walked in the store, the lady was messin' with her baby. She looked up and seen him and then she went back down and messing with her baby. And he say he just went up there, walked around the corner and shot her. You know, then he say he hit at cash register, he shot it, and kept hittin', bangin' it and it wouldn't *** nothin' wouldn't happen.

(RA-ROA.3 517)

that the defendant shot the victim before he attempted to remove any money from the cash register, which was the objective of the robbery. The fact that the victim was shot twice in the head, and once in the heart, also shows that the defendant intended to kill her. There was simply no reason for the defendant to kill Donna Burnell other than to eliminate her as a witness to his crime. The defendant clearly had time to reflect on his actions, as evidenced by the fact that he took the time to enter the store, walk to the cooler in the back, remove a hamburger and a cherry 7-Up, walk to the front of the store, and place the hamburger in the store's microwave before shooting her not once, but three times, twice at close range. Such actions prove that the defendant did not kill Donna Burnell in a quick, reactionary or instinctive way.

(R-RS.3 517-18) The record supports the factual findings.[10]

2. ANALYSIS – This Court has reasoned:

> Where the victim is not a police officer, "the evidence [supporting avoid arrest] must prove that the sole or dominant motive for the killing was to eliminate a witness," and "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.
>
> In other cases, this Court has found it significant that the victims knew and could identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator, we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant.

[10] (T-RS.12 1360; v.13 1369-71, 1373-76, 1409-11, 1438-45, 1453-57; v.14 1470, 1477-80, 1492-1515, 1517-24, 1569, 1572-73, 1576-78; v.15 1637-59, 1662-63, 1674, 1701-03, 1710-12, 1740-41, 1743-44; v.16 1865-71; v.18 2103-06, 2132-34, 2139-44)

Calhoun v. State, 138 So.3d 350, 361-62 (Fla. 2013) (quoting *Buzia v. State*, 926 So.2d 1203, 1209–10 (Fla. 2006).

Lowe asserts the only relevant fact cited by the trial court was that Lowe knew Burnell. He points to *Calhoun* to support his claim. However, unlike *Calhoun*, 138 So.3d 350, 362[11] the forensic evidence along with Lowe's statement gives a clear picture of what happened between Lowe and Burnell and shows his dominant reason for the killing was witness elimination. Also, *Wilcox v. State*, 143 So.3d 359, 385 (Fla. 2014) is distinguishable. There, Wilcox wanted to eliminate the victim for "safety" reasons, not as a witness.

Conversely here, Lowe cased Nu-Pack previously, and on the day of the murder got a soda and a burger before approaching his victim, thus giving him time to contemplate what he should do with Burnell who he knew from another store. By the time he reached the counter, he had decided to kill her as evidenced by his first shot being to the top of Burnell's head as she bent attending her nephew. Dr. Hobin found the shot to the top of Burnell's head was incapacitation, a traumatic injury, possibly

[11] In *Calhoun*, this Court reasoned that the facts relied upon by the trial court were addressed to an attempt to avoid arrest after the murder not his motivation for the killing. The aggravator was rejected as little information existed "about what happened between Calhoun and Brown in the events leading up to Brown being put in the trunk of her car and dying from smoke inhalation and thermal burns in the woods." *Calhoun v. State*, 138 So.3d 350, 362 (Fla. 2013)

causing an immediate loss of consciousness. (T-RS.14 1530-31). *Cf. McMillian v. State*, 94 So.3d 572, 580-81 n.16 (Fla. 2012)(finding medical examiner's testimony together with the totality of the evidence proves sequence of shots). The shot to the top of Burnell's head came before Lowe even attempted to get money as evidence by the positioning of her body away from the register, she was incapacitated immediately, there was no sign of a struggle, the register was not opened and was signaling an invalid attempt, and that it had been shot at by Lowe. Also, Lowe wore no mask or gloves and even after shooting Burnell in the head, he shot her twice more in the head and heart at very close range. While Burnell apparently denied knowing Lowe,[12] this was after she suffered three gunshots to head and heart. However, Lowe knew Burnell, which yields the reasonable inference that he feared she would know and report him. *See Serrano v. State*, 64 So.3d 93, 114 (Fla. 2011) (upholding avoid arrest aggravator in part because defendant knew victim and she offered no resistance). As the court found, Burnell posed no threat to Lowe; she had a child with her and it is reasonable to conclude she would do nothing to endanger the boy. *Cf. Buzia*,

[12] Lowe places too much emphasis on Burnell's apparent denial of knowing her assailant. At the time questioned, she had been shot twice in the head and once in the chest. Luedtke found her almost unresponsive, Officer Ewert said Burnell just repeated "no," and Dr. Hobin said her wounds would have caused her to be disoriented at a minimum as the brain injury was incapacitating. (T-RS.13 1371, 1380-81, 1416-17; v.14 1530-31)

926 So.2d at 1211 (affirming avoid arrest aggravator in part as victim posed no threat to defendant)

Lowe asserts there was evidence he was not the shooter and this Court should look to Officer Ewert's report that Burnell indicated she did not know Lowe. The State incorporates Issue 7 here and reminds this Court that on collateral review, it rejected an ineffectiveness claim that counsel failed to present Burnell's dying declaration that she did not know her assailant based in part on Lowe's failure to prove Burnell knew him. *Lowe II*, 2 So.3d at 33-34. Such does not detract from the avoid arrest aggravator as the focus is on Lowe's intent/belief that Burnell knew him and could identify him had he not killed her.

3. HARMLESS ERROR – Even if aggravator is found not supported, Lowe is not entitled to a new sentencing. The court found three other aggravators, (1) on community control, (2) prior violent felony and (3) felony murder/pecuniary gain and noted they "alone justify the imposition of the death penalty in this case." The avoid arrest was merely further justification of death. (R-RS.3 523) The sentencing result would not be different even without the avoid arrest aggravator. Under *Reynolds*, 934 So.2d at 1158 (applying harmless error), the submission of this aggravator should be found harmless especially where this Court upheld Lowe's original death sentence with just prior violent felony and felony murder aggravators. *Lowe I*, 650 So.2s 977.

E. AGGRAVATION NOT SUBMITTED IN ORIGINAL TRIAL MAY BE USED IN RE-SENTENCING – Relying on *State v. Biegenwald*, 110 N.J. 521, 541 (N.J. 1988), Lowe claims it was an *ex post facto* and constitutional violation for the State to argue and the court to find aggravators not offered in the original trial. The claim is unpreserved and meritless.

1. STANDARD OF REVIEW – The existence of an aggravator is a factual finding reviewed under the competent, substantial evidence test. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997)

2. PRESERVATION[13] – Lowe did not preserve this issue for appeal. Below he limited his argument to barring CCP and HAC aggravators. (T-RS.1 6-15, 85-90). *Steinhorst*, 412 So.2d at 338.

3. ANALYSIS – This Court has rejected this claim previously. *See Hall v. State*, 614 So.2d 473, 477 (Fla. 1993) (holding "because a resentencing is a totally new proceeding, the resentencing court is not bound by the original court's

[13] In his heading, Lowe notes "improper doubling." (IB 47), however, he does not make any argument on this point, thus, the issue should be deemed waived. *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); *Cooper v. State*, 856 So.2d 969, 977 n.7 (Fla. 2003). Below, Lowe asserted an improper doubling argument with respect to under community control and prior violent felony aggravators only. (T-RS.20 2419-20). This Court has rejected such arguments previously. *See Hildwin v. State*, 727 So.2d 193, 196 (Fla. 1998) (rejecting claim of improper doubling where the same underlying felony supported both the "under sentence of imprisonment" and "prior violent felony" aggravators); *Delap v. State*, 440 So.2d 1242, 1256 (Fla. 1983)

findings"); *Preston v. State*, 607 So.2d 404, 408-09 (Fla. 1992) (applying "clean slate" rule to capital resentencing); *Poland v. Arizona*, 476 U.S. 147 (1986).

Reliance on *Biegenwald*, a new Jersey case, is misplaced as the suggestion that the State should present all its evidence in the original trial was mere *dicta* and was limited to prior convictions. Moreover, in *State v. Koedatich*, 572 A.2d 622 (1990), the New Jersey Supreme Court found that double jeopardy did not bar the State in a resentencing from relying on aggravating factors not found unanimously by the original sentencer. Lowe has not offered a basis to recede from this Court's precedent permitting new aggravators in a resentencing.

ISSUE 3

TRIAL COURT APPLIED THE CORRECT LAW AND ITS MITIGATION FINDINGS ARE SUPPORTED BY RECORD EVIDENCE (restated)

Lowe argues the trial court's treatment of mitigation rendered his capital sentence unconstitutional. He argues the court: (1) unlawfully relied on the original sentencing; (2) failed to apply the correct law and weight to the age mitigator; (3) assessed "family relationships" improperly and used it as aggravation; (4) found non-statutory aggravation; and (5) failed to give any weight to mitigation. Contrary to Lowe's claim, the court did not rest its decision on a prior sentencing; instead it assessed the evidence presented, made findings supported by

competent, substantial evidence, applied the law properly, and reasonably weighed the mitigation. (R-RS.3 508-27) The sentencing order should be upheld as it meets the dictates of *Spencer* and section 921.141.

A. STANDARD OF REVIEW – Review of capital sentencing orders have not been for the use of talismanic incantations, but for the content of the written orders outlining the factual findings as to aggravation and mitigation, the weight assigned each factor, and the reasoned weighing of those factors in determining the sentence. *See Griffin v. State*, 820 So.2d 906, 914 & n. 10 (Fla. 2002)(considering entire context of sentencing order and applying harmless error analysis in review). This Court has explained that to comply with section 921.141(3), the judge "must (1) determine whether aggravating and mitigating circumstances are present, (2) weigh these circumstances, and (3) issue written findings." *Layman v. State*, 652 So.2d 373, 375 (Fla. 1995). *See also Campbell v. State*, 571 So.2d 415 (Fla. 1990). As provided in *Bouie v. State*, 559 So.2d 1113, 1115-16 (Fla. 1990) written justification of a death sentence "provides 'the opportunity for meaningful review' in this Court. ... Specific findings of fact based on the record must be made ... and the trial judge must 'independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed.'"

Expounding further upon the details needed for a meaningful review, this Court required that each statutory and non-statutory mitigator be identified, evaluated to determine if it were mitigating and established by the evidence, and to assess the weight each proven mitigator deserved. *Ferrell v. State*, 653 So.2d 367, 371 (Fla. 1995). *See Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000) (holding court may assign mitigator no weight). "The trial court's findings will be upheld where there is competent, substantial evidence in the record to support each finding." *Heyne v. State*, 88 So.3d 113, 123 (Fla. 2012) "This Court reviews a trial court's assignment of weight to mitigation under an abuse of discretion standard." *Bevel v. State*, 983 So.2d 505, 521 (Fla. 2008)

B. TRIAL COURT'S ORDER

1. AGE MITIGATOR – In finding this mitigator, the court noted Lowe's date of birth and found the mitigator proven assigning it "little weight." (R-RS.3 520)

2. FAMILY RELATIONSHIPS – The court found Lowe "comes from a loving, normal functioning family. He has maintained relationships with his mother and sister during his long period of incarceration. (R-RS.3 521).

