IN THE FLORIDA SUPREME COURT

IRA MARTIN AMAZON,

Appellant,

v. CASE NO. 64,117

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case, but provides the following statement of facts to give the Court a fuller understanding of this case:

GUILT PHASE:

During the early morning hours of December 1, 1981, Mrs. Candice Dougherty heard a scream. At about the same time, her telephone rang. She answered the phone and a voice said, "It is my mother." Dougherty then heard a scream over the telephone. Thinking it was her friend and neighbor, Joy Chapin, on the phone, and that something had happened to Joy's mother, Dougherty ran across the street to the Chapin residence. She called out for Joy, but Joy didn't come to the door. Dougherty tried to get in the house, but the door was locked. Joy Chapin's two and a half year old daughter, Kristen, tried to let Dougherty in the house, but she was unable to unlock the door. Dougherty pounded on the door, and then heard Joy Chapin moan and say, "I can't come." (R 1259, 1260)

Dougherty ran next door to the Calder residence and told John Calder that something had happened to Joy Chapin. It was then 3:50 a.m. Dougherty and Calder ran back to the Chapin residence and eventually gained entry through an open sliding glass door at the back of the house. (R 1239-1241, 1260, 1261)

Inside, Calder saw Kristen Chapin and asked her, "Where is mama?" He then heard Joy Chapin moan and saw her lying on the

floor in the living room. Calder grabbed Kristen and handed her to his wife, who was right behind him at that time. He then ran to Joy and found her bleeding, with a pool of blood on the carpet. (R 1243, 1244)

After telling Joy "It's going to be all right," Mrs. Dougherty ran upstairs and found Joy's eleven year old daughter, Jennifer, lying on the floor, face down in a pool of blood, and the telephone dangling off the counter. Mr. Calder felt Jennifer's neck for a pulse, and thought he found one, but she did not appear to be breathing. Dougherty called 911 to get help, but she was too hysterical to get the message across. Calder grabbed the phone from her and completed the call. Mrs. Calder took Kristen Chapin out of the house, and Mrs. Dougherty returned to her home to check on the safety of her children. (R 1245, 1262, 1263)

Mr. Calder then searched the house for something to use as a compress. He found a towel and put it on Joy's back. She was still moaning. Calder then feared that the assailant might still be in the house, so he went outside and waited for law enforcement and emergency medical personnel to arrive. (R 1246-1248)

At approximately 4:05 a.m., sheriff's deputies and paramedics arrived. The paramedics attended the victims while the deputies secured the scene and began talking to neighbors who had gathered outside. (R 1236, 1248)

Medical examiner and pathologist, Donna Brown, examined the bodies at the scene and later performed autopsies at the medical examiner's office. She concluded that Joy and Jennifer Chapin died as the result of multiple stab wounds, and that Joy Chapin may also have been sexually battered prior to her death. (R 1405-1407)

Joy Chapin had suffered seven stab wounds and two relatively superficial or incised wounds. There were a lot of bruises on the insides of her lips. Long abrasions and scrape marks were across her cheek and chin. The tip of her nose was fractured. There was a scrape across her chest and a scrape under each breast. There were wounds on her wrist which exposed fatty tissue. Two "sucker type" bruises or "hickies" were found on her right breast and left shoulder. One stab wound was in her abdomen, two stabs were in her back, and two were located in the flank area. She had a very large wound about 2 inches wide under her left arm. The most severe stab would was 5 to 6 inches deep in the axillary area and traversed her lung. Joy would have died within 15 or 20 minutes after the stabbing. (R 1409-1418)

Jennifer Chapin had suffered sixteen stab wounds and two superficially incised wounds. Four stab wounds were found on her left shoulder, six in the back, four more to her thigh, and two superficial wounds on her left hand. There were four other stab wounds, the most severe of which was under the arm

pit and went five or six inches into the lung and aorta. There were also some superficial scrapes. Jennifer would have died within 15 to 20 minutes after the stabbing. (R 1412-1414)

A bloody tampon and four pieces of rope or clothesline cord were found on the floor in one of the Chapins' bedrooms. (R 1190-1191, 1219, 1312-1314) A pubic hair which was consistent with the pubic hair of appellant was found on the rope. (R 1472) John Chapin testified that prior to December 1, 1981, there was no rope of that type in the house while he lived there and while he stayed there during his separation from his wife. (R 1295-1296, 1302) Michael Fitzgerald, a former neighbor of Amazon's, testified that he had seen similar clothesline-type rope in Amazon's backyard and in his garage one or two years before the homicides. (R 1484-1490)

A knife was found behind a board that was between two fences separating the Amazons' and the Chapins' yards. (R 1194-1195) It was a kitchen knife manufactured by Chicago Cutlery. (R 1324-1328) Human blood of the same type as Joy Chapin's was discovered on the knife. (R 1526) A fiber consistent with fibers from the carpet in the Chapins' house was also on the knife. (R 1477) John Chapin testified that no such knife was in the Chapin residence prior to December 1, 1981. (R 1298) Candace Dougherty testified that in all the numerous occasions she had been in the Chapin residence and helped Joy Chapin

prepare meals, she had never noticed a knife of that type in the residence. She also testified that the knife found at the crime scene was the same size, shape, and make as a knife that had been stolen when her house was burglarized a year earlier. (R 1265-1269)

The point of entry into the Chapins' house was an upstairs bedroom window where a screen had been removed and glass had been broken out. (R 1189) Latent fingerprints matching Ira Amazon's fingers were discovered on the aluminum frame of the screen. (R 1366, 1400-1401, 1445-1457)

William Tobin, a forensic metallurgist, examined the screen and the murder weapon and determined that there was deformation on the knife blade that was consistent with deformation on the screen, and that the knife "could very well have been used to cause damage to the screen." (R 1729-1746)

Lisa Michelle Lawhorn, a neighbor of Amazon's testified that on the day prior to the murders, November 30, 1981, at about 5:00 or 6:00 p.m., she talked to Amazon about selling her motorcycle to him for $150 or $175. He wanted to buy it and said he would have the money either the next day or the day after that. (R 1428-1430) The next day, December 1, 1981, she saw Amazon at about 6:30 or 7:00 a.m. They talked about the Chapin murders, and Amazon said someone broke into his house. She noticed a scratch above his eye and asked him if

he had been wrestling or having a fight with his girlfriend. He said, "Yes." There was nothing in Amazon's appearance or demeanor at that time to cause her to believe that he was under the influence of intoxicating liquor or drugs. She testified that prior to December 1, 1981, Amazon frequently smoked marijuana and that she had been around him when he sold drugs. (R 1429-1430, 1434-1439)

Ira Amazon was one of the neighbors who gathered outside the Chapin residence shortly after the murders. (R 1335-1336) Mrs. Dougherty remembered that he was out there "the whole time...talking to people, walking around. He looked just like everyone else, wondering what in the world happened out there." He "did not look unusual, he looked like he always looked to me. Like anybody else out there." (R 1272-1273)

Deputy Jerry Davis observed appellant standing outside the Chapin residence at approximately 4:15-4:25 a.m. He observed nothing unusual about appellant's actions or demeanor. (R 1234, 1236) At about 6:30 a.m., Davis was conducting an investigation in Amazon's house when he observed Amazon carry some clothes downstairs and place them in the laundry room. There was nothing unusual about his demeanor at that time. (R 1233)

At about 4:00-4:30 a.m., Deputy John Davis observed Ira Amazon standing in the front yard of his home with his mother, Naomi, and his sister, Jodi. Jodi told Davis she was awakened

by screams coming from the Chapin house, got scared, and turned her bedroom light on. At that point, appellant interrupted and said, "When Jodi turned her light on, that woke me up." He said he went to his bedroom window, heard a loud banging noise, and observed someone run from the back of the Chapin residence, scale the six foot backyard fence, and run toward the orange groves. While relating this, appellant would not make eye contact with Davis and kept looking down at the ground. Davis noticed that appellant's legs were wet at that time (appellant was wearing shorts). (R 1157, 1337-1338) Appellant did not appear to be drunk or intoxicated in any way. (R 1341) Later, Amazon walked with Davis around his house to tell Deputy Romanosky what he had observed. Appellant had no trouble walking or talking to Davis and Romanoski. (R 1342-1345)

