IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
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JERRY LAYNE ROGERS,

Appellant,

vs.

CASE NO. 66,356

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts appellant's Statement of the Case, but notes much of the length of the instant answer brief is attributable to the necessity that the state set out the full factual and procedural history of each point on appeal.

Appellee generally accepts appellant's Statement of the Facts, but suggests that appellant's observations as to the weight of co-defendant McDermid's testimony was a matter most properly left to the jury; the state also cannot accept such statements of "facts" as, "the defense presented substantial testimony and evidence which cast doubt on the validity on the various identifications of Rogers..." (Brief of Appellant at 9). The state also supplements appellant's Statement of the Facts as follows:

Appellant and Thomas McDermid were related, to a degree, by marriage, and met for the first time in 1970 (R 6523). After knowing each other off and on, the two apparently grew somewhat close in early 1981, when appellant and McDermid went into partnership involving a cabinet making business in Orlando (R 7069,7016). According to McDermid, he contributed five thousand dollars to the business, and expected to share in the profits, as well as to receive a salary (R 7018,7070-7071). Business, however, was ultimately a failure, and McDermid did not get back his initial investment (R 7071). Prior to such time, however, the witness stated that he and appellant, and their respective families, got along very well, going out to dinner and movies together regularly (R 7019). McDermid stated that between October of 1981 and April of 1982, he would see appellant almost on a daily basis, often going out together for meals

(R 7066-7067).

On October 23, 1981 Kenneth Jones sold one .45 caliber Star semi-automatic handgun to appellant; Jones, a dealer in Orlando, sold him a second one on November 27, 1981 (R 6615-6618). Copies of the firearm transaction records, complete with serial numbers, were introduced at trial (R 4068,4069). On the date of the first purchase, October 23, 1981, appellant and McDermid, each armed with a .45 caliber semi-automatic handgun, and wearing stocking masks over their faces, robbed the Daniels Market in Orlando (R 4802-2812). Although the two escaped with the proceeds, appellant's face was observed when, in the parking lot, he raised his stocking mask (R 6884-6890). Additionally,a citizen had noted appellant's vehicle parked nearby, and had forwarded the license number to the police (R 6917-6920,6856). According to McDermid, when the two had gotten into the vehicle, he had gotten down onto the floorboard and they had returned to the shop (R 7047-7048). That same night, the two drove the vehicle to North Carolina (R 7064). On the way up they heard, over the scanner, that the police had a tag number of a vehicle involved in the Daniels robbery (R 7064-7065). While in North Carolina, the truck was repainted a different color and otherwise altered (R 7065-7066).

McDermid testified that on the early afternoon of January 4, 1982, he and appellant rented a vehicle at the Hertz Rent-a-Car on Gore and Orange Avenue in Orlando (R 6524). Their plans were to drive to either St. Augustine or Jacksonville to "pick out a place to rob." (R 6529). Mary Jo Winter of Hertz identified appellant at trial, as the person who had rented the car, and the formal written rental forms were introduced (R 6628-6633). These records indicated that the vehicle had been checked

out at 1:51 p.m. on January 4th and returned at 12:41 p.m. on January 5, 1982; the records further indicated that the car had been driven 264 miles (R 4070). Ms. Winter stated that the mileage between Orlando and St. Augustine was 108 miles each way (R 6633).

McDermid testified that appellant drove the car back to the cabinet shop, while he proceeded in his own vehicle (R 6525). Once there, McDermid loaded the car with three guns from the shop, two .45 caliber automatics and a Baretta (R 6526). McDermid further stated that the two .45 caliber handguns were those which appellant had purchased from Jones and that one of them, that purchased in November, belonged to him (R 6526,6555). McDermid also stated that he had placed two pillow cases and two stocking masks into the vehicle (R 6527); he added two jackets and a change of trousers, so as to be able to cover over any clothing which a witness might identify (R 6527-6528).

Appellant drove the vehicle and the two proceeded to the interstate and on to St. Augustine, arriving in mid-afternoon (R 6530). Once there, they proceeded to "case" a number of potential targets, including an A & P supermarket, examining the various means of entry and exit to such store, pacing off how long it would take to and from their car (R 6530); they also tried to determine the location of the cash registers and office area (R 6531). Following such examination, they drove on to a Winn Dixie supermarket, located near a Holiday Inn, in St. Augustine arriving at 3:30 or 3:35 (R 6531). The two closely scrutinized this scene, and the surrounding area including the Holiday Inn, and decided to "do" the Winn Dixie, as opposed to the A & P (R 6531-6532); McDermid testified that they had decided upon the escape route which they would use, involving

the second story breezeway of the Holiday Inn (R 6532). Despite this decision, they also checked out other establishments, and apparently came close to robbing the A & P, before ultimately returning to the Winn Dixie after dinner (R 6533). They arrived at approximately 7:00 p.m. that evening (R 6535). They then proceeded to totally walk the area, constantly checking the crowd situation in the store and looking out for police patrols; they noted that police cars seemed to pass by at half hour intervals (R 6535-6536). At just before 9:00 p.m., McDermid slipped on his jacket, "extra" trousers and a pair of rubber gloves, putting the gun and pillow case into his jacket pockets (R 6537). Appellant similarly "suited up", and, immediately before entering the store, the two slipped the stocking masks over their faces (R 6537-6538): according to McDermid, these masks created "a little bit of difficulty seeing." (6540).

Once inside, McDermid testified that he had proceeded to the cash register nearest the check out, where he had pulled out the gun and the pillow case (R 6539). He ordered a nearby customer at the register to lie on the floor, and directed the cashier to open the register (R 6540). Appellant, meanwhile, had jumped up on the counter by the check-cashing or office area (R 6540). McDermid stated that he heard a noise, as if appellant had fallen, and looked over at him. At such time, he noticed that appellant had his stocking mask raised and that he was peering into the back portion of the store (R 6540). Satisfied nothing was wrong, McDermid directed the cashier once again to open the register (R 6541). According to the witness, he had to keep repeating that the cashier stop looking in his direction and open the register; he stated that when the cashier looked in his direction, she would also have been looking toward the counter where the appellant was standing (R 6542-6543).

In any event, at this time, appellant got down from the counter and approached McDermid saying, "Forget it. Come on. Let's go." (R 6543). When McDermid protested that the drawer was about to be opened, appellant continued to insist that they leave (R 6543). The two ran out without obtaining any money (R 6543). According to McDermid, they ran toward the Holiday Inn, where the car was parked, as fast as they could, McDermid in the lead (R 6543-6545). The witness also stated that they were only in the store for some thirty seconds, and had only planned to stay in for forty-five seconds at the most, "because of 911 and police response." (R 6545). McDermid similarly stated that appellant stayed behind him on the run through the parking lot to "cover his back." (R 6545).

McDermid testified that, as he ran, he heard a man's voice which he knew not to be that of appellant, saying, "No, please don't." (R 6549-6550). He stated that he heard three shots, and that there had been a pause between the first and the last two, which had been close together (R 6550-6551). McDermid did not stop, and kept running, through the Holiday Inn breezeway, down the stairs and to the car; once there, he laid down on the floor (R 6551). Ten or fifteen seconds later, appellant arrived, got into the car, and started it up (R 6552). McDermid testified that, as they drove back to Orlando, appellant said that while he had stood up upon the counter, he had looked back and had seen a man go out the back of the store (R 6554). McDermid stated that appellant had then said that when he [appellant] had come out of the front door of the store he had been looking for this person (R 6654). Appellant then said, "He was playing hero and I shot the son of a bitch." (R 6554). The two proceeded to a nightclub in Casselberry, eventually returning to the shop and unloading the car (R 6557). At such time, it was noted that appellant's

stocking mask was missing (R 6557).

Meanwhile, the body of David Eugene Smith was found lying prone, face down in a pool of blood, by a dumpster in the parking lot, apparently between the Winn Dixie supermarket and the Holiday Inn (R 6364,6376,6424-6425). According to one of the paramedics dispatched to the scene, Smith was lying with one arm over his head, one arm at his side, and with his legs crossed (R 6362). When the paramedics rolled him over in an attempt to hook up a cardiac monitor, they observed several projectiles underneath him (R 6364). Sheriffs Deputies had arrived by this point, and they similarly observed three projectiles within inches of the body, one of them at least partly embedded into the asphalt (R 6377,6421). Additionally, three .45 caliber casings were located within six feet of the body (R 6426). A security guard at the Holiday Inn discovered a stocking mask at the entrance of the second floor breezeway (R 6380,6461).

The autopsy revealed the presence of three entrance and three exit wounds; no projectile was found in the body (R 6386). Doctor Lipovic identified the path of one bullet, stating that it had entered Smith's body near the tip of the right shoulder, turned downward, and exited just above the left nipple of the chest (R 6387-6389). The doctor stated the gun powder residue was present, indicating that the muzzle of the gun had been only "a few inches" away from the victim at the time the shot was fired (R 6388). The doctor noted that this bullet had not penetrated any vital organ (R 6389). Doctor Lipovic stated that the entrance wounds of the second and third bullets were within one inch of each other on the lower back, right side; the exit wounds were even closer in the right breast area (R 6390-6391). The doctor stated that no gunpowder residue was found in regard to these wounds (R 6391).

According to Lipovic, the bullets were discharged at a greater distance from the body in reference to these two wounds (R 6392). It was noted, in reference to the exit wounds of these two shots, that there was slight marginal abrasion, which in itself indicated that there had been an obstruction of some sort, preventing the "clean" exit of bullets two and three (R 6392-6393). The doctor testified that the location of the wounds was consistent with those which one would find if the victim had been shot while lying on the ground (R 6397); he stated, in reference to the first bullet, that the wounds were consistent with those which one would expect to find if the victim had been shot while ducking down or stooping (R 6396). Doctor Lipovic testified that the two shots through the back and chest were fatal, and the cause of death, in that they had perforated the lungs and caused massive internal bleeding (R 6395).

The crime was under investigation for months, before a lead of any sort turned up. THis lead was provided through the search of appellant's residence in Orlando. According to McDermid, his relationship with the appellant began to deteriorate in March of 1982 (R 7066). This, however, did not stop the two from robbing a Publix supermarket in Winter Park on April 7, 1982 (R 7050). Appellant and McDermid were identified by witnesses as the two men, each wearing a stocking mask and each armed with a .45 caliber handgun, who had escaped such store with six thousand dollars (R 6734-6745). Following this robbery, the police obtained a search warrant for appellant's residence, executed same on April 12, 1982 (R 6641).

At that time, the officers seized a number of firearms, including a Star .45 caliber handgun; the serial number of this handgun matched that of the firearm purchased by appellant on November 27, 1981, and

carried by McDermid in St. Augustine (R 6642-6644). Additionally, several boxes of spent shell casings and .45 caliber ammunition were recovered from a closet in appellant's bedroom (R 6652-6653); a similar search of McDermid's residence and automobile turned up, among other things, a stocking mask (R 6560). Analysis by the firearms examiner at the Florida Department of Law Enforcement indicated that, while the spent projectiles found at the scene could have been fired by a .45 caliber Star handgun, it had not been fired from that particular automatic recovered from appellant's residence (R 6670,6677). Comparison of the cartridges found at the scene and those found in the closet of appellant's residence, however, indicated that sixty-nine of the casings found in appellant's closet were fired from the same weapon that discharged the bullets which killed David Smith (R 6683).

SUMMARY OF ARGUMENT

Appellant raises thirteen points on appeal, some burgeoning with subpoints, in relation to his conviction of first degree murder and sentence of death. He raises ten as to conviction, and three as to the sentence. The following summaries relate to each point:

POINT I

Appellant has failed to demonstrate reversible error in regard to the trial court's failure to send written copies of the jury instruction back to the jury for their use in deliberation. This court has previously held that such a matter lies within the sound discretion of the trial court, and, in this case, the jury indicated no need or desire for such written instructions. A copy of the written instructions is included in record, as precedent demands.

POINT II

Appellant has failed to demonstrate reversible error in regard to his amalgamated evidentiary point raising, in his view, five instances of the improper exclusion of defense evidence. Two common themes run through appellant's subpoints. In many instances, appellant failed to preserve his argument, by failing to proffer the allegedly excluded evidence on the record below. In other instances, there was no need to proffer this evidence, because it had already come in through the testimony of other witnesses. The trial court was correct in finding that appellant failed to lay an adequate predicate for the impeachment of a state witness, through reputation evidence, and was likewise correct, under this court's prior precedents, in excluding some of the testimony of an alleged expert on eye-witness identification.

POINT III

Appellant has failed to demonstrate reversible error in regard to the denial of his motion to dismiss the indictment, predicated upon the alleged lack of qualification of one of the grand jurors. The motion was untimely, in that it was made orally immediately before trial by one who had reasonable grounds to believe that he would be indicted. Additionally, appellant completely failed to demonstrate any good cause for the alleged lack of qualification, in that none of the statutory criteria for disqualification applied.

POINT IV

Appellant has failed to demonstrate reversible error in regard to the denial of his motion to dismiss, predicated upon pre-arrest delay. Although almost two years passed between the incident and appellant's indictment, the record is clear that appellant suffered no actual prejudice attributable to any impermissible delay. The state, at the earliest, could not had brought a prosecution until after the co-defendant in this case implicated appellant, some eleven months after the incident. There has been absolutely no showing of intentional or tactical delay by the state, and it would seem that appellant was unavailable for any earlier trial, by virtue of pending prosecutions in a number of different jurisdictions throughout the state. Appellant's claims of prejudice are based upon total speculation, and are primarily related to witnesses whose memory cannot be said to have faded, in that they knew nothing to begin with.

POINT V

Appellant has failed to demonstrate reversible error in regard to the trial court's denial of his motion in limine to exclude similar

fact evidence, or, as a result of the admission of such evidence. The evidence, relating to two other armed robberies committed by appellant and his co-defendant by means of an identical modus operandi was admissible to show identity. When one considers the common points shared by all the offenses, one with another, it is clear that a sufficiently unique pattern of criminal activity existed. The only dissimilarities between the offenses can be explained by changes in circumstance or the arising of an unanticipated event. The evidence did not become a feature of the trial.

POINT VI

Appellant has failed to demonstrate reversible error in regard to the trial court's denial of his motion to suppress or exclude identification testimony by witness Supinger. There was absolutely no showing of any suggestiveness employed by the police in regard to a photo-lineup shown the witness, and the prosecutor's unintentional failure to secure the presence of appellant's counsel at such lineup was not prejudicial. Further, appellant cannot himself engineer a confrontation with a potential identification witness and then cry foul; appellant, conducting his own defense, asked the witness at a deposition whether or not she recognized him. At such time, he knew full well that she had just come from the photo-lineup. The witness' in-court identification of appellant meets the requisite indicia for reliability, and appellant was afforded a full opportunity to cross-examine her as to the basis for her identification. The matter was properly one for the jury to weigh in light of the absence of police misconduct.

POINT VII

Appellant has failed to demonstrate reversible error in regard to

two trial court rulings which he claims allowed for the instroduction of impermissible hearsay. In both instances, appellant's "hearsay" objection is particularly unconvincing, because the declarants of the alleged hearsay statements were not only available for trial, but were witnesses who could, and often did, testify as to the matters at issue. Appellant was never denied an opportunity to confront or examine a witness and, to the extent impermissible hearsay was admitted, it can safely be said that it had not appreciable effect on the result.

POINT VIII

Appellant has failed to demonstrate reversible error in regard to the prosecutor's cross-examination and impeachment of defense witness Reynolds. Appellee contends that questioning the witness as to a pending charge, a matter brought out by the defense on direct, was proper, in that the existence of such charge, filed by the same prosecutor as was prosecuting appellant, was relevant as to bias. The state contends that, to the extent that the matter was given too much attention, appellant must bear some of the blame, in that his objection was not timely, and in that he explored the matter himself on re-direct. In any event, because two other witnesses offered the same testimony, reversible error has not been demonstrated.

POINT IX

Appellant has failed to demonstrate reversible error in regard to the denial of his motion to suppress evidence. His attacks upon the search warrant are completely unfounded, in that the warrant was issued upon a showing of probable cause and was not overly broad, so as to allow a general search. The items seized from appellant's residence by the Orange County officials were properly seized as within the scopy of the

warrant or as in plain view at the time of the valid execution of such warrant. No purpose would be served by suppression of the items.

POINT X

Appellant has failed to demonstrate reversible error in regard to the trial court's alleged error in refusing to allow him to state the grounds for an objection. The grounds for such an objection are apparent from examination of those objections preceding it, and appellant has suffered no irretrievable prejudice. This point, such as it is, can be reviewed by this court on the merits, if such is this court's desire.

POINT XI

Appellant has failed to demonstrate any basis for vacation of his sentence of death, due to the introduction of allegedly improper character evidence at sentencing. Appellant failed to interpose a timely objection to the testimony in question, on the grounds which he now asserts on appeal. The evidence played no appreciable part between either the jury's advisory verdict or the ultimate sentence imposed, in that other valid evidence supports the finding of the aggravating circumstance at issue, and the death sentence itself is supported by valid aggravating factors, in the absence of anything in mitigation.

POINT XII

Appellant has failed to demonstrate any invalidity in the instant sentence of death, which is supported by the finding of the five aggravating circumstances and no mitigating, statutory or otherwise. At most, one impermissible doubling of aggravating circumstances can be said to have occurred, a factor which had no effect on the weighing process. The trial court properly weighed the evidence in mitigation, such as it was, and found it wanting. Appellant's contentions that the

trial court gave undue weight to the jury's recommendation or that the prosecutor's argument, to which no objection was imposed, tainted such recommendation, are completely without merit. Death is the appropriate sentence for one, with appellant's prior record, who murders another, under the circumstances in which David Smith, the victim in this case, met his death.

POINT XIII

Appellant has failed to demonstrate any reason why this court, after fourteen years of litigation regarding the constitutionality of Florida's capital sentencing statute, should suddenly reverse itself, inasmuch as he simply re-presents arguments which he knows this court has rejected before.

POINT I

THE TRIAL COURT'S DENIAL OF ANY RE-
QUEST THAT WRITTEN INSTRUCTIONS BE
SENT BACK TO THE JURY WAS NOT ERROR

A charge conference was held when court convened on November 13, 1984, and, at such conference, appellant personally waived all lesser included offenses of first degree murder (R 8080-8085). Following closing arguments, Judge Weinberg charged the jury (R 8235-8246). A typed copy of the jury instructions, as given, is included in the record on appeal (R 4632-4650). As the jury retired to deliberate, the following exchange took place:

> MR. ROGERS: Your Honor, the copy of these instructions --
>
> THE COURT: You did not give a copy of the instructions to the jury. It is allowable, but we don't do that.
>
> MR. ROGERS: I thought it was mandatory.
>
> THE COURT: Not mandatory under the criminal rule, they do not receive a copy of the jury instructions.
>
> All right, is there anything now, all your objections are renewed for the record. (R 8246-7).

No further objection was made, and the point was not included in appellant's motion for new trial (R 4546-4550).

Appellant contends on appeal that reversible error has occurred, noting the language of Florida Rule of Criminal Procedure 3.390(b) which provides, "Every charge to a jury shall be orally delivered, and charges in capital cases shall also be in writing." It is appellant's contention that the above rule mandates not only that such instructions be in writing, but that such written instructions be sent to the jury. Appellee disagrees.

This court had occasion to reach this precise issue in Delap v. State, 440 So.2d 1242 (Fla. 1983). In such capital case, the trial judge, as here, had denied a defense request that written instructions be sent back with the jury during their deliberations; the court allowed, however, that such would

be considered if the jury returned with a question. This court held,

> Florida Rule of Criminal Procedure 3.400 gives the trial court discretion in determining whether the instructions should be sent to the jury room when the jury retires for deliberation. Defendant argues that the requirement of delivery to the jury so that they could have the written instructions during deliberations was a mandatory duty. The rule makes it clear that it is in the sound discretion of the trial court to determine whether written instructions should be carried in their written form by the jury to the jury room during its deliberations. Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970). Defendant has failed to show an abuse of discretion. Delap at 1254.

This case would seem indistinguishable from Delap. Appellant has shown no reason, other than his construction of the rule, why the jury in this case had to have copies of the written instructions. It would appear, from the copy in the record that, as in Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970), the typed instructions had a great deal of cross-outs and interlineations. It must be noted that the judge had crossed out all of those instructions dealing with lesser included offenses due to appellant's waiver thereof (R 4633, 4636-8), as well as those instructions dealing with irrelevant subjects such as insanity (R 4639). Certainly, to have sent these written instructions back to the jury would have exposed them to a number of confusing and irrelevant matters. Matire, like Delap, emphasizes that whether or not to send written instructions back to the jury is a matter within the court's discretion, and the court in Matire found such conclusion compatable with the holdings of Coggins v. State, 101 So.2d 400 (Fla. 3d DCA 1958) and Kimmons v. State, 178 So.2d 608 (Fla. 1st DCA 1965), such latter cases cited by appellant sub judice. Compare also Brown v. State, 12 So.2d 292 (Fla. 1943). There is absolutely no indication in this case that the jury was at all confused or hampered due to the lack of written instructions, and it should be noted that no question or inquiry was sent to the judge.

The state maintains that the actions of the trial court comply with Rules 3.390 and 3.400. The jury instructions delivered were reduced to writing and are contained in the record on appeal. See McKinney v. State, 74 Fla. 25, 76 So. 333 (1917). Appellee is respectfully unable to concur with the contention in appellant's initial brief to the effect that the typed jury instructions in the record do not jibe with those delivered in open court (Brief of Appellant at 22). The only difference between the two, aside from the paragraph structure, would seem to be the portion in which Judge Weinberg specifically described the verdict form (R 8244, 4649). In all other, and relevant, respects, the written instructions conform to those orally delivered, and transcribed, and appellant has failed to demonstrate any abuse of discretion in the trial court's actions. The drastic and expensive step of retrial is unnecessary, and the instant conviction should be affirmed.

POINT II

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR IN REGARD TO ANY OF THE FIVE EVIDENTIARY RULINGS ALLEGED TO HAVE IMPROPERLY RESTRICTED DEFENSE EVIDENCE

In this point, appellant has raised a melange of evidentiary rulings which he now contends constitute reversible error. In many of these sub-points, the allegedly excluded evidence is not included in the record on appeal, thus making review impossible. None of these evidentiary rulings complained of were raised as grounds for new trial in appellant's post-trial motion for new trial (R 4546-4550), and it would appear that in a number of instances he acquiesced in the trial court's ruling. Each sub-point will now be addressed in the order set out in appellant's initial brief.

A. THE TRIAL COURT'S EXCLUSION OF TESTIMONY THROUGH WITNESS JOHNSTON ALLEGEDLY PERTAINING TO THE REPUTATION OF THOMAS McDERMID WAS NOT ERROR

As appellant notes in his brief, he called Albert Johnston as a witness during his case-in-chief (R 7542-7577). Johnston had been a former business partner of appellant's at the Countertop Shop (R 7443). He testified that he had met Thomas McDermid in May or June of 1981, when the latter had come to work for appellant at the shop (R 7544, 7548). It does not appear that Johnston knew McDermid for more than three or four months at the outside, and they apparently parted company on bad terms as a result of an incident on September 1, 1981 (R 7548).

During direct examination, the following exchange took place:

> Q: Okay. Now did you have a means to know the reputation for the truth and veracity of Thomas McDermid in his community?
>
> A: Except what I've heard, you know, from people. Personally I didn't, because I didn't associate with him anymore than I had to.

Q: What was that reputation?

MR. WHITEMAN: Your Honor, I'm going to object as to the no proper predicate and I'm not sure that testimony is admissible, anyway.

THE COURT: Well, there is no predicate for it, so objection be sustained at this time without prejudice to you to try and develop a predicate.

BY MR. ROGERS:

Q: Mr. Johnston, during the period, the time period you knew Mr. McDermid, did you know of his reputation for truth and veracity in the community?

MR. WHITEMAN: Your Honor, I'd raise the same objection. There has not been a proper predicate laid to ask that concluding question.

