IN THE SUPREME COURT OF FLORIDA

TOMMY LEE RANDOLPH,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 54,869
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPELLEE'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellee was the prosecution in the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, and Appellant was the defendant, respectively. The parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal;
"T"	Transcripts of Trial Proceedings; and
"SR"	Supplemental Record on Appeal.

All emphasis is supplied by the Appellee, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee will accept Appellant's Statement of the Case and Statement of the Facts as being a general overview of the course of the trial court proceedings and the evidence which supported Appellant's judgment and sentence.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE LOGICALLY AND LEGALLY RELEVANT TESTIMONY WHICH ENCOMPASSED COLLATERAL CRIMES.

The landmark case of Williams v. State, 110 So.2d 654 (Fla. 1959), lays down the test of the admissibility of evidence as being one of relevancy. Even if the evidence in question tends to reveal the commission of a collateral crime, it is admissible if found to be relevant for any purpose save that of showing bad character or propensity. The evidence in question is clearly relevant to material facts in issue.

Appellant was charged with, inter alia, first degree murder, attempted robbery, and conspiracy to commit robbery (R 3-4). Althea Glinton testified that she was a prostitute (T 354), and for the past four or five years she had been giving her earnings to Appellant (T 355). On the night of the crimes charged, Appellant wanted Glinton to turn one more trick before they went home (T 365). Glinton then saw the victim on Ninth Street and Avenue D (T 367-368), and called him over. Glinton got into the victim's truck and they pulled in front of a rooming house in that area (T 369). When Glinton and the victim had finished, and Glinton was leaving the truck, Appellant showed up and pushed Glinton away (T 372). Glinton left the area (T 373, 375-376), overhearing Appellant tell the victim not to try anything and Appellant wouldn't

shoot (T 372). Glinton next heard two gunshots (T 377). She testified that Appellant had a pistol which would occasionally get stuck when you tried to shoot it (T 360-361). Twenty-five caliber misfired cartridges were found in Appellant's residence and also at the scene of the murder (T 639-641). Additionally, the bullet which resulted in the victim's death was a .25 caliber bullet (T 639). Finally, after the shooting, Appellant asked Glinton if the victim had any money on him (T 380-381). Receiving an affirmative reply, Appellant walked over to the victim's truck (with the victim's body laying inside) and looked in the window (T 380-381). Lula Mae Fermin, who lives in the rooming house and heard the shots, testified that she looked outside and saw a man go into the truck and get something (T 520-522).

Now, just a few days earlier, Ken Eller and Mike Hayes "picked up" Althea Glinton and another woman in the same general area (the corner of Ninth Street and Avenue B) and went to a rooming house with them (T 790, 791, 806). Upon finishing their activities therein, they were approached by Appellant and another individual upon leaving the rooming house (T 792, 807). The girls disappeared (T 807-808), and Eller and Hayes were robbed at gunpoint. Appellant had a .25 caliber gun (T 793-794, 805, 807). After the robbery, Appellant was overheard saying that he should have killed one of them because he didn't have any money (T 795, 808).

It is evident that the Eller and Hayes incident is extremely similar to the instant incident. The two incidents

took place in the same general area, within days of each other, the same participants were involved, the same type weapon was involved, the same modus operandi was involved, the same type of victim was involved, and the same type of offense was involved. The collateral crime evidence was clearly relevant and admissible as it related to a material fact in issue. The collateral crime evidence demonstrated Appellant's motive in approaching the victim in the crime sub judice. It demonstrated Appellant's intent to try to rob the victim in the crime sub judice. It demonstrated Appellant's state of mind as to what he would do if one of his victims did not have any money (it is to be noted that the victim's money in the case sub judice was hidden in a door pocket to the truck--T 786, whereas Glinton told Appellant that the victim's money was in his sock--T 380-381). Finally, the collateral crime evidence was relevant as showing a plan or pattern followed by Appellant in committing this type of crime. It showed a common scheme and design.

Thus, the collateral crime evidence was relevant to proving premeditation in that it showed Appellant's intent to commit murder if he did not find enough money on his robbery victim. The collateral crime evidence was relevant to show Appellant's motive and intent in approaching the victim in the first place (i.e., to commit a robbery). It is to be noted in this regard that Appellant's statement to the police was to the effect that he merely went over to the victim because he thought the victim was bothering Althea

Glinton (T 759). Finally, the collateral crime evidence, in showing a common scheme, plan, and design, was supportive of the conspiracy charge.

In Evans v. State, 336 So.2d 703 (Fla. 4DCA 1976), the court held that in a prosecution for conspiracy, testimony showing that the defendant and others had been involved in other acts of industrial sabotage against nonunion businesses as part of the union's organizational effort was relevant and admissible to show motive, intent, and common scheme or design. Similarly, see, Eans v. State, 366 So.2d 540 (Fla. 3DCA 1979); Hamilton v. State, 356 So.2d 30 (Fla. 3DCA 1978). Finally, in Griffin v. State, 124 So.2d 38 (Fla. 1DCA 1960), in a prosecution for murder resulting from the violent death of one who was mortally wounded in the course of an armed robbery, it was held that evidence to the effect that within 60 days prior to the homicide for which the defendant was on trial, he confederated in the commission of collateral crimes where it appeared that the collateral crimes had in common with the crime for which he was being tried a general pattern or design on the part of the confederates to illegally appropriate to their own use property of others, was admissible. See also, Smith v. Wainwright, 568 F.2d 362 (5th Cir. 1978); United States v. Brunson, 549 F.2d 348 (5th Cir. 1977). All the above cases clearly support the correctness of the trial court's ruling.

To no avail, Appellant argues that inasmuch as the trial judge granted a judgment of acquittal on the conspiracy

count, as well as Althea Glinton's testimony that there was no conspiracy, the trial court erred in allowing into evidence the testimony as to collateral crimes to show common scheme or design. However, the judgment of acquittal on the conspiracy count occurred subsequent to the presentation of the collateral crime evidence. The State legitimately and in good faith presented the collateral crime evidence to support the conspiracy charge. The fact that Althea Glinton denied that there was a conspiracy is of no help to Appellant. While recognizing that the matter is not a subject for appeal, the conspiracy charge should have gone to the jury because there were questions of fact, raised by the collateral crime evidence, as to the existence of a conspiracy. At any rate, as previously pointed out, the collateral crime evidence additionally and more importantly demonstrated Appellant's motive, intent, and state of mind in approaching the victim's truck and eventually killing the victim. The collateral crime evidence most certainly was not a feature of this trial. On the other hand, its relevancy is crystal clear.

Finally, Appellant claims that the collateral crime evidence should not have been admitted because it prejudiced him on the question of the appropriate sentence. However, this is clearly not the standard by which the courts should be guided in considering the question of the admissibility of collateral crime evidence. As previously noted, relevancy is the test. The collateral crime evidence in question was

both logically and legally relevant to the question of Appellant's guilt or innocence. Parenthetically, Appellee would add that even if it could arguably be said to be error to admit relevant collateral crime evidence because of the ramifications it may have on the second phase of the trial, any arguable error in this regard is harmless under the facts of this case. During the second phase of the proceedings, Appellant admitted that he had been previously convicted at least three times (T 934). His counsel made reference to the jury that Appellant had been previously incarcerated on other charges (T 932-933). How can error be demonstrated when Appellant himself voluntarily took the stand thereby allowing evidence as to his prior criminal convictions to be admitted before the jury? Betsy v. State, 368 So.2d 436 (Fla. 3DCA 1979); Peak v. State, 363 So.2d 1166 (Fla. 3DCA 1978).

Regardless of Appellant's own admissions as to his prior criminal record, this Court has previously stated in Messer v. State, F.S.C. No. 49,780, opinion filed 4-26-79, that Section 921.141(1), Fla. Stat. (1973), provides for the presentation of any evidence as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Subsections (6) and (7) of that statute. It goes without saying that the State has the burden of proof at the second phase of this proceeding. Should the State not have the right to negate the existence of any mitigating factors, at least

those which are listed in the statute? If not, the jury is liable to infer that such mitigating factors are indeed present, insofar as they were instructed on these factors and the State ignored them. This Court, in Messer, supra, even stated that certain of the testimony admitted by the State at the second phase "also tended to negate various statutory mitigating circumstances." As such, and applied to the facts of the case sub judice, the State should have been properly allowed to bring into evidence during the second phase of Appellant's trial testimony as to the existence of prior criminal activity so as to negate that particular mitigating factor. This being the case, no error could have resulted, as it applied to the sentence, by virtue of the proper admission of the collateral crime evidence during the guilt phase of Appellant's trial.

Finally, Appellee must note that the State offered a limiting instruction to the jury regarding the appropriate use of the collateral crime evidence (T 833; R 10). However, Appellant flatly objected to the trial court's so instructing the jury (T 833-834). Under these circumstances, Appellant should not be heard to complain. See, Delaney v. State, 342 So.2d 1098 (Fla. 1977).

