IN THE SUPREME COURT OF FLORIDA

DARIUS M. KIMBROUGH,

Appellant,

v. CASE NO. 84,989

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State accepts Kimbrough's rendition of the Case as put forth in his brief except as to the following matters.[1] Of the 19 pre-trial motions filed by Kimbrough, the trial court granted only his motions for "Juror Questionnaire to Supplement Voir Dire;" "to Preclude Challenge for Cause;" "for list of Prospective Jurors in Advance of Trial; "to Produce Criminal Records of State Witnesses; and "for Pre-Trial Hearing to Determine Admissibility of Photographic Slides" (R.294-348; 376-379). In its order, it also allowed hearing on Kimbrough's motions for "Statement of Particulars;" "to Preclude Racially Discriminatory Excusal of Blacks...; "to Allow Defense Counsel to Examine Grand Jurors on Voir Dire; and his "Proposed Preliminary Jury Instruction" (R.379). The Hearing was conducted on November 1, 1993 (R.20-31).

Significantly, relative to Kimbrough's first point on appeal, the trial court's written order denied his "Motion to Prohibit Argument and/or Instructions concerning First Degree Felony Murder"

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[1]The Appellant was the defendant in the trial court below. The Appellee, THE STATE OF FLORIDA, was the prosecution. In this brief, the Appellant will be identified as "Kimbrough". Appellee will be identified as the "State". The symbol "R" will be used to designate the record on appeal including pre-trial and post-trial hearing transcripts. The symbol "T" will designate the Guilt Phase Transcript. "PT" designates the Penalty Phase Transcript. "SR" represents the supplemental record. "p" represents pages of Kimbrough's brief. All emphasis is supplied unless otherwise indicated.

(R.304-308, 376). It found: "The allegations of the indictment are sufficient to charge Murder in the First Degree, ***whether it be premeditated or felony murder***. *Barton v. State*, 618 So. 2d 618, 624 (2d DCA 1966)." (R.376). At the hearing conducted on November 1st, Kimbrough's counsel requested:

> MR. SIMS: ...This is just a Statement of Particulars, requesting that the State underline and outline any felony murder underlying offense that they are attempting to base the first degree murder conviction upon. ... (R.21)

The prosecutor rejoindered:

> MR. ASHTON: Well, the theory of the prosecution under that Indictment can be either premeditated or felony murder.
>
> THE COURT: All right.
>
> MR. ASHTON: We'll be arguing both. . . . We have a burglary, we have a rape. At the very least, those two are obvious. So I don't want to be limited to those, and hopefully, I don't think we have to respond to the Statement of Particulars. I don't think the defense is under risk of confusion, based on the facts of this case, as far as how she was killed, are fairly clear. (R.22)

Kimbrough in his brief mentions that the trial court granted his Motion in Limine concerning statements made by Denise Collins about him to the apartment manager where she lived before he murdered her, but neglects to inform this Court of the substance of that evidence. At a pre-trial hearing on May 18, 1994, Kimbrough's

counsel proffered the substance of Denise's statements:

> MR. SIMS: ...Our motion deals with statements Ms. Collins allegedly made the day before her attack and in the week before her attack about a big black male with gold teeth having said lewd things to her and was acting threateningly towards her. We're asking for their exclusion because it is clearly hearsay and there is no exception to that hearsay. (R.54-55)[2]

As regards the trial court's denial of the State's motion in limine to exclude reverse *Williams* rule evidence concerning Gary Boodhoo, the victim's ex-boyfriend, the prosecutor proffered that Boodhoo had become "very good friends," that "she trusted him completely," and there was "no hostility" between them (R.64). The prosecutor further related: "...Gary Boodhoo has been exclusively excluded as having done this crime." (R.64). The trial court found, regarding an alleged violent incident occurring in Boston when Boodhoo and the victim were an item, that the time attenuation between the incident and the murder failed to make it relevant. The trial court further held regarding this matter:

> THE COURT: ***...I don't think it's similar enough. I don't think there's anything about that that even approaches this. The man [Boodhoo] didn't beat her up so badly. He went in the bathroom. He stopped***

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[2]Needless to say, Kimbrough had gold teeth, and it is probable that he was the black male who harassed the victim before he snuck into her apartment, raped, and murdered her. The prosecutor agreed with Mr. Sims that this damaging evidence did not fall under one of the hearsay exceptions, so it was excluded. (R.56)

> ***the argument. He stopped the fight. He got away from her. I'm not going to allow it.*** ... (R.90-91)

As concerns Kimbrough's alleged request for a jury instruction on murder in the third degree, the record indicates the following matters (T.701-02). On behalf of Kimbrough, his counsel requested:

> MS. CASHMAN: We would be requesting murder two, murder three with aggravated battery as felony and manslaughter as to the murder one charge. (T.701-02)

The prosecutor rejoindered:

> MR. ASHTON: Can't have third degree murder with aggravated battery ... . Case law says that's not permissible. I would have to get it for you it's not necessary. It's the same level as manslaughter. It's only more confusing to the jury so I would object to it. Besides there's no --
>
> THE COURT: Why don't you get the case law and I'll look at it in the morning. (T.702)

The next morning Kimbrough did nothing regarding this matter (T.711-719). Before recessing that day, the trial court briefly conducted a conference on jury instructions, in which "murder three with aggravated battery as felony" as a lessor was mentioned (T.847). In fact, the record clearly reflects the trial court instructed the jury on murder three "...while engaged in the commission of aggravated battery." (T.981). The instruction as given was not objected to by Kimbrough (T.1001).

The trial court's denial of Kimbrough's motion for judgment of

acquittal was as follows:

> THE COURT: Well, the evidence so far as I've heard it puts the defendant in the apartment and there's enough evidence there to show he was in the bed and there's enough evidence to -- as to the sexual battery that she was apparently struggling with it because of the bruise marks on her arms indicating as the doctor said would indicate she was -- she was being held down or it was consistent with being held down.
>
> And as far as the burglary there's no evidence that she had known him before and certainly the ladder under there would indicate how the entry was made. This sliding glass door was unlocked and from what I understand it was somewhat open which would be normal on the second floor. One would expect it would be safe to do that. Apparently not.
>
> ...I am finding that taking this in the light most favorable to the State the State has proved sufficient cause to get it to the jury. (T.882-83)

A correct rendition of the case as it relates to Juror Julian is as follows. The substance of the charge of juror misconduct concerning Mr. Julian came from an affidavit signed by Ann Marie Mulligan (R.454). She alleged:

> ...I overheard one of the male jurors telling the group that his fiancee' works with one of the expert witnesses of the case by the name of Dave Baer. ... He proceeded to tell the group that Mr. Baer told his fiancee' that he would have to return today because they didn't ask him the right questions. The rest of the group acknowledged what he had said by nodding in the affirmative. Nothing more was said by that group at that time about the trial while in my presence.

A hearing on Kimbrough's Motion for New Trial relating to this matter was held on August 8, 1994 (R.109). At the outset, Mr. Sims expressed that the hearing should be on Kimbrough's Motion to Allow Voir dire of a Juror, and that he was not prepared to go forward on the new trial motion without his co-counsel (R.109). The prosecutor argued:

> ...[T]he defense had this information before closing arguments and therefore our position is they waived any basis of motion for new trial or any objection because they didn't raise it timely.
>
> ...I think the deposition is very clear that I informed Mr. Sims I Faxed to the Court yesterday the Defense knew about this well before the end of the trial and chose not to bring it up.
>
> ...[T]he fact that the juror's fiancee worked at the crime lab is a fact that was known to the Defense even before this person came forward because we found out about it during the trial and informed Mr. Sims and Miss Cashman of that fact. If they wanted any inquiry we can have it then. (R.110-112)

The trial court's reaction to this ***"wait and see"*** strategy by the Defense was as follows:

> THE COURT: Well, I believe from what I saw of the trial and the opportunities they were given to ask for mistrial that it looked like you all were doing well and gave up every chance for mistrial during the trial.
>
> In fact I asked specifically up here at the Bench at least twice maybe three times in closing

> arguments do you want a mistrial? And I even asked Darius Kimbrough if he wanted a mistrial and he said no. That was his agreement. That was a tactical decision.
>
> Apparently you all did know about this witness who might have known, as far as, ***so my feeling is you all didn't want a mistrial until after the verdicts came in then it began to look like it would be a nice thing to have***, of course, however. (R.113-14)

The trial court reserved ruling until the juror could appear before it (R.113-14).

On August 30, 1994, a hearing was conducted prior to the commencement of the Penalty Phase of Kimbrough's trial related to Juror #76, Eddie Julian (R.154-92). The bottom line of this hearing was that Julian was engaged to a chemical analyst at the FDLE crime lab and she knew Dave Baer (R.154-56). He did not discuss the case with her (R.155-56). When asked, he could not even remember what Mr. Baer looked liked, mistaking him for the other expert on DNA evidence, Dr. Martin Tracey (R.157). The only thing he told his fellow jurors was that his fiancee worked at the crime lab (R.157). He did not recognize Baer's name when it was mentioned by the prosecutor at the initial voir dire to choose a jury (R.158). There was nothing "...that occurred outside the courtroom with his fiancee..." that would have affected his deliberations (R.162).

After the individual voir dire of Julian, each of the jurors was individually voir dired about outside influences affecting their deliberations (R.165-84). Each of them responded there were no outside influences affecting their verdict (R.165-84).

The State during its argument asked the Defense why it "...withheld this information from the Court, from the State and allowed this jury to deliberate this case." (R.188). It further argued that the motion for mistrial was waived (R.188). The trial court found as follows:

> THE COURT: It appears to me that the cases cited by the Defense presume there's some kind of extra record evidence. I'm not seeing any from what we heard here. ...
>
> So any evidence that he might have brought in there was not from something that he learned during the trial or something he learned from his girlfriend from what we questioned every juror including Mr. Julian at length and every alternate and I can find nothing that he said that would have affected even the slightest bit the outcome of this trial. And if you can specifically name something I would like to know what it was. (R.190-91)

The trial court specifically addressed Kimbrough's counsel regarding this matter as follows:

> THE COURT: Is there any reason why when you learned about this you didn't tell the Court? Why did you wait until the verdict was in? Defense?
>
> There were a couple times when you had opportunity for mistrial and I specifically asked you during

> closing arguments, are you asking for mistrial? You specifically said no. So there were opportunities for this subject to come up surely you didn't forget it until after the verdict was in. What was the reason?
>
> MS. CASHMAN: ***It was a strategic decision. Mr. Sims and I consulted with other attorneys from the office and decided that the appropriate place to bring this issue up and put it front of the Court was at a motion for new trial and that was when we brought it up.***
>
> THE COURT: Okay. Well, I'm going to deny the motion for new trial. (R.191-92)

A correct rendition of the case relating to three of the jurors reading an Orlando Sentinel article on the trial after the verdict is as follows. Virginia Fanslow, Patricia Marzke and Janet Steele revealed that they had read the article, but it did not change their minds as to their verdict (R.204-11). Kimbrough requested a mistrial through his counsel as to the Penalty Phase. The trial court individually voir dired each of the jurors (R.210-17). Ms. Fanslow remembered from the article that Denise Collins had been "harassed" prior to her murder (R.210-11). She also commented to the trial court: ***"You didn't tell us not to read after we had made a verdict."*** (R.211). Ms. Marzke indicated that she had read that Denise had reported that Kimbrough had been "stalking" her (R.215). Ms. Steele remembered that Denise had moved into the apartment because she had 2 cats, and that "...she had reported

being stalked." (R.217). Kimbrough in his rendition of the case failed to account for the prosecutor joining his motion for mistrial as follows: "...***[W]e agree the panel has to be stricken.***" (R.218) The panel was in fact stricken and a new penalty phase jury chosen as he had originally requested prior to his trial, but which was denied by the trial court (R.326-27, 378).

Each of Kimbrough's objections to alleged non-statutory aggravation argument by the State during the Penalty Phase were overruled (PT.542, 546, 549). Through counsel, he indicated he was satisfied with the Penalty Phase jury instructions as given (R.565).

STATEMENT OF THE FACTS

GUILT PHASE

The State accepts Kimbrough's rendition of the facts as set forth in his brief except as to the following matters either omitted or incorrectly represented by him. Sandra Hughes was Denise Collins' best friend since they attended Titusville High School together (T.454). On the evening of October 2, 1991, Sandra had Denise over for dinner at her place in Winter Park (T.456). Denise arrived after work at approximately 8 p.m. (T.456). They ate and then listened to music (T.457). Later, Gary Boodhoo and Linda Hartman joined them (T.457). The four of them listened to

music and talked (T.457). Denise left "...sometime after 11, before midnight." (T.458). Gary and Linda left around the same time (T.459). The next time she saw Denise was the following day at the hospital when she saw her before she died (T.459).

