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IN THE SUPREME COURT OF FLORIDA

TOMMY S. GROOVER,)

Appellant,)

vs.) CASE NO.: 63,375

STATE OF FLORIDA,)

Appellee.)

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

ANSWER BRIEF OF APPELLEE

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THIS CASE INVOLVES
A CAPITAL SENTENCE

TOPICAL INDEX

TABLE OF CASES

Other Authority:

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT OF FLORIDA

TOMMY S. GROOVER,	)	
Appellant,	)	
vs.	)	CASE NO.: 63, 375
STATE OF FLORIDA,	)	
Appellee.	)	

ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

The State of Florida accepts the Preliminary Statement set forth in the initial brief and will use the designations set forth therein.

The State wishes to inform this Court that this case was the topic a recent magazine article. "Our Troubled Criminal Justice System: Plea bargaining - The Tough Choices Prosecutors Must Make" Life, Vol. 6 No. 10 October 1983, pp. 32-43.

STATEMENT OF THE CASE AND FACTS

The State of Florida accepts the Statement of the Case and Facts of the initial brief as a substantially accurate recitation of the events of this cause.

Certain important clarifications and additions will be set forth by the State. However other factual representations, additions, and/or clarifications are contained in the argument section to which the specific facts best relate. This is not an attempt to circumvent the established rules of procedure, but is offered for brevity and clarity given the voluminous record and multiple issues presented. See, Rule 9.210(c), F.R.App.P.

The following are the State's specific exceptions:

1. Appellant's sworn statement of May 17, 1982, was given after the parties had terminated plea negotiations and an agreement had been made. (R 120, 122) (See, particularly, Statement of Appellant's attorney T88) This is equally true of the July 9, 1982, deposition testimony. Id. Both statements were given after plea negotiations were completed and the bargain struck. (Id.; R 129-137)

2. Appellant's May 18, 1982, plea of guilty to one count of first degree murder pursuant to the plea agreement was withdrawn at Appellant's request. Appellant indicated to his attorney and to the prosecutor that "he would not continue with his cooperation with the State pursuant to the agreement . . . ." (T 87-88) Appellant's counsel was permitted to withdraw due to "antagonism" and "apparent conflict between personalities or the way the case is going . . . ." (T 87-88) Appellant confirmed the conflict. (T 90, 89)

3. There were three separate types of injury to the body of

RICHARD PADGETT: blunt trauma ("bangs and bruises to the upper left back, mid back and lips); sharp trauma (two stab wounds to the left chest and superficial slashes to the upper chest and neck) and gunshot wounds (a single .22 caliber shot in the back of the head) (T665-668) Cause of death was a combination of the gunshot and the stab wounds; each was potentially fatal. (T669) The medical exmainer's best reasonable conclusion was that PADGETT was shot first and then stabbed. Id.

4. The seven non-fatal stab wounds to the body of NANCY SHEPPARD were all to the front of the neck; (T674) Cause of death was gunshot wounds to the head and the chest. She had been shot five times with a .22 caliber firearm. (T673-675, 677) The medical examiner estimated PADGETT had been dead four to ten hours longer than SHEPPARD. (T678-679) The bodies had not been placed into the water filled ditch at the same time. Id.

5. The autopsy of JODY DALTON revealed four .22 caliber gunshot wounds - all to the left side of the head--as well as contusions and bruises to the face, cheek, forehead, chin, mouth, right shoulder, arm, elbow, front of the elbow, left arm and forearm, front part of the chest and abdomen, thighs, lower thighs, knees, and right leg. (T691-692) The bruises were not inflicted in any sort of pattern which indicated a blunt object(s) such as fists or feet was used. (T692) The bruises occurred prior to death and could not have resulted after Miss Dalton's body was placed in the water. (T696, 698-699)

6. Appellant testified that his statement of May 17, 1982, was given under duress and intimidation by threats of the prosecutor.

(T1305-06) Appellant stated the prosecutor was not going to let him out of his office until he "got through" with the statement. Id.

POINT I

APPELLANT HAS FAILED TO ESTABLISH AN ABUSE OF JUDICIAL DISCRETION IN THE ADMISSION OF SIMILAR FACT EVIDENCE WHERE THE EVIDENCE WAS NOT A FEATURE OF APPELLANT'S TRIAL BUT WAS COMPETENT AND RELEVANT TO PROVE INTENT, MOTIVE, IDENTITY, AND GENERAL PATTERN OF CRIMINALTIY.

ARGUMENT

Appellant was indicted for the first degree murder of three individuals. (R 2-4, 33-35) Each murder occurred independently of the others; however, each is related in that the latter two (DALTON and SHEPPARD) were an attempt to cover up the first (PADGETT) and were a part of an ongoing criminal scheme. Id. Appellant did not deny his presence at, or involvement in the circumstances leading up to, the three murders. (T 1237, 1270; 1280-1292, 1295-1301, 1306) Yet he denied direct involvement in each killing.

At trial, Appellant testified that he refused to shoot Richard Padgett and Robert Tinker Parker[1] committed the murder in his presence. (T 1273-1274) As to the second murder, Appellant stated that he was talking with Elaine Parker when Tinker Parker killed Jody Dalton:

> After that Tinker came walking back around the car with a gun in his hand, told me, he said, 'Get the keys from Elaine and open the trunk.'

(T 1291). At Tinker Parker's direction, Appellant helped to tie cement blocks to Dalton's naked body and the two (Appellant and T. Parker) submerged it in Donut Lake. (T 1292-1295).

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[1] Parker was tried separately on three counts of first degree murder. He was convicted and sentenced to death in the murder of Nancy Sheppard. His appeal is pending before this Court. Parker v. State, No. 63,700.

Appellant drove the third murder victim, Nancy Sheppard and his friends, Billy Long, Tinker and Elaine Parker, back to the scene of Padgett's murder. (T 1298-1299) Appellant testified that he stayed in the car with Elaine when Nancy Sheppard got out with Tinker and Billy. (T 1299) Appellant did not see what happened, but heard shots. Tinker and Billy got back into the car and "we left". (T 1301, 1300) Appellant drove to Donut Lake, the scene of Dalton's murder, where Tinker retrieved his wallet. (T 1301-2)

Appellant stated his actions were attributable to concern that Tinker Parker might kill him. (T 1297-1298).

Appellant claims that collateral crime testimony was improperly admitted at his trial. He argues that the evidence was not relevant to the crimes for which he was charged, but was admitted solely to establish bad character and/or propensity to commit crime. As such the evidence became a feature, rather than an incident, of the trial thereby violating Section 90.403, Florida Statues,[2] Williams v. State, 110 So.2d 654 (Fla.) cert. denied 361 U.S. (1959) (Williams I) and Williams v. State, 117 So.2d 473 (Fla. 1960) (Williams II).

Appellant challenges three separate admissions of similar fact evidence. First, he claims impropriety in the admission of testimony concerning an 1980 aggravated battery in which Robert Parker shot Billy Long. (See, Appellant's brief, p. 12, 13-14) (R 87) Testimony concerning this incident was adduced during the prosecutor's

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[2] Section 90.403, Florida Statutes, serves to exclude relevant evidence when its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or needless presentation of cumulative evidence". This precise objection was not made as to any of the three specific similar crime allegations presented herein. See this argument, infra.

direct examination of Billy Long who was attempting to explain why he shot Nancy Sheppard when Parker insisted that he do so -- or be killed himself. (T 820-821) Appellant did not object to this evidence at trial.

Prior to trial, the record reflects an objection was noted to the State's four (4) Notices of Intent to Rely upon evidence of collateral crimes under the "Williams Rule." (T 459) However the record does not contain a written pre-trial opposition or motion to exclude. The hearing transcript evidences little as to the grounds of the oral objection:

> Judge, I think especially the actions that took place both days after the murders are irrelevant to the charge, the murders that his charged with. And to allow the jury to consider actions that took place afterwards is strickly going to prejudice the jury.

(T 466, see generally, 459-467). Relevancy appears to be the only objection noted.

Second, Appellant challenges testimony indicating that on February 6, 1982 he threatened to kill Joanie Bennett if she "opened her mouth" about the Dalton murder. Appellant objected to this testimony only on the ground of relevancy. (T 1043) Exclusion on the basis of prejudice pursuant to Section 90.403, Florida Statutes, was not argued.