For all the above reasons, this point on appeal is utterly without merit.

POINT II

NO ERROR OCCURRED PURSUANT TO THE TESTIMONY OF THE VICTIM'S FATHER.

Appellant makes a blanket statement that the testimony of a member of a victim's family is inadmissible. This is not an accurate statement of the law. While it is true that the courts must guard against the possibility that sympathy will be injected into the trial, and that is why, normally, a family member should not be called to identify the victim, this is not to say that family members cannot be witnesses even though they have relevant evidence to offer. The general prohibition against a family member's taking the stand solely to identify the body of the victim has its roots in the premise that other witnesses could just as well perform that function, thereby saving the jury from being exposed to the possibility of sympathy for that family member. However, if a family member has relevant testimony which is peculiarly within his knowledge, then how can it be said that such testimony should not be forthcoming to the jury? Is not the purpose of a trial to ascertain the truth?

In the case sub judice, Appellant was charged with first degree murder, which charge could be proven by evidence of a murder having been committed during the course of a robbery. Additionally, Appellant was charged with attempted robbery and conspiracy to commit robbery. As it happens, the victim was a partner in business with his father (T 666). The night the victim was murdered was the end of the week,

and the victim received $100 cash from his father as part of the victim's paycheck (T 667). That was the extent of the testimony which Appellant now claims should overturn his judgment and sentence. This testimony was relevant to demonstrate that just a few hours before his murder, the victim had $100 cash on him. Later, when the victim was found, only $20 was found hidden in a passenger door compartment to his truck (T 265, 785, 786). Obviously, the testimony as to how much money the victim initially had on the evening in question, as compared to how much money his body was found with, was relevant to demonstrate the distinct probability that Appellant approached the victim on the evening in question to rob him, and in fact did rob him. It is true that Appellant was only charged with attempted robbery. However, the amount of money that the victim had on him was probative as supporting the theory that Appellant did in fact, not only attempt to rob the victim, but indeed rob him. In essence, Appellant, in this point, is doing nothing more than attempting to limit how the State presents its case against him. The testimony in question was relevant to show the disparity in the amount of money Appellant initially had and was subsequently found with. This disparity could very well have been caused by a robbery committed by Appellant, thereby rebutting Appellant's statement to the police that he only went over to the victim to make sure Althea Glinton was O.K. (T 759). While it is true that the State could not prove beyond a reasonable doubt that Appellant did in fact commit the robbery (and that is why

the State charged Appellant with attempted robbery), such does not negate the relevancy of the testimony in question as it relates to Appellant's motive, intent, and state of mind. The fact that Althea Glinton may have testified that the victim indicated to her that the victim did not have any money to spend on her on the night in question does not mean that the victim did not have any money which may have been robbed from him by Appellant.

Secondly, Appellant placed no proffer into the record at the time of the tender of the testimony as to how he would be prejudiced thereby. He merely objected on relevancy grounds. At the very least, if Appellant felt that he would be denied a fair trial (or had been denied a fair trial), he should have objected, stated how he thought he would be prejudiced, and moved for a mistrial. See generally, Clark v. State, 363 So.2d 331 (Fla. 1978). As it was, the trial court certainly instructed the jury that they were to put any feelings of sympathy aside (T 912-913). If there was error in the admission of the testimony in question, such error was cured by the instruction. Davis v. State, 350 So.2d 834 (Fla. 3DCA 1977).

The bottom line is that Appellant's broad statement of law is, in fact, not the law. As stated by this Court in Lewis v. State, 377 So.2d 640 (Fla. 1979),

> "Because the testimony of these witnesses [family members] was essential for a purpose other than the mere identification of decedent--to rebut appellant's theory of self-defense--their testimony was

properly introduced at appellant's trial." Id. at 643.

As is the case in Point I, relevancy is the test of admissibility, and if any error occurred, it certainly cannot be presumed that it injuriously affected the substantial rights of Appellant. See generally, Salvatore v. State, 366 So.2d 745 (Fla. 1978). There is simply no showing on this record that the jury came back with a guilty verdict because the victim's father testified, where they would not have otherwise done so.

POINT III

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE PHYSICAL EVIDENCE AS WELL AS APPELLANT'S STATEMENTS.

Appellant has divided the instant point into two subpoints, one dealing with the admissibility of his statements and the other dealing with the admissibility of the physical evidence. However, before reaching any discussion on the merits of these subpoints, Appellee deems it necessary to note and discuss the fact that Appellant has neither properly preserved this point for appellate review nor has he sufficiently demonstrated the illegality of his arrest (such alleged illegality which forms the basis of his argument on the merits).

Appellant attempted to challenge the admissibility of the physical evidence in question and his statements merely on the basis of objections propounded during the course of the trial. No motion to suppress either the physical evidence or the statements was ever filed. Fla. R. Crim. P. 3.190(h)(4) and (i)(2) state that:

> "The motion to suppress shall be made [prior to] trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court may entertain the motion or an appropriate objection at the trial."

By use of the word "shall," the rules clearly indicate that it is mandatory that a motion to suppress be made prior to trial. However, there are stated exceptions in which the

court, in its discretion, may entertain the motion or an appropriate objection at trial. Thus, in Kelly v. State, 202 So.2d 901 (Fla. 2DCA 1967), the defendants failed to file a pretrial motion to suppress. However, considerable testimony was taken on the question of whether or not the officers had probable cause to legally justify the search without a warrant of the automobile being used by the defendant. The trial court determined the issue adverse to the defendants. The appellate court refused to reach the merits of the question for the reason that the defendants failed to have the issue determined prior to trial by filing a pretrial motion to suppress. The court stated that an objection to evidence on the ground that it was obtained by an unlawful search and seizure ordinarily comes too late when made for the first time at trial. There are three exceptions: (1) where opportunity for a pretrial motion did not exist, (2) where the defendant was not aware of the grounds for the motion, and (3) where the unlawful search appeared from an admitted or uncontroverted state of fact or from the face of the warrant or affidavit upon which it was based, therefore raising only a question of law. The reason stated for this rule requiring such a motion prior to trial was that a court will not halt trial of litigation in chief and embark upon trial of controverted fact issues for the purpose of determining the competency or admissibility of proffered evidence as against an objection that it was procured by illegal means. See also, Law v. State, 204 So.2d 741

(Fla. 2DCA 1967); New v. State, 211 So.2d 35 (Fla. 2DCA 1968); and Davis v. State, 187 So. 761 (Fla. 1939). All of these cases, including the Davis case from this Court, stand for the same proposition. There is no contention that the instant case comes within any of the exceptions permitting the point to be raised initially during trial. Indeed, there is nothing in the record to indicate that Appellant could not have raised these matters in a pretrial motion to suppress. Having failed to do so, this point is not properly preserved for appellate review and cannot form the basis for a reversal of Appellant's judgment and sentence.

Additionally, it is crystal clear that, at trial, Appellant never posed an objection to the admissibility of the physical evidence or the statements based upon the same grounds he now raises on appeal, i.e., the arrest of Appellant at his home but without an arrest warrant was illegal. The objections made at trial were that the officers were not shown to have probable cause to make the arrest. There was absolutely no mention whatsoever at any time of the arrest being illegal for want of an arrest warrant. (T 487-488, 500-503, 514, 583-584, 605, 729, 739). Indeed, at least three of these objections specifically relied upon the theory that no predicate as to probable cause (not the necessity for obtaining a warrant) was laid. (T 500-503, 514, 583-584). The only objections made as to the introduction of the statements were premised upon grounds totally unrelated to any aspect of the legality of the arrest (T 729, 739).

In Castor v. State, 365 So.2d 701 (Fla. 1978), this Court stated that the requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually. An objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. In the case sub judice, the trial judge certainly could not have been on notice as to the putative error which Appellant now complains of. Indeed, Appellant never mentioned to the trial judge any warrant requirement. The trial judge could not have been aware of Payton v. New York, 455 U.S. ___, 100 S.C. 1371, 63 L.Ed.2d 639 (1980), for that case had not yet been rendered. Indeed, the controlling authority on this issue at the time was State v. Perez, 277 So.2d 778 (Fla. 1973), and United States v. Williams, 573 F.2d 348 (5th Cir. 1978). These authorities indicated that no warrant was necessary to arrest one in his home. Inasmuch as Appellant did not apprise the trial court of the putative error which he now complains of on appeal, and the trial court could not have been aware of the legitimacy of such an unannounced contention, this Court should refrain from reviewing these matters. See, Shea v. State, 167 So.2d 767

(Fla. 3DCA 1964); Darrigo v. State, 243 So.2d 171 (Fla. 2DCA 1971); Bailey v. State, 358 So.2d 1169 (Fla. 3DCA 1978); Black v. State, 367 So.2d 656 (Fla. 3DCA 1979); Williams v. State, 378 So.2d 837 (Fla. 1DCA 1979); United States v. Fox, 613 F.2d 99 (5th Cir. 1980).