THE COURT: Agreed. Objection be sustained.

BY MR. ROGERS:

Q: How long did you know Thomas Joseph McDermid?

A: Well, the first time I ever saw him was either May or June of '81.

Q: Okay. And when was the last time you really had any communications with him? Would that have been in September?

A: September the 1st.

Q: Okay.

THE COURT: What year?

THE WITNESS: '81.

BY MR. ROGERS:

Q: 1981 -- if -- well, no. (R 7547-8).

At this point, the judge ordered a break in proceedings, suggesting to appellant that he confer with his co-counsel (R 7548-9). When proceedings reconvened, appellant continued examining Johnston, but asked him no further questions as to his knowledge of McDermid's reputation (R 7550-7562). No proffer was made

of any excluded testimony, and this point was not raised in appellant's motion for new trial (R 4546-4550).

Appellant contends on appeal that his conviction of first degree murder must be reversed because he was prevented from bringing out evidence as to former co-defendant McDermid's alleged reputation for lack of truthfulness. Initially, it must be noted that there is no indication from this record that this witness could or would have come forward with testimony to such effect. Appellant never proffered the allegedly excluded evidence, and, as a result, the preservation of this point is highly doubtful. See, Hitchcock v. State, 413 So.2d 741 (Fla. 1982); Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984); A.McD. v. State, 422 So.2d 336 (Fla. 3d DCA 1982).

Additionally, it is not clear from the record whether or not appellant abandoned this line of inquiry himself. The state did not object to all reputation evidence regarding McDermid per se; it simply insisted that appellant lay a proper predicate before such could be admitted. It is entirely possible that appellant, discouraged with Johnston's lack of familiarity with McDermid, regarded the proposed impeachment as fruitless.

In any event, it is clear that the best evidence of a witness's reputation is obtained from his neighbors or people in the community in which he resides. See, Hinson v. State, 59 Fla. 20, 52 So. 194 (1910); Stanley v. State, 93 Fla. 372, 112 So. 73 (1927). Although it has been recognized that exceptions can be made, and persons who know the witness from the workplace can similarly testify, "workplace" witnesses are only allowed after a showing has been made not only that other community witnesses are unavailable, but that such witnesses in the workplace have intimate knowledge of the subject or his reputation. See, Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937), "community" held to include "the place in the same city where the defendant worked day after day and those who came in daily contact with her for several years"; Florida East

Coast Railway Co. v. Hunt, 322 So.2d 68 (Fla. 3d DCA 1975). Thus, courts have reversed convictions in cases where witnesses without sufficient "credentials" have been allowed to testify as to another's reputation for truth or veracity. Compare, Stripling v. State, 349 So.2d 187 (Fla. 3d DCA 1977); Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979).

In this case, there was no showing that Johnston and McDermid were residents of the same community or that others more familiar with McDermid's reputation were unavailable. At best, Johnston seems to have had a passing acquaintance with McDermid, not wishing to "associate with him anymore than [he] had to." (R 7547). His initial answer to the predicate question seemed to deny any personal knowledge of McDermid's reputation (R 7547). Appellee respectfully contends that the state's objections were well taken, in that appellant never demonstrated that Johnston had a substantial knowledge of McDermid's reputation or that other witnesses with greater knowledge were not available. Additionally, even if any error could be said to have been committed in this context, it must be regarded as harmless. Cf., Parker v. State, 458 So.2d 750 (Fla. 1984). The jury was well aware of appellant's views as to the credibility of Thomas McDermid. McDermid had been called by a witness by both the state and defense, and his credibility and biases were fully aired before the jury (R 6569-6598; 7010-7063). Additionally, the defense called several of McDermid's former cellmates to testify as to inconsistent statements he had allegedly given regarding appellant's lack of culpability (R 7224-7242; 7242-7273; 7273-7290). It is inconceivable that the "loss" of this testimony had any effect on the verdict sub judice, and the instant conviction should be affirmed.

B. THE ALLEGED EXCLUSION FROM EVIDENCE OF MEDICAL RECORDS OF A STATE WITNESS WAS NOT ERROR

As appellant notes in his brief, one of the primary thrusts of the defense

offered at trial was that Thomas McDermid was a liar, having boasted to his cellmates that appellant, although arrested as his accomplice, had not been involved (R 7224-7242; 7242-7273; 7273-7290). During its case in rebuttal, the state called James Lancia as a witness (R 8001-8027). Lancia, a former cellmate of appellant, testified that while the two had been incarcerated in the Seminole County Jail, appellant, as part of his defense on charges pending there, had persuaded him to perjure himself; Lancia had testified untruthfully, at appellant's request, that McDermid had made statements to the effect that appellant had not been involved in the charges in question (R 8002). On cross-examination, the witness denied having a history of paranoid schizophrenia or being on medication for such condition, although, on rebuttal, he admitted suffering from depression while being incarcerated in Seminole County (R 8014, 8021). Lancia also acknowledged having been on medication for depression at the time that perjured testimony was made (R 8020-1).

On surrebuttal, appellant called Carol Guemple, medical supervisor at the Seminole County Sheriff's Department and Correctional Division (R 8049-8061); appellant had earlier attempted to call her, apparently as some form of pre-emptive impeachment, but, following objection, she had been withdrawn as a witness (R 7110-7117). Prior to her testimony, the state had objected to the defense seeking to introduce "as a whole" an evidence package of Lancia's medical records, noting that, apparently, much of the medical material was not relevant to Lancia's mental condition at any relevant time (R 8038-9); the state also noted the witness's lack of medical expertise and argued against her being allowed to explain any medical diagnosis (R 8038). Judge Weinberg noted that the matter did not simply seem to be one of impeachment, in that Lancia had admitted being treated for depression, and the judge further noted the limited scope of surrebuttal (R 8041-2). He then ruled that the nurse would be able to testify as to her observations of appellant, as well as any record

which she had made herself (R 8043-4). The judge indicated that he was not inclined to allow the entire "package" of records into evidence, and appellant stated that he and the prosecutor could "settle" as to how much would be used (R 8044). The following exchange then took place:

> THE COURT: Let's see. Apparently, the records are a real problem. The records are not admissible, anyway, as such. It's not a business record.
> They don't count as that, in this particular case. So, what we'll do is put the witness on the stand and the state will object and I'll rule on the objection. That would be the best way.
>
> MR. ROGERS: I'm not trying to get the records admissible. I want to use them, mark them for identification and use the nurse to testify from the records. (emphasis supplied) (R 8045).

At this point in time, proceedings broke, so as to allow appellant to talk with the prospective witness, and when the parties returned, the state objected to the introduction of a letter written by Lancia; such objection was overruled (R 8046-8). After further discussion, Miss Guemple was called to the stand, and she testified as to her observations and treatment of Lancia (R 8080). She specifically testified concerning the contents of two notes or letters written by Lancia, which were admitted into evidence (R 8052-56; Defense Exhibit # 51 R 4386-8). She also confirmed Lancia's condition and testified as to the medication prescribed (R 8050-8055). At the close of direct examination, the following occurred:

> MR. ROGERS: Your Honor, I'd move to admit this into evidence at this time.
>
> THE COURT: Let's see.
>
> MR. ROGERS: This is the one we separated.
>
> THE COURT: Any objection?
>
> MR. WHITEMAN: Yes, Your Honor. She's testified

from these documents, and again, my objection is, we don't write down a witness's testimony.

THE COURT: Objection sustained except as to the letter, I think.

MR. ROGERS: Okay.

MR. WHITEMAN: The letter and the note.

MR. ROGERS: The note was also written by Mr. Lancia.

THE COURT: The note and the letter will be received. (R 8056).

Appellant contends on appeal that vital evidence has been excluded and that reversal must be ordered, given the fact that the harmful nature of the exclusion of this evidence is obvious. (Brief of Appellant at 28). Appellee must initially ask, "What evidence? What exclusion?" The record on appeal does not contain any of the allegedly excluded medical record. Inasmuch as reversal cannot be predicated upon speculation, Sullivan v. State, 303 So.2d 632 (Fla. 1974), it is obvious that appellant has failed to sustain his burden in this case.

It is also obvious that the jury was adequately apprised of Lancia's mental condition. As noted, the witness himself acknowledged his depression and treatment for such. Miss Guemple testified as to her observations of Lancia, and those notes and letters written by him were admitted. Given the fact that, at one point, appellant stated that he apparently wished to use the record simply as a way of refreshing the witness's recollection, and given the rather ambiguous tender of evidence and lack of continued objection, appellant has hardly demonstrated that he was denied the use of vitally needed testimony; as with all of these other evidentiary sub-points, this issue was not raised in appellant's motion for new trial (R 4546-4550). Additionally, given the fact that the testimony would not seem to have been contrary to Lancia's trial testimony, the extent to which appellant was entitled to bring in extrinsic

evidence of impeachment, through another witness, would seem highly debatable. See, Patterson v. State, 25 So.2d 713 (Fla. 1946); Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981); Erp v. Carroll, 438 So.2d 31 (Fla. 5th DCA 1983). In conclusion, the situation would seem analogous to that before this court in Sims v. State, 444 So.2d 922 (Fla. 1983), wherein this court upheld the exclusion of documents corroborative of a defense witness's testimony, finding such to be superfluous to the witness's testimony and not relevant to any material issue of fact. Appellant has failed to demonstrate reversible error, and the instant conviction should be affirmed.

C. THE EXCLUSION FROM EVIDENCE OF THE TESTIMONY OF GARY BOYNTON, APPELLANT'S FORMER ATTORNEY, WAS NOT ERROR

Appellant's former co-defendant, Thomas McDermid, was called as a witness by both the state and defense. During his direct examination by appellant, the witness testified extensively as to a deposition which he gave in Orange County on January 14, 1983, and appellant read from such deposition in questioning McDermid as to his motivation for or explanation of certain statements made at the time (R 7022-7030). McDermid acknowledged that at a subsequent deposition on or about February 11, 1983, he had stated that if appellant brought up anyone's name that he [McDermid] did not like, he would implicate other members of appellant's family (R 7038-9). On cross-examination, McDermid described how his formally close relationship with appellant had soured (R 7071), stating that, following his arrest, he had become angry at what he perceived to be appellant's attempts to implicate members of the McDermid family; accordingly, he had threatened to implicate other members of the Rogers family (R 7072-4). McDermid stated that such was the reason for his conduct at the 1983 deposition (R 7074).

The defense sought to call Gary Boynton as a witness during its case-in-chief. Boynton had represented appellant in some of his Orlando cases (R 7449).

Boynton, as evidenced by the proffer, was prepared to testify that McDermid had threatened to implicate members of appellant's family at one of the depositions held in Orlando (R 7449); the witness could also testify as to various allegedly unfounded accusations McDermid had made against appellant, apparently in retaliation for Rogers' attempt to implicate McDermid's brother (R 7450-1). The state objected to Boynton's testimony, on the grounds that such was entirely cumulative and not in the nature of impeachment (R 7439-7440); appellant's theory of admissibility was that Boynton's testimony would demonstrate McDermid's bias (R 7440). Appellant acknowledged that Boynton had had no contact with McDermid other than at the deposition and was not present when any of the "deals" were arranged (R 7440, 7443). Boynton himself volunteered that he would be able to testify as to McDermid's demeanor during the deposition (R 7444). Judge Weinberg found the evidence inadmissible, largely on the grounds that it was cumulative and repetitive (R 7448, 7454, 7455).

Appellant contends on appeal that this ruling constitutes reversible error, in that Boynton would have offered testimony of great relevance, noting that such witness was a member of the Florida Bar. Appellant does, however, note that the testimony would have been "somewhat" cumulative. Appellee joins appellant in this latter assessment, and would go further; Boynton's testimony would have been 100% cumulative. Given a trial court's well-recognized discretion in the admission of evidence, see, Welty v. State, 402 So.2d 1159 (Fla. 1981), appellee contends that no abuse of discretion has been demonstrated. McDermid, for what it was worth, had already testified as to his conduct at the earlier deposition and had acknowledged "threatening" appellant. The jury was already well aware of the past and present hostility between appellant and McDermid, and the latter had expressly acknowledged animosity toward appellant for any attempt by Rogers to implicate William McDermid (R 7074). Because the jury had already heard this testimony through other witnesses, appellee cannot

see the harm in excluding simply cumulative testimony, see, Palmes v. State, 397 So.2d 648 (Fla. 1981), and Boynton's subjective assessment that McDermid seemed "nasty" during the depositions hardly seem of great relevance. See also, Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The instant conviction should be affirmed.

D. THE TRIAL COURT'S EXCLUSION FROM EVIDENCE OF A TYPED BOLO WAS NOT ERROR

As appellant notes in his brief, the defense called Sergeant Nicklo, a state witness who had previously testified, as one of its witnesses during its case-in-chief (R 6956-6982). Nicklo testified that, on the night of the murder, a description had been prepared of the two persons suspected of being involved in the incident; such description was apparently broadcast as part of a BOLO (R 6957). When asked to divulge the BOLO description, Nicklo responded,

> One subject was a white male five foot seven about twenty-seven to thirty years old, dark brown hair, short mustache, buck teeth, approximately 180 pounds. Clothing, light-colored, quilted down type jacket and jeans.
> The second subject was about five eight, twenty-seven to thirty years old, brown hair, 180 pounds, muscular build, clothes, blue jean jacket, brown flannel shirt, jeans and a white smooth belt. (R 6957).

Nicklo was then shown defendant's composite Exhibit AA, which he identified as two documents, one a "refined" copy of the description and the other a copy of his report (R 6959-60). He subsequently read from the contents of the revised BOLO,

> One white male mid twenties, approximately one eighty pounds, five foot seven, five foot eight, brown hair, short, medium cut, outstanding features, noticeable buck teeth, clothes, light bluish quilted ski-type down jacket, boots, work type with laces, and with a semi-automatic pistol, caliber unknown, blue steel.
> White male age mid twenties, stocky build, solid muscular, five eight, five nine, weight unknown, clothes, blue jean jacket with outside pockets, brown flannel shirt, belt, white and smooth and with a .45 caliber automatic, make Star or Llama brand, blue steel. (R 6972).

No attempt was made to introduce Defense Composite Exhibit AA during the testimony of witness Nicklo, and it was only at a "housekeeping" session two days later that appellant sought to have the exhibit introduced (R 7373). At such time, the state objected, noting that the matter had been covered by live testimony (R 7373). Judge Weinberg sustained the objection (R 7373).

Appellant contends that the exclusion of this evidence constitutes reversible error, in that the crux of the defense involved identification. Initially, it must be noted, that as in Point II (A) and (B) supra, the record does not contain the excluded evidence. Inasmuch as appellant has failed to sufficiently proffer this evidence, so as to have it included in the record on appeal, he has obviously failed to preserve this point, demonstrate the evidence's admissibility, or show that the trial court abused its discretion. See, Hitchcock v. State, supra; Jacobs, supra; Sullivan, supra.

This point on appeal basically presents the question, as best the state can determine, if a witness testifies as to the contents of a document, must the document itself also be introduced? It must be noted that the state never sought to suggest that Nicklo's testimony as to the BOLO was inaccurate. As such, it would seem that the state waived any objection it might have had as to the best evidence rule, section 90.953 Florida Statutes (1981), and that to have allowed both the document and oral testimony would simply have resulted in the bolstering of Nicklo on this subject. Cf., Williams v. State, 386 So.2d 538 (Fla. 1980). Parenthetically, inasmuch as the jury had already been apprised of the contents of the BOLO through Nicklo's testimony, it would seem that any error in excluding this piece of documentary evidence would be harmless. See, Palmes v. State, supra, exclusion of evidence harmless where substantially the same matters presented to the jury through testimony of same or other witnesses; Steinhorst, supra. As in Point II (B), this point would also seem to resemble the situation in Sims v. State, supra, wherein this court recognized as meritless

a contention of error regarding the exclusion from evidence of documents "corroborative of a defense witness's testimony", such documents found to be superfluous and irrelevant to any material issue of fact. Appellant has failed to demonstrate reversible error, and the instant conviction should be affirmed.

E. TRIAL COURT'S EXCLUSION OF CERTAIN PORTIONS OF THE TESTIMONY OF WITNESS BRIGHAM WAS NOT ERROR

On October 16, 1984, the state filed a motion in limine to preclude the defense from bringing out the testimony of John Brigham, an "expert" on eyewitness identification, citing, inter alia, this court's decision of Johnson v. State, 393 So.2d 1069 (Fla. 1981); appellant filed a response to such motion on October 25, 1984 (R 3798-3804). On October 26, 1984, Judge Weinberg ruled that the motion was granted in part and denied in part, holding,

> The witness shall not be permitted to testify as to his general conclusions and observations, including his statistical research on the alleged validity or non-validity of eyewitness identification. However, the witness is not excluding (sic) from testimony (sic) that directly impacts on the conduct of any witness, including use of photo-lineups and lineups that might impact on a particular witness. (R 3811).

During trial, on November 9, 1984, appellant proffered the testimony of Dr. Brigham, a social psychologist (R 7700-7706). Dr. Brigham, after having been read a hypothetical question approximately one and one half pages in length, offered his views as to the factors which could interfere with a person's ability to make an accurate identification (R 7702-5). Following such proffer, the state renewed its objection to the testimony of Dr. Brigham in toto (R 7706-7). Judge Weinberg ruled that he would allow the witness to answer hypothetical questions, but that he would not be allowed to testify as to how much weight should be given an individual witness's testimony (R 7707-8). Following such ruling, appellant then called Boynton to the stand and questioned him as suggested. (R 7715-7724).

On appeal, appellant contends once again that reversible error resulted from the alleged exclusion of some of the testimony of Dr. Boynton; such excluded testimony is alleged to relate to "specific" hypothetical questions. Appellant notes that, pursuant to this court's decision in Johnson, all of the expert testimony on this subject could have been excluded, but argues that, because some was admitted, the exclusion of any is reversible; this would apparently seem to be an interesting variation on the theme, "half a loaf is better than none." As with the number of other sub-points in this point, appellee must initially question the existence of any excluded evidence or lingering dissatisfaction on the part of appellant, following the ruling of Judge Weinberg. To appellee, the evidence admitted after the proffer does not seem materially different from that offered earlier; Boynton was certainly allowed to apprise the jury of his theories regarding the factors which would influence a witness's identification testimony. The jury was able to utilize this testimony in evaluating that of any of the other witnesses fitting the "profiles" described.

Additionally, given this court's prior holdings in Johnson v. State, supra, and the more recent Johnson v. State, 438 So.2d 774 (Fla. 1983), it would seem that appellant received more than that to which he was entitled. This court has noted the discretion possessed by a trial judge in regard to the range of subjects about which an expert can testify and has upheld exclusion of expert testimony on the subject of eyewitness identification. Thus, it would not have been an abuse of discretion for Judge Weinberg to have granted the state's motion in limine completely and to have barred Dr. Brigham from testifying at all. As it was, however, the judge allowed Brigham to testify as to his field, and appellee does not concur with appellant as to the "skewed and confusing" nature of Brigham's testimony. Appellant has failed to demonstrate an abuse of discretion or reversible error, and the instant conviction should be affirmed.

POINT III

DENIAL OF APPELLANT'S MOTION TO DISMISS THE INDICTMENT, DUE TO THE ALLEGED LACK OF QUALIFICATION OF ONE OF THE GRAND JURORS, WAS NOT ERROR

The indictment in this cause was returned on December 19, 1983 and subsequently amended, due to a spelling error, on February 22, 1984 (R 1, 41). A plea of not guilty was entered on such date (R 4690). On May 10, 1984, appellant filed a motion to compel the state to furnish the names, addresses and telephone numbers of all grand jurors, as well as for leave to depose the grand jurors; the grounds for such motion were the defense desired to learn of the testimony presented to the grand jury by Thomas McDermid, so as to be able to utilize such testimony for impeachment purposes at trial (R 758-760). At the hearing of June 15, 1984, Judge Weinberg denied the motion, noting that no court reporter had transcribed the testimony before the grand jury and that, hence, appellant would simply be seeking to recreate McDermid's testimony through the recollection of eighteen different witnesses (R 4787-4791; 1776-7).

During a hearing on October 25, 1984, appellant expressed a desire for the names of the grand jurors, so that he could assure that none of the trial jurors were related to those who had served earlier (R 5755-5758). Judge Weinberg granted such request (R 3810). Subsequently, on October 30, 1984, after the jury for the trial had been selected but not yet sworn, the court heard an *ore tenus* motion to dismiss the indictment, apparently on the grounds that one of the grand jurors, Robert Supinger, was the father-in-law of one of the cashiers at Winn-Dixie, Ketsey Day Supinger, who would be a witness (R 6147-6156). Inasmuch as, to appellee's knowledge, no formal motion to dismiss was filed, one must glean appellant's argument from the transcript of the hearing (R 6147-6156). It appears that the defense contended that Robert Supinger had, additionally,

been in contact with his daughter-in-law about the case, although it must be noted that at the time of the incident in January of 1982, Ketsey Day had not yet married into the family (R 6150-2).

The state objected to the belated challenge, noting that the grand jury had already been sworn and impaneled (R 6153-4). Judge Weinberg noted that Miss Supinger was not alleged to be a victim of the offense, nor in fact was she, and denied the motion (R 6155-6). No attempt was made to proffer the testimony of any witness, but, as appellant notes, Robert Supinger was called as a witness during the defense portion of the trial. At such time, Supinger acknowledged that he had in fact served on the grand jury and also advised that he had sent his daughter-in-law a newsclipping about the offense (R 7169-7173). He stated that that was the extent of any contact between them as to the incident, never talking with his daughter-in-law about the case (R 7172).

Appellant contends on appeal that his motion to dismiss should have been granted, in that it was timely and in that Ketsey Day Supinger was "the person alleged to be injured by the offense charged." Appellee disagrees on both counts. Three statutes would seem to have applicability sub judice. Section 905.04 Florida Statutes (1983) sets out the grounds for challenge of individual grand jurors; such grounds include:

> (a) Does not have the qualifications required by law;
>
> (b) Has a state of mind that will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging;
>
> (c) Is related by blood or marriage within the third degree to the defendant, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was initiated.

Section 905.05 Florida Statutes (1981) provides that a challenge or objection to the grand jury may not be made after it has been impaneled and sworn, but that such section shall not apply

to a person who did not know or have reasonable ground to believe, at the time the grand jury was impaneled or sworn, that cases in which he was or might be involved would be investigated by the grand jury.

Lastly, section 905.075 Florida Statutes (1981) provides that a grand juror may be excused from deliberating in any case in which the party being investigated is related by blood or marriage to the grand juror. The section expressly provides,

> The failure of a grand juror to excuse himself or be relieved from participation in the investigation and voting shall not invalidate an indictment found or returned against the relative.

Appellant contends that his motion to dismiss was timely because he had only recently come into possession of the names of the grand jurors. Yet, section 905.05 says nothing about excusing untimely challenges on the basis that the defendant only recently came into possession of facts supporting his motion. Rather, the section only excuses the untimely challenges of those who, at the time of impanelment, did not know that they were subject to indictment. Appellant has done nothing to demonstrate that he falls into such class. Given his allegations of pre-arrest delay, see Point IV, infra, it is doubtful that his indictment in this cause came as a complete surprise, and indeed, from certain facts adduced at the hearing on the above motion, it would seem that it did not. During the testimony on appellant's pre-trial motion to dismiss, the attorney assisting appellant in representation on his Seminole County charges in April of 1983 stated that it was clear in his mind that appellant was going to be prosecuted for an offense in St. Johns County; according to Attorney West, appellant knew of McDermid's statements implicating him and was engaged in obtaining information relative to the St. Augustine offense and the plea bargain which McDermid had entered into, for use as impeachment at the Seminole County trial (R 4938-9; 1905). Thus, it would certainly seem that appellant had

reasonable grounds to know of his impending indictment, and could have brought this motion in a timely manner. Further, it would appear that appellant was physically present in St. Johns County at least part of the time between his arraignment on the initial indictment, on January 6, 1984, and the return of the amended indictment on February 22, 1984, and that, as such, he could have sought to enquire into the grand jury proceeding at such time (R 5-13, 8422-8425, 4683-4690). This court has emphasized the need for timely challenges in these matters, and has not waived such requirement without good cause. Compare, Bundy v. State, 455 So.2d 330 (Fla. 1984); Seay v. State, 286 So.2d 532 (Fla. 1973). No such good cause has been shown sub judice.

