IN THE SUPREME COURT OF FLORIDA

KENNETH MICHAEL GARDNER,

Appellant,

v. CASE NO. 64,541

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On May 24, 1983, Kenneth Gardner was indicted for the first degree murder and robbery of Joseph C. Holda. (R 16, 17) Holda was 72 years old. (R 38) After trial by jury, Gardner was found guilty and sentenced to death. (R 407; 410 - 419; 3097) This appeal is from the Circuit Court of Pinellas County; and, jurisdiction is conferred pursuant to Article V, §3(b)(1), Fla. Const.

After joy-riding (drinking beer and smoking marijuana) with three (3) casual acquaintances, (R 2083) Kenneth Gardner fatally stabbed Joseph C. Holda. (R 2105) Gardner was a waiter at the Fort Harrison Hotel (Scientology building) at the Lemon Tree Restaurant in Clearwater, Florida. (R 2078) He and his friends (Tony Capers, Debra Tyler, and Larry Hadley) borrowed an automobile for an afternoon ride. (R 2083) The party decided to rob a local hardware store where Joseph Holda was in charge. (R 2094) Kenneth Gardner, the group leader/facilitator, stated (prior to the robbery) that if necessary he would "waste" the victim. (R 2094, 2095) After entering the store and holding Mr. Holda to the floor, only pennies were found to be taken from the cash register. (R 2103 - 2104) Mr. Holda was then stabbed forty-two (42) times by Kenneth Gardner (R 2105, 2563 - 2570; 3130 - 3133) and his throat was slit in an attempted decapitation. (R 2106; 2563; 3128 - 3129) There were defensive wounds. (R 2106; 2567) Mr. Holda's wallet, containing $11.00 (R 2109) was taken by Kenneth Gardner during the struggle. (R 2106). Mr. Holda resisted the robbery; and Kenneth Gardner slit his throat. (R 2106)

After the killing, Kenneth Gardner disposed of incriminating

evidence; (clothing and fruits of the crime) polished his shoes to camouflage blood stains; (R 221) had Larry Hadley return the borrowed car with gasoline money; (R 2109) and, went under-ground to avoid police detection. (R 2113)

The crime was solved weeks later when Larry Hadley informed police of the crime. Prior to arrest, Larry Hadley was outfitted with a "body bug" and engaged Kenneth Gardner in a conversation in which penal admissions were declareed. (R 2932 - 2935)

The trial court has drafted a most complete, cogent findings as to aggravating and mitigating circumstances. (R 410 - 419; A 1 - 10). There is record support for the findings.

ARGUMENT

ISSUE I
(As stated by Appellant)

THE COURT BELOW ERRED IN REFUSING TO TAKE CORRECTIVE MEASURES AFTER THE ASSISTANT STATE ATTORNEY ASKED AN IMPROPER VOIR DIRE QUESTION WHICH MISSTATED THE LAW.

The jurors to whom the voire dire questions were directed never served on the petit jury selected. Appellant argues the entire venire was "poisoned" by the question. Such is not so. Defense counsel objected to the prosecutor's question and moved for a mistiral. (R 1392) The prosecutor acknowledged that his question was both awkward and, at worst, poorly worded. (R 1393) The trial court correctly declined to comply with defense counsel's urging that a standard jury instruction be read at the particular preliminary part of the trial. (R 1395) The prosecutor then delivered his "rephrased" question (the functional equivalent of a currative instruction) which comported with the court's suggestion:

> MR. YOUNG: Miss Truong, that question was phrased very awkwardly and probably incorrectly. What I'm asking you is the Judge will give you the law at the end of the trial which, you know by now, there is law that applies to a co-perpetrator. Can you follow that law?
>
> JUROR TRUONG: Yes.
>
> (R 1395, lines 17 - 23)

At the conclusion of the trial, the lower court gave the following instruction:

> As for accomplices, you should use great caution in relying on the testimony of a witness who claims to have helped the Defendant commit a crime. This is particularly true when there is no other evidence tending to agree with what the witness says about the Defendant.
>
> However, if the testmony of such a witness

> convinces you beyond a reasonable doubt of the Defendant's guilt, or the other evidence in the case does so, then you should find the Defendant guilty.
>
> (R 2747, line 20 - R 2748, line 5)

The jury instruction given is in harmony with Florida Standard Jury Instructions (Crim.) 2.04(b). Appellant relies on Smith v. State, 253 So.2d 465 (Fla. 1 DCA 1978) and Leibold v. State, 386 So.2d 17 (Fla. 3 DCA 1980) for reversal. In Smith, the damage as to questioning of prospective jurors is dicta as the case was decided on other grounds. Significantly, the Smith panel did reflect on the proper question: " . . . whether . . . such juror would follow the instructions of the court." This is precisely the rephrased question of the prosecutor. In Leibold, after a review of the jury voire dire examination, no prejudice was found to justify reversal.

In Ferguson v. State, 417 So.2d 639 (Fla. 1982), this court noted that a motion for mistrial is addressed to the sound discretion of the trial judge; and, the motion is to be granted when the error is so prejudiced and fundamental that the expenditure of further time and expense would be wasteful if not futile. See, Johnsen v. State, 332 So.2d 69 (Fla. 1969) and Salvatore v. State of Florida, 366 So.2d 745, 750 (Fla. 1978) cert. denied, 444 U.S. 885. There is no error.

ISSUE II
(As stated by Appellant)

THE COURT BELOW ERRED IN REFUSING TO GRANT DEFENSE CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS, FORCING GARDNER TO EXERCISE PEREMPTORY CHALLENGES TO EXCUSE THESE JURORS, AND IN REFUSING TO ALLOW GARDNER TO EXERCISE MORE THAN TEN PEREMPTORY CHALLENGES AFTER TELLING COUNSEL HE COULD PROBABLY ALLOW EACH SIDE A TOTAL OF SIXTEEN PEREMPTORY CHALLENGES.

The contention on peremptory challenges is controlled by Fla. R. Crim. P. 3.350. Appellant, in essence, urges that he was under the impression he would have sixteen (16) peremptory challenges. The trial court did not represent this. The court did represent that after ten (10) challenges were exhausted, defense counsel could approach the Bench requesting the court to use its discretion allowing additional challenges. (R 1107 - 1108) This record does not reflect that the trial court led defense counsel to believe he would have 16 perempotry challenges, carte' blanche.

In Thomas v. State, 403 So.2d 371 (Fla. 1981), the prosecution and defense counsel stipulated to sixty-six (66) peremptory challenges. This stipulation was accepted by the court. Even though the stipulation exceeded the number legally required by the rule, error was found on limiting Thomas' peremptory challenges to sixteen; however, this was not the sole basis of reversal. Significantly, there existed a combination of two errors whos cummulative affect warranted reversal.

In Jacobs v. State, 396 So.2d 713 (Fla. 1981), a case closer on point, this Court ruled:

> [8, 9] Jacobs requested forty peremptory challenges in the jury selection process based on the fact that she was chrged with four felonies

> punishable by deth or life imprisonment. The trial judge, following Florida Rule of Criminal Procedure 3.350, denied the request, ruling that the defendant had only ten challenges as a matter of right. Consistent with Johnson v. State, 222 So.2d 191 (Fla. 1969), the judge exercised his discretion by allowing two additional challenges. No error or abuse of discretion is reflected here. Additionally, we find no error in the joinder of the four charges in one indictment, particularly because all four counts arose from one continuous sequence of events See Fla. R. Crim. P. 3.150.
>
> (text of 396 So.2d at 717)

Here, Appellant fails to demonstrate either a stipulation or an abuse of discretion by the lower court.

ISSUE III
(As stated by Appellant)

THE COURT BELOW ERRED IN FAILING TO CONDUCT ADEQUATE INQUIRIES CONCERNING SEVERAL DISCOVERY VIOLATIONS COMMITTED BY THE SATE AND IN NOT PROVIDING APPROPRIATE RELIEF TO GARDNER FOR THESE VIOLATIONS.

Appellant makes a four (4) pronged attack focusing on purported discovery violations. The "State" will address each sub-issue seriatim:

A. Deposition of Larry Hadley

After several futile attempts to depose Larry Hadley (witness to homicide), Appellant filed a Motion in Limine; a Motion for Sanctions; and an alternative Motion for Sanctions or in Limine detailing his efforts to depose Mr. Hadley. (R 241 - 248). A hearing was held October 4, 1983. (R 871 - 1045). The lower court ore tenus, denied the motions. (R 886) The court ruled that the motions were taken under advisement in case Mr. Hadley testified. (R 886) Mr. Hadley did not testify. The motion was denied on its face. (R 247) The court ruled on October 4, 1984, and rendered orders denying relief on October 10, 1983. (R 307 - 309) From the transcript, there is no dispute that Mr. Hadley was not mentally competent to be deposed. (R 880; 882; 884) As such, there is no Richardson violation. A violation of a rule of procedure does not call for reversal of a conviction unless the record discloses that non-compliance with the rule resulted in prejudice or harm to the defendant. Richardson v. State, 246 So.2d 771 (Fla. 1971). The prosecution has the burden of showing to the trial court there was no prejudice to the defendant. Cumbie v. State, 345 So.2d 1061 (Fla. 1977). In fact, it

has been held that the burden remains on the State to prove to the appellate court that the failure to hold a Richardson inquiry was not prejudicial. Cuciak v. State, 410 So.2d 916, 918 (Fla. 1982). With Justice Alderman concurring in result only with opinion urging that on appeal it is the defendant's burden to prove error.