About ten minutes later, Deputy Davis went back to the Amazon house and spoke some more with Naomi and Jodi Amazon. At that time, appellant came running out the front door screaming that the Amazons' house had been burglarized. He had no difficulty in running. He took Davis into the house and pointed out a cut screen on the side garage door and said some items had been moved around inside the house. (R 1345-1348) The contents of Naomi Amazon's purse were later discovered approximately 150 yards from the Amazons' residence. (R 1205-1206)

Deputy Romanosky testified that his tracking dog, Thor, followed a scent from the back of the Chapin residence to the fence separating the Chapins' and Amazons' yards and also around the Amazons' house. The dog ended his tracking at the side garage door to the Amazon residence. The door was closed at that time. Later, after appellant reported that his house had been burglarized, Romanosky returned to the Amazon residence and observed that the side garage door was open and that the screen had been cut. (R 1154-1159)

A neighbor, John Fitzgerald, testified that shortly after deputies arrived at the crime scene, appellant walked over to him, spoke with him for a while, and then walked away. When asked whether there was anything about appellant's demeanor, or his behavior, or the way he spoke, or the way he smelled, or the way he carried himself, that indicated he was under the influence of anything, Fitzgerald replied, "Absolutely not." (R 1751-1756) Fitzgerald observed appellant three or four other times that morning and observed nothing unusual about him except that he had changed clothes. (R 1757-1758) Fitzgerald described appellant as a manipulative person. (R 1765)

Michael Randall, a television news reporter, arrived at the crime scene after 6:00 a.m. He talked with appellant for 2-5 minutes and walked with him from the front of his yard to the side garage door. Amazon did not have any difficulty

walking or talking. (R 1162-1166, 1170-1171) A crime scene technician, Sharon Rothwell, took elimination prints from Amazon at 8:00 a.m. She noticed nothing unusual about him. (R 1308-1309)

Appellant was taken to the sheriff's office for questioning approximately 12 hours after the murders. (R 1239, 1538-1541) After being advised of his Miranda rights, he made an unrecorded statement that he had been with his friend, Stacey Burkowitz, until about 2:00 a.m. He went to bed shortly after that. He heard a banging noise that sounded like a sliding glass door that woke him. He got out of bed, looked out his window and saw what appeared to be someone climbing over the Chapins' fence. He didn't think much about it until the police arrived. (R 1645)

After being questioned further and confronted with the fingerprint match, Amazon said, "Okay, I killed her" and cried for a short period of time. (R 1545-1547, 1652) He then said he broke through the Chapins' bedroom window to steal silver and money. It was dark inside the house. He couldn't see anyone and went through the house. Mrs. Chapin snuck up behind him and hit him on the head with a candlestick holder. He then stabbed her and saw "the girl" on the phone, grabbed the phone away from her, stabbed her, and left. (R 1545-1547, 1656) He did not mention having any sexual contact with Joy Chapin. (R 1545-1547)

Appellant at first denied raping or having sex with Mrs. Chapin, but when he was told that tests would be able to

determine that he had sex with her, he stated that after he was hit with the candlestick holder he took Mrs. Chapin into another room and had sex with her, but did not force her. Next, he asked her if there were any valuables downstairs. She said yes. He took her out of the room and went downstairs with her. He then saw Jennifer Chapin talking on the telephone upstairs in the kitchen. He ran back upstairs, grabbed a knife off the kitchen counter, grabbed the phone away from Jennifer, and started stabbing her. Mrs. Chapin followed him upstairs to the kitchen. He pushed her back down the stairs to the living room and started stabbing her. Then he heard someone screaming at the door, and he fled through the rear sliding glass doors, jumped over the fence, and ran home. Next, he staged a burglary at his house, took his mother's purse up the road, dumped the contents out, returned home, changed his clothes and hid them, went to bed, and waited for the arrival of the police. (R 1549, 1660, 1662)

According to Detective Gary Herbein, appellant said he killed the Chapins because they could recognize him. (R 1559) Detective Earling did not remember hearing appellant make that statement, but he recalled asking appellant, "Didn't she know who you were?", and he said, "I didn't think so until she turned the light on." (R 1656-1657) A recorded statement was subsequently taken from appellant. (See R 558-561) After the recorded statement had been completed and signed by

appellant, Detective Herbein asked him if he had taken any drugs [before he murdered the Chapins]. Appellant said he had consumed LSD, quaaludes, and rum. (R 1558)

At trial, Amazon testified that on November 30, 1981, he and his friend, Stacey Burkowitz had a few rum and coke drinks at his house. After Stacey left around 1:00 a.m., appellant drove his mother's car to get a street sign which had Stacey's name on it. After "ripping off" the street sign, he stopped at a lounge and had three more drinks. When the lounge closed at 2:00 a.m., he returned home. At home he stole some money, two or three rings, a necklace, 15 or 20 Dexidrine pills and some Valiums from his mother's purse. He was going to sell the pills for money to buy a motorcycle. He consumed one of the Dexidrines and one of the Valiums. Then he staged a burglary to cover up the theft. He scattered the contents of his mother's purse over the shoulder of County Road 39. (R 1786-1796)

Appellant testified that he had stolen from his mother before, "Just about everything that has been there, jewelry, money, silverware, clothing." He also admitted stealing from his father and from his father's pharmacy. He stole "Narcotics, magazines, cigarettes, just about anything I wanted." He admitted having a problem with stealing since childhood. He saw a psychiatrist about the problem when he was 7 or 8 years old. (R 1796-1797)

After staging the burglary, Amazon went to his bedroom, consumed a "hit" of LSD, turned on his strobe light, listened to "acid rock" on the radio, and looked at posters on the wall. (R 1798-18-3)

Appellant said that the next thing he remembered was falling through a window. He got up off the floor, looked up, and saw Mrs. Chapin standing in front of him. She turned around, he walked behind her. They went into another room. He took his clothes off and she had "oral copulation" on him. They then had the "normal routines of having the sexual act." After he ejaculated, he put his clothes back on and asked her "if she had any valuables." (R 1803-1804)

Mrs. Chapin put her nightgown back on and picked up a couple of candlesticks. They walked down the stairs. At the bottom of the steps he noticed a light flash on. He ran back upstairs and saw Jennifer on the telephone. Mrs. Chapin followed him up the stairs and hit him in the back and on the head. (R 1805-1806) He stabbed Jennifer and Joy Chapin, heard a loud bang, and ran out the sliding glass door. (R 1807-1808) He stated that he had no recollection at all as to why he went over to the Chapins' residence. (R 1808) He said he remembered seeing the knife on the counter, but had no recollection of bringing the knife or any cord into the house. He admitted once having a cord similar to the cord found in the house. (R 1809)

The next thing appellant said he remembered was waking up at 8:00 a.m. at his house. He came out of his bedroom and saw police officers talking to his mother and sister at the foot of their steps. He had no idea why they were there. He went downstairs and asked his mother why the police were there. She told him the house had been burglarized. (R 1809-1810) He did not remember killing the Chapins until he was provided with information about the crimes while being questioned at the sheriff's office. (R 1822, 1829-1831) He said he started having flashbacks of what he had done, and then admitted to the homicides. (R 1831)

Appellant testified that after he was taken to the Pinellas County Hospital by the Sheriff's Office he told a nurse that he had taken quaaludes, marijuana, Dilaudids, cocaine, LSD, Seconals, Tuinals, Placidyls, and narcotics since he was 15 years old. When she asked him when was the last time he had taken drugs, he told her Thursday (December 1, 1981 was a Tuesday). (R 1841-1842; see also R 1494-1495)

Appellant also testified that he was not treated at the jail for drug withdrawal. He was only taken out of his cell for blood and urine samples. (R 1843-1844) (Note: this is contrary to appellant's statement on page 9 of his brief that he required treatment for drug withdrawal his first night in jail.)