Further, the state would contend that the manner in which appellant "prosecuted" this motion resembles the situation before this court in Francois v. State, 407 So.2d 885 (Fla. 1981). In such case, this court found that although the defendant had filed a timely motion to dismiss on the basis of grand jury improprieties, he had failed to diligently pursue the matter and had invited the court to rule against him. Here, appellant waited until October 25, 1984, less than a week before trial and more than ten months after the initial indictment, to request the names of the grand jurors for any purpose other than depositions; appellant's initial desire to learn their identity had related only to his desire to impeach McDermid's trial testimony. After having received the jury list, appellant did not bother to file a written motion to dismiss, and presented no sworn testimony, such as that of Supinger, to support his claims. It must be noted that there were sixteen grand jurors, and it is entirely possible that Supinger was not one of those voting to return the indictment (R 8397). In Oglesby v. State, 83 Fla. 132, 90 So. 825 (1922), this court found an allegation of grand juror impropriety too unspecific, wherein although it was alleged that the grand juror was the son-in-law of the victim, it was never alleged that such grand juror had participated in returning the indictment. As

in Francois, appellant's counsel simply gave Judge Weinberg no good reason to rule in his favor; appellant's participation in securing a trial jury immediately before arguing this motion hardly indicates a real expectation that dismissal would be granted.

Finally, to the extent that the merits must be considered, appellant has cited to this court no precedent in which the relief he seeks, i.e. dismissal, was awarded under circumstances comparable to that sub judice. In contrast to the situation in Porter v. State, 400 So.2d 5 (Fla. 1981), appellant never alleged that Supinger was unable to be impartial, an allegation which would have necessitated a finding of fact. Rather, he alleged only that the grand juror was related by blood or marriage to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was initiated. As the judge correctly held below, the only person alleged to be injured by the offense charged was David Eugene Smith; Smith was no relative of Supinger and Smith was alleged to have been murdered (R 41).

Similarly, appellant did nothing to demonstrate that the instant prosecution had been initiated on the complaint of Ketsey Day Supinger, a difficult proposition, given the fact that, as to be argued infra, Mrs. Supinger made no positive identification of the persons at the Winn-Dixie robbery until immediately before trial, and was in Japan throughout the entire investigation of the case. As appellant himself notes, citing State v. Demetree, 213 So.2d 709, 713 (Fla. 1968), "[I]t is well settled that the burden is on the accused to plead and prove, with the greatest accuracy and precision, the irregularities in the selection of the grand jurors which are claimed to have vitiated an indictment." (emphasis supplied). Appellant has woefully failed to carry his burden in this regard, and, further, the holding of Oglesby v. State, supra applies. In such case, as noted, although the defense had alleged a disqualification in regard to one of the jurors, it had failed to allege, or prove, that such juror had participated in returning

the indictment. There were no grounds for dismissal sub judice, and denial of appellant's motion was correct.

Finally, the state would note, as the parties did below, the fact that the prohibitions of section 905.04 do not seem always, in every circumstance, to be absolute. Although such statute disqualifies persons related to a certain degree to the defendant from serving on a grand jury, section 905.075 provides that even if a grand juror should have been disqualified on such grounds, his presence on the jury does not invalidate any indictment returned. Such statute would seem to apply something close to harmless error to grand juror disqualification, and, no doubt, is a recognition that where an indictment is found by fifteen unassailable grand jurors, it should not be undone simply because of the presence of one whose presence could, arguably, be said to have been improper. As has been noted in other contexts, the differences between grand and petit juries are many, the grand jury's function to act as an accusatorial body and not as an ultimate fact finder, returning no verdict or judgment. See, Porter, supra. The state finds nothing impermissible in Robert Supinger's presence on the grand jury sub judice, and contends that appellant had no valid grounds for dismissal of the indictment, even if such grounds had been presented in a timely fashion. However, to the extent necessary, appellee would contend that sections 905.04 and 905.07 should be read in para materia so as to leave intact the instant indictment. Appellant's conviction should be affirmed.

POINT IV

DENIAL OF APPELLANT'S MOTION TO DISMISS, PREDICATED UPON PRE-ARREST DELAY, WAS NOT ERROR

On April 10, 1984, appellant moved to dismiss the indictment on the grounds of pre-arrest delay, contending that the twenty-three month delay from the murder until appellant's arrest had denied him due process; appellant specifically alleged the existence of actual, substantial and presumptive prejudice, affecting his ability to prepare a defense, noting the inability to locate certain witnesses and the impairment of memory of others (R 592-4). Appellant also alleged that the state had intentionally delayed the prosecution for tactical reasons, possessing sufficient information to obtain an indictment on November 24, 1982 (R 592-4). The state subsequently filed a written response to such motion (R 1770).

Appellant's motion was heard in conjunction with other defense motions in a pre-trial hearing, spanning several days from July 9, 1984 to July 12, 1984 (R 4835-5565). Eleven witnesses presented testimony of some relevance to this matter, and the trial judge additionally considered several depositions. It is clear from the testimony of Detective Nicklo of the St. Augustine Police Department that, at the time the murder occurred, January 4, 1982, there was nothing to link appellant with the crime (R 4893-4); no fingerprints were found and no witnesses identified appellant's photo from any lineup (R 4893-4). The first bit of relevant physical evidence was not secured until April 14, 1982, when, following a search of appellant's residence in Orange County by local authorities, several empty cartridges were found which were eventually found to match those at the scene; the murder weapon was not recovered then, or ever (R 4894). The importance of these casings, however, was not immediately apparent, in that they had to be sent to the crime lab for processing (R 4885). The next "break" in

the case, such as it was, was a witness's identification of Thomas McDermid, from a photo-lineup, as being in the area at the time of the murder; no identification of appellant was made (R 4863). Finally, on November 29, 1982, eleven months after the incident, McDermid himself implicated appellant in the murder (R 4865). Nicklo stated that in early December of 1982, to his knowledge, appellant faced three active prosecutions in Orange and Seminole Counties (R 4890).

In addition to the witness' testimony as to the pace of the prosecution, appellant also called several witnesses, ostensibly to demonstrate the prejudicial result of the delay. Appellant's wife, Debra Rogers, testified that appellant had been with her and the children on the night of the murder (R 4958, 4960); she stated that her mother and a couple named Norwood had also been present (R 4958, 4960). Debra Rogers testified that she had attempted to locate the Norwoods during appellant's trial in Seminole County, and had been unable to do so (R 4956-4958). She said that she had no address or phone number for these persons, and had last seen them in July of 1982 (R 4958-4960). The state introduced into evidence the motion to dismiss for pre-arrest delay filed by appellant in his prosecution in Seminole County, in which he averred that he was prejudiced in preparation for his trial therein due to the absence of his alibi witnesses, the Norwoods, who would provide an alibi for February 12 and 17, 1982; in such motion, appellant contended that the Norwoods had moved from the State of Florida in September of 1982 (R 1870-1872).

Appellant also called a number of other witnesses. Detective Williams, a former St. Augustine police officer, testified that he had conducted some of the investigation in the case, and had suffered a debilitating heart attack in March of 1983, and, as a result, could not independently recall a great deal of the events pertaining to the case. It appears, however, that Williams' participation was not great, in that he simply delivered exhibits to the lab, and talked with two rather tangential witnesses; the written records of these interviews

were preserved, and admitted at the hearing, and both witnesses, Bennett and LeClaire, testified at the hearing, as well as at trial (R 1893-1901). LeClaire testified that he had seen two people in the Winn-Dixie parking lot on the night of the murder, but that he was never able to identify them (R 4966). Joel Bennett recalled identifying Thomas McDermid's photograph from a lineup, as well as the circumstances of his original sighting of him, but stated that his memory of the events in question would have been better at the time (R 5382-5388); in a rather strange exchange during cross-examination, Bennett stated that he felt that whatever memory loss he had suffered had occurred in the first eleven months since the incident (R 5391). Additionally, Vickie Baker, an employee at the Winn-Dixie, stated that the time which had passed since the incident had affected her memory "slightly" (R 5361). Although, as appellant notes, she was unable to recall the results of any photo-lineup she had been shown, she was able to describe the crime itself in great detail (R 5361-5380); according to Detective Nicklo, Miss Baker had been shown a photo-lineup on May 3, 1982 and had been unable to make any identification (R 4873-4).

As noted, the judge also considered the depositions of witnesses Sapp, Hagan, Burnett and Valerie and Grady Gray (R 1967-2004, 1948-1966, 1296-1331, 1603-1660, 1681-1712). All of these witnesses had one thing in common - none were ever able to make an identification of the persons that they saw on the night of the incident, either from photo or "live" lineups. Sapp and Hagan were at the nearby Holiday Inn, and the others were inside the Winn-Dixie (R 1982, 1960, 4873-4). The Grays were apparently never shown any photographs (R 1701, 1704). Formal argument was held on the motion on July 12, 1984 (R 5430-5469) and Judge Weinberg formally denied it on July 18, 1984 (R 2988-2991). In a highly detailed order, the judge found that appellant had failed to demonstrate actual prejudice from the delay or that the state had delayed for tactical reasons. The judge noted that the state could not have proceeded

against appellant until McDermid's statement of November 29, 1982; he further noted the absence of continually sitting grand juries in the county (R 2989). The judge expressly noted that the alleged alibi witnesses, the Norwoods, had disappeared prior to November of 1982, and, noting the absence of any identification of appellant, except for McDermid, found that the state had not been engaged in any delay to cause "faded" memories (R 2990). The court found that the state did not delay in seeking out the evidence and noted its inability to simultaneously try appellant in several locations in Florida at the same time (R 2990-1).

In his brief, appellant contends that the judge misconstrued both the law and the facts, in denying his motion, holding him to too high a burden of proof; he specifically alleges that the court misunderstood Howell v. State, 418 So.2d 1164 (Fla. 1st DCA 1982), and required him to show not only actual prejudice, but also bad faith on the part of the state.[1] Inasmuch as Howell expressly held that if the defendant could not satisfy his initial burden of proof, demonstrating actual prejudice, the inquiry proceeds no further, it is difficult to see how the judge could have erred. Judge Weinberg correctly found that appellant had failed to make any showing of actual prejudice.

Howell also provides a good example of what "actual prejudice" is not. In Howell, the defendant had proffered evidence of "faded memories of his friends, as well as his own memory." The court noted that it was unclear whether these memories had faded due to the passage of time prior to the indictment or whether

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[1] Appellant notes that the First District in Howell adopted the "test" enunciated in United States v. Townley, 665 F.2d 579 (5th Cir. 1982). The First District described Townley as a case from the newly created Eleventh Circuit. It is not. It is from a part of the Fifth Circuit Court of Appeals which remained in such circuit. The Eleventh Circuit applies a different test which, like other circuits, requires the defendant to establish actual prejudice and deliberate prosecutorial delay to gain tactical advantage. See, Stoner v. Graddick, 751 F.2d 1535 (11th Cir. 1985). Inasmuch as this court, to appellee's knowledge, has never taken an express position on this subject, it would appear within this court's discretion to adopt a different test from that in Townley or Howell .

they had faded afterwards. The court further noted that it was unclear in what material way the faded memories had caused Howell actual prejudice, and concluded that speculative allegations as to faded memories simply did not suffice to prove actual prejudice. Other district courts have strictly applied Howell in this regard. See, Marrero v. State, 428 So.2d 304 (Fla. 2d DCA 1983); Barber v. State, 438 So.2d 976 (Fla. 3d DCA 1983). Marrero analyzed several different claims of prejudice in some detail. The court noted that the defense claim of prejudice, in regard to a thirteen month delay, was unfounded where it appeared that appellant had never "known" the information which he claimed unable to recall; it further noted that the destruction of certain phone company records thirty days after creation could not constitute actual prejudice resulting from the delay, in that the records would have been unavailable in any prosecution undertaken more than thirty days after the calls. Similarly, in State v. Parent, 408 So.2d 613 (Fla. 2d DCA 1981), the Second District reversed an order of dismissal predicated upon an alleged showing of actual prejudice, stemming from an eleven month delay in bringing charges. The court noted that even though actual physical evidence had been destroyed, a factor not present in the instant case, dismissal had not been required, and further noted that there had been no showing that the lost evidence would have been available at the point in time at which the prosecution allegedly should have begun. In reference to the claims of failed memory, the court observed that statements such as the following, "If it had been earlier, I might recall more about it, but I mean a year later, it's kind of vague," simply represented the type of memory lapse "common in any case." Parent at 614. The court also observed that the police officers could review their written reports to refresh their memory.

It is clear that in this case, we have nothing more than speculation as to "faded memories." Appellant himself never testified that he could not recall his own whereabouts. Indeed, he, his wife and mother-in-law were all available

to provide him with an alibi for the time of the murder, the alleged family bar-b-que. The fact that the other alleged guests, the Norwoods, could not be found for trial is without importance, in that they had disappeared as early as June of 1982, months before any prosecution could have been mounted. Cf., Marrero; Parent. No physical evidence was lost or destroyed in this case. See, Parent, supra. Further, it is clear that those witnesses with seemingly impaired memories never really had anything of significance to recall anyway. The attempted robbery in this case took place very quickly and both armed men wore stocking masks over their faces. No one, who could have positively been able to make an identification at the time of the incident, lost that ability due to the passage of time. Cf., Marrero, supra. Appellant never demonstrated that any significant memory loss occurred during the eleven months after McDermid's statement in November of 1982, the arguable beginning date for any prosecution.

It is the defense's contention that, had prosecution been undertaken more expeditiously, several witnesses, especially LeClaire, Bennett, Sapp and Hagan, could have identified someone other than appellant as being in the area, thus exonerating him. This is sheer, unbridled speculation, and would seem to relate more to the pace of the investigation, as opposed to the formal prosecution. Detective Nicklo testified that after Sapp and Hagan had been unable to identify anyone from the photo-lineup, it had been decided not to follow up with them any further (R 4885). Appellant cannot turn unproductive state witnesses, none of those witnesses discussed in this point were called by the prosecution at trial, into "critical" defense witnesses, simply so as to be able to take advantage of any "faded memory." It is clear that most of the "memory lapse" simply represented the ordinary effects of time, a truism recognized by the court in Parent; a defendant surely cannot be found to have established prejudice every time a witness testifies that his or her recollection of the event was clearer closer to the time that it occurred. Appellant never demonstrated that any lapse

in memory was the result of impermissible delay by the state following McDermid's statement in November of 1982; indeed, the sworn testimony of witnesses Bennett and Grady Gray would seem to be to the contrary. Further, none of the witnesses suffered appreciable memory lapse, and Detective Williams had his reports to fall back upon, see, Parent, supra; appellant's speculation that this officer may have mishandled critical evidence, and then forgotten about it, is just that, speculation.

Judge Weinberg was correct in characterizing these witnesses as "negative" ones. It is clear, in contrast to the situation in State v. Griffin, 347 So.2d 692 (Fla. 1st DCA 1977), that actual prejudice was not demonstrated. In Griffin, the only case in which such prejudice has been found, the trial court dismissed the charges, finding that the defendant "has no recollection of what he was doing or where he was nor has he been able to locate any witness who can speak as to his actions and whereabouts on the date of the alleged crime." Id at 696. Appellant sub judice suffered no actual prejudice to his ability to mount a defense due to the twenty-three months which passed between incident and indictment. Judge Weinberg was correct in finding that appellant had failed to sustain his burden of proof as to this matter.

The question then arises as to the need to consider the reason for any delay sub judice. As noted, Howell provides that once the defense has failed to demonstrate actual prejudice, all inquiry ends. Because, appellee suggests that appellant has misconstrued the state's motives and actions in this case, it is worth discussing what the record reveals as to the cause for any delay.

Appellant contends in his brief that "the state did not dispute the fact that their own delay arose from a desire to avoid any speedy trial problems which might arise due to appellant's charges in other circuits and the state." (Brief of Appellant at 38). This allegation is not supported by the record. As noted earlier, the state did not have any evidence irrefutably linking

appellant to the offense until McDermid's statement of November 29, 1982, some eleven months after the murder; as measured from this date, the "delay" in this case would seem to be eleven months, until the indictment of December 19, 1983. Detective Nicklo testified that, following his submission of earlier probable cause statements, he had been told that there simply was not enough evidence (R 4866, 4868). After submission of his probable cause statement of December 2, 1982, following McDermid's statement, as part of an entire discussion, it was noted that there was a problem with "too many trials." (R 4869-4870). According to Nicklo, at that time, to his knowledge, appellant was then facing three active prosecutions in Orange and Seminole County (R 4896). It is also apparent that the investigation had not ended, in that Nicklo stated that he had been conducting photo-lineups in March of 1983 (R 4871-2). Documents introduced at the hearing indicate that appellant was engaged in a trial in Seminole County as late as August 9, 1983, four months before the indictment (R 1870-1877). During argument on this motion, the assistant state attorney noted the fact that St. Johns County has no standing grand jury (R 5458), and pointed out the difficulty in logistics had appellant been facing simultaneously-pending charges in three counties with speedy trial running on all of them at once (R 5464-5).

The above is hardly indicative of any improper motive on the part of the state or any actions on its part which would violate "fundamental concepts of justice or the community's sense of fair play and decency." See, United States v. Lovasco, 431 U.S. 783, 791, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). The United States Supreme Court, in both Lovasco and United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) emphasized, not only the protection afforded by the statute of limitations, but also the cardinal concept that due process does not mandate that the state prosecute any case "before its time." In Lovasco, the court expressly found that it would serve no one's interest to compel the state to initiate prosecution upon the bare existence of probable

cause, and concluded that, in instances of investigative delay, a prosecution delay for such cause would not deprive the defendant of due process "even if his defense might have been somewhat prejudiced by the lapse of time." Id at 797.

It is obvious in this case that a great deal of the time between incident and indictment was spent on investigation; indeed, it would seem that the investigation might have lasted at least through March of 1983. If it can be said that there was any delay in this case for reasons other than investigation, something that the record does not support, it would seem, from the comments below by the state attorney, that such delay was motivated by appellant's unavailability, due to other pending prosecutions, and the state's desire not to intrude with new charges at such juncture. Whereas, as appellant points out below, it might have been the state's option to have filed charges and left it up to him to simply waive speedy trial (R 5467), the state's failure to do so hardly bespeaks a desire to utilize any delay against appellant. As this court noted in another capital case, Sturdivan v. State, 419 So.2d 300, 303 (Fla. 1982), "[B]ecause the state has the burden of proof, delay works against the state more than it does against a defendant."; the situation in such case involved an eight year delay between a murder and trial due to the appellant's incarceration in another state. Compare also, Thomas v. State, 374 So.2d 508 (Fla. 1979), no showing that state intentionally withheld charges to extend speedy trial time. Assuming one must balance any prejudice shown by appellant against the reasons for any delay sub judice, no reason for any delay can count against the government.

In conclusion, the state would simply note, as the United States Supreme Court did in Marion, the importance of the statute of limitations. The court observed in such case that the statute of limitations was the primary guarantee against bringing overly stale criminal charges, and noted that such statutes represented legislative assessments of the relative interests of the state and the defendant in administering and receiving justice. In Florida, section

775.15(a) Florida Statutes (1981) provides that a prosecution for a capital felony may be commenced at any time. Such statute must represent a legislative intent that prosecutions for first degree murder be brought whenever the evidence can be found to support them. While appellee does not regard the above statement as extinguishing all due process concerns, it does suggest that prosecutions of this type are regarded by society as of the highest importance. The state also notes this court's recent affirmance of the conviction and sentence of death in Kelley v. State, 11 F.L.W. 159 (Fla. April 10, 1986), wherein the defendant had been indicted fifteen (15) years after the offense in question and in which, during the interim, the state had destroyed a great deal of physical evidence. This court upheld the lower court's denial of Kelley's motion to dismiss the indictment, and deferred to its conclusion that prejudice had not been demonstrated. While recognizing that the circumstances of Kelley are not completely on all fours with those sub judice, the state would observe that Rogers' claims of prejudice would seem paltry in comparison to the circumstances in Kelley. A bit of commonality between the two, however, would seem to be the relative lack of importance of the evidence allegedly effected by the delay. In Kelley, it was noted that the testimonial evidence was central to the case, rather than the "real" evidence; in this case, the witnesses whose memories allegedly lapsed were of secondary importance, if that. Denial of appellant's motion to dismiss due to pre-arrest delay was not error, and the instant conviction should be affirmed.

POINT V

DENIAL OF APPELLANT'S MOTION IN LIMINE, AND THE ADMISSION OF EVIDENCE AS TO COLLATERAL CRIMES, WAS NOT ERROR

On February 22, 1984, the day the amended indictment was returned, the state filed its Notice of Similar Fact Evidence, pursuant to section 90.404(2) Florida Statutes (1981), in which it formally advised appellant and the court that it intended to offer similar fact evidence at trial relating to two other robberies committed by appellant; such robberies occurred in Orange County on October 23, 1981 and April 7, 1982 (R 43). On May 10, 1984, appellant filed a motion in limine to preclude the introduction of the evidence, contending that it did not go toward a material issue such as motive or identity (R 765-6). The state responded to such motion on June 20, 1984, contending that the evidence was admissible to show identity, noting the similarities of the incidents and the fact that appellant and McDermid had been identified as the perpetrators of the Orange County crime; appellant had been convicted of both offenses (R 1769).

The motion in limine was heard in conjunction with other pre-trial motions in a hearing spanning several days from July 9, 1984 to July 12, 1984 (R 4835-5565). Fifteen witnesses presented testimony of some relevance to this point, and the judge indicated that he would consider the written statement of Thomas McDermid (R 5438, 2985). From the testimony of Vicky Baker and McDermid's statement, it is clear that the facts of the instant attempted robbery are as follows. Shortly before the closing time of 9:00 p.m. on January 4, 1982, two men, with stocking masks over their faces, each armed with a .45 caliber automatic, entered the Winn-Dixie in St. Augustine. The shorter of the two jumped up on the counter, near where the office was located, and waved his gun in the air, while the other proceeded to one of the registers and ordered the cashier

to deliver over the money. There was no one in the office at this time. All customers and personnel were ordered onto the floor. The pair carried pillowcases for the money to be placed into, but the registers were never opened. Apparently upon seeing someone exit through the back door of the store, the shorter one yelled out for them to "forget it", and the two ran out. McDermid acknowledged being the "taller" one. (R 5359-5379; 2817-2868).

Avalon Jameson, Jack Lockman, James Woodard and Stanley Dombrosky testified as to the Winter Park Publix armed robbery of April 7, 1982 (R 5058-5081; 5082-5089; 5121-5144; 5354-5358). Their testimony indicates that such robbery occurred as follows. Apparently one-half hour prior to closing time, two men, wearing stocking masks over their faces, each armed with a .45 caliber automatic, robbed the Publix supermarket in Winter Park. One, subsequently identified by witnesses as appellant, Jerry Layne Rogers, proceeded to the office area, where he demanded money from James Woodard; the money was placed in a pillowcase. When Woodard could not open one drawer, appellant threatened to shoot him and a scuffle ensued. Appellant then called out for help and the other robber, identified by witnesses as McDermid, came over. Prior to this time, McDermid had been engaged in robbing cashier Avalon Jameson, directing her to turn over the proceeds of the registers and ordering everyone to get down on the floor. According to Woodard, McDermid had then obtained the contents of the office register, and the two ran out.