Third, Appellant opposes admission of testimony concerning the post-murder aggravated assaults upon Hal Johns, Lewis Bradley, and Denise Long.[3] (T 845-846, 1164-1167, 1178, 1449-1450, 1455). There

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[3] Denise Long is the former wife of Billy Long. At the time of the murders she was living with Hal Johns who is Appellant's step-brother. (T1162, 1165) Denise and Johns were living at the home of Lewis Bradley (T1174).

was no objection made when Billy Long testified to the assault on Hal Johns and Denise Long:

> Q: Who had the gun when they (Appellant and Tinker Parker) came out?
>
> A: Tinker had it.
>
> Q: Okay.
>
> A: And he said, 'I had to take the gun away from Tommy because he was going to kill Hal and Denise both.'

(T 845) Likewise an objection was not entered when Denise Long or John Bradley testified to the same incident. (T 1164-1167; 1449-1450).

Appellant did object during Long's testimony to reference by Appellant and Tinker Parker that drug money was owed to them by Denise Long. (T 834-5) A lengthy discussion was held out of the presence of the jury in which the State argued the testimony was necessary in order to establish: (1) the time of death for Nancy Sheppard; and (2) a continuing criminal enterprise, motive, intent, state of mind, pattern of criminality and totality of circumstances Id. Frederiksen v. State, 312 So.2d 217 (Fla. 3d DCA 1975).

Florida law provides that an argument made for the first time on appeal cannot be considered unless it amounts to fundamental error. De La Cova v. State, 355 So.2d 1227, 1230 (Fla. 3d DCA 1978). An argument raised on appeal but not presented to the trial court has not properly preserved for appellate review. Pinder v. State, 396 So.2d 272 (Fla. 3d DCA 1981); Clark v. State, 363 So.2d 331 (Fla. 1978); State v. Cumbie, 380 So.2d 1031 (Fla. 1980). See also Williams v. State, 414 So.2d 509 (Fla. 1982). Under this line of cases, little of the evidence challenged in brief has been properly preserved for appellate review.

It is a well-settled legal proposition that testimony of a collateral offense relevant to show bad character or propensity is inadmissible. Williams v. State; Owens v. State, 361 So.2d 224, 225 (Fla. 1st DCA 1978). However, as this Court stated in Ashley v. State, 265 So.2d 685, 694 (Fla. 1972) and re-emphasized in Ruffin v. State, 397 So.2d 277 (Fla. 1981) rehearing denied:

> All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy.

Id. at 280. (T 466) Common examples of elements which similar fact evidence is relevant to prove include motive, intent, absence of mistake, common scheme or plan, identity, or a system or general pattern of criminality. Williams I; Ruffin v. State; Ziegler v. State, 404 So.2d 861, 862-3 (Fla. 1st DCA 1981).

Appellant conceeds that some of the similar fact evidence is relevant to motive, but maintains such evidence is so prejudicial that it and the narcotics involvement of Appellant and his accomplices became a feature of this trial. (See, initial brief, pp. 12-13,17) The State does not agree and submits the instant collateral crime evidence was not given undue emphasis. Here as in the recent case of Washington v. State, 432 So.2d 44, 47 (Fla. 1983), the probative value of the admitted evidence was not outweighed by prejudice to the accused.

In Washington, the defendant and two friends were attempting to find buyers for stolen guns. A deputy sheriff was present at one such sales pitch and followed Washington's accomplice as he returned to the vehicle. Identifying himself, the deputy asked for a driver's license. The vehicle's driver was unable to comply and was asked to

get out of the car. As he did so, Washington exited the backseat from the passenger side, walked around the rear of the vehicle, drew a .32 caliber chrome-plated pistol and ordered the deputy to freeze. As the deputy reached for his gun and a security officer reached for Washington, Washington fired four bullets into the deputy. Defendant Washington and his companions fled on foot leaving behind the car and the guns. Washington was apprehended a week later in North Carolina driving an automobile stolen in Daytona Beach, Florida. He was subsequently convicted of first degree murder and sentenced to death. Id. at 46.

On appeal, Washington asserted claims identical to those advanced herein by Appellant. He maintained that evidence showing the guns were stolen was improper as was evidence indicating that after the murder he stole a car in Daytona Beach and that after his arrest he had escaped custody temporarily. Id. at 47. Upon review of the evidence in Washington's case, this Court deemed all challenged evidence relevant to the issues at trial:

> Evidence that the guns were stolen was relevant in showing appellant's motivation in shooting the deputy. . . . Evidence of the stolen automobile was relevant to show identity and flight. Flight from the vicinity of the crime is a fact from which guilt can be inferred. . . . Evidence of the escape was relevant to show a guilty conscience. . . . None of this collateral crime evidence was given undue emphasis. Since its probative value was not outweighed by any improper prejudicial effect, the Court did not err in admitting it.

Id. at 47 (citations omitted) (emphasis added).

In Appellant's case, the evidence of Parker's prior assault with a firearm upon Billy Long was relevant to prove state of mind, motive, intent, a common scheme or plan, and a general pattern of criminality.

As stated, the argument advance in brief concerning collateral crimes by a third party was never raised below. Moreover in accordance with Hirsch v. State, 279 So.2d 866 (Fla. 1973) such evidence is not covered by the "Williams Rule."

Long testified to his participation in the Sheppard murder which he allegedly committed due to threats made to him by Tinker Parker.[4] To Long, the threats had special meaning due to the 1980 incident. (T 812-833, 881-885, 900-903) Long testified that Appellant was in the car as he fired the shots into the back of the young woman's head, but nevertheless Appellant cheered him on by yelling: "Shoot her again, shoot her again. She's still breathin." (T 817, 898-899, 900-903) Appellant also urged Long to use a knife to cut Sheppard's throat after she'd been shot five times. (T 906-907).

Long testified to matters within his personal first-hand experience. In Hirsch v. State, the evidence deemed inadmissable in the defendant's perjury trial related to telephone communications by a party representing herself to be an unrelated third party. Also unlike the present case, the crime to which the evidence was directed in Hirsch was uncharged. Not so here, both Parker and Appellant were charged in the murders of Sheppard, Dalton, and Padgett; Long was charged in the Sheppard murder. Hence the facts of the murder as well as the reason for Long's participation were highly relevant. c.f. Whitted v. State, 362 So.2d 668 (Fla. 1978) (Sole purpose of testimony was to create impression in jury's mind that teacher's

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[4] Appellant emphasized Long's part in the Sheppard murder. (T 848-854) and Long's fear of Parker. (T 881-885, 900-903). Parker's threats to Long should be carefully reviewed and compared to the threats allegedly made by Parker to Appellant.

sexual activity with victim was the reason the defendant had also engaged in this conduct while at the teacher's home hours later).

Evidence of Appellant's threats to Joan Bennett following the Dalton murder were relevant to show identity,[5] guilty conscience, pattern of criminal activity, motivation and intent. Likewise, the post-murder threats to Johns, Bradley and Denise Long were admissible for identical reasons.

Appellant was charged with each murder and faced a capital sentence for each. He admitted his physical presence, but at trial maintained non-participation.[6] This position blatantly contradicted earlier statements to law enforcement authorities which were introduced at trial against Appellant. The State submits the evidence admitted was highly probative and relevant to the elements of the offenses which the prosecution was required to prove at trial. As such, the evidence was properly admitted and Appellant has failed to establish to the contrary.

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[5] Appellant claimed Parker committed the murder. (T1290-1295).

[6] Apparently it was Appellant's steadfast refusal to testify truthfully concerning the Dalton murder for which he was not initially charged which resulted in the withdrawal of the guilty plea.

POINT II

APPELLANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL BY IMPROPER PROSECUTIONAL COMMENT MADE DURING ARGUMENT TO THE JURY.

ARGUMENT

Appellant maintains that he was denied his constitutional right to a fair trial by the "repeated inflammatory emotional and thoroughly improper arguments made by the prosecutor." (See, initial brief, point II, p. 18). He asserts seven grounds:

1) Vituperative characterizations (T 1510, 1516, 1514, 1518, 1520, 1521, 1532, 1655);

2) Expressions of personal opinion concerning the credibility of witnesses. (T 1520, 1522, 1523, 1527, 1528, 1547, 1549);

3) Appeals by the prosecutor to the sympathy of the jury. (T 1511, 1513, 1550, 1635-1636, 1643-1644, 1646, 1654, 1659, 1660);

4) Mistatement of the law concerning coercion or duress as a defense. (T 1538- 1541);

5) Grossly improper remarks concerning the role of defense counsel. (T 1658, 1551-1552);

6) Prosecutor's encouragement to recommend death for its symbolic value only. (T 1509, 1660-1661); and

7) Prosecutor's emotional appeal to enlist jurors in the war against crime.