Here, as Mr. Hadley did not testify (because of mental incompetency), the Richardson hearing was more than adequate. Additionally, in State v. Jackson, 436 So.2d 985 (Fla. 3 DCA 1983), the court reviewed a circuit court order excluding a witness because the prosecution failed to produce the witness for depostion. The district court issued its gracious writ and quashed the circuit court order holding:

> [2] It is not the responsibility of the state to produce a witness subpoenaed by a defendant for discovery purposes; to order the state to do so, or to dismiss a criminal case for faiure of the state to do so, constitutes a departure from the essential requirements of law. State v. Adderly, 411 So.2d 981 (Fla. 3 DCA 1982); Knight v. State 373 So.2d 5 (Fla. 4 DCA 1979), cert. denied, 385 So.2d 761 (Fla. 1980); State ex rel. Gerstein v. Durant, 348 So.2d 405 (Fla. 3 DCA 1977); State v. Roig, 305 So.2d 836 (Fla. 3 DCA 1974).

(text of 436 So.2d 985)

As Mr. Hadley was not a witness, the prosecution carried its burden of showing no prejudice to the defendant. In no way whatsoever did the prosecution impale the defense investigation of this case. As to whether the Richardson hearing was adequate, the record appears to reflect all of the available information on the subject which could have been developed. The failure to make formal findings concerning each of the pertinent Richardson considerations does not

constitute reversible error. Ansley v. State, 302 So.2d 797 (Fla. 1 DCA 1974). In explaining Richardson, Judge Grimes in Baker v. State, 438 So.2d 905, 906 (Fla. 2 DCA 1983) pet. for review den. 447 So.2d 885 (Fla. 1984) observes that once there has been an adequate inquiry into all the surrounding circumstances, the trial court has discretion to determine whether the state's failure to list a witness constitutes harm or prejudice to the default. As Mr. Hadley did not testify, the trial court did not abuse its discretion in denying the motion without prejudice for reconsideration if the witness were to testify.

B. Names of Tony Capers and Debra Tyler as State Witnesses

On May 3, 1983, the Public Defender set a hearing on Motion to Determine Conflict. There, the names of Anthony Capers; Kenneth Gardner; and, Debra Tyler were styled as defendants. (R 4) On May 9, 1984, defense counsel was appointed because of the conflict. (R 5) Thus, the record shows defense counsel had knowledge of Tony Capers and Debra Tyler.

On October 4, 1984, the prosecution informed defense counsel that Tony Capers had negotiated a plea bargain and he and Debra Tyler would be testifying against Appellant. (R 889; 890) The prosecution represented that it was not changing theories of prosecution; but, merely witnesses. (R 896) Also, the prosecution pointed to the "cover sheet" of Answer to Denial for Discovery (R 52) had the names of Capers and Tyler imprinted as witnesses. (R 897) In fact, the discovery "cover sheet" listed these names. (R 265) Prior to the hearing (at the court's direction), defense counsel deposed Mr. Capers. (R 904, 905; 919; 940) Defense counsel

represented that he learned of that on the day of the homicide, his client, Ms. Tyler and Mr. Capers drank beer and imbibed marijuana. (R 940)

Appellant argues that the lower court erred when it there was no definitive ruling on the purported Richardson violation. In shorrt, there was no Richardson violation; and, assuming a "colorable" one existed, the failure to make formal findings concerning each of the pertinent Richardson considerations does not constitute reversible error. Ansley v. State, 302 So.2d 797 (Fla. 1 DCA 1974) and Baker v. State, 438 So.2d 905, 906, pet. for review den., 447 So.2d 885 (Fla. 1984). As defense counsel had both actual and constructive knowledge of Tony Capers and Debra Tyer, there was no error. The prosecution can hardly be faulted for not having considered Tony Capers (an individual charged in this criminal act) as a potential witness until such time as he chose to be bound by plea negotiations. No harm or prejudice was suffered by Appellant; and, the court did not abuse its discretion in allowing Mr. Capers to testify.

C. Photopack viewed by Lester Stewart

Where Appellant fails to focus is that Lester Stewart testified the previous day; identified Larry Hadley's photograph; and, was cross-examined on this issue. (R 1732 - 1734)

Defense counsel admitted the "cover sheet" (R 265, 266) Answer to the Denial for Discovery had the word "photopack" on it. (R 2268) At Alan Moore's deposition of August 26, 1983, defense counsel learned that Lester Stewart had identified Hadley from a photopack as the man who and asked him about renting an apartment. (R

686)

There is no discovery violation. Defense counsel had actual knowledge of the photopack's existence. That defense counsel did not direct the police to produce the photopack, when he had actual knowledge of the photopack, can hardly be attributed to the State. The trial court cannot be said to have abused its discretion under Richardson v. State, 246 So.2d 771 (Fla. 1971) The following transpired which is in support of the court's ruling:

> THE COURT: Did you ever notify the State Attorney's office they didn't have the photopack there?
>
> MR. MENSH: No sir.
>
> THE COURT: Did you ever make any inquiry subsequently as to where the photopack was?
>
> MR. MENSH: No, sir, the State Attorney was there. Mr. Young was present. In other words, the State Attorney insisted on my being present.
>
> THE COURT: Did you point out to him obviously the photopack isn't here, can I see it, can you make it available?
>
> MR. MENSH: I don't think so. I just said to let me see all of the evidence in the case.
>
> THE COURT: Because there wasn't no photopack there, that was the end of the subject?
>
> MR. MENSH: Yes, sir.
>
> THE COURT: I think it's incumbent upon the lawyer, regardless of which side of the fence he is on, to pursue a reasonable effort to obtain evidence which was disclosed during a portion of the discovery, which it was, here on the cover sheet. I don't think you have to sit there and look over everything and find something missing, to say you have no responsibilites then to pursue the missing item. Now, obviously the photopack is some place. It has to be available. What you do is not take a positive step to locate it. You step back and take a negative

response because it wasn't there, you are not going to take any effort to locate it. I think an obligation is imposed upon you at the time when all of the evidence is displayed to point out the photopack is not there and to say that I want it there on such-and-such a date when I come back if at all possible, and to cooperate and work with the police. And I'm sure they have no reason not to make it available.

It's a little late in Court, in other words, to stand up and say you didn't take any more steps. Have you seen the photopack here in the Courtroom?

MR. MENSH: I looked at it from the Clerk, yes, sir.

THE COURT: All right, the objection is to be overruled, then.

(R 2270, line 24 - R 2272, line 18)

There was no prejudice or harm visited upon Gardner; and, he fails to demonstrate same.

D. Lab Results on Scrapings Taken from Polk's Hardware Store

Kevin Noppinger was qualified on the basis of his education, training, and experience as an expert in the field of forensic serology. (R 1811) The witness identified the evidence which he analyzed. In reference to State's Exhibit No. 10, scraping materials were identified as:

(1) Bottom shelf on display counter
(2) Lower shelf of center display counter
(3) Shelf second from floor
(4) From floor by body
(5) From floor under body

(R 1822, 1823)

Defense counsel argued a discovery violation as he was never furnished with a copy of the report. (R 1823) The prosecutor replied that he, too, was never served with a copy of the report. (R 1824; 1839) Physical evidence from the medical examiner's office was

listed on the Discovery "cover sheet". (R 266) The record reflects that defense counsel was apprised of the fact on September 8, 1983, the five scrapings exited. (R 1829) The police property report showed that samples of the scrapings were mailed to defense counsel on September 10, 1983. (R 1830).

There was a conflict of past recollection as to whether defense counsel had been notified of the expert testimony as to the scrapings. (R 1833). The probative value of the expert's testimony was explored: His report "verified that all that blood and the victim was the victim's." (R 1834) Out of the jury's presence, the testimony was proffered. (R 1835 - 1837) The prosecution argued it was not in a position to deliver the report when it never received it. (R 1841) The court asked the defense counsel to designate prejudice (R 1842) and he responded that he had no idea what the expert's testimony would be. (R 1844) The court ruled:

> THE COURT: All right, the Court feels that the State has satisfied this Court there has not been an intentional violation of discovery procedures.
>
> Secondly, I do not feel there would be any prejudice by allowing this expert to merely identify these blood scrapings apparently as having been from the body of Mr. Holda.
>
> (R 1846, lines 16 - 23)

Thereafter, defense counsel deposed the expert. (R 1850)

There was an adequate Richardson hearing. The court determined no prejudice. The record does reflect all the available information on the subject that could be developed. Appellant asserts error because the lower court never resolved the representational conflicts between counsel as to disclosure. The court found both counsel to have given truthful representations. (R 1847, 1848) Appellant also

asserts the court filed to designate whether discovery violation was trivial or substantial. The failure to make formal findings concerning each of the pertinent Richardson consideration does not constitute reversible error. Ansley v. State, 302 So.2d 797 (Fla. 1 DCA 1974) and Baker v. State, 438 So.2d 905, 906 (Fla. 2d DCA 1983 pet. for rev. den. 447 So.2d 885 (Fla. 1984). Under the circumstances of this record, the trial court did not err in allowing the expert to testify.

E. Conclusion

Either individually or cumulatively, the purported Richardson violations were either cured or did not exist. Appellant is not entitled to a new trial.