Kimbrough in his brief represented that Gary "...still pursued Collins to be his girlfriend..." (p.6). In fact, Sandra testified under cross-examination:

> Q. When she came back he was no longer her boyfriend.
>
> A. Right. They were just friends.
>
> Q. And he wanted her to be her -- to be his girlfriend, correct?
>
> A. But she was not interested in having him as boyfriend?
>
> A. Right. (T.460-61)

On redirect, Sandra testified that when she, Denise, Gary, and Linda were together the night she was murdered, there were no arguments between Denise and Gary (T.464). It was a "...pleasant and unassuming evening." (T.464).

Deputy Pelaez was the first police officer on the murder scene (T.466-68). Fire Rescue personnel were waiting for him so they could enter the apartment (T.467). The entry door was "cracked" open by Fire Rescue (T.467). It was approximately 4 a.m., there

were no lights on in the apartment, and it was "pretty dark" (T.468). He announced himself and there was no response (T.468). He "began to hear some moaning sound, grunting like someone was in pain." (T.468). At this point he made entry (T.468). He observed:

> A. In the bedroom I had my flashlight with me which I was shining. I observed a white female lying on the floor in the bedroom fully unclothed and she was -- you could see she was injured because she was -- had blood all over her body and seemed to be in a semi-conscious type state like a coma so to speak. (T.469)

Deputy Pelaez further testified that Fire Rescue followed him in, and upon discovering Denise attempted to assist her (T.469-70). "...[J]ust prior to them giving her assistance she sprung up in a upright [seated] position." (T.470). Denise "had traces" of blood "all over [her] face and body from the left side." (T.470). Deputy Pelaez could "...see trauma on it." (T.470). The following activity occurred after her sitting up:

> A. Slumped forward but she didn't actually fall. She slumped forward. She was leaning.
>
> Q. Like folded in half?
>
> A. Something like that. Not quite completely half. At this point Rescue people gotten [sic] their equipment together and attempting to put her back in the prone position on her back and they brought her back down. ***As they brought her back down she began to vomit as on her way down she was loosing blood from gushes. She had done that a couple of times as a matter of fact.*** (T.470-71)

Deputy Brian Tittle was the second officer on the scene, and his initial responsibility was "...to insure the situation was safe for everybody else in [the apartment] (T.476)." While determining that no one else was present, he and another Deputy observed the sliding glass door "...far end from where the front door was ... standing open." (T.476-77). In fact, the sliding door was "3/4's of the way to completely open." (T.477).

Deputies Donald Knight and Marcus McCloud, Crime Scene Technicians, testified as to the evidence that was collected at the murder scene over the course of four days (T.481-519). Notable evidence found was as follows. A cast made of a ladder impression outside the balcony leading to the sliding glass door to Denise's apartment (T.482-488). Black sheets with "dried reddish stains on [them]" (T.508-09).

Andre Lee, a truck driver, testified that on the night of the murder, he worked until approximately 9:45 to 10 p.m. (T.531). He went straight home (T.532). When he got home he went to close his blinds and noticed someone outside looking up toward his apartment (T.532-33). Mr. Lee's apartment was directly above the victim's apartment (T.532). He went to take a shower, and when he checked again about 20 minutes later, the guy was still there (T.533).

So, Mr. Lee put on some clothes and went outside to investigate (T.533). He walked by Kimbrough and saw "an aluminum ladder up on the balcony of the second floor which would have been 2211 [the victim's apartment] (T.534)." Kimbrough was "[s]tanding approximately [2] to maybe 3 feet away from the ladder." (T.534). Kimbrough was looking up at 2211 (T.534). It was pretty dark but Mr. Lee could still see Kimbrough a little bit (T.535). Mr. Lee said something to him, but he did not respond (T.535). When Mr. Lee got back to his apartment, he looked out and Kimbough was still there (T.535). Mr. Lee saw a police car with its lights on in a nearby complex, so he went to bed and forgot about it (T.535).

The next day he was woken by loud police radios (T.536). However, he was not woken by any loud noises prior to that (T.536). A week later he saw Kimbrough again and called Detective Gay (T.536). Initially, Mr. Lee testified that when he called Detective Gay the police could not find Kimbrough (T.536). In fact, as was testified to on redirect, Mr. Lee pointed out Kimbrough to Detective Gay on October 22nd and Kimbrough was arrested that day (T.549). Mr. Lee also testified that when shown a photo lineup by Detective Gay, he "told him which one [he] ***thought*** [he] saw." (T.537). Mr. Lee identified Kimbrough in court as the man standing outside Denise's balcony the night of the

murder (T.537).

Gary Stone worked at Carousel Apartments as a tile setter, patch and dry wall man at the time of the murder (T.551). He testified that he was familiar with the ladder Kimbrough used to gain access to Denise's second floor apartment (T.551). It was stored in an elevator shaft (T.552-53). Although the room was kept locked, it was very easy to break in (T.553). Mr. Stone remembered that on the day of the murder a black guy with a snake watched him put the ladder away (T.553).

Detective Gay was the lead homicide investigator (T.560). He requested semen samples from the victim and witnessed Dr. Blakely prepare the Rape Kit (T.561-565). On the morning of October 3rd the area around the murder scene had been roped off, and Detective Gay looked around to see who was "...showing interest and who [was] standing around." (T.566). One of the guys who stood out was a guy with a "rather large snake around his neck." (T.566). The guy with the snake was Alonzo Terrell, and Kimbrough was standing next to him (T.567).

Later that day he spoke with Andre Lee (T.568). Detective Gay composed a photo lineup, which he showed to Mr. Lee on October 5th (T.568-570). Mr. Lee chose photo #1, which wasn't Kimbrough, but when he made the choice he expressed to Detective Gay that "he

couldn't be absolutely positively sure. He thought #1 ... was similar to the individual he saw." (T.570). On October 22nd when Mr. Lee called Detective Gay to tell him Kimbrough was around the Carousel Apartment complex, he pointed Kimbrough out as soon as Detective Gay pulled in (T.571-72). Gary Stone chose Terrell's photo from the lineup as the individual with the snake who watched him put the ladder away the day of the murder (T.572-73). The ladder that Kimbrough used had "a bent foot." (T.574-75).

On cross-examination, the defense was allowed to elicit, over the State's objection, the report of the victim's mother that a couple of days before the murder she had heard "what sounded like Gary Boodhoo's voice ... and [a] metal ladder outside." (T.585-86). On redirect, when the prosecutor attempted to elicit other information gained from the mother, the defense's objection was sustained.[3] Detective Gay did testify that his interview with Sandra Hughes revealed that Gary Boodhoo and the victim were very good friends (T.596). Ms. Hughes gave him no reason to suspect

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[3]At side bar Mr. Ashton proffered the following information the mother gave Detective Gay: "He will testify about the investigation revealing ***Miss Collins had been harassed by a man ... matching Mr. Kimbrough's description and on the day prior to the murder he got it from the victim's mother***.

Mr. Sims already brought out a portion of what the mother told Mr. Gay. ... He brought out the reason why this officer singled out these individuals [Kimbrough and Terrell]. The reason was not just to chat about the snake, ***the reason was to look at Mr. Kimbrough's teeth because he matched the description***. He's kicked the door open, ...to everything this investigator [did]." (T.590-91)

Boodhoo of the murder (T.596). Neither did Linda Hartman (T.597). Finally, in the Fall of 1993 Boodhoo submitted himself to a blood withdrawal, and the DNA test of his blood excluded him as a suspect (T.598-99).

Various technicians from the FDLE crime lab testified as to their findings as to certain evidence (T.603-84). Three (3) pubic hairs matching Kimbrough's were found on the victim's blood-stained, fitted sheet, and one (1) was found on one of her towels (T.629-30). Traces of spermatozoa were found in a vaginal smear of the victim and on the blood-stained sheets (T.665-71).

David Baer was qualified by the trial court over defense objection "as expert not only in serology but also in DNA testing and the interpretations of that testing so he can give his opinion on that."[4] (T.696). Mr. Baer testified that he did 3 out of 5 DNA probes of the victim's vaginal swabs (T.747-51). On the first probe "...faint bands appear to be in the same location as the bands in the blood from Mr. Kimbrough." (T.747). The results related to the vaginal swabs were not so conclusive as Mr. Baer's testimony illustrates:

Q. Did you run all five -- attempt to run all five

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[4]The defense did not object to Baer being qualified as an expert in serology. (T.693-94)

of the probes on the vaginal swab?

A. In this case I believe I did three.

Q. And third one is the one that didn't come up?

A. Third I got nothing which at that point I figure I got as much as I could from these. (T.751)

However, the DNA evidence obtained from the semen stains found on the "sheet cuttings" provided a visual and computer match to Kimbrough's blood on all 5 probes (T.752-762). He further testified regarding the probabilities concerning this match as follows:

Q. What is the probability of finding someone in the Caucasian population that matches the five probes that you found in the evidence sample?

A. For the five probes chance of finding a person with this particular combination is one out of one point one billion in white.

Q. What is the probability of finding someone that matches those five probes that you have from the evidence sample in the black population?

A. Figure I came to is one out of one hundred forty million. (T.775)

On redirect examination, Mr. Baer testified there was ***no evidence of "band shifting" in this case*** (T.796). Gary Boodhoo was excluded as a suspect through DNA test results. (T.798-99)

Dr. Martin Tracey was qualified as an expert in genetics with

no objection (T.805). His probabilities regarding Kimbrough's match on 4 probes was:

> A. Yeah. I can tell you what the calculations look like.
>
> For the tests D2S44, D17S79, D4S139, and D10S28 the frequency of this, if you [saw] this match, if you were to simply plug a Caucasian data base off the street you would see the same banding pattern in one person out of approximately a hundred million. If it [sic] you were to do the same calculations using a black data base rather than a Caucasian data base you would see the same margin in one person out of approximately thirty-six million. (T.817)

Dr. Tracey also testified as to the probabilities of Kimbrough's match under the most conservative methods of figuring the same:

> A. ...I did ceiling calculations in two ways. The first way recommended by the two authors that I mentioned the Hartel and Lewontin. In that case you get a number that is approximately one in eleven million human beings. If you use the National Research Counsel [sic] method where you arbitrarily place things at a ten percent floor the probability of getting DNA pattern for these four tests out of any human being is one in a million. So that the affect of the ten percent reduces it by about removing one zero from that. (T.822)

Dr. Hegert, Orange County Medical Examiner, testified that his external examination of Denise revealed "a number of areas of injury of the body surface. The primary areas of injury were in -- located in the area of the head (T.856)." Her head exhibited considerable swelling on both sides (T.856). Her jaw was fractured

"just to the right of the mid line and on the internal examination of the mouth there was great deal of hemorrhage on the inside of the cheek in the area of the left upper jaw region (T.856)." She had swelling on the left side of her face and "evidence of contusions or bruising on the left side of the head along the hair line (T.856)." There were "oval areas of contusions or bruises," as well as bruising on the left ear and 2 "tears on the back side of the ear and evidence of contusions or bruising down the entire left side of the face and to the left neck (T.856)."

Dr. Hegert's internal examination revealed "extensive fracturing of the left side of the head in the area of the temple and of the bone in the area of the ear over the ear (T.857)." Denise had "a great deal of hemorrhage in the scalp tissue there was also fracture extending then from that area of injury on the left side in the area of the temple across the top of the scull all the way over to the similar area on the right side of the head (T.857)." Internal examination of the brain exhibited injury on the surface underlying the fractures to the skull (T.857). There was "a great deal of hemorrhage and extensive swelling of the entire brain including the area of the brain called the brain stem (T.857)." The cause of death "***was the hemorrhage and the injury to the brain including the bleeding and swelling that resulted from***

blunt force injury to the face and head of this woman (T.857)."

The areas of bruising on Denise's body included "both the outside of the left arm in the upper one half of the arm as well as on the inside of the left arm and on the inside of the right arm. (T.857)." There were "also some smaller areas of contusions on the forearms ... and also several areas of bruise on her leg (T.858)."