Witnesses Douglas and Jeneane Warner and Investigator Bourdon testified as to the robbery at Daniels Market, and the state also introduced into evidence the depositions in prior testimony of Jeffrey and Robert Daniel (R 5227-5232, 5232-5264, 5225, 2683-2700, 2701-2743, 2744-2767, 2767-2793). Their testimony indicates that such robbery took place as follows, although there would seem to have been some conflict between the Daniel brothers as to the order of events. Minutes before 8:00 p.m., closing time, on October 23, 1981, two men, with

stocking masks over their faces, each armed with a .45 caliber automatic, entered Daniels Market in Orange County. One of them, subsequently identified by witnesses as appellant, Jerry Layne Rogers, proceeded to the office area, stopping on the way to point his gun at Robert Daniel and demand that he open the registers; when Daniel professed ignorance as to how to open them, Rogers proceeded into the office, where he opened the register inside. All of the occupants of the store had been directed to "hit the floor", and the other robber, identified by witnesses as McDermid, apparently stood guard with his gun. Jeffrey Daniel was then forced to open the registers and drop the money into a sack or bag. Finally, one yelled, "Time", and the two ran out of the store. As they left the parking lot, appellant raised his stocking mask, and he was seen, and later identified, by Mrs. Warner; additionally, another citizen observed appellant's vehicle nearby and wrote down the license number, giving it to the police.

There was also testimony from various law enforcement officials as to the similarity, or alleged lack thereof, of the above offenses. While the witnesses agreed that some of the common factors of these offenses were also common to a number of other armed robberies, they also noted that when all of the similarities were considered together, the number of robberies involving all such factors was very small, if not beyond their experience (R 4890-1, 5178-9, 5279-5280, 5303-4); such fact was noted by the court in its order (R 2953-4). Following the testimony, argument was had on the motion on July 12, 1984 (R 5525-5564). Judge Weinberg subsequently denied the motion on July 18, 1984, in an order replete with findings of fact. The judge noted the following similarities or modus operandi present in each case:

1. Target is a chain-type grocery store.
2. Robbery takes place just prior to closing.
3. Two (2) white males involved, one slightly taller than the other. Both in the mid 20's or early 30's.

4. Both wear nylon stocking masks.
5. Each carries an automatic type firearm (handgun).
6. One robber directs his attention to the cash registers, while the other seeks out the office and office safe area containing cash receipts.
7. Both robbers direct patrons and employees to 'lay on the floor.'
8. Unnecessary violence and physical contact with victims is sought to be avoided.
9. Bags are used to secure money, plastic or pillowcases.
10. Tom McDermid was one of the two participants. (R 2986-7).

Judge Weinberg found that there was a "close, well-connected chain of similar facts between the Publix Winter Park robbery, the Daniels Grocery robbery and the case sub judice rising to the level of more than coincidence." (R 2994). He did, however, as a matter of caution, while denying the motion, note that such denial was without prejudice to appellant's attack of the manner and scope of the collateral crimes evidence as presented at trial (R 2995).

Despite the allegations in appellant's brief to the effect that this evidence became a "feature of the trial", it is clear that such did not, in fact, occur. Of the nineteen witnesses called by the state, only five, Woodard, Daniel, Bourdon, Warner and Hepburn testified as to the other robberies. All were called at the close of the state's case, and after a cautionary instruction had been delivered by Judge Weinberg (R 6732, 6733-6786, 6799-6841, 6846-6882, 6883-6914, 6914-6939); it should be noted that, apparently to avoid "commingling issues", the state did not examine Thomas McDermid, called early in its case, as to any collateral crime evidence (R 6521-6606). Of a trial whose testimony fills some 1,860 pages, the state's collateral crime witnesses account for 188 pages of testimony, much of that number representing appellant's cross and recross examination of such witnesses.

Appellant contends on appeal, in addition to the above "feature" argument, that admission of any of the collateral crime evidence was error, in that the

evidence was irrelevant and prejudicial, specifically noting that in none of the other robberies, had a murder been committed. Appellee notes that the issue of the admission of collateral crime evidence in capital cases has occurred with some frequency and has led to some mixed results. Compare, Peek v. State, 11 F.L.W. 175 (Fla. April 17, 1986); Drake v. State, 400 So.2d 1217 (Fla. 1981); with Chandler v. State, 442 So.2d 171 (Fla. 1983); Heiney v. State, 447 So.2d 210 (Fla. 1984); Burr v. State, 466 So.2d 1051 (Fla. 1985). The state suggests that the similar fact evidence sub judice has more in common with that before this court in Chandler or Burr, as opposed to that in either Drake or Peek.

In such latter cases, however, it would seem that this court has fashioned the standard it applies in evaluating the admission of such evidence. Noting that a mere general similarity between the crime at issue and the collateral crimes would be insufficient, this court has stated,

> There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant, the points of similarity must have some specifal character or be so unusual as to point to the defendant. Drake at 1219.

The state maintains that there are sufficient identifiable points of similarity, i.e., those cited by the court below, and a startling lack of dissimilarities, such that it can be said that, when considered cumulatively, all three robberies possess a sufficiently special character.

While it cannot be denied that the three robberies occurred at different geographic locations, and occurred on a schedule of approximately one every three months between October 1981 and April 1982, it can be seen that, once the robberies began, they could all have been choreographed by the same person, and, from all indications, were. McDermid and Rogers each had his set function, and each stuck to his particular role during the course of a robbery. While it is true that the Daniels Market is not part of a chain, Robert Daniel stated that

it was set up in the same manner as a Winn-Dixie or Publix, although on a smaller scale (R 6801). Thus, each store had its office area with safe in the same general area, and, in each robbery, one of the participants, Rogers, had responsibility for that area. Once inside, Rogers always proceeded to the office, and McDermid always attended to the registers; all persons were always ordered to the floor. The robberies were obviously planned to be conducted very quickly. There was no robbery of the customers or gratuitous violence or contact. The robbers always struck close to closing time, and always armed and disguised themselves in exactly the same manner.

The alleged dissimilarities, which appellant predictably makes much of, are largely non-existent or, at most, explainable by changed circumstances or unanticipated events occurring during the robberies themselves. Given the identifications of McDermid and Rogers by witnesses at the scenes of each crime, the BOLO descriptions would obviously seem to be unimportant. Further, the fact that no one was killed in the other robberies is not of as great importance as appellant believes. In no other robbery did the perpetrators encounter a store employee in the parking lot, bent upon notifying the authorities and/or preventing their escape; thus, the need for any killing did not arise. Similarly, the fact that the robbers operated in different locations is not of great relevance. McDermid testified that they rented the car to drive to either St. Augustine or Jacksonville "to pick out a place to rob." (R 6529). Appellant has cited no requirement that robbers must confine their offenses to the same general area indefinitely and, indeed, it is doubtful whether "smart" ones would do so. These are, truly, distinctions, without a difference.

Appellee emphasizes such, because, in a number of cases in which this court has found improper the admission of evidence of collateral crimes, pursuant to Williams v. State, 110 So.2d 654 (Fla. 1959), it has noted the dissimilarities between the incidents. Thus, in Peek, this court noted that the

murder victims were killed in different manners and at different times of day, with different modes of entry into their homes. In Drake, this court, again, noted that only the sex of the victims and the fact that their hands had been bound could be said to be similarities between the offenses; the defendant's actions toward each victim were graphically different, stabbing one, violating and choking another and physically striking the third. Here, as argued above, within the confines of each store, there were no dissimilarities between the offenses. The robbers did not pistol whip a clerk in one store, and not in another; they did not hold up a jewelry store one day, and a shoe store the next. They perpetrated the exact modus operandi in each of the three grocery stores and never deviated therefrom. Compare, Mattera v. State, 409 So.2d 257 (Fla. 4th DCA 1982), robberies not alike where one inside job, one involved gun, while other did not, and one occurred at restaurant, and other at motel.

Further, there is a key link between the robberies, which did not depend upon this jury's verdict - Thomas McDermid. In Sias v. State, 416 So.2d 1213 (Fla. 3d DCA 1982), the Third District upheld the admission of certain collateral crime evidence in a sexual battery prosecution. The two incidents had some similarities and some dissimilarities. In each, a young man, in a park area, was grabbed from behind, covered about the head or face with a jacket or t-shirt, and sexually assaulted. The incidents took place at different locations, and in one, the juvenile was offered some marijuana. The court regarded this latter difference as explained by the difference in ages between the victims, and noted that in each case, the juveniles had stated that the defendant had been accompanied "not only by another person, but, according to the identifications, the very same person." Id. at 1216. Thus, while not giving great weight to some surface or explainable differences, the court observed that the crimes had proceeded in nearly-identical fashion. Both of these factors considered by the court in Sias are applicable sub judice.

As this court observed in Chandler,

> The common points shared by Chandler's Texas crime and the crime charged below may not be sufficiently unique or unusual, when considered individually, to establish a common modus operandi. We find, however, no error in the trial court's determination that these points, considered one with another, establish a sufficiently unique pattern of criminal activity to justify admission of evidence of Chandler's collateral crime as relevant to the issue of identity in the crime charged. Chandler at 173.

This is a significant holding, because on their face, the Texas and Florida incidents differed. The victim did not die in Texas, and in the Florida case, Chandler had killed an elderly couple. The trial judge in Chandler, however, had detailed the similarities in a written order, which bears great similarity to that order of Judge Weinberg sub judice. Appellee contends that while comparing "similar fact" precedents would seem as difficult as comparing "similar fact" crimes, Chandler supports the actions of the trial judge in this case. See also Burr v. State, testimony of other convenient store clerks to the effect that appellant had robbed them, in prosecution for felony murder, admissible to establish identity; Bryant v. State, 235 So.2d 721 (Fla. 1970). Admission into evidence of testimony as to the Publix and Daniels market robberies was not error, inasmuch as such evidence was properly admissible as to the issue of identity, given the number of similarities between the incidents and the lack of unexplainable dissimilarities.

Appellee further maintains that the evidence, when admitted, was properly treated by the state. The state, given the lack of overwhelming identification evidence as to this offense, had need of the collateral crime evidence, compare, Styles v. State, 384 So.2d 703 (Fla. 2d DCA 1980), and was not engaging in over-kill. Further, the evidence did not become a "feature" of the trial. While the state recognizes that the counting of transcript pages is not the surest test, it does find relevance in the fact that the testimony of the state witnesses on this subject comprised less than one-tenth of the trial transcript. See,

Wilson v. State, 330 So.2d 457 (Fla. 1976), Williams Rule evidence taking up 600 pages of trial transcript not feature of trial but approaching outer barrier of the permissible; Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982). The state also notes that a good portion of these transcript pages represents appellant's cross-examination of the state witnesses. See, Sias, supra at 1216, state not accountable for defense "excessive focus" upon collateral crime evidence. There is no indication that the jury misunderstood the purpose for which this evidence was admitted, and given its admissibility to prove identity, appellant has failed to demonstrate reversible error. The instant conviction should be affirmed.

POINT VI

DENIAL OF APPELLANT'S MOTION TO SUPPRESS OR PRECLUDE TESTIMONY AS TO IDENTIFICATION BY WITNESS SUPINGER WAS NOT ERROR

On September 12, 1984, appellant filed his Motion to Require and Authorize Defense Counsel or Defendant to be Present at Photographic-Lineup. In such motion, appellant averred that he believed that an investigator would be traveling to Japan to conduct a photographic-lineup before two prospective state witnesses presently in such country; appellant contended that he had the right to be present, either personally or through counsel, at such photo-lineup, at county expense (R 3342-3). On September 18, 1984, Judge Weinberg rendered an order, containing the following language:

> In the event the state desires to have any witnesses, including witnesses not yet known, to participate in any photographic-lineup involving the defendant, the state will notify defendant in advance. Further, co-counsel for the defendant will be permitted to attend and be present during the entire presentation of photographic displays to such witnesses. Obviously, the defendant himself cannot be physically present in the room since it is his identification that is at issue (R 3498).

On October 22, 1984, Ketsey Day Supinger, who had been employed as a cashier at the Winn-Dixie on the day of the robbery, but who had subsequently quit and moved to Japan, appeared for her deposition with defense counsel (R 4419, 4421). During the course of this deposition, it became apparent that, prior to proceeding to the deposition, the witness had been taken to a photo-lineup at the St. Augustine Police Department, at which he had made no identification (R 4422-4424). The assistant state attorney present at the deposition, who was not the assistant responsible for this case, stated that he had not been aware of the court's order of September 18, 1984, mandating the presence of counsel at any photo-lineup (R 4453). The proceedings were recessed, and Judge Weinberg and prosecutor John Whiteman arrived (R 4454).

In light of the apparent violation of his order, Judge Weinberg stated that his initial inclination was to find that, although nothing would bar the witness from testifying as to her recollection of the actual incident, there could be no mention of the photo-lineup unless defense counsel brought it out (R 4458). Defense counsel argued that the alleged discovery violation would justify dismissal of the charges (R 4461), and the state attorney argued that a formal hearing should be held (R 4462), contending that no basis existed to suppress Mrs. Supinger's testimony as to the lineup (R 4462-4465). The judge did not rule out the possibility of a hearing, stating that he wished the deposition to proceed and adding that he would read and consider it in any ruling (R 4475-6).

Three days later, on October 25, 1984, the court convened a hearing which it described as one pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971)(R 5639-5751). At such time, the state noted that no written motions to suppress or to exclude Mrs. Supinger's testimony had been filed (R 5641-2). Four witnesses testified at this hearing, including Mrs. Supinger, her mother, who had been present at the photo-lineup, a police officer who had also been present and Flynn Edmonson, an investigator with the state attorney's office. During the hearing, Ketsey Day Supinger testified regarding her initial encounter with the masked robber on January 4, 1982, stating that she had been as close as one foot away from him (R 5660) and that he had stood next to her for a full minute (R 5661); she testified that she had concentrated upon looking at his face for a number of seconds and that the store had been brightly lit (R 5661-2). Mrs. Supinger stated that the mask diminished her ability to see his whole face only "very little" and that she was able to see his facial features (R 5662-3). She specifically mentioned his eyes, stating that she had gotten a particular feeling which she could not forget as to the way that they had looked at her (R 5663).

The witness also described the manner in which the photo-lineup had been conducted. Mrs. Supinger testified that no one had suggested to her, in any form, what photo, if any, she should choose (R 5667-9). She stated that she had finally selected two which she felt were closest to the man in question (R 5669). The witness also stated that she had seen one of the persons whom she had selected, "the one that [she] had felt most strongly toward being the person that held [her] up", later that same day (R 5670-1). Ketsey Day Supinger testified that during the deposition appellant had asked her if she recognized him, and that she had replied that she did (R 5673), and that such identification had been made without any suggestion as to whom she "should" recognize (R 5683).

The testimony of Mrs. Supinger's mother, Norma Day, and the St. Augustine policeman present, Steven Fricke, similarly indicated that no suggestiveness had been employed in the identification procedure (R 5731-2, 5747-8). Investigator Edmonson testified that he had been unaware of the court's order regarding the presence of defense counsel, but that assistant state attorney Whiteman had suggested to him that one of appellant's counsel be present at the lineup (R 5702). Edmonson stated, however, that he had discussed the matter with another assistant state attorney, Alexander, who had countermanded such instructions (R 5703). Because Whiteman was in another trial, Edmonson acted in accordance with Alexander's directive, and no defense attorney was advised of the lineup (R 5703). The witness stated that Mrs. Supinger had focused upon two photographs, stating that the one of appellant seemed closest, but noting that his face had not seemed as fat (R 5706). According to Edmonson, Ketsey Supinger had said that if she could see "the guy" in person, she could identify him, stating that she needed for him to turn his head (R 5707). At the conclusion of the testimony, Judge Weinberg stated that he wanted to read the depositions (R 4419-4518; 3868-3895) before making any ruling. (R 5751).

The judge rendered a highly detailed order the next day (R 3808-3811).

In such order, he noted that the sole issue before the court had been the discovery violation of the court order of September 18, 1984. The judge found that the discovery violation was not intentional or willful, "but the result of the trial attorney for the state being occupied in court at the time the defendant wanted to take the deposition." (R 3810). The court noted the difficulties presented by the fact that appellant, conducting his own defense, would be present at the deposition of a witness whose ability to make an identification was at issue. The judge found no basis to exclude all of Ketsey Day Supinger's testimony, but stated that it would be up to the defense, if desired, to bring up the photo-lineup, and Mrs. Supinger's lack of positive identification therein. Judge Weinberg expressly held that the "state shall not offer evidence of the result of the photo-lineup held on October 22, 1984." (R 3810).

Three days later, appellant filed his Motion to Suppress In Court Identification and Pre-Trial Identification, contending that any in-court indentification by Ketsey Day Supinger should be suppressed, in that, inter alia, the witness lacked sufficient opportunity to observe the robber at the time of the incident, and in that the photo-lineup had been conducted in a suggestive manner (R 3863-3866). The motion was argued after the jury was sworn at trial, on October 29, 1984 (R 6162-6178). Judge Weinberg stated that he would stand on his own prior order, noting that the defense was free to liberally cross-examine Miss Supinger at trial as to her ability to make an identification and that it would be up to the jury to weigh her testimony (R 6173-4). The motion to suppress was denied (R 6178).

Ketsey Day Supinger was the state's first witness at trial (R 6205-6342). She testified in detail as to the attempted robbery of January 4, 1982, including her observation of one of the robbers (R 6223-6225). Appellant's objection to any in-court identification was renewed and denied (R 6226), and she identified

appellant as the individual that she had seen in the store that night, stating that there was "no doubt" in her mind whatsoever (R 6227).

Appellant extensively cross-examined Mrs. Supinger as to her prior descriptions of the robbers, given immediately after the robbery, when she was admittedly very nervous (R 6246, 6288); her written reports and observations were admitted into evidence (R 4060-5). She also testified as to having seen a newspaper clipping about the robbery earlier in the year (R 6254-5), as well as a flyer put out by Winn-Dixie after the robbery (R 6267); she described the photo in the newsclipping as of very poor quality (R 6274). Appellant chose to bring up the controversial photo-lineup of October 22, 1984 (R 6269-6272, 6277-6278), and expressly questioned her as to her ability to observe during the robbery (R 6292-6316). Appellant also specifically questioned her as to why she had recognized him at the deposition, in answer to his question (R 6317), and pressed her as to her basis for any present identification of him,

> Q: Nearly. You're basing this, if I'm understanding you correctly, on the time that you got to look at this person that was wearing a stocking mask and pointing a gun at you while you were trying to open the cash register. That's what you're basing this opinion on, is that what you'd have us believe today?
>
> A: Yes.
>
> Q: And the only real view, concentrated view you had is when you stopped what you were doing and turned around and looked at this person in the face for two seconds three years ago?
>
> A: That's right, plus, I kept looking at him when I told him I couldn't open the drawer. (R 6318-9).

On redirect, the state questioned her as to several of her statements made during the deposition, which had been relied upon by the defense in its suppression motion. Specifically, the state asked her to explain why, at the beginning of the deposition, she had answered that she did not know if she could identify the man she had seen in the stocking mask "by face". (R 6325,

4440). Mrs. Supinger answered,

> I didn't know at that time whether I would have the guts to look at the man that was sitting across from me and tell him that he was the man standing next to me that night and I could not say without being asked directly whether or not he was the man. (R 6328).

She stated that she had been answering with her emotions, as opposed to her perception (R 6328). The state also specifically asked Mrs. Supinger what help the photograph in the newspaper had been in her identification of appellant in court; she replied, "None." (R 6330). Mrs. Supinger was also asked about her rather ambiguous answer during the hearing of October 25, 1984, relating to how she recognized appellant at the deposition (R 6336-7). Although this exchange seems equally ambiguous, the gist of her answer would seem to be that her identification was based upon her view during the robbery (R 6336-7). All renewals of the suppression motion were denied (R 6343-6).

Appellant contends on appeal that all testimony by Mrs. Supinger as to identity should have been suppressed or excluded because her in-court identification was not based upon any untainted source. Appellant contends that something akin to a suggestive show-up occurred, not at the photo-lineup, but at the deposition, where Mrs. Supinger observed him in person after previously viewing the photographs. Appellant notes what he perceives to be inconsistencies in the witness's prior descriptions of the robbers, and claims that her in-court identification was unreliable. Appellant claims that the court order of September 18, 1984 was designed to prevent exactly what had occurred.

Appellee cannot agree with any of the above. As to the judge's order of September 18, 1984, the state does not know, in fact, what motivated the requirement that appellant's counsel be present at any photo-lineup. As appellant notes in his brief, there is no constitutional requirement that counsel be present at such event. See, United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). Although, in a footnote, such opinion cites to Cox v.

State, 219 So.2d 762 (Fla. 3d DCA 1969), involving videotapes, for the proposition that Florida does in fact have such requirement, Cox would not seem to be either on point or followed within this state. See, State v. Gaitor, 388 So.2d 570 (Fla. 3d DCA 1980); Griffin v. State, 370 So.2d 860 (Fla. 1st DCA 1979). It is likely that the purpose for counsel at any pre-trial identification proceeding would be to prevent any suggestiveness in the manner in which the lineup would be conducted. Compare, Moore v. Illinois, 434 U.S. 218, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977). In this case, there has been absolutely no indication of any suggestiveness employed by the police in their handling of the photo-lineup of October 22, 1984 (R 5667-9, 5731-2, 5747-8). The United States Supreme Court in Moore noted that, in contrast to corporeal lineups, photo-lineups were not "trial-like adversary confrontations" and that, even without being present at the lineups, defense counsel had an equal chance to prepare for trial by presenting his own photographic displays to the witnesses prior to trial. Moore at n. 3. The fact that, largely through a misunderstanding by the state's investigator, defense counsel was not present at the photo-lineup of October 22, 1984 presented no basis for suppression of Mrs. Supinger's testimony *in toto*.

Furthermore, it is clear that the state paid its "penalty" for any transgression of the court order. The judge conducted a hearing, in the spirit of Richardson v. State. Although finding no intentional misconduct on the part of the state, Judge Weinberg precluded the state from introducing into evidence testimony regarding the photo-lineup, although leaving such option up to the defense (R 3811). The state complied with such directive, not questioning Mrs. Supinger on this matter. Appellant, however, did bring up the matter on cross-examination, although the judge subsequently ruled that he had not "opened the door" sufficiently for the state, on redirect, to explore the subject further (R 6330).

Appellant, of course, was not satisfied with the remedy fashioned by the judge and moved to suppress all identification testimony by Mrs. Supinger, suggesting that any identification she would or could make at trial would be tainted by the pre-trial confrontation at the deposition. There are a number of things wrong with this argument. Initially, it must be noted that, regardless of whatever preceded it, any "confrontation" at the deposition was of appellant's choosing. One who personally conducts his own defense and who chooses to personally question witnesses as to whether they recognize him as the perpetrator of the crime at issue must take his witnesses as he finds them. Appellant's contention that had he but known of the preceding photo-lineup, he would not have asked Mrs. Supinger whether or not she recognized him or been present at the deposition himself (Brief of Appellant at 57-8) is highly implausible. Because Mrs. Supinger was forty-five minutes late for the deposition, one of the first questions was where she had been (R 4422-3, 4430). When the witness responded that she had been looking at a photo-lineup at the police station across the street, neither appellant nor his attorneys expressed any desire to curtail the deposition or to forbear any questions regarding identification.

Furthermore, appellant can hardly "blame" the state for the fact that Mrs. Supinger figured out his identity at the deposition, allegedly as a result of the assistant state attorney referring to appellant by name; Mrs. Supinger stated that she had heard at least one year earlier that appellant was representing himself (R 4426). Most persons who conduct depositions cannot expect either their identities or visages to remain "confidential". Although the state certainly should have had defense counsel present at the photo-lineup, appellee suggests that it was, in all likelihood, the best course to have conducted such lineup prior to the deposition. Had the witness proceeded directly to the deposition, appellant would most likely have argued that any in-court identification would be tainted by the fact that Mrs. Supinger had seen him for the

first time since the robbery at the deposition, wherein she had learned of his status as the defendant.

