SUPREME COURT OF FLORIDA

MICHAEL SCOTT KEEN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 67,384
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"AB"	Appellant's Initial Brief

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case as found on page vii of Appellant's Initial Brief with the following additions and clarifications:

On June 7, 1985, Appellant, Michael Scott Keen, was found guilty by a jury of his peers for the crime of murder in the first degree (R 1381,1743).

On June 10, 1985, a seperate sentencing proceeding was conducted by the trial jury for the purpose of advising the trial court whether the Appellant should be sentenced to death or life imprisonment for his conviction of murder in the first degree. The trial court instructed the jury on the following aggravating circumstances:

> 1. The crime for which the defendant is to be sentenced was committed for pecuniary gain;
>
> 2. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel;
>
> 3. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
> (R 1551-1552,1747)

The trial court then instructed the jury on the mitigating circumstances that they could consider (R 1552-1553; 1747-1748). Thereafter, the jury unanimously recommended that the Appellant be sentenced to death (R 1558,1751).

Subsequently, in its sentencing order, the trial court determined the above-cited, three aggravating circumstances to be applicable to Appellant (R 1762-1765). The trial court found no mitigating circumstances to be applicable (R 1765). The trial

court accepted the jury's recommdation of death and sentenced Appellant to death for the murder of his wife, Anita Lopez Keen.

STATEMENT OF THE FACTS

Appellant's Statement of the Facts as found on pages vii, viii, and ix of Appellant's Initial Brief is inaccurate and incomplete. For that reason, Appellee will submit it's own Statement of the Facts:

Kenneth Shapiro was present on Appellant's boat the day Appellant murdered his wife, and testified on behalf of the State. Shapiro moved to Miami in December of 1977, two years after he graduated from Cornell University in New York with a degree in Food Science (R 767-768). Shapiro testified that he moved to Florida to see what kind of job he could land and initially lived with his grandparents on Miami Beach (R 768). Appellant and Shapiro met in 1978 after Shapiro answered an advertisement in the paper for a sales position with the sign company Appellant was a local manager for (R 769). Appellant hired Shapiro, to work for him and two months later invited him to move into his Hialeah apartment (R 771). In 1979 the two men moved to an apartment in North Miami Beach Appellant had leased (R 773). Appellant's brother, Patrick, who also worked in Appellant's sign business, moved in with Appellant and Shapiro for a short time (R 774). Appellant and Shapiro lived in the North Miami Beach apartment for approximately one (1) year (R 774). Shapiro moved out of the apartment in April 1980 and went to Tampa for about four months (4) to work at another job (R 828-829). Things didn't work out in Tampa so in July of 1980, he returned and moved in with Appellant

who had leased a home in Fort Lauderdale (R 829). All the while Shapiro lived with Appellant from 1978 until 1980, Appellant was very generous financially to Shapiro. He helped him out with rent and food and made him several loans (R 817-818). Appellant even bought Shapiro a Cadillac (R 820). Appellant never mentioned anything to Shapiro about paying him back (R 773). It was in 1980 that Appellant began talking about his "plan". Appellant told Shapiro he wanted to find an unsuspecting girl, marry her, insure her, and kill her for the insurance proceeds (R 776-777). Appellant wanted to retire before the age of forty (40) and told Shapiro the easiest way to do it was to murder someone, collect a large lump sum of money, and invest it (R 823). When Appellant first told Shapiro of the plan, Shapiro just shrugged it off (R 821). Appellant met the victim late summer of 1980 after his brother Patrick introduced the victim to him. Anita Lopez was then twenty-one (21) years old, Cuban born, and worked in a tractor factory (R 1185). After he began seeing the victim regularly, Appellant told Shapiro, "I feel Anita is the girl" (R 839). Shortly after this the victim moved in with Appellant and Shapiro at the Fort Lauderdale house (R 1105). Shapiro testified that Appellant discussed his plan throughout his relationship with the victim (R 777). By early 1981 Appellant began discussing the actual ways the victim could be disposed of (R 777). Shapiro testified that Appellant first thought he would kill the victim by pushing her off a high building (R 778). Appellant ultimately decided a drowning would be better (R 782). Shapiro testified that he stayed in the house with Appellant during these "discussions" because he was afraid of Appellant (R 779). Appellant told Shapiro