On cross examination, appellant admitted going to see a Dr. Gibson a couple of weeks before the trial at the request of his attorney. He told Dr. Gibson that he hadn't taken any drugs for about two weeks prior to the murders. (R 1865)

At approximately 7:30 p.m. on December 1, 1981, blood and urine samples were taken from Amazon. (R 1495-1496, 1791-1792) Tests subsequently conducted by two experts were negative for the presence of drugs or alcohol. (R 1095, 1725-1726) At the time of the testing, there was no reliable test for LSD. (R 1099) Such a test was subsequently developed. (R 1101) Dr. Brian Finkle conducted the test on Amazon's urine sample. It proved negative for the presence of LSD. (R 1104)

It was Dr. Finkle's professional and expert opinion that appellant did not ingest LSD or any other drug of abuse for at least two days prior to the taking of his blood and urine samples. (R 1138)

Dr. Finkle also testified that based on his experience with individuals under the influence of LSD, gaining entry into the Chapins' residence through the upstairs bedroom window would have been "quite inconsistent" with the physical abilities of a person on LSD. (R 1110-1111, see photo of window at R 546)

PENALTY PHASE AND JUROR MISCONDUCT INQUIRY:

Appellee accepts appellant's statement of the facts as to these proceedings.

ARGUMENT

ISSUE I.

WHETHER THE TRIAL COURT ERRED IN DENYING AMAZON'S MOTION TO DISMISS THE MURDER CHARGES ON THE GROUND THAT DOUBLE JEOPARDY PROTECTIONS BARRED THEIR PROSECUTION, OR ALTERNATIVELY WHETHER THE TRIAL COURT ERRED IN ALLOWING THE MURDER PROSECUTION TO PROCEED UNDER A FELONY MURDER THEORY.

At the time Ira Amazon committed the offenses of first degree murder, sexual battery and burglary, Section 775.021(4), Florida Statutes (1977), was applicable. It provided:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

In discussing this statute, this Court in Borges v. State, 415 So.2d 1265 (Fla. 1982) stated:

> A less serious offense is included in a more serious one if all of the elements required to be proven to establish the former are also required to be proven, along with more, to establish the latter. If each offense requires proof of an element that the other does not, the offenses are separate and discrete and one is not included in the other. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Thus, in Borges this Court indicated that whether an offense is a lesser included offense of a greater offense is determined by comparing the elements of the two crimes, and if a

less serious offense is not necessarily included in a more serious offense, separate sentences for each offense may be imposed.

Borges was followed by State v. Carpenter, 417 So.2d 986 (Fla. 1982), in which the defendant appealed his sentences for battery on a law enforcement officer and resisting arrest with violence. Said the Court:

> A single transaction can given rise to distinct offenses under separate statutes without violating the double jeopardy clause of the fifth amendment. Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). In determining whether separate punishment can be imposed, Blockburger requires that courts examine the offenses to ascertain whether each offense requires proof of a fact which the other does not. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. See Iannelli v. United States, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 1293 n.17, 43 L.Ed.2d 616 (1975). In Albernaz v. United States the Court recognized that the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them rests wholly with the legislative branch.
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> In applying the Blockburger test the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts as alleged in a particular information. See Whalen v. United States, 445 U.S. 684, 685 n.8, 100 S.Ct. 1432, 1439 n.8, 63 L.Ed.2d 715 (1980). (Emphasis supplied)

The holding in Carpenter, supra, was embodied in an amendment to §775.021(4), Fla. Stat. (1977), which became

law on June 23, 1983. Chapter 83-156, Laws of Florida. Section 775.021(4) now reads:

> Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudiciation of guilt, shall be sentenced separately for each criminal offense and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial. (Emphasis supplied)

Appellee submits that in amending §775.021(4), Fla. Stat. (1977), the legislature made its previous intention with respect to the statute unmistakably clear. It codified its approval of Borges and Carpenter, supra, and its disapproval of such decisions as State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), in which the Court looked not to the statutory elements of each offense in applying the Blockburger test, but instead looked at the charging document or the evidence adduced at trial to conclude that a separate sentence for an underlying felony could not be imposed along with a murder sentence.

The United States Supreme Court has made it clear that in a single trial setting the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. In Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), the United States Supreme Court held that the double jeopardy clause of the fifth amendment

to the Constitution did not preclude the imposition of cumulative sentences for conspiracy to import marijuana and conspiracy to distribute marijuana even though one transaction gave rise to both offenses. Relying on Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), the dispositive question to the Court was whether the legislature intended to authorize separate punishments for the differing offenses. Speaking for six members of the Court, Justice Rehnquist stated:

> ...the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. (450 U.S. 333 at 334)

In Missouri v. Hunter, __U.S.__, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), the Missouri Supreme Court had refused to permit cumulative sentences in a single trial because the two offenses were the same offense, notwithstanding the legislature's intent for multiple punishments. In reversing the state court the United States Supreme Court said:

> With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.
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> Our analysis and reasoning in Whalen and Albernaz lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in

> Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent....
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> * * *
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> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

When the Blockburger test is correctly applied in the instant case without regard to the accusatory pleading or the proof adduced at trial, it becomes apparent that the trial court did not err in imposing judgments and sentences for two counts of first degree murder after appellant previously entered guilty pleas to the burglary and sexual battery charges. Obviously, it is possible to prove first degree murder without also proving burglary or sexual battery, and vice versa.

Murder requires the killing of a human being which neither sexual battery nor burglary require. Sexual battery requires an oral, anal, or vaginal penetration which is unnecessary for a murder. Burglary requires the entering or remaining in a structure or conveyance with the intent to commit an offense, which murder does not require. Thus, under a Blockburger analysis, first degree murder is a separate offense from burglary or sexual battery.

Even if this Court were not to follow Borges, Carpenter, Whalen, Albernaz, and Hunter, supra, in the instant case and,

instead, were to look to the proof adduced at trial, the conclusion would still be reached that the trial court did not err.

In McCampbell v. State, 421 So.2d 1072 (Fla. 1982), this Court said:

> Appellant's argument is that given the ambiguous verdict (not knowing if the jury were finding guilt of premeditated murder or felony murder), the logical choice would be felony murder; that being so, guilt and sentencing on the robbery charge must be vacated as a double jeopardy violation. State v. Pinder, 375 So.2d 836 (Fla. 1979), receded from in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). However, we have said that if there be sufficient evidence to support a finding by the jury of premeditated murder, the principles announced in Pinder would not be applicable. Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319, and cert. denied, 454 U.S. 1164, 102 S.Ct. 1039, 71 L.Ed.2d 320 (1982). In the instant case, the testimony of witnesses Young, Schmidt, Orlicka, and Calhoun present adequate proof of premeditation. "If the evidence shows that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill." 403 So.2d at 949. There being adequate proof of premeditation, appellant may thus be convicted and sentenced for the robbery offense.

See also Heiney v. State, __So.2d__ (Fla. 1984)[9 FLW 54, 56] and Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982).

In the present case there is sufficient or adequate evidence of premeditation to support appellant's murder convictions. (See appellee's argument as to Issue VI D.)

Appellant may attempt to distinguish the instant case from McCampbell, Heiney, and Breedlove, supra, by arguing that those three cases involved single trial settings whereas this case involves more than a single trial setting. Appellee disputes this claim.

In the trial court, the State always intended and expected to have appellant's four charges tried together. An information charging the two counts of sexual battery and burglary was filed December 8, 1981, the same date the Grand Jury's indictment for the two murders was filed. (DCR 1, 2; R 8, 9) Appellant filed a written plea of not guilty to the four charges in a single document on January 6, 1982, and trial was set on all four charges for May 3, 1982. (R 27, 37) Appellant demanded discovery to all four charges in his single Demand For Discovery dated December 9, 1981. (R 11, 12) In its single Answer To Demand For Discovery dated December 21, 1981, the State provided discovery as to all four charges. (R 20-24) Until appellant unexpectedly pled guilty to the sexual battery and burglary charges on April 26, 1982, all four charges were considered together in almost all of the pleadings filed by the parties. The State never reached any plea agreement with appellant and always intended to prosecute him on all four charges in a single trial.

The instant case does not present the usual pattern historically associated with the policy objectives of the double jeopardy clause. No additional charges have been

filed after an accused has been found guilty of one offense; no attempt has been made to present a prosecution following an earlier failure of proof. No repeated attempts have been made to subject the accused to embarrassment, expense and ordeal and to compel him to live in a continuing state of anxiety and insecurity. The State merely insists on the right to compel appellant to answer once for each offense of murder he is accused of committing and that he not be permitted to totally avoid such accountability.