ISSUE IV
(As stated by Appellant)

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE PRIOR CONSISTENT STATEMENTS MADE BY KEY PROSECUTION WITNESS TONY CAPERS IN ORDER TO BOLSTER THE TESTIMONY HE GAVE AT TRIAL.

Tony Capers, an eye-witness participant to the homicide, gave a complete account of the murder. (R 2076 - 2206) During his cross-examination, defense counsel accused Capers of fabrication: "You have made more mistakes than that before about the color of the shoes, have you not?" (R 2120) Defense counsel was directed to impeach from a deposition. (R 2121) Later, defense counsel began impeachment, focusing on April 23, 1983, statement. (R 2144 - 2148) Also, defense counsel focused impeachment on an October 4, 1983, deposition relating to quality and "rolling technique" of marijuana. (R 2152 - 2153; 2161 - 2162; 2169) Defense counsel continued in his assertion that he noted conflict between deposition and trial testimony relating to marijuana. (R 2189) Sepcifically, defense counsel targeted fabrication as to "time-of-day" entry into the hardware store. (R 2195 2197) Defense counsel used the April 23, 1983, statement for that purpose. (R 2195)

Pursuant to §90.801(2)(b), Florida Statutes (1983), the prosecutor introduced the prior consistent statement of April 23, 1983, to rebut the allegation of fabrication. (R 2481) See Van Gallon v. State, 50 So.2d 882 (Fla. 1951) and McElveen v. State, 415 So.2d 746 (Fla. 1 DCA 1982). Defense counsel did dwell on the topic of marijuana and time of entry so that the jury might well have concluded fabrication.

Additionally, defense counsel dwelled on Capers' plea bargain. The inference from his cross-examination (R 2123, 2128 - 2129, 2132) is inescapable that Capers is portrayed as one who would admit to anything in order to escape the death penalty. (R 2481)

It is settled that if a state statute is patterned after the language of its federal counterpart, the statute will take the same construction in Florida courts as its prototype has been given insofar as such construction comports with the spirit and policy of the Florida law relating to the same subject. See, Pasco County School Board v. Florida Public Employees Relations Commission, 353 So.2d 108, 116 (Fla. 1 DCA 1977) and Brown v. State, 426 So.2d 76, 88 fn. 19 (Fla. 1 DCA 1983). Here, See §90.801(2)(b) is patterned after Fed. Rules Evid. Rule 801(d)(1)(B), 28 U.S.C.A. See generally, United States v. Sutton, 732 F.2d 1483, 1493 (10th Cir. 1984) and United States v. Brantley, 733 F.2d 1429, 1438 (11th Cir. 1984).

In an analysis of the rule, Judge Weick in writing for United States v. Hamilton, 689 So.2d 1262 (6th Cir. 1982) cert. den. 103 S.Ct. 753 (1983) noted:

> [20] A wide variety of circuits have held that a charge of recent fabrication or improper motive need not be express. U.S. v. Baron, 602 F.2d 1248, 1253 (7th Cir.), cert. denied, 444 US. 967, 100 S.Ct. 456, 62 L.Ed.2d 380 (1979), and cases cited therein. The Baron Court even provided that "[t]he fact that defense counsel may not have intended to imply that [defendant's] story was fabricated [recently] is irrelevant if that inference fairly arises from the line of questioning he prusued." Id. Where credibility has been challenged on the basis of facts absent from the prior statement, the statement has been admitted when it was consistent with the remaining testimony. U.S. v. Lombardi, 550 F.2d 827 (2d Cir. 1977). Broad discretion is given to the trial court regarding

> the admission of prior consistent statements. U.S. v. Mock, 640 F.2d 629, 632 (5th Cir. 1981); U.S. v. Goodson, 502 F.2d 1303, 1307 (5th Cir. 1974).
>
> (text of 689 F.2d at 1273)

In the case at bar, what inference arises from defense counsel's extensive cross-examination of Tony Capers' guilty plea litany? (R 2123, 2128 - 2129, 2132) The suggestion is inescapable that Tony Capers negotiated his guilty plea to escape the death penalty. The statement (R 2482 - 2486) is a confirmation of the factual basis in the guilty plea. Additionally, Mr. Capers was continually challenging the witness as to whether it was Larry Hadley or Appellant who inflicted the "stab" wounds:

> Q. And you are telling this Jury, Mr. Capers, it was not Larry Hadley, is that correct?
>
> A. Yes.
>
> MR. YOUNG: Objection, Judge. Again, it's been asked and answered four or five times. Mr. Mensh made his point.
>
> THE COURT: He already answered the question.
>
> MR. YOUNG: I just didn't want to go through the rest of the Co-Defendants, your Honor, without objection.
>
> BY MR. MENSH:
>
> Q. And you were not a lookout outside the south-side door of the hardware store during the time that Larry Hadley and Ken Gardner and Debra Tyler went into the store, is that your testimony?
>
> A. No, it isn't.
>
> MR. YOUNG: Objection. Asked and answered five or six times now. This is the same question I objected to asked and answered last time.
>
> MR. MENSH: If it please the Court, I have

> received different answers from the witness during the course of one deposition as it relates to the marijuana and as --
>
> (R 2188, line 22 - R 2189, line 19)

There was no error in allowing Detective McManus to testify about Capers' post-arrest account of the homicide under §90.801(2)(b), Florida Statutes (1983) as it rebutted the implicaton of recent fabrication or improper influence or motive. See, United States v. Henderson, 717 F.2d 135, 137 (4th Cir. 1983) cert. denied 104 S.Ct. 1006 (1984). The inference of recent fabrications or improper influence/motive fairly arises from the cross-examinaton of Mr. Capers by defense counsel. The inference throughout the Capers' cross-examination was that Capers, not Hadley, was the lookout. (R 2471) The statement served to rebut this implication.

ISSUE V
(As stated by Appellant)

THE COURT BELOW ERRED IN ALOWING THE STATE TO ELICIT TESTIMONY FROM DETECTIVE RICHARD McMANUS CONCERNING LARRY HADLEY'S CHARACTER AND PERSONALITY.

Appellant assails the testimony of Richard McManus focusing on his mental condition and personality. The witness testified.

> A. Larry Hadley is like a big puppy dog. He is easily led. He is easily influenced. From my knowledge of him, he can be easily led astray if someone has a dominant personality, and he doesn't have much of a dominant personality whatsoever.

(R 2469, lines 3 - 7)

A bench conference was held at the request of defense counsel. (R 2469 - 2470) Defense counsel informed the court that Larry Hadley had been judicially determined in 1976 and 1977 to be incompetent to stand trial. (R 2469 - 2470) The purpose of the testimony was that the prosecutor anticipated defense counsel would portray Hadley as a ". . . 300-pound militant, violent, black male that has bullied other people into saying that Gardner did it and they all got together because they were friends . . . " (R 2474)

This question of a lay person testifying as to the mental status of an individual is not novel in either Florida or the federal courts. Section 90.701, Florida Statutes (1983) addresses opinion testimony of lay witness. It has long been recognized in Florida that the mental condition of a person may be established by the opinon of the ordinary witness which is based on observation. Mitchell v. State, 31 So. 242 (Fla. 1901) and Fields v. State, 35 So. 185 (1903).

In Hixon v. State, 165 So.2d 436 (Fla. 2 DCA 1964), the following principle of law was stated:

> [9] In a crimnal prosecution, a lay or nonexpert witness may be permitted to give an opinon regarding the sanity or insanity of the person whose mental condition is in issue, but he cannot express general opinions as to sanity nor give opinions independent of facts and circumstances within his own knowledge. The opinion, rather, is to be given after the witness has testified with regard to appearances, actions, and conduct of the person whose sanity is being investigated; and such a witness must testify from personal knowledge and observation. Thus, a nonexpert witness who bases his testimony upon relevant facts and circumstances known to and detailed by him may give an opinion as to sanity. 20 Am. Jur., Evidence, sections 852, 853, 854, pages 713 - 716; 2 Underhill's Criminal Evidence, pages 1147, 1151; 2 Wharton's Criminal Evidence, section 532, pages 371 - 372; Armstrong v. State, supra; Hall v. State 1919, 78 Fla. 420, 83 So. 513. The opportunity for observation by the witness testifying appears to be an essentaial element in weighing the testimony given by him. Wells v. State, 1957, 98 So.2d 795.
>
> (text of 165 So.2d at 441)

On the federal side, the rules are the same.[1]

In United States v. Alden, 476 F.2d 378, 385 (7th Cir. 1973), Judge Pell noted:

> [9,10] There are two phases of the present matter. First, there is the question of lay witnesses testifying as to their observations of the person in question without the expression of an opinion as to mental capacity. here the trial court should be liberal in admission, as any acts, conduct, declarations, spoken words, appearance, and manner of speech on the part of the person involved would be relevant to the issue. Even brief observation would not exclude

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[1] See, Brown v. State, 426 So.2d 76, 88 fn. 19 (Fla. 1 DCA 1983) for the statutory comparison analysis between a state statute and its federal counterpart.

> the evidence but merely go to its weight, Mason v. United States, 402 F.2d 732, 738 (8th Cir. 1968), cert. denied, 394 US. 950, 89 S.Ct. 1288, 22 L.Ed.2d 484 (1969).
>
> The second phase of the matter involves the expression of an opinion by the lay witness. Here we are of the opinion, with which the Government apparently agrees, that the opinion can only be expressed where the witness has been qualified by sufficient association with an opportunity to observe the subject, Mason, supra, 402 F.2d at 739.