3. REFERENCE TO PRIOR SENTENCING – After making factual findings and weight assessments, the trial court set out its balancing of the factors in determining the appropriate

sentence. (R-RS.3 508-22). In its assessment, the trial court noted this Court's decision finding the prior violent felony and felony murder aggravators "sufficient aggravating circumstances" supported a death sentence. It found the additional aggravation further justified a death sentence here. (R-RS.3 523)

4. AGE MITIGATOR IN SENTENCING CALCULUS - In the weighing analysis, the court reasoned the age mitigation deserved "little to no weight" as Lowe, while only 20-years old in 1990, had a criminal history and prison term, had been living on his own since he was 16, supporting himself, and Lowe's "actions, past and present, were conscious choices, not the result of any psychological or environmental factors." (R-RS.3 525-26).

C. ANALYSIS

1. REFERENCE TO FORMER SENTENCING - Lowe claims the court erred in relying upon a former sentencing. Other than stating that the court's "citation to *Morton* is unpersuasive," no other argument is made. Not only is the claim devoid of supporting argument rendering it waived, *Duest,* 555 So.2d at 852, but Lowe takes the statement out of context.

In the trial court's "Analysis" section, it recognized it was not permitted to to rely on a prior sentencing order under *Moron*, yet such was, "instructive" as in *Lowe I*, the felony murder and prior violent felony aggravators alone were sufficient to support a death sentence. The trial court stated

it found those same aggravators as well as two additional ones, avoid arrest and community control. (R-RS.3 523). Clearly, the court was not relying on the prior sentencing, but merely noting the original affirmance, yielding support to the instant re-sentencing findings; this was acknowledgement a superior court's findings, not abdication of sentencing responsibility. Moreover, the court analyzed and found more aggravation. Not only did the court state it could not rely upon the former sentencing, but as this Court found in *Morton*, significant differences between the former and instant sentencing exist. This Court should affirm.

2. AGE – With respect to the age mitigator, Lowe claims as error the fact that in the individual assessment of the mitigator "little weight" was assigned, but in the "Analysis" section the mitigator was identified as having "little to no weight." He asserts this was a disparagement of the mitigator and that discussion of Lowe's history was requiring an improper nexus between mitigator and crime. The pith of the complaint is more weight should have been given.

Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion." *Sireci v. State*, 587 So.2d 450, 453 (Fla. 1991). The weight assigned is reviewed for abuse of discretion. *Cole v. State*, 701 So.2d 845, 852 (Fla. 1997). This Court recognizes the weight assigned mitigation is related to whether

the mitigator reduces the defendant's degree of moral culpability. *See Hall v. State*, 742 So.2d 225, 227 (Fla. 1999). A lack of proof of a nexus between mitigator and defendant is a valid consideration when assessing weight. *See Lebron v. State*, 982 So.2d 649, 664 (Fla. 2008) (finding no abuse of discretion in assigning limited weight to mitigator where nexus between it and defendant's act at time of crime were not shown); *Cox v. State*, 819 So.2d 705, 718 (Fla. 2002) (same).

In the initial assessment, Lowe's age was given "little weight," (R-RS.3 520), but in the "Analysis" the court stated:[14]

> The sole statutory mitigation offered by the defendant is entitled to little or no weight. The defendant may have been twenty years old, but at that point in his life he was no stranger to the criminal justice system. The testimony of his own witnesses established that he had been through the juvenile system and graduated early into adult court by the time he was 17. He had been to prison in the Department of Corrections, had lived on his own since age sixteen (Sherrion Lowe's testimony), was gainfully employed, and lived with a steady girlfriend in a middle-class neighborhood in Sebastian. Although his witnesses established that he was immature at that time, there was no testimony that his age somehow led him to commit this crime. In fact, his own expert witnesses,

[14] To the extent Lowe challenges the change from "little weight" to "little to no weight," the difference is negligible. The mitigator was found and weighed. Even had the court been consistent in its terminology, it is clear the mitigator would not have supported a life sentence. The trial court announced: "When compared to the mitigation offered by the defendant, the aggravating circumstances of this case far outweigh them, and justify a sentence of death." (R-RS.3 525) *See Griffin v. State*, 820 So.2d 906, 914 & n. 10 (Fla. 2002) (considering entire context of sentencing order and applying harmless error analysis in its review).

> Ron McAndrew and Dr. Reibsame, both testified that the defendant's actions, past and present, were conscious choices, not the result of any psychological or environmental factors.

(R-RS.3 525-26)

Lowe does not take issue with the factual findings, only that in his estimation, more credence should have been given Lowe's "immaturity of youth and the profoundly mitigating effect of age." (IB 50) While Dr. Riebsame testified Lowe did not have coping skills between ages 16 to 20 but had at age 40, the doctor found no psychological-psychiatric disorders at the time of the crime. As was done in Lowe's case, a trial court should find a mitigator proven if supported by the evidence. *Coday v. State*, 946 So.2d 988, 1003 (Fla. 2006). When expert opinion evidence is presented, it "may be rejected if that evidence cannot be reconciled with the other evidence in the case." *Id*. *See Gunsby v. State*, 574 So.2d 1085, 1090 (Fla. 1991) (reasoning "resolution of factual conflicts is solely the responsibility and duty of the trial judge"). Here, the age mitigator was found, but assigned little weight as other factors in Lowe's life, such as living on his own for four years gainfully employed, rebutted the claim he lacked coping skills. Lowe has not shown an abuse of discretion.

Likewise, the fact that the court referenced Lowe's life experiences in the years leading up to the crime was a proper

consideration. Such a nexus supports a weight assignment. *See Lebron*, 982 So.2d at 664. Citation of *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Tennard v. Dretke*, 542 U.S. 274, 285-87 (2004); and *Smith v. Texas*, 543 U.S. 37, 44-45 (2004) do not help Lowe. At no time was Lowe barred from presenting age as mitigation, nor did the court reject it. The court merely assigned little to no weight because it found, in essence, Lowe's age did not reduce the degree of Lowe's culpability. *See Hall*, 742 So.2d at 227. This Court should affirm.

3. RECORD EVIDENCE SUPPORTS "FAMILY RELATIONSHIPS" MITIGATOR – Lowe takes issue with the court finding "defendant comes from a loving, normal functioning family." (R-RS.3 521; IB 51) This, Lowe asserts, was "non-statutory aggravation" and instead, the court should have found Lowe had been subjected to corporal punishment and shunned by his family. Contrary to Lowe's argument, he did not proffer corporal punishment or shunning by his family as mitigation. (R-RS.3 435-37; 447-462; T-RS.21 2521)[15] The record supports the court's finding.

[15] In trial is appeared the Blackmon was offered as the shooter, but in closing, Sailor was named the shooter and Lowe a minor participant. Other mitigation requested was: (1) age, (2) good behavior while incarcerated; (3) Lowe is loving family member, capable of maintaining family relationships, who has counseled his family members and has tried to give monetary support; (4) Lowe is creative; (5) Lowe is maturing and is a different person today than in July 1990; (6) Lowe is religious and shares his faith with other inmates; (7) no risk of future dangerousness;

Lowe presented his mother, Sherri, who testified Lowe had an "average family" and grew up in well maintained "humble accommodations," that his father very responsible toward his family, and did things with the family, many of which involved their church. Discipline involved talking, counseling, revoking privileges, and corporal punishment with a hand or belt. (T-RS.19 2298-2300, 2303-05, 2319-20; State's Ex 50). While Lowe's father had a drinking problem before he joined the Jehovah's Witnesses and he and Sherri separated for about six weeks before reconciling, such was resolved when Lowe was 12-years old. (T-RS.19 2301-03). Lowe's parents remained supportive of him during his criminal cases (T-RS.19 2308-12, 2320-22, 2330-32) Even after his murder conviction, Lowe and his family remained in contact encouraged him. Sherri loves her son. (R-RS.19 2315-18).

According to Dr. Riebsame, Lowe's criminal history began at age 15, Lowe ran from his father's discipline and spent nights in abandoned homes and in the woods. At 17, Lowe was homeless and shunned by his family and church. (T-RS.20 2353-55) Dr. Riebsame testified he spoke to Lowe and his mother, aunt, brother and sister about Charlie's use of alcohol and all, but Lowe's mother referenced Charlie's "heavy alcohol use." However, Charlie stopped using alcohol when Lowe was 12-years old. (T-

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(8) participated in sports in school; and (9) gives emotional support to family. (T-RS.21 2521, 2526-30).

RS.20 2370, 2390). The doctor reported corporal punishment was used which entailed Charlie using his hand, extension cords, broom stick, or paddles to the boys' calves, thighs, and buttocks. However, Dr. Riebsame was not asserting the punishment was abusive; there were no beatings and he was not finding a cause and effect regarding the homicide. (T-RS.20 2374-75, 2391)

It is the sentencer's responsibility to consider mitigation and to resolve evidentiary conflicts. That determination will not be reversed if supported by the record. *Parker v. State*, 641 So.2d 369, 377 (Fla. 1994). Here, Lowe's mother painted a picture of the and average, loving, normal family. The court may not be faulted in accepting her version over Dr. Riebsame's. To the extent Lowe suggests the mitigator should have been a non-loving family with an alcoholic abusive fathers, that claim has not been preserved. That mitigation was never requested and, in fact, Dr. Riebsame noted Charlie stopped drining when Lowe was 12, and that the corporal punishment was not abusive and there was no cause and effect to the homicide. *Steinhorst*, 412 So.2d at 338. The court did not treat this mitigation as aggravation. It was merely used as part of the weighing analysis to determine the appropriate sentence. (R-RS.3 526-27).

Should this Court find the love and normalcy of Lowe's family should not have been considered, the result of the sentencing would not have been different. There is strong

aggravation in this case, including prior violent felony and under community control, and felony murder/pecuniary gain which the trial court found sufficient to impose death even before adding in the avoid arrest aggravator. Substituting negative family relationships for the positive "family relationships" found and adding the previously rejected, abusive upbringing would not change the sentence to life.

4. NO UNFOUNDED AGGRAVATION WAS USED – Again, Lowe points to the court's discussion of his life, criminal history, and actions preceding the murder to suggest such was "unfounded aggravation." (IB 53). Lowe does not take issue with the facts as stated, only how they appear to him to have been used. A review of the "Analysis" shows the court discussing Lowe's character and history in weighing the aggravation and mitigation to determine whether sufficient aggravation exists and whether it is outweighed by the mitigation. (R-RS.3 525-26) When read in context, no non-statutory aggravation was found or employed.

5. NO ABUSE OF DISCRETION IN WEIGHING MITIGATION – Pointing to the "Analysis" section, Lowe claims the court gave no weight to some mitigation and others were judged "not particularly mitigating." (R-RS.3 525-26) Before this reasoning was stated, the court had explained the weighty nature of the aggravation and determined that when compared to the mitigation, "the aggravating circumstances of this case far outweigh them,

and justify a sentence of death." (R-RS.3 525) The court gave its basis for finding some mitigation proven, but not other factors. It stated the established mitigation did not "serve to distinguish the defendant from other individuals." This satisfied *Trease v. State*, 768 So.2d 1050, 1055 (Fla. 2000) as valid reasons were given. This Court should affirm.