Because the state was guilty of no impropriety and because Mrs. Supinger never identified appellant under any suggestive circumstances, the precedents relied upon by appellant on appeal, concerning the need for the state to demonstrate an untainted basis for an in-court indentification, see, State v. Sepulvado, 362 So.2d 324 (Fla. 2d DCA 1978), would seem inapplicable; as argued earlier, the only "confrontation" between witness and defendant was engineered by Jerry Layne Rogers himself. The situation cannot be analogized to the state conducting an impermissibly suggestive show-up at a pre-trial or preliminary hearing, compare Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), and appellant cannot himself "taint" an eyewitness and then demand the exclusion of her testimony. As this court observed in McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980), a defendant cannot take advantage on appeal of a situation which he has created himself at trial. Cf., Sullivan v. State, 303 So.2d 632 (Fla. 1974); White v. State, 446 So.2d 1031 (Fla. 1984). Further, the state did not, in contrast to the situation in Gilbert, seek to "bolster" Mrs. Supinger's in-court identification with testimony as to her prior out-of-court identification. Compare also, Grant v. State, 390 So.2d 311 (Fla. 1980). The state sought only an in-court identification by the witness; it was the defense who brought out the prior attempts at identification and utilized such for impeachment.

Thus, it would seem that there was no necessity that the two-prong inquiry, described by this court in Grant, and by the United States Supreme Court in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), be utilized. Such "test" for the admissibility of evidence as to out-of-court identifications provides that the first inquiry is whether the police conducted an unnecessarily suggestive procedure in obtaining an out-of-court identification;

the next inquiry is "if so, considering all of the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." Grant at 343. The factors to be considered in making this latter assessment include

> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation. Cited in Grant at 343.

This court noted in Grant that it need address only the first step, finding that the police had utilized no suggestiveness.

As argued previously, given the lack of suggestiveness sub judice, a similar result is justified in this case. The question remains, however, the extent to which any further inquiry must be made as to the reliability of Mrs. Supinger's in-court identification. While fully concurring with Judge Weinberg's finding that appellant's argument related more to the weight of the testimony, as opposed to its admissibility, see White v. State, 403 So.2d 331 (Fla. 1981), and while maintaining that appellant has failed to demonstrate why any independent inquiry into reliability is called for, given the lack of any prior suggestive identification, appellee suggests that Mrs. Supinger's in-court identification satisfied the Grant and Manson criteria.

First of all, despite appellant's attempts to minimize the opportunity which Mrs. Supinger had to view appellant during the robbery, it is clear that she stared at him at a close distance for several seconds, finding the stocking mask only slightly distortive of his features (R 6215, 5662); she stated that the store was brightly lit at the time (R 5661). Further, Mrs. Supinger was not simply a passerby; a gun was being held on her and she was in fear during the attempted robbery (R 6225). She stated that she had stopped and looked at nothing but appellant's face, concentrating on it rather than the gun (R 5661-2).

She stated that she was able to discern his facial features, noting his eyes and his irregular teeth (R 6224-5); she testified that she could see the shape of his head and "his features up around the nose and cheekbones." (R 6224).

Further, as the cross-examination at trial made plain, Mrs. Supinger's initial description of appellant, given to the police shortly after the incident, was essentially accurate. As the documents introduced at trial indicate, Mrs. Supinger's description was limited by the nature of the rather generalized police form she utilized, i.e. the height categories were broken down in three inch intervals (R 4060). Mrs. Supinger initially identified the man who robbed her as a white male, fair complexion, straight brown hair, protruding or irregular teeth, loud voice, thin mustache between 5'4" and 5'7" and with a heavy build (R 4060); she described his clothing in another statement (R 4061). At trial, she explained that she had been very nervous at the time the forms had been filled out, and also upset at the death of David Smith (R 6285, 6288). She also stated that she had checked both "protuding" and "irregular" teeth because, unable to choose between the two, she had been directed to do so by the police (R 6247, 6279); she similarly stated that she had not checked any eye color because she was directed not to do so by the police, in that she could not be absolutely definite (R 6307-8). Appellant has failed to demonstrate any substantial discrepancy between her in-court identification of appellant and the prior descriptions which she gave the police.

Further, appellant is incorrect in his assertion that Mrs. Supinger was leaning toward the "wrong" choice at the photo-lineup. Mrs. Supinger testified that when she saw, and identified, appellant at the deposition, he was the one whose picture she had felt "strongly" was that of the robber (R 5670). Investigator Edmonson, whose testimony is relied upon by appellant, testified that, at the lineup, Mrs. Supinger had pointed to appellant's photo and said, "I think it's this guy, but his face wasn't that fat." (R 5706, 5709-10). Further, at

trial, Mrs. Supinger explained her prior hesitance to identify anyone at the deposition, stating that she was unnerved by the enormity of being in the same room with the man who had attempted to rob her (R 6328). It is also obvious, from her other comments, that she needed to see appellant in the flesh, preferably turning his head, before she could make a positive identification (R 5707, 6280). There is obviously no indication in this case that Mrs. Supinger ever misidentified anyone, and the first four criteria of the reliability "test" had been met. Compare Baxter v. State, 355 So.2d 1234 (Fla. 2d DCA 1978); State v. Mendez, 423 So.2d 621 (Fla. 4th DCA 1982).

The final consideration is the length of time between the identification and the incident. In this case, it is admittedly a long period of time, however, in light of the witness's initial opportunity to observe appellant at the time of the robbery, the attention to which she paid him, the accuracy of her prior descriptions, the lack of any misidentification and the certainty she displayed at trial when she made her in-court identification (R 6227), appellee contends that this factor was simply one for the jury to weigh in evaluating her testimony. The state also suggests that it was up to the jury to weigh the fact that her testimony apparently conflicted with that of McDermid, who had, of course, claimed that he was the one holding the gun on Ketsey Day Supinger; McDermid explained such discrepancy by noting that, at one point while appellant was on the counter, he had raised his stocking mask, thus perhaps, affording Mrs. Supinger with her view of his face (R 6540). Compare McCrae, supra, failure of witness to identify defendant merely question of weight for jury; White v. State, 403 So.2d 331 (Fla. 1981), victim's alleged inability to view defendant at time of incident relates only to weight or credibility of testimony; Downer v. State, 375 So.2d 840 (Fla. 1979). The record is clear that Mrs. Supinger had an opportunity to view appellant at the time of the incident, sufficient to support any in-court identification; she specifically stated that any view of a newspaper

clipping was not the basis for her identification, compare Bundy v. State, supra, and neither the photo-lineup nor confrontation at appellant's deposition can be said to have created any presumption that her in-court identification was tainted or otherwise inadmissible. Although the facts of this case, especially as pertaining to this witness and her identification, can only be described as unorthodox, appellant has failed to demonstrate that the extreme sanction requested, suppression of any and all identification testimony by this witness, was warranted. Denial of appellant's motions was not error, and the instant conviction should be affirmed.

POINT VII

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR IN REGARD TO THE TRIAL COURT'S EVIDENTIARY RULINGS DURING THE TESTIMONY OF WITNESSES TODD AND YOUNG

In this point, as in Point II, supra, appellant raises a combined evidentiary point, relating to, in this instance, the alleged admission into evidence of two examples of impermissible hearsay. As in Point II, reversible error has not been demonstrated. The two situations at issue will now be discussed in detail.

A. THE TRIAL COURT DID NOT ERR IN ITS EVIDENTIARY RULING DURING THE TESTIMONY OF WITNESS TODD

During his case-in-chief, appellant called as a witness Michael Todd, a correctional officer with the Orange County Sheriff's Department (R 7200). Todd testified that, on June 29, 1982, he had been charged with transporting McDermid to the visiting room to see his attorney; Todd stated that McDermid was in a medical holding cell because he had been beaten five minutes earlier (R 7202). According to Todd, as he led McDermid down the hallway, appellant entered from another direction, at which time McDermid stated that he was going to "get" appellant on the roof during recreation and lunged for him (R 7202). The officer tried to subdue McDermid, but the latter resisted and it took four officers to restrain him (R 7202). The officer described it as a "typical" jail altercation (R 7204). When appellant asked him whether he [appellant] had said anything during the altercation, Todd stated that the incident report had indicated that one of the officers, a Corporal Vennal, had said that there was an "argued" (sic) between appellant and McDermid (R 7205).

On cross-examination, the prosecutor asked where McDermid had been taken after the altercation; the witness stated that he had been taken to a special holding cell (R 7210-11). Over a hearsay objection, which was overruled, Todd

stated that McDermid had told him that the reason for the incident was that appellant had been trying to have him hurt and that he was only "going after him" for that reason (R 7211). According to Todd, at that time, McDermid had told him that appellant had told other witnesses that he [McDermid] was an informant (R 7211).

Appellant contends on appeal that the overruling of his hearsay objection, and introduction of the above testimony, constitutes reversible error. Appellant cites to Teffeteller v. State, 429 So.2d 840 (Fla. 1983), and contends that, applying the "test" therein as to the effect of such error, it is clear that "without this unrebutted hearsay evidence,... the result below may have been different indeed." (Brief of Appellant at 64). Appellant notes the importance of Thomas McDermid and his testimony to the state's case, and basically concludes that any error committed which tangentially refers to him or invokes his name must be cause for reversal. Appellee, of course, disagrees.

Initially, it must be noted that, in bringing out McDermid's statements immediately after the altercation, the state was simply engaging in proper cross-examination. As this court observed in McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980), citing in turn from 4 Jones on Evidence, Cross Examination of Witnesses § 25:3 (6th Ed. 1972), one of the objects of cross-examination is

> to elicit the whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill-up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate testimony cross-examination.

In McCrae, this court noted that the defense had "tactfully misled" the jury through its direct examination of a witness, and stated that the state was entitled to negate the delusive innuendoes so created. This court also observed that the defense could not profit on appeal from a situation which it had created at trial.

McCrae obviously applies sub judice, because appellant's position is apparently that he was entitled to bring out McDermid's out-of-court statements on direct, at least arguably hearsay, but that the state could not bring out other statements of McDermid, made shortly afterwards, which would tend to explain or modify those made earlier. If there is a problem with hearsay sub judice, it was surely inaugurated by appellant, and, his having "opened the door", his complaints as to the state's evidence ring hollow. Further, to the extent that appellant can argue that "his" "hearsay" was actually a verbal act, the state would suggest that McDermid's statements, regarding to this reasons for "breaking bad" with appellant, i.e. his fear that appellant intended to have him hurt, such fear voiced several minutes after being beaten up, were properly admitted as statements of McDermid's then-existing mental or emotional state, pursuant to section 90.803(3) Florida Statutes (1981).

The state suggests, however, that detailed consideration of hearsay exceptions is not of primary importance. As this court observed in Breedlove v. State, 413 So.2d 1, 6 (Fla. 1982), the reasons for the inadmissibility of hearsay evidence are that: (1) the declarant does not testify under oath; (2) the trier of fact cannot observe the declarant's demeanor; and (3) the declarant is not subject to cross-examination. In this case, none of the above factors are present, in reference to McDermid's statements. McDermid did testify under oath as to this incident and the statements which he made, for both the state and defense (R 6521-6606; 7010-7077). Obviously, at such times, the jury could observe his demeanor, while testifying, and he was subject to cross-examination or direct examination, as the case might be. Although appellant does not acknowledge this in his brief, McDermid had already testified, as noted above, as to his lunging for appellant at the Orange County jail and his reasons for "attacking" him, i.e. that appellant had paid others to have him killed (R 7073). Appellant had every opportunity to examine McDermid at such time, and the state's

re-presentation of this evidence, in order to balance appellant's skewed direct examination, serves as no ground for reversal; appellant, of course, retained the opportunity to recall McDermid, cf., Harnum v. State, 384 So.2d 1320 (Fla. 2d DCA 1980), or, of course, during his own testimony to elucidate this matter.

Thus, given the fact that the jury had already heard this evidence in another form, without objection from counsel, and given the fact that the declarant remained fully available for examination, appellant obviously suffered no lack of opportunity to "confront" an unavailable witness. Compare, Brunelle v. State, 456 So.2d 1324 (Fla. 4th DCA 1984), hearsay which was nothing more than brief duplication of admissible testimony, constituted harmless error. Applying the "test" of Teffeteller and Hendrieth v. State, 483 So.2d 768 (Fla. 1st DCA 1986), it is clear that any error committed herein had no appreciable effect on the verdict. See also, Palmes, supra. Appellant has failed to demonstrate reversible error, and the instant conviction should be affirmed.

B. THE TRIAL COURT DID NOT ERR IN ITS EVIDENTIARY RULING DURING THE TESTIMONY OF WITNESS YOUNG

The state called Steven Young, appellant's brother-in-law, as a witness during its case on rebuttal (R 7953-7989). Young had been on leave from the army for approximately one month, between December 19, 1981 and January 20, 1982, and during such time, had resided, for a majority of the time, with appellant, also spending some time at his mother's house (R 7954-5). The prosecutor asked Young whether he was familiar, "back in December of '81, January of '82," with the relationship that existed between his mother, Maxine Arzberger, and Debra and Jerry Rogers; Young replied in the affirmative (R 7956). The following exchange then took place:

> Q: How were you familiar with that relationship?
>
> A: My mother told me about --

> MR. ROGERS: Objection, Your Honor. I object to anything this witness has to say about what someone told him.
>
> THE COURT: Objection will be overruled.
>
> MR. WHITEMAN: Okay. (R 7956).

Asked to characterized the relationship, Young stated that his mother was not on speaking terms with appellant or his wife, due to a dispute over an inter-family automobile sale (R 7956-7). Young stated that he had never observed his mother in the presence of Jerry or Debra Rogers during the time that he was home, and noted that Mrs. Arzberger had not been present at a Christmas party hosted by appellant (R 7957). When the prosecutor asked Young how long the "relationship of not talking" had existed, Young responded,

> I can only speak for the time I was there. And, as far as I know, it was a long time. But, they definitely weren't in a good relationship for the time I was there. (R 7957-8).

Young also stated that, while he was at his mother's house, she had told him that the car incident was responsible for the estrangment (R 7958).

Appellant contends on appeal that the overruling of his hearsay objection led to the introduction of impermissible evidence, which was irretrievably prejudicial, because it attacked the credibility of Maxine Arzberger, thus effecting his alibi; appellant notes that his alibi defense "was second only to the critical impeachment of Thomas McDermid's testimony." (Brief of Appellant at 78). Appellee, as in Point VIIA, supra, cannot agree with this argument in relation to the "family feud" evidence.

Initially, it must be noted that much of Young's "opinion" as to the bad feelings between Maxine Arzberger and the Rogers was based, not upon what someone else had told him, but upon his own observations. Young was definitely competent to testify as to how many times, if any, he had observed the three together, and, as a guest in both the Arzberger and Rogers households, he would

certainly have been in a position to make such determination. Additionally, Young carefully limited his testimony to the time frame in which he was physically present in Orlando and able to observe. Thus, although Young would seem to have strayed from his personal opinion somewhat, and recounted what his mother did tell him, there was a sufficient non-hearsay basis for his assertion that "bad blood" existed.

Again, as in Point VIIA, supra, Young was, to the extent that he was repeating his mother comments, not telling the jury anything that they did not already know. Appellant himself, while testifying, had acknowledged that, due to the automobile transaction, there had been bad feelings in the family, although he had claimed that the breach had healed by the time of the murder/bar-b-que (R 7755-6). Further, as in the earlier point, the declarant of the alleged statements testified at trial, and was available for examination by any party (R 7881-7917). During her testimony, Maxine Arzberger stated that she had attended a family bar-b-que, at which appellant, his wife and children and the Norwoods had been present, although she could not recall the date (R 7882). The state questioned her as to her prior tape-recorded statement, which was played in open-court, in which she had stated that, in fact, she had not attended any such function and that, at that time, her relationship with her daughter and son-in-law had not been too good (R 7899). At this point, however, Mrs. Arzberger disagreed with what she had said in her earlier statement, claiming that the state attorney investigator had threatened her into making it, and specifically denied the allegation that she had been on bad terms with the Rogers family at the time of the bar-b-que (R 7908, 7892).

Thus, due to the fact that the declarant testified in this case and was available for examination, cf., Breedlove, appellee cannot find that any impermissible lack of opportunity to confront an unavailable witness existed. Hearsay seems an unavailing ground for exclusion of evidence when the "missing"

witness can simply be recalled for any clarification desired. Cf., Harnum, supra. While it would have been better form, no doubt, for the state to have either restricted its questioning of Steven Young as to his opinion based on personal observation or to have fully questioned Mrs. Arzberger as to any prior statements that she might have made to Young, so as to lay a predicate for formal impeachment, given Young's own ability to testify on this subject and Arzberger's availibility at trial, it cannot be said that the "test" discussed in Point VIIA, supra, as derived from Teffeteller v. State, has been met. Appellant was not found guilty as a result of one more hole blown in his already tattered "alibi". Introduction of this evidence had no appreciable effect on the jury's verdict, compare, Palmes, Roman v. State, 475 So.2d 1228 (Fla. 1985), and the instant conviction should be affirmed.

POINT VIII

THE STATE'S CROSS-EXAMINATION OF DEFENSE WITNESS REYNOLDS SERVES AS NO BASIS FOR REVERSAL OF THE INSTANT CONVICTION

As part of his assault on the credibility of Thomas McDermid, appellant called three inmates who had been incarcerated in the St. Johns County Jail at the same time that McDermid was at such location (R 7224, 7242, 7242-7273, 7273-7290). All three essentially presented the same testimony - that McDermid, while their "cellmate", had made statements to them inconsistent with his trial testimony, i.e. to the effect that his partner in the murder in question was not appellant, but someone else; in some instances, he allegedly even displayed a photograph of this other alleged accomplice, who was said to bear a family resemblance to McDermid (R 7225-9, 7244-8, 7275-8). The "middle" witness in this triumvirate was Hubert Reynolds, who, on direct examination, stated that McDermid and he had shared a cell in the St. Johns County Jail in December of 1983 through January of 1984 (F 7242-3).

Reynolds claimed that, at such time, McDermid had shown him some photographs and pointed out an individual whom he said had accompanied him in a robbery; according to Reynolds, McDermid had stated that he had shot someone in the parking lot (R 7244). In answer to appellant's question, the witness stated that Rogers was not the individual in the photograph, and he further offered the opinion that such unknown person resembled McDermid (R 7245-6). Reynolds also claimed that he bore no animosity toward the state, or reason for getting even with them, despite the fact that they had prosecuted him in the past (R 7247). He did note, however, that he had been on parole, and that at present time he was incarcerated, having "caught a charge back" (R 7247-8).

On cross-examination, the witness acknowledged having been convicted

three times of a felony, and stated that, at the time he had come into contact with McDermid, he had been incarcerated as a result of charges filed by the St. Johns County prosecutor (R 7252). He claimed that although he had, at one point, harbored "hard feelings" toward the state attorney or "the people that were in charge of keeping [him] in custody while [he] was in the St. Johns County Jail," he presently had no such feelings toward the prosecutor or the state attorney's office (R 7251-2). He continued to assert this lack of ill will, while admitting to having a lawsuit pending against the county and sheriff (R 7272). Reynolds also contended that his present incarceration, to date some eight months, was the result of charges which the state attorney's office had filed against him (R 7259).

During this cross-examination, the state sought to question Reynolds about a fire which he had allegedly set while incarcerated, asking him whether or not he and one Shelley Brazel had done so, because they were upset at being in jail (R 7260); Reynolds categorically denied it, and no objection was interposed in reference to this inquiry (R 7260). Earlier, the state had sought to question Reynolds as to whether or not he had ever been charged with a crime along with Butch McBurrows or Shelley Brazel (R 7252-3). Appellant had objected to such question and that relating to McBurrows had never been answered (R 7251); the grounds for appellant's other objection, which was overruled, was, "What's this all about?" (R 7253). Reynolds had acknowledged being charged along with Brazel "for an incident at the jail which involved a fire", but denied ever calling the prosecutor's office and offering to provide names of those who would state that Brazel had been bragging, in jail, that Reynolds was not actually involved in the case (R 7254).

On re-direct examination, appellant brought out the fact that Reynolds had entered a plea of nolo contendere to the charge which had originally served as the basis for his parole revocation (R 7265); Reynolds stated that if not

for the "charge that was put on [him] at the jail for the fire", he would be out of prison, having entered the other plea (R 7271). Further, at this time, Reynolds fully discussed the incident in the jail, and admitted no culpability, offering his explanation for why he had been caught up in the affray (R 7265-7271).

Appellant contends on appeal that reversible error occurred in the prosecutor's cross-examination of Reynolds, claiming that this court's decision of Fulton v. State, 335 So.2d 280 (Fla. 1976) provides that evidence of pending charges against a witness is inadmissible for impeachment purposes, and also citing Watson v. Campbell, 55 So.2d 540 (Fla. 1951) for the proposition that "bad acts" cannot be introduced to impeach the credibility of a witness. Appellant also complains of the propounding of an improper predicate question which, he maintains, left the jury with a misapprehension as to Reynolds' credibility. Appellant argues that because Reynolds' credibility was "critical to the defense case-in-chief", any error committed herein cannot be harmless (Brief of Appellant at 70).

Initially, one must determine how much, if any, of these arguments are preserved. Despite appellant's new-found vehemence on this subject, his contention that he is entitled to a re-trial on this basis alone, it is worth noting that no motion to strike out evidence or motion for mistrial was ever made below; the point was similarly not included in appellant's motion for new trial (R 4546-4550). Further, his two objections, apparently on relevancy grounds, were made very early in the cross-examination (R 7253), and no objection was interposed in reference to what appellant describes as the improper compound question (R 7254), thus failing to preserve the point for appeal. See, Castor v. State, 365 So.2d 701 (Fla. 1978). While mindful of this court's observation in Jackson v. State, 451 So.2d 458 (Fla. 1984), to the effect that an objection need not always be made at the moment an examination enters impermissible area of inquiry, the state would suggest that because the initial inquiry, to which appellant

objected, was proper, and because the subsequent inquiry, to which appellant did not object, borders more closely on the improper, the situation is distinguishable from Jackson.

Appellant's reliance upon Fulton is definitely justified. In such case, this court held that it was permissible to bring out the fact that a state witness was facing criminal charges, so as to demonstrate bias he might have toward the state or against the defense, but that a defense witness' "supposed bias, attributable to charges concerning a totally distinct offense", was not a proper subject for impeachment. As support for this latter proposition, this court cited to Williams v. State, 110 So.2d 654 (Fla. 1959), Watson v. Campbell, supra, and Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973). Further, in reaching such conclusion, this court rejected the state's argument, based on such precedents as Wallace v. State, 41 Fla. 547, 26 So. 713 (1899), to the effect that the matter of impeachment as to pending charges should be left to the sound discretion of the trial court; this court cited to another portion of the Wallace opinion, dealing with cross-examination of the defendant as to collateral conduct, as opposed to pending charges, wherein the Wallace court had observed that inquiry into collateral matters should not be allowed unless there is reason to believe that it may tend to promote the ends of justice and seem "essential to the true estimation of the witness' testimony by the jury." Wallace at 576, cited in Fulton at 283. This court found the error committed in Fulton reversible, because the testimony of the defense witness so impeached was critical to the claim of self-defense. This court also noted the danger of a "spill-over" effect or guilt by association, if the jury came to believe that the defendant's witnesses, as well as the defendant, were charged with crimes.

The state respectfully suggests that Fulton sets down too absolute a rule and that the precedents upon which it relies, and which it utilizes, are not completely apposite. It is well established that evidence which is inad-

missible as impeachment under other methods is admissible if it shows the bias of a witness. Erhardt, Florida Evidence, § 608.4 (2d Ed. 1984); Sias v. State, at 1218, "If in showing the bias of a defense witness in a criminal case the prosecutor incidentally elicits testimony that would be otherwise inadmissible against the defendant, the testimony is not ipso facto rendered inadmissible." It is hard to see how Williams v. State or Whitehead v. State are apt precedents to preclude this type of evidence of impeachment, when the state was not seeking to introduce a formal conviction against the witness or utilizing the procedures of section 90.610 Florida Statutes (1981). Further, this court's usage of Wallace in the Fulton decision would seem somewhat inconsistent. One claim of error considered in Wallace was the court's sustaining of a state objection to defense impeachment of a state witness on the basis of a pending criminal charge. This court in Wallace found no error in reference to such ruling, stating that the general rule upon the subject was that cross-examination of a witness as to indictments or charges before conviction against him, of criminal offenses, was a matter of discretion in the trial court, not reviewable unless an abuse of such discretion had been shown. Thus, although the situation in Fulton did not involve the impeachment of a defense witness, as in this case, the state's reliance upon it would not seem to have been misplaced.