(See initial brief, generally, point II, pp. 17-23).

A review of the record reflects Appellant failed to enter an objection to any of the aforementioned allegedly prejudicial comments.[7]

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[7] Florida law requires that an objection be made with specificity. Further requirements include a motion for mistrial and/or request for a curative instruction. See caselaw cited infra.

Appellant acknowledges this omission in brief, but maintains the arguments are so "thoroughly prejudicial that the fundamental fairness of the proceedings were destroyed." Id. at 23.

The failure of the defendant to object to the allegedly improper comments is fatal. Maggard v. State, 399 So.2d 973, 976 (Fla.) cert. denied, 454 U.S. 1059 (1981); Thomas v. State, 326 So.2d 413 (Fla. 1976); Ray v. State, 403 So.2d 956, 960 (Fla. 1981); Castor v. State, 365 So.2d 701, 703 (Fla. 1978); Clark v. State, 363 So.2d 331, 333-34 (Fla. 1978); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Peterson v. State, 376 So.2d 1230, 1235 (Fla. 4th DCA 1979); Herzog v. State, infra; See also, Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978). The foregoing rule must prevail unless the remarks are "so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influences." Grant v. State, 194 So.2d 612, 613, n. 1 (Fla. 1967); Herzog v.State, No, 61,513 (Fla. September 22, 1983) [8 FLW 383, 384]. Accord, Wilson v. State, No. 61,365 (Fla. July 21, 1983) [8 FLW 265]; Mason v. State, No. 60,703 (Fla. September 8, 1983) [8 FLW 331, 332].

An example of prejudice requiring reversal can be found in the recent case of Teffeteller v. State, No. 60,337 (Fla. August 25, 1983) [8 FLW 306]. The State emphasizes however that in Teffeteller v. State, the defense objected, moved for mistrial and requested a cautionary instruction thereby preserving the point for appellate review. Id. at 307. Considering the tone of this Court's opinion in Teffeteller, the "inexcusable prosecutorial overkill" may have constituted fundamental error, however, the point was not addressed

as review was properly preserved. Id. at 307.

The State submits the comments challenged herein were not sufficiently prejudicial to constitute fundamental error whereby established procedural requirements must be waived. The allegedly "vituperative characterizations" analogized Appellant to a "shark", a "predator", a "savage", a "sinner", a "devil", a "rat", "worse than an animal". The three murders were compared to a "frenzy of killing" and to "blood much like the frenzy of sharks attacking a wounded and bleeding animal". The killers, including Appellant, were referred to as "vicious"; "a pack of wolves". (See initial brief, pp. 19-20). Appellant's counsel acknowledged such characterizations were "argumentative phrase(s)--that's all it is." (T1685) We also note the trial court's comment that this was the first conviction of this sort in Duval County since re-enactment of the death penalty. (R281).

Considerable latitude is allowed a prosecutor in closing argument and logical inferences based on the record are permissible. Thomas v. State, 326 So.2d 413 (Fla. 1976); Paramore v. State, 229 So.2d 855 (Fla. 1969); Gosney v. State, 382 So.2d 413 (Fla. 5th DCA 1976). Moreover, closing argument must be viewed in its entirety under Florida law. Wingate v. State, 232 So.2d 44, 45 (Fla. 3d DCA 1974).

In Darden v. State, 329 So.2d 287 (Fla. 1976), the prosecutor referred to the defendant as an animal. Refusing to reverse, this Court declared that each case of allegedly improper comment must be reviewed individually and on its own merit. When the Darden comments were viewed in their totality, ample evidence supporting the comments was found to exist.

In Breedlove v. State, 413 So.2d 1 (Fla. 1982), this Court

rejected arguments similar to those presented herein. Id. at 7-8. The prosecutor referred to other criminal acts (rape), called the defendant an animal and appealed to community prejudice with references to violence in Dade County, Florida. Unlike this cause, Breedlove objected and moved for a mistrial. The trial judge refused the request due to the context of the remarks. Upon review, this Court concluded that "some of the remarks may have been improper, but we do not find them so prejudicial that a new trial is required." Id. at 8.

In his closing argument in this case, the prosecutor referred to Appellant's statement to law enforcement authorities as well as to the trial testimony. In pointing out the contradictions between Appellant's statements and those of his accomplices, some of whom testified as state witnesses, the prosecutor recounted the testimony, and at times, expressed his belief.[8] The prosecutor, in his fashion, was questioning whether the witness or the defendant was to be believed. (T 1523) We submit the remarks were comments upon the contradictory testimony and when viewed in their entirety were harmless. Compare, Arline v. State, 303 So.2d 37 (Fla. 1st DCA 1974) (The prosecutor stated: And I would ask you to find in your heart as I have found in mine in the past months as I have prepared for this case. . . that the defendant committed this heinous crime). The State emphasizes that objections were not entered to of these remarks.

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[8] A review of the record does not reveal expression of personal belief for each transcription cite specified by the defense. (See initial brief, p. 20; compare T 1520, 1522, 1523, 1526, 1530, 1543).

The comments upon the ages of the young victims: Nancy Sheppard, who had just turned seventeen, and Jody Dalton, who was twenty-one years old, were nothing more than comments upon the evidence adduced at trial. Such latitude is afforded in closing argument. Wingate v. State; Paramore. Again there was no objection or notice of dissatisfaction voiced by Appellant. State v. Cumbie, Castor v. State; Clark v. State.

Appellant argues that the prosecutor clearly misstated the law in regard to coercion being a defense to murder. (See initial brief, p. 21). Again we note that an objection was not entered. However the prosecutor's comment was not an attempt to instruct the jury as to the law of the case. (T 1538-1541) The prosecutor clearly indicated to the jury that the judge would instruct the law (T 1537, 1538) The reference was to the theory of principle participant versus an aider and abettor. Appellant cites Wright v. State, 402 So.2d 493, 498 (Fla. 3d DCA 1981) which specifically supports the prosecutor's comment: duress is not a defense to intentional homicide. In Wright, the Third District does not address the applicability of this principle to felony murder -- nor should this Court as it was not raised below. We note however that the State did not proceed on a felony murder theory as to all three homicides. (T 1209-1229)

The comment concerning defense counsel made during the closing of the penalty phase is as follows:

> [By Mr. Austin]
>
> . . . And I thank you on behalf of Mr. Greene and plus for your attention here today because I have been talking a long time and I am not apoligizing for that because I have a duty to do

> that and I don't apologize for it. But I know I sat here and I am watching, you have been alert and attentive and you have listened to me and I appreciate that. And I want you to listen to Mr. Shore [Defense counsel]. Mr. Shore is doing the best he can with a bad situation, and listen to him and give attention to his argument.

(T 1658) (emphasis added). We submit this comment is not prejudicial and did not cast dispersion upon the defense or to defense trial tactics. See Harich v. State, No. 62,366 (Fla. August 25, 1983) [8 FLW 309,311]; Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1972). The State also submits that as in Cochran, there is ample evidence of Appellant's guilt.

Appellant is unsuccessful in his attempts to convince this Court that the "recommendations of death for symbolic value" rise to fundamental error requiring reversal. The cases cited by Appellant are clearly distinguishable. In Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968), the jury was told that narcotics activity would continue if the defendant was acquitted.

> This is your community. If you believe that Deputy Booth is lying on that witness stand, if you think he's mistaken then you come in with a verdict of an acquittal and let him go back out in your community and handle more morphine.

Id. at 750; Accord, similar comments in Porter v. State, 347 So.2d 449 (Fla. 3d DCA 1977); McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982).

In Russell v. State, 233 So.2d 154, (Fla. 4th DCA 1970), the jury was admonished that "another innocent party could possibly get killed" if the defendant was not convicted. The prosecutor also stated:

> . . .We are going to have a breakdown in society and we are going to have people getting stabbed all over Orange County.

Id. at 55. Similar remarks, unmistakably implying that the defendant would commit another murder if acquitted, were deemed prejudicial in Sims v. State, 371 So.2d 211, 212 (Fla. 3d DCA 1979). There are no such comment here.