that if he went to the authorities he would be killed (R 779). Shapiro testified that his life had been threatened and that he was very scared (R 779). Shapiro testified that he was a witness at the marriage of Appellant and the victim in August 1980 (R 779). Appellant continued to discuss his plan even more often after he married the victim and told Shapiro he had insured the victim (R 782-783). Shapiro testified that he didn't know how to handle Appellant so he didn't offer any resistance to his plan (R 782). Shapiro said he felt "boxed in", remained quiet and didn't tell anyone of Appellant's plan (R 783). Shapiro testified that soon the victim became pregnant and that Appellant did not want the child (R 784). The victim's pregnancy accelerated the implementation of Appellant's plan (R 836). In late October or early November 1981, Appellant told Shapiro that if Sunday, November 15th was a nice day, that that would be the day he would proceed with his plan (R 784-785). Shapiro testified that Appellant wanted him involved with the plan to act as an alibi or buffer, someone who could back up and substantiate the story that was going to be used to cover the incident (R 785). Appellant told Shapiro that he would be killed if he went to the authorities and would be killed if he didn't go on the boat (R 809). Shapiro took Appellant's threats seriously (R 809). He felt boxed in (R 809). Appellant also threatened to kill Shapiro's grandparents (R 811). Appellant told Shapiro that this would be his way of repaying Appellant the huge debt he had amassed over the years (R 786). Appellant told Shapiro that he was now concerned that Shapiro hadn't paid him back and didn't appear as though he'd be able to (R 787). This was finally going to be a way for Shapiro to "pitch in,

help out and wipe the slate clean" (R 787). Appellant's "plan" was that on Sunday, the 15th, Appellant and the victim would go out on the boat that Appellant and his brother Patrick owned (R 787,830). Appellant thought the victim would be receptive to the idea because she'd think it would just be the two of them (R 787). Appellant told Shapiro to meet him at a bar called Tugboat Annies on the Intracoastal Waterway in Fort Lauderdale (R 788). Thereafter, Appellant would "invite" Shapiro to join him and the victim, Shapiro would accept, and the three of them would head out into the Atlantic Ocean 9R 788-789). Shapiro didn't immediately agree to go along with Appellant's plan but as the day grew closer, Appellant began hammering at Shapiro (R 789). Shapiro said Appellant told him he better go along with it or else he'd be in alot of trouble (R 789). November 15th turned out to be a "nice" day and Shapiro went to Tugboat Annies as Appellant had earlier told him to do (R 789). Appellant and the victim were already there (R 789-790). After spending some time at the bar, the three boarded Appellant's boat as planned (R 792). Appellant piloted the boat so far out into the ocean that only the tops of the tallest buildings on land could be seen from the boat (R 793). The water there was very calm (R 793). When the boat was far enough out, Appellant without saying a word, put the boat in neutral, walked over to where the victim was standing against an railing and pushed her from behind into the ocean (R 794). There were no other boats in the area (R 855). It was late in the day and just barely still light out (R 794). Shapiro testified that he wanted to stop Appellant but just froze in his tracks (R 795-796,863). Appellant told Shapiro to put the boat in gear and take it out of the

victim's range (R 795). The victim was not wearing any life-saving equipment (R 795). Appellant took over the controls of the boat and kept the boat out of the victim's range (R 796). Shapiro testified that Appellant kept the boat in the area because he wanted to witness the victim "go under", actually drown so that he knew, in fact that she had died and then could go ahead and proceed to make a claim against the policy he had (R 796-797). Appellant planned on recovering the victims dead body and presenting it (R 797). As Appellant was waiting for the victim to die it became dark out (R 797), and he was unable to see the victim. Shapiro testified that the last time he saw the victim she was in the ocean: "She was swimming. She was treading water. She was doing the back stroke, the crawl, doing what she had to do to stay afloat" (R 797). After it got too dark out, Appellant headed the boat back to his backyard dock in Fort Lauderdale (R 797). Since they didn't have the victim's body, Appellant decided they would tell the authorities that the victim had just fallen overboard (R 798,860). The boat got back to port at around 7:30 p.m. or 8:00 p.m. (R 798). On the way, the boat passed a Coast Guard Station and numerous dockside business establishments but Appellant never stopped to tell authorities about the accident." (R 798-799). After Appellant and Shapiro got back to Appellant's house, Shapiro called the Coast Guard and the authorities (R 799) and someone from the Broward Sheriff's Office came out that night to make a report (R 800). About a week later, Shapiro gave a sworn statement to Detective Carney of the sheriff's office (R 800). Shapiro backed up the story Appellant had outlined for him to follow, which was whatever happened to the victim was an accident (R 800). Shapiro

told the detective that they discovered the victim missing after they docked the boat and checked below and couldn't find her (R 801). Shapiro testified that the story told to the detective was a lie (R 801). Shapiro said he lied because his life had been threatened by Appellant and that he was scared, very scared (R 801). Appellant told Shapiro to tell the story again, under oath, to Appellant's attorney, Mr. Stone (R 801). The purpose of talking to the attorney was to get things going in terms of making the insurance claims (R 801). Shapiro told the same story to the attorney as he had earlier told the detective (R 802) The next time Shapiro gave a statement regarding the victim's disappearance was in August of 1984 when he was contacted by detectives Scheff and Amabile of the Broward Sheriff's Office (R 802). Shapiro finally told the truth about what happened November 15th 1981 to the detectives (R 804). As a result of Shapiro cooperating with the police he was let go from his job at Dean Witter Reynold in Miami (R 803). When asked why he finally told the truth in 1984, three (3) years after the murder, Shapiro testified that his knowledge of the murder was wearing at him, devastating him, and that he knew he would have to tell someone sooner or later (R 805). Shapiro broke down and told the truth after being questioned by police (R 805). Shapiro testified that Appellant had threatened him numerous times in the years since the murder (R 826). Shapiro kept quiet because he was afraid for himself as well as his grandparents (R 826). Shapiro denied that it was his idea to kill the victim or that he pushed the victim in the water (R 869). Shapiro testified that he was testifying without immunity but that he wanted to get the story off his chest (R 868).