ISSUE 4

THE APPROPRIATE MATERIALS ARE INCLUDED IN THE RECORD AND PERMITS THIS COURT A PROPER REVIEW (restated)

Lowe takes issue with five items which he asserts renders the record incomplete: (1) completed juror questionnaires; (2) certification of accuracy of transcription of tapes played in court (¶8 of Appellant's Partially Agreed Motion to Supplement and Correct the Record ("Motion")); (3) computer presentation used in opening statement (¶5 of Motion); (4) mannequin used during Dr. Hobin's testimony (¶6 of Motion); and (5) transcript of Lowe's second taped statement (¶8 of Motion). Lowe has not shown that these items are record items under rule 9.220 Fla. R. App. P. and that without them a proper review is not possible.

A. **SUPPLEMENTAION OF RECORD** – Rule 9.200(a)(1) provides:

> Except as otherwise designated by the parties, the record shall consist of the original documents, all exhibits that are not physical evidence, and any transcript(s) of proceedings filed in the lower tribunal, except summonses, praecipes, subpoenas, returns, notices of hearing or of taking deposition, depositions, and other discovery. In criminal cases, when any exhibit, including physical evidence, is to

> be included in the record, the clerk of the lower tribunal shall not, unless ordered by the court, transmit the original and, if capable of reproduction, shall transmit a copy, including but not limited to copies of any tapes, CDs, DVDs, or similar electronically recorded evidence. The record shall also include a progress docket.

With the exception of the completed juror questionnaires, the items Lowe sought to be included in the record were rejected by this Court (Order dated January 22, 2013) As these items were not properly part of the record, Lowe cannot establish his record is incomplete. Yet, Lowe was permitted to present the issue of record completeness on appeal. (Order of July 22, 2014)

1. COMPLETED JUROR QUESTIONAIRES[16] – On January 22, 2013, this Court entered an order granting in part Lowe's motion to supplement. Relevant here, this Court granted the motion to supplement with the completed juror questionnaires used in this case. On July 22, 2013, jurisdiction was again relinquished when it was determined the Clerk did not have the completed questionnaires. Following the August 30, 2013 hearing by the trial court, it was confirmed the completed questionnaires were destroyed. As he did in his Motion for New Trial or Summary Reversal, Lowe asserts the parties questioned potential juror Charles Simard ("Simard") regarding his opinions on the death penalty based on the questionnaire and that the for cause

[16] The State does not agree the completed questionnaires are necessarily part of the record. This is especially true where the entire voir dire has been transcribed.

challenge granted and later changed to a peremptory challenge was error and cannot reviewed without Simard's questionnaire and generally, the total absence of the questionnaires precludes a proper review. Other than the granting of a cause challenge, Lowe has not identified any other voir dire error.[17] The State incorporates its analysis of Issue 5.

A review of the record establishes, and Lowe does not alleged otherwise, the entire *voir dire* was transcribed, both parties had copies of the completed juror questionnaires, and questioned the jurors as desired. (T-RS vols. 4-12). During the first day of *voir dire*, the parties agreed to talk to approximately 50 jurors individually based on answers on the questionnaires. (T-RS.4 187-88, 213-14) The record reflects the parties identified for the jurors their questionnaire answers needing clarification. (T-RS vols. 4-12)

Lowe has not offered a case where a conviction/sentence was reversed where the transcript of *voir dire* was part of the record, but that the juror questionnaires upon which *voir dire* was conducted were missing. This is not a case where all or even part of *voir dire* is missing. Clearly, a meaningful review of the selection process may be conducted.

Also, Lowe has failed to offer how missing juror

[17] Again, the State maintains that the completed questionnaires do not fall under 9.200(a)(1), Fla. R. Crim. P.

questionnaires renders his or this Court's appellate review impossible in light of the fact the record contains the entire *voir dire*, during which defense counsel had the questionnaires, inquired of the jurors about their responses, and made the for cause challenges he deemed appropriate. The entire *voir dire* is a matter of record, and Lowe has not alleged how he or this Court cannot conduct a proper review. The propriety of the cause challenge/peremptory strike of Simard, the only one challenged, is reviewable. Simard's questionnaire answers are a matter of record, thus, Lowe has not the missing questionnaires preclude a meaningful review.

Further, Lowe has failed to allege that a meritorious appellate issue is linked to the missing questionnaires which would preclude him from proving prejudice. The issue Lowe raises is based on the record before this Court. *See Jones v. State*, 923 So.2d 486, 488-90 (Fla. 2006) (affirming defendant must "demonstrate that there is a basis for a claim that the missing transcript would reflect matters which prejudice the defendant" in order to obtain relief); *Armstrong v. State*, 862 So.2d 705, 721 (Fla. 2003) (finding new trial not required where defendant "failed to link a meritorious appellate issue to the allegedly missing record and thus cannot establish prejudice."); *Darling v. State*, 808 So.2d 145, 163 (Fla. 2002) (rejecting claim that missing pre-trial hearing transcripts required a new trial as

defendant "failed to demonstrate what specific prejudice, if any, has been incurred because of the missing transcripts" or that they are necessary for a complete appellate review).

2. CERTIFIED AND ACCURATE TRANSCRIPTS OF TAPES PLAYED IN COURT – Items 2 and 5 above are addressed to the court reporter's certification as to the accuracy of the transcript of Lowe's statements and testimony of those witnesses whose prior recorded testimony was played in re-sentencing. Lowe contends the reporter did not certify the accuracy of the transcription of the recording played during the re-sentencing and that given the number of inaudible sections, the reporter should listen to the tape and re-transcribe it and certify it was what the jury relied upon. The reporter transcribed what was played to the jury and certified such was done to the best of her ability. The reporter did certify the accuracy of the transcript at the end of each volume transcribed including those where prior records were played. It would be inappropriate for the reporter to certify what the jury relied upon. Such is unknown and would invade the jury's province.

3. COMPUTER PRESENTATION – During opening statement, the State used as a computer presentation[18] in the form of a diagram which could be moved. It was not introduced into evidence, no

[18] The prosecutor has advised counsel it is his understanding a specific internet provided computer program is required and is not something which can be copied onto a disc.

witnesses were questioned using the computer diagram. The court found it was "just a picture;" no "animation of a building" and no people displayed. There was no recreation of the crime scene. The presentation was found to be a demonstrative aid for opening statement. (T-RS.13 1326-27). Such aids, like work product, are not trial evidence and are not part of the record. The are not necessary for a complete review.

4. DEMONSTRATIVE AID MANNEQUIN – A mannequin with trajectory rods was used by as a demonstrative aid during Dr. Hobin's testimony. It was not put in evidence, and Lowe did not seek to document it via photograph or other means. (T-RS.14 1515-18) In overruling the objection to the mannequin as more prejudicial than probative ground, the trial court found: "I've seen the mannequin. *** It's just a gray face less (sic) body part. I don't think it's gruesome at all. * * * I'm gonna let him use the mannequin as a demonstrative aid if he wishes…." The court overruled the objection that the mannequin did not reflect the record. (T-RS.14 1516). As no photograph was created at the time the mannequin was used by Dr. Hobin as a demonstrative aid, and the mannequin was not entered into evidence, it was not an item with which the record could be supplemented. Dr. Hobin testified about trajectories visible on the mannequin giving this Court a record to review.

B. THE RECORD ALLOWS A COMPLETE REVIEW – Citing *Hardy v.*

United States, 375 U.S. 277, 280 (1964); *Delap v. State*, 350 So.2d 462 (1997); and *Smith v. State*, 801 So.2d 198 (Fla. 4th DCA 2001), Lowe claims there can be no complete review. However, the record here is distinguishable from the cases Lowe cites. Lowe has not offered how this Court is unable to do a complete and constitutional review of the re-sentencing record given that the entire *voir dire* and trial transcripts are in the record. He offers little more than a list of items he believes should have been included in the record. The transcript sets forth in words what transpired in *voir dire* and the balance of the penalty phase. Lowe has not identified how the absence of these items prejudiced his presentation or appellate review. Lowe does little more than re-identify items he wanted without offering substantive argument. *Duest*, 555 So.2d at 852 (noting issues without elucidation is insufficient).

ISSUE 5

THE STRIKING OF JUROR SIMARD WAS PROPER (restated)

Lowe claims the court erroneously granted a cause challenge to Juror Simard. The record establishes the juror's answers regarding his view of the death penalty were inconsistent and the court made a credibility finding. This Court should affirm.

A. STANDARD OF REVIEW – "A juror should be excused for cause if there is any reasonable doubt about the juror's ability to render an impartial verdict. *** On appeal, a trial court's

ruling on a cause challenge will be sustained absent an abuse of discretion." *Singleton v. State*, 783 So.2d 970, 973 (Fla. 2001). Review of a court's ruling on peremptory challenges is abuse of discretion. *See Nowell v. State*, 998 So.2d 597, 602 (Fla. 2008); *Melbourne v. State*, 679 So.2d 759 (Fla. 1996).

B. ANALYSIS – This Court has stated:

> Prospective jurors may not be excused for cause simply because they voice general objections to the death penalty. … The critical question is whether the prospective juror's views would prevent or substantially impair the performance of her duty under oath and in accordance with the judge's instructions. … A prospective juror's inability to be impartial about the death penalty need not be made "unmistakably clear." … "[T]here will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror." … The trial judge's predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record, … and it is the trial judge's duty to decide if a challenge for cause is proper.

Taylor v. State, 638 So.2d 30, 32 (Fla. 1994) (c.o.)

Lowe has not established the court abused its discretion in granting a "for cause" challenge to Simard, or that the un-objected to change to a peremptory challenge was an abuse of discretion. Lowe has not set forth argument to show the questionnaires would establish a meritorious appellate issue. After considering Simard's *voir dire* answers, the court made a credibility finding and granted the cause challenge properly.

The record reflects the prosecutor conducted individual *voir dire* of Simard on the completed questionnaires regarding his view of the death penalty. (T-RS.4 267)

> MR. BUTLER: **You indicated also on your questionnaire that you don't believe in the death penalty?**
>
> CHARLES SIMARD: **That's right.**
>
> MR. BUTLER: Now at first glance it would look then like **it might be difficult for you to sit as a juror** in a case where the only issue is whether the Defendant receives a death sentence or life without the possibility of parole for twenty-five years; is that fair?
>
> CHARLES SIMARD: **Yes.**
>
> MR. BUTLER: Because of your personal opposition to the death penalty, would you automatically vote for life?
>
> CHARLES SIMARD: I don't know.
>
> MR. BUTLER: Are you sure about that?
>
> CHARLES SIMARD: Right.
>
> MR. BUTLER: Why is that?
>
> CHARLES SIMARD: Because I don't know the circumstances, I suppose.
>
> MR. BUTLER: Well, the Judge will tell you that, at least in Florida the way it works in the State, before you can be eligible to receive the death sentence - - not everybody who commits first degree murder may receive the death penalty, or is even eligible. The State has to prove at least one aggravating factor beyond a reasonable doubt.
>
> ***
>
> **Given your personal opposition to the death penalty, are you going to be able to engage in that weighing process, or do you think that because of where you stand personally you're always going to tilt those scales towards - - towards a life sentence**?
>
> CHARLES SIMARD: **Yes, I'd probably go for life.**
>
> MR. BUTLER: **And that's even though the Judge would tell you you're supposed to**

weigh it?