In Hance v. Wainwright, 696 F.2d 940 (11th Cir. 1983), the egregious nature of the prosecutor's remarks was obvious. The prosecutor stated, inter alia:

> . . .[he] had the advantage of sincerely and objectively knowing the evidence, believing that we would be at this stage of the trial at some point this week. . . I've been with the District Attorney's Office for a little over eight years now and it's my recollection that we've had no more than a dozen times, no more than twelve times in those eight years, to request the [death penalty] out of the thousands of cases. . . that pass through our office. . . . I'm going to sleep well tonight, having [recommended Hance's electrocution] to you. As a matter of fact, I'm going to sleep better and safer in my house with my family if you come back with a sentence of death. . . .

Id. at 951-2. The Eleventh Circuit opinion continues at great length to quote from the closing argument before stating that such "gut emotion has no place in the courtroom. . . . " Id. at 952.

In Simmons v. Wainwright, 271 So.2d 464 (Fla. 1st DCA 1973), the prosecutor dwelt at length upon the irrelevant and immaterial collateral crimes of the defendant and his witnesses and instructed:

> And this is where it stops, right in this courtroom - tell Charlie Simmons [the defendant] and the rest of that roguey bunch down there - gang would be a better word - to stay out of this country, go out of here, and convict him today on all four charges.

Id. at 465-6

As stated, the factual circumstances and allegedly reversible comments in this cause differ greatly from those in the cases set

forth by Appellant.[9] Here the comments, when viewed in their entirety, are not so prejudicial to the rights of Appellant that neither rebuke nor retraction could eradicate the evil influence. Pait v. State, 112 So.2d 380 (Fla. 1959) Rebuke or retraction was not sought by Appellant or deemed warranted sua sponte by the trial court. The State submits this is a good indication that the remarks were not improper as now alleged by appellate counsel.

In Pait, this Court set forth a "safe" rule that ". . .unless this Court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the judgment should be reversed." Id. at 385. A review of the record fails to reveal error which goes to the foundation of Appellant's case or deprived him of a fair trial. Clark v. State; Gordon v. State, 104 So.2d 524 (Fla. 1958); Thomas v. State. This Court has consistently presumed that jurors will not be lead astray to wrongful verdict by impassioned eloquence. Id. citing to Paramore v. State, 229 So.2d 855 (Fla. 1969).

In conclusion the State submits that if error occurred, it was harmless and reversal is not required. Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981).

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9 In Chavez, McMillian, Russell and Sims, objections to the prosecutor's comments were entered.

POINT III

THE PROSECUTOR DID NOT MAKE IMPROPER ASSERTION OF FACTS TO WHICH HE HAD PERSONAL KNOWLEDGE WHILE CROSS-EXAMINING APPELLANT.

ARGUMENT

As stated, Appellant was tried on three separate counts of first degree murder. (R 2-4) A grand jury indictment was returned on February 25, 1982, as to the Sheppard and Padgett homicides. Id.[10] Each count carried a capital sentence of death pursuant to Section 921.141, Florida Statutes. Appellant, by negotiation through legal counsel, entered a plea agreement with the State. (R 129-130) Pursuant to this agreement the State was to drop the first degree murder count of Nancy P. Sheppard, the aggravated assault charges against Hal Johns, John Bradley and Denise Long, and was not to proceed with first degree murder charges against Appellant in the Jody Dalton homicide. (R 129) In exchange, Appellant was to enter a plea of guilty to one count of first degree murder in the death of Richard Padgett for which the prosecution was to recommend a sentence of life imprisonment with a minimum mandatory incarceration period of twenty-five years. (R 23)[11] Appellant was to cooperate fully with the State and to testify as a prosecution witness at any and all proceedings against Tinker and Elaine Parker concerning the deaths of Padgett, Sheppard and Dalton. (R 23, 129-30).

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[10] Appellant was not indicted on the Dalton murder until after the breakdown of the plea agreement. On August 26, 1982, six days after the plea was withdrawn, an amended indictment was returned. (R 33-34)

[11] The trial judge indicated that he would follow the State's recommendation on sentence. (R 131)

Following agreement, Appellant gave a lengthy sworn statement setting forth the events of February 6 and 7, 1982. (R 128-185) Prior to Appellant's statement on the record, the terms of the plea agreement were set forth and Appellant was questioned concerning his understanding and agreement. (R 129-130) The following excerpt is of importance:

> Finally, it is understood between us that if Mr. Groover declines to testify for the State, or testifies falsely, that is, lies, that the State will be able to reinstitute any charges that it has dropped, and to seek the death penalty on Mr. Groover for the murders of Richard Padgett and Nancy Shepard and Jody Dalton if it believes that those are warranted, or that he is guilty of any crimes involved in the death of Jody Dalton.

(R 130) On May 18, 1982, Appellant and his counsel executed a written plea of guilty and negotiated sentence form. (R 23-24)

Due to this agreement, Appellant was transported in June, 1982 to detention facilities in Clay County, Florida so that he not be confined in the same facility as the Parkers. (R 27) On July 9, 1982, Appellant's deposition was taken by his accomplices. (R 118)[12]

In August 1982, Appellant refused to comply with the plea agreement. (T87-90) Attorney Richard Nichols, who had been appointed by the court moved to withdraw and on August 17, 1982, the court appointed new legal representation. (R 28)

On August 20, 1983, Appellant moved to withdraw the previously entered plea of guilty. (R 29) Following argument, the motion was granted. (T 93-101) Pursuant to the terms of the agreement, Appellant's sworn statement was used against him at trial.

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[12] Appellant's deposition is included in the appellate record Volume III, p. 439 and Volume IV, p. 558. (See, R 118).

The foregoing is the firsthand information which Appellant contends was improperly imparted to the jury by the prosecutor. Appellant argued that his sworn statement was the product of threats made by the prosecutor, (T 1305-1306) When questioned on direct by his own attorney, Appellant testified:

Q Now, Mr. Groover, you heard earlier in the trial Mr. Greene [the prosecutor] and a witness read a statement into the record that you gave; did you give that statement to Mr. Greene?
A Yes, sir, I did.
Q Where did you give him a statement?
A In his office.
Q Okay. In Mr. Greene's office, in the State Attorney's Office upstairs?
A Right, Sixth Floor.
Q Why did you give Mr. Greene that statement?
A Why did I give Mr. Greene that statement?
Q Yes, sir.
A Cause he told me if I did not give him a statement I was going to get the electric chair. That was the only thing to keep me away from the electric chair.
Q That was the only thing to keep you away from the electric chair?
A Yes.
Q Giving him a statement?
A Right.
Q In the statement you indicated that under threat from Tinker Parker you shot Richard Padgett; why did you tell Mr. Greene that?
A Cause of the pressure I was under so I could get out of his office.
Q What exactly do you mean?
A I tried to get out of his office, he wasn't going to let me out of his office. He kept me there until I got through with the statement.
Q Did you shoot Richard Padgett?
A No, I did not.
Q Did you shoot Nancy Sheppard?
A No, I did not.
Q Did you shoot Jody Dalton?
A No, sir.
Q Did you kill any of those people?
A No, sir.

(T 1305 1306)

Appellant argues that Prosecutor Greene "effectively assumed the role of a witness. . ." and ". . .clearly inparted to the jury his contention that no threats were made to appellant." (See, initial brief, p. 26) The State submits this point is without merit and is best evidenced by the record itself. Mr. Greene's total cross-examination on this point is as follows:

> BY MR. GREENE: QPlease the Court. Mr. Groover, how was I keeping you in my office?
> A How was you keeping me in your office? You told me I couldn't go nowhere until the statement was through.
> Q How was I keeping you there, though; have you tied down, handcuffs?
> A and go nowhere.
> Q How was I doing that?
> A How?
> Q Yeah?
> A I just told you.
> Q Well, tell me how was I doing that; was I physically restraining you?
> A Just told me I couldn't go nowhere.
> Q I did?
> A Right.
> Q Did I say how I was going to keep you there?
> A You told me you was going to keep me there because I asked you to take me back over to the jailhouse.
> Q Did you?
> A Right.
> Q Was anybody else there?
> A There was people there sometimes and sometimes there wasn't.
> Q Well, were they there when I asked that to you?
> A I don't recall.
> Q You don't recall. Were you ever alone with me that day?
> A Yes, I was alone with you that day.
> Q How long?
> A I don't know. About five or ten minutes.
> Q Five or ten minutes?
> A Right.
> Q How -- by yourself with me?
> A All by myself.
> Q How many murders were you charged with then?
> A Three.