Hector Mimoso of the Broward County Sheriff's Office testified that he was dispatched to Appellant's residence the night of November 15th 1981 to investigate a missing person report (R 894-896). Present in the house was Appellant and Shapiro (R 896). Mimoso testified that he was at Appellant's house for a total of 30 to 40 minutes (R 897). Appellant told Mimoso that they were out on a boat trip and at one point on the trip, the victim who was pregnant said she was tired and that she was going down to the cabin to sleep (R 899). The last Appellant saw of the victim was when she went down to the cabin (R 899). When they returned to the house and went down to the cabin to look for her she wasn't there (R 899). Mimoso said that as Appellant was telling the story he was sitting down and was very calm and was not excited (R 899). Shapiro on the other hand was pacing through the house and seemed excited (R 902). When Mimoso asked Appellant if he could notify the victim's parents, Appellant told him that he didn't have their phone number or address and didn't even know their names (R 908). Mimoso found this strange (R 908). Appellant was the one who gave all of the information about the victim and her disappearance to Mimoso (R 914), and didn't have any trouble speaking to Mimoso.

Don Scarbrough of the Broward Sheriff's Office testified that on December 10, 1981, he met with Appellant in Appellant's attorney's office to discuss the victim's disappearance (R 920). Bruce Randall, Appellant's attorney was present during the discussion (R 921). The conversation was taped and was played for the jury and sent to this Court as State's Exhibit 7. However the playing of the tape was not transcribed by the court reporter for

some unknown reason (R 930). The following is a summary of the conversation recorded on the tape: After stating his name and address to Scarbrough, Appellant took an oath to tell the truth. Appellant told Scarbrough that November 15th had been a beautiful day. The victim had been "bugging" Appellant to take her out on the boat so the two took off down the intracoastal. Appellant realized he was low on gas so he stopped at a place called Tugboat Annies to fill up, have a beer, and play some video games. Appellant had earlier mentioned to his friend Ken Shapiro that he and the victim were going boating and invited him to go along but Shapiro had initially declined the invitation. Appellant had told Shapiro where he would be if Shapiro changed his mind and Shapiro ultimately showed up at Tugboat Annies. After spending some time at Tugboat Annies, Appellant, the victim, and Shapiro boarded the boat and headed out into the Atlantic Ocean. Appellant took the boat out very far and was only able to see the tops of the tallest buildings on land. The sun set early that day and the three of them were watching the sunset. The victim who was four or five months pregnant, was tired and wanted to go in the cabin and sleep. Appellant watched the victim go into the cabin and close the door behind her. Appellant told Scarbrough that the engines on the boat were very loud and that he had the music on the radio "blaring". He and Shapiro were talking and didn't hear "anything". Appellant headed the boat back to shore and docked the boat in his backyard. He then went to check on his wife in the cabin but she wasn't there. Appellant thought that maybe she was already in the house so he looked for her inside of their home. He couldn't find her in the house so he ran back to the boat and asked

Shapiro if he had seen her but Shapiro had not. Appellant said he wanted to take the boat back out and look for his wife but Shapiro told him to call the Coast Guard, that maybe the victim had fallen overboard. Appellant called the Coast Guard that night. The Coast Guard recommended Appellant call the Sheriff's Office which he did. A detective came out and took a statement from Appellant and the Coast Guard looked for the victim but couldn't find her. Appellant told Scarbrough that he had known Shapiro for about three (3) years and that Shapiro worked for him and lived with him. Appellant also told Scarbrough that he and Shapiro were together on the boat the entire ride. Appellant said that he learned that his wife was pregnant only a couple of weeks before the accident and that he and his wife really wanted the baby. When Scarbrough asked if the victim had any insurance policies out on her Appellant answered:

> Q. Did you wife have any insurance policies out on her?
> A. Yeah, I uh, I did not talk to the man at first, sh, he came to her first....
> Q. Mmm hmm.
> A. Uh I think it was Prudential, a gentleman in Miami to her job and uh, she wanted to get a policy of some type which would allow her to save money, I think a whole life type of thing which would be kind of an investment for her future too.
> Q. Um, did she have any other insurance policies that you know of?
> A. We had another one, with Life of Virginia <u>which was not a whole life, which I asked her to cancel and she said she did, as far as I know, it's it's not enforced right now</u>.