Furthermore, Appellant may not be excused from the above failures by application of the doctrine of fundamental error. Even assuming, solely for the purposes of this argument, that there was in fact error, it cannot be considered fundamental. Appellant's fair trial rights were not denied. The evidence and statements in question, insofar as their illegality is premised upon failure to obtain an arrest warrant, do not go to the truth-finding function of the trial. For example, there is no contention, nor could there be, that the consent to search forms signed by Appellant were involuntary or that Appellant did not fully receive and waive his Miranda rights. Indeed, it was Appellant who called for Detective Skovsgard so that Appellant could make a statement; Detective Skovsgard did not solicit a statement from Appellant (T 743-744). In essence, if this be error, it cannot be considered fundamental error because it did not adversely implicate the fairness of the trial itself.

Regardless of all the above, Appellant's reliance upon Payton, supra, as a basis to invalidate the alleged fruits of the arrest herein is misguided. The arrest herein took place well before the rendition date of Payton, supra.

Payton is not retroactive, except insofar as it applies to Payton himself.

The arrest in the instant case took place in 1978. Payton was rendered on April 15, 1980. Therein, the United States Supreme Court announced the rule that warrantless nonconsentual entries into a suspect's home to make a routine felony arrest of that suspect is violative of the Fourth Amendment. In so holding, the United States Supreme Court recognized that the question answered by the holding had up to that point still been unsettled. The court specifically mentioned the fact that the State of Florida had previously rejected such a constitutional attack to an arrest, citing State v. Perez, 277 So.2d 778 (Fla. 1973), cert. denied, 414 U.S. 1054, 94 S.Ct. 570, 38 L.Ed.2d 468 (1973). See also, Section 901.15, Fla. Stat. (F.S.A.). Thus, prior to Payton, the law in Florida was that no warrant was necessary to arrest one in his home. Law enforcement authorities in the State of Florida were justified in relying upon this law inasmuch as it had been approved by the Florida Supreme Court in a case in which the United States Supreme Court had declined to accept certiorari jurisdiction. Even the Fifth Circuit Court of Appeals was of the opinion that a warrantless arrest of one in his own home was not constitutionally invalid. United States v. Williams, 573 F.2d 348 (5th Cir. 1978). In the instant case, the arrest took place well before the Payton decision was rendered. There is not one scintilla of evidence, nor is it contended, that the arresting officer

conducted himself in any reprehensible or reproachable manner, or in any way violated the due process rights of Appellant as those rights existed prior to Payton, supra.

In a number of cases, the United States Supreme Court has indicated that the following are the criteria for determining the retroactivity of its new rules: (1) the purpose to be served by the particular new rule; (2) the extent of reliance which had been placed upon the old rule; and (3) the effect on the administration of justice of a retroactive application of the new rule. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968); Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969); Halliday v. United States, 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969); Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 23 L.Ed.2d 388 (1971); United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975).

In Linkletter, the High Court refused to apply the federal exclusionary rule which had been enunciated in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), to cases which had become final by the time the Mapp decision was rendered. Furthermore, in applying the criteria as set forth above, the High Court, in practically all of their post-Linkletter opinions, has held that new rules of law which expand the scope of the exclusionary rule

under the Fourth Amendment shall be given retrospective effect only to the actual litigants of the particular case before the United States Supreme Court. Thus, in discussing the retroactivity of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the United States Supreme Court stated as follows, in Desist, supra, 22 L.Ed.2d at 253:

> "The eavesdropping in this case was not carried out pursuant to such a warrant, and the convictions must therefore be reversed if Katz is to be applied to electronic surveillance conducted before the date of that decision. We have concluded, however, that to the extent Katz departed from previous holdings of this court, it should be given wholly prospective application."

Desist nonetheless argued that even if Katz is not given fully retrospective effect, at least it should govern those cases which, like his, were pending on direct review when Katz was decided. The United States Supreme Court rejected this contention, citing Johnson v. New Jersey, supra, as authority for the fact that any implication in Linkletter, to the effect that new enunciations of law regarding the exclusionary rule would be given effect to all cases not yet final at the time of the announcement of the rule, was being abandoned:

> ". . . There are no jurisprudential or constitutional obstacles to the adoption of a different cutoff point." Desist, 22 L.Ed.2d at 257.

In Desist, the court explained that the Linkletter decision was necessarily limited, because of the facts of that case,

to convictions which had become final by the time Mapp, supra, was rendered.

The United States Supreme Court further explained that all the reasons for making Katz retroactive also undercut any distinction between final convictions and those still pending on review:

> "Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date. Exclusion of electronic eavesdropping evidence seized before Katz would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-Katz decisions, and would not serve to deter similar searches and seizures in the future." Desist, 24 L.Ed.2d at 257.

Thus, Desist held that Katz is to be applied only to cases in which the prosecution sought to introduce the fruits of electronic surveillance conducted after the date of the rendition of Katz.

Similarly, in Williams v. United States, supra, the United States Supreme Court held that Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), would not be retroactive and would not be applicable to searches conducted prior to the decision in that case:

> "Considering that Desist represents the sound approach to retroactivity claims in Fourth Amendment cases, we are confident that we are not constitutionally bound to apply the standards of Chimel to the cases brought here by Elkanich and Williams. Both petitioners were duly convicted when judged by the then existing law; the

> authorities violated neither petitioner's rights either before or at trial. No claim is made that the evidence against them was constitutionally insufficient to prove their guilt. And the Chimel rule will receive sufficient implementation by applying it to those cases involving the admissibility of evidence seized in searches occurring after Chimel was announced on June 23, 1969, and carried out by authorities who through mistake or ignorance have violated the precepts of that decision." 28 L.Ed.2d at 397.

Finally, in United States v. Peltier, supra, the High Court held that the border patrol case of Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), would not be applicable to searches conducted prior to the rendition of that case:

> "Since 1965 this court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases 'where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials,' [citation omitted], the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the fact-finding process, the court has concluded that any such new constitutional principle would be accorded only prospective application."
> 45 L.Ed.2d at 380.

Thus, the United States Supreme Court indicated that it was in reliance upon a validly inactive statute, supported by longstanding administrative regulations and continuous judicial approval, that border patrol agents stopped and searched Peltier's automobile. Since the parties in the case then before the court acknowledged that Almeida-Sanchez was the first road and border patrol case to be decided by the United States Supreme Court, the court decided that they could not regard as blameworthy those parties who conformed their conduct to the prevailing statutory or constitutional norm even though those parties reasonably relied upon legal pronouncements emanating from sources other than the United States Supreme Court. An excellent discussion of all the above principles can be found in Annotation, United States Supreme Court's Views as to Retroactive Effect of Its Own Decisions Announcing New Rules, 22 L.Ed.2d 821 (1969), as subsequently supplemented in Later Case Services. See also, Edwards, Payton v. New York: A Case For Prospective Application, 64 Fla. B. J. 635 (1980).

Applying the above principles to the question of retroactivity of Payton, the conclusion can be none other than that Payton is not applicable to arrests which occur prior to the effective date of the Payton decision. Prior to Payton, the "operative fact" was that the type of arrest condemned by Payton was in fact legal and longstanding pursuant to rulings by both the Florida Supreme Court and

the Fifth Circuit Court of Appeals, review of said rulings having been declined by the United States Supreme Court. It goes without saying that the exclusionary rule as applied to the Payton doctrine does not minimize or avoid arbitrary or unreliable results. It serves other ends--deterrents of police misconduct. Thus, the truthfinding function is not compromised by the prospective application of Payton. There is no doubt about the relevance, probity, or reliability of the evidence seized.

The criterion of the purpose to be served by the Payton rule strongly supports prospective application. The exclusion of evidence obtained pursuant to a pre-Payton arrest does nothing to serve the underlying basis for the exclusionary rule--to deter illegal police action. The alleged misconduct of the police has already occurred at a point in time when said conduct was not considered illegal. It will not be corrected by excluding the evidence.

The criterion of the extent of the reliance by law enforcement authorities on the old standards also strongly supports prospective application. Payton was the first case within the state or federal jurisdiction which covers this area which held such an arrest to be illegal. As previously noted, the United States Supreme Court implicitly gave their stamp of approval (prior to Payton) to these decisions by declining to accept certiorari jurisdiction. It was quite reasonable for the officers in the case sub judice to rely upon the pre-Payton law, and they did so in good faith.