Denise's vagina exhibited 2 superficial tears "on the inner aspects of the genitalia approximately twelve o'clock. (T.858)." These injuries could have been caused by an erect male penis (T.858). The bruises on Denise's arms and forearms could be consistent with someone leaning over and holding her down (T.859). Denise was a rather "small lady," 5'4" tall, and weighed 112 lbs (T.867). The damage to the side of her head could have been produced by someone punching her in the side of the head (T.867).[5] Such would be possible "if someone was pretty powerful and struck her very hard (T.868)." Stomping someone on the side of her head would also be consistent with injuries of the victim (T.868). "[T]here were at least 3 or more separate blows to the face and head. (T.868)." Although Dr. Hegert testified under cross-examination that the injuries to Denise's vagina could have come

[5]At the Penalty Phase, Dr. Hegert testified that Denise's head injuries were "consistent within reasonable medical certainty [with] the knuckles from a fist striking her in the head (PT.436)."

from consensual sex, on redirect he testified they would have been painful (T.874).

PENALTY PHASE

The trial court's findings on aggravation were as follows:

> A) AGGRAVATING FACTORS
>
> 1.) **The Defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.**
>
> The Defendant in March of 1992 entered without permission the apartment occupied by Heather Claypool. She awoke from her bed in the middle of the night to see the Defendant at the end of her bed. He had socks on his hands. He made her take off her panties and forced her to have sex with him. He put a pillow over her face and said he did not want her to look at him, and he said he would not hurt her if she didn't. She did not fight back and she did not look at him. He did not injure her further after the rape. She testified that she was very much afraid. He left after the rape.[6] On November 3, 1993, the Defendant pled Nolo Contendere to Burglary of a Dwelling with a Battery Therein and Sexual Battery. This Court accepted that plea and subsequently sentenced the Defendant on December 15, 1993 to 10-1/2 years in the Department of Corrections followed by 10 years Supervised Probation on Count 1 and 10-1/2 years in the Department of Corrections on Count 2; each count was concurrent to the other. This aggravating circumstance was proved beyond a reasonable doubt.
>
> 2.) **The capital felony was committed while the defendant was engaged in the commission of an**

[6]See Heather's testimony at Penalty Phase. (PT.425-29)

attempt to commit or committing a sexual battery.

Denise Collins was brutally raped in her bed in the middle of the night by the Defendant. The DNA evidence matched that of the Defendant. The bruises on her arms are indicative of being held down. The evidence presented was that the victim and defendant did not know each other and that the Defendant gained entry into her apartment through the sliding glass door of her second-story apartment balcony. This aggravating circumstance was proved a beyond a reasonable doubt.

3.) **The capital felony was especially heinous, atrocious, or cruel.**

On October 3, 1991, the Defendant entered the second-story apartment of the victim, Denise Collins, as she lay in bed alone late at night. The victim was a 28-year-old female, 5 feet 4 inches tall, 112 pounds who lived in that apartment alone. The evidence indicates that the Defendant used a ladder to climb onto the balcony and get through the sliding glass door. He raped Ms. Collins. She had contusions on her upper arms and left side of face. The evidence presented by the Medical Examiner, Dr. Thomas Hegert, was that there were a minimum of three blows to the head, one of which would have rendered her unconscious. Her skull was fractured by a blunt force. There was blood on the wall as well as the bed, the carpet, and numerous items strewn throughout the room indicating a struggle. The Medical Examiner could not say in what sequence the blows to her head were inflicted, but that the one that fractured her skull would have rendered her unconscious. If she were rendered unconscious immediately, perhaps this crime would not be so hideous. The Medical Examiner, naturally, cannot determine which blow was first because they were all too close in time; however, there is other evidence that this crime involved quite a struggle. There was blood all over the room. The victim was still alive when she

> was found by the paramedics on the floor. She even sat up at one point when law enforcement was there. She regurgitated. Heroic efforts were made to save her life; however, she died at the hospital about 12 hours after the attack. There was semen found on the bottom sheet of Ms. Collins' bed. It was matched to the Defendant through DNA.
>
> ***The last moments of Denise Collins life were a nightmare. First, she discovered a stranger in her bedroom, then she was raped by that stranger. After that she was beaten, and her head was banged against the wall. She had to be in unspeakable fear and pain. Although no exact time period over which this hideous crime occurred has been established, based on the activities that took place and the extent of blood splattered throughout the room it was not quick.*** This aggravating circumstance was proved beyond a reasonable doubt. (R.596-97)

The trial court carefully considered both statutory and non-statutory mitigation presented by Kimbrough (R.597-600). It concluded: "The Court finds, as did the jury [11-1],[7] that the aggravating circumstances present in this case outweigh the mitigating circumstances present (R.600)."

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[7]Recall that this was a new jury since the guilt phase jury was dismissed because 3 of the jurors had read an Orlando Sentinel article on the trial after their verdict. Also, Kimbrough received a new jury for the penalty phase as he originally requested. (R.326-27, 378)

SUMMARY OF THE ARGUMENT

I. The evidence was legally sufficient to support Kimbrough's guilty verdict for the heinous murder of Denise Collins. Kimbrough never challenged the DNA test results, and this case does not involve use of the controversial "band shifting technique." No *Frye* hearing was required given this Court's judicial notice of DNA test results. The State introduced competent evidence from which the jury could have reasonably rejected Kimbrough's theory of defense.

II. The trial court correctly exercised its wide discretion in excluding Kimbrough's reverse *Williams* Rule evidence because it was irrelevant.

III. The trial court correctly exercised its discretion in finding the statutory mitigating factor of age did not exist. Kimbrough's argument is merely a disagreement with the weight given this mitigator.

IV. The trial court conscientiously weighed the aggravating circumstances against the mitigating evidence and concluded that death was warranted.

V. The trial court correctly exercised its discretion in finding the HAC circumstance applicable to the facts in this case, and in instructing the jury in keeping with its finding.

VI. The trial court correctly exercised its discretion when it excused a prospective juror for cause. He failed to object after she was excused. Her feelings against the death penalty would have prevented or substantially impaired the performance of her duties as a juror.

VII. The trial court correctly exercised its discretion in finding that the murder was committed during the same criminal episode as the sexual battery, and it correctly instructed the jury on this aggravating circumstance.

VIII. Kimbrough's final claim is nothing more than a boilerplate claim repeatedly found by this Court to be without substance. Florida's death penalty statute has withstood repeated constitutionality attacks and should not be revisited here, particularly when many of his sub-claims are procedurally barred.

ARGUMENT

POINT I

THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUPPORT KIMBROUGH'S GUILTY VERDICT FOR THE FIRST-DEGREE MURDER OF DENISE COLLINS.

The question of whether the evidence in this cause failed to exclude Kimbrough's reasonable hypothesis of innocence was for the jury to determine, and there was substantial and competent evidence to support its verdict of murder in the first degree. Placed in other terms, the State introduced competent evidence from which the jury could have reasonably rejected Kimbrough's theory of defense. Kimbrough would have this Honorable Court usurp the jury's function by becoming a "super jury", substituting its judgment for that of the jury and pitting its judgment against those determinations of fact which the jury properly rendered.

This Honorable Court's opinion in *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989) is an excellent starting point for any argument concerning a case wholly based upon circumstantial evidence:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. (footnote omitted) A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. *Jaramillo v. State*, 417 So. 2d 257 (Fla. 1984). Where the only proof of guilt is

> circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. *McArthur v. State*, 351 So. 2d 972 (Fla. 1977); *Mayo v. State*, 71 So. 2d 899 (Fla. 1954). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse. *Heiney v. State*, 447 So. 2d 210 (Fla.), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Rose v. State*, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), *disapproved on other grounds, Williams v. State*, 488 So. 2d 62 (Fla. 1986).

In that opinion, this Court delineated the role of the trial judge in such a case when ruling on a defendant's motion for judgment of acquittal:

> It is the trial judge's proper task to ***review*** [emphasis this Court's] the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. *Spinkellink v. State*, 313 So. 2d 666, 670 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The State is not required to "rebut conclusively every possible variation" (footnote omitted) of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. *See Toole v. State*, 472 So. 2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

Id. at 189. This Court has further opined regarding such motions:

> ...If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. (citation omitted)

Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991).

The District Court of Appeal of Florida, Third District, has delineated an appellate court's posture regarding review of a trial court's denial of a motion for judgment of acquittal as follows:

> ...In our appellate posture, we must assume that the trier of fact "believed that credible testimony most damaging to the defendant and drew from the facts established those reasonable conclusions most unfavorable to the defendant." (citations omitted) Consequently, this court will not substitute its judgment for that of the trier of fact nor pit its judgment against those determinations of fact properly rendered by the trier of fact. *State v. Smith*, 249 So. 2d 16 (Fla. 1971). All conflicts and reasonable inferences therefrom are resolved to support the judgment of conviction. (citations omitted)

E.Y. v. State, 390 So. 2d 776, 778 (Fla. 3d DCA 1980). Such a motion should not be granted unless there is no legally sufficient evidence on which to base a verdict of guilt. *Knight v. State*, 392 So. 2d 337, 339 (Fla 3d DCA 1981).

This Court has further opined regarding the circumstantial

evidence standard:

> ...The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. (cite omitted)

Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). This Court has held that premeditation can be shown by circumstantial evidence. *Crump v. State*, 622 So. 2d 963, 971 (Fla. 1993); *See also Sireci v. State*, 399 So. 2d 964 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982), *overruled on other grounds, Pope v. State*, 441 So. 2d 1073 (Fla. 1983). Premeditation may be inferred from the manner in which the murder was committed, including the nature and manner of the wounds. *See Taylor v. State*, 583 So. 2d 323 (Fla. 1991), *cert. denied* 115 S.Ct. 518 (1994); *Heiney v. State, supra*, at 215.

The trial court's denial of Kimbrough's motion for judgment of acquittal was as follows:

> THE COURT: Well, the evidence so far as I've heard it puts the defendant in the apartment and there's enough evidence there to show he was in the bed and there's enough evidence to -- as to the sexual battery that she was apparently struggling with it because of the bruise marks on her arms indicating as the doctor said would indicate she was -- she was being held down or it was consistent with being held down.
>
> And as far as the burglary there's no evidence

> that she had known him before and certainly the ladder under there would indicate how the entry was made. This sliding glass door was unlocked and from what I understand it was somewhat open which would be normal on the second floor. One would expect it would be safe to do that. Apparently not.
>
> ...I am finding that taking this in the light most favorable to the State the State has proved sufficient cause to get it to the jury.

This Court has held:

> ...[T]he trial court's conclusions of fact come to us clothed with a presumption of correctness, and, in testing the accuracy of these conclusions, we must interpret the evidence and all reasonable deductions and inferences which may be drawn therefrom in the light most favorable to the trial judge's conclusions. (citation omitted)

Shapiro v. State, 390 So. 2d 344, 346 (Fla. 1980).

The evidence adduced at trial clearly demonstrated that Denise Collins was murdered while resisting Kimbrough's sexual attack. Kimbrough's alleged hypothesis of innocence was "that the victim's ex-boyfriend [Gary Boodhoo] was the likely perpetrator of this crime (p.25)." The State presented evidence that Boodhoo's DNA test result excluded him as the perpetrator, and contrary to Kimbrough's assertion in his brief, the unexplained presence of his semen on the victim's sheets, placed him with the victim at or very

near the time of her demise (p.33-34).[8] *See Correll v. State, supra*, at 567; *Peavey v. State*, 442 So. 2d 200, 201 (Fla. 1983). "Because the circumstantial evidence standard does not require the jury to believe the defense's version of the facts on which the State has produced conflicting evidence, the jury properly could have concluded that [Kimbrough's] hypothesis of innocence was untrue." *Crump* at 971.

DNA Evidence

In *Hayes v. State*, 20 Fla. L. Weekly S296, S299 (Fla. June 22, 1995) this Court held:

> ...***We take judicial notice that DNA test results are generally accepted as reliable in the scientific community***, provided that the laboratory has followed accepted testing procedures that meet the *Frye* test to protect against false readings and contamination.

Earlier this Court held:

> ...If the reliability of a test's results is recognized and accepted among scientists, admitting those results is within a trial court's discretion. *Stevens v. State*, 419 So. 2d 1058 (Fla. 1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). When such reliable evidence is offered, "any inquiry into its reliability for purposes of admissibility is only necessary ***when***

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[8]There was also a match to Kimbrough's blood on one of the DNA probes of the vaginal swab taken of Denise prior to her death (T.747-51). Further, 4 pubic hairs matching Kimbrough's were found in the victim's bedroom where the murder took place. 3 were on the sheets where his semen was found and 1 on one of her towels (T.629-32).

> ***the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed.***" *Correll v. State*, 523 So. 2d 562, 567 (Fla.) *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988). (emphasis this Court's)

Robinson v. State, 610 So. 2d 1288, 1291 (Fla. 1992).