Even if this Court finds that this case involves more than a single trial setting, appellant's double jeopardy claim still must fail. Appellant relies on Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187 (1977). However, in Brown, the Court held that the double jeopardy clause precluded successive prosecutions for joyriding and auto theft because joyriding required no proof beyond that which was required for conviction of auto theft. Brown rested on the fact that joyriding was necessarily a lesser included offense of auto theft. In the instant case, there may be a conviction of murder in the first degree without necessarily requiring as a statutory element the offenses of burglary or sexual battery. Thus, Brown is inapposite.

Appellant may refer to footnote 6 of Brown v. Ohio, supra, and argue that the Blockburger test is not the only standard upon which he can rely. But in that footnote the Supreme

Court noted that successive prosecutions may in some circumstances be barred "where the second prosecution requires the relitigation of factual issues already resolved by the first." 53 L.Ed.2d at 195. In the instant case, appellant's prosecution for murder did not require relitigation of factual issues in appellant's guilty pleas to sexual battery or burglary.

Appellant also cites Whalen v. United States, 445 U.S. 684, 63 L.Ed.2d 715 (1980). However in Whalen the court concluded that rape was a necessary element of proof for the offense of killing a person in the course of a rape, that Congress did not intend separate sentences for both offenses, and that, consequently, the double jeopardy clause prohibited separate sentences for the offenses. Whalen involved only a single trial.

Amazon has not cited a single case that compels the conclusion that his murder trial violated the double jeopardy clause. His attempt to expand double jeopardy to apply to not only necessarily included lesser offenses, but also to other offenses which may be proved, is unsupported by decisional law and must be rejected.

It has also been recognized that where a defendant's actions are responsible for his offenses being prosecuted separately, his subsequent double jeopardy claim will be rejected. In the instant case, appellant caused his murder

offenses to be prosecuted separately from his burglary and sexual battery offenses. Thus, his double jeopardy claim is without merit.

In Jeffers v. United States, 432 U.S. 137, 53 L.Ed.2d 168 (1977), the Court stated:

> Brown v. Ohio, [citation omitted], decided today, establishes the general rule that the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense....
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> * * *
>
> The rule established in Brown, however, does have some exceptions....
>
> * * *
>
> If the defendant expressly asks for separate trials on the greater and the lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the Brown rule emerges.... [A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election.

In the instant case, appellant's four charges would have been resolved in a single proceeding if he had not elected to plead guilty to two of the charges prior to trial.

In United States v. Scott, 437 U.S. 82, 57 L.Ed.2d 65 (1978), the Court held that no interest protected by the double jeopardy clause was compromised where the defendant

had sought to have his trial terminated without any submission to either judge or jury as to his guilt or innocence. In the present case, appellant sought to avoid having his guilt or innocence as to first degree murder submitted to either judge or jury by pleading to sexual battery and burglary and then raising a double jeopardy claim. Such a use of the double jeopardy clause should not be sanctioned by this Court. As the Court in Scott stated, "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." (437 U.S. 82 at 99)

CF. Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979).

Fla. R. Crim. P. 3.151 provides:

> "(a) For purposes of these Rules, two or more offenses are related offenses if they are triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions.
>
> (b) Two or more indictments or informations charging related offenses shall be consolidated for trial on a timely motion by a defendant or by the state. The procedure thereafter shall be the same as if the prosecution were under a single indictment or information. Failure to timely move for consolidation constitutes a waiver of the right to consolidation.
>
> (c) When a defendant has been tried on a charge of one of two or more related offenses, the charge of every other related offense shall be dismissed on the defendant's motion unless a motion by such defendant for consolidation of such charges has been previously denied, or unless such defendant has waived his right to consolidation, or unless

> the prosecution has been unable, by due diligence, to obtain sufficient evidence to warrant charging such other offense or offenses.
>
> (d) A defendant may plead guilty or nolo contendere to a charge of one offense on condition that other charges or related offenses be dismissed or that no charges of other related offenses be instituted. Should the court find that such condition cannot be fulfilled, the plea shall be considered withdrawn."

Under this rule, a defendant may request consolidation of related offenses; failure to timely move for such consolidation constitutes a waiver thereof. When a defendant has been tried on a charge, the charge of every other related offense may be subsequently dismissed on the defendant's motion unless, inter alia, the defendant has waived the right to consolidate. Similarly, under subsection (d) a defendant may plead guilty or nolo contendere to one charge on condition that other charges or related offenses be dismissed or that no related offenses be instituted. Should the court find such condition cannot be fulfilled, the plea shall be considered withdrawn. In the case sub judice, appellant, well aware of pending related offenses, submitted his plea without seeking to condition it on dismissal of the other charges (murder). (DCR 13-20) Therefore, he was not in a position to complain about a subsequent trial of the related offenses. State v. Harris, 357 So.2d 758 (Fla. 4th DCA 1978).

Since it was appellant who sought to insure that prosecution of the murder charge and the sexual battery/burglary

offenses would be separate, and since appellant had yet to have his guilt or innocence of the offense of murder resolved by judge or jury, his double jeopardy claim was rightly rejected by the trial court.

Appellant's argument that the trial court erred in allowing his murder prosecution to proceed under a felony murder theory is likewise without merit. It is well settled in Florida that the State may proceed on alternative theories of premeditation and felony murder. Griffin v. State, 414 So.2d 1025 (Fla. 1982).

Appellee disputes appellant's statement on page 15 of his brief that the Second District Court of Appeal implicitly advised the trial court not to instruct the jury on felony murder. Actually, the appellate court implicitly advised appellant that to preserve his argument on appeal he should request appropriate instructions and special verdicts.

Appellant is correct that specific verdicts were not legally required in this case, but he is incorrect that the trial court abused its discretion in not requiring them (see footnote 3 on page 15 of appellant's brief).

ISSUE II.

WHETHER AMAZON'S ABSENCE FROM THE JURY VIEW OF THE SCENE VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL STAGES OF HIS TRIAL.

Appellant's counsel states on page 19 of appellant's brief that "Ira Amazon certainly had the right to be present at the jury view of the crime scene when evidence was presented in this case." Appellee has no quarrel with that statement. But appellee does quarrel with appellant's argument that he had no right not to be present at the jury view of the crime scene.

There are at least two substantial reasons why appellant might have desired to be absent from the jury view: (1) returning to the scene of the crime might have an adverse psychological effect on him, and (2) his presence at the crime scene might have an adverse effect on the jury. There may have been other valid reasons for appellant to be absent. If trial counsel decided for tactical reasons that it would be best for appellant to be absent, and if appellant agreed with those tactical decisions, might it not have denied appellant a fair trial for the trial court to force appellant to be present?

It is highly significant that appellant's experienced and competent trial counsel recommended to appellant that he waive his presence. Trial counsel obviously came to the conclusion that appellant's best interests would be served

if he were absent from the jury view of the crime scene. Whether appellant should be present at the jury view was discussed "in detail" with appellant. Appellant then authorized counsel to enter a waiver of his presence on his behalf. (R 1044) It has been recognized that law and tradition allocate to counsel the power to make decisions of trial strategy in many areas. Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562 at 573 (1975); United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970).

It should also be noted that not at any time after appellant waived his presence at the jury view did he object to his absence therefrom. No objection was made to witnesses describing the crime scene to the jury, and no objection was made to the playing and narration at the crime scene of a video tape of the crime scene area. No mention of appellant's absence from the jury view was made in appellant's motions for a new trial. Appellee submits that if there was error in appellant's absence from the jury view, that error has not been preserved for appellate review by appropriate objection.

As a general rule, appellate courts will not review a matter raised for the first time on appeal. Only in the rare case of fundamental error is the defendant's right to appeal preserved without a contemporaneous objection. State v. Jones, 377 So.2d 1163 (Fla. 1979). The instant case does not exhibit fundamental error. See Lowman v. State, 85 So. 166 (Fla. 1920), and Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed 674 (1934).