Q Three first degree murders?[13]
A Right.
Q And you're telling me that I brought -- what did I do; bring you over from the jail?
A Right. No, you didn't, you had your -- some guy working for you did.
Q And that I brought you over and had you brought over from the jail and I put you in my office and I closed the door and we were all alone; is that right?
A Right.
Q You and me?
A (Witness nods head.) Well, you had the guy you worked with working for you was in there for a little while, then he had to step out and make a phone call about his truck.
Q That's what I'm asking you, Mr. Groover. You're testifying that you were all alone with me; is that right?
A At one time yes.
Q Well, that's the question; is that right, yes or no?
A Yes.
Q Okay. You were saying you were under a lot of pressure then?
A Yes.
Q Cause you were being threatened with the death penalty?
A Right.
Q Because of that pressure you just told me anything that I wanted to hear?
A That's right.
Q Let me ask you something, Mr. Groover, are you under a lot of pressure now?
A It's a lot better, I ain't got to worry about trying to get back over to the jail, how or anything right now.
Q Oh, I see. Aren't you under the threat of the death penalty right now more than you have ever been in your life?
A Yes, I am.
Q Isn't that true?
A Yes.
Q You are really under the gun right now; aren't you, sir?
A Yes.
Q A lot more than you were in my office on May 17th.
A No, I wasn't.
Q Oh, I see. So you are telling me --

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[13] This is in error; Appellant was charged with two murders until the amended indictment of August 26, 1982 (R 33-34)

A Not the way you said it.
Q So you are telling me on May 17th you were under a lot more pressure and more threat of the death penalty than you are right now?
A Up under the same pressure.
Q What?
A I am up under the same pressure, but in your office was a lot different.
Q Why?
A Cause you wouldn't let me go nowhere.
Q You can't go anywhere now; can you?
A No, I can't.
Q Okay. In other words, you are lying through your teeth right now; aren't you?
A No, I ain't.
Q Lying to save your life; aren't you?
A No.
Q You really are in a life and death situation right now; aren't you?
A Right.
Q You weren't in my office; were you?
A Yes.
Q You were?
A From the way you said it.
Q What did you think I was going to do; pull the switch right then and electrocute you?
A No.
Q Well, what did you think?
A Well, from what you were telling me, you was going to make sure I had it.

(T 1307-1311) There were no objections entered to this line of questioning. Id.

Appellant offers nothing more than the foregoing portion of the record in support of his claim that Mr. Green assumed the role of a witness. When this "comment" is compared to the caselaw offered as controlling authority, it is readily apparent that reversible error did not occur in this cause.

In Waldrop v. State, 424 So.2d 1345 (Ala.Crim.Ap. 1982), the prosecutor was the state's main witness against the defendant. The facts of that Alabama case are strikingly different from the instant facts. There the district attorney, who testified to the confession and written statement, resumed his role as trial counsel and argued

in summation his own credibility to the jury. Respectfully, nothing in the instant record rises to this level of conduct. The State submits a comparison cannot be drawn between the facts of Waldrop v. State, and the previously quoted portion of the instant record.[14]

The second prong of Appellant's argument is equally without merit. Appellant submits that the prejudice was exacerbated when the prosecutor vouched for his investigator's credibility. As the foregoing excerpt indicates Appellant testified that he and Mr. Greene were left alone in the prosecutor's office for a short period at the time Appellant's statement was given. (T 1307, 1308, 1309) Following Appellant's testimony, the defense rested its case. In rebuttal, the prosecution called Investigator Dennie Haltiwanger who contradicted Appellant's version of events. (T 1394-1412) Haltiwanger testified that he was with Appellant constantly for the entire period of the sworn statement except when Appellant and his attorney conferred. (T 1399, 1410) Haltiwanger further testified that Appellant was not alone with Mr. Greene, no threats were made to Appellant, coercion exerted or mistreatment observed. Appellant did not act afraid or upset during the time in which the statement was given. (T 1395-1410) Moreover, Appellant's attorney was present. (T 1409)

Assistant State Attorney Ralph Greene did not question the state's rebuttal witness. (T 1394-1411) Nevertheless Appellant maintains Greene vouched for the investigator's credibility by the following argument to the jury:

> Dennie Haltiwanger said he had a good attitude, came over. Mr. Shore makes a big deal

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[14] This is equally true of the other foreign authority cited by Appellant.

> about him being there two hours and 50 minutes; 20 minutes is waiting for his lawyer to get there and he was with his lawyer half an hour. The whole statement took an hour and they took him back to jail. And Mr. Haltiwanger says that I did not talk to him one time other than in the sworn statement, and that Haltiwanger was there the whole time except when Groover was talking to his lawyer. And I submit to you that's the truth.

(T 1543)(emphasis added) It is this final statement which Appellant now challenges. However an objection was not entered. Clark v. State; State v. Cumbie; Maggard v. State; Herzog v. State. Therefore the trial judge was not alerted nor afforded the opportunity to correct or clarify the perceived prejudice with measures less drastic than the reversal request herein. The State submits the instant issue has not been preserved for appellate review.

Appellant argues that reversal must occur because the prosecutor's comment goes to credibility and not to a collateral matter. If Shargaa v. State, 102 So.2d 809, 814 (Fla. 1958) and O'Callaghan v. State, 429 So.2d 691, 697-8 (Fla. 1983) are compared as asked by Appellant, it is apparent that reversal is unnecessary. The facts of Shargaa, O'Callaghan and this cause differ remarkably.

In Shargaa v. State, the County Solicitor appeared as the State's first witness and identified the accused as the same person he had prosecuted for the second felony described in the information. Upon excusal as a witness, the attorney assumed a position at counsel table and actively prosecuted the remainder of the case. Without approving the practice, this Court did not find "any substantial harm as the testimony was directed toward a collateral issue." Id. at 813.

In O'Callaghan v. State, 429 So.2d 691 (Fla. 1983), the defendant was testifying as to his presence at the crime scene in an effort to

assist the police in finding the gun used in the crime. In explaining the absence of a metal detector, the prosecutor objected to the defendant's comment. The defendant continued in his answer whereupon the prosecutor responded: "That's a lie. I would like to go to the bench." Id. at 696. A defense objection was noted as well as a motion for mistrial. The trial judge gave a curative instruction. On review, this Court found the comment "unquestionably improper" and "beyond the limits of propriety." Id. However, reversal was not required due to the collateral nature of the comment and the overwhelming evidence of guilt. Id.

Here the prosecutor did not appear as a witness. The State presented the testimony of the investigator to counter that of Appellant. Mr. Greene's comment in closing refers to the conflict of testimony. The use of "I submit" may be explained as Appellant suggests, an endorsement of the investigator Haltiwanger due to personal knowledge, or as an argumentative style of comparison between the testimony of the two witnesses.

When viewed in its entirety, Appellant's testimony concerning fear and coercion (duress and domination) is hardly convincing. Appellant's credibility was undermined more by the content of his own testimony, than by any evidence or argument presented by the State. This is even more apparent when Appellant's explanation and Haltiwanger's rebuttal testimony are compared. This is particularly so since at trial Appellant maintained that he did not commit murder, not that he did so because of Parker's domination.

The closing argument must be viewed in its entirety. The prosecutor frequently "submitted" evidence for the jury's consider-

ation. Therefore useage of the term "I submit" in the instant context was merely a continuation of the prosecutor's style of argument. It is not worthy of the emphasis Appellant now attaches. This is best evidenced by the lack of objection at the time.

In Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982), the Fourth District stated it was improper for counsel to express personal opinions or to state facts of personal knowledge which are not in evidence. However the Fourth District noted that not every erroneous statement or expression of opinion requires a mistrial. In assessing the prejudicial impact of such assertions, the court must consider the strength of the evidence against the defendant. Id. at 439; Accord, O'Callaghan v. State, at 696. When this standard is applied to the instant cause, assuming arguendo that the prosecutor's comment was improper, the comment was harmless and reversal is not required. Appellant was not deprived of his constitutional right to a fair trial.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS STATEMENTS FREELY AND VOLUNTARILY MADE AFTER THE PLEA OF GUILTY WAS MADE.