(text of 476 F.2d at 385, emphasis supplied)

The case was reversed as neither of the lay witnesses had an opportunity to observe Appellant at the pertinent time. See, United States v. Minor, 459 F.2d 103, 106 (5th Cir. 1972).

It is a matter of judicial discretion as to whether opinion testimony is admissible. Compare Kersey v. State, 74 So. 983, 985 - 986 (Fla. 1917) with United States v. Burnette, 698 F.2d 1038, 1051 (9th Cir. 1983) cert. den. 103 S.Ct. 2106 and United States v. Jackson, 688 F.2d 1121, 1123 - 1124 (7th Cir. 1982) cert. den. 103 S.Ct. 1441. In any event, the jury was free to believe or disbelieve the lay opinion testimony. See United States v. Jackson, supra at 1126 and Jones v. State, 440 so.2d 570, 574 (Fla. 1983).

The "State" would urge that Detective McManus had sufficient time [five (5) hours on April 22, 1983] and subsequent contacts (R 2475 - 2476) to form a lay opinion as to Appellant's mental condition. A sufficient basis was established for the opinion testimony (R 2476) even though defense counsel asserted such evidence had not been established. (R 2494) As the prosecutor urged, it only took five (5) minutes observation of Larry Hadley to conclude: "He has the mind of a child." (R 2503) Under these circumstances, the

trial court did not err in its ruling:

> THE COURT: But this officer has a perfect right, as a professional, a professional with long-time experience, to make observations about people that he interviews, and especially after five hours of interviewing this man. I don't think there is anything wrong with the police officer, under these circumstances, making a statement which has been made here.
>
> (R 2504, lines 13 - 20)

ISSUE VI
(As stated by Appellant)

THE COURT BELOW ERRED IN UNDULY RESTRICTING GARDNER'S CROSS-EXAMINATION OF SEVERAL STATE WITNESSES, THUS DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS.

The Florida Evidence Code provides: "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of witnesses. The court may, in its discretion, permit inquiry into additional matters." See, Section 90.612(2), Florida Statutes (1983).

Appellant assails testimonial limitations addressing Detective Ronald Luchan and Detective Moore. The direct testimony of Detective Luchan focused on Appellant's April 22, 1983 admission that he had concealed shoe blood stains with shoe polish. (R 2243, 2743) The cross-examination focused on the witness' activities one month earlier. (R 2244) The court ruled defense counsel was trying to bring out matters totally unrelated to his direct testimony. (R 2247) The court noted that the Luchan testimony was confined to his conversaton about tennis shoes. (R 2247) The point in question has nothing to do with testimonial credibility and trustworthiness. See Section 90.608, Florida Stautes (1983). More in point, is Padgett v. State, 59 So. 946, 949 (Fla. 1912) which addresses the scope of examination and the discretion of the trial court. It would have been possible for defense counsel to have inquired into matters outside the scope of proper cross-examination if he had made the detective his own witness. See Shargaa v. State, 84 So.2d 42 (Fla. 1955). The scope of cross-examination lies within the sound discretion of the trial judge and is not subject to review except for

clear abuse. Matera v. State, 218 So.2d 180 (Fla. 3 DCA 1969) cert. denied, sub nom., Galtieri v. Florida, 396 U.S. 95 and Hernandez v. State, 360 So.2d 39 (Fla. 3 DCA 1978).

Appellant also complains that the lower court erred in not allowing defense counsel to cross-examine as to Colleen Barnhouse's statements made to police. (R 2246 - 2248; 2423 - 2425; 2460 - 2466) The court noted that defense counsel had Ms. Barnhouse by subpoena and that she was available to testify for the defense. (R 2461) See Shargaa v. State, supra. The same point was previously asserted as to the limitation of Detective Barnhouse's testimony centering on Colleen Barnhouse. (R 2423) There is no question but that from an evidentiary stance, the matters defense counsel sought to explore on cross-examination were never raised on direct examination. The trial court did not abuse its discretion in its rulings. Had defense counsel needed the designated testimony, he was free to call either Detective McManus or Colleen Barnhouse as his own witnesses. There is no error.

ISSUE VII
(As stated by Appellant)

THE COURT BELOW ERRED IN REFUSING TO GRANT GARDNER'S REQEUST FOR A MISTRIAL WHEN DETECTIVE McMANUS TESTIFIED THAT LESTER STEWART HAD AGREED TO TAKE A POLYGRAPH TEST.

On direct examination, Detective McManus testified as to the basis on which their suspicions focused on Lester Stewart as a suspect. (R 2289 - 2290) The pertinent testimony reads:

> Again, we ran several leads concerning him for about a two-week period. At the end of the two-week period, we finally brought him in. Now, I had spoken to him with Detective Moore at least on three prior occasions prior -- I mean, if you include the night of the hoimcide. The last occasion we brought him in, he agreed to take a polygraph test.
>
> (R 2290, lines 3 - 9)

Defense counsel moved for a mistrial. (R 2290) The lower court denied the motion for mistrial (R 2294) and gave the following curative instruction:

> THE COURT: Ladies and gentlemen of the Jury, the Court will ask you to please disregard the last statement by the Detective with reference to a polygraph test. Just take that statement out of your mind as if it was never even mentioned from the Detective's testimony. I am excluding, in other words, that portion of his remarks from the record in this case.
>
> (R 2294, line 21 - R 2295, line 3)

Appellant's reliance on Dean v. State, 325 So.2d 14, 17 (Fla. 1 DCA 1975) is misplaced. The testimony regarding polygraphs is as follows (upon questioning by the prosecutor):

> "Q. Mr. Rowell, you made a statement in the sworn statement and you made statements in here today. Which day were you telling the truth?
>
> A. I beg your pardon?

> Q. When were you telling the truth, when you testified in court today or those statements that you made?
>
> A. Today. Everything I have told today can be verified by the three lie detector tests I took."

(text of 325 So.2d at 17)

In Dean the testimony focused on the results of the polygraph test. Judge McConnel relied on Johnson v. State, 166 So.2d 798 (Fla. 2 DCA 1964) which held a mere reference to a lie detector test without any reference to the result, although inadmissible, has been held not to constitute reversible error where a cautionary instruction is given by the court. The Johnson court said:

> [5] On the basis of an analysis of the cases hereinbefore discussed we conclude that while neither the results of a lie detector examination nor testimony which in directly or inferentially apprises a jury of the results of a lie detector examination is admissible into evidence, the mere fact that the jury is apprised that a lie detector test was taken is not necessarily prejudicial if no inference as to the result is raised or if any inferences that might be raised as to the result are not prejudicial. This determination should not, of course, encourage attempts to introduce evidence is liable to be prejudicial and should be admitted only when clearly relevant and unmistakably nonprejudicial.

(text of 166 So.2d at 805)

In Ferguson v. State, 417 So.2d 637, 641 (Fla. 1982) Justice Adkins set the classic criteria for a mistrial:

> A mistrial is a device used to halt the proceedings when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile. Johnsen v. State, 332 So.2d 69 (Fla. 1976). Even if the comment is objectionable on some obvious ground, the proper procedure is to request an instruction from the court that the jury

> disregard the remarks. A motion for mistrial is addressed to the sound discretion of the trial judge and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity." Salvatore v. State of Florida, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (citations omitted).
>
> (text of 417 So.2d at 641)

In this case, the trial court correctly denied the motion. The comment was spontaneous and not solicited. Never did the comment on a polygraph become a focal point of the trial. Viewed in the context that no polygraph results were entered into evidence and a curative instruction was given, the testimony was not sufficiently prejudicial to warrant a mistrial. Under these circumstances, no reversible error exists.

ISSUE VIII
(As stated by Appellant)

THE COURT BELOW ERRED IN REFUSING TO CONSIDER RELEVANT EVIDENCE BEARING UPON THE VOLUNTARINESS OF STATEMENTS GARDNER MADE TO THE POLICE WHILE IN THEIR CUSTODY AND IN ADMITTING THESE STATEMENTS INTO EVIDENCE WHEN THE STATE HAD FAILED TO PROVE THEY WERE MADE VOLUNTARILY.

Appellant filed a pre-trial motion to suppress custodial statements. (R 226) Appellant also filed a pre-trial motion to suppress tangible evidence. (R 277 - 280) This latter motion addressed testimony of Tony Capers; physical evidence obtained from Mr. Capers (Appellant's tennis shoes); and, a wire-intercepted conversation between Larry Hadley and Mr. Capers. (R 277) As to the former, a hearing was held October 4, 1983 (R 948 - 1034) and denied. (R 310; 1031 - 1034) As to the latter, argument was submitted October 11, 1983 (R 1125 - 1175) and denied. (R 330; 1172) No testimony was offered in support of the latter motion.