Kimbrough argues that "the DNA results should not be accepted as reliable as a matter of law because the trial court did not perform the proper *Frye*[9] inquiry (pp. 35-36)." However, this Court took "***judicial notice that DNA test results are generally accepted as reliable in the scientific community...***" in *Hayes*, and has held that "any inquiry into its reliability ... is only necessary ***when the opposing party makes a timely request for such ... supported by authorities indicating that there may not be general scientific acceptance of the technique employed***" in *Correll* and *Robinson*. The defense made such a challenge in *Hayes* to the controversial "band shifting technique." No such challenge was made in this cause, and the "band shifting technique" was not utilized.

In fact, Kimbrough's counsels moved for a continuance so they could find their own DNA expert, because as Mr. Sims related

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[9]*Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

"...***the key issue in this case is ... DNA*** (R.8-12)."[10] They strategically elected not to have this expert testify. Mr. Sims was right, Kimbrough's DNA was the key issue in this case, because it placed him with the victim at or very near the time she was raped and savagely beaten to death for resisting. *Hayes*, *Robinson*, and *Correll* demonstrate that Kimbrough's argument as to the DNA test results is disingenuous. Kimbrough's DNA results should be accepted as reliable as a matter of law.

Premeditation

Another disingenuous argument made by Kimbrough is that there was "insufficient evidence of premeditation" in his murder of Denise (pp.43-45). Before addressing his argument, the State would note that the jury was instructed without objection as follows:

> There are two ways from which a person may be convicted of first degree murder.
>
> One is known as premeditated murder and another is known as *felony murder*. (T.978-980)

The jury was then instructed on the elements of both premeditated first degree murder and ***felony*** first degree murder (T.978-980).

The jury checked the space on the verdict form as to Count I

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[10]At a later hearing held on May 18, 1994, Mr. Sims related, "We're not listing him as a witness, your Honor." He further related that their DNA expert was not going to testify. (R.53-54)

which read: "We, the jury, find the defendant guilty of murder in the first degree as charged in the indictment." (R.445). The indictment as to Count I read: "...Kimbrough, did ... in violation of Florida Statute 782.04, from a ***premeditated*** design to effect the death of Denise Collins, did murder Denise Collins... ." (R.254).

Initially, Kimbrough filed a "Motion to Prohibit Argument and /or Instructions concerning First Degree Felony Murder" (R.304-308). The trial court, by written order, denied the motion as follows: "The allegations of the indictment are sufficient to charge Murder in the First Degree, ***whether it be premeditated or felony murder***. *Barton v. State*, 618 So. 2d 618, 624 (Fla. 2d DCA 1966)." (R.376). Subsequently, Kimbrough filed a Statement of Particulars "...requesting that the State underline and outline any felony murder underlying offense that they are attempting to base the first degree murder conviction upon." (R.21, 379). The prosecutor replied at the hearing on this and 3 other of Kimbrough's motions: "...We have a burglary, we have a rape. At the very least, those two are obvious (R.22)." Given these facts, the State respectfully submits Kimbrough's argument on premeditation is waived, and even if it is not, it is the State's position the jury found him guilty under both theories.

Without conceding as much, if one assumes that the jury's

verdict was limited to premeditated murder, the evidence in this case was sufficient to support such a verdict. *See Cochran v. State*, 547 So. 2d 928, 930, n.1 (Fla. 1989). This Court has stated:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wound inflicted. ...

Crump v. State, supra, at 971; *See also, Heiney v. State, supra*, at 215. The trial court's findings in support of the aggravating circumstance heinous, atrocious, or cruel, exhibit substantial and competent evidence to support the jury's verdict of premeditation (R.596-97). However, Kimbrough was guilty of first degree murder on either a felony murder theory or a premeditated murder theory.

There was substantial and competent evidence to support the jury's verdict of murder in the first degree. From the evidence, the jury could have reasonably rejected Kimbrough's theory that Gary Boodhoo was the perpetrator. His trial counsel rightfully acknowledged that the DNA evidence was the "key issue" in his trial, because Kimbrough's semen found on the victim's sheets[11]

[11]Recall there was a match with Kimbrough's blood on one DNA probe of the victim's vaginal swab (T.747-51).

placed him with her at or very near the time of her being savagely beaten to death. Unchallenged, the DNA evidence was reliable as a matter of law. His argument on premeditation was waived, but even if it wasn't, there was competent evidence to support the jury's verdict on either that theory or felony murder. Even if there was insufficient evidence of premeditation as alleged by Kimbrough, error, if any, would be harmless beyond a reasonable doubt because the evidence supported the conviction under a felony murder theory. *Mungin v. State*, 21 Fla. L. Weekly S66, S67 (Fla. February 8, 1996.)

POINT II

THE TRIAL COURT CORRECTLY EXERCISED ITS WIDE DISCRETION IN MATTERS PERTAINING TO THE ADMISSION OF EVIDENCE, WHEN IT FOUND KIMBROUGH'S REVERSE *WILLIAMS* RULE EVIDENCE IRRELEVANT.

A trial court enjoys wide discretion in areas concerning admission of evidence, and its ruling on admissibility of evidence will not be disturbed unless a clear abuse of discretion is shown. *Booker v. State*, 397 So. 2d 910 (Fla. 1981); *Wilson v. State*, 436 So. 2d 908 (Fla. 1983). This Court has delineated the standard of review for reverse *Williams* rule evidence as follows:

> The test for admissibility of similar-fact evidence is relevancy. *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied* 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). When the purported

> relevancy of past crimes is to identify the perpetrator of the crime being tried, we have required a close similarity of facts, a unique or "fingerprint" type of information, for the evidence to be relevant. *Drake v. State*, 400 So. 2d 1217 (Fla. 1981); *State v. Maisto*, 427 So. 2d 763 (Fla. 1982). If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense. Evidence of bad character or propensity to commit a crime by another would not be admitted; such evidence should benefit a criminal defendant no more than it should benefit the state. Relevance and weighing the probative value of the evidence against the possible prejudicial effect are the determinative factors governing the admissibility of similar-fact evidence of other crimes when offered by the state. These same factors should apply when the defendant offers such evidence.

State v. Savino, 567 So. 2d 892, 894 (Fla. 1990); *See also Crump v. State*, *supra*, at 969.

The following discourse exhibits the substance of the *reverse Williams* rule evidence that Kimbrough sought to introduce:

> MR. SIMS: ...The witness, Barhagalla [sic, herein Barbagallo], from Boston will say, I get a call from Denise [the victim]. She says, Gary [Boodhoo] beat me up, come here, over here, please, I'm afraid of him. He's locked himself in the bathroom. The witness, Barbagallo takes 20 to 25 minutes to arrive at the apartment of Denise Collins. He goes upstairs. Denise Collins is shaking, she is crying. There is furniture and books and stuff all over the ground. The bathroom door is locked. He goes to the bathroom door and says, Gary, you okay? You're not going to do

anything to yourself, are you? Gary says no. He knows Gary. He recognizes Gary's voice and he says, come on, Denise, let's leave. And she gathers up her stuff and goes home and on the way she goes, look, here's where he hit me, here's the bruises on my arm.

THE COURT: Is this the thing that happened in Boston in February of '90, over a year and-a-half before?

MR. SIMS: I believe it happened closer to the Fall or Summer of '90.

THE COURT: Was it as much as a year before? ...

MR. SIMS: Right.

. . .

THE COURT: So are you going to say that anybody whoever beat up this woman is suspect in the last year?

MR. SIMS: Anybody who beat her up and who had contact with her and had a key to her apartment and had seen her 15 minutes or 30 minutes before she went home that day and anybody who had wrecked her apartment in the same way and anybody who had thrown her around the walls, which is what she said happened to her by Gary. And what we have in this case is her blood smears, as if she had been tossed around and drug across the walls of the apartment. Yes, Ma'am, I am going to say in that situation we do so have some indication that that's relevant and that the jury should be able to hear our theory. But I think Mr. Kimbrough has a right to a defense and that's to put on that there is somebody else who had the opportunity and, perhaps, had motive and had access.

MR. ASHTON: Your Honor, I don't know where Mr. Sims is getting his facts from. We've deposed both of these witnesses and none of these witnesses ever quoted the victim as saying that he threw her

against the wall. I don't know where this comes from I've deposed Alvin Butler and Chris Barbagallo. No one has said that so I would ask the Court to look at the depositions for what exactly they did say.[12]

Now that we seem to get on the relevancy issue, I want to cite some case law for the Court which is *State v. Savino*, 567 So. 2d 892, Florida Supreme Court case which deals with the issue of what's called reverse *Williams* rule. Basically what it says is that if the Defense is attempting to admit similar fact evidence they have to meet the same standard that the State has to meet that is of similarity. In one case we have a situation where at best they can establish that she called, upset, that she said that she'd had a fight with her boyfriend. That the victim or the witness got there, found the apartment in disarray. She never said who wrecked the apartment, he just said it was in disarray. Could have been Denise Collins for all we know. That there'd been a fight and that she had some bruises on her arm.

In the murder case we have a situation where someone entered through a second story balcony glass door using a ladder, entered the apartment at 3:00 in the morning, beat the victim to death and raped her. In a situation -- and I can show the Court the photographs. This apartment was not ransacked. The only disarray in the apartment, other than the fact that the victim was just not a very good housekeeper, is that related to the violence itself. There in the room where she was murdered there are items on dressers undisturbed. There's a closet full of clothes that are undisturbed. There is nothing even remotely similar to the minimal description of the things we have in Boston. Also, the circumstances which were

[12]There was no telephone deposition of Alvin Butler in the Court File (SR.18). Chris' deposition reveals that he "never saw anything happen between them... (SR.6, 10)."

present when the incidences happened in Boston were no longer in existence. At that time Denise Collins and Gary Boodhoo were living together, they were having a relationship. At the time of this murder they were no longer having a relationship, they were very good friends. All of the witnesses who knew them said she trusted him completely. There was no hostility between the two of them. There was no romantic relationship between the two of them. Plus the fact that Gary Boodhoo has been exclusively excluded as having done this crime. This is simply a red herring that has no relevance to this case whatsoever and I'd ask the Court -- first of all, you know, I want to go back to the hearsay issue. Denise called up, she's upset. We don't know whether she had had a fight, gone out, come back, found Gary in the bathroom and got upset again and called. We have no idea when this fight actually happened. (R.60-64)

Argument concerning this matter concluded as follows:[13]

MR. ASHTON: But Mr. Barbagallo says when it happened.

MR. SIMS: ***He's not real clear when it happened.***

THE COURT: Well, he said the Spring -- He said late Winter or early Spring of 1990. Now, that would be in January to April.

MR. SIMS: ***Later he's saying he's not real clear on the time frame.***

THE COURT: But he didn't come too far off of that.

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[13]At one time during the argument, Mr. Sims read from Mr. Barbagallo's phone deposition: "...[Denise] [t]old [Barbagallo] that [Boodhoo] was a manic depressive and that he, you know, from time to time didn't take his medication and act very strangely. ***Not violently towards her***, but was destructive to things in the apartment, would be given to anger and rage for no apparent reason ... (R.87)."

> He said, like, February or March finally. ***I don't think that's relevant enough. I don't think it's similar enough. I don't think there's anything about that that even approaches this. The man didn't beat her up so badly. He went in the bathroom. He stopped the argument. He stopped the fight. He got away from her.*** I'm not going to allow it. ... (R.90-91)

Kimbrough has failed to demonstrate that the trial court abused its wide discretion in matters pertaining to the admission of evidence. The alleged incident in Boston between Denise and Gary Boodhoo did not bear "***a close similarity of facts, a unique or 'fingerprint' type of information***," for it to be relevant to her murder. *See State v. Savino*, at 894. Even if what Denise allegedly told Mr. Barbagallo qualified as an "excited utterance", which given the indefiniteness of his recounting of the incident and when it took place appears doubtful,[14] the Boston incident simply was irrelevant. It did not constitute a ***"fingerprint"*** to the murder of Denise Collins, as the findings of the trial court demonstrated (R.90-91).

Alternatively, without conceding error, the trial court's denial of the admission of testimony regarding the Boston incident was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Kimbrough elicited testimony under cross-

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[14]*See State v. Jano*, 524 So. 2d 660 (Fla. 1988).

examination from various witnesses as to the relationship past and present between Denise and Gary to support his theory that Gary was the murderer (T.460-61, 584-85). His closing argument focused on Boodhoo's past relationship with Denise, his alleged desire to reinitiate that relationship, his presence four nights a week at her apartment, and his having a key to her place (T.887-888). He argued that Boodhoo had the motive to kill her, and was in fact the murderer (T.907-08). His rebuttal argument was more of the same:

> Boodhoo had a key, motive. Wasn't checked out until two years later and the fact that's not sperm of his from that sheet, which we didn't see autorads on that, not sperm from him on that sheet does not mean that he didn't kill her. That gives an additional motive. ... (T.967)

Kimbrough's theory was placed before the jury, and the trial court's denial of the irrelevant Boston incident was harmless beyond a reasonable doubt.