ARGUMENT

A. FACTUAL PREDICATE.

Initially the State directs this Courts' attention to the facts of the plea agreement previously asserted under Point III, pp. 21-26. Appellant's plea of guilty was withdrawn on August 20, 1982. (R29-30) On October 26, 1982, the instant motion to suppress statements was filed. (R 113-115, T 130-198) At argument on November 19, 1982, testimony was introduced from Richard Nichols, Esquire, Appellants' counsel at the time of the plea,[15] (T136-167) Denny Haltiwanger, the State Attorney's investigator, (T167-174); Appellant (T174-188) and the prosecutor who participated in the negotiations, Ralph N. Greene, III, Esquire. (T188-197) The motion was taken under advisement and denied by lengthy written order dated November 24, 1982. (T197-198; R118-127) This Order adequately sets forth the chronology of events of this cause. Id.

B. APPELLANT'S STATEMENTS WERE NOT OBTAINED BY DIRECT OR IMPLIED PROMISES OF LENIENCY.

Appellant argues that his sworn statement of May 17, 1982, (R128-185) and his deposition testimony of July 9, 19832, (R439-684) were the result of promises made by the State in the plea bargain and, thus, were involuntary as a matter of law.

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[15] Attorney - client confidentiality was waived on a limited basis by Appellant. (T 140-151)

Appellant's plea of guilty was entered on May 18, 1982, pursuant to a lengthy written plea negotiation form. (R437-439) (T68-69) Appellant claims he entered the plea because of the State's promise to spare him the electric chair if he gave a confession. Under such circumstances, his argument continues, the confessions are involuntary. The State does not agree with the argument and authority advanced in brief.

In rejecting this contention, the trial court relied heavily on the repeated statements and explanations provided Appellant prior to his giving the sworn statement and to Appellant's responses and manner at that time. (R119-127; 128-137).

The trial court found: the agreement was reached prior to the giving of the sworn statement (R120) and Appellant voluntarily waived his constitutional rights and with the advise of counsel, engaged in a solemn contract with the State knowing full well what he was doing. (R121). See, United States v. Owens, 492 F.2d 1100 (5th Cir. 1974); e.f. McMann v. Richardson, 397 U.S. 765 (1970).

In Hutto v. Ross, 2129 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976), the Supreme Court of the United States disavowed a per se rule whereby any statment made as a result of a plea bargain is inadmissible. Id. at 30, 203. 677 (D.C. Cir. 1979), In furtherance of this legal principle, the United States Court of Appeals for the District of Columbia stated in United States v. Davis, 617 F.2d:

> We cannot conclude that pleas and statements resulting from plea bargaining are always involuntary. Rather, the proper task is a case-by-case consideration of whether the defendant voluntarily entered into the plea agreement and whether he testified voluntarily, as revealed by an examination of the surrounding circumstances.

Id. at 686-687. The federal court stated that "numerous circum-

stances" must be considered in determining voluntariness: the defendant's voluntary appearance at the prosecutor's office; the freely negotiated plea agreement while represented by counsel; the appearance and testimony before the grand jury without compulsion. In U.S. v. Davis, the Court found the government's promises of leniencey and dismissal were bargained for terms of the agreement, not overbearing or improper inducements. The testimony was a quid pro quo for the government's promises. The federal appellate court found the promises extended in Davis were permissible and did not render the defendant's statements involuntary. Id. at 687.

In this cause, the trial judge reached an identical conclusion under strikingly similar circumstances. (R 122, 124, 124-127). Here, Appellant turned himself in to authorities, freely negotiated a plea agreement while represented by counsel, gave a lengthy sworn statement and subsequent deposition without compulsion.

The reviewing court should defer to the fact-finding authority of the trial court and should not substitute its own judgment. DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983); State v. Melendez, 392 So.2d 587 (Fla. 4th DCA 1981). The trial court's ruling comes to this Court with the same presumption of correctness which attaches to jury verdicts and final judgments. Stone v. State, 378 So.2d 765 (Fla. 1979) cert. denied 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980).

Contrary to Appellant's assertion, the mere fact that he might not have testified except for the plea agreement is not sufficient to suppress the statements as involuntary. United States v. Stirling, 571 F.2d 708, 732, 731 (2nd Cir. 1977); See also, United States v. Herman, 544 F.2d 791 (5th Cir. 1977); (R 124-126)

In Hutto v. Ross. the Supreme Court addressed confessions or statements given as a result of a plea bargain were stated that "causation . . . has never been the test for voluntariness" and set forth a standard:

> The test is whether the confession was '"extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence,"'

Id. at 30 quoting Bram v. United States, 168 U.S. 532, 542-43 18 S.Ct. 183, 42 L.Ed. 568 (1897). Under the Davis-Stirling analysis, threat or promise did not interfer with the voluntariness of Appellant's statement. This is apparent by the repeated explanation that the statements could be used against Appellant should he elect to go to trial.

At the suppression hearing, Appellant's first attorney testified to the voluntariness of the plea as well as to the voluntariness of the statements. (136-167) Counsel stated Appellant was never threatened by him or by anyone in his presence -- particularly Prosecutor Greene or the SAO investigator. (T154) Moreover, the only reference made to the death penalty was made in response to Appellant's query concerning his chances should he be found guilty of one count of first degree murder. Id. The conversation was "cool and in a calm atmosphere"; Appellant appeared to comprehend what was said and his responses and questions were intelligent. (T155)

The State submits that upon evaluation and consideration of the total circumstances, there is insufficient evidence of threats or coercion to render Appellant's statements involuntary.

C. THE STATEMENTS WERE NOT MADE IN CONNECTION WITH THE GUILTY PLEA.

Not every discussion between a defendant and law enforcement agents is inadmissible. Only those made during discussions in which the defendant seeks to obtain concessions from the prosecution in return for the plea. Once accord is reached as to the terms of the bargain, statements wholly independent of plea negotiations are admissible. United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978) (en banc).

In Stevens v. State, 419 So.2d 1058 (Fla. 1982) cert. denied 103 S.Ct. 1236 (1983), this Court announced a test to determine whether a statement is made in connection with plea negotiations:

> . . . a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

Id. at 1062 citing United States v. Robertson. The trial court utilized this standard in concluding the plea negotiations were completed at the time the statements were given and under the circumstances, Appellant could not have maintained a reasonable expectation that the statements would not be used against him. (R118-127)

The statements were given after the parties completed negotiation and agreed to the plea agreement. (R120, 122) The terms of the agreement were set forth in a formal written agreement, negotiations were complete and the bargain struck prior to the giving of either statement. Thus the statements made after the plea agreement was completed are not inadmissible into evidence. United States v. Davis

at 686. Clearly these statements were not relative to plea negotiations or to an offer to plea:

It is this "in-connection-with-plea-negotiations" aspect to which Section 90.410, Florida Statutes applies. The State submits that the facts of this case do not justify exclusion of the statements under this statutory provision or under any of the authority cited by Appellant.

POINT V

THE TRIAL JUDGE DID NOT ERR IN OVERRIDING THE JURY RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSING A SENTENCE OF DEATH FOR THE FIRST DEGREE MURDER OF RICHARD PADGETT

ARGUMENT

Appellant's sentencing hearing was held on February 18, 1983. (T 1723-1755) During the penalty phase of the bifurcated trial the jury recommended that Appellant be sentenced to life imprisonment for the murder of Richard Padgett. (T 1715-1716) After consideration of the testimony and argument presented at the hearing and following review of the pre-sentence investigation report, the trial court found four (4) aggravating circumstances:

1. Appellant has been previously convicted of another capital felony. Section 921.141 (5)(6), Florida Statutes. (R 289)

2. The murder of Richard Padgett was committed while engaged in the commission of another felony, to wit kidnapping. Section 921.141 (5)(d), Florida Statutes (R 291-292)

3. The murder of Richard Padgett was especially heinous, atrocious, or cruel. Section 921.141 (5)(h), Florida Statutes. (R 293-295)

> 4. The murder of Richard Padgett was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. Sections 921.141 (5)(i), Florida Statutes.