Further, the portion of the Wallace opinion cited by this court in Fulton dealt with an entirely different matter, impeachment of the defendant, on the state's cross-examination, as to such subjects as his visits to "whore houses" or barrooms on Sunday. This court noted the broad scope of cross-examination which was permissible and further observed that, even when the answers given might be totally irrelevant as to the defendant's guilt and might tend to degrade or disgrace him, they were not to be dismissed upon such basis, as long as they went toward credibility. This court again noted the discretion of the trial court in this regard, and observed,

> The rules which should govern the trial court in exercising its discretion in allowing or disallowing inquiries into collateral matters to affect credibility do not authorize any question to be put for the sole purpose of disgracing the witness. The court should disallow all inquiries into collateral matters which do not tend to affect credibility. The inquiry must in general, although not necessarily, always relate to transactions comparatively recent, and the transaction inquired about must be one which bears directly upon the present character or credit of the witness. Inquiry into collateral matters should not be permitted, unless there is reason to believe it may tend to promote the ends of justice, and it seems essential to the true estimation of the witness' testimony by the jury. The court should promptly suppress all inquiry into matters not relevant to credit, and should not permit a disparaging course of examination, which seems unjust to the witness's, and uncalled for by the circumstances of the particular case. Wallace at 722.

This court then found that the trial court had not abused its discretion in allowing the cross-examination at issue. Although this court in Fulton describes the discretion afforded a trial court in regard to this evidence as "a very narrow discretion", it would seem from the facts of Wallace, that such description is open to debate.

The state would suggest that Wallace, as opposed to Fulton, would seem to be closer to the current thinking on this issue. Thus, following the repeal of section 90.08 Florida Statutes, relied upon in Fulton, section 90.608 Florida Statutes (1981), was enacted, which provides that, "Any party, ..., may attack the credibility of a witness by ... (b)[S]howing that the witness is biased." In Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982), this court recognized the fact that, while general character attacks upon a witness are impermissible in cross-examination, in order to impeach credibility, it is proper to ask about past criminal convictions, as well as pending criminal charges. Similarly, the district courts of this state have repeatedly observed that "all witnesses are subject to cross-examination for the purpose of discrediting them by showing bias, prejudice or intent.", see, e.g., Cox v. State, 441 So.2d 1169 (Fla. 4th

DCA 1983) and that such inquiries are designed to determine whether the witness is appearing for any reason "other than to tell the truth." See, e.g., Hannah v. State, 432 So.2d 631 (Fla. 3d DCA 1983), the effect of Fulton is essentially to provide that all parties, except the state, are allowed to attack the credibility of witnesses, and that all witnesses, except defense witnesses, are subject to cross-examination as to their biases or motives for testifying. The state contends that, within the discretion of the trial court, there is no reason to deprive the prosecution of an important tool utilized by the defense, and all other parties in civil actions, in determining or demonstrating a witness's bias, by virtue of the existence of a pending criminal charge. The instant case provides a good example why Fulton should be limited.

Hubert Reynolds testified that, although in the past he had harbored bad feelings toward the state attorney, he no longer did so and, apparently, was testifying simply from sheer altruism. Appellee suggests that in order to properly weigh this denial of hostility, the jury was entitled to know that Reynolds faced pending charges initiated by the same state attorney's office as was prosecuting Jerry Rogers. Indeed, it would seem that the same charges, which, on re-direct Reynolds indicated were not valid, were the only things standing between the witness and freedom. The state notes that because, in essence, the St. Johns County State Attorney's Office was a "party" to this prosecution, it was entitled to plumb the depths of hostility that Reynolds, its prior chargee, might still harbor toward it. Such hostility could obviously constitute a motive to testify untruthfully, and the jury was properly made aware of it.

The state is not seeking a blanket rule that all pending charges against defense witnesses are properly admitted for impeachment purposes, but merely requests that the "iron curtain" of Fulton be partially lifted, and that, in accordance with Wallace, the matter lie within the sound discretion of the trial

court. Certainly, none of the factors dictating reversal in Fulton are present here. Reynolds was not a "key" witness. His purpose was not to give direct evidence, but to impeach, and his testimony was replicated by other witnesses, Pitt and Tharpe (R 7225-6, 7274-6). Further, there was absolutely no danger of any "spill-over". No attempt was made to deny the fact that the witness, like appellant, had been incarcerated, or had a history with the criminal justice system, a pointless gesture given the fact that Reynolds' sole use was to testify as to jailhouse statements. Inasmuch as appellant himself brought out the fact that Reynolds was presently incarcerated, appellee would contend that the state was entitled to bring out the fact that this present incarceration, or the pendency of such present charges, resulted from an action by the specific prosecuting unit involved in this case. Compare, People v. Oliver, 314 N.W.2d 473 (Mich. App. 1981), (witness's arrest for failure to appear permissible impeachment of defense witness, as showing hostility to prosecution.)

Having said the above, the state would note its agreement with the principle that, while it is competent to show by cross-examination that a witness is hostile, an inquiry into the conduct and actions of the parties producing such hostility raises another and collateral issue which should not, as a general rule, be permitted to be gone into by the trial judge. See, Eldridge v. State, 27 Fla. 162, 9 So. 448 (1891); Pandula v. Fonseca, 145 Fla. 395, 199 So. 358 (1940). The state would also note that, while the prosecutor in this case occasionally seemed to stray into this area, discussing the specific activities in the jail giving rise to the charge, for the most part, he accepted Reynolds' answers, i.e. denials, and moved along. Compare, Lewis v. State, 377 So.2d 640 (Fla. 1979). It was, in fact, the defense which chose to allow Reynolds to fully explain his conduct in the jail (R 7265-7, 7270), the judge noting at one point, that the state had opened the door to this inquiry (R 7269). Although appellant chides appellee in his brief (Brief of Appellant at 70), for the fact that no evidence exists in

the record to "corroborate" the prosecutor's attempts to impeach Mr. Reynolds, and indeed, challenges appellee to point to extrinsic evidence as to such impeachment, the state is fully prepared to acknowledge that no such extrinsic evidence was admitted below and, furthermore, must express some relief at such conclusion. Following Reynolds' answers on cross-examination, it would have been at least arguably improper for the state to have overloaded the record on appeal with extrinsic proof, in relation to the matters forming his bias. Cf., Gelabert v. State, supra. For the most part, the cross-examination was kept within permissible bounds, and appellant has failed to demonstrate irretrievable prejudice.

In conclusion, appellee maintains that it was permissible for the state to examine Reynolds as to the pending charges against him to show bias, evidence of such pending charges already brought out by the defense in their initial or direct examination. Even if such inquiry, however, or the inquiry which could be said to follow it, as to the details forming the basis of the pending charge, can be said to be erroneous, such error would be harmless, given the fact that two other witnesses offered the same testimony as that of Reynolds. Compare, Friddle v. State, 438 So.2d 940 (Fla. 1st DCA 1983), improper inquiry of defense witness as to pending charges harmless error, where no danger of guilt by association; Parker v. State, 458 So.2d 750 (Fla. 1984), improper impeachment of defense witness as to reputation harmless error where, inter alia, witness's only purpose to impeach co-defendant. Parker and Friddle both have application in this case, and appellant has failed to demonstrate that any arguable overzealousness by the prosecution in impeaching defense witness Reynolds had an appreciable effect upon the verdict sub judice. The instant conviction should be affirmed.

POINT IX

DENIAL OF APPELLANT'S MOTION TO SUPPRESS EVIDENCE WAS NOT ERROR

On April 19, 1984, appellant filed a motion to suppress the evidence which had been seized from his residence in Orlando, as well as from his cabinet shop, on the grounds that the search warrant had been insufficient, noting an alleged prior ruling in his favor in a previous prosecution, and further contending that the affidavit was faulty; appellant also attacked the scope of the search (R 636-639). Appellant amended the motion on June 12, 1984, further claiming that the affidavit had been full of untruthful matters made "purposefully and with negligence", by the police, to mislead the judge into issuing the warrant (R 1284-5). The state filed a written response to such motion on June 20, 1984, contending, inter alia, that appellant's motion was insufficient to warrant a hearing, in that it was unsupported by affidavits, tending to prove the allegation of deliberate falsehood; the state also contended that the items seized allegedly beyond the scope of the warrant had been in plain view at the time and that the officers had had probable cause to believe that they would aid in the prosecution (R 1771-4).

The motion was heard during the "omnibus" motion hearing of July 9 through 12, 1984, and eight witnesses testified in reference to it (R 4903-4932, 4932-4946, 4946-4953, 4954-4960, 4990-4997, 4998-5057, 5145-5186, 5190-5217), and numerous exhibits, including the affidavit and search warrant, were introduced (R 1882-4, 1885-9, 1892, 2039). At the outset of the hearing on this motion, appellant clarified the fact that he was attacking the search of his cabinet shop, as well as his residence (R 4988). Following argument on the motion, (R 5470-5525), Judge Weinberg denied the motion, in his order of July 18, 1984 (R 2991-2).

Before turning to the applicable facts and law, it is important to emphasize precisely what evidence is at issue. Although the prosecutor had originally stated that he intended to introduce two items from the search of the residence, a .45 caliber automatic pistol and a composite of 69 shell casings, as well as certain receipts, records and documents from the search of the business (R 5423-3), at trial, it appears that only the items from the residence were actually introduced (R 4035-6, 6651, 6684).[2] Although, as noted by appellant, there was discussion as to a standing objection to all of the items, in reference to the motion to suppress (R 6613), at the time that the gun was introduced, appellant objected only on relevancy grounds (R 6651). As such, appellant would seem to have waived his search and seizure argument in relation to the admission of the gun. See, Russell v. State, 270 So.2d 462 (Fla. 3d DCA 1972).

The testimony at the motion hearing indicated that appellant, his residence and place of business had all been under informal surveillance prior to the robbery of the Winter Park Publix on April 7, 1982 (R 5017, 5022-3, 5048-9, 5157-8); although no criminal activity had been observed at these times, and indeed although appellant had not been seen physically immediately after the robbery, appellant's residency at the address in question was confirmed (R 5017, 5159). Apparently, due to a number of robberies throughout the area, police agencies were in cooperation with each other, and it had been observed that, a pattern had emerged - following a robbery, appellant and McDermid would not "come home for two or three days." (R 5185-6, 5179). Two days after the robbery, Detective McClintock with the Winter Park Police Department showed a photo-lineup

[2] As part of its cross-examination of a witness recalled by the defense, the state introduced a newsclipping found in appellant's wallet at the time of the search; the only objection interposed by appellant was based upon chain of custody grounds (R 7521-7526), and, thus, no search and seizure argument has been preserved in regard to such exhibit. Russell v. State, 270 So.2d 426 (Fla. 3d DCA 1972). Additionally, given the fact that this exhibit went solely toward the collateral crime evidence, any error in regard to its admission can be said to be harmless.

to a number of the employees of the Publix, which had been robbed (R 5192). According to the officer, McDermid was identified by two witnesses, Avalon Jameson and James Woodard, while appellant was identified by Woodard; the witness stated that the identifications had been made "without hesitation." (R 5206).

McClintock passed this information on to Deputy Wood of the Orange County Sheriff's Department, who proceeded to draw up an affidavit for a search warrant; Wood testified that he had studied the incident reports and witness statements as well (R 5150). Wood stated that McClintock had told him that "two people" had made the identification (R 5153). The affidavit which Wood drew up includes the following:

> ...and that there is now being kept in and on said premises and curtilage certain semi-automatic pistol, a clear nylon stocking, and U.S. currency
> which is being kept and used in violation of the laws of the State of Florida, to-wit: the laws prohibiting robbery with a firearm, Florida State Statute 812.13(2)(a)
> and that the facts tending to establish the grounds for this application and the probably (sic) cause of affiant believing that such facts exist are as follows:
>
> * * *
>
> Your Affiant knows that on April 7, 1982 at Publix Supermarket located at 741 South Orlando Avenue was the victim of a robbery. This crime was committed by two white males of which the descriptions match those of the defendants known as Jerry Layne Rogers and Thomas Joseph McDermid. Your Affiant knows this as surveillance teams have observed these suspects on numerous occasions.
> Your Affiant knows that on April 9, 1982, Investigator William B. McClintock of the Winter Park Police Department showed a photographic lineup to two separate witnesses to this armed robbery. These two witnesses positively identified, without hesitation, Jerry Layne Rogers and Thomas McDermid as the persons who robbed them on April 7, 1982.
> The above named defendants committed this armed robbery utilizing semi-automatic pistols and clear stocking masks. The defendants gained in excess of $6,000.00 in U.S. currency from this robbery.
> Your Affiant believes that the above named items of evidence used during the perpetration of this crime are concealed within the above described dwelling (R 1883).

Wood testified that the affidavit had been presented to Orange County Judge Sprinkel, at which time it was noted that certain typographical errors had been made in the affidavit and warrant, "not" for "now" and "suck" for "such" (R 5159-60). The witness stated that these errors were hand-corrected, and that both he and the judge initialed them (R 5160-1); such changes were made prior to the signing of the warrant (R 5161). The witness further testified that, at that time, he had orally provided the judge with some general background on the case (R 5168). Wood also testified that at the time he had prepared the warrant, to his knowledge, the serial numbers of the stolen bills had not yet been reported (R 5170); he also said that, at such time, he had no reason not to believe that appellant had been identified by both witnesses (R 5169-70).

Judge Sprinkel approved the requested warrant, authorizing the search of appellant's residence for the property described, i.e., certain semi-automatic pistol, a clear nylon stocking and U.S. currency (R 1882). He also approved a search warrant for appellant's cabinet shop and an arrest warrant (R 2039-4, 5215-6); apparently, warrants were also obtained for the search of McDermid's residence (R 4947). The search of appellant's residence was conducted on April 12, 1982, primarily by Deputy Sears; Deputy McGraw photographed the scene and search thereof (R 4991-7), and the photographs were introduced into evidence (R 2011-2028). From the photographs, inventory form and testimony, it would appear that the search of appellant's bedroom netted, inter alia, $2,154.00 dollars, mostly in small bills, a nine millimeter Beretta pistol, a semi-automatic rifle, a Titan .32 automatic, a .45 caliber automatic, boxes of .45 caliber ammunition, as well as spent shells and boxes of spent 9 millimeter rounds and live shells (R 1888-9, 2012-2013, 2023, 2026-8, 5008-5014). The handguns were recovered from the dresser area, while the ammunition was on the closet shelf (R 5013, 2020, 2026).

Appellant specifically questioned Sears as to why various items, other

than the semi-automatic pistol, were seized, although it must be noted that at some points he cut off the witness' answers, and on occasion even objected, to the response to his own question (R 5008, 5010). Sears stated that he did not know "anything about guns", and was not able to determine, on sight, which were automatics or of what caliber (R 5008-5010). He specifically stated that it was unclear at the time whether the assault rifle was in fact legal (R 5010). Sears testified that he had known, prior to the search, that Detective Nicklo of St. Augustine was looking for a .45 caliber automatic in reference to the instant incident, but he stated that he did not know what type of ammunition, if any, the other officer was looking for (R 5030). The following exchange then took place,

> Q: Why did you seize the ammunition?
>
> A: I knew that there was a murder investigation being conducted in St. Augustine, Florida, and that there was a .45 caliber involved and I didn't know if the .45 caliber that was in your house was the same gun that was used and if the ammunition that was in your house went to that gun or another gun. That's why I took the ammunition to determine --
>
> Q: So you made all these little deductions while you were deciding what to take out of the house?
>
> A: Correct.
>
> Q: Did you have reason to believe that possibly the weapon, the .45 that you seized was probably the murder weapon?
>
> A: Yes, I did.
>
> Q: And just to follow reasoning a little bit, if you had the weapon and you could have made additional cases, I don't understand the reasoning for taking the ammunition unless you knew what the ammunition was.
>
> A: I don't know -- I don't know much about guns. Ammunition, what was taken -- if it was to be returned, it was returned (R 5030-1).

In denying appellant's motion to suppress, Judge Weinberg found that the warrant had been issued lawfully, was based on probable cause and had been exe-

cuted properly (R 2992). While noting that the material seized was somewhat beyond that precisely described in the warrant, he found that the seizure of the ammunition did not invalidate the warrant and was not an act such as to vitiate the intentions and purposes of seeking out evidence of an armed robbery. The court found that no evidence had been adduced to the effect that the warrant had not been obtained in good faith, "under reasonable circumstances and not designed to oppress or harass" the defense (R 2992). Judge Weinberg expressly found that the state "in seizing the additional material connected with an alleged armed robbery, cannot be placed in a worse position had they actually described each and every item with ultimate particularity." (R 2992). He found that, based on the totality of the circumstances, the warrant and its attendant evidence should not fail (R 2992).

On appeal, appellant contends that the above ruling was error, on a number of bases. He contends, first of all, that the search warrant was not supported by probable cause, in that the affidavit had contained misstatements; he also contends that the warrant was overbroad, noting that items had been seized outside of its scope, and alleging that the description of "U.S. currency" was too unspecific. In reference to his first argument, appellant specifically attacks the evidence of any surveillance and questions the officers' probable cause to believe that the items sought were in fact in appellant's residence at the time. Noting the typographical errors, and the fact that the officer had spoken with the judge at the time of the presentation of the affidavit, appellant suggests that the police were "lackadaisical" in their preparation of the warrant.

Although appellant has been specific in his concerns, he has failed to set out the analytic framework which is necessary to resolve this point on appeal. As the state sees it, the following inquiries must be made: (1) whether the affidavit was valid; (2) whether the items at issue, the pistol and ammunition, were seized pursuant to the warrant; (3) whether, if they were not, a valid

warrant exception exists to authorize their seizure and (4) whether, if not, it would serve a valid public interest in suppressing the evidence. It is the state's position that the warrant was valid and that the pistol and ammunition were both validly seized pursuant to it. Because the warrant expressly authorizes search for and seizure of "certain semi-automatic pistol", only the ammunition can be said to have been seized beyond the scope of the warrant. Appellee contends that, if in fact such did occur, the seizure of the ammunition was still valid as a "plain view" seizure, made at the time that the police were authorized to be where they were; this argument will be discussed in greater detail, _infra_. Lastly, the state contends that because the items were seized in good faith, their exclusion would serve no valid public interest.

Appellant's attack upon the warrant is his weakest argument and, the state would contend, in large part simply represents his continued efforts to deny his culpability in the Winter Park robbery. Initially, given his nebulous stand in his motion to suppress, i.e., that the inaccuracies in the affidavit were made "purposefully with negligence", it is debatable whether or not he was entitled to an evidentiary hearing on this matter. _See_, _Franks v. Delaware_, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); _Mason v. State_, 375 So.2d 1125 (Fla. 1st DCA 1979); _Dodds v. State_, 434 So.2d 940 (Fla. 4th DCA 1983). Further, it is clear that the alleged "misstatements" in the affidavit exist only in appellant's imagination. Simply because a witness prefaces his identification with the words "I feel...", is no mark of hesitancy; McClintock testified that each witness made his or her identification without hesitation. Similarly, the affidavit was not inaccurate, in that there was surveillance, appellant and McDermid did in fact fit the descriptions of the robbers and identifications of each, or both, had been made. To the extent that it is relevant, Woods testified that, his impression was that each witness had identified each defendant, and he was certainly not holding any evidence back, when he presented the

affidavit. Compare, LaChance v. State, 376 So.2d 932 (Fla. 4th DCA 1979), officer explained word usage in affidavit, such that credibility not destroyed and no finding of untruthfulness. In Francis v. State, 412 So.2d 931 (Fla. 1st DCA 1982), the court found that, at most an innocent or negligent misrepresentation had been made, when the affiant represented that a positive identification of the defendant had been made, when in fact, arguably, only a tentative one had; the warrant was upheld. Compare also, Murphy v. State, 413 So.2d 1268 (Fla. 1st DCA 1982).

Because there was no finding of intentional or reckless disregard of the truth, or indeed because there was no such evidence adduced below, there was no necessity that any part of the affidavit be excised. Compare Antone v. State, 382 So.2d 1205 (Fla. 1980); Harris v. State, 438 So.2d 787 (Fla. 1983). The affidavit, when read in a commonsense manner, see, United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965), was sufficient to establish probable cause for the issuance of the warrant, under Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Further, appellant's arguments to the contrary, Judge Sprinkel had a substantial basis to conclude that there was at least a fair probability that the item sought would be at appellant's residence. See, Gates, supra; State v. Vanwinkle, 444 So.2d 1005 (Fla. 5th DCA 1984). Appellant's "staleness" argument is completely without merit. It was not necessary that the state demonstrate that it was "more likely than not" that the items sought were at appellant's residence, see United States v. Hendershot, 614 F.2d 648 (9th Cir. 1980), and courts have recognized, "evidence that a defendant has stolen material which one normally would expect him to hide at his residence will support a search of that residence." See, United States v. Maestras, 546 F.2d 1177 (5th Cir.1977); United States v. Green, 634 F.2d 222 (5th Cir. Unit B 1981). As has been recognized, it is not necessary that the affidavit establish beyond a reasonable doubt that the objects sought will be found at the place sought

to be searched; it is sufficient that the facts warrant a reasonable person to believe that the objects sought would be found therein. Here, the warrant was executed five days after the armed robbery, and one of the items sought was $6,000.00 in currency; it would be logical to conclude that such sum would be found at appellant's residence. The instant search warrant was properly issued, upon a showing of probable cause.

Further, appellant's attack upon the warrant as a "general warrant" is without foundation, and his reliance upon Carlton v. State, 449 So.2d 250 (Fla. 1984) is completely misplaced; Carlton, it should be noted, expressly disapproved another decision cited by appellant, Pezzella v. State, 390 So.2d 97 (Fla. 3d DCA 1980). The "command" portion of the instant warrant directs the seizure of "certain semi-automatic pistol, a clear nylon stocking and U.S. currency." No impermissible vagueness is apparent in such description, and courts have held that the term, "U.S. currency", is sufficient. See, State v. Hills, 428 So.2d 715 (Fla. 4th DCA 1983). Additionally, the fact that items, arguably outside the scope of the warrant, were also seized cannot serve as a basis for exclusion of those specifically named therein, especially in the absence of any showing that a complete "general" search has taken place. Cf., Waller v. Georgia, __ U.S. __, 104 S.Ct. 2210 (1984). No such showing has been made sub judice, and appellant's attacks upon the warrant must fail.

Having reached such conclusion, the next inquiry relates to whether or not the items seized were within the scope of the warrant. The .45 caliber pistol definitely was, and nothing more need be said about it, leaving the sole matter to be decided to be the boxes of ammunition. Any inquiry relating to the ammunition is complicated by the fact that it was, at least arguably, relevant to both prosecutions - the Orlando robbery and the St. Augustine murder. Just as there does not seem to be a great deal of caselaw as to whether or not search and seizure of a firearm includes ammunition not presently contained

therein, a proposition which the state advances but admittedly cannot buttress with precedent, but see, Alford v. State, 307 So.2d 433 (Fla. 1975) (spent cartridge casings instrumentality of the crime), there does not seem to be a great deal of caselaw involving the seizure of evidence which not only pertains to the crime being investigated, but also, possibly, to another matter. In Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), however, a situation somewhat comparable to that sub judice would seem to have existed. While executing a warrant for various documents relating to the crime of false pretenses, in reference to a particular lot in a subdivision, Lot 13T, the state came upon documents pertaining to another lot. Andresen argued that their seizure was improper, in that they could also be used to help form the evidentiary basis for another charge. The state, citing to Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), which was also argued by the prosecutor below, (R 5504), contended that the seizure was proper, and contended that the evidence as to the other lot was admissible in the Lot 13T prosecution, in that, similar to Florida's Williams Rule evidence, it went toward Andreson's intent and lack of mistake. The United States Supreme Court agreed, and noted that the documents had subsequently been utilized as the basis for additional charges.