Finally, the criterion of the effect on the administration of justice strongly supports prospective application. Exclusion of evidence seized before Payton would increase the burden of the administration of justice, would overturn convictions based on fair reliance upon pre-Payton decisions, and would not serve to deter similar searches and seizures in the future. It is to be noted that the United States Supreme Court has relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity. Desist, supra. Because the deterrent purpose of Payton overwhelmingly supports nonretroactivity, the United States Supreme Court has indicated that it would reach the conclusion of nonretroactivity even if relatively few convictions would be set aside by its retroactive application. See Desist, supra. The bottom line is that the United States Supreme Court, in every case in which the court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, has concluded that any such new constitutional principle would be accorded only prospective application. Peltier, supra. As such, no other conclusion can be reached but that Payton is not applicable to arrests which occur prior to the effective date of the Payton decision, such as here.

Appellee is not unaware of State v. Santamaria, 385 So.2d 1131 (Fla. 1DCA 1980). However, therein, the trial court granted a motion to suppress based on legal theories subsequently enunciated in Payton, supra. Thus, when the matter came before the appellate court, the issues had been fully developed and litigated in the trial court, and resulted in a ruling in the defendant's favor. Thus, the appellate court felt justified in validating the trial court's ruling inasmuch as Payton had subsequently been rendered, ratifying the trial court's theory.

Similarly, Appellee is not unaware of Busch v. State, ___ So.2d ___ (Fla. 1DCA 1980), Case No. GG-445, opinion filed 11-17-80. Therein, the appellate court held that Payton is retroactive. However, rehearing is pending in that matter and, Appellee would submit, the Busch court is incorrect in its conclusions. Busch was pending United States Supreme Court certiorari at the time that Payton was rendered. Thereafter, the United States Supreme Court remanded the Busch case to the state appellate court for further consideration in light of Payton. The First District Court of Appeal considered that the United States Supreme Court would not have remanded the matter back to the state appellate court for consideration in light of Payton if there had been no intention on the part of the United States Supreme Court that Payton be applied to Busch. In reaching this conclusion, the appellate court clearly failed to consider Bowen v. United States, 422 U.S. 916 (1975).

In Bowen, the defendant was stopped by border patrol authorities who discovered contraband in the defendant's vehicle. This led to the defendant's conviction on drug related offenses in federal court. Following the affirmance of his convictions by the Ninth Circuit Court of Appeals, the defendant petitioned for certiorari to the United States Supreme Court. That petition was still pending when the court announced its decision in Almeida-Sanchez, supra, which invalidated the use of roving patrols to search motor vehicles with neither a warrant nor probable cause, at points removed from the border and its equivalents. Shortly thereafter, the court granted Bowen's petition, vacated the judgment below and remanded the matter to the court of appeals for further consideration in light of Almeida-Sanchez. The court of appeals considered whether the new rule of law promulgated in Almeida-Sanchez was properly to be applied to events occurring before its announcement and, concluding that the mandate of Almeida-Sanchez would not be applied to invalidate border patrol searches conducted prior to the date of that decision, reaffirmed Bowen's convictions. See: United States v. Bowen, 500 F.2d 960 (9th Cir. 1974). Said court relied upon Williams v. United States, supra, and Michigan v. Payne, 412 U.S. 47 (1973), as authority for not applying Almeida-Sanchez to the "pipeline" cases--that is, cases on appeal, and said:

> "The only remaining question is the date upon which Almeida-Sanchez would become applicable to searches at fixed checkpoints. Some would argue that there should be at least a limited retroactivity, requiring us to apply the new rule to those cases involving

searches at fixed checkpoints that are now on direct appeal. These are the so-called 'pipeline' cases. We reject this approach and hold that Almeida-Sanchez applies only to searches at fixed checkpoints after June 21, 1973, the date of the Almeida-Sanchez decision. The Supreme Court's recent decisions indicate that the pipeline theory does not enjoy majority approval. [citation omitted]. The court had precisely that issue before it in Williams v. United States, [supra], and a majority declined to apply the new rule either to the cases in the pipeline (on direct appeal) or to the cases that were before the court on collateral attack. Only Justices Brennan and Marshall supported the pipeline theory.

In Michigan v. Payne [citation omitted], the court again adopted limited prospectivity, i.e., only the challenging appellant would benefit from the new rule. In Payne, the court held that the prophylactic limitations established in North Carolina v. Pearce, [citation omitted], would not be applicable to resentencing proceedings that occurred prior to the date of the Pearce decision, even though Payne's appeal was in the pipeline when Pearce was decided. Justice Marshall, dissenting, concluded that 'considerations of fairness rooted in the Constitution [require] that cases in the pipeline when a new constitutional rule is announced must be given the benefit of that rule.' [citation omitted]. None of the other justices joined in this part of his dissent and Justice Marshall himself admitted that, other than exceptions not applicable in this case, all 'constitutional rules of criminal procedure have been given prospective effect only.' [citation and footnote omitted]. He noted that limited retroactivity, as applied in Linkletter [citation omitted], was an 'anomaly.' It would be unwise for us to adopt the pipeline theory when the Court has declined to apply it." 500 F.2d at 979-980.

Bowen applied for certiorari and after granting the writ the United States Supreme Court, citing to Michigan v. Payne and United States v. Peltier, held the Fourth Amendment exclusionary rule could not be served by applying the principles of Almeida-Sanchez, supra, retroactively and affirmed the decision of the court of appeals. For a like holding as it related to the application of Delaware v. Prouse, 440 U.S. 648 (1979) upon cases pending on appeal when that case was decided, see State v. Carpentieri, 414 A.2d 966 (N.J. 1980); Chapman v. United States, 547 F.2d 1240, 1247 (5th Cir. 1977); United States v. Miller, 492 F.2d 37 (5th Cir. 1974).

Thus, the above discussion clearly demonstrates that even had the instant matters been properly preserved by the pretrial filing of a motion to suppress and by the appropriate objections at trial, Appellant's reliance upon Payton, supra, on appeal is of no avail to him. The great weight of authority clearly indicates that Payton is to be given prospective application only. The only retroactive application of the Payton decision is to the defendant Payton himself.

Aside from all the above, even if the issue were properly preserved, and even if Payton were applicable, Payton was indeed satisfied for Payton clearly allowed an exception to the warrant requirement where exigent circumstances are present.

In the case sub judice, there were indeed exigent circumstances. Edna Plain testified that she saw Althea Glinton and Appellant during and immediately following the commission of the murder (T 670-671). At the scene of the crime, she overheard Appellant ask Glinton if the victim had any money on him (T 671-672). Appellant told them not to come over by the truck; meanwhile, Appellant himself went over to the truck and wiped the door handle with his sleeve (T 672, 674). Later on, she saw Appellant and Glinton. They asked her to get into their car. Plain refused because she was afraid (T 674-675). Officer Oliver Walker testified that, pursuant to his investigation at the scene on the morning of the crime, he ran into Edna Plain (T 581). She told Officer Walker that she knew who was involved in the crime and that she wanted Officer Walker to "hurry up and get these people, because she was afraid that someone--they would find out sooner or later that somebody had told them about this incident and they know--." (T 589). Edna further told Officer Walker,

> "After she told me to rush, get as fast as I could to 21st Street and pick this man up, because she was in fear of her life, she felt that this man would kill her, and told me that she wouldn't be satisfied until this man was picked up and for me to notify her that this man was locked up in jail, then she would have peace of mind." (T 590).
>
> * * *
>
> "She told me that she really wanted me to catch--get Tommy Lee Randolph off the street, she was afraid of her life, she feels that this man would kill her

> because he knew that she was the onliest one that knew about the incident." (T 595).
>
> * * *
>
> "In the conversation that we had, the time that we were together, she explained to me what had took place on Ninth Street and what Beeper had said, she told me that she knew that this man had--Randolph had got involved in something bad and she knew about it and she wanted him off the streets, because she was afraid of her life. She was in danger from this man who knew that she knew about it and he would probably hurt her. And she wouldn't have peace of mind until we got him off the streets." (T 597-598).

Officer Walker had known Edna Plain for five or ten years (T 586), and she had given him information in the past which had proven to be reliable (T 600). Plain had explained to Officer Walker that she had been looking for him all night (T 588-589).

The exigency of the circumstances is obvious. Officer Walker not only had probable cause but was also concerned for the life of Edna Plain. He immediately dispatched himself to Appellant's house to look for him before Appellant was able to find Edna Plain. She was legitimately concerned for her life and Officer Walker acted prudently in attempting to locate Appellant before Appellant was able to find Edna Plain and harm her, an important State witness. Officer Walker was justified in attempting to apprehend Appellant as soon as possible pursuant to his belief that Edna Plain was in imminent peril of bodily harm. See generally, State v. Kelly, 260 So.2d 903 (Fla. 2DCA 1972).

Regardless of all the above, as will be shown below, both Appellant's statements and the seizure of the physical evidence were sufficiently attenuated from any prior alleged illegality such that there was no error in admitting the statements and the evidence before the jury.