Appellee objects to appellant's attempt to sandbag the State by requesting permission to be absent from the jury view and then asking that his convictions be overturned because his request was granted. Consistently, the Florida appellate courts have maintained that an accused will be estopped from advocating a position in the lower court, or inviting error therein, and thereafter urging reversal in the appellate court. McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); Davis v. State, 413 So.2d 70 (Fla. 3d DCA 1982); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980); Odom v. State, 375 So.2d 1079 (Fla. 1st DCA 1979); McClure v. State, 371 So.2d 196 (Fla. 2d DCA 1979); Jones v. State, 358 So.2d 37 (Fla. 4th DCA 1978); Richardson v. State, 345 So.2d 380 (Fla. 3d DCA 1977); Andrews v. State, 343 So.2d 844 (Fla. 1st DCA 1976); Jackson v. State, 359 So.2d 1190 (Fla. 1978). As stated by Judge Schwartz in State v. Belien, supra, "...gotcha! maneuvers will not be permitted to succeed in criminal, any more than in civil litigation."

The facts in Francis v. State, 413 So.2d 1175 (Fla. 1982), cited by appellant, are easily distinguishable from the facts in the present case.

In Francis, defense counsel asked permission of the court for Francis to go to the restroom. When asked by the court whether he waived Francis' presence for the purposes of jury selection, defense counsel, without consulting Francis,

answered that he did. The jury selection then proceeded in the courtroom outside Francis' presence. After Francis returned to the courtroom, the judge, counsel for both sides, and the court reporter returned to the jury room to exercise Francis' and the State's peremptory challenges. Francis' counsel told him he could not go with them into the jury room. His counsel had not obtained his express consent to challenge peremptorily the jury in his absence.

In the instant case, Amazon's counsel discussed the jury view of the crime scene with Amazon "in detail" before Amazon, through counsel, expressly waived his presence. Clearly, there is little factual similarity in this case to Francis.

In Francis and in Mulvey v. State, 41 So.2d 156, 158 (Fla. 1949), this Court declined to express an opinion as to whether a defendant may waive his right to be present in a capital case. But in Haynes v. State, 72 So. 180 (Fla. 1916), this Court found no error in a capital defendant's absence from a jury view when he was not denied the privilege of being present. In Dodd v. State, 209 So.2d 666 (Fla. 1968), Justice Ervin (dissenting) expressed the opinion that the defendant, convicted of first degree murder, waived his presence at a jury view when he failed to go to the view of his own volition. Also, in McCullom v. State, 74 So.2d 74, 78 (Fla. 1954), there is a suggestion that a capital defendant may waive his presence at a jury view. Appellee contends that there is no

compelling reason not to allow a defendant to waive his presence in a capital case, especially when he waives his presence at a jury view of the crime scene at the recommendation of his counsel and there is nothing in the record to indicate that prejudice or harm resulted to him by his voluntary absence. See Synder v. Massachusetts, supra.

The provisions of Fla. R. Crim. P. 3.180 were designed for the benefit of defendants. If a defendant in a capital case decides after conferring with counsel that it would be in his best interest to waive one of the provisions of the Rule, why should he not be permitted to do so? See Mulvey v. State and Lowman v. State, supra.

In summary, appellant has not set forth any persuasive reasons why his voluntary absence from the jury view should result in his convictions being overturned. The accuser is entitled to as much fairness as the accused in our criminal justice system, Snyder, supra, and it would be grossly unfair to the State in the instant case for this Court to allow Amazon's "gotcha! maneuver" to succeed.

ISSUE III.

WHETHER THE TRIAL COURT ERRED IN DENYING AMAZON'S MOTION FOR NEW TRIAL BASED UPON JUROR MISCONDUCT.

Fla. R. Crim. P. 3.600(b) provides:

> The court shall grant a new trial if any of the following grounds is established, providing substantial rights of the defendant were prejudiced thereby (emphasis supplied):
>
> * * *
>
> (2) That the jury received any evidence out of court, other than that resulting from an authorized view of the premises;
>
> * * *
>
> (4) That any of the jurors was guilty of misconduct....

Section 924.33, Florida Statutes (1983) provides:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant. (Emphasis supplied)

Appellant appears to suggest in his brief that juror misconduct automatically creates a presumption of juror prejudice. However, the law in Florida does not go that far. The cases cited by appellant are not as broad in their holdings as appellant indicates. Appellee contends that, in accordance with §924.33, Fla. Stat., it was not the State's burden at the judicial inquiry below to overcome a presumption of prejudice.

When the question of possible juror misconduct arose, the trial court inquired into the matter in accordance with the guidelines set forth in United States v. Herring, 568 F.2d 1099 (5th Cir. 1978). The trial judge questioned individually all jurors and other witnesses concerning the possibility of prejudicial material reaching one or more of the jurors during the trial and thereby possibly influencing the deliberations of the jury. The attorneys for the defendant and the State were also given opportunities to examine the jurors and other witnesses. The jurors and witnesses were granted immunity from any prosecution that might arise as a result of the Court's investigation.

After having considered all of the testimony presented by the witnesses, the tangible evidence filed with the Court, the arguments of the attorneys, and the memorandums of law provided by the attorneys, and after reviewing the court file and the transcripts of the hearings, the trial court found that juror misconduct did not prejudice the substantial rights of the defendant, Ira Amazon. (R 447-450, 589-590) These findings should not be disturbed in the absence of a clear showing that the trial court committed error or that the evidence demonstrates that the conclusions reached are erroneous. See North v. State, 65 So.2d 77, 100 (Fla. 1952); McNamara v. State, 357 So.2d 410 (Fla. 1978); State v. Garcia, 431 So.2d 651 (Fla. 3d DCA 1983).

Appellant complains in his brief that three jurors frequented the motel lounge without the bailiff's supervision. But, as appellant also points out, there was no evidence of any communication to the jurors about the case. Nor was there any evidence that the jurors overheard any conversation about the case.

Juror Margaret Trembley went to the motel lounge on the first night of sequestration and had just ordered a drink when the bailiff asked her to go back to her room. The jurors had not yet been instructed not to be in the lounge. She was in the lounge less than five minutes and was the only one there other than the barmaid. She did not discuss the trial with the barmaid or anyone else. (R 2519-2522, 2671-2678)

After the verdict had been rendered in Amazon's case, Margaret Trembley and alternate juror Jack Marcotte went to the lounge at about 4:00 p.m. for a drink. They did not discuss the trial. Juror George Fox later joined them. Again, the trial was not discussed. (R 2679-2685) They told the barmaid they couldn't talk about the case because it could lead to a mistrial. (R 2641, 2642)

Juror George Fox reportedly went to the lounge and had several drinks during the guilt phase of Amazon's trial. He appeared intoxicated to witnesses Janet Ann Moore and Walter Evans. (R 2752, 2889-2890) Fox identified himself to Ann Moore as a juror but said he was not allowed to talk about

the case. (R 2740, 2742, 2743) There was no evidence that Fox engaged in or overheard any discussions about the trial.

That three jurors, Margaret Trembley, Jack Marcotte, and George Fox, were in the lounge after the verdict was returned is irrelevant to the verdict previously returned, and non-prejudicial as to the sentencing phase, since the jurors recommended a life sentence rather than death. Appellant conceded this point in the court below. (R 436)

Margaret Trembley's presence in the lounge during the guilt phase of the trial was clearly non-prejudicial to appellant.

The trial court's extensive inquiry into George Fox's presence in the lounge during the guilt phase established that he was not influenced by anyone in the lounge and was not exposed to any damaging material.

All of the jurors testified that they did not discuss the trial with anyone and did not hear the trial being discussed. There is nothing in the record to indicate that any witness was being untruthful. To the contrary, all witnesses were unhesitatingly candid, even when to be otherwise might have been easier under the circumstances.

In short, there is simply no concrete evidence that appellant's substantial rights were prejudiced by the fact that three jurors momentarily frequented the motel lounge without first obtaining permission to do so.

The extensiveness of the judicial inquiry and the truthfulness of the jurors unexpectedly established that juror Frank Hunter and his roommate, alternate juror Jack Marcotte, watched televised news accounts of appellant's trial because they wanted to see themselves on television. The sound was turned off, however. (R 2951-2952, 3142) Appellant argues that appellant was prejudiced by this viewing because at least one of the broadcasts included video tape of the FBI metallurgist's testimony about comparing the murder weapon and window screen markings.