POINT III

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THE STATUTORY MITIGATOR OF AGE DID NOT EXIST.

This Honorable Court has addressed the matter of "age" as a mitigator as follows:

> ...We have previously addressed this question of whether age, without more, is to be considered a

> mitigating factor in *Agan*[15] and *Peek v. State*, 395 So. 2d 492 (Fla. 1980, *cert denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), but the question continues to be raised. It should be recognized that age is simply a fact, every murderer has one, and it can be considered under the general instruction that the jury may consider any aspect of the defendant's character or the statutory mitigating factor, section 921.141(6)(g), Florida Statutes (1981). ***However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility.***

Echols v. State, 484 So. 2d 568, 575 (Fla. 1985). In *Peek v. State, supra*, at 498 this Court opined:

> There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing.

See also, Mills v. State, 476 So. 2d 172, (Fla. 1985), *cert. denied* 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986)(Trial court was not required to find mitigating circumstance based on youth at murder trial, where defendant was 22 years old at time of crime.); *Garcia v. State*, 492 So. 2d 360, 367 (Fla. 1986), *cert. denied* 479 U.S. 1022, 107 S.Ct.680, 93 L.Ed.2d 730 (Fact that defendant was 20 years of age, without more, was not significant, and trial court

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[15]*Agan v. State*, 445 So. 2d 326 (Fla. 1983), *cert. denied*, 105 S.Ct.225 (1984).

did not err in not finding it as a statutory mitigating factor for defendant's two first-degree murder convictions.). Although there is no per se rule which pinpoints a particular age as an automatic mitigator, this Court has further opined:

> ***...If any group was intended to be included within the statutory mitigating factor of age, it must be those who were minors at the time of the commission of their crimes***. §921.141 (6)(g) Fla. Stat. (1989).

Ellis v. State, 622 So. 2d 991 (Fla. 1993).

In this cause, the trial court's written sentencing order regarding the statutory mitigator of age found as follows:

> 1. **The age of the Defendant at the time of the crime.** The Defendant was 19 at the time. There was no evidence presented to indicate he was impaired in any way. The age of 19 alone does not mitigate a crime of this nature. Nor does his dropping out of school indicate a lack of maturity or appreciation of the seriousness of this crime. At the time of this crime the Defendant was enrolled in Mid Florida Tech getting his G.E.D. A confidential psychological evaluation was provided to the defense, but nothing was presented from that evaluation by the defense for, as defense stated, tactical reasons. This mitigating circumstance does not exist. Further, even if this mitigator did exist and were given any weight, it would not change the balance between the aggravating and mitigating circumstances.

Kimbrough was not a minor when he brutally attacked and raped Denise Collins. He was not immature or suffering from any impairment. Although a high school dropout, he was enrolled to

obtain his G.E.D.. Kimbrough has failed to demonstrate that the trial court abused its discretion in not finding the age mitigator. "[M]ere disagreement with the force to be given [the age mitigator] is an insufficient basis for challenging a sentence." *Quince v. State*, 414 So. 2d 185, 187 (1982); *See also Porter v. State*, 429 So. 2d 293, 296 (Fla.), *cert. denied* 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); *Echols v. State, supra*, at 576.

Even if it is found to apply, failure to do so was harmless beyond a reasonable doubt given the three strong aggravators, particularly the heinousness of the murder, the lack of statutory mitigators, and the weak non-statutory mitigation (R.596-600). *Wuornos v. State*, 644 So. 2d 1000, 1011 (Fla. 1994). The trial court indicated as much: "Further, even if this mitigator did exist and were given any weight, it would not change the balance between the aggravating and mitigating circumstances (R.598)."

POINT IV

THE TRIAL COURT CONSCIENTIOUSLY WEIGHED THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING EVIDENCE AND CONCLUDED THAT DEATH WAS WARRANTED.

Proportionality review as delineated by this Honorable Court is as follows:

> ...In reviewing a death sentence, this Court must consider the particular circumstances of the case on review in comparison to other decisions we have

> made, and then decide if death is an appropriate penalty in comparison to those other decisions.

Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995). Under similar aggravating circumstances as those found in this cause, burglary, rape and victim brutally beaten to death, this Court has consistently found the death penalty proportionate. *See Owen v. State*, 596 So. 2d 985 (Fla. 1992), *cert. denied*, 113 S.Ct. 338 (Defendant forcibly entered victim's Boca Raton home during the night and bludgeoned her with a hammer as she slept, and then sexually assaulted her.); *Capehart v. State*, 583 So. 2d 1009 (Fla. 1991), *cert. denied*, 112 S.Ct. 955 (Defendant broke in to 62-year-old victim's home, smothered her with pillow as he raped her, ultimately asphyxiating her.); *Cherry v. State*, 544 So. 2d 184 (Fla. 1989), *cert. denied*, 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 963 (Defendant burglarized small 2 bedroom house in DeLand belonging to elderly couple, raped wife and inflicted multiple blows to her head, ultimately beating her to death.); *Brown v. State*, 473 So. 2d 1260 (Fla.), *cert. denied*, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985) (81-year-old victim, a semi-invalid, was beaten, raped, and killed by asphyxiation.).[16]

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[16]See also *Chandler v. State*, 534 So. 2d 701 (Fla.), *cert. denied*, 490 U.S. 1075, 109 S.Ct. 208, 104 L.Ed.2d 652 (Defendant abducted elderly couple from their home and beat them to death in each other's presence with a baseball bat.); *Hitchcock v. State*, 578 So. 2d 685 (Fla.), *cert. denied*, 112

The trial court found the following three (3) aggravators applied as to Kimbrough's rape and murder of Denise Collins:

> **1. The Defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.** (Kimbrough stole into the apartment of Heather Claypool late at night and raped her in March of 1992.)
>
> **2. The capital felony was committed while the defendant was engaged in the commission of an attempt to commit or committing a sexual battery.** ("Denise Collins was brutally raped in her bed in the middle of the night by [Kimbrough].")
>
> **3. The capital felony was especially heinous, atrocious, or cruel.** ("The last moments of Denise Collins' life were a nightmare. First, she discovered a stranger in her bedroom, then she was raped by that stranger. After that she was beaten, and her head was banged against the wall. She had to be in unspeakable fear and pain. Although no exact time period over which this hideous crime occurred has been established, based on the activities that took place and the extent of blood splattered throughout the room it was not quick.") (R.596-597)

The trial court's written order demonstrates that it carefully weighed Kimbrough's mitigating circumstances (R.597-600). It found no Statutory Mitigating Factors. On the matter of Kimbrough's ***age*** as an alleged mitigating circumstance, as previously discussed, the

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S.Ct. 311 (1990) (Hitchcock admitted he kept "chokin' and chokin' the victim, and hitting her, both inside and outside the house, until she finally lost consciousness."); *Gilliam v. State*, 582 So. 2d 610 (Fla. 1991) (Victim sustained "brutal injuries" while being raped and then murdered.)

trial court found that Kimbrough "was 19 at the time of the murder." It further found "[t]here was no evidence presented to indicate he was impaired in any way," or that "his dropping out of school did not indicate lack of maturity or appreciation of the seriousness of this crime," and he was working on "getting his G.E.D.." (R.597-98)

The trial court's findings on Non-Statutory Mitigating Factors were as follows:

> 2. **Unstable childhood.** The testimony was that the Defendant always lived with his mother except for one school year when he chose to return to Memphis to live with Julius Phillips to go to school. (He and his mother had moved to Orlando when he was a teenager, but he didn't like it at first.)
>
> A brief synopsis of his living arrangements will assist with the evaluation of this and the next three mitigators proposed by the Defense. (The Defendant is referred to as Mark by the witnesses, family members, and his attorneys; so the Court has used the name "Mark" to refer to him through this synopsis.)
>
> Kimbrough's early years were spent in Memphis. His mother, Annie Louise Kimbrough, was 13 when her mother died. Annie was the youngest of 6 children. She lived with her grandmother after her mother's death and then with her sister Gala, who is 10 years older than Annie. Annie was 18 or 19 when she became pregnant with Mark out of wedlock. Before Mark was born, Annie began living with "Bud" (David McDaniel). For years Annie and Bud thought Mark was Bud's child. Annie and Mark lived with Bud during this time, but intermittently they also

lived with Gala Mae Elliott (Annie's sister). Gala did not like Bud and he was not allowed in her home. He drank too much.

When Mark was approximately 6 to 8 years old, it became apparent to all that his biological father was actually Kenny Ray Smith. Smith had suspected that he was, but had said nothing about it until now. Once they all realized he was the father, Mark was told. From then on Mark would tell everyone he had two daddies. Both fathers had extended families with whom Mark spent time. Bud treated Mark as his own child even after it was determined he was not. When Mark was about 9 years old, Bud moved to Summerville and Annie and Mark did not go with him. Not only did Bud stay in touch with Mark after he moved to Summerville, but so did his sister and mother. Bud's sister, Cheryl, had kept Mark some when he was a baby. She testified she kept him every weekend, and when Mark was 10 or 11 Cheryl kept Mark and Annie lived with her sister Gala. When Annie moved again, Cheryl wanted to keep Mark rather than have him run from one place to another. She testified she wanted him to have a stable life. She also testified that Annie was a good mother.

At some time after Mark lived with Cheryl, Annie and Mark traveled to California. They visited several times and actually stayed long enough to enroll Mark in school there at some point. Mark and Annie also lived with Patricia Walton and her son Malcolm who was Mark's cousin. That was the year Mark and Malcolm were in the 10th grade, and they were in talent shows dancing and singing.

Mark's next father figure was Julius Phillips who Annie met on the job at Red Lobster. She met Julius when Mark was 8 years old. They were together for 9 years, but grew apart. It was not a bitter separation and he stayed in touch with Mark. In fact, after Annie and Mark moved to Florida, he let Mark move back to Memphis with him for about 1

to 1½ years. He testified Annie never left Memphis without Mark until this time. He wanted Mark to stay with him even when Annie moved to Florida and after awhile Annie allowed Mark to go back up there to stay with him for that 1 to 1½ years. At the time of this crime the Defendant had moved back to Orlando, was living with his mother at Carousel Apartments, and she was supporting him.

Basically, from all the testimony, it appears that Annie stayed in relationships for extended periods of time. All of her family and the families of the three men she was involved with accepted Mark and treated him as their own. Although Annie could not be considered unstable, she did have a lot of people who surrounded her and Mark who provided all kinds of love and support for her and Mark.

As to his unstable childhood, the instability was that he and his mother seemed to move between her family members and the families of the men with whom she was involved. It appears he and Annie were together, but there were a lot of relatives who kept Mark for her at different times. They all testified they loved Mark as their own and wanted him to stay with them. He traveled freely and smoothly between these homes. The Court finds this mitigating circumstance does not exist.

3. **Maternal deprivation.** Mark did call his mother by her middle name, Louise. That in and of itself does not mean she was not a good mother. The evidence shows that Mark and his mother were close. She took him with her to California. Whenever she moved anywhere, Mark went with her except the one time she allowed him to live with Julius to go to school. Based on the testimony of the witnesses as well as his mother Mark and Annie had many places to stay and an unusually extended support group. The fact that other people loved and cared for Mark does not add up to maternal deprivation. The Court finds this mitigating circumstance does not exist.

4. **First Father Figure an Alcoholic.** David McDaniel drank although the extent of his drinking was never explored. Assuming he did drink heavily, there was certainly no evidence to show that Mark suffered in any way as a result of it. It could account for the fact that Annie and Mark lived with Gala intermittently during the time she and Mr. McDaniel were together. Gala did not like him and thought Annie "deserved better." The Court will accept the fact that David McDaniel drank and to a limited extent that affected Mark's life by causing his mother and him to move out of their home. Therefore, this mitigating circumstance does exist.

5. **Dysfunctional Family**. The Defendant did not grow up in the textbook family. He learned during primary school years that he had a different father than who he had thought. He then accepted both men as his "daddy," and both men accepted him. There was never any evidence presented that the defendant had difficulty with the fact that his mother had lied to him about who his father was. He seemed to like the idea that he had two fathers. The Defendant and his mother moved rather often and usually lived with others, but that has been considered in the Defendant's second mitigator, **Unstable Childhood.**

The Court finds that Mitigating Factors 2-5 are so interrelated, it is difficult to separate them. All deal with Mark's childhood and interfamily relationships. Although the court found that some of the mitigators listed by the defense exist and others did not, lumped together they do deserve consideration and this Court has given them some weight.