CHARLES SIMARD: **Yes.**

MR. BUTLER: You're still going to go for life.

***

MR. GARLAND: You heard about aggravating circumstances, and that is aggravating makes it worse or I guess more so. And the Judge will instruct you, but it makes it more so than when there is such a thing as a normal murder; do you understand that?

CHARLES SIMARD: Yes.

MR. GARLAND: Do you know what mitigating means?

SIMARD: Extenuating circumstances.

MR. GARLAND: They're not excuses but they are evidence of the character of the Defendant and things like that.

Do you think as you sit here today that you could put aside your personal opinions, and listen to Judge Pegg's instructions and make a decision as to whether or not you could recommend life or death in this case?

CHARLES SIMARD: **I think so.**

MR. GARLAND: **You think you can follow the law**?

CHARLES SIMARD: Uh-huh.

MR. GARLAND: Is that a yes?

CHARLES SIMARD: **Yes.**

(T-RS.4 267-271) (emphasis supplied)

At sidebar, the State moved for a cause challenge arguing Simard told the defense he could follow the law, but told the State otherwise. The prosecutor stated "I don't know where [Simard] stands but there's certainly a reasonable doubt as to whether he can be fair and impartial." Lowe objected to the challenge. (T-RS.4 271-72). The court granted the cause challenged as he was "not convinced, I think he's a challenge

for cause so I'll excuse him." (T-RS.4 272). While Lowe may disagree with the decision, it is a matter of record what Simard's questionnaire stated and Lowe has not offered how the missing questionnaire precludes meaningful review.

The court made a credibility determination; it was "not convinced" Simard could set aside his views on the death penalty and follow the law. Under *Taylor*, 638 So.2d at 32 it is clear there was no abuse of discretion. Deference must be given the judge assessed Simard credibility, and found he would be unable to faithfully follow the law. *Sanchez-Velasco*, 570 So.2d at 915.

The record reflects that while the State's sole for cause challenge was granted, the State later withdrew that challenge and substituted a peremptory strike as the jury was being selected.(T-RS.12 1297-98) No objection was raised to the State changing the strike to Simard to a peremptory as the State had used only eight of its strikes, and it would not change the make-up of the jury. (T-RS.12 1297). Not only did Lowe fail to object to the procedure, he raised no objection to the use of a peremptory challenge. In fact, he had suggested that the State could use a peremptory challenge against Simard. (T-RS.4 272). Having failed to object to this procedure, it is not preserved, and Lowe should not be heard to complain. *Steinhorst*.

Nonetheless, Lowe's reliance on *Ault v. State*, 866 So.2d 674 (Fla. 2003) to assert that such a withdrawal of the cause

challenge does not cure the alleged error is misplaced. *Ault* is not applicable as Ault does not address the issue presented here. In *Ault*, the use of a peremptory strike in place of a cause challenge was offered as an appellate legal argument to overcome a finding the cause challenge was erroneous. Here, the substitution was made at trial before the jury was sworn. No objection was made to the substitution allowed below. However, under either a "for cause" or peremptory strike review, the trial court did not abuse its discretion.

ISSUE 6

THE JURY WAS INSTRUCTED PROPERLY AND WAS NOT PRECLUDED FROM CONSIDERING ANY MITIGATION (restated)

In spite of the fact the jury heard testimony/argument and was instructed on the statutory "minor participant" mitigator, Lowe asserts the mere fact the jury was told he had been convicted of murder it was precluded from considering his limited role, disproportionate treatment, and proper evaluation of aggravation (IB 58-63) This issue is unpreserved and meritless as he was permitted to present testimony/argument on the point and the jury was instructed properly. Fundamental error has not been shown.

A. STANDARD OF REVIEW – Jury instructions "are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error

occurred." *State v. Delva*, 575 So.2d 643, 644 (Fla. 1991). Fundamental error is "error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. 644-45.

B. PRESERVAION - Below, Lowe did not object to the instruction informing the jury he had been convicted of first-degree murder and the sole focus was on the appropriate sentence to be imposed. As such it is not preserved for review and fundamental error must be shown, *Delva*.

C. ANALYSIS – Lowe cannot show fundamental error. The court gave the authorized instructions. In defense opening statement the jury was informed that Lowe did not act alone and he was not the shooter. (T-RS.13 1347-49) This was followed up with testimony by Lisa Miller and Ben Carter who spoke of alleged admissions by Dwayne Blackmon regarding being the shooter in a homicide (T-RS.19 2263-77; 2279-95) After the State's rebuttal witnesses undermined the theory that Blackmon was the shooter, the defense continued to argue Lowe was not the shooter, rather Sailor was. The theme was Lowe was a minor participant. (T-RS.21 2503-24) Following this, Lowe's request for the minor participant mitigator instruction was granted, and the jury was instructed. The jury was told it had to base its recommendation on the evidence it heard in the penalty phase (T-

RS.21 2534, 2537-38, 2542-43). The trial court made findings on the mitigator, and gave its basis for rejecting it. (R-RS.3 519-20). Also, the jury was instructed: "***mitigating circumstances may include any aspect of the Defendant's character, background, or life or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case." (T-RS.21 2542). As such, Lowe's citing of *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989) or *Abdul-Kabir v. Quarterman*, 530 U.S. 233 (2007) do not support his claim. The jury was instructed properly that it could consider any aspect of Lowe's life and crime which meets constitutional muster.

The jury is presumed to follow the instructions. "[We] presum[e] that jurors *** attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324, n. 9 (1985). *See Davis v. State,* 121 So.3d 462, 492 (Fla. 2013); *United States v. Olano*, 507 U.S. 725, 740 (1993)(same). Here the jury knew it could consider as mitigation Lowe's participation level and Lowe has not shown fundamental error arose from the jury instruction limiting consideration to sentencing, not re-assessing guilt.

Moreover, the evidence revealed Lowe was the sole

perpetrator. His fingerprints alone were found in the store, only one person was seen leaving Nu-Pack after the murder, and Lowe fit that description whereas Blackmon and Sailor did not. Also, Lowe was clocked out of work at the relevant time and Blackmon was sick in bed. Clearly, knowing that Lowe had been convicted previously does not reach down into the validity of the penalty phase itself to the extent that a different recommendation would have resulted. This Court should affirm.

ISSUE 7

LOWE DECLINED AN *ENMUND/TISON* INSTRUCTION AND WAS PERMITTED TO ARGUE HIS MINOR PARTICIPATION IN A CRIME COMMITTED BY OTHERS (restated)

Lowe asserts the remanded for re-sentencing required *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987) findings and it was error for the court not to give the instruction. This Court did not remand for such a finding, *Lowe II*, 2 So.3d at 39-42, and Lowe declined an *Enmund/Tison* instruction. The matter is not preserved for appeal and there is no fundamental error as the State argued Lowe was the sole participant and shooter. While Lowe alternately pointed to Blackmon and Sailor as the shooter, the court found Lowe acted alone. This Court should affirm.

A. STANDARD OF REVIEW – Jury instructions "are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error

occurred." *Delva*, 575 So.2d at 644 (Fla. 1991).

B. PRESERVATION – During the charge conference, the judge raised the issue of giving an *Enmund/Tison* instruction. The prosecutor submitted such was not appropriate as he would not be arguing that anyone other than Lowe was involved. (T-RS.20 2429-31). Lowe asked for the evening to consider the instruction. (T-RS.20 2430-31). The next day, Lowe announced he was satisfied with the instructions as amended by the prosecutor. (T-RS.21 2447). Following the giving of the instructions, Lowe agreed they were read in accordance with the court's rulings. (T-RS.21 2552). He did not ask for an *Enmund/Tison* instruction and did not object that one was missing which should have been given. This issue is unpreserved, *Steinhorst* and meritless.

C. TRIAL COURT'S ORDER – In its sentencing order, the court found the avoid arrest aggravator and rejected the statutory mitigator of minor participant finding:

> 1. "no evidence the defendant wore a mask or gloves during the crime to hide his identity;"(R-RS.3 514-15)
> 2. Lowe's prints were on hamburger wrapper found in Nu-Pack microwave; (R-RS.3 514);
> 3. Crime scene evidence gleaned "supports the conclusion that the defendant murdered the victim to avoid being identified by her" (R-RS.3 515)
> 4. Evidence established Lowe "killed Donna Burnell <u>before</u> attempting to remove any money from the cash register." (R-RS.3 515);
> 5. Lowe "was never able to open the cash drawer" and shot the cash drawer trying to open it; (R-RS.3 516)
> 6. Evidence establishes there was no reason for the Lowe to kill Burnell other than to prevent her from identifying him as perpetrator of robbery (R-RS.3 518)

7. Lowe's used Miller and Carter to suggest Blackmon was the shooter, but trial court found neither witness credible; (R-RS.3 520);
8. "Other evidence" "unequivocally established" Lowe "was the shooter and acted alone. Most incriminating was the defendant's fingerprints, and his alone, found inside the Nu-Pack store." (R-RS.3 520).

D. ANALYSIS – A review of *Lowe II*, 2 So.3d at 39-42 reveals that this Court did not remand for an *Enmund*/*Tison* finding. Instead this Court found ineffective assistance for not discovering Miller (Grone) and Carter who may have been used to argue for minor participant mitigation and disproportionate punishment. *Lowe II*, 2 So.3d at 40. The record reveals Lowe did not seek a specific mitigator of disproportionate punishment, but, asked for the minor participant mitigator and argued that Lowe was merely involved in the robbery and either Blackmon or Sailor shot Burnell. (R-RS.3 435-37, 447-62; T-RS.20 2404-22). The court made findings that Lowe was the sole perpetrator of the robbery/homicide and shot Burnell in its finding of the avoid arrest aggravator and rejection of the minor participant mitigator. Lowe has not shown fundamental error in this case.[19] In *Jackson v. State*, 502 So.2d 409, 412 (Fla. 1986), this Court

[19] Lowe's citation to *Perez v. State*, 919 So.2d 347 (Fla. 2005) (finding two persons involved in murder and underlying felony); *Diaz v. State*, 513 So.2d 1045 (1987) (finding Diaz one of three men who robbed bar where person was killed); *Jackson v. State*, 502 So.2d 409, 412-13 (Fla. 1986) (finding brothers were major participants in robbery/homicide) do not further Lowe's position as there was no credible evidence that anyone other than Lowe committed the robbery/homicide.

recognized "*Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), held that the Constitution does not require a specific jury finding on the *Enmund* issue. The Constitution requires only that the 'requisite findings are made in an adequate proceeding before some appropriate tribunal-be it an appellate court, a trial judge, or a jury.' *Id.* at 106 S.Ct. at 700 (footnote omitted)." As identified above, the record supports the finding Lowe was the only one involved in the robbery/homicide of Burnell. This Court should affirm.