However, after considering argument of counsel and viewing the video tape in question, the trial court found that there was no evidence of any prejudicial material of any kind reaching Hunter, Marcotte, or any other juror. (R 490)

The trial court's finding is supported by this Court's decision in Bottoson v. State, __So.2d__(Fla. 1983)[8 FLW SCO 505, 506]. At Bottoson's sentencing hearing, an FBI agent identified an exhibit as papers relating to Bottoson's prior conviction for bank robbery. The state neglected to offer the exhibit into evidence, but somehow it was included with the materials given to the jury. The Court stated:

> We agree with appellant that it is error for the jury to be exposed to materials that have not been properly introduced into evidence. However, before a mistrial can be granted, it must be shown that the existence of an unauthorized object in the jury room has somehow prejudiced the defendant. [Cites omited] There is no prejudice

> where the information conveyed by the unauthorized materials merely duplicates evidence that had been properly presented to the jury at trial. [Cites omitted] In this case the unadmitted exhibit that was inadvertently allowed to go into the jury room merely reproduced the testimony of the FBI agent, which the jury had already heard. We therefore hold that the trial court did not abuse its discretion in denying the motion for mistrial.

In the instant case, jurors Hunter and Marcotte viewed a short video tape of an FBI agent's trial testimony. The tape merely duplicated evidence that had been properly presented to the jury at trial. There is no reason why the holding in this case should be any different from the holding in Bottoson, supra.

The State further relies on the case of Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982), although not factually on point, as authority for the general proposition that "...due process does not require a new trial every time a juror has been placed in a potentially compromising situation."

ISSUE IV.

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF COLLATERAL CRIMES.

In Williams v. State, 110 So.2d 654, 661 (Fla. 1959), cert. denied, 361 U.S. 847, this Court announced a broad rule of admissibility of collateral crime evidence based upon relevancy. The Court held that "evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion." The Court again addressed the subject of collateral crime evidence in Ashley v. State, 265 So.2d 685 (Fla. 1972), where it stated:

> Evidence which has a reasonable tendency to establish the crime laid in the indictment is not inadmissible merely because it points to another crime.... So long as evidence of other crimes is relevant for any purpose the fact that it is prejudicial does not make it inadmissible.

In Ruffin v. State, 397 So.2d 277 (Fla. 1981) this Court said, "Evidence of other crimes is relevant if it casts light on the character of the crime for which the accused is being prosecuted."

In the instant case, defense counsel Richard Pippinger stated in opening argument:

> Ira remembers bringing absolutely nothing into that house with him, not a knife, not a cord. Ira's best recollection...is that that knife was on the counter in the kitchen, and that with Joy Chapin

> and Jennifer Chapin, and all the confusion there at that time, he grabbed and struck out in a panicked state....(R 1081)

Did appellant conveniently find a knife on the kitchen counter and strike out in panic, or did he bring the knife with him into the Chapin residence in a premeditated design to kill? This was one of the important factual questions the jury had to decide.

During its case in chief, the State questioned Candice Dougherty, a friend and neighbor of the Chapins, about a burglary of her house in which three Chicago Cutlery knives were stolen. The knife found at the crime scene was very similar to one of the knives stolen from Mrs. Dougherty. It was a Chicago Cutlery knife of the same size and shape as one of the stolen knives. (R 1268, 1321-1324)

Mrs. Dougherty testified that she had known Joy Chapin for three or four years and that they were very close friends. (R 1253) Mrs. Dougherty talked to Mrs. Chapin every day. They ate meals together very often and helped each other in the preparation of meals. They socialized in the home with each other. (R 1254) Mrs. Dougherty had been in Mrs. Chapin's home in the days and weeks prior to her death and had been in the kitchen with her during that time and had helped in the preparation of meals. In all the occasions Mrs. Dougherty had been in the Chapin residence she had never seen a knife similar to her stolen Chicago Cutlery knives. (R 1269)

Mrs. Dougherty's testimony concerning the theft of her knives was relevant to show that she would have recognized such a knife if she had seen one in Mrs. Chapin's house. The fact that Mrs. Dougherty never saw such a knife in Mrs. Chapin's house was circumstantial evidence tending to show that appellant did not conveniently find such a knife on Mrs. Chapin's kitchen counter and that he brought the knife with him into the residence.

Appellant argues that "This evidence of a collateral burglary in the same neighborhood as the homicides was irrelevant to prove an issue in this case. Its sole effect was to suggest that Amazon committed other crimes." It should be readily apparent, however, that Mrs. Dougherty's testimony had probative value as to whether appellant's version of events was credible. It suggested that appellant did not find the knife in Mrs. Chapin's residence and that, therefore, he must have brought the knife into the house with him. Mrs. Dougherty's testimony "cast light on the character of the crime" for which Amazon was prosecuted. Ruffin, supra. It was circumstantial evidence of appellant's guilt and, thus, admissible. Florida courts have long recognized that trial courts are to be allowed great latitude in the admission of indirect or circumstantial evidence.

Even if this Court were to determine that evidence of the theft of knives from Mrs. Dougherty was erroneously admitted in

the present case, appellee would maintain that such error was harmless. In Clark v. State, 378 So.2d 1315 (Fla. 3d DCA 1980) the court determined that a Williams Rule violation had occurred, but stated:

> We believe that it is harmless and, accordingly, we hold that where the proof of guilt is clear and convincing so that even without the collateral evidence introduced in violation of the Williams Rule, the defendant would clearly have been found guilty, then the violation of the rule may be considered harmless.

In the present case, appellant would clearly have been found guilty even without the collateral evidence that was introduced.

Moreover, it is difficult to see how appellant was prejudiced by Mrs. Dougherty's testimony in the light of appellant's own testimony. He testified that a few hours before he killed Joy and Jennifer Chapin he "ripped off" a street sign that had his girlfriend's name on it (R 1789, 1790), stole money, jewelry, and drugs from his mother's purse (R 1793), consumed some of the drugs and intended to sell the rest (R 1793, 1794), staged a burglary at his home (R 1796), and scattered his mother's purse and its contents over the shoulder of a county road. (R 1796) He admitted stealing from his mother before, "Just about everything that has been there, jewelry, money, silverware, clothing." (R 1797) He admitted stealing from his father and his father's pharmacy. He stole "Narcotics, magazines, cigarettes, just about anything I wanted." (R 1797) He admitted

having a problem with stealing and that he had the problem since childhood. He admitted having psychiatric examinations for his stealing problem. (R 1797)

Amazon testified that he had taken "quaaludes, marijuana, Dilaudids, cocaine, LSD, Seconals, Tuinals, Placidyls, narcotics" since about the age of 15. (R 1841) He described himself as an experienced drug user. (R 1873) He once told a friend that he had to "do four hits of acid before he could really get a decent trip." (R 1873) However, he said that this statement to his friend was a lie. (R 1873, 1874)

Appellant admitted having sex with Joy Chapin and then asking her for her valuables. He admitted stabbing Joy and Jennifer Chapin to death. In short, he admitted that he was a chronic thief, a drug user, a liar, a rapist, and a murderer. Appellant's own testimony thoroughly established his bad character and propensity. If Mrs. Dougherty's testimony suggested that appellant's character was bad and that he had a propensity to steal, appellant's testimony left no doubt about it. Mrs. Dougherty's testimony must therefore be considered harmless.

ISSUE V.

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF A FORENSIC METALLURIST REGARDING MARKS FOUND ON THE SCREEN FRAMING AND THE KNIFE.

Whether appellant found the murder weapon on the Chapins' kitchen counter as he claimed, or brought it with him into the residence as suggested by the State, was a material fact in issue in appellant's trial. It was probative as to the issue of premeditation.