6. **Talent for Singing**. Mark performed in talent shows. The court accepts that he did sing and dance. However, the Defendant also abandoned that pursuit, so the extent of his talent is not established, but the fact that he did sing and

dance does exist.

This mitigator was given little weight (R.598-600).

The trial court concluded its Sentencing Order as follows:

> ***The Court has carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.*** (R.600)

The trial court in this cause "conscientiously weighed the aggravating circumstances against the mitigating evidence and concluded that death was warranted." *Hitchcock v. State*, 578 So. 2d 685, 693 (Fla.), *cert. denied*, 112 S.Ct. 311 (1990). The cases Kimbrough relies on are clearly distinguishable on the facts from this cause, in that not one case cited involved sexual battery to the victim. *Id.* Even if this Court were to find that one of the aggravating circumstances was not applicable, the trial court would still have found that the remaining aggravating circumstances outweighed the mitigating evidence, thereby rendering any error harmless beyond a reasonable doubt. *See Capehart v. State, supra*, at 1014. Kimbrough's sentence of death was proportionate.

POINT V

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THE AGGRAVATING CIRCUMSTANCE HEINOUS, ATROCIOUS, OR CRUEL EXISTED, AND INSTRUCTING THE JURY IN KEEPING WITH ITS FINDING.

This Court has opined:

> ...It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, or cruel; rather, it is the ***entire set of circumstances surrounding the killing***.

Magill v. State, 386 So. 2d 1188 (Fla. 1980), *cert. denied*, 101 S.Ct. 1384 (1981), (*Magill I*), *appeal upon remand*, 428 So. 2d 649, 651 (Fla. 1989), *cert. denied*, 104 S.Ct. 198. It has further opined:

> ...In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a "***common-sense inference from the circumstances***," *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989), and the common-sense inference from the facts is that the victim struggled with her assailant and suffered before she died. We find no abuse of discretion. *Grossman v. State*, 525 So. 2d 833, 841 (Fla. 1988), *cert denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989).

Gilliam v. State, supra, at 612.

Kimbrough's argument fails to consider the "entire set of circumstances" surrounding Denise's murder, as well as the "common-sense inference" the trial judge could draw from those

circumstances. He also ignores the crucial factor of Denise's ***fear*** in encountering him in the dead of night, while she was sleeping, in the sanctity of her residence. "The mindset or mental anguish of the victim is an important factor in determining whether this aggravating circumstance applies." *Phillips v. State*, 476 So. 2d 194, 196 (Fla. 1985). "Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State*, 607 So. 2d 404, 409-10 (Fla.), *cert. denied*, 113 S.Ct. 1619 (1992); *See also Hitchcock v. State, supra*, at 693; *Rivera v. State*, 561 So. 2d 536, 540 (Fla. 1990); *Chandler v. State, supra*, at 704; *Phillips v. State, supra; Mason v. State*, 438 So. 2d 374 (Fla. 1983), *cert. denied* 104 S.Ct. 1330 (1984); *Adams v. State*, 412 So. 2d 850 (Fla.), *cert denied*, 103 S.Ct. 182 (1982). "Moreover, ***the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances.***" *Swafford v. State*, supra, at 277; *See also Preston v. State, supra*, at 946 ("victim ***must have*** felt terror and fear as these events unfolded" [emphasis this court's]).

The trial court's findings on the aggravator heinous, atrocious, or cruel were as follows:

> On October 3, 1991, the Defendant entered the

second-story apartment of the victim, Denise Collins, as she lay in bed alone late at night. The victim was a 28-year-old female, 5 feet 4 inches tall, 112 pounds who lived in that apartment alone. The evidence indicates that the Defendant used a ladder to climb onto the balcony and get through the sliding glass door. He raped Ms. Collins. She had contusions on her upper arms and left side of face. The evidence presented by the Medical Examiner, Dr. Thomas Hegert, was that there were a minimum of three blows to the head, one of which would have rendered her unconscious. Her skull was fractured by a blunt force. ***There was blood on the wall as well as the bed, the carpet, and numerous items strewn throughout the room indicating a struggle.*** The Medical Examiner could not say in what sequence the blows to her head were inflicted, but that the one that fractured her skull would have rendered her unconscious. If she were rendered unconscious immediately, perhaps this crime would not be so hideous. The Medical Examiner, naturally, cannot determine which blow was first because they were all too close in time; however, ***there is other evidence that this crime involved quite a struggle. There was blood all over the room.*** The victim was still alive when she was found by the paramedics on the floor. She even sat up at one point when law enforcement was there. She regurgitated. Heroic efforts were made to save her life; however, she died at the hospital about 12 hours after the attack. ***There was semen found on the bottom sheet of Ms. Collins' bed. It was matched to the Defendant through DNA.***

The last moments of Denise Collins life were a nightmare. First, she discovered a stranger in her bedroom, then she was raped by that stranger. After that she was beaten, and her head was banged against the wall. She had to be in unspeakable fear and pain. Although no exact time period over which this hideous crime occurred has been established, based on the activities that took place and the extent of blood splattered throughout

the room it was not quick. ... (R.596-97)

The trial court correctly viewed the entire set of circumstances surrounding the murder of Denise Collins. It then applied a common-sense inference from the circumstances, including the terror Denise must have felt when she was set upon up by Kimbrough in the sanctity of her apartment, in the dead of the night, and brutally beaten when she resisted his sexual attack.[17] It correctly exercised its discretion in finding the aggravator heinous, atrocious, or cruel. Its findings are clothed with a presumption of correctness. *Shapiro v. State, supra.*

Given the applicability of the heinous, atrocious or cruel aggravator, the State would now address the trial court's instructing the jury on the same. "A judge should instruct a jury only on those aggravating circumstances for which credible and competent evidence has been presented." *Hunter v. State, supra,* at 252. "Further, the court should not give instructions which are confusing, contradictory, or misleading." *Butler v. State,* 493 So. 2d 451, 452 (Fla. 1986). A trial court in a death penalty case has the discretion not to instruct on aggravating factors clearly

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[17]It may be inferred that Denise's demise culminated from her resistance. Heather Claypool, who was raped by Kimbrough 5 months later, under circumstances similar to those surrounding the murder of Denise, did not resist and survived. (R.596; PT.426-27)

unsupported by any evidence. *Johnson v. Singletary*, 612 So. 2d 575, 577 n.2 (Fla.), *cert. denied*, 113 S.Ct. 2049 (1993). This Court has held:

> ***The trial court properly rejected Stewart's confusing request that the jury be instructed on all possible aggravating factors*** so that he could argue that the absence of many of these factors was a reason for imposing a lesser sentence. ***Florida Standard Jury Instructions state that the jury be instructed only on those factors for which evidence has been presented***. Fla. Std. Jury Instr. (Crim.) 78 (1981).

Stewart v. State, 549 So. 2d 171, *cert. denied*, 479 U.S. 1031, 110 S.Ct. 3294, 111 L.Ed.2d 802, *appeal after remand* 588 So. 2d 972, *cert. denied*, 112 S.Ct. 1599.

In this case the trial court correctly exercised its discretion in instructing the jury on heinous, atrocious, or cruel and the other two aggravating circumstances. It also correctly exercised its discretion in not instructing the jury on the remaining aggravating circumstances which were unsupported by the evidence.

Kimbrough's argument on the giving of the standard jury instruction on heinous, atrocious, or cruel is as confusing as the request made by his trial counsel and as that found in *Stewart*. He argues:

> ...[T]he trial court did not instruct on all the

> aggravating circumstances. The trial court elected to instruct on only those aggravating circumstances which he believed were supported by the evidence. Therefore, appellant contends that the trial court erred in instructing the jury on the aggravating circumstances of an especially heinous, atrocious or cruel murder where a timely objection was made and where there was no evidentiary support whatsoever for the instruction. It is expressly submitted that giving the unsupported instruction over objection violated the Eighth Amendment, in that the presence of that legally improper instruction was confusing and misleading to the jury concerning their recommendation of the appropriate sanction (pp.65-66).

The trial court did not instruct on all the aggravating circumstances because only three (3) of them were supported by the evidence. It followed the Standard Jury Instruction and correctly exercised its discretion when it instructed the jury "only on those aggravating circumstances for which credible and competent evidence ha[d] been presented." *Hunter*, at 252.

As regards Kimbrough's alleged "timely objection," the record reflects the following proposed defense penalty phase instruction: "The Legislature has established eleven (11) Statutory aggravating factors, but you will be instructed on only three (3), since those are the only ones arguably applicable to the Defendant." (R.508) The Penalty Phase Charge Conference reflects the following argument concerning this proposed instruction:

> THE COURT: ... Then page fourteen. Do they need to

know how much there are originally?

MS. CASHMAN (Kimbrough's counsel): I believe so.

MR. ASHTON: Not unless you're going to give them all.

THE COURT: I can't think of any reason were [sic] they need to know there are eleven possible aggravators. ***Why would I tell them that if they don't apply?***

MS. CASHMAN: ***To give them some perspective of how many to apply and determine proportionality is always a consideration in death penalty cases.***[18]

THE COURT: ***Is there any case out there that says they need to know there are eleven statutory aggravators? Do you know of one?***

MS. CASHMAN: ***There's no case that says that.***

THE COURT: I'm not going to do it then.
(PT.465-66)

At the conclusion of the Penalty Phase charge the record reflects:

THE COURT: Anything for the Record? ***Satisfied with the instructions as read?***

MS. CASHMAN: ***Yes, Ma'am.***

MR. ASHTON: Yes.

THE COURT: ***Anything else***?

MS. CASHMAN: ***Not that I'm aware of.***
(PT.565)

There was no timely objection, and even if there was it was not

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[18]This argument is a variation of that made in *Stewart*, in which this Court rejected the defense proposal as confusing.

renewed. Therefore, Kimbrough's contradictory argument on this matter is procedurally barred. *Fotopolous v. State*, 608 So. 2d 784, 791-92 (Fla. 1992); *cert. denied*, 113 S.Ct. 2377 (1993).

Clearly, as previously delineated, there was "credible and competent evidence" on this aggravator. Finally, the giving of the heinous, atrocious, or cruel instruction was appropriate and did not confuse the jury. Conversely, regarding Kimbrough's argument that the jury should have been instructed on all the aggravating circumstances, if so instructed, the jury would have been both misled and confused.[19] In addition, as the record reflects, this particular argument was not made below and is procedurally barred (R.508; PT.465-66, 565).

Kimbrough also argues that the heinous, atrocious or cruel circumstance "due to the subjectivity involved, violates the Eighth Amendment because it fails to adequately channel the discretion of the jury (p.66)." This Court's opinion in *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992) is dispositive of this contention:

> ...Because of this court's narrowing construction, the United States Supreme Court upheld the aggravating circumstance of heinous, atrocious or cruel against a vagueness challenge in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d

[19]An argument Kimbrough assuredly would have made if the trial court ***had*** given instructions on all the aggravating circumstances.

> 854 (1976). Unlike the jury instruction found wanting in *Espinosa v. Florida*, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), the full instruction on heinous, atrocious, or cruel now contained in Florida Standard Jury Instructions in Criminal Cases, which is consistent with *Profitt*, was given in [Kimbrough's] case.[20]

Kimbrough later alleges:

> ...[T]he natural racial tension involved in such a crime [black man raping and murdering white woman] makes such a vague instruction as HAC extremely prejudicial to a black defendant to the extent that the weighing of aggravating and mitigating factors is completely compromised (p.67)

First, this crass, racist conjecture, totally unsubstantiated by any record support, was never argued below and is not cognizable now. Second, vagueness challenges concerning this aggravator have repeatedly failed when raised before this Court, as should the instant one. *See e.g., Johnson v. State*, 660 So. 2d 637, 648 (Fla. 1995); *Hannon v. State*, 638 So. 2d 39, 43, n.3 (Fla.1994), *revised on denial of rehearing, cert. denied*, 115 S.Ct. 1118 (1995); *Preston v. State, supra; Power v. State*, 605 So. 2d 856, 864-65, n.10 (Fla. 1992).

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[20]Kimbrough's HAC instruction was as follows:

> 3. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means to inflict a high degree of pain with utter indifference to, or enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim. (R.528; T.561)

Finally, without conceding as much, even if this aggravator were not supported by the evidence, error would be harmless beyond a reasonable doubt "because we can presume that the jury disregarded the factor[s] not supported by the evidence." *Fotopoulos v. State*, 608 So. 2d 784, 792 (Fla. 1992), *cert denied*, 113 S.Ct. 2377 (1993), *citing to Sochor v. Florida*, ___ U.S. ___, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992).