The state contends that a similar argument can be made here. At the time the ammunition was seized, it was unclear, without a ballistics test, which, if any, of the arsenal of weapons it "went with". The seizing officer testified that he, in essence, knew nothing at all about guns, and, apparently, simply wished to preserve all relevant evidence by securing the ammunition. Appellee suggests that this ammunition could have been introduced against appellant in the Orange County prosecution in that, such robbery involving a .45 caliber handgun, its presence in appellant's home would have given greater credence to the witness' testimony as to his possession of a firearm, and, as the prosecutor

argued, would have shown that the guns seized were operational, in daily use and not present by "mistake." Compare Alvord v. State, 322 So.2d 533, 538 (Fla. 1975), evidence of defendant's ownership of gun, although not used in murder, lent credence to testimony of girlfriend; Harris v. State, 129 Fla. 733, 177 So. 187 (1937). To the extent that the ammunition was not included in the warrant, its seizure was proper, pursuant to such cases as Hayden, Andreson, Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) and Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), inasmuch as it was discovered in plain view during the course of a valid search.

In Coolidge, the United States Supreme Court held that while the "plain view" doctrine could not be utilized to "create" a general exploratory search, it had application when, at a time a police officer, having the right to be where he was, i.e. such as while executing a search warrant, inadvertently comes upon evidence whose incriminating nature is immediately apparent. In Brown, the United States Supreme Court described "plain view" as not so much an independent exception to the warrant clause, but simply as an "extension of whatever the prior justification for the officer's 'access to an object' may be," Id at 739-740, and additionally, clarified the phrase, "immediately apparent", which it described as "an unhappy choice of words", holding that it was not required that the sighted evidence "more likely than not" be evidence of a crime, but merely that a man of reasonable caution would so believe. Brown at 742-3. A number of federal appellate courts, in discussing the "inadvertence" requirement, have held that the discovery of an item need not "dumbfound" the officers, and that its seizure will not be impermissible even if the officers, to some extent, have expected, suspected or could have foreseen that the item might be found. As long as there is no showing that the officers purposefully engineered their presence so as to be able to take advantage of the search warrant, or that they knowingly forbore obtaining a warrant, despite having probable cause to do so

for the "extra" items, the seizure will be found to be valid. Compare, e.g., United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981); United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979); United States v. Hare, 589 F.2d 1291 (6th Cir. 1979); United States v. $10,000 in U.S. Currency, 780 F.2d 213 (2nd Cir. 1986). A number of these cases have focused on the "good faith" of the officers in seeking to stay within the bounds of the warrant. See, Heldt, supra; U.S. v. $10,000, supra.

Although this court discussed the Coolidge "plain view" requirements in Neary v. State, 384 So.2d 881 (Fla. 1980), it did not apply such principle to the search at hand. This court did, however, in Alford v. State, supra, look to both Coolidge and Hayden in validating the seizure in question. In Alford, while armed with a search warrant for .38 caliber cartridges, the searching officers discovered certain items of Alford's clothing, which were not named in the warrant, but which they seized and introduced against him. This court approved such seizure, writing,

> The state in this case should not be held to the strict requirement that only those things particularly described in the warrant may be seized. This would fly in the face of the universally accepted 'plain view' exception to the warrant requirement of the Fourth Amendment. The police are not required to close their eyes and turn their heads away from evidence inadvertently discovered during the course of a lawful search, the presence of which they had no prior knowledge. (citation omitted). Alford at 439.

Similarly, in Antone v. State, supra, this court approved the seizure of a blue fiber, found in a shed behind the defendant's home, when, apparently, it had not been listed in the warrant. Usually in the context of stolen property, district courts throughout the state have upheld the seizure of additional property or evidence discovered during the course of a valid search, when the officers had reason to believe that such additional property was stolen, contraband or otherwise evidence. Compare Partin v. State, 277 So.2d 847 (Fla. 3d DCA 1973);

Ludwig v. State, 215 So.2d 898 (Fla. 3d DCA 1968); Hess v. State, 309 So.2d 606 (Fla. 2d DCA 1975); State v. Sanders, 431 So.2d 1034 (Fla. 4th DCA 1983). In State v. Musselwhite, 402 So.2d 1235 (Fla. 2d DCA 1981), the Second District, citing to Hayden, reversed the suppression of, inter alia, the title certificate to an automobile, which had been seized during a search for cannabis and the fruits and instrumentalities of the crime of possession of cannabis, pursuant to a warrant so limited. The court found that a sufficient nexus existed between the crime and the objects seized, noting that in order to convict Musselwhite of possession, the state would have to prove his relationship to the vehicle.

On the basis of the above precedents, appellee contends that the ammunition was validly seized as evidence or contraband in plain view, either in reference to the Orlando or St. Augustine offense. There is no doubt that the officers' "intrusion" was valid, inasmuch as they were executing a valid warrant. Similarly, there is no doubt that, as to the Orange County offense, they would have had no probable cause to believe that ammunition would be found, inasmuch as the gun had never been discharged during the offense; as to the St. Augustine offense, although there might have been some suspicion that the spent shells would be found at appellant's residence, such suspicion could hardly be said to arise to the level of probable cause, such that a warrant could have been obtained, prior to the search of April 12, 1982 itself. Lastly, the evidentiary value of the ammunition was such, as to either offense, that its seizure was proper. A man of reasonable caution would believe that the ammunition was relevant to the Orange County armed robbery; similarly, such man would believe that the ammunition was relevant to the St. Augustine homicide, given the fact that the witnesses therein had seen a .45 caliber pistol, spent shells had been left behind, and appellant fit the general description of the perpetrator. The seizure was proper.

Similarly, while, without doubt, complicating the situation to a good degree, the existence of two separate "crimes" cannot be said to dictate a dif-

ferent result. In United States v. Honore, 450 F.2d 31 (9th Cir. 1971), the court upheld a police officer's seizure of a carbine and license plate, which were discovered during a search for stolen property. The officers searching for the stolen property were state police officers, who knew that the FBI suspected one of the occupants of the house of armed bank robbery; the gun and license plate were apparently held for or turned over to the FBI by the state authorities, and were utilized in the federal prosecution of Honore. The Ninth Circuit held that articles which could be considered to be the means or instrumentality of crimes other than those for which the search was being conducted could validly be seized under those circumstances. See also, Woodbury v. Beto, 426 F.2d 923 (5th Cir. 1970), firearm relevant to murder prosecution validly seized by police executing warrant for stolen narcotics, even when, at time of seizure, officers did not know of death of victim, where officers knew of use of firearm in theft of narcotics. Thus, seizure of the ammunition was proper, and appellant has failed to demonstrate reversible error in regard to either the denial of his motion to suppress or the admission of the above evidence.

To the extent that this court disagrees with any of the above analysis, the state contends that suppression of the ammunition or spent shells would still have been unjustified.[3] It is clear from the testimony of Detective Sears that his decision to seize the ammunition was not motivated by any desire to avoid proper procedure for obtaining a warrant or, more importantly, to engage in a general search. He simply did not understand firearms. To him, the evidence seemed related to the purpose for which he was searching the residence. When one balances the interests of the parties of this case, i.e. the state and the defendant, as was done in United State v. Leon, __ U.S.__, 104 S.Ct. 3405

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[3] To the extent that this court finds any invalidity in the search warrant, the state would contend that the above analysis, based upon United States v. Leon, __U.S.__, 104 S.Ct. 3405 (1984) would likewise justify the admission of the pistol and ammunition, given the lack of intentional misrepresentation by the police in the securing of the warrant and the facial validity of such warrant.

(1984), it is clear that suppression of this inherently trustworthy tangible evidence, obtained, as far as can be determined, in reliance upon a valid warrant, is not justified by any damage to society its admission could be said to inflict; given the court's observation in Brown, to the effect that plain view is not a warrant exception, so much as an expansion of the officers pre-existing justification for access to the item, it is not inappropriate to invoke Leon in what could be considered a warrantless seizure or at least one beyond the scope of a search warrant.

In United States v. Hare, the court described as "an absurd scenario", one which would require the police to obtain a second search warrant, before seizing property revealed "in plain view" during the execution of a prior warrant, writing,

> In such a case, whenever evidence of one of these other crimes turns up, even though it would have been impossible to obtain a warrant previously, someone must be sent to obtain a new warrant to authorize the seizure. It is even questionable whether the police would be authorized to remain until the new warrant is obtained, securing the premises against possible destruction of the evidence, since their right to be on the property lapses as soon as they have completed the search authorized by the warrant. At the same time, the intrusion has already occurred in a fully legal, limited manner, so Fourth Amendment interests are not served by delay. The courts do try to avoid imposing significant limitations and burdens on the ability of the police to do their job when those burdens would serve no purpose. Id. at 1295.

Surely, such observations apply sub judice. By virtue of the prior valid intrusion, appellant's privacy interests in the ammunition were obviously gone before the end of the search. It would have served no one's interest, as this court observed in Alford, to have required the police to close their eyes and turn their heads away from the ammunition inadvertently discovered during this search. The searching officers had a good faith basis to believe that the ammunition fell within the scope of the warrant or that it could be seized pursuant to Coolidge. Compare State v. Bernie, 472 So.2d 1243 (Fla. 2d DCA 1985).

Exclusion of this evidence would serve no purpose.

Finally, as Judge Weinberg noted in denying appellant's motion, given the "innocence" of the St. Augustine autorities, it would hardly seem equitable to place them in a worse position, by suppressing this evidence, due to any blunder by the Orlando police. Suppressing the instant evidence, and invalidating a valid St. Johns County prosecution and conviction of first degree murder, would hardly serve to "deter" Edward Sears, since retired, of the Orange County Sheriff's Department. It can be argued that if seizure of the ammunition was proper in reference to the Orange County offense, at some point, at the close of the prosecution, such evidence would have to have been returned to appellant. In this case, obviously, it was not, inasmuch as it was given over to the St. Augustine authorities. Nevertheless, it is clear, that, if necessary, at some point prior to the properties returned to appellant, the St. Augustine authorities, based upon the facts that they now knew about this case, could have obtained a valid search warrant and seized the ammunition directly themselves. To suppress the instant evidence would in essence be to require this entirely needless step and to invalidate the instant prosecution because it was not taken. Given the fact that, as noted, appellant's Fourth Amendment rights or interests in reference to this property were decided for all time on April 12, 1982, it is hardly equitable to penalize St. Augustine for extinguishing a right long dead.

In Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the United States Supreme Court held that exclusion of physical evidence which would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. The court considered a situation in which the body of a murder victim was discovered following improperly elicited statements from the defendant as to its location; at the same time, a squadron of volunteers had been searching the area. The court, reversing the order of suppression, noted that to mandate exclusion of the evidence under such circumstances, would mean

that,

> the pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagrant. Cited Id. at 2511.

While recognizing that the record as to any inevitable discovery or independent source, cf., Delap, supra, was not greatly developed below, the state would contend that Nix, or its rationale, is not without application. The evidence in this case was admitted in a St. Johns County prosecution, due to the fact that the Orange County officers handed it over to their peers in St. Johns County. As argued above, had they not done so, and were it necessary, the St. Johns County prosecutor could have sought to obtain his own search warrant. Given the fact that the evidence was usable in Orange County, there was no necessity that the evidence ever physically leave police custody before the service of the warrant. Given such inevitability, suppression is not mandated. Cf., United States v. Washington, 782 F.2d 807 (9th Cir. 1986). Denial of appellant's motion to suppress was not error, and based upon all of the arguments contained in this point, the instant conviction should be affirmed.

POINT X

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR IN REGARD TO THE TRIAL COURT'S RULING DURING THE TESTIMONY OF WITNESS ARZBERGER

The state's first witness in rebuttal was Maxine Arzberger, appellant's mother-in-law (R 7881-7917). Prior to calling her, the state had asked that she be called as a court witness, given the inconsistencies in her prior statements; the court deferred ruling, deciding to wait until the witness actually testified (R 7877-7880). On direct examination, Mrs. Arzberger gave testimony in conflict with her prior statements and, without objection, was declared an adverse witness (R 7884). The state then asked her whether she recalled, at an earlier deposition, identifying certain tape-recordings as representing phone conversations between herself and a state attorney investigator; it was during these phone conversations that the statements inconsistent with her trial testimony were made (R 7885-7). Mrs. Arzberger stated that she did not recall identifying her voice (R 7887).

At this point, the prosecutor proposed playing the tape-recording of one conversation in question and asking the witness whether she recognized her voice (R 7887). Asked for his position on this issue, appellant responded, "First of all, I don't think the tape's admissible. We've got the witness here to testify. She's given no testimony." (R 7887), noting that the state had not asked the witness any questions about what she had said on the tape "or the circumstances or anything." (R 7887-8). When the state offered to ask Mrs. Arzberger a few more questions, if that was appellant's only objection, appellant stated that it was not (R 7888). Appellant later stated that he wished all of the tapes played, although it is apparent that a number of unrelated and possibly prejudicial matters were contained therein (R 7889). The prosecutor offered to play

all of the tape, if that was what appellant desired, but noted that there were discussions of appellant's father getting rid of "the gun", a subject about which Mrs. Arzberger stated she knew nothing (R 7889). The judge ruled that he would strike out any volunteered statement by Mrs. Arzberger's interrogator, Flynn Edmonson, and the prosecutor offered to stop the tape at appropriate intervals (R 7890).

The prosecutor then played the beginning portion of the tape-recorded conversation between Mrs. Arzberger and Flynn Edmonson, stopping when appellant stated, "Now we can stop it, Your Honor." (R 7897, 7893-7). Appellant then observed, "We've heard all of the little self-serving statements from Mr. Edmonson on the tape. That was my objection to begin with." (R 7897)(emphasis supplied). Judge Weinberg stated that appellant's objection's objection was noted, and suggested that the prosecutor question the witness (R 7897). The following then took place:

> BY MR. WHITEMAN:
>
> Q: Ms. Arzberger, is it not true you told Mr. Edmonson on that tape that your daughter, Debbie, is the one that asked you to remember that you were there when, in fact, you were not there?
>
> A: No.
>
> MR. WHITEMAN: I'd like permission to play the tape.
>
> THE COURT: You may play the tape.
>
> MR. ROGERS: Objection. My objection was --
>
> THE COURT: Objection will be overruled. She's denying saying anyone asked her to do it, so play the tape.
>
> 'MS. ARZBERGER: I don't like to lie for anybody...' (R 7898) (emphasis supplied).

Appellant contends on appeal that reversible error occurred below, not in the judge's ruling, but in the fact that he allegedly refused to allow appellant to state the specific grounds for his objection. Appellant, citing to

Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983), analogizes the situation to one in which a trial court has refused to allow a proffer of evidence, thus precluding appellate review. This comparison is a faulty one. The only instance in which the lack of specificity of an objection would become troublesome to appellant would be on appeal, when the opposing party, such as the state sub judice, would argue that improper preservation had occurred. To date, the state has not done so. The state also suggests that the only instance in which the alleged lack of preservation would positively prejudice appellant would be where a meritorious objection was lost thereby. Appellant does not tell us, in his brief, just what he was prevented from saying below, and, similarly, despite the momentary interruption, if the matter had been of importance to him, one might expect that he would have placed the grounds for his objection on the record at a later time or included the matter in his motion for new trial (R 4546-4550). Having done neither, appellee questions the extent to which appellant utilized his "available remedies" below. Cf., Sullivan v. State, supra.

In any event, from the record as provided, one can come up with a reasonably good assumption as to the grounds for the objection, inasmuch as such objection had already been made and rejected before. Appellant's initial problem with the tape, apparently, was that, it should not be admitted before a proper predicate was laid, i.e. the witness' lack of recollection or denial of its contents (R 7887). This objection has been rendered immaterial, inasmuch as the tape was never offered or admitted into evidence, and the state's usage of the tape was proper, pursuant to either section 90.608(a) Florida Statutes (1981) or 90.614(2) Florida Statutes (1981). Further, it is apparent that although appellant at one time stated that he wished the entire tape played (R 7888), he also objected to the fact that the tape contained "all of the little self-serving statements from Mr. Edmonson." (R 7897). At the time that he voiced this objection, he said that it had been his "objection to begin with" (R 7897).

Judge Weinberg noted the objection, having previously directed the state not to play any portion of the tape which would represent volunteered statements of Edmonson alone (R 7887, 7890). Thus, when appellant raised the objection in question, stating, "Objection. My objection was ..." it is likely that he was restating either his general objection as to the lack of a predicate or his objection to the inclusion of Edmonson's statements in the tape. Either objection would, on appeal, prove an insufficient basis for reversal.

This court has repeatedly recognized the broad range of discretion possessed by trial courts in regard to evidentiary matters. See, e.g., Maggard v. State, 399 So.2d 973 (Fla. 1981). Appellee suggests that appellant has failed to demonstrate any such abuse in this case, which could have served as the basis for a proper objection, as to the trial court's handling of the tape-recorded statements of Mrs. Arzberger. A sufficient predicate was laid for the usage of this tape, given the witness's inconsistencies at trial and her denial, or lack of recollection, of certain portions of the recorded prior statements. Compare, Ford v. State, 374 So.2d 496 (Fla. 1979).

Further, it is clear, given the "inter-connection" of the questions by Edmonson and the answer by Arzberger, that it would have been impossible to delete all of the investigators' statements or questions. As it was, the prosecutor announced that he would not play portions of the tape which could be said to be unnecessarily prejudicial to the defense, and Judge Weinberg ordered any volunteered statements by the investigator excluded (R 7888-9). As the court observed in Hills v. State, 428 So.2d 318, 320, n. 1 (Fla. 1st DCA 1983),

> We recognize that precise excision from tape-recorded statements or conversations of only those portions which contain inconsistent statements is, in many instances, easier said than done. The trial court must be accorded some discretion in separating out the wheat from the chaff in such recordings so that playback of the resulting product can be followed and understood.

Additionally, appellant's inconsistent positions on this matter, i.e. demanding that the entire tape be played while complaining of Edmonson's comments, hardly assisted Judge Weinberg. As the court observed in Denny v. State, 404 So.2d 824, 826 (Fla. 1st DCA 1981), an appellant cannot complain on appeal of the playing of extraneous portions of a tape-recording, when his objections as to the completeness of the tape have encouraged the judge to play it in its entirety before the jury. Given the fact that Arzberger and Edmonson were both fully available for examination at trial, appellant has failed to demonstrate any error as to the manner in which the tape was played. The instant conviction should be affirmed.

POINT XI

APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR IN REGARD TO THE TRIAL COURT'S EVIDENTIARY RULING DURING THE TESTIMONY OF WITNESS EDMONSON AT SENTENCING

At the sentencing hearing of November 14, 1984, appellant and his wife offered testimony in mitigation (R 8300-7). Debra Rogers testified that she and appellant had been married for fourteen years and had three children, describing him as a good husband and father (R 8301). She also offered her opinion that he was not guilty of any of the crimes that Thomas McDermid had implicated him in (R 8301). Appellant testified that he had never even been arrested prior to April of 1982, and that all of his convictions were attributable to McDermid (R 8304). He then categorically denied ever having committed any armed robbery (R 8304). When his attorney started to ask him when, if ever, he had been in St. Augustine, appellant gratuitously volunteered that he had offered to take polygraphs or truth serum but that the state had not accepted his offer (R 8305).

On cross-examination, the state asked appellant whether or not he had a "pretty hot temper"; appellant in essence denied it (R 8305). He similarly denied getting violent when he was angry, observing that he had had opportunities to "get violent" but never had (R 8306). The prosecutor then asked him about an incident, occurring around the time of the murder, when he and his brother-in-law, Steve Young, had been at a Denny's Restaurant. The prosecutor asked appellant whether or not at such time, when someone had come up to the table to take a chair, appellant had stated to Young that, if he had to, he would have stuck this unknown person in the throat with a fork (R 8306). No objection was interposed to this testimony, and appellant flatly denied ever saying anything of the kind (R 8306).

On rebuttal, the state called Steve Young, who testified, when asked about the incident, that whereas he and appellant had been at the restaurant, and someone had attempted to take a chair, no threat had ever been verbalized, although appellant had gotten somewhat angry (R 8308). No objection was interposed in regard to this testimony (R 8308). Young also stated that he could not recall ever having told Investigator Edmonson that appellant had made a threat (R 8308). The state then called Investigator Edmonson, and the following exchange took place:

> Q: What did Mr. Steven Young tell you with regards to an incident involving a chair in a restaurant?
>
> MR. TUMIN: Your Honor, I object to the whole line of questioning both from the previous witness and this witness. We are on rebuttal. If they want to rebut anything that the state said or that the defense said in terms of mitigation, fine. But they haven't -- none of this relates to any testimony that was elicited from Mrs. Rogers or Mr. Rogers. That's what the rebuttal is.
>
> MR. WHITEMAN: I think the character of him being a non-violent person was elicited.
>
> MR. TUMIN: He's trying to discredit his own witnesses.
>
> MR. WHITEMAN: Your Honor --
>
> MR. TUMIN: Steven Young was a witness for the state.
>
> THE COURT: All right. Objection will be overruled. Go ahead. (R 8310-11).

Edmonson then testified that Steve Young had told them that appellant had stated, after the attempted chair theft, that he should run a fork through the throat of the offender (R 8311).

Appellant contends on appeal that his sentence of death, the unanimous recommendation of the jury, should be vacated because of the above evidentiary ruling. Appellant argues in his brief that he had objected to this testimony at the trial, "based on the irrelevant nature of the testimony." (Brief of Appel-

lant at 80), as well as based upon the fact that it was outside the scope of rebuttal. Appellant argues that this evidence constitutes improper character evidence, going toward a non-statutory aggravating circumstance, and that the state's cross-examination of him violated State v. Dixon, 283 So.2d 1 (Fla. 1973), in that it was designed to require him to help the state prove an aggravating circumstance. Appellant notes that the prosecutor mentioned the fork incident in his closing argument to the jury (R 8315), and also seems to argue that this court's decision of Elledge v. State, 346 So.2d 998 (Fla. 1977) excuses his failure to object in a more timely or comprehensive fashion.

Appellee disagrees with appellant's reading of Elledge, and submits that neither adequate preservation nor fundamental error has been demonstrated in this case. It is clear from the record that appellant made no contemporaneous objection to the introduction of this testimony due to its content or prejudicial nature, and it should be obvious that he had at least three opportunities to do so. His only objection, when made, was based upon the fact that the testimony was outside the scope of rebuttal, and, indeed, at such time he did not seem to object to its content. Compare, Stewart v. State, 420 So.2d 862 (Fla. 1982). The state contends that this court's decision in Steinhorst v. State bars review of this point on appeal, inasmuch as Judge Weinberg was never presented with the identical claims of error which appellant seeks to raise on appeal. In such case, this court held that in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal grounds for an objection, exception or motion at trial. This was not done, either in reference to the testimony of Edmonson, cross-examination of appellant, or closing argument by the prosecutor, and accordingly none of these arguments are preserved. See, Rose v. State, 461 So.2d 84 (Fla. 1984).

Further, while appellee agrees with appellant as to the fact that, in establishing that aggravating circumstance relating to prior convictions of

violent felonies, the state is restricted to proof of actual convictions, see, Provence v. State, 337 So.2d 783 (Fla. 1976), Perry v. State, 395 So.2d 170 (Fla. 1980), the state does not agree that in Elledge, this court held that the introduction of any arguably improper evidence, going toward a non-statutory aggravating circumstance, constitutes fundamental error in every case. In Elledge, a witness testified at the penalty phase regarding the facts supporting a pending murder charge against the defendant, which was unrelated to the murder for which he had just been convicted. This court found such to be error, and because it could not determine whether or not the judge had found any facts in mitigation, vacated the sentence, inasmuch as it was impossible to tell the part which this evidence had played in the weighing process. Interestingly, however, in Elledge, this court also approved the introduction into evidence of testimony at the sentencing phase regarding the details of another murder, which had by this point resulted in a conviction, which likewise was not one for which the defendant was being sentenced. In upholding such admission, this court observed,

> we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. Id at 1001.