Appellant's main thrust is that the trial court failed to consider evidence suggesting Larry Hadley had made threats against Appellant. Gardner's argument is that the failure reflects on the voluntariness of the confession. That is not so. The prosecution pointed out:

> The fact the defendant was threatened by Larry Hadley has absolutely no bearing on the post-Miranda statement. Had Mr. Mensh asked the question had he been threatened by the police or any agents of the police or anything along that line or any civilians in the police department, perhaps it might be a legitimate question.
>
> (R 1010, lines 10 - 17)

The court correctly reasoned:

> THE COURT: Well, the statement right here, he

> answers that, yes -- he says, "I have been threatened." McManus says, "By whom?" Gardner, "By Larry." It's right in the statement. It goes on and explains why he feels he has been threatened. I don't think that has anything to do with the voluntariness of his confession to the police.
>
> (R 1010, lines 18 - 24)

The inquiry into threats focuses on police threats. That Hadley might have threatened Appellant certainly has no relevance now as Appellant was enjoying the benefits of police protection. The general rule is that confessions induced by violence, force, fear, or duress are involuntary and inadmissible. This is not a case where a purported threat was levied against the family or friends of the defendant (where the coercion continues); or, where a defendant is afraid of violence from a third party (after all Appellant was confessing to the police). Because Appellant was in police custody, any effect of Hadley's purported threat was effectively dispelled. At trial, the testimony about Hadley's threat was received into evidence. (R 2337) There is no allegation of police threats; and, on this record, there is nothing to suggest that the confession is testimonially untrustworthy.

In Stokes v. State, 403 So.2d 377, 378 (Fla. 1981), this court noted that the defendant "may have been motivated to confess because of his concern for the welfare of his family in the face of reprised threats by the Outlaws Motorcycle Gang is an insufficient basis on which to predicate a motion to suppress." See, Halliwell v. State, 323 So.2d 557 (Fla. 1975); Coleman v. State, 245 So.2d 642 (Fla. 1 DCA 1971). There was no police coercion. (R 958) There is no basis to believe Appellant was going to suffer "D.T.'s". (R 1005)

This record clearly discloses that Gardner had received proper Miranda warnings (R 956), and it sustains the State's position that Gardner's waiver of privilege against self-incrimination and right to counsel was both knowing and voluntary.

As to the Motion to Suppress tangible evidence, there was no testimony. On this record, there was a failure of proof; and, the collateral conclusion is that no merit exists to support the claim. Failure to put on proof constitutes a procedural default. Under Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977).

ISSUE IX
(As stated by Appellant)

THE COURT BELOW ERRED IN ALLOWING THE STATE TO ELICIT TESTIMONY FROM ONE OF ITS WITNESSES WHICH CONSTITUTED COMMENT ON GARDNER'S ABSOLUTE RIGHT TO REMAIN SILENT.

Defense counsel did object (R 2339) to the testimony focusing on Appellant's use of marijuana; and, that if such were elicited, it would be " . . . the first time you heard Defendant making such allegations . . . " (R 2338) The court did not find this to be a comment on defendant's right to remain silent.

> THE COURT: I don't think this is a comment on the right of the Defendant to remain silent. It concerns itself with the interrogation the officer conducted which is in written form, question and answers of the Defendant. None of the statements made by the Defendant call for any issue of beer or marijuana. It would probably have been a little more practicable for the State if the State had --

(R 2341, lines 14 - 22)

Appellant never requested a currative instruction or moved for a mistrial. In-trial reference to a defendant's silence is not always reversible error. The test for determining when a prosecutor's comment is a reference, direct or oblique, to the silence of the accused is whether the language used was manifestly intended, or was of such character, that the jury would naturally and necessarily accept it as a reminder that the defendant did not testify. See, United States v. Waller, 607 F.2d 49 (3rd Cir. 1979); United States v. Harbin, 601 F.2d 773 (5th Cir. 1979); United States v. Muscarella, 585 F.2d 242 (7th Cir. 1978); Catches v. United States, 582 F.2d 453 (8th Cir. 1978). If error is designated, it may be nonprejudicial if it is harmless beyond a resonable doubt. Chapman v.

California, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, (1967). The test for determining whether an indirect, in-trial remark constitutes improper comment on a defendant's exercise of his Fifth Amendment privilege to remain silent is: "Was the language used intended to be or was it of such character that the jury naturally and necessarily would take it to be a comment on the failure of the accused to testify." United States v. Anderson, 481 F.2d 685, 701 (4th Cir. 19732) affd. 417 U.S. 211 (1974). The present record falls short of this mark. The comments when read in context were merely comments on the uncontradicted nature of the evidence and do not constitute prejudicial error. See, Wilson v. State, 436 So.2d 908, 910 (Fla. 1983).

ISSUE X
(As stated by Appellant)

THE COURT BELOW ERRED IN DENYING GARDNER'S MOTIONS FOR MISTRIAL DUE TO SEVERAL INSTANCES OF IMPROPER COMMENTS BY THE COURT AND BY THE PROSECUTING ATTORNEY.

The "State" will divide the issue raised by Appellant into two (2) sections for reply: (1) Prosecutor Remarks and (2) Judicial Remarks.

A. Prosecutor Remarks

Appellant assails the comment during the opening statement of the defense attorney. There the following transpired:

> I also ask that during the presentation of the evidence by Mrs. Andrews and Mr. Young, the State Attorney's Office, that you listen carefully to see if they, in fact, produced those words from Larry Hadley that Mrs. Andrews said she would present in Evidence.
>
> MR. YOUNG: Excuse me, Judge, I apologize, Judge, I will object to any statements by Mr. Hadley. Mr. Mensh knows full well he is also under a criminal charge and we cannot produce him.

(R 1687, lines 4 - 13)

Argument commenced at the bench. Defense counsel conceded that he had knowledge Larry Hadley was charged with the crime of accessory after the fact to the murder of James Holder. (R 1688; 1690) The prosecutor designated the defense remarks a challenge to the prosecution to produce Larry Hadley. (R 1689) In fact, Larry Hadley did not have immunity and his counsel had represented Hadley would invoke the Fifth Amendment if called as a witness. Additionally, the prosecutor questioned whether Hadley was competent to enter into an immunity agreement. (R 1691) The trial court ruled that the prosecution had not misrepresented its case in opening; and, as a

consequence, defense counsel was warned to "be careful" with the remainder of his opening. The prosecutor gave an outline of his anticipated proof. The "State" acquainted the jurors with the contemplated testimony and through whom the testimony was to be elicited. (R 1672 - 1681) The prosecutor stated the facts she intended to prove; and, how she was to prove them. The defense comment was in error. (R 1687) The prosecutor correctly took exception. That defense counsel suggests Larry Hadley was available pursuant to Section 914.03, Florida Statutes (1983)(R 1691) is an abstraction. The prosecutor is free to call whoever he chooses to establish his case in chief.

Next, on the cross-examination of Tony Capers (where he testified he sold his blood at a Plasma Center and was a marijuana purchaser), defense counse inquired whether the witness had "connections to buy marijuana." (R 2151) The prosecution objected on grounds of relevance. After a bench conference, the court ruled that defense counsel could not inquire into "connections". (R 2154) Defense counsel then asked:

> BY MR. MENSH:
>
> Q. Mr. Capers, as I was saying, on the 23rd of March, you went out and used a special connection and made a purchase of some very strong, very effective, heavy duty marijuana, did you not?
>
> MR. YOUNG: Judge, just for the record, that is in direct contravention of what the Court just ruled at the Bench, and I will object.
>
> (R 2155, lines 1 - 8)

Defense counsel moved for a mistrial because of the prosecution's objection urging interference with the latitude of his cross-

examination. (R 2156) Appellant's reliance on Briggs v. State, 455 So.2d 519 (Fla. 1 DCA 1984), and its internal authority is misplaced. In Briggs, the prosecutor attempted in the jury's presence, to suggest that defense counsel was not being truthful and deliberately misleading the jury. In Briggs there was a personal attack on the integrity of the opposing counsel. Here, the prosecutor objected to defense counsel's question and, as basis, urged non-compliance with the trial court's ruling. In no way, is the case at bar governed by the principles announced in Briggs.

B. Judicial Remarks

Appellant next complains about the basis for a judicial ruling. The prosecutor objected to the propounding of "once-asked" questions. (R 1770) The court clarified its remark at a bench conference:

> THE COURT: I have only commented on the fact you asked the same question and got the same answer, which the record will show. I just wonder how many times this has to be asked and get the same answer. That is not commenting. I am just asking Counsel what the importance of asking the question over and over and over.
>
> (R 1771, lines 14 - 20)

In fact, the court noted that questioning had reached the point where it ws abusive to the witness. (R 1772)

The second purported prejudicial judicial remark is tortured. During the direct examination of Tony Capers by the prosecution, the following transpired:

> Q. Approximately what time did you get back in Clearwater?

A. Oh, it was about twelve, around about twelve o'clock. It was about noontime.

Q. Were you wearing a watch, Mr. Capers?

A. No, I wasn't.

Q. So could it have been a little later or a little earlier than twelve o'clock?

A. Yes, it's possible.

MR. MENSH: Objected to as calling for speculation, your Honor.

Also, I object on the grounds it is leading, suggestive of the answer.

Also, I have a further ground. May we approach the Bench?

THE COURT: She only asked him if he was wearing a watch. He said no. The implication is how did he, I suppose, know it was noon without a watch. You shouldn't suggest any other time because he said it was noon.

(R 2088, line 17 - R 2089, line 11)

To categorize this as prejudicial judicial comment is wrong. The court merely stated a basis and rationale (R 2089) for its ruling. (R 2090) Appellant's motion for mistrial was also denied on this score. (R 2090) In no way, did the trial court violate the judicial prohibitions set out in Section 90.106, Florida Statutes (1983).