POINT VI

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN EXCUSING POTENTIAL PENALTY PHASE JUROR LINDA ALEXANDER FOR CAUSE.

Kimbrough's sixth claim is procedurally barred. Although he objected to the State's challenge of Ms. Alexander for cause, he did not object after she was in fact excused by the trial court. *Peterka v. State*, 640 So. 2d 59, 65-66 (Fla. 1994), *cert. denied*, 115 S.Ct. 940 (1995).

On the merits, the bottom line is that Ms. Alexander's feelings against recommending the death penalty would have prevented or substantially impaired the performance of her duties as a juror in accordance with her instructions and oath. The trial court correctly exercised its discretion in excusing Ms. Alexander for cause. *Witherspoon v. Illinois*, 391 U.S. 510, 522

(1968) and its *progeny* do not apply.[21]

This Court has opined regarding a trial court's rulings on challenges for cause:

> There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors. In fact, it has been said: "There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury." (citations omitted)

Cook v. State, 542 So. 2d 964, 969 (Fla. 1989).

After a detailed analysis of the relevant United States Supreme Court opinions regarding prospective jurors excusal for cause owing to their inability to recommend the death penalty supra, this Court opined:

> We agree that prospective jurors who believe the death penalty is unjust may serve as jurors and cannot be excluded for cause of that belief. However, ***if that belief prevents them from applying the law and discharging their sworn duty, the trial court is obliged to excuse them for cause.***

Randolph v. State, 562 So. 2d 331 (Fla. 1990), *cert. denied*, 498

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[21]*Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968); *Lockhart v.McCree*, 476 U.S.162, 176 (1986); *Gray v. Mississippi*, 481 U.S. 648 (1987).

U.S. 992 (1991). In assessing whether to excuse jurors because of their views against capital punishment, the test is whether their views would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath. *Peterka v. State, supra*, at 65-66 (Prospective juror's stated inability to set aside his personal opposition to death penalty justified excusing that prospective juror for cause in capital murder case); *See also, Marquard v. State*, 641 So. 2d 54, 56 (Fla. 1994), *cert. denied*, 115 S.Ct. 946 (1995)(In dialogue with prosecutor, venireperson stated that he would not and could not vote for death penalty no matter what the circumstances.); *Reaves v. State*, 639 So. 2d 1, 4 (Fla.), 115 S.Ct. 488 (1994)(Trial court did not abuse its discretion in granting state's challenge for cause regarding prospective juror in capital murder case; prospective juror expressed reluctance in her ability to sentence someone to death, yet also indicated that she could follow judge's instructions relevant to capital sentencing.).

An inability to be impartial about the death penalty is a valid reason to remove a prospective juror for cause. *Hannon v. State*, 638 So. 2d at 41. A prospective juror's views regarding capital punishment need not be unmistakably clear to strike for cause. *Id.* (Trial court correctly exercised its discretion when

it excused one potential juror for cause, after he unequivocally answered no when asked if he could recommend the death penalty in an appropriate case. Same applied to a potential juror who vacillated on whether he could impose the death penalty in an appropriate case.).

> [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." *Sanchez-Velasco v. State*, 570 So. 2d 908, 915 (1990)(quoting *Wainwright v. Witt*, 469 U.S. at 424-26, 105 S.Ct. at 852-53). The trial judge's predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record, *Witt*, 469 U.S. at 429, 105 S.Ct. at 854, and it is the trial judge's duty to decide if a challenge for cause is proper. *Id.* at 423, 105 S.Ct. at 851.

Taylor v. State, 638 So. 2d 30 (Fla.), *cert. denied* 115 S.Ct. 518 (1994)(Prospective juror properly excused even after she reluctantly agreed, after encouragement by defense counsel, she could follow the law despite her opposition to death penalty.).

Prospective juror Linda Alexander's questionnaire demonstrated that she was a likely candidate to be challenged by the State for cause, and the trial court correctly exercised its discretion in striking her for cause upon the State's request in view of the aforementioned authorities. On question 7(b) she answered "***Yes***",

when asked if her feelings regarding the death penalty would prevent her from following the court's instructions regarding her verdict recommending either death or life imprisonment (R.492i). On question 8(a)and (b) she also answered "***Yes***", when asked whether her feelings on the death penalty would make it very difficult for her to follow the court's instructions regarding both her guilty or not guilty verdict, and her recommendation on either death or life imprisonment (R.492i). On question 9, when asked whether she could follow the judge's instructions as to sentencing, aside from her personal feelings, she answered "***NO***" (R.492i). Before her answers to these questions, at question 4, she indicated she "***had a friend on Death Row*** (R.492i)."

Alerted by Ms. Alexander's responses on her questionnaire, the prosecutor's voir dire soon revealed she should be stricken for cause:

> MR. ASHTON: ... Miss Alexander, first thing I want to ask you about is you mention in your questionnaire you have ***a friend that's on Death Row?***
>
> JUROR: ***Was.***
>
> MR. ASHTON: What was his name?
>
> JUROR: ***Henry Dupree.***
>
> MR. ASHTON: ***Do you think that that fact would make it difficult for to you sit on a case where the***

Death Penalty is the issue?

JUROR: ***Yes***.

MR. ASHTON: Do you feel that your friendship with this individual would you be able to recommend [the] Death Penalty for someone?

JUROR: It's hard to say really.

MR. ASHTON: What -- can you kind of think that through with me a little bit? How do you feel about that?

JUROR: ***I have a boyfriend that's serving time now and it's real hard to really say, you know.***

MR. ASHTON: Okay. ***How do you feel about the idea of being a juror in a Death Penalty case***?

JUROR: ***Not too good.***

MR. ASHTON: Okay. Do you think that sometimes [the] Death Penalty is appropriate?

JUROR: Yes.

MR. ASHTON: Do you think that you personally could impose the Death Penalty on someone else if you thought the facts and the law called for it?

JUROR: Maybe.

MR. ASHTON: ***Is there a probability there will -- you might not be able to impose the Death Penalty regardless of the facts and circumstances and the law***?

JUROR: ***Yes***.

MR. ASHTON: That's a probability, too?

JUROR: Right.

MR. ASHTON: Was the person on Death Row a friend of yours.

JUROR: Schoolmate.

MR. ASHTON: Did you feel like he didn't belong there.

JUROR: Well, not really. It's just [the] point of knowing the person.

MR. ASHTON: Your relationship with Mr. Dupree, Henry James Dupree?

JUROR: Yes.

MR. ASHTON: Would your relationship with him make it very difficult for you to follow the law in the area of the Death Penalty and vote to recommend death if that's what [the] law called for?

JUROR: Well, see, like I said, ***I have my oldest child's father he was recommended to Death Row or twenty-five years in prison and he['s] still serving twenty-five years in prison now.***

MR. ASHTON: What's his name.

JUROR: ***Samuel Lee Montgomery.***

MR. ASHTON: So you know two people [who have] been prosecuted for first degree murder in Orange County.

JUROR: Yes.

MR. ASHTON: They['re] here in Orange County, right?

JUROR: Right.

MR. ASHTON: ***Do you feel like you at this point can be completely fair and impartial in judging issues***

> ***of the Death Penalty in Orange County having had a personal relationship with people who were in that relationship***?
>
> JUROR: ***No***. (PT.97-100)

Kimbrough's counsel attempted to rehabilitate her, and at one point the trial court had to admonish counsel as follows: "You can't ***push*** her for a definite answer. She's ***uncertain***. She's uncertain. And ***we can't make her tell us something*** she doesn't need -- ... (T.101-02)." At the conclusion of defense counsel's voir dire, the trial court requested Ms. Alexander to step out into the hall, and asked if there were any challenges for cause (T.103). The prosecutor challenged Ms. Alexander for cause because "[T]here's reasonable doubt as to her inability to follow the law (T.103-04)." The defense objected, but the trial court found as follows regarding the prosecutor's basis for his challenge:

> THE COURT: I tend to agree with that. She's -- all the way through know two people. One already put to death, other one sitting on this twenty-five year minimum mandatory.
>
> I'm going to strike her for cause. ... (T.104)

Clearly, Ms. Alexander should have been stricken for cause, and the trial court correctly exercised its discretion in so doing. The facts surrounding Ms. Alexander's excusal for cause are analogous to those in *Taylor v. State, supra*, at 32, where the

prospective juror reluctantly agreed, after ***coaxing*** by defense counsel, that he could follow the law despite his opposition to the death penalty. Of course, it appears in this cause, as reflected in the trial court's admonishment about ***pushing*** Ms. Alexander, that defense counsel went further than mere coaxing.

The questionnaires were the defense's idea, for the alleged purpose of saving time by screening potential jurors for challenges for cause (R.28, 377, 492; PT.3-4). Neither the trial court or the prosecutor agreed that they saved time, but they were allowed to be used anyway (R.492; PT.3-4). Also, a ***new, separate*** Penalty Phase jury was chosen after the Defense and the State jointly moved to strike the Guilt Phase jury, because 3 jurors had been tainted by media exposure after their verdict (R.204-218).

It appears the questionnaires served there purpose regarding challenges for cause (R.492; PT. 34-259). There were at least 11 excusals for cause after voir dire from the questionnaires (PT.42, 51-52, 92, 96, 103-04, 139, 144, 194-95, 229, 246, 259). Of those, 8 were by the defense, and were without objection by the State. The remaining 3 challenges were by the State, and the only one (1) Kimbrough objected to was Ms. Alexander, although it is difficult to distinguish why her feelings on the death penalty were any less clear than those of Ms. Hopkins and Ms. Click (R.492i, 492nn,

492qq; T.97-104, 227-229, 244-246). In fact, if one reviews the questionnaires for Ms. Hopkins and Ms. Click, as well as their responses on voir dire, it is clear that Ms. Alexander was as much, if not more, subject to being stricken for cause. Simply put, Ms. Alexander could ***not*** have been ***completely fair and impartial in judging issues of the Death Penalty in Orange County having had a personal relationship with [2] people who faced it at one time, one of whom, Henry Dupree, was executed*** (PT.100). The trial court correctly exercised its discretion in excusing her for cause.

POINT VII

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN FINDING THAT THE MURDER WAS COMMITTED WHILE KIMBROUGH WAS ENGAGED IN THE COMMISSION OF, OR ATTEMPTING TO COMMIT, A SEXUAL BATTERY.

The trial court correctly applied a common-sense inference from the circumstances that Denise struggled with Kimbrough while he raped her. Not only is Kimbrough's application of §921.141 erroneous, but he relies upon a trial court finding as authority for his argument. His argument is misleading, and devoid of merit.

§921.141(5)(d) Fla. Stat. (1991) reads:

> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any ... sexual battery ... .

"It is a homicide committed during the perpetration of a felony, if the homicide is part of the res gestae of the felony." *Jefferson v. State*, 128 So. 2d 132, 137 (Fla. 1961); *See also, Roberts v. State*, 510 So. 2d 885, 888 (Fla. 1987), *cert. denied*, 485 U.S. 943 (1988) ("Although as Roberts points out, it is clear from the record that the murder ***did not occur 'during' the actual sexual battery on Rimondi, the murder of Napoles and subsequent sexual battery and kidnaping of Rimondi were part of the same criminal episode***.").

"In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a '***common-sense inference*** from the circumstances,' *Swafford v. State, supra*, at 277." *Gilliam v. State, supra*, at 612. In this cause, the "***common-sense inference***" from the circumstances surrounding Denise's murder was that she struggled mightily with Kimbrough when he stole into her apartment in the dead of night and raped her.

The trial court's "common-sense inference" from the facts surrounding Denise's murder is best viewed in light of its findings for the HAC aggravator previously presented in the State's rendition of the Facts regarding the Penalty Phase, and again in its argument as to Kimbrough's fifth claim (R.596-97; pp.23-24, 55-56 this brief). Those findings are entirely supported by the

record, as seen in the State's rendition of the Facts at the outset of its brief (pp.11-19).

Kimbrough cites *Buford v. State*, 403 So. 2d 943 (Fla. 1981) as authority for the following erroneous assertion seen on page 75 of his brief: "For this aggravating circumstance to stand the state must prove beyond a reasonable doubt that before the murder occurred the crime of sexual battery was complete and that sufficient penetration occurred." In fact, there is no holding in *Buford* of this sort, because it would run counter to a proper reading of §921.141(5)(d).[22] What Kimbrough cites as an authoritative holding in *Buford* is in fact a factual finding by the trial court in its sentencing order in that cause. *Id.* at 946. *Roberts v. State, supra*, at 888, is dispositive of this claim.