Appellant said the two insurance policies went into effect just prior to his August 1st marriage to the victim.

Life of Virginia Agent, Donald Johnson, testified that on

June 9, 1981, he went to Appellant's Ft. Lauderdale home to discuss insurance (R 936). Johnson testified that he went to Appellant's home after he was contacted by Appellant and that once there, Appellant, not the victim, initiated the discussion that the victim get life insurance (R 936-937). Appellant told Johnson that the victim was his fiance and that he wanted life insurance (R R 937,941,955). The victim did not object (R 955). A policy on the victim's life was actually applied for at that time and Appellant watched as the victim filled out the application (R 937). Johnson testified that another male was present in the house at the time but he didn't know who it was (R 951). Johnson testified that the policy on the victim's life was for term insurance rather than whole life (R 938). Johnson explained that a term policy has no cash value and is used strictly for protection as opposed to a whole life policy which builds a cash value over time (R 938). The policy was for $50,000.00 (R 941). Contained in the policy was a double indemnity clause which provided that in the case of accidental death the policy would pay $100,000.00, twice it's face value (R 941). Johnson testified that such a clause must be requested and increases the monthly premium (R 942). The total cost of the victim's premium was $60.50 per quarter (R 942). Appellant was the beneficiary of the policy (R 940). The first premium payment was paid that night (R 942). Johnson testified that the premium continued to be paid through the years 1981, 1982, 1983 and was paid up until August 1984 when Appellant was arrested (R 943). Johnson explained that the company didn't pay on the victim's policy after the boating "accident" because no body was found and there was no legal declaration of death (R 965). Johnson

also explained that the proceeds from the policy would have been paid to Appellant in seven (7) years if the victim continued to be missing (R 963). Johnson testified that if Appellant at any point had stopped paying the insurance premium the policy would have lapsed and been cancelled (R 965).

Maddie Genova, an assistant office manager for Prudential Insurance Company, testified that a whole life insurance policy on the life of the victim had been taken out with Prudential June 19, 1981 (R 980,989). The policy had a face value of $50,000.00 and had a double indemnity clause which provided that in case of accidental death the policy would be worth $100,000.00 (R 984). Appellant was also the beneficiary of this policy (R 984). The monthly premium for this policy was $47.65 (R 990).

Mike Waddle shared a call with Appellant at the Broward County Jail and testified on behalf of the State (R 1003-1004). Waddle testified that Appellant told him that he was arrested because his brother, Patrick, had turned him in because a "deal" between the two didn't work out (R 1005). Appellant told Waddle that deal was to take Appellant's wife out for a "swim" from which she would not return and that Appellant and Patrick were to collect the insurance money (R 1006). Appellant told Waddle that his brother turned him in because the insurance companies weren't paying "it" off and he got tired of waiting and went to the insurance company with the result that Appellant was arrested (R 1005-1006). Waddle testified that Appellant never mentioned that Ken Shapiro was part of this deal (R 1012).

Detective Phillip Amabile of the Broward Sheriff's Office testified that in August of 1984 he was contacted by an insurance

company that had been contacted by Patrick Keen regarding the victim's murder (R 1024-1025). Based on that contact, Amabile contacted Ken Shapiro and took a formal statement from him on August 22, 1984 (R 1024-1025). Shapiro gave the statement without any offers of immunity and was offered nothing in exchange for the statement (R 1025). Amabile testified that after speaking with Shapiro, he contacted Appellant on August 23rd, who was then living in Seminole County under the name Michael Kingston (R 1026-1027). Amabile testified that Detective Richard Scheff was with him at the time he initially contacted Appellant (R 1027). Appellant was read his Miranda rights and Appellant acknowledged them (R 1027). Appellant asked what evidence they had against him and said, "You might as well tell me because as soon as I get an attorney, he will file a motion for discovery and I will find out anyway" (R 1029). Amabile then told Appellant that Shapiro had talked (R 1029). Appellant then asked what the punishment was for first degree murder and Detective Scheff told him death or life imprisonment (R 1031). Appellant asked if a confession could get him a life sentence (R 1031). Amabile testified that Detective Scheff told Appellant tha he couldn't predict anything like that nor could make any promises that would happen (R 1031). Amabile testified that Appellant then said that he couldn't understand why Shapiro would make up lies about him and stated that he couldn't see any strategic reason to confess (R 1031). Appellant referred to his earlier statement given to the Broward Sheriff's Office in 1981 and said that it was a true account of what did occur (R 1031-1032). Amabile testified that Appellant was then transported by car from Seminole County back to Broward County and that Appellant discussed