The third judicial comment focused Detective McManus' testimony. On cross-examination, the witness testified:

Q. Were his hands handcuffed in front of him or in back of him?

A. I believe they were handcuffed in back.

Q. In back of him?

A. Yes.

Q. Are you certain of that?

A. That is normal -- well, I can't be positive, but I'm going to say they were, because that is our normal procedure.

Q. That his hands were handcuffed in back of him?

A. Yes.

(R 2360, lines 10 - 20)

Defense counsel attempted to impeach from a prior deposition:

BY MR. MENSH:

Q. Question: "Were his hands handcuffed in front or in back?

Answer: "I cannot be specific on that. I know he was handcuffed.

(R 2362, lines 20 - 24)

The prosecutor objected urging no inconsistency on which inpeachment might lie. (R 2363) In the presence of the jury, the court ruled:

THE COURT: that doesn't sound like an inconsistency to me. I think you are trying to make it appear there is an inconsistency, but I don't see it. I will sustain the objection.

(R 2363, lines 13 - 16)

Defense counsel urged a violation of Section 90.106, Florida Statutes (1983). At the bench, the court quiered whether he was being forced to make all his rulings at the bench.

In answer to these collective claims (R 1295 - 1296; 1392 - 1395; 1482 - 1486; 1687 - 1692; 1770 - 1776; 1890 - 1891; 1908 - 1911; 1984 - 2001; 2089 - 2091; 2155 - 2158; 2290 - 2294; 2363 - 2365; 2602 - 2608; 2786 - 2787; 2839 - 2841), Appellant overlooks that a mistrial is to be neither manufactured nor invited. Again

Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982) establishes the standard for granting a mistrial. Under Ferguson, Appellant fails to show reversible error.

> A mistrial is a device used to halt the proceedings when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile. Johnsen v. State, 332 So.2d 69 (Fla. 1976). Even if the comment is objectionable on some obvious ground, the proper procedure is to request an instruction from the court that the jury disregard the remarks. A motion for mistrial is addressed to the sound discretion of the trial judge and "the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity." Salvatore v. State of Florida, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (citations omitted).
>
> (text of 417 So.2d at 641)

ISSUE XI
(As stated by Appellant)

THE COURT BELOW ERRED IN GIVING THE JURY INCORRECT AND MISLEADING JURY INSTRUCTIONS, AND IN REFUSING TO INSTRUCT ON THE DEFENSE OF VOLUNTARY INTOXICATION AND ON ALL PROPER LESSER INCLUDED OFFENSES.

The jury instruction requested by the prosecution reads: "Co-Defendants Hadley and Tyler are unavailable to either side and the Jury should draw no inference from their absence." (R 2652) Defense counsel objected. (R 2655) The instruction was read to the jury. (R 2742, 2743) After the instructions were given, the objection was renewed. (R 2755)

The trial court acknowledged Debra Tyler was charged with murder in the first degree (R 2653) and Larry Hadley was charged with accessory after the fact. (R 2652) The court declined to instruct on Section 914.03, Florida Statutes (1983) (use immunity). (R 2653) The court reasoned:

> THE COURT: That doesn't matter when he is charged. He is charged. He is charged prior to this trial. If they had given him use or transactional or any other type, it wouldn't have worked. The man could not have been brought into the Courtroom to testify because apparently according to his Counsel he is incompetent to appear in the Courtroom.
>
> MR. YOUNG: That is right.
>
> THE COURT: We have two psychiatrists looking at him. There was no way the State could have brought him in.
>
> (R 2654, line 19 - 2655, line 5)

Here, the prosecution is faced with a delicate balance of weighing a witness' right against self-incrimination against use and derivative use immunity. See, Menut v. State, 446 So.2d 718 (Fla. 4

DCA 1984). Had the testimony of Larry Hadley been so significant, then Appellant was free to produce him. Additionally, the record indicates Hadley was unavailable because of his mental condition. (R 2654, 2655) Clearly, the prosecution is not obliged to engage in a futile effort. The instruction is correct.

B. Defense of Voluntary Intoxication

Appellant requested an instruction on voluntary intoxication. (R 2639, 2640) The prosecution, on the authority of Jacobs v. State, 396 So.2d 1113 (Fla. 1981) and Shaw v. State, 228 So.2d 619 (Fla. 2 DCA 1969) excepted. The request was denied. (R 2647) At the conclusion of the instruction, as read, defense counsel renewed his objection. (R 2755).

In Linehan v. State, 442 So.2d 244 (Fla. 2 DCA 1983) certified questions pending in Linehan v. State, Fla. Case No. 64,609, argued October 4, 1984, there are two questions relating to this topic:

1. Whether voluntary intoxication is a defense to arson or any crime?

2. Whether voluntary intoxication is a defense to first-degree (felony) murder?

In this case, Appellant was charged with robbery terminating in a homicide. The intent to rob with a purpose of permanently depriving a victim of something of value by force is not normally transferred to the homicide victim. Gardner intended to commit robbery not murder. However, the felony-murder rule imposes limitation in such cases. This rule negates the premise that Gardner did not intend the anticipated consequences of his act. Why? Because murder is the unlawful killing of a human being with malice aforethought. Malice aforethought does not require deliberation; and, it is proved

by the commission of the felony. An involuntary killing constitutes murder if it occurs during the commission of a felony. If death occurs as a result of a forcible felony (such as robery) the felony-murder rule elevates the death to first degree murder. Under the felony murder rule, state of mind in immaterial. The state of mind is shown by malice aforethought (this is supplied by the felony). As Gardner perpetrated the robbery, he is responsible for the murder. Voluntary intoxication is not a defense to the murder if it is not a defense to the felony.

As to the straight first degree murder charge, voluntary intoxication may be a defense to a specific intent crime. There must be proof Gardner was intoxicated before he formulated the intent to commit the crime. (R 26429) More on point, intoxication does not negate intent when Gardner was sober when he formed his intent and subsequently because intoxicated to gain perhaps the courage to execute the crime.

Here, Gardner did not testify. The prosecutor pursuant to the facts argued the following:

> And I think if the Court considers the fact that the Defendant drove the back roads home, he destroyed all of the evidence of the crime, he washed the blood off, he attempted to get the blue bag out of the car, based on the evidence at this point, your Honor, I submit that the Defendant has not met his burden, however slight it is, of essentially putting some evidence in front of the Jury to the effect he was so drunk he did not know the difference between right and wrong.
>
> (R 2645, lines 10 - 19)

The crux of the argument was that Gardner never established he was in an unconscious or wholly incapacitated state or that as a result

of intoxication Gardner was in a fixed state of insanity. Linehan v. State, supra at 250, 251. Under the facts of this case, the lower court did not err as a matter of law in declining to deliver the intoxication instruction.

C. Lesser Included Offenses -- Murder in the First Degree

Appellant acknowledges that the prosecution elected to proceed on both premeditation and felony murder as methods of proving the crime.

Appellant requested an instruction on third degree felony murder. (R 2617) The court denied the request. (R 2623) After the instructions were read, Appellant renewed his objection. (R 2755).

This Court has addressed the question raised in Adams v. State, 341 So.2d 765 (Fla. 1976), reh. den. Feb. 14, 1977. In Adams, felony murder is a degree of homicide; but, not a lesser degree. The felony murder rule defines as murder any homicide committed while perpetrating or attempting a felony. Obviously, felony murder is an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Malice aforethought is supplied by the robbery. Pursuant to Section 782.04(4), Florida Statutes (1983), an individual who personally kills another during the perpetraton of the enumerated felonies is guilty of first degree murder. Only if the felon were an accessory before the fact or not present would ssecond degree murder come into play.

The jury instruction limitation of the jury's option is not error. This result is the very goal of the first degree felony murder provision stated in Section 782.04(1)(a), Florida Statutes

(1983). On the authority of Adams, the jury instructions were lawful. Again, felony murder is a degree of homicide; but, not a lesser degree.

D. Lesser Included Offenses -- Robbery with a Deadly Weapon

The following transpired at the jury instruction conference:

> MR. YOUNG: I'm sorry, Judge, one count is Murder 1, Murder 2, Murder 3 -- I'm sorry, manslaughter, not Murder 3. Obviously felony murder will plug in on Murder 1. But I did include the instruction on felony murder in the first degree.
>
> (R 2614, lines 14 - 19)

There was discussion about instructing on robbery with a weapon and robbery. (R 2614) The prosecutor never advised the court to so instruct; and, defense counsel never requested these instructions. He later mentions the offenses; but, never requests an instruction. (R 2649) As defense counsel never requested nor objected to their omission, the "State" would assert a procedural default as a bar to consideration of the claim. See, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). As read, the instructions were correct. (R 2739 - 2741) In fact, the court instructed as follows:

> Box No. 1, is guilty of robbery with a deadly weapon, as charged.
>
> Box No. 2, guilty of robbery with a weapon, as included.
>
> Box No. 3, guilty of robbery without a weapon, as included.
>
> (R 2753, lines 6 - 11)

Under this sub-claim, Gardner points out that he requested jury instructions on aggravated assault and assault. (R 2624) The court

did not rule; and, the instructions, as read, did not include these offenses. The trial court observed the following in reflection on lesser-included offenses:

> THE COURT: I think some are considered insulting to the Jury. That is my concern. Most people don't like it, especially laymen sitting on the Jury, to see the Court charge them with a lot of hypotheticals if the facts don't fit. I don't think the facts of this case fit, so I'm going to deny those lessers.
>
> (R 2623, lines 14 - 21)