A. APPELLANT'S STATEMENTS WERE ADMISSIBLE.

Brown v. Illinois, 422 U.S. 590 (1975) and Dunaway v. New York, 442 U.S. 200 (1979), state that, under the Fourth Amendment, the relevant inquiry as to the admissibility of a statement following an illegal arrest is not a "but for" rule, but whether the statements were obtained by exploitation of the illegality of the arrest. Factors to be considered include (1) the temporal proximity of the arrest and the confession, (2) the presence of intervening circumstances, and (3) particularly, the purpose and flagrancy of the official misconduct.

In the case sub judice, Appellant was arrested early in the morning (T 595), and made his statements later that evening (T 743). As to intervening circumstances, it must be noted that no officer ever solicited a statement from Appellant. It was Appellant who sent word that he wanted to make a statement to Detective Skovsgard (T 743). Detective Skovsgard came to the jail and advised Appellant of his Miranda rights. Appellant indicated that he understood the same, that he waived the same, and that he wanted to give Detective Skovsgard a statement (T 743-744). As to the

flagrancy of the official misconduct, Appellee reiterates what has previously been noted, that the arresting officer acted legally and in good faith under the existing law at the time of the arrest. There was probable cause to make the arrest, based at the very least upon Edna Plain's statements. Clearly, the arresting officer did not commit a flagrant and bad faith violation of the then existing law.

Appellant attempts to compare the instant case with United States v. Tucker, 610 F.2d 1007 (2nd Cir. 1979). However, Appellant's solicitation of Detective Skovsgard so that Appellant could make a statement to the detective is a much greater intervening circumstance than the defendant Tucker's blurting out "you got me" after the agents formally arrested him.

In United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978), rehearing granted en banc on other grounds, 612 F.2d 906 (5th Cir. 1980), the Fifth Circuit Court of Appeals held that the confession that followed an illegal arrest was not come at by exploitation of the illegality, where the defendant, after his arrest, was advised of his constitutional rights, obtained meaningful counsel from a friend who was a law enforcement officer and who advised him to cooperate with government agents, and where the defendant made a confession after being so counseled. In the case sub judice, clearly, the statements of Appellant were not obtained by exploitation of any alleged illegality of his arrest. They were obtained solely, and as a result of,

Appellant's seeking out of Detective Skovsgard so that Appellant could make a statement to the detective.

B. THE PHYSICAL EVIDENCE WAS SEIZED PURSUANT TO A VALID AND VOLUNTARY CONSENT.

Once again, as previously noted, the test under Fourth Amendment analysis is not the "but for" test, but whether there was sufficient attenuation between the alleged illegal conduct and the discovery of evidence.

In the case sub judice, upon his arrest, Appellant was advised of his Miranda rights (T 503). After the charges were explained to him, and after he personally read aloud a consent to search form, Appellant signed the consent to search form (T 507, 515). Although the form was admitted into evidence (T 514), Appellant has not seen fit to make it a part of the instant Record on Appeal. If it is necessary to this Court's ruling, this Court should allow Appellant an opportunity to supplement the record with Appellant's signed consent to search form. In all probability, the consent to search form indicates that Appellant knew he had a right to refuse. The bottom line is that the consent to search form is clear and convincing proof that absolutely no coercion existed which forced Appellant to allow the police officers to search his house. The consent was sufficiently attenuated from any alleged illegality which occurred pursuant to an arrest based on probable cause, but without a warrant. St. John v. State, 363 So.2d 862 (Fla. 4DCA 1978).

POINT IV

NO ERROR OCCURRED IN ADMITTING EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT.

Initially, and most importantly, Appellee must reiterate that Appellant never raised at trial any issue whatsoever about the legality of the search warrant. There was no pretrial motion to suppress. Appellant never objected to the introduction of any item seized pursuant to the search warrant. Appellant refers to page 605 of the transcript in an attempt to demonstrate that Appellant interposed a continuing objection premised upon an alleged illegal search and seizure. However, it is crystal clear that Appellant's objection in this regard refers to evidence seized pursuant to the consent to search form. This is evident pursuant to an inspection of the context within which the objection is found (T 601-608). When the testimony turned to the evidence seized pursuant to the search warrant, Appellant was satisfied that the legality of <u>that</u> evidence had been demonstrated (by virtue of the existence of a search warrant). No objection was interposed in this regard (T 608-612). Indeed, at no point did Appellant ever mention that he had any objection whatsoever regarding a search incident to a search warrant. Inasmuch as Appellant claims that there were three separate searches (see Appellant's brief, page 21), it certainly cannot be said that Appellant's general objections premised upon an alleged illegal search and seizure (said objections occurring in the context of

the officer's initial entry into the house to arrest Appellant and to search the house pursuant to the consent to search form) ever apprised the trial judge that Appellant was concerned at all about an alleged insufficiency in the probable cause affidavit which supported the search warrant. Based on all the cases previously cited in the beginning of the argument of Point III, supra, Appellee would submit that Appellant, by failing to make a pretrial motion to suppress, and by specifically failing to object on the instant grounds at trial, has failed to preserve this point for appellate review.

Regarding the merits, in making an affidavit, an officer need not state exactitudes to establish probable cause but, rather, he may rely on probabilities based on his common sense deduction. State v. Williams, 374 So.2d 609 (Fla. 3DCA 1979). An affidavit for a search warrant should not be scrutinized for technical niceties. The proper test of the sufficiency of an affidavit for a search warrant is whether a reasonable person, knowing all the facts which the affiants knew, would have believed there was probable cause to search under the circumstances. The facts constituting probable cause to search need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which a conviction must be based. State v. Heape, 369 So.2d 386 (Fla. 2DCA 1979). The test depends upon probabilities determined by factual and practical considerations of everyday life on which

reasonably prudent and cautious persons, not legal technicians, act. Reasonable inferences may be drawn from the facts contained in the affidavit, for inference is the essence of probable cause. Churney v. State, 348 So.2d 395 (Fla. 3DCA 1977).

In the case sub judice, the affidavit stated that Edna Plain was an informant who, in the past, had proven to be reliable in police investigations. Information from Edna Plain was that she was in the company of Althea Glinton on the morning of February 25, 1978. Glinton told her that Appellant had pulled Glinton from a truck and that, upon Glinton's leaving, Glinton heard a gunshot. That is when Glinton came to get Edna Plain, and they both went to the scene. Appellant was standing across the street from the truck. Appellant asked Glinton if the victim had any money, to which Glinton replied in the affirmative. Appellant told Glinton and Edna Plain to stay away from the truck, while Appellant himself went in the truck. Appellant was wearing a tam type cap and a leather jacket. Edna then saw Appellant and Glinton leave together in a yellow car. Glinton herself gave sworn testimony that she and Appellant went home. Officer Walker received all this information from Edna Plain and went to Appellant's house on the same morning. Appellant was brought to the police department, but he was wearing different clothes. Finally, Edna Plain stated that Appellant was known to carry a small automatic weapon.

The affidavit and search warrant were dated three

days later, on March 1, 1978. However, the face of the affidavit indicated that Appellant was in detention during the interim. The affidavit was certainly such that a reasonable person would have probable cause to believe that the weapon and/or other evidence of the murder, i.e., the clothes Appellant was wearing on the day of the murder, were in the house. While Appellant would attempt to focus this Court's attention on the gun, Appellee would note that the affidavit in support of the search warrant gave probable cause to believe that the clothes Appellant was wearing were also in the house. In fact, these items were found in the house pursuant to the search warrant. It cannot be said that probable cause did not exist for the issuance of this search warrant.

POINT V

THE TRIAL COURT DID NOT ERR IN EXCEPTING THE CHIEF INVESTIGATOR FROM THE RULE OF WITNESS SEQUESTRATION.

The rule of witness sequestration is not an absolute rule which must be invoked at the mere request of counsel. Spencer v. State, 133 So.2d 729 (Fla. 1961). The rule in Florida is that the trial judge is endowed with a sound judicial discretion to decide whether particular prospective witnesses should be excluded from the sequestration rule. The obvious reason for the rule is to avoid the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand. Spencer, supra. It is often less likely that such a result will follow in the case of a law enforcement officer who has had experience in criminal trial work and whose interest in the results will not apt to be personal. Spencer, supra. Unless a trial judge can be said to have abused the discretion which is his to exercise in such situations, then his judgment will not be disturbed. The burden is on the complaining party to demonstrate an abuse of discretion with resultant injury. Spencer, supra.

In the case sub judice, the State asked for an exception to the sequestration rule for Detective Earl Skovsgard, the principal investigating officer in the case (T 218). Appellant objected (T 218, 221) on the basis that he felt some State witnesses may be intimidated into giving testimony consistent with statements which they had previously

given to Detective Skovsgard. There was absolutely no objection whatsoever on the grounds which, in actuality, forms the real basis for having a sequestration rule--to avoid the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand. Apparently, Appellant was not concerned at all with this.