the case on the way (R 1032). Appellant maintained his earlier story and told Amabile and Scheff that he "didn't physically kill Anita" (R 1032), and that he couldn't see any strategic reason to confess to her murder (R 1033). When Appellant arrived in Broward County he was again advised of his rights and signed a rights waiver form (R 1033-1034). Appellant told detectives that he, his wife and Shapiro went out on his boat November 15, 1981 and cruised through the intracoastal waterway out into the Atlantic Ocean (R 1040). All three were on the flybridge of the boat when the victim said she was going to the cabin below to get some rest (R 1040). After awhile the boat headed back to dock and when they docked and went below to get the victim, she was missing (R 1040). Amabile asked how she could be missing if they didn't make any stops on the way in (R 1040). Appellant said they didn't make any stops and that he didn't hear any splashing (R 1030). Appellant told Amabile the Coast Guard and Sheriff's Office were contacted when they got back to dock (R 1040). Appellant kept reemphasizing how he couldn't understand why Shapiro would lie about what really happened (R 1041). Eventually, Appellant did change his story, Amabile testified (R 1041). Appellant reached that point when he said that the story was all wrong, that "it was all a big fuck-up" (R 1041). Amabile testified that Appellant said they had discussed murdering the victim for the insurance money but "planned and playing and fantasizing and actually doing it are two different things" (R 1041-1042). Appellant never said that he actually killed the victim (R 1042). Appellant then told Amabile another version of what happened on November 15th 1981 (R 1042). Appellant said that he, the victim and Shapiro were out boating in the

Atlantic Ocean when the victim went below to get a drink (R 1042). Appellant went with the victim to get a drink for himself (R 1042). Appellant and the victim were hugging each other when they were pushed overboard by Shapiro (R 1042-1043). Appellant said that the victim hit her head on the dive platform and that he couldn't see her (R 1044). Appellant told Amabile that Shapiro sped anway in the boat but that he was able to swim back to the boat, grabbed hold of the dive platform and boisted himself on board (R 1045). Appellant said that the victim was still in the water and that Shapiro was standing at the controls like a zombie (R 1046). Appellant told Amabile that he struggled with Shapiro for control of the boat and when he finally got it, he went back and searched for the victim until dark (R 1046). He and Shapiro then headed back to port and called the Coast Guard and the Sheriff's Office (R 1046). Orignally Appellant said that Shapiro might have pushed he and the victim overboard intentionally because he knew about the victim's insurance policy (R 1043). After Amabile pointed out to Appellant that there was no way Shapiro could collect because Appellant was the beneficiary Appellant said it was an accident (R 1043). Appellant told Amabile that Shapiro made up the story he had told Hector Mimoso and Detective Scarbrough and that he went along with it because he didn't want Shapiro to appear as a liar (R 1047). Amabile testified that he wanted to tape Appellant's statement but that Appellant wouldn't agree to it (R 1048). Appellant told Amabile that he wanted to make sure his version was true and accurate and that there were too many ways to screw up a tape and made reference to President Nixon and the missing 18 minutes of tape (R 1048). Appellant requested

therefore that his statement be handwritten and Amabile told him he would do his best writing his statement in longhand (R 1048). Amabile testified that he had tried to make the statement verbation of what Appellant had said (R 1051). Amabile thereupon wrote each question and answer that Appellant and he already discussed. Amabile said he made some intentional errors on the statement which Appellant caught and corrected in his own handwriting (R 1051). Appellant would not sign the statement (R 1052). Amabile testified that he told Appellant that he didn't have to talk to him but Appellant said that he didn't need a lawyer because he knew more than they did (R 1092-1093). Amabile testified that he thought Appellant was very intelligent and articulate and that he never had reason to believe Appellant was under the influence of drugs when giving his statement (R 1093). Amabile understood everything Appellant said without any difficulty (R 1094).

Detective Richard Scheff was present with Detective Amabile when Appellant was arrested and later gave his statement (R 1023). Scheff corroborated the testimony of Detective Amabile.

The only witness who testified on behalf of the defense was Appellant, Michael Scott Keen. Appellant testified that he had been convicted of a felony one time and that he was born in Virginia and moved to Florida as a child (R 1173). He testified that in 1977 he went into the electrical sign business and moved to Hialeah (R 1175). Appellant testified that he met Shapiro after he placed an ad in the newspaper for a salesman and Shapiro answered it (R 1176-1177). Appellant hired Shapiro and shortly thereafter, Shapiro moved in with Appellant in his Hialeah apartment (R 1177). In 1979 Appellant and Shapiro moved to North Miami Beach (R