ISSUE 8

THE JURY WAS NOT MISLED REGARDING SENTENCING OPTIONS BY EITHER THE TRIAL COURT OR THE STATE (restated)

Lowe claims his jury was misled as to the effect of the life without the possibility of parole for 25 years sentencing option due to the court's ruling precluding argument that the consecutive 15 year sentence for the contemporaneous attempted robbery was not relevant to the likelihood of parole. He asserts the State's closing argument informing the jury that he had been on death row for 20 years and should be returned there compounded the error. The record reflects it was Lowe's witnesses, Chaplin Resinella, Warden McAndrew, and Dr. Riebsame, who first discussed Lowe's death row incarceration. (T-RS.18 2191-98, 2240; v.20 2349) No objection was raised to the State's closing, which was asserting the aggravation outweighed the

mitigation; nothing had changed in 20 years, not the defendant's "story" or the balancing of sentencing factors. The court's ruling and the State's argument were proper.

A. STANDARD OF REVIEW – Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. *Williams v. State*, 967 So.2d 735, 748 (Fla. 2007). Control of prosecutorial argument lies within the trial court's sound discretion, and will not be disturbed absent an abuse of discretion. *See Esty v. State*, 642 So. 2d 1074, 1079 (Fla. 1994).

B. PRESERVATION – Lowe did not object to the State's closing argument challenged here. The matter in not preserved. *San Martin v. State*, 717 So.2d 462, 467 (Fla. 1998); *Riechmann v. State*, 581 So.2d 133, 138-39 n.12 (Fla. 1991)

C. COURT'S RULING - The State's motion in limine sought to preclude Lowe from arguing that given how the parole system works he would not be released. The State agreed it would not argue Lowe would be getting out after 25 years. (S-RS.1 136-37) As a result of the court granting that motion, (S-RS.1 136-37), Lowe sought clarification as how he might be permitted to use the contemporaneous robbery conviction and consecutive 15-year sentence. (S-RS.1 141-47). The court ruled Lowe could make note of the robbery conviction, but not say it was concurrent or consecutive. (S-RS.1 146) The State pointed to *Gore*, 706 So.2d

at 1332-33, noting the impossibility of assessing the impact of a robbery sentence consecutive to an indeterminate sentence of life without the possibility of parole for 25 years. The motion in limine was granted. (S-RS.1 147-48)

D. ANALYSIS - Contrary to Lowe's accusation, the State did not argue that Lowe should be returned to death row merely because he had been sentenced to death previously. The State noted Lowe had been on death row for 20 years and should be returned there because nothing had changed since 1990, neither his implausible "story" about Blackmon and Sailor, nor the weight of his mitigation. Given the aggravation outweighed the mitigation, the State argued death was a justified sentence.

"Wide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." *Breedlove v. State*, 413 So.2d 1, 8 (Fla. 1982). In arguing to a jury "[p]ublic prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." *Spencer v. State*, 133 So.2d 729, 731 (Fla. 1961). "In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial." *Bertolotti v. State*, 476 So.2d 130, 133 (Fla. 1985).

See Teffeteller v. State, 439 So.2d 840 (Fla. 1983). "Any error in prosecutorial comments is harmless, however, if there is no reasonable possibility that those comments affected the verdict." *King v. State*, 623 So.2d 486, 488 (Fla. 1993).

At no time in its closing argument did the State suggest Lowe would be getting out of prison in short order, thus, should be sentenced to death. Lowe points to two questions in ***voir dire*** where a potential juror, Charles Kunkle, asked if there was a possibility of parole, and potential juror, Michael Ryan asked if credit for time served was given. The prosecutor responded there is a possibility of parole after 25 years, but the jury should not be concerned about that. No contemporaneous objection was raised to the exchange. The prosecutor also told the jurors credit would be given for time served. An objection followed. (T-RS.11 1094-95) The court explained:

> ***time does count from the time the person is sentenced.
>
> Also, but, as far as eligibility, none of us in the judicial system have anything to do with whether a person is either granted parole of not granted parole, so we're unable to speculate on the likelihood of parole and it just is out of our hands.
>
> On the other hand, also, that should not be a consideration. The only consideration that you should make in making your determination is the aggravating factors and the mitigating factors. That should not enter into your decision making deliberations.

(T-RS.11 1098). This was permitted. *See Armstrong v. State*, 73 So.3d 155, 174 (Fla. 2011) (finding no error where jury informed

capital defendant on re-sentencing was entitled to credit for time served for life without the possibility of parole for 25 years option); *Gore*, 706 So.2d at 1332–33 (finding no abuse of discretion in instructing jury defendant would receive credit for time served and whether defendant would get parole on other life sentences); *Green v. State*, 907 So.2d 489, 497 (Fla. 2005) (finding no abuse of discretion in telling jury defendants get credit for time served, but no guarantee to be paroled).

Lowe did not object to the instruction and did not seek a mistrial or excusal of the jurors who heard the discussion. Nonetheless, the jury is presumed to follow the court's instructions and this jury was told that it was not a concern for sentencing. No error occurred.

Similarly, Lowe asserts that informing the jury of the dates of the crime and that testimony was given previously is error with a nefarious intent. The jury was properly informed that Lowe had been convicted previously and the dates of the crime. More important, it was Lowe's witnesses who first told the jury he had been on death row for 20 years. Given there had been a conviction, it is not improper to assume that testimony may have been given in a prior proceeding. "[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and

follow the instructions given them." *Francis*, 471 U.S. at 324, n. 9; *Davis*, 121 So.3d at 492; *Olano*, 507 U.S. at 740.

Likewise, there was no fundamental error shown by Lowe in his unpreserved challenge to the State's closing argument. The State did not violate the dictated of *Hitchcock v. State*, 673 So.2d 859, 863 (Fla. 1996). The State did not imply that Lowe would be getting out of prison at anytime in the future. In fact, the State in discounting the future dangerousness mitigation noted that Lowe would be in general population, not on the streets (T-RS.21 2496-97)

The trial court's ruling and the resulting closing argument show no error. In *Gore*, 760 So.2d at 1332-33, this Court found no error in telling the jury that it was proper to instruct that the sentence was death of life with the possibility of parole after 25 years. This was so even though Gore faced several other life sentences. That fact also distinguishes *Gore* from Lowe. Here, Lowe had a 15 year consecutive sentence; however, it could not be determined when that 15 year sentence would come into play. Further, it did not amount as a practical matter to a life sentence. Lowe sentencing situation was much more speculative that that in *Gore*. As such, the trial court's ruling and the State's closing argument were proper. It has not been shown beyond a reasonable doubt that had the jurors been informed a 15-year consecutive sentence was imposed that they

would not have returned the unanimous death sentence, but a life recommendation instead. This Court should affirm.

ISSUE 9

LOWE DID NOT OBJECT TO TESTIMONY ON THE EFFECT OF VIOLATION OF COMMUNITY CONTROL ON YOUTHFUL OFFENDER SENTENCE (restated)

Lowe asserts the testimony of Community Control Officer, Richard Ambrum ("Ambrum") was erroneous and used to misled the jury regarding the avoid arrest aggravator. (IB 70-71-72). Lowe did not object to the violation of community control ("VOCC") and subsequent sentencing information provided by Abrum on direct or redirect examination on the same grounds he raises here. (T-RS.18 2141-44, 2157). Likewise, he did not object to the State's closing argument. The issue is unpreserved and fundamental error has not been shown. The court did not use the maximum penalty for a VOCC as a basis for the avoid arrest aggravator and even if the aggravator is stricken, the result of the sentencing would not be different. This Court should affirm.

A. STANDARD OF REVIEW – Admission of evidence is within the court's discretion, and its ruling will be affirmed unless an abuse of discretion is shown. *Williams*, 967 So.2d at 748. Control of prosecutorial argument lies within the court's sound discretion, and will not be disturbed absent abuse of discretion. *Esty*, 642 So.2d at 1079.

B. PRESERVATION – Lowe did not object to the substance of

Abrum's testimony on direct or cross-examination. Likewise, he did not object to the State's closing argument. The issue is unpreserved and there is no fundamental error. *Steinhorst*. See also *San Martin v. State*, 717 So.2d 462, 467 (Fla. 1998); *Riechmann v. State*, 581 So.2d 133, 138-39 n.12 (Fla. 1991)

C. TESTIMONY, CLOSING ARGUMENT, AND SENTENCING ORDER – On direct examination, Abrum stated Lowe faced "somewhere in the area" of 30 years for a VOCC. (T-RS.18 2141-44). Or redirect, he testified he had seen youthful offender sentences result in a penalty beyond the six-year youthful offender sentence. (T-RS.18 2157). On cross-examination by Lowe, it was clear Abrum was unsure of which statute applied:

> Q. Now certainly your answer would be different if you were told that the person were sentenced as a youthful offender; correct?
> A. **At that time I'm not sure what they – I know that there's been some changes with the – whether or not they were in violation, I'm not sure what the law was on that at that time**.
> ***
> Q. Isn't it true that someone sentenced as a youthful offender is looking at a different potential maximum sentence that someone convicted as an adult?
> A. Possibly.
> Q. Thus the different classifications; correct?
> A. But I have seen youthful offenders go back to court on a violation. Are you talking about being out – sentenced outside of youthful offender, too?
> Q. So you're aware of the youthful offender statute; correct?
> A. **If I understand you correctly you're asking me if – if he would have only be (sic) able to be sentenced to six years probation**?
> Q. I'm asking is there a difference between being sentenced as a youthful offender – your knowledge, is

there is a difference between being sentenced as a youthful offender and as an adult?
A. Yes, absolutely.
Q. And the distinction is with regard to potential maximum penalty; correct?
A. To my knowledge it's the initial sentence, not potential

(T-RS.18 2145-47)

In closing, the State asserted the avoid arrest aggravator was established in part because Lowe "does not like to get caught" as evidenced by Officer Mike Scully's testimony about chasing Lowe through a golf course after he took Crosby's van. (T-RS.21 2457) The State also reminded the jury that Lowe knew he would go back to prison if he were caught for the Nu-Pack robbery. It noted Abrum testified Lowe could get up to 30 years plus time for any new charge (T-RS.21 2465-66). The sentencing order made no mention of the years Lowe would face for a VOCC only he was on community control and "would have undoubtedly returned to prison" for a VOCC (R-RS.3 514, 518, 524).