Florida Standard Jury Instructions in Criminal Cases, 1981 Edition (p. 266) lists assault and aggravated assault as category 2 lesser-included offenses. In Brown v. State, 206 So.2d 377 (Fla. 1968), this court described the categories proper for jury instructions. The basic premise is: " . . . if the offense of lesser degree is necessarily proved by proof of the greater, it will be considered a category 1 offense. If the lesser degree offense is not necessarily included in the greater but is coverd by the charging document and the proof, it will be a category 4 (sic) 2 offense." at 257. On this record, the evidences of the completed crime is so great that there is no rational basis for the jury to conclude that the attempted crime was the only crime committed. As a category 2 offense under the Brown rationale, an instruction is not required. In State v. Abreau, 363 So.2d 1063, 1064 (Fla. 1978), this court clarified its decision in Lomax v. State, 345 So.2d 719 (Fla. 1977). This court disapproved the Lomax language which suggested the harmless error doctrine was not applicable. Only the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible. If

the omitted instruction relates to an offense two or more step removed, reviewing courts are free to apply the harmless error doctrine. Under the category 2 clarification, attempt; grand theft first degree; grand theft second degree; battery; and, aggravated battery are categorized with descending significance. Florida Standard Jury Instructions at 266. Under the facts of this record, error (if there is any, and there is none) is at most harmless under the rationale of State v. Abreau, 363 So.2d 1063 (Fla. 1978).

E. Conclusion

The instructions given in the instant case were lawful; and, if not subject to procedural defect, the omissions were at most harmless error.

ISSUE XII
(As stated by Appellant)

THE COURT BELOW ERRED IN REFUSING GARDNER'S REQUEST TO CONDUCT INDIVIDUAL, SEQUESTERED VOIR DIRE ON THE DEATH PENALTY.

The Branch v. State, 212 So.2d 29, 30 (Fla. 2 DCA 1968) the question as to whether error was registered when the trial judge failed to allow voir dire examination individually and outside the presence of the remaining jurors was litigated. Associate Judge Ben Overton ruled this to be "discretionary with the trial court, and the record fails to reflect that the trial judge abused his discretion. Likewise, in Stone v. State, 378 So.2d 765 (Fla. 1979), Justice Atkins in reliance on Branch rejected a similar claim:

> [4] During the voir dire examination, defense counsel requested that each prospective juror be examined individually with the others absent, "so that those who had specific knowledge of the crime would not contaminate the others' minds." The trial court did not commit reversible error in denying this motion. Such a request is addressed to the discretion of the court and the record fails to show an abuse of discretion. Branch v. State, 212 So.2d 29 (Fla. 2 DCA 1968).
>
> (text of 378 So.2d at 768)

This claim has also been rejected on collateral attack. See, Spinkellink v. Wainwright, 578 F.2d 582, 593 - 594 (5th Cir. 1978). In Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. Unit B, 1981), Judge Hill stated:

> The guarantee of impartiality cannot mean that the state has a right to present in case to the jury most likely to return a verdict of guilt, nor can it mean that the accused has aright to present his case to the jury most likely to acquit.
>
> (text of 660 F.2d at 579)

The claim is without merit. The trial court did not abuse its discretion in denying the Motion for Sequestered voir dire. (R 322)

ISSUE XIII
(As stated by Appellant)

> THE COURT BELOW ERRED IN REFUSING TO ALLOW GARDNER TO SUBSTITUTE PRIVATE COUNSEL FOR HIS COURT-APPOINTED ATTORNEY AND TO ALLOW NEW COUNSEL ADEQUATE TIME TO PREPARE FOR THE SENTENCING HEARING.

Initially, Appellant urges a violation of Fla. R. Crim. P. 3.111(b)(1) as the rule provides for the appointment of counsel for indigent defendants. In no way was Mr. Bergman retained for representation as he was negotiating fee with Appellant's family. (R 2939) In fact, Gardner was " . . . hoping to have his family members from out of state pay for the attorney's fees." This record does not suggest that Appellant's economic status had improved. At best, Appellant's high hopes do not equate with a solvent balance sheet.

In no way was Mr. Bergman prepared for the sentencing phase. There was no trial transcript and he didn't attack the trial. The prosecutor did not invite "built-in" error. (R 2942) To have allowed trial counsel to withdraw and substitute Mr. Bergmen would perhaps have generated a bona fide Strickland v. Washington, __ U.S. __, 80 L.Ed.2d 674, __ S.Ct. __ (1984) claim. The court reasoned:

> Mr. Gardner is so adequately represented by an attorney of that skill, that knowledge and that background at the present time, to have yourself come in here and say, "I can do it equally and an adequate job," without knowing anything about the record, without ever having attended the trial, without having heard a single witness testify that you are equally and capable to assume that responsibility is in itself a very large portion for you to assume.
>
> (R 2944, lines 6 - 15)

The "State" has no quarrel with the principle that an accused

is entitled to be represented by counsel; however, indigent defendants have no right to select counsel of their own choosing and are entitled only to the appointment of a public defender in the absence of some specific reasons based on facts pointing to the disqualification of the public defender in a particluar case. See, Wiltz v. State, 346 So.2d 1221, 1223 (Fla. 3 DCA 1977). In Gandy v. Alabama, 569 F.2d 1318, 1319 (5th Cir. 1978) Judge Hill observed that " . . . the right to counsel of one's choice is not absolute as is the right to the assistance of counsel." Further, "[T]he right to choose counsel may not be subverted to obstruct the ordinary procedure in the courts or to interfere with the fair administration of justice."

The court noted that Mr. Bergman was more than welcome to file a Notice of Appearance as co-counsel in all of Appellant's remaining proceedings. (R 2945) This record does not indicate that Mr. Bergman availed himself of his opportunity. Thus, Appellant exercised his constitutional right to waive Mr. Bergman's participation.

The trial court was faced with the following factors:

> (1) The length of delay substitution would cause.
>
> (2) The balance of convenience or inconvenience to litigants, witnesses, opposing counsel, and the court.
>
> (3) Whether the delay was for a legitimate reason or dilatory and contrived.

See Gandy v. Alabama, 569 F.2d 1318, 1324 (5th Cir. 1978). In fact, §921.141(1), Florida Statutes provides: "The (sentencing) proceedings shall be conducted by the trial judge before the trial jury as soon as possible."

The lower court did not err as a matter of law or fact in

denying the Motion for Substitution of counsel and continuance. There is no constitutional deprivation. See, Morris v. Slappy, __ U.S. __, 75 L.Ed.2d 610, 103 S.Ct. __ (1983).

ISSUE XIV
(As stated by Appellant)

THE JURY WHICH RECOMMENDED THE PENALTY OF DEATH FOR GARDNER WAS TAINTED BY HEARING INADMISSIBLE EVIDENCE IN AGGRAVATION.

Defense counsel objected to publication of tape-recorded conversations between Appellant and Hadley during the penalty phase of the trial. (R 2817 - 2820) Section 921.141, Florida Statutes (1983) provides:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall included matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissiblity under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, his subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States of the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

There was no state or federal constitutional infirmity in recording the conversation. In argument for the use of the tape the prosecution argued:

> MR. YOUNG: Judge, the only problem with that is Detective Moore and Detective McManus were deposed by Mr. Mensh back in July or whenever it was, last Summer, and Mr. Mensh questioned them very thoroughly about what Debra Tyler said, as well as what Larry Hadley said. Mr. Mensh is fully aware of what Tyler told the detectives.
>
> Mr. Mensh also received a copy of Tyler's taped transcribed transcript, and he has been fully

apprised of these facts.

(R 2823, lines 5 - 14)

The prosecutor disclosed that Debra Tyler was under indictment and, pursuant to advice of counsel, would not be available for interview. (R 2821) The transcript of the taped conversation between Kenneth Gardner and Larry Hadley on April 22, 1983, is included in the record proper. (R 2932 - 2935)

Appellant overlooks the purpose for which the transcript and recording was received into evidence. There is little question but that Gardner's admissions indicate that the murder was completed in a cold, caluclated and premediated manner. Gardner asserts that Hadley is an "accessory to the fact" and "Nobody can touch us." Gardner continues: "I'm an ex-cop and I don't give a shit. I'm an ex-cop." (R 2934) This is reflection of Gardner's "cold and calculated" state of mind.

This taped conversation also goes to show, in anticipatory rebuttal, that Gardner was not acting in the domination of Hadley, Tyler, or Capers. The prosecution did not know what evidence in mitigation the defense could present. This evidence has probabative value. Additionally, Gardner repeatedly encourages Hadley to get out of town. This scheme suggests a statutory factor in aggravation that the murder was committed for the purpose of avoiding arrest or hindering law enforcement.

The evidence in review was certainly admissible either in aggravation or anticipatory rebuttal of mitigation. The consent of Hadley to wear the body bug was never in issue; and, further this record does not suggest that Hadley ever refused or declined to be

deposed.