The issue in this case would seem to be, assuming that any claim of error has been preserved, whether the admission of this evidence contributed to an unreliable sentence of death. Initially, it must be noted that even if the prosecutor was incorrect in arguing to the jury that this evidence could be considered in reference to any aggravating factor, it is unclear, under Elledge, whether or not it would have been otherwise admissible as going toward appellant's character. Section 921.141(1) Florida Statutes (1981) provides that at sentencing, 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 one must wonder, whether, even if the pendency of the murder charge in Elledge could not have been admitted, the facts underlying such crime could have, as evidence as Elledge's character. It must also be observed, that it is permissible to cross-examine the defendant at a capital sentencing phase, and there is no doubt that appellant sought to put into evidence his good character and non-violence. Further, given this testimony by appellant, no doubt in furtherance of mitigation, it is unclear whether or not the state would have been entitled to bring its own evidence to rebut any showing by the defense of the applicability of that mitigating circumstance relating to a lack of significant history of prior criminal activity, pursuant to section 921.141(6)(a) Florida Statutes (1981). It does not appear that this circumstance is limited to the existence, or lack thereof, of formal convictions. Cf., Simmons v. State, 419 So.2d 316 (Fla. 1982).

In any event, from the record, we do know the purpose for which the prosecutor asked the jury to consider this evidence. Accordingly, we can know how much, if any, of a role it played in the sentencing decision, and we can say, in contrast to either Elledge or Dougan v. State, 470 So.2d 607 (Fla. 1985), that the introduction of this evidence had no effect on the advisory sentence or that ultimately imposed. In his argument to the jury as to why they should find that aggravating circumstance relating to prior convictions of crimes of violence, the state, in addition to noting this fork incident, drew the jury's attention to appellant's three (3) prior convictions of armed robbery; certified copies of such judgments and sentences had been introduced into evidence at the sentencing hearing (R 4521-4533). Thus, in addition to the evidence going toward other aggravating factors, and a lack of evidence going toward mitigating factors, there were several other valid evidentiary bases supporting this aggravating factor and an ultimate sentence of death. Further, when Judge Weinberg found this aggravating circumstance, he noted, as a factual basis, only the 3 Orange County con-

victions (R 4592-3); additionally, he found four (4) other aggravating circumstances and no mitigating circumstances, statutory or otherwise (R 4591-7). It can be said that the "fork threat" is entirely superfluous to the instant death sentence.

In drawing such conclusion, the state notes the reletive infrequency with which evidentiary matters have served as bases for vacation of sentences of death. Usually, in such situations, the error committed involves the introduction of evidence which the defense does not have an opportunity to cross-examine or rebut. See, Engle v. State, 438 So.2d 803 (Fla. 1983). Obviously, such was not the error sub judice, in that, despite the fact that Edmonson's testimony was hearsay, the declarants, appellant and Young, were available to testify. In fact, they both testified to the effect that the statement had never been made, testimony which the jury could easily have preferred over that of Edmonson. While recognizing this court's holdings in Elledge, Dougan and Robinson v. State, 11 F.L.W. 167 (Fla. April 10, 1986), the state suggests that the introduction of improper evidence at sentencing is not always grounds for reversal. Compare, Harich v. State, 437 So.2d 1082 (Fla. 1983), admission of defendant's previously-suppressed statements at sentencing error, but harmless in that evidence not critical or substantial, and defendant not prejudice. The instant sentence of death is in no way predicated upon this nebulous quasi-threat, never consummated, involving a chair, a stranger and a fork, and the instant sentence should be affirmed.

POINT XII

THE INSTANT SENTENCE OF DEATH IS VALID AND SHOULD BE AFFIRMED; IT IS SUPPORTED BY THE FINDING OF PROPER AGGRAVATING CIRCUMSTANCES; NO ERROR EXISTS IN THE TRIAL COURT'S FAILURE TO FIND ANY CIRCUMSTANCE IN MITIGATION; THE JUDGE DID NOT GIVE UNDUE WEIGHT TO THE JURY'S ADVISORY SENTENCE; THE SENTENCE IS NOT TAINTED BY ANY FUNDAMENTAL ERROR IN THE PROSECUTOR'S CLOSING ARGUMENT

As appellant notes, the jury in this case, after deliberating a relatively short time, returned a unanimous advisory verdict of death (R 8338-8342, 4534). Judge Weinberg adjudicated appellant guilty of first degree murder, and set sentencing for some three weeks away, on December 5, 1984, ordering a pre-sentence investigation report (R 8342-3). On such date, Judge Weinberg imposed a sentence of death, and read, in open court, from his written findings of fact in support of such sentence (R 8390-3; 4591-8). The judge found the presence of five (5) statutory aggravating circumstances: (1) that the capital felony had been committed by one previously convicted of a felony involving the use or threat of violence, pursuant to section 921.141(5)(b) Florida Statutes (1981); (2) that the capital felony had been committed while the defendant was engaged in the commission of, attempt to commit, or the flight after committing or attempting to commit an enumerated felony, robbery, in violation of section 921.141(5)(d) Florida Statutes (1981); (3) that the capital felony had been committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, pursuant to section 921.141(5)(e) Florida Statutes (1981); (4) that the capital felony had been committed for pecuniary gain, pursuant to section 921.141(5)(f) Florida Statutes (1981) and (5) that the capital felony had been committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, pursuant to section 921.141(5)(i) Florida Statutes (1981) (R 4591-8). The judge found that there were "no miti-

gating circumstances, statutory or otherwise" (R 4597), and, in demonstrating the lack of applicability of any statutory mitigating factor, such as that pursuant to section 921.141(6)(d) Florida Statute (1981), found that although two persons had been engaged in the armed robbery in question, "Appellant pulled the trigger and was the more active participant in the entire episode." (R 4596).

In his point on appeal, appellant raises a multi-faceted challenge to his sentence, attacking the finding of four of the five aggravating circumstances and the failure by the judge to find any circumstance in mitigation. He also contends that Judge Weinberg gave undue weight to the advisory verdict and that such verdict was tainted by the prosecutor's closing argument at the penalty phase, to which no objection was interposed. Appellee contends that no reversible error has been demonstrated, and that the instant sentence of death should be affirmed in all respects. Appellant's contentions will now be specifically addressed.

XIIA. THE TRIAL COURT FOUND AT LEAST FOUR VALID AGGRAVATING CIRCUMSTANCES

In his brief, appellant challenges the finding of four of the five aggravating circumstances cited by Judge Weinberg; he omits any challenge to that finding pursuant to section 921.141(5)(b), relating to the commission of the capital felony by one previously convicted of crimes of violence. Before turning to the three aggravating circumstances most at issue, the state would briefly recognize that, in light of such precedents of this court as Provence v. State, supra, it is difficult to find a basis for the trial court's independent finding of that aggravating circumstance pertaining to pecuniary gain. Accordingly, the state would contend that such circumstance must be regarded as having merged with that pertaining to the commission of the instant homicide during flight after an attempted robbery, pursuant to section 921.141(5)(d). Because this doubling had no effect upon the weighing process, there being other valid

aggravating circumstances and an absence of any findings in mitigation, the instant sentence should be affirmed. Compare, e.g., Vaught v. State, 410 So.2d 147 (Fla. 1982).

1. THE TRIAL COURT VALIDLY FOUND THAT THE CAPITAL FELONY HAD BEEN COMMITTED IN FLIGHT FROM AN ATTEMPTED ROBBERY

In his brief, appellant concedes that this finding is supported by the evidence (Brief of Appellant at 86), but argues that it must be stricken because it represents an impermissible doubling with that relating to pecuniary gain. Of course, immediately previously, appellant had argued that the finding relating to pecuniary gain had to be stricken because of lack of evidentiary support (Brief of Appellant 84-6). It would seem that the trial judge is not the only individual who could be allegedly guilty of "impermissible doubling." Appellee knows of no instance in which this court, finding an overlap in aggravating circumstances, has stricken both of them, and appellant has failed to demonstrate the need for the creation of such precedent. This finding is entirely proper, compare Mikenas v. State, 367 So.2d 666 (Fla. 1979), and with appellant's prior record, would justify imposition of the instant sentence. Compare White v. State, 446 So.2d 1031 (Fla. 1984); Maxwell v. State, 443 So.2d 967 (Fla. 1983).

2. THE TRIAL COURT VALIDLY FOUND THAT THE CAPITAL FELONY HAD BEEN COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST

As support for this finding, Judge Weinberg stated that appellant's motive in killing David Smith was to prevent him from either detaining appellant or from otherwise aiding the police. This finding is premised upon McDermid's testimony to the effect that appellant had stated, while on route back to Orlando, that, while in the store, he had seen someone go out of the back. Accordingly, when appellant exited the store from the front, he stated that he was "looking for" this person (R 6554). Appellant told McDermid, in reference to his motive for the shooting, "He was playing hero and I shot the son of a bitch." (R 6554).

Thus, the situation in this case differs from others in which this court has stricken the instant finding. In Rivers v. State, 458 So.2d 762 (Fla. 1984), the defendant, during a restaurant robbery, shot and killed a waitress as she tried to run down the hallway. This court found that the trial judge's conclusion that she had been killed to prevent her from leaving the restaurant and alerting the authorities was speculation. Here, in contrast to Rivers, the store employee had left the store and, the robbery having been aborted, appellant would have had no reason to kill David Eugene Smith, other than to facilitate the getaway or to prevent or delay apprehension. It must be noted that at the penalty phase, the state adduced evidence to the effect that, at the time the victim was found, a set of car keys were in his hand or otherwise in his possession, and photographs to such effect were also admitted (R 8268, 4520). Appellant's statement to McDermid that he was looking for Smith at the time they left the store obviously indicates that he knew what he had to do. His subsequent comment to McDermid, as to the victim's "playing hero" is obviously more instructive as to motive or intent, than that in Griffin v. State, 474 So.2d 777 (1985),"I shot the cracker. The cracker is bleeding like a hog," wherein the court struck the finding of this aggravating factor.

It is also clear, as will be discussed more fully below, that given the number of shots, appellant obviously intended to completely eliminate this potential witness or hindrance to his escape. The victim was shot once at very close range, non-fatally, in the shoulder, as, in all likelihood, he drew back or stooped away (R 6395-6). Given the testimony as to the pause between the shots, it is likely that this non-fatal shot was the first, and that, as the victim lay helplessly prone on the ground, appellant then fired the two fatal shots (R 6397, 6550-1). Although fired from a greater distance, these bullets met with resistance in their exit, in that the victim was lying face down on the asphalt, and such resistance accounts for the shape of the exit wounds;

one of the bullets, additionally, was embedded into the asphalt after penetrating Smith's body (R 6392-5, 6421). Given the fact that the victim was shot once non-fatally, it can safely be inferred from the evidence that, following such shot, he was no longer a threat to appellant, and that the remaining shots were fired to assure that he could never testify in court or otherwise secure the police to arrest appellant. Compare Herring v. State, 446 So.2d 1049 (Fla. 1984); Vaught, supra. Appellant's reliance upon Armstrong v. State, 399 So.2d 953 (Fla. 1981), in which this particular aggravating factor was not at issue, would seem misplaced, and, given the clear evidence of appellant's motive in killing David Smith, the finding of this aggravating circumstance was proper.

3. THE TRIAL COURT VALIDLY FOUND THAT THE CAPITAL FELONY HAD BEEN COMMITTED IN A COLD AND CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

Judge Weinberg found this aggravating circumstance on the basis of the fact that, at the time the fatal shots were fired, the victim posed no threat whatsoever to appellant (R 4596). In contrast to a "traditional" felony-murder, it is clear that David Smith was not killed to facilitate the taking of property; appellant had already called off the robbery after seeing Smith exit the store. Further, it is clear, in contrast to the cases relied upon by appellant, such as Blanco v. State, 452 So.2d 520 (Fla. 1984), that the meeting between appellant and David Eugene Smith was no chance encounter or accident. Appellant was not surprised to find Smith in the parking lot; he had been specifically looking for him when he left the store, and his statements to McDermid evince an intent to kill him. Compare also Thompson v. State, 456 So.2d 444 (Fla. 1984).

Additionally, although appellant argues that the murder took place too quickly for any heightened premeditation to be formed, it is clear that appellant had at least three chances to cease and desist. The victim was shot three times.

If appellant was surprised at finding Smith in the parking lot, one could have expected, at most, a quick shot. Instead, the victim was shot once, and then, after a pause, shot twice more in quick succession, despite his plea that his life be saved. As one can deduce from the testimony of the medical examiner, the non-fatal shot was in all likelihood the first, when the victim was standing, or, at least, vertical; the remaining shots were fired as the victim lay face down on the ground. The medical testimony indicates that the non-fatal shot was fired at very close range. This murder has all the indications of an "execution style" killing, and the finding of this aggravating circumstance is supported by precedent. Compare Herring v. State, supra.

Herring is an instructive case, because, in such case, the victim was a convenience store clerk, killed in the course of an armed robbery; the body was recovered by the cash register, shot three times. This court approved the sentence of death, including the trial court's finding of "cold and calculated", noting that from the evidence, it was clear that the defendant had shot the victim once while the victim was standing by the register, and then again as the victim lay on the floor. This court noted that the first shot might have been provoked by the defendant's fear that the victim was threatening him, but found that the second shot had been fired with premeditation. Not only does such finding apply here, but it must be noted that in Herring, this court also approved the finding of that aggravating circumstance relating to avoidance of arrest, predicated upon the defendant's statement that he had killed the victim to prevent him from being a witness against him. Thus, this court found no impermissible "doubling" in the finding of both aggravating circumstances 921.141 (5)(e) and (i). Such conclusion is obviously warranted in this case, and the instant sentence of death should be affirmed.

In conclusion, the instant sentence of death is supported by the finding of valid aggravating factors. Once one eliminates that pertaining to pecuniary

gain, it is clear that all such findings are supported by record evidence. Given the entire lack of mitigating evidence, and the finding of any circumstance in mitigation, the presence of the unassailable aggravating circumstances described above justifies the sentence of death in all respects. Compare, Vaught; Bassett v. State, 449 So.2d 803 (Fla. 1984); Hargrave v. State, 366 So.2d 1 (Fla. 1978); White, supra. In fact, it is clear that the weighing process in this case would not be effected by the striking of up to three aggravating circumstances in this case.

XIIB. THE TRIAL COURT'S FAILURE TO FIND ANY MITIGATING CIRCUMSTANCE WAS NOT AN ABUSE OF DISCRETION

In his brief, appellant contends that Judge Weinberg rejected out of hand a finding that he lacked a significant history of prior criminal activity; given appellant's three prior convictions of armed robbery, this assertion is completely without merit. Compare, Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). Appellant then recounts the evidence going toward statutory factors elicited at the hearing, and additionally discusses the contents of the presentence investigation report, not presently a part of the record on appeal, and urges vehemently that the trial court abused its discretion in failing to find any factors in mitigation in reference to these matters. This court has repeatedly held that it is within the province of the sentencing court to determine whether a mitigating circumstance has been proven and the weight to be accorded it. See, Riley v. State, 413 So.2d 1173 (Fla. 1982); White, supra. A different result will not be reached on appeal, simply because the defendant continues to place a different construction upon the evidence. See, Stano v. State, 460 So.2d 890 (Fla. 1984). There is obviously nothing in the record to indicate that the judge did not fully consider all of the matters presented.

Appellant's contention that the fate of Thomas McDermid, i.e. his lack

of a sentence of death, should dictate a different result in regard to his own death sentence, is without merit. Absolutely no construction of the evidence in this case would indicate that McDermid was the "more guilty" participant or that appellant was a mere passive tagalong during the instant offense. The state's case was predicated upon an assertion that appellant was the trigger-man; appellant's defense was predicated upon his belief that he was not present at all. In light of such precedents as Hoffman v. State, 474 So.2d 1178 (Fla. 1985) and Deaton v. State, 480 So.2d 1279 (Fla. 1985), error has obviously not been demonstrated. The instant conviction should be affirmed.

XIIC. THE TRIAL COURT DID NOT GIVE UNDUE WEIGHT TO THE JURY'S ADVISORY VERDICT

In his brief, appellant provides no record basis for his assertion that Judge Weinberg was a "prisoner" of the jury's advisory verdict; at most, it would appear that one could misconstrue the judge's observation in his sentencing order to the effect that such unanimous advisory verdict was "convincing to the court." (R 4597). It is clear, however, inasmuch as the next sentence of such order reads, "The death penalty is justified in law and fact" (R 4597), that the actual sentence imposed was the product of the judge's reasoned and independent judgment. It must be noted that the sentence was not actually imposed until three weeks after the return of the advisory verdict. Compare, Randolph v. State, 463 So.2d 186 (Fla. 1984).

It is clear that during such time, Judge Weinberg was utilizing not only his recollection of the trial, but also the pre-sentence investigation report in determining the appropriate sentence. It is also clear that the error committed in Ross v. State, 386 So.2d 1191 (Fla. 1980) was not committed herein. Judge Weinberg did not state that, finding no reason to override the jury, he would impose their sentence. This argument is totally without merit.

XIID. THE INSTANT SENTENCE OF DEATH IS NOT TAINTED BY ANY FUNDAMENTAL ERROR IN THE ARGUMENT BY THE PROSECUTOR AT SENTENCING

As his final attack upon his sentence of death, appellant asserts, for the first time, that the prosecutor misstated that law during argument at the penalty phase, and that the jury was led to believe that they need not find appellant to be the triggerman in order to recommend death (R 8322). The full context of such argument, however, reads:

> Now I submit again that under the law of Florida, it is not necessary for you to conclude that Jerry Layne Rogers pulled the trigger of the gun that killed David Eugene Smith to return an advisory sentence of death, but I submit that Jerry Layne Rogers did, in fact, pull that trigger. The testimony of Thomas McDermid is that it was Jerry Layne Rogers, his partner, who fired the shots that killed David Eugene Smith shortly after David Eugene Smith pleaded, 'No, please don't.' (R 8322).

In defense closing, appellant's counsel argued that appellant had been nowhere near the scene at the time of the murder (R 8328, 8330-1). Among his finding in the sentencing order, Judge Weinberg found that appellant had pulled the trigger and was the more active participant (R 4596). In his brief, appellant concedes that substantial, competent evidence exists in the record to support any finding that appellant was the actual trigger man (Brief of Appellant at 92).

Inasmuch as no objection was interposed in reference to the prosecutor's closing argument at sentencing, this point is not properly before this court, and appellant should not be able to avoid the contemporaneous objection rule by alleging the existence of any "taint". See, Bassett, supra; Rose, supra. Additionally, it is clear that this observation by the prosecutor was, at worst, unnecessary. The jury had only two views of the crime before it - total innocence or total guilt - either appellant pulled the trigger or he was not present. This was not an instance, as in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), upon which appellant relies, in which a participant in a

felony sought to show that, while intending to participate in such felony, he did not intend to kill, and in fact had neither killed nor attempted to do so. Enmund is simply inapplicable to these facts.

Further, the prosecutor's argument was not an incorrect statement of the law, in that non-triggermen in a felony murder can be sentenced to death, where it is shown that they attempted or intended to kill. Compare, James v. State, 453 So.2d 786 (Fla. 1984); Bush v. State, 461 So.2d 936 (Fla. 1984); State v. White, 470 So.2d 1377 (Fla. 1985); Cave v. State, 476 So.2d 180 (Fla. 1985). Given the lack of objection, lack of request for further instruction to the jury, and total inapplicability of Enmund to the facts sub judice, appellant has failed to demonstrate any taint in the instant sentence. The sentence of death should be affirmed.

POINT XIII

FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONALLY SOUND ON ITS FACE AND AS APPLIED; APPELLANT HAS FAILED TO PRESERVE THE MYRIAD ISSUES HE NOW RAISES FOR APPELLATE REVIEW.

In his final point on appeal, appellant raises a number of varied and undetailed challenges to the constitutionality of Florida's death penalty statute. In doing so, appellant candidly and correctly concedes that this court has rejected each of these challenges in the past. Appellant fails to apprise this court, however, of the fact that the various arguments he now raises for the first time on appeal have never been presented specifically to the trial court so as to preserve them for appellate consideration by this tribunal. As such, they have not been preserved for appellate review under this state's contemporaneous objection rule. See, Ferguson v. State, 417 So.2d 639 (Fla. 1982); Williams v. State, 414 So.2d 509 (Fla. 1982); Steinhorst v. State, supra.

In fact, as this court noted in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), Florida's death penalty statute has been repeatedly upheld against claims of denial of due process, equal protection, as well as against assertions that it involves cruel and unusual punishment. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); Ferguson v. State, supra; Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Alvord v. State, supra; State v. Dixon, supra.

Appellant raises nothing but vague, unspecific, and unsupported assertions that the capital sentencing statute is constitutionally infirm, and such assertions should be readily rejected. For example, appellant argues that the statute does not sufficiently define aggravating circumstances; that it fails to provide

a standard of proof for evaluating aggravating and mitigating factors; and that it does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and (other unnamed) factors. This court, however, has continuously held that the aggravating and mitigating circumstances enumerated in section 921.141 are not vague and provide meaningful restraints and guidelines to the discretion of judge and jury. Lightbourne v. State, supra; State v. Dixon, supra. Furthermore, the constitutionality of the statute and the mechanics of its operation have been consistently upheld despite numerous and varied challenges. Proffitt v. Florida, supra; Spinkellink v. Wainwright, supra; Ferguson v. State, supra; Alvord v. State, supra.

Furthermore, appellant's time-worn accusation that the death penalty by electrocution is cruel and unusual or that the failure to require notice of aggravating circumstances as well as the "arbitrary and unreliable application of the death sentence" results in a denial of due process has likewise been consistently rejected. Proffitt v. Florida, supra; Spinkellink v. Wainwright, supra; State v. Dixon, supra.

Similarly, appellant's argument that the "cold, calculated, and premeditated" aggravating circumstance outlined in section 921.141(5)(i) makes the death penalty virtually automatic absent a mitigating circumstance is preposterous in light of this court's consistent and clear pronouncement that such an aggravating factor does not apply in all premeditated murder cases but only under certain factual circumstances. Harris v. State, supra; Jent v. State, 408 So.2d 1025 (Fla. 1981). Furthermore, appellant's argument that application of this aggravating circumstance to this particular defendant is violative of the constitutional protections against ex post facto laws is meritless in light of this court's holdings in Combs v. State, 403 So.2d 418 (Fla. 1981), and later cases.

The state submits that the remainder of appellant's hodgepodge of con-

stitutional challenges are equally unsupported, unspecific and without merit. For example, appellant's claim that a defendant's due process rights are violated by failure to notify him of the aggravating circumstances to be utilized to justify the imposition of the death sentence has been previously raised and disposed of in Sireci v. State, 399 So.2d 964, 965-66 (Fla. 1981); see also, Menendez v. State, 368 So.2d 1278 (Fla. 1979).

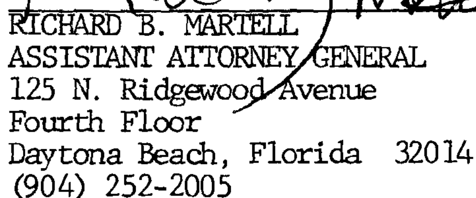
In short, this point on appeal would seem reminiscent of that raised, and rejected by this court in Stano v. State, 460 So.2d 889 (Fla. 1984), a "grab bag" of previously-rejected challenges to the constitutionality of section 921.141, not deserving of reconsideration. Such conclusion is warranted sub judice.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of death of the trial court in all respects.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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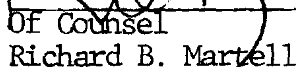
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to Christopher S. Quarles, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 29 day of May, 1986.



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