It is to be noted that each and every witness who took the stand at Appellant's trial was under oath to tell the truth. Appellant had full opportunity to cross-examine each and every witness to determine if their current trial testimony was pursuant to some sort of "intimidation" effect which may have been caused by the presence of Detective Skovsgard. Furthermore, it cannot be said that Detective Skovsgard's testimony related to substantive eyewitness matters. His testimony was limited to the fact that Appellant and Althea Glinton signed consent to search forms which forms were admitted into evidence (T 514), and to the fact that Appellant gave the detective a taped statement (T 742-788). Certainly, this is not the type of testimony which could have been colored by previous testimony from the stand. Indeed, Detective Skovsgard's testimony was corroborated by the admission into evidence of the consent to search forms as well as the taped statement.

This Court has stated that the rule of sequestration is intended to prevent the shaping of testimony by witnesses. Dumas v. State, 350 So.2d 464 (Fla. 1977). However, no trial

is invalid simply because one or more potential witnesses hear the testimony of other witnesses. Dumas, supra. This is not a situation where the witness who was excluded from the sequestration rule was a principal actor in the crime, nor is this a case where the testimony of the witness was actually suggested by what he heard in the courtroom. While it may or may not be appropriate for the trial judge to conduct some sort of inquiry to determine whether or not a potential witness should be allowed to be an exception to the sequestration rule, the bottom line inquiry before this Court is whether or not Appellant has satisfied his burden of showing injury. Appellee submits that he has not. There is no reasonable view of the proceedings at the instant trial which should have the effect of warranting a reversal of Appellant's judgment and sentence based on this point.

POINT VI

THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT'S JUDGMENT AND SENTENCE.

Appellant has made a broadsided attack on, not the amount of evidence which was presented against him, but the type of evidence which was presented against him. If Appellant's conclusions are correct, then the prison population problem in this state would be nonexistent, for there would be no convictions. Initially, a few observations must be made. Contrary to Appellant's assertions, this was not a totally circumstantial evidence case, unless a confession can be considered circumstantial evidence. Appellant did confess to Althea Glinton (T 386, 451). Secondly, contrary to Appellant's assertions, the State did not rely upon the sole theory of "felony murder", although that was indeed the stronger of the two theories (felony murder and premeditation). Appellee will discuss this matter further on, but it is worthy of note that at the charge conference, when Appellant submitted a requested instruction which called for a not guilty verdict if the jury did not find felony murder, the State objected because the jury could still find that the murder was premeditated (T 830; R 9). The jury was instructed on premeditation as well as felony murder (T 897-898), and the evidence supported both theories, as will be shown below. Thirdly, contrary to Appellant's assertions, the evidence presented at trial was not consistent with Althea Glinton's having shot the victim. Indeed, pursuant to her own testimony,

the evidence was totally inconsistent with that theory. Were this Court to accept such a rationale to overturn Appellant's judgment and sentence, every judgment and sentence could be overturned based on the simple argument that the State's witnesses were lying.

While Appellant seeks to challenge his judgment and sentence on the basis of Glinton's character and the nature of her plea negotiations, it should be noted that no part of her testimony was impeached or rendered inconsistent with the physical facts of the case. This is what clearly and undeniably distinguishes the instant case from Tibbs v. State, 337 So.2d 788 (Fla. 1976). Indeed, much of Glinton's testimony was in fact corroborated by the physical evidence and the testimony of other, independent witnesses. For example, the victim was shot with a .25 caliber bullet (T 639). Appellant had a .25 caliber gun (T 675). The gun would occasionally misfire (T 360, 361). Various .25 caliber bullets were found in and around Appellant's house, as well as at the scene of the crime. Some of these bullets had been misfired (including the one at the scene of the crime). All the bullets which had been misfired came from the same gun (T 246-247, 292, 293, 294, 604, 605, 639-641, 643, 654, 664). Additionally, Lula Mae Fermin corroborated Glinton's testimony regarding Glinton's going inside the nearby rooming house when Appellant initially came on the scene (T 374, 518-519). Further, Edna Plain corroborated Glinton's testimony to the effect that Glinton ran into Edna Plain on the street at

approximately the same time as the shots were fired (T 377, 670-671). Also, both Lula Mae Fermin and Edna Plain testified that it was Appellant who went over to the truck and retrieved items therefrom (T 520-522). Edna Plain testified that Appellant appeared to be wiping the door handle with Appellant's sleeve (T 674). It was Appellant who told Glinton and Edna Plain not to come near the truck (T 672). Finally, and most significantly, this very same modus operandi had been practiced by Appellant a few days earlier, at the same general location (see Point I, supra). There can be no real question about Appellant's having committed this murder.

It similarly cannot be said that Althea Glinton's testimony was false just because she entered into a plea negotiation with the State. This matter was fully brought out by the prosecution at Appellant's trial (T 353). Glinton was allowed to plead no contest to second degree murder in return for her truthful testimony regarding the instant matter (T 353). Appellant certainly had the right of cross-examination regarding these plea negotiations, and the jury had the benefit of Glinton's full testimony in the context of the plea negotiations. It is not for an appellate court to assume the fact finding role of a jury.

In essence, Appellant would have this Court discard traditional rules of evidence and hold that, because this is a capital case, the conviction cannot be based on the testimony of one such as Althea Glinton. This proposition is absurd and would necessarily seriously erode the operation

of the criminal justice system. Rarely is the prosecution so fortunate as to have a group of nuns who are eyewitnesses to the violent crimes of society! The standard of proof in a capital case is the same as in all other criminal prosecutions: the State must prove guilt beyond a reasonable doubt. The State's burden of proof does not rise to "beyond the possibility of a doubt" in a capital case as suggested by Appellant. The jury had the benefit of all the testimony and all the evidence, and the State's case was presented in the context of Appellant's cross-examination of the State's witnesses. The jury was well aware of Althea Glinton's character and the circumstances of her plea negotiations. Their unanimous verdict is supported by the evidence, and should not be overturned.

Under the felony murder theory, the evidence is overwhelming. Althea Glinton testified that she was a prostitute who gave all her earnings to Appellant (T 354-355). In regard to the victim, as she was leaving his vehicle, Appellant showed up and pushed Glinton away (T 372). Appellant told the victim not to try anything and Appellant would not shoot (T 372). Appellant was acting like he was going to find out if the victim had any money on him (T 373). In fact, the only money found in the victim's vehicle was hidden in a door pocket on the passenger door (T 785, 786). Various witnesses heard Appellant ask Glinton, after the shooting, where Appellant hid his money (T 380-381, 671-672). At least one witness saw Appellant actually go into the truck and retrieve some items (T 520-522). As previously noted, this

modus operandi completely and totally matched a previous robbery by Appellant just a few days earlier and in the same area.

As to premeditation, during that previous robbery, Appellant was overheard stating that he should have killed one of the victims because of the small amount of money the victim had on him (T 795, 808). This prior statement of Appellant demonstrates his premeditated intent to kill when one of his robbery victims has insufficient cash. It must be noted that premeditation may be proven circumstantially. Among the circumstances are (1) previous difficulties between the parties, (2) the manner in which the homicide is committed, and (3) the nature and manner of the wounds. Phippen v. State, ___ So.2d ___ (Fla. 1980), F.S.C. No. 54,664, opinion filed 10-23-80. While it cannot be said that Appellant had previous difficulties with the victim, he did previously express an intent to kill those victims who did not have sufficient cash to rob. Furthermore, the manner in which the homicide was committed, and the nature of the wound, clearly negates any contention of self-defense. The nature of the wound indicates that the murder was cold and calculating, as well as deliberate. There was one bullet wound right through the middle of the chest (T 458). There was no apparent reason whatsoever for Appellant to have shot the victim, absent Appellant's anger in not retrieving enough money from the victim.

In the final analysis, this Court cannot overlook

Glinton's testimony to the effect that Appellant confessed to Glinton, and told her what "song and dance" should be given to the police should they question her (T 386, 388, 389, 451). The evidence was sufficient under both the felony murder theory and the premeditation theory for the jury to conclude beyond a reasonable doubt that Appellant committed this murder. Tedder v. State, 322 So.2d 908 (Fla. 1975); Calloway v. State, 189 So.2d 617 (Fla. 1966).

POINT VII

APPELLANT'S DEATH SENTENCE MEETS CONSTITUTIONAL REQUIREMENTS.

A. THE EVIDENCE SUPPORTS APPELLANT'S CAPITAL SENTENCE.

The trial judge's findings in support of the sentence of death are found in the Record on Appeal (pages 19-21). Therein, the trial judge indicated that "the record discloses the only listed aggravating circumstances which have any application here are" the factors relating to (1) felony murder, (2) pecuniary gain, and (3) heinous, atrocious, or cruel. Thereafter, the trial judge stated that "the only listed mitigating circumstances which conceivably might have any application here are" the factors relating to (1) the capacity of the defendant to appreciate the criminality of his conduct, and (2) the age of the defendant. Thereafter, the trial judge proceeded to discuss his factual findings in light of the aforementioned factors.