1178). Appellant's brother Patrick was also living with him at this time as well as working for him (R 1178). Appellant testified that while he was very successful in his business, Shapiro was not (R 1178). In 1980 he and Shapiro moved to a home in Fort Lauderdale (R 1179). For a period of time Shapiro lived and worked in Tampa but that he came back and lived with Appellant (R 1180). Appellant testified that he and Shapiro were good friends and that both enjoyed sports and parimutual wagering (R 1181). Appellant dated several women during the time he lived with Shapiro but testified that Shapiro had no social life (R 1181). He testified that Shapiro began accumulating debts to him for things such as rent, car payments, food and small general loans (R 1181). Appellant bought Shapiro a Cadillac to encourage Shapiro and to improve Shapiro's image (R 1182). During this time Appellant was making approximately $50,000.00 a year (R 1182), and Shapiro's finances were very poor (R 1183). Appellant denied that he ever discussed finding a girl to kill (R 1183). He testified that he met the victim through his brother Patrick and that he started dating the victim in 1980 toward the end of the summer (R 1185). They lived together for about a year before they were married (R 1185). Appellant and the victim were married before a notary on August 1, 1981 (R 1184). During Appellant's relationship with the victim Shapiro lived in the house with the victim, Appellant and Appellant's brother Patrick (R 1186-1187). Patrick moved out in June of 1981 and Shapiro was asked to leave and eventually agreed to find his own place (R 1186). Appellant testified that there was some friction between Shapiro and the victim (R 1186).

Appellant testified that on the date of the accident,

November 15, 1981, he and the victim decided to go out on his boat which he kept docked in his backyard (R 1189-1190). He denied that he made the decision to go boating that day back in October (R 1191). He testified that Shapiro had had a bad previous week and he invited him to go along not really expecting him to accept (R 1191). Shapiro did not immediately agree to go along (R 1191). Appellant testified that he and the victim left his house about 11:30 A.M. and went to Tugboat Annies on the intracoastal (R 1192). Shapiro arrived at Tugboat Annies about 1:00 P.M. (R 1193). Appellant drove the boat many miles out into the Atlantic (R 1195). No one was wearing life jackets (R 1197). Appellant testified that when they were about 15 miles out, the victim said she didn't feel well and that her tummy was hurting (R 1197). Appellant suggested that soda might calm her stomach so the victim went down to the lower deck of the boat to get a drink (R 1198). Appellant went to check on the victim because he thought she was getting ill (R 1201). He told Shapiro to take over the controls and head into shore (R 1201). Appellant was holding the victim when he felt a blow to his back and fell into the ocean along with the victim (R 1202). Appellant looked for the victim in the water but didn't see her (R 1204). Appellant thought she was hanging onto the boat so he started swimming toward the boat which Shapiro had driven away (R 1204). The boat was several hundred feet away but Appellant managed to catch up with it and hoisted himself up onto the boat by the dive board (R 1203-1204). Shapiro was on the upper deck at the controls of the boat (R 1205). Appellant testifed that he was cold and wet and sat down on the boat for a couple of minutes before asking Shapiro where the victim was (R

1205). Shapiro didn't answer and Appellant got up and took control of the boat after he pried Shapiro's fingers off of the wheel (R 1206). Shapiro was like a zombie (R 1206). Appellant was hysterical and drove the boat back to the scene and looked for the victim (R 1200-1207). He looked for the victim for a long time before heading back to shore and calling the Coast Guard (R 1207). As Appellant was searching for the victim, Shapiro sat there and apologized, saying it was an accident, that he slipped going down the ladder (R 1209). Appellant testified that he originally told a different story to police because Shapiro told the Coast Guard the victim disappeared (R 1210). Shapiro begged Appellant to go along with the story because he was afraid they would implicate him and not believe it was an accident (R 1210). Appellant testified that the sworn-to statement he gave Detective Scarbrough was false and that he lied out of misguided loyalty to Shapiro and didn't want to get him into trouble (R 1211). Shapiro begged Appellant to go along with the story and said nothing would come of it anyway (R 1211). Appellant said he didn't know if Shapiro intentionally pushed he and the victim overboard (R 1213). Appellant testified that he changed his story from 1981 to what he gave in court, after he realized what Shapiro had said and decided he had to tell what really happened (R 1216). Appellant verified the manner in which his statement was taken by Amabile and Scheff and that the statement was not totally accurate (R 1218-1220). He testified that at the time of his arrest he was living under the name Michael Kingston so that he could rebuild his credit which had been ruined after his wife's death (R 1222-1223). Appellant testified that he didn't assume the new name to avoid

detection (R 1223). Appellant denied not knowing the victim's parents name when talking with Mimoso (R 1224) and stated that he had seen the victim's mother only one time after the accident when she came to collect her daughter's belongings (R 1224). Appellant also testified that it was the victim's idea to get insurance, that she was a modern girl and paid for it herself (R 1225). Appellant testified that he filed the Petition for Order of Presumption of Death on his attorney's advice and paid the insurance premiums up until 1984 also on his attorney's advice (R 1212,1226).