William Tobin, an FBI forensic metallurgist, conducted microscopic laboratory examinations of the murder weapon and the screen that was removed from the Chapins' residence by appellant. He was asked if he found areas on the knife which suggested that it might have been used as a prying tool. He testified, "Yes, I did. I found several areas of localized deformation on the knife which is indicative of having been used in a situation where bending and torsional forces were involved." (R 1738)

Tobin compared the knife and the deformed areas on the knife with the screen. He stated, "The deformation on the knife blade... is consistent with having been caused by forces of twisting or torsion about an object of a very small radius of curvature and the area on the screen that exhibits significant bending is such an area...it could have been used as the instrument used to gain entry or to cause that deformation...the deformation on the knife is consistent with having

caused damage as exhibited by the screen, but...I found no marks that could positively conclude that." (R 1739, 1740)

Tobin further testified, "...we are dealing with a very unique set of forces involved in causing the deformation on that knife....I have narrowed the force system down to a relatively unique set of forces, so it's not only not inconsistent, it narrows down that this could very well have been used to cause the damage to the screen." (R 1745, 1746)

Mr. Tobin's testimony satisfied the requirements of §90.702, Fla. Stat. (1981) and the cases cited by appellant. Metallurgy is beyond the common understanding of the average layman, and it is certainly not clear that the jury could have concluded by examining the knife and screen that the knife's deformities were consistent with having caused the damage exhibited by the screen. This conclusion was within the sphere of Mr. Tobin's expertise and beyond the scope of the common knowledge of the jurors.

This Court held in Johnson v. State, 393 So.2d 1069 (Fla. 1980), that "The trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify, and, unless there is a clear showing of error, its decision will not be disturbed on appeal." Appellant has failed to clearly show that the trial court erred in allowing Mr. Tobin's testimony. Hence, his argument must fail.

ISSUE VI.

WHETHER THE TRIAL COURT ERRED IN SENTENCING AMAZON TO DEATH.

A

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDES WERE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

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

> The trial court properly found the murder to be heinous, atrocious, and cruel. Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different from the norm of capital felonies and sets this crime apart from murder in, for example, a street, a store, or other public place.

In the instant case, there was not just a single stab wound; Joy Chapin was first sexually battered and then stabbed seven or more times, Jennifer Chapin was stabbed sixteen or more times. Both were stabbed in their own residence, not in a public place. They were killed in the presence of each other, and each was aware of impending injury or death of the other. Both suffered tremendous mental anguish. Both may have lived 15 or 20 minutes after the stabbings. After she had been raped and stabbed, Joy Chapin told Mrs. Dougherty, "I can't come [to the door]." Several minutes later she was found still alive and moaning on her living room floor. The murders

in this case were at least as heinous, atrocious, and cruel as the murder in Breedlove, supra.

In Adams v. State, 412 So.2d 850 (Fla. 1982), the Court said:

> The fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony.... From defendant's statement we find that the victim was "screaming" prior to death. A frightened eight-year-old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel....

A frightened eleven-year-old girl being stabbed eighteen times by an adult male while she phoned for help for her mother should also certainly be described as heinous, atrocious and cruel.

Appellant relies upon Riley v. State for the proposition that "a victim's awareness of the suffering of others is an irrelevant factor". This reliance is totally misplaced. The victim in Riley died instantaneously from a gunshot in the head. The victim's son watched the execution. The victim was unaware of the suffering of others. This contrasts with the instant case in which both murder victims were aware of the suffering of each other. In Buford v. State, 403 So.2d 943, 954 (Fla. 1981), this Court stated that "...[m]ental anguish bears on the atrocity of the crime." Appellant subjected the victims in this case to severe mental anguish before killing them. The murders were certainly "accompanied by such additional acts as to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

B

WHETHER THE COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDES OCCURRED DURING THE COMMISSION OF A BURGLARY, SEXUAL BATTERY, AND KIDNAPPING.

On April 26, 1982, appellant pleaded guilty to the burglary and sexual battery charges which were filed in addition to the murder charges in this case. (DCR 12-20) Apparently concerned about the double jeopardy arguments advanced by defense counsel in appellant's subsequent trial for murder, the State's prosecutors asked the trial judge not to instruct the jury that the burglary and sexual battery could be considered in aggravation. The judge complied with the State's request. (R 2152-2162) The State did not, however, waive the use of the burglary and sexual battery as aggravating factors by the trial judge.

In view of the fact that appellant pleaded guilty to the burglary and sexual battery charges, his right to due process was not violated when the court considered these crimes in aggravation. Since appellant pleaded guilty to the crimes, there is no conceivable way the judge could have been persuaded that he should not consider them in aggravation. The judge found that the murders were premeditated, and the evidence supported that finding. The evidence also supported appellant's guilt as to burglary and sexual battery. There

was absolutely no reason for the judge not to accept appellant's guilty pleas to burglary and sexual battery as conclusively establishing these crimes as aggravating factors. There is no way appellant was unfairly prejudiced by the court's consideration of these factors.

As to the crime of kidnapping, it is clear that appellant forced Joy Chapin "to accompany him as he went through the house looking for items of value." (R 495) Appellant maintains that this confinement or movement was no more than that inherent in or inconsequential to the robbery. However, the forced movement of Mrs. Chapin by appellant was not inherent or necessarily required in the commission of the robbery (or attempted robbery), which could have been accomplished on the spot without any asportation whatever. Faison v. State, 426 So.2d 963 (Fla. 1983). The movement of Mrs. Chapin was not slight. Amazon forced her to accompany him from upstairs to downstairs. The confinement had independent significance in that it prevented Mrs. Chapin from escaping or calling for help. It made the robbery or attempted robbery substantially easier to commit. It has been held that the forced movement or confinement of a person in his own home can constitute kidnapping. Ayendes v. State, 385 So.2d 698 (Fla. 1st DCA 1980); Carron v. State, 414 So.2d 288 (Fla. 2d DCA 1982), app. 427 So.2d 192 (Fla. 1983). The trial court correctly found that a kidnapping occurred in this case. See Faison, and Carron, supra.

C

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDES WERE COMMITTED TO AVOID OR PREVENT ARREST.

The record in this case shows that appellant told Detective Herbein that he stabbed Joy and Jennifer Chapin because they could identify him. Herbein's testimony was not severely impeached as claimed by appellant. The statement was made to Herbein before Amazon's typewritten or tape recorded statements were taken. Appellant also told Detective Earling that he didn't think he could be identified until the light went on.

Once the light went on, there was no doubt that appellant would have been identified by his neighbors, the Chapins. With Jennifer Chapin on the phone calling for help, appellant knew he had to eliminate Jennifer and Joy Chapin as witnesses.

There is also reason to believe that appellant entered the Chapin residence to commit a burglary and a rape, and that he took the knife and rope into the residence to eliminate the witnesses.

In Elledge v. State, 408 So.2d 1021 (Fla. 1981), the Court found that murder was committed to avoid arrest when the defendant confessed that the victim threatened to call the police. In Ross v. State, 386 So.2d 1191 (Fla. 1980), the Court found the same aggravating circumstance when the victim's phone was pulled from the wall. In Hitchcock v. State,

413 So.2d 741 (Fla. 1982) it was held that murder was committed to avoid arrest when the defendant's thirteen-year-old stepdaughter said she was going to tell her mother she was hurt. In Adams v. State, 412 So.2d 850 (Fla. 1982), evidence that the eight-year-old victim knew the defendant and could have identified him was sufficient for the Court to find the same aggravating circumstance. All of these cases point to the correctness of the trial court's finding in the instant case that appellant killed to avoid arrest.

D

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDES WERE PREMEDITATED.

The trial court found that the Chapin murders were premeditated. However, the court did not find premediation to be an aggravating circumstance. The court found only the four following aggravating factors: (1) the capital felony was committed while the defendant was engaged in the commission of burglary, sexual battery, and kidnapping, (2) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, (3) the capital felony was committed for pecuniary gain, (4) the capital felony was especially heinous, atrocious, or cruel. (See R 495, A5) The court set forth its findings as to premediation solely for the purpose of justifying the sentences for burglary and sexual battery it imposed on December 8, 1982. The sentences would have been improper had the burglary and sexual battery been found to be underlying felonies supporting a felony murder conviction.

The court's findings as to premeditation were clearly supported by the evidence. This Court said in Buford v. State, 403 So.2d 943 (Fla. 1981)(citations omitted):

> If the evidence shows that the accused had ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design, it will be deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill. Where a person strikes another with a deadly weapon

> and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed.

In Sireci v. State, 399 So.2d 964 (Fla. 1981) the Court said (citations omitted):

> Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature of the wounds inflicted.