D. ANALYSIS – As noted above, neither Abrum's testimony nor the State's closing drew an objection. Lowe asserts he faced a maximum sentence of six years, less credit for time served, for a VOCC in July, 1990. Such appears to be an accurate statement of the law, but the question remains whether that fact alone renders Lowe's sentencing fundamentally unfair. *See State v. Arnette*, 604 So2d 482 (Fla. 1992); *Darden v. State*, 641 So.2d 431 (Fla. 1994) Section §958.14, Fla. Stat., was

amended in 1990 effective October 1, 1990, *see* Chapter 90-208 Laws of Florida. Abrum apparently was confused as to the effects of a new substantive crime on Lowe's community control (T-RS.18 2145-47), but that does not detract from the evidence supporting the avoid arrest aggravator and sentence.

Likewise, while the State argued in closing Lowe faced up to 30 years, that was not the thrust of its argument in support of the avoid arrest aggravator. The State pointed to other factors of the crime to establish the aggravator, namely, the fact Lowe knew the victim, shot her three times before even trying to get the cash, there were no signs of a struggle in the store, the victim offered no resistance as she was with her three-year old nephew, and Lowe did not wear gloves or a mask. (T-RS.21) When this argument is considered, the VOCC sentence was not the basis of the State's argument and was not central to the aggravator. Given this, Lowe's reliance on *Zant v. Stephens*, 462 U.S. 862, 884-85, 887, n.24 (1983), *Johnson v. Mississippi*, 486 U.S. 578 (1988) and *Garcia v. State*, 622 So.2d 1325, 1331 (Fla. 1993) does not establish fundamental error. In fact, these cases allow for an assessment of the impact of challenged evidence/factors in the sentencing calculus.

Here, three aggravators, four merged into three, remain. Also, the court did not consider the maximum time Lowe could get for a VOCC in assessing the avoid arrest aggravator. Hence, the

result of the sentencing would not be different given *Lowe I*, 650 So.2d at 977, where the sentence was proper based on two aggravators and similar mitigation. This Court should affirm.

ISSUE 10

STATE'S OBJETIONS TO TESTIMONY ABOUT SAILOR'S POINTING A GUN AT CARS AND ADMISSION OF BLACKMON'S AFFIDAVIT WERE SUSTATINED PROPERLY (restated)

It is Lowe's claim the court erred in sustaining the State's objection: (1) to Officer Ewert's testimony that he had prior contact with Sailor who he saw pointing a gun at cars and (2) admission of now deceased Blackmon's sworn affidavit. These ruling, he claims, unlawfully restricted his mitigation presentation and limited his cross-examination. The proffered evidence related to Sailor, who did not testify in this case, was not relevant or mitigating as it was not addressed to "any aspect of a defendant's character or record" or "any of the circumstances of the offense." *Lockett*, 438 U.S. at 604-605. Regarding Blackmon's affidavit, the issue was not preserved as the court ruled the affidavit may be admissible through another witness and Lowe's counsel admitted that John Unruh, the drafter of the affidavit, was available to be called. Nonetheless, the affidavit was excluded properly as hearsay evidence which the State had no opportunity to rebut.

A. STANDARD OF REVIEW – Admission of evidence is within court's discretion, and its ruling will be affirmed unless there

has been an abuse of discretion. *Williams*, 967 So.2d at 748.

B. PRESERVATION – During argument on the admissibility of Blackmon's affidavit and the propriety of its use as impeachment of Green, Lowe admitted he had John Unruh, the affidavit's drafter, set to testify. The court sustained the objection without prejudice allowing Lowe to question Green about any threats to Blackmon or bad conduct with Blackmon, or to try to admit the document through a different witness. Lowe questioned Green as permitted, but did not call John Unruh. Given this, the matter is not preserved for appeal. *Steinhorst*.

C. ANALYSIS

1. SAILOR'S PRIOR USE OF A GUN – Relevant evidence is evidence that tends "to prove or disprove a material fact." §90.401, Fla. Stat. Under *Lockett*, the jury may not be barred from considering any "aspect of a defendant's character or record" or "any of the circumstances of the offense" offered as mitigation. Here, Lowe sought to present bad character testimony that Sailor, some time before and unrelated to the murder, had been seen by Officer Ewert pointing a gun at traffic. (T-RS.13 1391-92) Sailor was not called as a witness. Lowe offered that the testimony was relevant as Sailor was a potential suspect and the defense theory was that he participated in the robbery. (T-RS.13 1395). Contrary to Lowe's position, Sailor's prior criminal activity was not relevant to Lowe's sentencing as it

did not go to any aspect of **Lowe's** character/record or the homicide committed. Moreover, Ewert did not know whether Sailor was part of the murder investigation.

Collateral crime evidence is inadmissible if "relevant solely to prove bad character or propensity." *Wright v. State*, 19 So.3d 277, 292 (Fla. 2009). In *Espinosa v. State*, 589 So.2d 887, 892-93 (Fla. 1991), *cert. granted, judgment reversed on other grounds, Espinosa v. Florida*, 505 U.S. 1079 (1992), this Court found evidence of codefendant's violent history was inadmissible under §90.404 if it were offered to show the codefendant "had a generally violent character;" the co-defendant "acted in conformity with it on a particular occasion;" or "as similar fact evidence of other crimes, wrongs, or acts" by the codefendant "solely to prove *** bad character or propensity." Sailor was not shown to be involved in the murder, and even if some evidence existed, the prior bad act/shooting at traffic had no relevancy to the instant crime or re-sentencing. It was inadmissible and excluded properly.

2. BLACKMON'S AFFIDAVIT – Lowe was not permitted to admit Blackmon's affidavit into evidence or to read from the affidavit in questioning Green. The Court found it was an affidavit of a deceased person and Lowe could not impeach one witness with another's affidavit. Such was hearsay which the State could not rebut. Instead, Lowe could ask Green directly if he

intimidated/threatened Blackmon. Those rulings were proper.

Green was deposed on October 2, 1990 and Blackmon signed his affidavit on October 26, 1990. Green was not re-deposed. In rejecting an ineffectiveness claim for not impeaching Green in the initial trial with the affidavit, this Court found:

> Blackmon testified at the hearing that although the assistant public defenders did not force him to sign the affidavit, **most of the statements in the affidavit were either lies or statements that had been twisted**. *** the trial court found that the effectiveness of the **affidavit for impeachment purposes was questionable** because the two documents did not appear inconsistent. ***.
>
> We agree with the trial court's findings. Although **impeaching Blackmon's credibility** with the affidavit could have called into question Blackmon's ability to tell the truth, Lowe fails to demonstrate that the failure to impeach undermined confidence in the outcome of the guilt phase proceeding because of the evidence that implicated him in the crime….

Lowe II, 2 So.3d at 36.

Lowe was trying to impeach someone other than the affiant who had already testified most of the affidavit statements were untruthful. Lowe was precluded properly from impeaching Green with another person's affidavit. *See Wilcox v. State*, 143 So.3d 359, 383-84 (Fla. 2014) (affirming witness could not be impeached with another witness's affidavit). Lowe was permitted to question Green regarding Blackmon's allegation as long as counsel did not appear to be reading from the affidavit. (T-RS.16 1822-34) Vicki Blackmon testified Blackmon had threatened that he would not testify if his new criminal troubles were not

taken care of, however, those problems did not go away and he remained in jail. (T-RS.17 2028-31) Given this, *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973) are not implicated. Lowe has not shown the affidavit was mitigating. This Court should affirm.

ISSUE 11

THERE WAS NO ERROR IN EXCLUDING DEFENSE EXPERT'S TESTING RESULTS DUE TO A DISCOVERY VIOLATION (restate)

Here, Lowe submits the court erred in excluding Dr. Reibsame's testing results related to future dangerousness. The discovery violation precluded the State from cross-examining the doctor and from obtaining its own witness. While the doctor was not permitted to discuss the testing conducted/statistical evidence, he told the jury of his evaluation and was permitted to give his ultimate opinion. This Court should find that there was no abuse of discretion under these circumstance. However, if the testimony should not have been excluded, it was harmless beyond a reasonable doubt under *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986). The jury was told of the test for future dangerousness Dr. Reibsame employed and that his opinion was Lowe will not be dangerous in the future and there was less danger to the public as Lowe would be incarcerated. The State did not argue for a capital sentence due to Lowe getting credit for time served. It argued against the mitigator given Lowe

past actions. Nonetheless, the court found the mitigator of "low risk of future dangerousness." This Court should affirm.

A. STANDARD OF REVIEW – A trial court has broad discretion in determining whether a discovery violation occurred, in handling any violation, and in determining the proper remedy. *Pender v. State*, 700 So. 2d 664, 667 (Fla. 1997). *See also, Rimmer v. State*, 59 So.3d 763, 787 (Fla. 2010) (recognizing decision on a *Richardson v. State*, 246 So.2d 771 (Fla. 1971) hearing is subject to reversal only upon a showing of abuse of discretion); *State v. Tascarella*, 580 So. 2d 154, 157 (Fla. 1991) (explaining ruling on discovery violation excluding testimony is discretionary and should not be disturbed unless abuse is shown clearly).

B. PRESERVATION – Lowe failed to preserve this issue for appeal. He did not proffer the evidence which he claims was excluded improperly. *See Baker v. State*, 71 So.3d 802, 816 (Fla. 2011) (recognizing party seeking to admit evidence must proffer contents of excluded evidence to preserve it for appeal).

C. TRIAL COURT'S RULIING – The State objected to Dr. Reibsame discussing his test result/statistics on Lowe's future dangerousness as such was not disclosed until September 22, 2011, the day the doctor testified. On August 23,rd the State deposed the doctor based on his report which did not reference any testing on future dangerousness. The State was not informed

until the day Dr. Reibsame testified that he had done additional testing after his deposition. Based on the deposition and report, the State did not bring its expert, Dr. Rifkin for rebuttal. Further the late disclosure denied the State the opportunity to research whether such testing met the *Frye v. United States*, 293 F. 2013 (D.C. 1923) standard applicable at that time. (T-RS.20 2377-84). The court found the discovery violation was substantial, but not willful and failure to notify the State impaired its ability to cross-examine the doctor and to present its own witnesses. As a result, Dr. Reibsame was not permitted to testify about any testing conducted after his deposition. However, the doctor was permitted to give his opinion on non-test information. (T-RS.20 2382, 2384-87)

D. ANALYSIS – Dr. Reibsame testified he made an appraisal of Lowe's future dangerousness based on certain risk factors and using an actuarial assessment and set out the risk factors considered. (T-RS.20 2375-77). After the State's objection was sustained, Dr. Reibsame testified he was of the opinion Lowe will not be dangerous in the future. (T-RS. 2388-90).

As noted above, Lowe failed to disclose that Dr. Reibsame did additional testing after his deposition upon which the defense would rely. Such precluded the State from raising a *Frye* challenge and surprised it at trial where it could not call its expert or rebut the defense testing. *Lee v. State*, 538 So.2d 63,

65 (Fla. 2d DCA 1989) (finding failure to disclose test results until time expert was to testify was discovery violation)

Even if error, it was harmless beyond a reasonable doubt. *Delhall v. State*, 95 So.3d 134, 163 (Fla. 2012); *Ibar v. State*, 938 So.2d 451, 466 (Fla. 2006) (*quoting DiGuilio*, 491 So.2d at 1135). The jury was informed that an evaluation of future dangerousness was done using a statistical model and that Dr. Reibsame found Lowe would not be dangerous in the future. In closing argument, the State did not attack the doctor's conclusion because he did not conduct testing. The trial court found the mitigator proven. Under these circumstances, any error was harmless beyond a reasonable doubt.