In United States v. White, 401 U.S. 745, 28 L.Ed.2d 453, 91 S.Ct. 1122 (1971) the majority held that electronic eavesdropping does not constitute a search and seizure within the meaning of the Fourth Amendment; and, that there shall be no different result by reason of an informant's disappearance and unavailablity at trial. The unavailability of Hadley is not critical to deciding whether prior events invaded his Fourth Amendment rights. See, United States v. White, 401 US. 745, 28 L.Ed.2d 453, 460 91 S.Ct. 1122 (1971). Appellant's reliance on Tollett v. State, 272 So.d 490 (Fla. 1973) is topically misplaced copying the safeguards of the Florida Constitution with those provided in the United States Constitution. See, Art. I, §12, Fla. Const.

In Engle v. State, 438 So.2d 803 (Fla. 1983), this Court found error when during sentencing when evidence of co-perpetrator's confession from a separate trial was not introduced at the guilt phase of the trial; but, was received during sentencing. Here, Appellant confesses an independant confession to police with a conversation between the principal and accessory. Here, it is the statements of Gardner himself which are admitted. The case at bar is to be distinguished from Engle. There is no error.

ISSUE XV
(As stated by Appellant)

THE TRIAL COURT ERRED IN SENTENCING GARDNER TO DEATH BECAUSE THE SENTENCING JUDGE ANNOUNCED THAT HE WOULD GIVE UNDUE WEIGHT TO THE JURY'S RECOMMENDATION, AND THE WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED AN EXISTING MITIGATING CIRCUMSTANCE.

Appellant, in this claim, overlooks that the United States Supreme Court in a triology has made it clear that state governments have a valid structure for implementation of death as long as the structure recognizes and encompasses in implementation one valid statutory aggravating circumstance. Barclay v. Florida, __ U.S. __, 77 L.Ed.2d 1134, 103 S.Ct. __ (1983); California v. Ramos, __ U.S. __, 77 L.Ed.2d 1171, 103 S.Ct. (1983); and Zant v. Stephens, __ U.S. __, 77 L.Ed.2d 235, 103 S.Ct. __ (1983). There has been no improper application of Section 921.141, Florida Statutes in rendition of the death sentence.

A.

Appellant urges error on two judicial vior dire examination points:

> In this connection, I should point out to each of you that if the jury is called upon to render its advisory opinion to the Court, that such -- that such opinion is exactly what it purports to be, that is, advisory only, and the Court will be guided and give great weight to such a recommendation or opinion, but the Court is not bound by such an advisory opinion or verdict.
>
> (R 1333, line 22 - R 1334, line 4)

> In this connection, I should point out to each of you that if the jury is called upon to render its advisory opinion to the Court, that such opinion is exactly what it purports to be, that is, advisory only to the Judge, and the Court, while I will give it great weight, and I would

be guided by your recommendation, as the judge I'm not bound to follow any such advisory opinion.

(R 1505, line 24 - R 1506, line 7)

The court was most clear that it was not bound by jury recommendations. (R 1334) When reading the court's findings as to aggravating and mitigating circumstances in support of the death penalty (A 1 - 10), there is no documentation that the trial court lent added weight to the jury recommendation in the sentencing process.

This case is distinguished from Ross v. State, 386 So2.d 1191, 1197 (Fla. 1980). In Ross, the court's "Findings of Aggravating and Mitigating Circumstances" reflected that the trial court felt compelled to impose the death penalty in this case because the jury had recommended death to be the appropriate penalty. No such oral or written finding is present in the instant case. Clearly, the "third step" in Florida's statutory scheme was executed as trial judge interposed his reasoned judgment between the emotions of the jurors and the death sentence. See, Section 921.141(3), Florida Statutes (1983).

B.

In this case, there was proof of Gardner's intent to avoid arrest and detection. See, Riley v. State, 366 So.2d 19, 21 (Fla. 1978) and Menendez v. State, 368 So.2d 1278 (Fla. 1979). Appellant places no weight on the testimony of Tony Capers; however, the trial court did. Tony Capers, the accomplice testified, after they agreed to rob the hardware store, as follows:

Q. And what happened next?

A. Well, then Kenny Gardner said if he had to,

> he would waste the guy. And I told him that I wouldn't go in that store, you know, with him with the motive of killing the old man. And I told him that it would be better for us to go in there and get the money and leave, you know, knock the old man out and leave the store. And he said -- um, he'll go along with my -- he'll go along with my plan.
>
> (R 2094, line 20 - R 2095, line 2)

Gardner declared that if necessary he would "waste" the victim. His accomplice, who was party to the conversation, interpreted the penal admission to mean what it said; and, as a consequence, Capers replied that he didn't want to go into the store "with the motive of killing the old man." Gardner stated after the homicide: "Well, I didn't have a choice." (R 2112) Proof of intent to avoid detection and arrest is as strong as it can be.

C.

To read this claim, one might think that all Gardner did was mutilate a cadaver. Such is not the case.

There is record support for the findings. (R 413 - 415; App. 4 - 6) The testimony of Dr. Joan Wood, Medical Examiner, is perhaps the most disquieting to reach this court. (R 2563) There exists photographs of the victim's remains which were admitted into evidence. (R 2564) Dr. Wood continued with her calculation of stab wounds. (R 2566 - 2567) There existed <u>defense</u> wounds (R 2567) from which the finder of fact concluded the victim was defending himself. (R 2106; 2567 - 258) Multiple wounds were inflicted <u>prior</u> to expiration. (R 2569, 2570) In fact, before his death, he suffered 17 wounds to his heart (R 2570) and then continued to survive two to five minutes. (R 2571) Death was <u>not</u> instantaneous. There is no

question but that the medical examiner's testimony established that Gardner was cruel in inflicting the wounds and that Mr. Holder suffered while expiring. See Demps v. State, 395 So.2d 501 (Fla. 1981) cert. denied, 454 U.S. 933 (1981).

There exists a cogent, well-reasoned finding on this claim. (A 4 - 6) As recognized by the Second District, it is most rare that intoxication can be so extreme that defendant had no control over his acts. See, Linehan v. State, 442 So.2d 244, 249 (Fla. 2 DCA 1983) (en banc) argued on October 4, 1984 in FSC Case No. 64,609. Whether Gardner was a dipsomaniac or an inexperienced inebriate was adequately considered and rejected in mitigation. There is no error.

D.

In finding that the murder was accomplished "in cold, calculation and premeditated without any pretense of mode or legal justification" pursuant to Section 921.141(5)(i), Florida Statutes (1983), Judge O'Brien correctly relied on Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981) and the language of Spinkellink v. State, 313 so.2d 666 (Fla. 1975), cert. denied, 428 US. 911 (1976). In no way is Spinkellink an aberration. The prosecution carried beyond a reasonable doubt the elements of the premeditation aggravating factor. There was a plan to rob the store and if necessary to "waste" the victim. (R 2094) After the robbery and murder, Gardner declared he had no choice in the matter. (R 2112)

Appellant' reliance on King v. State, 436 So.2d 50 (Fla. 1983) is misplaced. As this Court pointed out, this aggravating circumstance (although not intended to be all-inclusive) is characterized

in executions or contract murders. Clearly, the former applies to this case. The coup de main or decisive finishing act was for Gardner to slit Mr. Holda's throat from ear to ear in an almost complete decapitation attempt. The medical examiner, in additional explanation to the victim's throat being cut, described what can only be designated an execution:

> A. Yes, as I indicated earlier, the two cutting wounds to the neck could not have been created without lifting the head upward. There is a great deal of force being applied to the blade of this knife to create as deep a wound as is present along the right side of the neck. And the handle of the knife and upper portion of the blade are becoming caught on tissue as the knife is being pulled along, and the knife must then be backed up and begun again.
>
> (R 2581, lines 16 - 24)

There is no error on this sentencing claim.

E.

There exists a myriad of impressions as to why Gardner engaged in a frenzied execution slaying. That myriad is as numbered as there are available professional and lay opinion (all of which can be accepted or rejected by the finder of fact).

As observed in Buford v. State, 403 So.2d 943, 953 (Fla. 1981) cert. denied, 454 U.S. 1163:

> [13] Defendant then contends that the trial court erred in not finding the additional mitigating factors which were present in the evidence. he complains that the trial court rejected the mitigating circumstances of extreme mental or emotional disturbance or impaired mental capacity, discounting the effects of defendant's consuption of alcohol, drugs, and marijuana. Obviously the ability of the defendant to give a detailed account of the crime was inconsistent with the contention that he had a diminished or impaired mental capacity because of excessive

consumption of alcohol, drugs, and marijuana. In view of the testimony presented, the trial judge correctly rejected defendant's "drinking" and "drug use" as a mitigating factor. Jones v. State, 332 So.2d 615 (Fla. 1976), does not avail defendant because in Jones there was extensive psychiatric evidence to the effect that the defendant did not know the difference between right and wrong.

Gardner's actions, subsequent to the homicide, negate any argument that he was not oriented in all spheres as to time, place, actions, and consequences of his actions. His actions negate any suggestion that he was under the influence of drugs or alcohol. The testimony of Tony Capers proves Gardner disposed of the incriminating evidence and calmly viewed the 11:00 p.m. news. (R 2106 - 2112) There is ample record support for the trial court's rejection of this claim.

CONCLUSION

Upon the arguments presented in Issues I - XII, the People pray that this Court affirm Kenneth Gardner's judgment; and, further in Issues XIII - XV, the People pray that this Court affirm Kenneth Gardner's sentence of death by electrocution.

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. Regular Mail to Robert F. Moeller, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830, this 2nd day of November, 1984.

OF COUNSEL FOR APPELLEE