Appellant initially claims that the trial court improperly considered as two separate and distinct aggravating factors those which related to felony murder and pecuniary gain. While it is true that the trial judge mentioned both of these factors as being relevant to the facts of the case, it does not appear that the trial judge necessarily considered the two factors as separate and independent. Indeed, the mere recitation of both factors does not necessarily call for a condemnation of the sentence. Hargrave v. State, 366 So.2d 1 (Fla. 1978); Fleming v. State, 374 So.2d 954 (Fla. 1979).

The capital sentencing statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. It requires a weighing process. Hargrave, supra; Fleming, supra. The style in which the trial judge worded his sentencing order indicates that, while he mentioned the various relevant factors, it was the single ultimate fact of Appellant's having killed the victim in the course of an attempted robbery which weighed in the trial judge's mind. This ultimate fact supports either the felony murder aggravating factor or the pecuniary gain aggravating factor, and the trial judge indicated this. However, by so indicating, one cannot draw the conclusion that he considered both factors independently and separately, thereby improperly "doubling up" those two aggravating factors.

However, regardless of the above, at least one of the above two aggravating factors is clearly a valid factor (whether it be the felony murder factor or the pecuniary gain factor). Thus, the ultimate facts supporting that one factor (said facts being that Appellant was "in the act of attempting to rob the victim for his money"), when considered with the factor of "heinous, atrocious, or cruel," fully support the imposition of the death penalty.

Furthermore, Appellant's contentions that the felony murder aggravating factor is unconstitutional are without merit. Initially, Appellee must note that Appellant never raised this issue in the trial court. Thus, he has not preserved this issue for appellate review. The trial court

was never apprised by Appellant that Appellant was concerned about the constitutionality of the felony murder aggravating statute. Therefore, the matter has been waived for appellate review. State v. Barber, 301 So.2d 7 (Fla. 1974); Wainwright v. Sykes, 433 U.S. 72 (1977).

Appellant's reliance upon North Carolina's interpretation of its own law, in North Carolina v. Cherry, 257 S.E.2nd 551 (N.C. 1979), is misplaced. Florida is certainly not required to accept North Carolina's interpretation of its own laws insofar as it may be analogous to provisions of Florida law. Indeed, this Court, in State v. Dixon, 283 So.2d 1 (Fla. 1973), has already determined that the commission of a capital felony as part of another dangerous and violent felony consists not only of a capital felony but also an aggravated capital felony, and that "such a determination is, in the opinion of this Court, reasonable" Id. at 9. There is certainly no infirmity in the rationale of this Court in this regard, for it is clear that the obvious ultimate purpose of felony murder statutes is to prevent the death of other persons likely to occur during the commission of certain felonies which the legislature has determined are inherently dangerous and particularly grievous felonies. It is furthermore obvious that Florida's interpretation in this regard is not violative of the Eighth Amendment. Indeed, the United States Supreme Court already upheld on Eighth Amendment

grounds Florida's death penalty statute as it applies to Florida's capital murder statute, even though felony murder can constitute a capital felony and an aggravating factor. Proffitt v. Florida, 428 U.S. 242 (1976).

Not only is it reasonable to make felony murder an aggravating factor, but such factor does not automatically result in the death penalty (as Appellant so glibly contends), nor is there a preclusion of the jury's consideration of any other mitigating factor. One need only review the opinions of the United States Supreme Court in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), to conclude that it was the fact that those death penalty statutes provided for a mandatory death penalty with no opportunity for the jury to consider mitigating factors that rendered those statutes unconstitutional. Indeed, the language was clear in those cases that had the respective state statutes allowed the jury an opportunity to consider circumstances in mitigation, the statutes would not have been in violation of the Eighth Amendment. This fact was driven home one year later by the United States Supreme Court in Roberts v. Louisiana, 431 U.S. 633 (1977), wherein Louisiana's death penalty statute which provided for a mandatory death penalty upon the intentional killing of a fireman or peace officer, was considered upon Eighth Amendment grounds. The opinion of the court clearly stated that the fact that the murder victim was a peace

officer could properly be regarded as an aggravating factor (even though this factor was inherent in the capital felony, and in fact made the crime a capital felony)! However, insofar as there was no provision for the jury's consideration of mitigating circumstances, the statute was unconstitutional.

The fact that the capital felony was also a felony murder most certainly may be considered as an aggravating circumstance. However, the factors that were lacking in Louisiana's statute are not present in Florida's statute. Florida's statute contains no provision for a mandatory death penalty. The Florida Supreme Court has repeatedly emphasized that the Florida death penalty statute does not comprehend a mere tabulation of aggravating circumstances versus mitigating circumstances to arrive at a net sum; rather, it requires a weighing of those circumstances. Dixon, supra. Hence, the mere fact that a certain defendant's case satisfies the particular aggravating circumstance that the capital felony was committed during the commission of a certain enumerated felony does not automatically result in the imposition of death. Florida's statute allows consideration of any circumstance in mitigation. It is obvious that the United States Supreme Court does not consider the Eighth Amendment to be violated by the use of a particular element in a capital crime as an aggravating factor, as long as the death penalty is not automatic and the jury may consider mitigating circumstances.

As to the finding of heinous, atrocious, or cruel, Appellant goes to great lengths to point out that various matters discussed by the trial judge constitute the use of nonstatutory factors in aggravation. However, this is simply not the case. The trial court never stated that individual facts which go into the formula and ultimately resulted in the conclusion that the murder was indeed heinous, atrocious, or cruel, were themselves separate and independent aggravating factors. Indeed, it would seem to go without saying that one must look to the character of the crime and the surrounding circumstances before making a determination as to whether or not a particular crime is heinous, atrocious, or cruel. Thus, in the case sub judice, the evidence before the trial judge was that the murder fit into a planned pattern and scheme between Appellant and the prostitute to set up robberies. Appellant had already indicated just a few days prior, that he should kill his victims if it turns out they do not have sufficient money to satisfy his immediate desires. This statement of Appellant's indicates the extreme wickedness with which Appellant approaches his crimes. This was not just another shooting death where the victim died quickly and painlessly, as Appellant would have this Court believe. Appellant demonstrated his cold and calculating nature to kill at a whim. A calculated execution type killing does indeed constitute the presence of "heinous, atrocious, or cruel." See generally, Hargrave v. State, 366 So.2d 1 (Fla. 1978). Furthermore, Appellant was not concerned about

what he had done. Indeed, he queried Glinton, after the murder, as to if Appellant had any money on him and where he kept it. He then went back in the truck with the dead body to look for the same. Such a lack of remorse, continuing up through the date of the trial, while not a separate and independent aggravating factor, does indeed go into the equation of "heinous, atrocious, or cruel." In Hargrave, supra, this Court noted that "heinous, atrocious, or cruel" included the fact that the defendant therein told various people that he had killed before and he could kill again. In Sullivan v. State, 303 So.2d 632 (Fla. 1974), there was testimony that it would not bother the defendant therein to kill again. When considered with the type of killing involved, this matter must go into the equation of "heinous, atrocious, or cruel." Finally, in Jackson v. State, 366 So.2d 752 (Fla. 1978), the trial judge stated that he observed no signs of remorse on the part of the defendant, thereby indicating full well to the trial court that the death penalty was the proper selection of punishment in that particular case. Once again, these matters are not separate aggravating factors, but merely observations which go into the equation which constitutes the factor of "heinous, atrocious, or cruel." In other words, it is not simply the physical acts which can constitute the presence of this aggravating factor, but a defendant's state of mind as well as the context within which the crime is committed must also be considered. Additionally, the victim did not die instantly

and painlessly, as in Cooper v. State, 336 So.2d 1133 (Fla. 1976) and Williams v. State, F.S.C. No. 50,666 (opinion filed June 12, 1980). It took a few minutes for the victim to die (T 459). Finally, the trial court noted the existence of yet another aggravating factor, that being Appellant's plea of guilty for another violent felony. See, McCrae v. State, F.S.C. No. 45,894 (opinion rendered October 30, 1980).

In an attempt to offset all the above aggravating factors, Appellant presented testimony as to his age and as to his heroin use on the night in question. The trial court found that Appellant's age was well over his majority, and that Appellant had matured into a pimp living off his woman. As to Appellant's use of heroin on the evening of the murder, the trial court concluded, and the facts surely supported, that the mitigating circumstances as to "extreme mental or emotional disturbance" and "extreme duress" were not even worth mentioning. (T 942-943). The only factor in this regard that was worth mentioning concerned the capacity of Appellant to appreciate the criminality of his conduct. However, the trial court was justified in rejecting this factor also inasmuch as Appellant certainly demonstrated that he knew exactly what he was doing. Appellant, after the murder, asked Glinton where the victim kept his money. Appellant went into the truck in an apparent attempt to retrieve the same. He attempted to wipe his fingerprints off the handle of the truck. He directed Glinton to tell

the police a cover story should the police inquire. These facts certainly do not demonstrate an impaired capacity to appreciate the criminality of one's conduct. While it is true that, in some cases drug or alcohol ingestion should be considered in mitigation (as cited by Appellant), clearly this is not one of those cases. A simple comparison of the instant case with Appellant's cited cases in this regard will demonstrate Appellee's point. More on point is Stone v. State, F.S.C. No. 48,275 (opinion rendered November 1, 1979). In the final analysis, matters of this type are for the factfinder, and should not be disturbed on appeal.