ISSUE 12

DEFENSE COUNSEL AGREED TO DELIBERATING JURY RECEIVING SHERRI LOWE'S LETTER TO HER SON (restated)

Lowe asserts a letter his mother wrote to him dated December 9, 1988 which was admitted into evidence as State Exhibit 32 in the original trial[20] was not admitted into evidence in the resentencing and should not have been given to the jury during deliberations. He claims such was fundamental error.

[20] In Lowe's original direct appeal, with respect to the contents of the box, this Court reasoned Lowe's challenge to the admission of items in State's ex. 32, including "letters from Lowe's mother detailing Lowe's prior exploits and sins," was not preserved for review, but "even if counsel had preserved this issue for review, any error in admitting these items into evidence was harmless beyond a reasonable doubt given the record in this case." *Lowe I*, 650 So.2d at 974.

What Lowe fails to address the fact that he specifically agreed to the letter being sent to the jury during deliberations. (T-RS.21 2554-55) He cannot complain now.

A. STANDARD OF REVIEW – This Court has stated generally:

> it is improper to allow materials into the jury's deliberation room that have not been admitted into evidence if the materials are of such character as to influence the jury. *** However, it is not *per se* reversible error when any unauthorized materials are present in the jury room. Rather, where an objection is raised, Florida courts have applied a harmless error analysis.

Gonzalez v. State, 136 So.3d 1125, 1145 (Fla. 2014).

B. PRESERVATION – Lowe has not preserved this issue for appeal. Not only did he not object to the examination of Sherri Lowe with the letter, but he agreed it should be giving to the jury for deliberations (T-RS.20 2328-29; T-RS.21 2554-55). *Steinhorst*. Equally important, Lowe should not be heard to complain now as this, if error, was invited error. *Tomas v. State*, 126 So.3d 1086, 1088 (Fla. 4th DCA 2012)(finding defendant agreed to unauthorized evidence given to jury for deliberations and even if error, was invited error). Under the rule of invited error, "'a party may not make or invite error at trial and then take advantage of the error on appeal.'" *Sheffield v. Superior Ins. Co.*, 800 So.2d 197, 202–03 (Fla. 2001) (*quoting Goodwin v. State*, 751 So.2d 537, 544 n. 8 (Fla. 1999)).

C. ANALYSIS – Lowe's mother admitted the letter from

State's Exhibit 32 from the original trial "is certainly my handwriting," but she was interrupted before she could identify what she did not recall. (T-RS.19 2322; T-RS.20 2329-32). At no time did she disavow the letter as not being hers. Sherri testified about her disappointment with her son's behavior, and belief he was on a path leading to death. The direct and cross-examinations revealed Lowe had gotten into trouble at school and committed other crimes since his early teens, Sherri was concerned with his behavior, the family tried to counsel Lowe, Sherri included biblical references and scripture passages in her 1988 letter, and noted Lowe's older brother was also in trouble. (T-RS.19 2308-11; 2329-30, 2332, 2334) While, Lowe's father's desire not to see his son until his behavior improved was not reported by Sherri, Dr. Riebsame testified Lowe was shunned by the family and congregation due to his behavior. (T-RS.20 2355, 2369-72) This information essentially duplicates that which was in the letter. *See Bottoson v. State*, 443 So.2d 962 (Fla. 1983) (finding harmless error where jury heard same information during testimony as contained in document not admitted into evidence, but given the jury for deliberation, by mistake). Based on this, no fundamental error has been shown.

ISSUE 13

USE OF COMPUTER GENERATED DIAGRAM OF THE CRIME SCENE AS DEMONSTRATIVE AID WAS PROPER

During the State's opening statement, a computer generated diagram of the crime scene was presented. Lowe objected saying this was the first he saw of the "computer recreation" and he could not see it. (T-RS.13 1326). Lowe focused on movement provided by the program. Here, Lowe alleges a discovery violation which did not result in a *Richardson* inquiry. Lowe mischaracterizes the program as an "animation" and has not shown the computer generated portion of the State's opening was a discoverable matter under Rule 3.220, Fla. Stat. The computer diagram was never used with a witness or admitted into evidence. This Court should reject this claim.

A. STANDARD OF REVIEW – "It is well settled that the use of 'demonstrative devices to aid the jury's comprehension is well within the court's discretion.'" *McCoy v. State*, 853 So.2d 396, 405 (Fla. 2003) (*quoting United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988).

B. TRIAL COURT'S RULING – The State argued the diagram was merely a demonstrative aid which was not intended to be put into evidence. The court found the demonstrative aid was "just a picture;" no "animation of a building" and no people displayed. There was no recreation of the crime scene. The presentation was deemed a demonstrative aid. (T-RS.13 1326-27)

C. PRESERVATION – While Lowe noted he had not seen the computer program previously and that he could not see it, the

pith of his argument was that it was an animation. (T-RS.13 1326-27). Here, Lowe raises a *Richardson* violation which he did not press below or seek a ruling from the trial court. *Armstrong v. State*, 642 So. 2d 730, 740 (Fla. 1994) (finding claim procedurally barred where judge heard motion, but never ruled); *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983)(same); *State v. Kelley*, 588 So. 2d 595, 600 (Fla. 1st DCA 1991) (noting failure to obtain ruling effectively waives motion).

D. ANALYSIS – The computer presentation was merely a digitalized diagram of the crime scene which could be manipulated so it could be viewed from different perspectives. (T-RS.13 1326-27). Lowe did not ask for a *Richardson* inquiry, and merely claimed he had not seen the aid before, and could not see it now. Such does not put the court on notice that a discovery violation occurred where the diagram would not be put into evidence or discussed with a witness. The court immediately noted it was a demonstrative aid and would not be offered as evidence. *Jones v. State*, 32 So.3d 706, 710-11 (Fla. 4th DCA 2010) is distinguishable. There the State was seeking admission of evidence it obtained in the middle of trial. Here, the State was using a computer generated diagram to identify specific locations in the Nu-Pack store it expected to be relevant to the aggravation to be proven in the case.

Lowe does not offer how his defense was impacted by the

State's use of the computer diagram of the crime scene. Likewise, he made no objections to the facts as presented in the State's opening. This Court should reject the claim.

ISSUE 14

USE OF A MANNEQUIN AS A DEMONSTRATIVE AID TO ASSIST THE MEDICAL EXAMINER WAS PROPER (restated)

During Dr. Hobin's testimony, Lowe raised a lack of probative value objection to the use of a mannequin to show the bullet trajectories as the medical examiner which was overruled. Such was proper as the mannequin and inserted dowels gave a reasonable reproduction of the bullet trajectories and would assist the doctor in his testimony before the jury.

A. STANDARD OF REVIEW – In *State v. Duncan*, 894 So.2d 817, 829 (Fla. 2004), this Court reaffirmed the standard set out in *Brown v. State*, 550 So.2d 527, 528 (Fla. 1st DCA 1989) that:

> Demonstrative exhibits to aid the jury's understanding may be utilized when relevant to the issues in the case, but only if the exhibits constitute an accurate and reasonable reproduction of the object involved. The determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion.

B. TRIAL COURT'S RULING – The court heard Dr. Hobin explain the general trajectories of bullets which entered Burnell and that use of a mannequin to show the trajectories was helpful. In response to Lowe's objection, the court asked what difference it made and how was Lowe prejudiced if the doctor's

trajectories were off a few degrees. Lowe offered that prejudice came from not knowing the trajectory and an anatomical figure would be prejudicial. The court stated it had seen the mannequin which was not gruesome, but "just a grey faceless body part." The mannequin was allowed to be used. (T-RS.13 1516)

C. ANALYSIS – Contrary to Lowe's position, the mannequin with the general trajectories identified with dowels was utilized properly. Dr. Hobin was showing the anatomical trajectories, i.e., the position of the gun in relationship to the body, not the true trajectory in space. (T-RS.13 1519-20)[21] On cross-examination, it was revealed the mannequin figure was slightly taller and thinner than Burnell and because Dr. Hobin could not state in what position Burnell was when shot he could give anatomical, but not spatial trajectories. (T-RS.13 1524-27)

The use of the mannequin here satisfied *Duncan*, 894 So.2d at 829. There only were slight differences between the victim's size and the mannequin's dimensions. The jury was advised the trajectories were anatomical not spatial and had a small degree of error. In *Duncan*, there was no abuse of discretion in permitting a State witness using a "dummy" to demonstrate the attack he witnessed.

[21] For example, an anatomical trajectory would be a wound track from top to bottom as a straight line from gun to victim, but a trajectory in space might reveal that the victim was bending over when shot from front to back or may have been sitting when shot from above.

Brown, 550 So.2d at 528 does not establish error here. In *Brown*, the State was permitted to use a knife "**similar** to the one used by appellant." *Brown* does not require the demonstrative aid be an exact duplicate, only "an accurate and reasonable reproduction." The mannequin used here meets that standard as it was reasonably similar being only **slightly** taller and thinner. Likewise, *United States v. Gaskell*, 985 F.2d 1056, 1060 (11th Cir. 1993) does not further Lowe's argument. There, the demonstrative demonstration was rejected because conditions and doll used in support of shaken baby "were **not sufficiently similar** to the alleged actions of the defendant to allow a fair comparison." The testimony reveals Dr. Hobin's placement of the dowels might have been off by a few degrees. Such is sufficiently similar to find no abuse of discretion.

Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994) does not support Lowe's claim. There, the only issue was the defendant's sanity. Hence the number and manner of the blows inflicted and represented on a clay bust did not answer that question. Likewise, a live model dressed in the victim's close was not of assistance. *Id.* at 1132. Here, Lowe faced a re-sentencing in a capital case necessitating the State to set out for the new jury the circumstances of the crime and establish aggravation. One of the aggravator was avoid arrest which the State supported in part with circumstantial evidence. Such evidence from Dr. Hobin

included the location of Burnell's wounds, from what distance the shots were fired, the incapacitating nature of each gunshot wound, and from what angle the shots were fired. The use of a mannequin permitted the State to argue subsequently that Lowe shot Burnell as she was bent over attending to her nephew and twice more as she was incapacitated on the floor and from close range at slightly downward angles. This Court should affirm.

ISSUE 15

THE CHALLENGE TO THE STATE'S CLOSING ARGUMENT IS NOT PRESERNVED AND FUNDAMENTAL ERROR HAS NOT BEEN SHOWN

Lowe points to several comments by the State in penalty phase closing which address some of the non-statutory mitigation offered and asked the jury to determine whether such was mitigating for a first-degree murder noting Burnell also was spiritual, and like everyone was loved by and loved her family. Lowe did not make a contemporaneous objection. The argument was made in terms of the mitigation offered and not a bare comparison of victim and defendant. No fundamental error has been shown. This Court should affirm.