Kimbrough alleges at page 77 of his brief that "[t]wo key areas of proof are missing: one, that the sexual activity, if any, was non-consensual; two, the sexual activity tied to appellant through the DNA testing occurred during the course of the fatal beating." As to Kimbrough's inference that sex with Denise was consensual, Jordan snuck into her apartment by using a ladder to climb up to her second floor apartment in the middle of the night,

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[22]Kimbrough's assertion that the "sexual battery was ***complete***" clearly means that an ***attempted*** sexual battery would not apply.

while she was most likely sleeping, so he could ***rape*** her. Denise resisted, as evidenced by the bruises on her arms, legs, left side of her head, and fractures to her skull. Further evidence of her resistance was, the blood on her bed, the wall and carpet of her bedroom, as well as numerous items strewn about the room, indicative of a struggle. There were also injuries to Denise's vagina. The common-sense inference from these facts is that Denise was ***raped***, and that sexual activity with Jordan was ***non-consensual***.[23]

Kimbrough's "during the course" argument is refuted by *Roberts*. The mortal beating Denise experienced when she resisted Kimbrough's sexual battery occurred during the ***same criminal episode***. Whether it occurred before, during, or after the beating is irrelevant, as long as she was alive when she was raped, which she was, as evidenced by her sitting up and regurgitating blood when the paramedics attempted to aid her, and her death 12 hours after his attack. Kimbrough's pubic hairs, semen on her bed sheets, and in her vagina,[24] as well as the clear evidence of a

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[23]As previously delineated, Denise's resistance most likely culminated in her death. Kimbrough snuck into Heather Claypool's apartment and raped her, but she did not resist, and she lived to tell what happened to her. (R.596; PT.425-29).

[24]Recall, there was a match to Kimbrough's blood on one of the DNA probes of the vaginal swab taken prior to Denise's death (T.747-51).

struggle, supports the trial court's finding pursuant to §921.141(5)(d). *Roberts*, at 888.

Even if this Court were to find this aggravator inapplicable, without conceding as much, error would be harmless beyond a reasonable doubt. *See e.g., Capehart v. State, supra*, at 1014; *Wuornos v. State, supra*, at 1011. Even in the absence of this aggravator, the trial court would still have found that the rape of Heather Claypool and the HAC aggravator outweighed weak mitigating evidence.

POINT VIII

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

On pages 78-91, Kimbrough lists a myriad [at least 19] of claims and sub-claims which are allegedly deficiencies in Florida's sentencing structure. He makes ***no*** reference to the record. Each claim and sub-claim contained in Point VIII has already been decided adversely to Kimbrough's position. This Court by now should be well aware with what essentially constitutes a boiler plate argument. *See e.g., Hunter v. State*, 660 So. 2d 244 (Fla. 1995); *Fotopolous v. State*, 608 So. 2d 784, 794 n.7 (Fla. 1992), *cert. denied*, 113 S.Ct. 2377 (1993). In addition, many of the "claims" Kimbrough purports to raise, are procedurally barred because they were not raised at trial. The State would

respectfully request this Court to expressly deny those claims which are procedurally barred on procedural bar grounds. *See e.g., Hunter*, at 252-54. The State will address each claim and sub-claim separately, utilizing Kimbrough's numbering system to avoid confusion.

1. The Jury

a. Standard Jury Instructions

On p. 78 of his brief, Kimbrough provieds a vague and generalized comment that "numerous requested changes to the Florida Standard Jury Instructions" were denied by the trial court. Without specific reference to which instructions he is now in fact challenging, and no record support for his allegations, his argumentative and unsupported conclusion quite simply constitutes insufficient briefing of an issue for appellate review. Even if he were to argue with specificity, any potential argument raised would be waived because he accepted, through counsel, the penalty phase jury instructions as given, without renewing any objections to them (PT.565).[25] *See e.g., Ponticelli v. State*, 618 So. 2d 154 (1993), *cert. denied*, 114 S.Ct. 352; *Harris v. State*, 438 So. 2d 787 (Fla.1983), *cert. denied*, 104 S.Ct. 2181. This nebulous claim is

[25]The State herein raises his failure to object to the penalty phase jury instructions as given as a procedural bar to any subsequent jury instruction challenge Kimbrough made in his boilerplate constitutional claim.

procedurally barred.

i. Heinous, Atrocious, or Cruel

On pages 78-79 of his brief, Kimbrough argues the HAC standard jury instruction "does not limit and define the 'heinous, atrocious, or cruel' circumstance." However, the jury instruction given in Kimbrough's case was the *Proffitt* instruction which this Court expressly upheld in *Preston v. State*, 607 So. 2d at 410, and *Power v. State*, 605 So. 2d 856, 864-65 n.10 (Fla. 1992). Kimbrough's claim is foreclosed by binding precedent. *See e.g., Johnson v. State*, 660 So. 2d at 648; *Hannon v. State*, 638 So. 2d at 43 n.3.

Kimbrough's due process argument, seen in n.8 on p. 79 of his brief, regarding an alleged "torturous intent" element of the HAC aggravator has no legal basis, and has in fact been expressly rejected by this Court. *See e.g., Taylor v. State*, 638 So. 2d at 34 n.4; *Hitchcock v. State*, 578 So. 2d at 692 ("that Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and therefore, not heinous, atrocious, or cruel"). There is no reason to revisit this well settled issue.

ii. Felony Murder

Although Kimbrough raised an "overbroad" challenge to this

aggravator (R.340-41), there was no challenge to the instruction given concerning it, nor did he provide an alternative instruction. Again, he accepted the Penalty Phase instructions as given. This claim found on p. 79 of Kimbrough's brief is procedurally barred. *Hunter*, at 253; *Fotopolous*, at 792, 794. In addition, this Court has expressly found this claim to be meritless. *Hunter*, at 252-53.

b. **Majority Verdicts**

On p. 79 of his brief, Kimbrough argues Florida's "sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority." If Kimbrough raised this claim below the State could not locate it, and his failure to provide a record cite, clearly implies that this claim is procedurally barred. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7. This claim was expressly rejected in *Hunter*, at 252-53. *See also, James v. State*, 453 So. 2d 786, 792 (Fla. 1994).

c. **Aggravators as an Element of the Crime.**

On p. 80 of his brief, Kimbrough argues "[o]ur law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible." Again, the State argues this claim was not raised below and is procedurally barred. *Hunter*, at 252-53; *Fotopolous*, at 792, 794. Even if not barred, this claim is foreclosed by binding precedent. *See e.g., Jones v. State*, 569 So.

2d 1234 (Fla. 1990); *See also, Hildwin v. Florida*, 490 U.S. 639 (1989).

d. **The *Caldwell* Claim.**

On p.80 Kimbrough argues "[t]he standard instructions do not inform the jury of the great importance of its penalty verdict." He asserts the jury is told its "recommendation" is just "advisory" in violation of the holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This claim was not raised below and is procedurally barred.[26] *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7. Even if preserved, it has been rejected on the merits. *Id.*

2. Counsel

At pp.80-81 of his brief, Kimbrough argues that court-appointed counsel in capital cases are inadequate. This claim was not preserved for appeal and is procedurally barred. *Hunter*, at 252-53; *Fotopolous*, at 792, 794. It has been rejected by this Court on the merits as well. *Id.*

3. The Trial Judge

On p. 81, Kimbrough argues "the trial court has an ambiguous

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[26]At the Penalty Phase Charge Conference, Kimbrough's counsel requested the trial court to repeat a *Caldwell* instruction advising the jury their recommendation is "given great weight (R.495; PT.459-60)." The trial court observed that such an instruction had been given in its preliminary charge to the jury (PT.460). The State voiced it had no objection, and the trial court indicated it would include it in its final charge to the jury (PT.461).

role in our capital punishment system." This claim was not raised below, is procedurally barred, and is meritless. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7.

4. The Florida Judicial System

At pp.82-83 of his brief, Kimbrough argues he "was sentenced by a judge selected by a racially discriminatory system...." Nowhere in the record below does this argument appear, rendering it procedurally barred. *Hunter*, at 253; *Fotopolous*, at 792, 794. Even if it were properly preserved, this claim was raised in *Hunter*, and rejected as devoid of merit. *Id.*

5. Appellate Review

a. ***Proffitt***

Kimbrough argues on p. 84, that this Court has not followed the requirements of *Proffitt v. Florida*, 428 U.S. 242 (1976). This claim was not preserved below, is procedurally barred, and is meritless. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7.

b. **Aggravating Circumstances**

On p. 84, Kimbrough argues that the aggravators are applied inconsistently at the appellate level. This claim was not preserved below, is procedurally barred, and is meritless. *Hunter, at 252-53; Fotopolous, at 792, 794 n.7.*

c. **Appellate Reweighing**

On p. 86, Kimbrough argues that Florida's Death Penalty Statute "does not have the independent appellate reweighing of aggravating and mitigating circumstances required by *Proffitt*, 428 U.S. at 252-53." This claim was not preserved below, is procedurally barred, and is meritless. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7.

d. **Procedural Technicalities**

Also on p. 86, Kimbrough argues that the contemporaneous objection rule "has institutionalized disparate application of the law in capital sentencing." This claim was not preserved below, is procedurally barred, and is meritless. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7.

e. ***Tedder***

On p. 87 of his brief, Kimbrough complains that "[t]he failure of the Florida Appellate Review Process" is demonstrated by the inability of this Court to apply the *Tedder*[27] Rule consistently. This claim was not preserved below, is procedurally barred, and is meritless. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7.

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[27]*Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

6. Other Problems With the Statute

a. Lack of Special Verdicts

At pp. 87-88, Kimbrough argues the death penalty statute is invalid because it does not provide for special verdicts. Again, Kimbrough has provided no record cites, and the State's review of the record concerning either aggravation/mitigation or felony murder[28]/premeditated murder special verdicts finds this claim unpreserved and procedurally barred. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7. Both the aggravation/mitigation component and the felony murder/premeditated murder component are foreclosed by binding precedent. *Id.*; *Patten v. State*, 598 So. 2d 60 (Fla. 1992); *Jones v. State*, 569 So. 2d 1234 (Fla. 1990).

b. No Power to Mitigate

On pp. 88-89, Kimbrough argues that Fla. R. Crim. P. 3.800(b), "forbids the mitigation of a death sentence," which he alleges violates the "constitutional presumption against capital punishment...." This claim was not preserved below, is procedurally barred, and is meritless. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7.

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[28]Kimbrough's pre-trial motion challenging the constitutionality of the death statute argued that the felony murder aggravator was overbroad in that it was an automatic aggravator, carrying with it a presumption of death (R.340).

c. **Florida Creates a Presumption of Death.**

At pp. 89-90 of his brief, Kimbrough argues that "every felony murder case ... and every premeditated murder case..." create a presumption of death. Additionally, he argues the same applies to HAC. Although Kimbrough does not provide reference to where these claims may be found in the record, the State was able to locate in his various pre-trial motions similar arguments (R.302-03, 339-344, 381-96). However, as previously delineated, Kimbrough accepted the Penalty Phase instructions as given without preserving previous objections, and it is the State's position these claims are procedurally barred. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7. Even if this claim was properly preserved, this Court has rejected it. *Id.*

d. **Florida Instructs Juries Not to Consider Sympathy.**

On p.90, Kimbrough argues that the anti-sympathy jury instruction is unconstitutional. Again, he fails to provide a record cite, but the State's review of the record reveals a request by him for a special instruction which included the following language: "...there is nothing which would suggest that the decision to afford an individual defendant mercy violates our Constitution... (R.510; PT.473-74)." The State objected, and the trial court denied the request. This claim has been expressly

rejected by this Court and the United States Supreme Court. *Hunter*, at 253; *Saffle v. Parks*, 494 U.S. 484 (1990).[29]

e. **Electrocution is Cruel and Unusual Punishment.**

Kimbrough's final boilerplate claim at pp.90-91 asserts that death by electrocution is cruel and unusual punishment. Although this claim may be preserved, it is foreclosed by binding precedent. *Hunter*, at 252-53; *Fotopolous*, at 792, 794 n.7.

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[29]Kimbrough relies on the Circuit Court of Appeals opinion that preceded the United States Supreme Court decision in *Parks*. Despite Kimbrough's claim, ***Parks directly rejected the anti-sympathy claim.***

CONCLUSION

Based upon the foregoing facts, authorities, and reasoning, the State respectfully requests that Kimbrough's convictions and sentences be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ANSWER BRIEF has been hand delivered to GEORGE D.E. BURDEN, Assistant Public Defender, Counsel for Appellant, at the Public Defender's basket at the Fifth District Court of Appeal, this 23rd day of February, 1996.

MARK S. DUNN
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