(R 295-297)

The trial court considered the non-statutory mitigating circumstances presented by counsel as well as those promulgated under Section 921.141(6), Florida Statutes. After careful review, the court found there were no mitigating circumstances. (R 282-288; T 1753) Accordingly and in full compliance with Section 921.141, the trial judge sentenced Appellant to death for murder of Richard Padgett (T 1753, R 297-299)

A. Jury Recommendation

The importance of the jury recommendation cannot be overstressed. Its significance was explained in Tedder v. State, 322 So.2d 908 (Fla. 1975) wherein this Court stated:

> A jury recommendation under the trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Id. at 910. Appellee submits that the jury's advisory sentencing verdict carries great weight, but is not controlling. Gardner v. State, 313 So.2d 675 (Fla. 1975); Sawyer v. State, 313 So.2d 680 (Fla. 1975); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Barkley v. State, 343 So.2d 1266 (Fla. 1977); Hoy v. State, 353 So.2d 826 (Fla. 1977); cert. denied 439, U.S. 920 (1978); Ross v. State, 386 So.2d 1191, (Fla. 1980);

McCrae v. State, 395 So.2d 1145 (Fla. 1981). The trial judge may decline to follow a jury recommendation where the facts indicate a sentence of death is appropriate. Stevens v. State at 1065.

Appellant alludes to a constitutional argument, but fails to set forth the specifics for review by this Court or for response by the State. He claims instead repeated rejections of the constitutionality of a judicial override. If Appellant's argument is directed toward double jeopardy concepts, this Court has repeatedly held that a sentence of death imposed by a trial court after a jury recommendation of life imprisonment does not constitute double jeopardy. Douglas v. State, 373 So.2d 895 (Fla. 1979); Phippen v. State, 389 So.2d 991 (Fla. 1980); Engle v. State, No. 57,708 (Fla. September 15, 1983) [8 FLW, 357, 360].

This Court has always afforded great weight to a jury recommendation, but upon thorough review and careful consideration of the individual facts of a case, has approved death as an appropriate penalty even where jurors have recommended life imprisonment. Routly v. State, No. 60,066 (Fla. September 22, 1983) [8 FLW 388, 389-391]; Stevens v. State, at 1065; Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979) cert. denied 447 U.S. 912 (1980). Such action has been affirmed. Dobbert v. Strickland No. 82-5121 (11th Cir. October 19, 1983)(as yet unreported) The State submits that the facts of this cause are so compelling that a judicial override was indeed proper.

B. Propriety of Death Sentence Under these facts

The circumstances of this cause are so clear and convincing that

virtually no reasonably person could differ with the sentence imposed by this Court. Tedder v. State at 910. The action of the trial court in overriding the jury's advisory sentence of life imprisonment is therefore proper.[16] The State respectfully requests this Court to affirm the sentence of the trial court.

Appellant briefly challenges three of the aforementioned four aggravating factors. (See, initial brief, p. 38, n. 11) The main thrust of his argument is the trial court failed to find mitigation factors from the evidence presented which could have accounted for the jury recommendation of life. Appellant contends evidence was presented whereby the statutory mitigating factors of age[17] and extreme duress[18] could have been found. Likewise Appellant submits evidence was introduced showing that he was a loving, helpful, non-violent person.

Evidence directed at all of the foregoing was carefully considered by the trial court. (R 282) Based on the evidence presented, the sentencing judge concluded that the facts were insufficient to establish that Appellant acted under extreme duress or substantial domination of another person. Section 921.141 (6)(g), Florida Statute. The trial judge refused to find Appellant acted under the domination and control of Parker. Accord, Stevens at State at 1064-5. We submit there is sufficient evidence in the record for this Court to affirm that ruling. (R 285-6)

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16 The trial judge specifically considered the Tedder standard. (R 298)

17 Section 921.141(6)(g), Florida Statutes.

18 Section 921.141(6)(e), Florida Statutes.

As to age, the sentencing court found Appellant's maturity and experience to be far beyond his chronological age of twenty-four (24) years. (R 287-288) The court relied upon factors such as: Appellant had been self-supporting and on his own for six (6) years; had been married, fathered a child and divorced; had prior involvement with the law; and had lived in several states while working at an assortment of occupations. Id.

The court considered all the other evidence presented in mitigation and found no factors in mitigation. Only the statutory mitigation factors were disavowed in the written sentencing order. (R 282, 282-288) However the judge specifically noted the absence of mitigating factors as to the Padgett (and Dalton) murder(s). (R 297)

Thus this case is unlike the case law cited by Appellant. In Washington v. State, 432 So.2d 44 (Fla. 1983), a jury override was reversed where the trial judge found two statutory mitigating factors (age and lack of a significant criminal record) and three aggravating factors (avoid lawful arrest, hinder governmental function and cold, calculated manner). This Court reasoned that the jury recommendation could have been based on the two statutory mitigation factors as well as the non-statutory factor of character as attested to by the defendant's family. Of utmost importance to the reversal are the facts of the case[19] and the prosecution's request that the court follow the advisory sentence of life imprisonment. The instant case involves a triple murder which arose from a drug debt of approximately one hundred dollars. Appellant was the first person to be convicted in Duval County, Florida of three first degree murders since re-enact-

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[19] See discussion of Washington, supra.

ment of capital punishment. (R 281)

In McCampbell v. State, 421 So.2d 1072, 1074 (Fla. 1982), this Court overturned a sentence of death imposed over a jury recommendation of life imprisonment. The primary reason appears to be the sentencing judge's consideration of non-statutory enumerated aggravating factors as well as three statutory aggravating circumstances. Id. at 1074-1075. No factors were found in mitigation, yet this Court expressed concern with consideration of material extraneous to the record. It appears that the trial court was also influenced by the jury's six (6) minute deliberation prior to returning the advisory sentence. Given the facts and circumstances present in McCampbell, this Court concluded that Tedder standard had not been satisfied. The State submits that review of the instant record will not support a similar conclusion.

In Welty v. State, 402 So.2d 1159 (Fla. 1981), this Court again reversed imposition of a capital sentence over a jury's recommendation of life due to the erroneous doubling of aggravating circumstances and the circumstances which this Court believed could cause reasonable persons to differ. Id. at 1164.

The State submits the instant record supports the judicial override and imposition of the death penalty. The jury's recommendation of life imprisonment was not based on valid mitigating factors discernible from the record. Stevens v. State at 1065; Hoy v. State; Douglas v. State.

POINT VI

THE JURY WAS PROPERLY INSTRUCTED ON THE AGGRAVATING AND MITIGATING FACTORS.

ARGUMENT

Appellant contends that the capital sentences imposed are improper as the jury was improperly instructed on the aggravating and mitigating factors which could be considered. The State will address individually each portion of the tripartite argument.

A. SIMULTANEOUS CONVICTION FOR A CAPITAL FELONY. SECTION 921.141 (5)(6).

In arriving at this factor, the trial judge made the following finding of fact:

> The defendant has been convicted of the first degree murder of Padgett, Sheppard and Dalton. Although all convictions were obtained at the same time on January 8, 1983, they are separate and not fused convictions. Therefore, each murder conviction is an aggravating circumstance as to the other murder conviction. (Elledge v. State, 346 So.2d 998 and King v. State, 390 So.2d 315)

(R 289-290) Appellant argues that the three capital convictions returned simultaneously by the jury panel cannot be considered in aggravation under Subsection (5)(b) as they are not true "prior convictions." Appellant acknowledges caselaw whereby this Court has held proper the consideration of a conviction occuring contemporaneously with the capital conviction. Elledge v. State, 346 So.2d 998 (Fla. 1977); Lucas v. State, 376 So.2d 1149 (Fla. 1979); King v. State, 390 So.2d 315 (Fla. 1980). Appellant submits that re-examination of those cases is in order.

Respectfully, this Court revisited this precise issue in Elledge v. State, 408 So.2d 1021 (Fla. 1981) (Elledge II)[20]

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[20] Resentencing was required in Elledge, due in part to admission of evidence concerning the armed robbery and murder of Edward Gaffney, for which Elledge had not yet been convicted. By the time of resentencing, Elledge had been convicted of that offense.