A. STANDARD OF REVIEW - Control of prosecutorial argument lies within the trial court's sound discretion, and will not be disturbed absent an abuse of discretion. *See Esty*, 642 So.2d at 1079. "Wide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to

advance all legitimate arguments." *Breedlove*, 413 So.2d a 8. In arguing to a jury "[p]ublic prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." *Spencer v. State*, 133 So.2d 729, 731 (Fla. 1961). "In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial." *Bertolotti*, 476 So.2d at 133. *See Teffeteller*, 439 So.2d at 840. "Any error in prosecutorial comments is harmless, however, if there is no reasonable possibility that those comments affected the verdict." *King*, 623 So. 2d at 488; *Watts v. State*, 593 So.2d 198 (Fla. 1992). Reversal is not required for comments which do not vitiate the whole trial or "inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." *Bertolotti*, 476 So. 2d at 134. The harmless error analysis applies to prosecutorial misconduct claims. *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984).

B. PRESERVATION – Recently, this Court stated: "In order to preserve a claim of improper prosecutorial argument, "[c]ounsel must contemporaneously object to improper comments." *Bailey v. State*, 998 So.2d 545, 554 (Fla. 2008) (*quoting Merck v. State*, 975 So.2d 1054, 1061 (Fla. 2007)), *cert. denied*, ---

U.S. ----, 129 S.Ct. 2395, 173 L.Ed.2d 1307 (2009)." *Hayward v. State*, 24 So.3d 17, 40 (Fla. 2009). Where no objection is raised, the issue is "unpreserved and fundamental error must be shown for resentencing to be required." Id at 40-41. Fundamental error "is a high burden which requires an error that 'goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.' *Bailey*, 998 So.2d at 554 (*quoting Johnson v. State*, 969 So.2d 938, 955 (Fla. 2007))." *Hayward*, 24 So.3d at 40-41. In the sentencing context, there is fundamental error where the comments are "so prejudicial as to taint the jury's recommended sentence." *Jones v. State*, 949 So.2d 1021, 1037 (Fla. 2006) (*quoting Fennie v. State*, 855 So.2d 597, 609 (Fla. 2003)). *See Hayward*, 24 So.3d at 41. Lowe raised no objection, thus, the issue is not preserved and fundamental error must be shown.

C. ANALYSIS – When the State's closing is read in context, the pith of the argument asked the jury to consider whether Lowe's evidence was really mitigating as many can claim spirituality, love of family, that they love and care for their family, and that they have matured over time. The prosecutor was asking the jury to look at Lowe's actions and determine whether such factors were mitigating for Burnell's murder; whether those factors were aspects of Lowe's record and circumstances leading up to the crime which warranted a sentence

less than death. Such were proper consideration for the jury.

However, to the extent the argument may be seen as an improper comparison, it does not rise to the level of fundamental error. *See Wheeler v. State*, 4 So.3d 599, 610-611 (Fla. 2009) (finding State's closing asking jury to consider life choices of victim and defendant not to amount to fundamental error); *Hayward*, 24 So.3d at 40-41 (finding no fundamental error where prosecutor asked jury to consider life choices of victim and defendant); *Bertolotti*, 476 So.2d at 133 (find misconduct in re-sentencing closing argument no to be so outrageous as to render the penalty phase unfair even though the prosecutor commented on defendant's right to remain silent, included a "golden rule" argument, and asked the jury to send a message to the community). In *Miller v. State*, 926 So.2d 1243, 1255 (Fla. 2006), this Court determined the prosecutor's argument telling the jury the defendant did not care for the victim or his family, but now wants the jury to care for him and focus only on his life and family was not an improper comparison. *Miller* contrasted *Richardson v. State*, 604 So.2d 1107, 1109 (Fla. 1992) (concluding prosecutor was not allowed to ask the jury to show the defendant as much pity as he showed the victim and finding comment harmless beyond a reasonable doubt). The State's penalty phase argument could be compared to that in *Miller* in that it showed both parties were similarly situated.

The State's challenged argument was not so outrageous as to render the trial unfair. Rather, it was limited to portions of four pages of the closing which spanned 52 pages. It also challenged three of the non-statutory mitigators, namely, family relationships, maturity, religious faith, all of which the trial court found and weighed in the sentencing calculus. (R-RS.3 521) The trial court did not use the victim impact testimony in sentencing Lowe. The jury was instructed on the proper use of victim impact testimony[22] (T-RS.18 2160-61) and that the recommendation should not be influenced by sympathy, but should be based on the evidence and law contained in the instructions. (T-RS.21 2538) Lowe has not shown the unanimous jury's advisory verdict was inflamed by the State's argument and that such a recommendation would not have been rendered otherwise. Lowe was not deprived a fair sentencing. This Court should affirm.

ISSUE 16

THE SENTENCE IS PROPRTIONAL (restated)

Here, Lowe points to his youth, that the HAC and CCP aggravators were not present and this was merely a "robbery gone bad" to challenge proportionality. Contrary to that assertion, four aggravators of great weight, one statutory mitigator of

[22] The trial court advised that the victim impact evidence: "is presented to show the victim's uniqueness as an individual and the resultant loss caused by the death of Donna Burnell, however, you may not consider this evidence as an aggravating circumstance." (T-RS.18 2160-61)

little weight, and seven non-statutory mitigators of moderate to little weight,[23] establishes the sentence is proportional.

A. STANDARD OF REVIEW – Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. *Urbin v. State*, 714 So.2d 411 (Fla. 1998). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990).

B. ANALYSIS – The jury unanimously recommended death and the court's findings are supported by competent, substantial evidence as set forth in the issues above and reincorporated here. Lowe was not a minor, but a 20-year old who had been living on his own for approximately four years. As such, *Bell v. State*, 841 So.2d 329, 335 (Fla. 2002) does not further Lowe's position. The weight assigned was not an abuse of discretion. Likewise, the fact that certain aggravators, HAC and CCP, were not found is irrelevant. The focus is on the factors

[23] Aggravators given great weight: (1) community control; (2) prior violent felony; (3) felony murder/pecuniary gain; and (4) avoid arrest. Statutory age mitigator and non-statutory mitigation given weight: (1) good behavior while confined (moderate wt); (2) family relationships (little wt); (3) maturity (little wt); (4) religious faith (little wt); (5) work ethic (little wt); (6) low risk of future danger (little wt); and (7) good courtroom behavior (little wt). (R-RS.3 5507-28)

established in comparison to other capital case. This Court has affirmed other cases with similar aggravation and mitigation. See, e.g., *Bryant v. State*, 785 So.2d 422, 437 (Fla. 2001) (holding death sentence in armed robbery and murder was proportional where three aggravators outweighed one nonstatutory mitigator); *Pope v. State*, 679 So.2d 710, 716 (Fla. 1996) (holding sentence proportional in robbery-homicide where two aggravators, pecuniary gain and prior violent felony, outweighed two statutory and several non-statutory mitigators); *Melton v. State*, 638 So.2d 927, 930 (Fla. 1994) (holding sentence proportional where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed some non-statutory mitigation); *Lowe I*, 650 So.2s at 696 (affirming sentence based on two aggravators and similar mitigation).

Reliance on *Yacob v. State*, 136 So.3d 539 (Fla. 2014) is misplaced. Not only was *Yacob* a single aggravator case, but it was not weighty. Here, there were four aggravators, including under sentence of imprisonment/community control, prior violent felony, felony murder/pecuniary gain, and avoid arrest. This, unlike *Yacob,* was not a "robbery gone bad." Rather, Lowe had cased the Nu-Pack twice, aborting when customers were present, and in the final attempt shot the clerk before even attempting to get the cash. This too was unlike *Yacob* where the clerk was shot when he tried to impede Yacob's flight after the robbery.

Johnson v. State, 720 So.2d 232 (Fla. 1998) is distinguishable. There, the prior violent felony aggravator was found not weighty because it was based on an aggravated assault upon defendant's brother who said he had not been injured in the confrontation based on a misunderstanding. Even so, with the remaining aggravation of felony murder/pecuniary gain, the age mitigator, and six non-statutory mitigators, one of which was substantial, it was a "close case" to find the sentence disproportionate. Here, Lowe has weighty aggravation and less weighty mitigation. Proportionality should be found. Also, *Ballard v. State*, 66 So.3d 912 (Fla. 2011) is distinguishable. It, too, is a single aggravator case with both statutory mental mitigators, age mitigator, and numerous nonstatutory mitigators. Lowe's case is more aggravated and less mitigated. Likewise, *Brooks v. State*, 918 So.2d 191, 208 (Fla. 205) does not further Lowe's claim. The facts of this case support the finding Lowe was the sole perpetrator and the trial court rejected the "minor participant" mitigator. The State reincorporates it answer to Issues 1-3, 6, and 7. Hence, disparate treatment is not an issue and the sentence should be found proportionate.

ISSUE 17

LOWE'S SPECIAL VERDICT FORM AND INSTRUCTIONS WERE DENIED PROPERLY (restated)

Citing *Ring v. Arizona*, 536 U.S. 584 (2002), Lowe claims it

was error to deny his requests for a special verdict forms and jury instructions to separately and unanimously find each aggravator beyond a reasonable doubt. Lowe admits this Court rejected such a claim in *State v. Steele*, 921 So.2d 538 (Fla. 2005), but maintains there should have been a unanimous finding that his "contemporaneous conviction" "was a 'sufficient aggravating circumstance' *** to authorize death." He claims the verdict did not authorize the death penalty. This Court has rejected similar claims repeatedly and Lowe has not offered a basis for this Court to recede from that precedent.

A. STANDARD OF REVIEW – Abuse of discretion applies to review of decisions on jury instructions. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997).

B. ANALYSIS – This Court held: "Under the law, therefore, the jury may recommend a sentence of death so long as a **majority** concludes that at least one aggravating circumstance exists." *Steele*, 921 So.2d at 545. Florida's capital sentencing does not require unanimity of any sentencing factor. Moreover, Lowe not only had the contemporaneous attempted murder conviction, but he had the prior violent felony and "on community control" aggravators. *See, Kocaker v. State*, 119 So.3d 1214, 1233 (Fla. 2013) (holding "*Ring* does not apply to cases where the prior violent felony aggravator exists."); *Hodges v. State*, 55 So.3d 515, 540 (Fla. 2010) (noting "Court has repeatedly held that

Ring does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable.").

ISSUE 18

CUMULATIVE ERROR HAS NOT BEEN ESTABLISHED (restated)

Lowe asserts "cumulative error requires reversal," but he does not identify the errors to consider nor does he offer argument. This claim is insufficiently pled. *Duest*, 555 So.2d at 852 and should be deemed waived. Also, as multiple errors were not shown, Lowe's claim fails. *See Bates v. State*, 3 So.3d 1091 (Fla. 2009) (finding where individual error not found, cumulative error claim fails)

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm Lowe's death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail through the e-portal to: Steven H. Malone, Esq., Office of the Criminal Conflict and Civil Regional Counsel, Fourth District at RC4AppellateFilings@rc-4.com and stevenhmalone@bellsouth.net this 31st day of December, 2014.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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