On cross-examination the prosecutor asked Appellant who Patrick Night was and Appellant answered that it was his brother but that it was not his brother's real name (R 1230). Appellant testified that Patrick lived with him, the victim and Shapiro in Fort Lauderdale until June 1981 and denied that Patrick was present in the house when Appellant and the victim met with Life of Virginia Agent Donald Johnson (R 1231). Appellant admitted he used a phony name to get get credit and admitted that he lied to Detective Scarbrough when he was under oath (R 1232). Appellant denied that he found out his wife was pregnant 1 or 2 weeks before the murder and denied that he contacted Shapiro after learning of her pregnancy (R 1246). Appellant testified that the victim, an employee in a tractor factory, took out the insurance policies because she wanted to start building an estate (R 1256). When the prosecutor pointed out that a whole life policy pays less then a bank over time, Appellant said the victim bought it impulsively (R 1257). Appellant didn't know if Shapiro knew he had a prior criminal record and denied "inviting" Shapiro on the boat because Shapiro didn't have a record (R 1258). Appellant denied that after

the victim's death, her mother called looking for her and that he told her to ask her other daughter where she was (R 1175).

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS INDICTMENT FOR LACK OF JURISDICTION?

POINT II

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR MISTRIAL?

POINT III

WHETHER APPELLANT WAS DENIED A FAIR TRIAL BY ANY ACTIONS ON THE PART OF THE STATE?

POINT IV

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS?

POINT V

WHETHER THERE EXISTED SUBSTANTIAL COMPETENT, EVIDENCE TO SUPPORT THE CONVICTION AND SUSTAIN THE DETERMINATION OF GUILT?
(Restated).

POINT VI

WHETHER THE TRIAL COURT DID NOT COMMIT ERROR, REVERSIBLE OR OTHERWISE, IN MAKING VARIOUS RULINGS?

POINT VII

WHETHER THE TRIAL COURT ERRED IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH?

SUMMARY OF ARGUMENT

I The trial court correctly denied Appellant's Motion to dismiss for lack of jurisdiction where it is was established that an essential element of the homicide, i.e., premeditation, occured in Broward County.

II Although the prosecutor's reference to the 1973 incident was improper, it did not rise to the level of reversible error considering the overwhelming evidence of guilt against Appellant. In any event, this issue was not preserved for appeal because denfense counsel did not request a curative instruction after his objection to the reference was sustained.

III The prosecutor did not engage in misconduct in any form whatsever. The victim's pregnancy as well the line of questioning that led to the polygraph reference was brought up by defense counsel and not the prosector. In any event, any error must be deemed harmless.

IV Appellant's argument as to the trial court's denial of motion to suppress has not been preserved for appeal since defense counsel did not contemporaneously object to the statements when they were brought out at trial. Even if preserved, Appellant's argument is without merit where Appellant never invoked his right to counsel and even if he did invoke that right, he later waived it when he initiated conversation with police regarding the murder. Even if it was error to admit the statements, Appellee would submit such error is harmless

considering that that statement was exculpatory and cumulative to other evidence brought out at trial and where Appellant would have been convicted absent the statements admission into evidence.

V Appellant is not entitled to a new trial in the interest of justice. The evidence against Appellant was overwhelming.

VI The trial court did not err in making various rulings. Appellant's Motion for Charge of Venue was properly denied where Appellant failed to demonstrate that he could not receive a fair trial in Broward County. The trial court also correctly denied Appellant's Motion for New Trial based on alleged juror misconduct where Appellant failed to show the alleged misconduct was potentially prejudicial or that the misconduct even occurred. Appellant's Motion to Reveal Grand Jury Testimony was properly denied since there is no pretrial right to inspect such testimony as an aid in preparing one's defense.

VII The trial court correctly sentenced Appellant to death. Further, a proportionality review by this court will reveal that a sentence of death was warranted under these circumstances.

POINT I

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS INDICTMENT FOR LACK OF JURISDICTION.

Appellant contends that the State of Florida was without jurisdiction to try and convict Appellant for the first degree premeditated murder of his wife, Anita Lopez Keen, since her murder occurred on the high seas, beyond the territorial jurisdiction of the State of Florida. Appellee maintains however, that Florida does have jurisdiction over this matter.

The criminal jurisdiction of the State of Florida is set forth in Section 910.005 Florida Statutes which provides in pertinent part:

> (1) A person is subject to prosecution in this state for an offense that he commits, while either within or outside the state, by his own conduct of that of another for which he is legally accountable, if:
> (a) The offense is committed wholly or partly within the state.
> * * * * *
> (2) An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element, occurs within the state.

Section 910.005 was interpreted by this Court in Lane v. State, 380 So.2d 1022 (Fla. 1980). In Lane, the defendant was charged with first degree murder. At trial it was shown that the offense commenced in Florida and concluded in Alabama where the victim died. This court held that § 910.005 allows Florida jurisdiction to try homicide offenses where an essential element of the homicide occurs within the state even if the fatal blow was struck outside of the state. This Court specifically found that premeditation in a murder case was an essential element for purposes of jurisdiction being proved in the State of Florida. Id. at 1028.