Finally, Appellant makes a statement that as a matter of constitutional law a statute which mandates the death sentence for every felony murder unless the defendant comes forward with proof of statutory mitigating circumstances would improperly shift the burden of proof to the defendant in every felony murder case. First of all, Florida's death penalty statute does not mandate the death sentence for every felony murder. Secondly, Florida's death penalty statute does not necessarily require a defendant to come forward with proof of statutory mitigating circumstances. Thirdly, there is no shift in the burden of proof. If the "felony murder" aggravating factor is to be found, the State must prove it first. Then, and only then, would the existence of an aggravating factor be present. Appellant could just

as well make the argument that whenever a murder is committed by a person under sentence of imprisonment or by a person previously convicted of a violent felony, there is a mandatory death penalty unless the defendant comes forward. However, these contentions are ludicrous because the jury and judge may consider any matter whatsoever in mitigation, whether the defendant comes forward or not. Furthermore, it is the State that carries the burden of proof, and said burden does not shift any more than it would at the first phase once the State has presented its prima facie case. This Court has clearly noted that the inquiry to be made when a trial judge relies upon impermissible aggravating factors is, would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factors not been present? Elledge v. State, 346 So.2d 998 (Fla. 1977). In the case sub judice, the trial judge found that death was the appropriate sentence, and there is no basis in the record to disturb that conclusion.

B. NO PROCEDURAL ERRORS OCCURRED DURING THE SENTENCING PHASE.

Appellant first argues that the prosecution elicited evidence before the jury that Appellant had prior convictions for nonviolent felonies. However, it was not the prosecution, but the defense, that brought these facts to the attention of the jury. It is true that the State attempted to introduce

into evidence recorded adjudications for nonviolent felonies. However, all the prosecution did was ask the witness if he could identify various State exhibits (T 929). At no time, were these exhibits identified before the jury for what they were (adjudications). It was Appellant, in objecting to the admissibility of the exhibits, who told the jury what the exhibits were (T 930). Thus, any prejudice in this regard, caused by the jury having heard that Appellant had prior convictions for nonviolent felonies, was created at the hands of Appellant himself. He therefore is estopped from claiming that this matter represents grounds for a reversal. See generally, Clark v. State, 363 So.2d 331 (Fla. 1978).

At any rate, Appellee submits that the trial court was in error, and that such evidence can indeed be presented to the jury as evidence which would negate the existence of a mitigating factor--no significant history of prior criminal activity. Messer, supra, as well as Section 921.141(1), Fla. Stat. (1973), provides for the presentation of any evidence as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of that statute. The State has the burden of proof at the sentencing phase and, therefore, must have the right to negate the existence of any mitigating factors, at least those which are listed in the statute.

If not, the jury is liable to infer that such mitigating factors are indeed present, insofar as they were instructed on these factors and the State ignored them. Thus, the trial court's ruling, disallowing the State from presenting this evidence, was in error, and if these matters came before the jury, no legal prejudice could have resulted. Appellant's reliance upon Mikenas v. State, 367 So.2d 606 (Fla. 1978), for the proposition that the use of evidence of nonviolent offenses is improper, is misguided. That case states that such evidence cannot constitute the existence of an aggravating factor. It does not state that the prosecution may not use such evidence to negate the existence of a mitigating factor, which was the prosecution's position in the trial court sub judice (T 930-931).

Furthermore, the State properly questioned Appellant, once he took the stand, as to how many times he had previously been convicted (T 934). This Court has already stated that once a defendant becomes a witness, he may be examined the same as other witnesses on matters which illuminate the quality of his testimony. Johnson v. State, 380 So.2d 1024 (Fla. 1979). When a defendant voluntarily takes the stand, he is under an obligation to speak truthfully and accurately. The credibility of a witness and the weight to be given his testimony is a matter to be determined by the trier of fact. The inquiry as to prior convictions gives the trier of fact further insight into a defendant's credibility. It does not

place an unreasonable burden on a defendant's right to testify and does not violate a defendant's right to due process. Johnson, supra. A narrow interpretation of the rules of evidence, at the sentencing phase, is not to be applied, except as to illegally-seized evidence. Alvord v. State, 322 So.2d 533 (Fla. 1975).

Furthermore, insofar as Appellant attempted to demonstrate to the jury the applicability of the "mental" mitigating circumstances, the prosecution was within its rights in attempting to demonstrate that Appellant's testimony in this regard did not show the existence of the "mental" mitigating circumstances. If the prosecution attempted to rebut Appellant's testimony in this regard by showing that Appellant was in full control of his faculties, this was the prosecution's prerogative. The issue was not one of the use of heroin, but the applicability of the "mental" mitigating circumstances which Appellant claimed existed pursuant to his use of heroin.

Finally, while the prosecutor did argue to the jury that both the "felony murder" aggravating factor and the "pecuniary gain" aggravating factor were present, it is to be noted that the ultimate sentencing authority is the trial judge. The presence of facts which support both aggravating factors does not necessarily mean that both were considered separately, thus improperly doubling up the aggravating factors. As to the prosecutor's argument that the "heinous, atrocious,

or cruel" aggravating factor was present, this factor was clearly supported by the evidence presented.

C. CONSIDERATION OF THE MITIGATING CIRCUMSTANCES WERE NOT LIMITED TO THOSE ENUMERATED IN THE STATUTE.

The trial judge's instructions to the jury in this regard tracked the statute. The consideration of mitigating circumstances was not improperly limited by the charge to the jury. The jury must be guided somewhat, and the list is not exhaustive. This point has been ruled upon by this Court in Peek v. State, F.S.C. No. 54,226, opinion filed October 30, 1980. Peek, supra, is dispositive of this point.

D. NO ERROR OCCURRED IN THE TRIAL JUDGE'S IMMEDIATELY IMPOSING SENTENCE FOLLOWING THE JURY RECOMMENDATION.

It is to be noted that the trial judge did indeed impose the capital sentence directly following the jury's recommendation. However, there certainly cannot be any presumption that, in so doing, the trial judge failed to apply the facts of the case to the statutory aggravating and mitigating circumstances. In fact, the trial judge's written findings reflect that he did so specifically apply the facts of the case to the aggravating and mitigating circumstances (R 19-21). As stated by this Court in King v. State, 1980 F.L.W. 239 (S.C.O.), Case No. 52,185, opinion filed May 8, 1980,

> "We do not find that the trial judge in this instance made a summary decision. A judge is not barred from considering and deliberating the aggravating and mitigating circumstances while the jury also deliberates."

In this instance, it so happens that the trial judge's conclusions as to the appropriate sentence matched the jury's conclusions as to the appropriate sentence. There was no reason for the trial judge to further deliberate. The written findings in support of the sentence of death followed within two weeks.

E. FLORIDA'S CAPITAL SENTENCING STATUTE IS NOT UNCONSTITUTIONAL.

As recognized by Appellant, this Court has specifically or impliedly rejected each and every one of Appellant's challenges raised herein. As such, further discussion regarding these issues is unnecessary. Menendez v. State, 368 So.2d 1278 (Fla. 1979); Proffitt, supra; Spinkellink v. Wainwright, 578 F.2d 572 (5th Cir. 1978); Fleming v. State, 374 So.2d 954 (Fla. 1979); Jackson v. State, 366 So.2d 753 (Fla. 1978).

POINT VIII

APPELLANT'S DOUBLE JEOPARDY RIGHTS WERE NOT VIOLATED BY HIS CONVICTIONS FOR FIRST DEGREE MURDER AND ATTEMPTED ROBBERY.

Appellant would have a good argument in this regard were the first degree murder conviction based solely on felony murder, as Appellant contends. Unfortunately for Appellant, the first degree murder conviction is supportable under either the felony murder theory or the premeditation theory. Both of these theories were amply discussed in Point VI, supra. Inasmuch as the first degree murder conviction is supportable under the premeditation theory, then Appellant's judgment and sentence for attempted robbery does not violate his double jeopardy rights. State v. Pinder, 375 So.2d 836 (Fla. 1979).

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Appellee would respectfully request that this Honorable Court affirm the judgment and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent by courier/mail to Craig S. Barnard, Chief Assistant Public Defender, Jerry L. Schwarz, Assistant Public Defender, and to Jon May, Assistant Public Defender, 13th Floor Harvey Building, 224 Datura Street, West Palm Beach, Florida 33401, this 14th day of January, 1981.

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Of Counsel