> Appellant first complains that the limited testimony as to the Gaffney murder was not allowable under the literal dictates of our previous opinion in this case. Elledge I at 1003. But the entire thrust of our prior decision was the distinction between felony convictions, which were allowable to prove the corresponding aggravating factor, and a charge for such a crime which was not allowable. Our concern was that the requirements of Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), be met. Provence requires that a conviction is essential for consideration of prior crimes under the aggravating factor in section 921.141(5)(b), Florida Statutes (1977).[1] Yet it is clear from the record that prior to the resentencig (sic) trial, Elledge had indeed been convicted for the Gaffney murder. In Elledge I we made clear that evidence of convictions for certain felonies is admissible, including testimony of witnesses, 'because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case.' Id. at 1001. We are at a loss to understand how appellant could claim that evidence of the Gaffney murder is forever barred despite an ensuing conviction in light of the reasoning in Elledge I.

Id. at 1022. (footnote omitted)

Elledge II emphasizes this Court's desire to exclude the possibility of considering mere arrests or accusations as factors in aggravation pursuant to Provence v. State, 337 So.2d 783, 786 (Fla. 1976). See, Elledge v. State, 408 So.2d at 1022. Accord, Odom v. State, 403 So.2d 936, 942 (Fla. 1981). "Prior" in relation to convictions in aggravation has the same meaning as in determining the existence (or absence) of the mitigating circumstance of no prior criminal activity pursuant to Section 921.141(6)(a), Florida Statutes. "Prior" means prior to the sentencing of the defendant, not prior to the commission of the murder for which the accused is being sentenced. Ruffin v. State, 397 So.2d 277, 283 (Fla.) cert. denied 454 U.S. 882 (1981);

Teffeteller v. State at 308. Accord King v. State, 390 So.2d 315, 320-321 (Fla. 1980) Delap v. State No. 56,235 (Fla. September 15, 1983) [8 FLW 369, 374-5]; ABA Sentencing Alternatives and Procedures (1979).

B. THE JURY WAS INSTRUCTED AS TO ALL STATUTORILY ENUMERATED FACTORS EXCEPT THOSE AGREED UPON AS INAPPLICABLE.

Appellant's argument under this point is confusing. Initially he argues error in failing to instruct as to all nine statutorily enumerated factors. Then Appellant contends error occurred when the court judge instructed on six of the possible nine factors. Appellant argues the jury was mislead into believing all were potentially applicable as aggravating circumstances.

A review of the record indicates that the jury was instructed to consider the factors listed in aggravation under Section 921.141(5)(b), (d), (e), (f), (h) and (i), Florida Statutes. The prosecutor and Appellant's trial counsel agreed that Subsection 5(c) and (g) did not apply. (T 1694, 1697). The record does not reflect discussion of Subsection 5(a). It appears to have been discussed and discarded as inapplicable prior to recordation of the in-chambers charge conference. (T 1689) The record begins a with discussion of Subsection 5(b). (T 1689)

In conclusion, the Submits this argument can be given little credence for the sentencing judge prefaced his instruction the jury as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. . .

(T 1706) (emphasizes added; but see entire instruction T 1706-1712)

It is presumed that the jurors were competent to follow these straightforward instructions.

C. THE JURY WAS PROPERLY INSTRUCTED AS TO THE FACTORS OF "HEINOUS, ATROCIOUS AND CRUEL" AND "COLD, CALCULATED AND PREMEDITATED MANNER."

Appellant argues error in instruction on Section 921.141(5)(h) and (i) in that a definition of "heinous, atrocious and cruel" and "cold, calculated and premeditated manner without any pretense of moral or legal justification" was not provided. The State acknowledges the existence of caselaw which precisely defines each legal term and distinguishes one from the other. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Cooper v. State, 336 So.2d 1133 (Fla. 1976); Jent v. State, 408 So.2d 1024 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981). However the record does not indicate that Appellant opposed the instruction or objected to the instruction being given in its present manner. (T 1697, 1714) Furthermore there was no suggestion or request that the terms be explained to the jurors. The State submits that this point has not been preserved for appellate review.

POINT VII

THE TRIAL COURT CONSIDERED ALL EVIDENCE IN MITIGATION WHICH WAS PRESENTED BY APPELLANT, BOTH STATUTORY AND NON-STATUTORY FACTORS.

ARGUMENT

Appellant argues that the sentencing judge violated Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S.

104, 113-114 (1982) by limiting consideration to only those mitigating factors enumerated by statute. The record does not support this position.

The penalty phase of Appellant's trial was short. The State did not present additional testimony, but relied upon evidence submitted during the guilt phase. (T 1623) The defense presented only the brief testimony of Appellant's mother, Lois P. Herrington. (T 1623-1627) Thus the "numerous non-statutory mitigating circumstances" ignored by the trial judge, (Appellant's non-violent nature and his rescue of his sister and her children from a burning trailer) were contained in four pages of testimony provided by Appellant's mother. Id. Evidence of drug or alcohol dependency or "mental mitigation" was not introduced save in connection with Section 921.141(6)(e), Florida Statutes.

The testimony of Appellant's mother hardly constitutes "ample evidence" or "justification" for finding any of the factors suggested in mitigation. Those factors presented were considered fully in the trial court's deliberations. (T282) Neither Lockett nor Eddings requires that the non-statutory factors be found. The mandate of the United States Supreme Court is that factors in mitigation not be unduly restricted to those provided by state statute. The record indicates that these constitutional requirements were followed.

POINT VIII

THE SENTENCES OF DEATH WERE PROPERLY IMPOSED AND DO NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.

ARGUMENT

Appellant's argument again focuses on the trial court's failure to accept duress or domination of Robert Parker as justification for his actions. Reversible error is alleged in the court's failure to find this factor in mitigation when subsequently the same trial judge expressed facts in the subsequent trial of Robert Parker indicating Parker made threats to Appellant. In Parker's case,[21] the court stated in its sentencing order.

> The evidence showed that this defendant [ROBERT PARKER] was the ringleader of a drug operation and that the homicidal events started when defendant made threats of death to enforce payment of drug debts.
>
> * * *
>
> The acts of all the co-defendants are so intertwined in the murders that it is necessary to refer to them in this sentence of Robert Parker.
>
> * * *
>
> The facts and circumstances of these three murders are so senseless and vicious as to be almost unbelievable - yet they did happen and three young people are dead.
>
> The evidence at trial was that Parker was a drug dealer and Groover sold drugs for him. Groover owed Parker money for drugs he had sold to Richard Padgett and others. The day before the homicidal events began [2/5/82], Parker placed a rope over a tree limb and told Groover he would hang him if he did not pay the drug debt.
>
> The day of the homicides Parker again threatened to kill Groover if he did not get the money.

(PR491, 478; PT 479) The State submits that these factual findings,

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[21] Robert Parker v. State, No, 63,700, is pending before this Court. The undersigned is currently counsel of record for the State in both Parker and Groover.

as well as the exerpted portions of the testimony of Michael Green and Joan Bennett,[22] do not reveal circumstances sufficient to establish a mandatory finding of duress or domination in mitigation. Indeed, the State submits a careful review of the evidence mandates a contrary finding -- which is the conclusion reached by the sentencing judge.

The trial judge is required to take notice and consider the factor in the overall weighing process prior to imposition of sentence. The trial court is not compelled to make such a finding in mitigation. The record reflects that the sentencing judge duly considered all evidence as required. (R)

The threat allegedly made to Appellant by Robert Parker was to pay the money owed ($100) not to commit murder or be killed (c.f. threats made to Billy Long at the murder site). The State submits Appellant's argument is without merit. The record is depositive.

Yet it was Appellant who defied Parker when Jody Dalton was found in Tinker's stash. (T 1027, 1064-5) Appellant stood up to Parker to protect the girl. Why not to protect himself? Later, it was Appellant's idea to kill Dalton, not Tinker Parker's. Appellant wanted her dead because she observed him discard the Padgett murder

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22 On cross-exam Bennett clearly stated that while she was surprised by Appellant's actions, (She had previously considered Appellant to be a wimp. (PT 1594) She was afraid of both Parker and Appellant. (PT 1595) Bennett testified that Appellant shot Jody Dalton and she did not hear anyone tell him to do so. (PT 1595-6)

weapon. (T 1032, 1068, 1087) It was Appellant who took the gun away from Parker prior to Padgett's murder. (R 962-3) The record simply does not support the finding of this factor in mitigation.

CONCLUSION

Based on the foregoing arguments and authorities cited herein, Appellee, the State of Florida, respectfully requests that this Honorable Court affirm the ruling of the trial court affirming Appellant's convictions and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Glenna Joyce Reeves, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32202, this 26 day of October, 1983.

Barbara Ann Butler
Assistant State Attorney

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