The fact that appellant saw a light go on and thought he could be identified, stabbed Joy Chapin and then ran upstairs and stabbed Jennifer Chapin sixteen or more times while she tried to call for help, and then came back downstairs and stabbed Joy Chapin several more times to finish her off, is certainly sufficient evidence of premeditation. There was no provocation. Appellant had more than ample time to form a purpose to kill and for his mind to become fully conscious of his own design. By his own statement he killed the Chapins because they could identify him. The manner in which the homicides were committed and the nature of the wounds inflicted were ample evidence of premeditation. Compare Hernandez v. State, 273 So.2d 130 (Fla. 1st DCA 1973), in which evidence that the defendant stabbed the victim 14 times in the back was held to be sufficient evidence of premeditation.

E

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND AS MITIGATING CIRCUMSTANCES THAT AMAZON SUFFERED FROM AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE AND THAT HIS CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS BEHAVIOR TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

Other than appellant's self-serving statements that he consumed LSD and other drugs prior to committing the murders, there was no evidence that he was under the influence of any drug at that time. Dr. Merin's testimony was predicated on the assumption that appellant consumed a variety of drugs prior to the murders which heightened his personality disorders. But the evidence in the case, including the blood and urine analyses, Amazon's statements to a nurse and a doctor that he had not consumed drugs for several days prior to the murders, Amazon's testimony that he was not treated for drug withdrawal at the jail, the physical control and agility that would have been required to remove the screen from the upstairs window and enter the window, appellant's behavior after the murders, all showed that appellant's mental or emotional problems were not heightened by drug consumption.

Dr. Merin testified:

> During the hours preceding the crime, his thinking had become impaired as a consequence of his use of alcohol and a variety of drugs. The drugs included LSD,

> Valium and Dexedrine at a minimum. The LSD particularly created a vagueness of brain responsiveness which interferred with the normal processing of rapidly changing conditions and intense emotions. The LSD and the alcohol greatly exaggerated and magnified an existing disturbed condition in active process. The drugs and so on did not create a new condition. I might add here that each of these things, the drugs by themselves, the alcohol by themselves, his past history by itself, all of these things, none of these things in and of themselves could produce this....(R 2311)

Dr. Merin also testified (Mr. Meisner questioning):

> Q. ...assume for the moment that this jury is convinced and has been shown by scientific proof that there was no LSD as the Defendant says, that there was no Valium, that there was no Dexedrine element in his activities prior to the time of the burglary, the rape and the murders, and that just... leaves remaining six drinks, ...would that cause you to change your opinion regarding his ability to form intent?
>
> A. I think so. Absent those things. Of course, I had operated on the basis of the presence of those items.... Absent those things the probabilities are very great that we wouldn't have seen the same sort of thing.

Dr. Merin also said that if the evidence in the case was that appellant carried a knife with him into the Chapins' home, that Mrs. Chapin was assaulted with the knife (a knife prick in the neck, one in the rear end, and one on each breast), that appellant brought rope into the house and tied Mrs. Chapin's wrists with the rope, then his opinion would be different and he "probably wouldn't be here right now." (R 2347-2350)

Dr. Merin described appellant as of higher than average intelligence and said that he "certainly understood what was occurring [the night of the murders]." He found that appellant "was in good contact with reality. He was not delusional. He had no hallucination. There was nothing wrong with his cognition, the manner in which he was capable of thinking." (R 2296, 2353-2354) "Ira Amazon did know right from wrong at the time of the crime. Further, Ira Amazon was capable of developing an intent so long as it is understood that this intent formulated just moments before he committed the homicides." (R 2302-2303) Merin also admitted that appellant could be a compulsive liar. (R 2353-2354)

The trial judge was certainly justified in rejecting Dr. Merin's conclusions as to appellant's heightened emotional disturbance supposedly caused by drugs. The judge was also justified in finding that "although there was some evidence of a personality defect in Amazon and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, such capacity was <u>not substantially</u> impaired." (R 492)(A2) Dr. Merin's testimony simply was not very compelling. He consulted with no one except appellant, appellant's mother, and appellant's lawyer. (R 2341-2342) He based his conclusions on the self-serving statements of appellant and his supporters.

He admitted that his conclusions would be different if the facts of the crime were different than he understood them to be.

In Smith v. State, 407 So.2d 894 (Fla. 1981) this Court said:

> [T]he decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury.
>
> * * *
>
> ...The trial court here did not ignore every aspect of the medical testimony regarding the appellant; rather, it found that the medical testimony simply did not compel application of a mitigating factor in sentencing. Unlike the court in Huckaby, the trial court did not improperly refuse to recognize certain mitigating circumstances; rather it considered the evidence presented regarding the defendant's mental state and then made its decision, which we are not to disturb unless absolutely required to do so.

This Court is not warranted to disturb the trial court's findings in the instant case. There is nothing in the record to indicate that the court's conclusions or the methods followed in reaching them were improper. It was within the trial judge's province to grant Dr. Merin's testimony little or no weight. Johnson v. State, 442 So.2d 185 (Fla. 1983)

F

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND AMAZON'S AGE AS A MITIGATING CIRCUMSTANCE.

In Songer v. State, 322 So.2d 481 (Fla. 1975), this Court said, "...today one is considered an adult responsible for one's own conduct at the age of 18 years." The trial court in Peek v. State, 395 So.2d 492 (Fla. 1980), rejected the defendant's age (19) as being a mitigating factor. In upholding the trial court, this Court stated, "There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing."

In the present case, the trial judge expressly considered but rejected appellant's age as a mitigating factor. The record supports his finding.

G

WHETHER THE TRIAL COURT ERRED IN FINDING THAT AMAZON HAD WAIVED THE CONSIDERATION OF NONSTATUTORY MITIGATING CIRCUMSTANCES AND IN FAILING TO CONSIDER AND WEIGH EVIDENCE OF NONSTATUTORY MITIGATING CIRCUMSTANCES.

As to this issue, appellant has obviously and ridiculously twisted the trial judge's words in claiming that the judge did not consider nonstatutory mitigating circumstances because of the defense waiver of a PSI. The judge specifically stated that "throughout both the guilt phase and the sentencing phase of the trial, the Court listened intently for evidence of any nature or kind which could be a mitigating factor whether it was a statutorily enumerated mitigating circumstance or a non-statutory mitigating circumstance." (R 494-495)(A 4-5) Appellant's arguments concerning additional mitigating circumstances are totally without merit.

ISSUE VII.

WHETHER THE TRIAL COURT ERRED IN SENTENCING AMAZON TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

Although the advisory recommendation of the jury is to be accorded great weight, the ultimate decision on whether the death penalty should be imposed rests with the trial judge. White v. State, 403 So.2d 331 (Fla. 1981). Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973). In this case, the trial court properly found four aggravating and no mitigating circumstances under the death statute. The only colorable mitigating circumstances were appellant's age and emotional immaturity. These factors, however, do not outweigh the enormity of the aggravating facts.

In Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), cert. denied, __U.S.__, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), this Court said:

> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of

> appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

In this case, the trial judge was not unreasonable in rejecting the jury's recommendation. Either the jury was predisposed to vote against the death penalty or it gave excessive weight to one or more of the following factors: (1) appellant's age (2) Dr. Merin's testimony, (3)sympathy for appellant's family. The trial judge was not unreasonable in failing to give great weight to any of those factors. The more experienced judge was better able to give appropriate weight to the aggravating and mitigating circumstances. The aggravating circumstances in this case vastly outweighed any mitigating circumstances. The judge exercised a reasoned judgment in rejecting the jury's recommendation and in sentencing Amazon to death. The sentence should therefore be affirmed.

ISSUE VIII.

WHETHER THE TRIAL COURT ERRED IN IMPOSING DEATH SENTENCE UPON AMAZON AFTER THE JURY RECOMMENDED LIFE IMPRISONMENT BECAUSE SUCH A SENTENCE PLACED AMAZON IN DOUBLE JEOPARDY, VIOLATED HIS RIGHT TO DUE PROCESS, AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

This Court has previously decided against the arguments appellant makes as to this issue. Douglas v. State, 373 So.2d 895 (Fla. 1979); Spaziano v. State, 433 So.2d 508 (Fla. 1983). The doctrine of stare decisis should therefore be applied here.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the judgments and sentences imposed by the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Assistant Public Defender, Chief, Capital Appeals, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830 on this 8th day of June, 1984.

James H. Dysart

OF COUNSEL FOR APPELLEE