Appellee maintains the correctness of Lane and it's applicability to the instant case where Appellant formulated the plan to kill his wife in Broward County, Florida.

In the case sub judice, Appellant was indicted in Broward County, Florida for the first degree premeditated murder of his wife, (R 1642). The evidence adduced at trial established that Appellant in 1980 began talking to his roommate, Ken Shapiro, about finding an unsuspecting girl, marrying her, and insuring her, and killing her for the insurance proceeds (R 776,777). In the summer of 1980, Appellant met the victim, Anita Lopez, who was then twenty-one (21) years old (R 1185). After Appellant began seeing the victim regularly, he told Ken Shapiro "I feel Anita is the girl" (R 839). Thereafter, the victim moved into Appellant's home in Fort Lauderdale (R 1185). Throughout his relationship with the victim, Appellant discussed with Shapiro, his "plan" (R 776-778). By early 1981, Appellant began to discuss possible methods for killing the victim (R 777), and finally decided upon taking her out to sea in his boat and pushing her overboard (R 782). In June of 1981, two insurance policies were taken out on the life of the victim, Anita Lopez Keen, each paying $50,000.00 dollars upon her death and each carrying a double indemnity clause stating that if her death was accidental, the policies would pay $100,000.00 each (R 931,941,984,989). Appellant, Michael Scott Keen, was the designated beneficiary of both policies.

Appellant and the victim were married on August 1, 1981 (R 1184). After the marriage, Appellant spoke more and more frequently about his plan to murder the victim. In the meantime, the victim became pregnant (R 784). The victim's pregnancy accelerated Appellant's plan to commit her murder (R 835-836). In either late

October or early November of 1981, the Appellant told Ken Shapiro that if Sunday, November 15th was a "nice day", the plan was to proceed (R 784-785). Appellant told Shapiro that on the 15th day of November, he and the victim would go out on his boat and that Shapiro would meet then at a place called Tugboat Annies, on the intracoastal waterway (R 787,788). There after the three of them would head out into the ocean (R 788,789). The entire plan was conceived in Broward County (R 788).

On November 15, 1981, Appellant and the victim met Shapiro at Tugboat Annies in Broward County, and later boarded Appellant's boat and headed out to the ocean according to the plan (R 792). The three were many miles out at sea when Appellant put the boat in neutral and walked over to the victim who was standing along the rail of the boat (R 794,795). Appellant pushed the victim from behind and she fell into the ocean (R 795). The victim did not have any life saving equipment on(R 797). Shapiro testified that Appellant wanted to witness the victim drown so that he would know for sure she was dead and could collect on her life insurance policy (R 796,797). Appellant planned on recovering the victim's body but as night fell, it became increasingly dark and the victim was nowhere to be seen (R 797). Appellant then decided to head back to Fort Lauderdale and tell the authorities that the victim apparently had just fallen in the water (R 798). Appellant told a fictitious story to the authorities regarding the victims disappearance which he forced Shapiro to corroborate (R 800,801). Appellant continued to pay the premiums on the victim's two life insurance policies after her death and on March 22, 1982 he filed a claim against both policies as the beneficiary (R 1114). Neither insurance company would pay on the

policies (R 1255). On July 28, 1982, he filed in the Circuit Court of Broward County a Petition for Order of Presumption of Death (R 1716,1717), which the court declined to issue. Appellant was not arrested until August of 1984 for the first degree premeditated murder of his wife, when the Broward Sheriff's Office received information from an insurance company who had received a tip from Appellant's brother, Patrick Keen (R 1024).

Appellee submits that based on the above cited facts, the state proved beyond a reasonable doubt that the plan to murder the victim was conceived in Broward County, Florida. Premeditation having been proven to have occurred in Florida, Florida's jurisdiction over this matter was properly established as the jury so found (R 1742). Lane at 1029.

Appellant insists however, that Florida was without jurisdiction over this matter because the murder itself occured beyond Florida's territorial jurisdiction. It is important to note that Appellant does not challange the validity of § 910.005 or this Court's decision in Lane. Rather, Appellant ignores Lane and argues that jurisdiction over this matter rests exclusively with the Federal Courts pursuant to 18 U.S.C., Section 7 which allegedly preempts Florida from exercising jurisdiction over the high seas, beyond its territorial limits. Appellee maintains however, that Appellant's argument is totally without merit. The instant case does not involve any attempt by Florida to regulate and control the activities of it's citizens in waters outside of its territorial limits. Compare, Southeastern Fisheries Association v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984). Rather, the instant case involves the prohibition of conduct within the state itself. Even

Appellant cannot seriously question the legitimate interests of this State in proscribing certain kinds of conduct which occur wholly or partly within the state. Heath v. Alabama, 474 US __, 106 S.Ct. ___, 88 L.Ed. 21 387 (1985). It is against the laws of Florida to commit first degree premediated murder and if any element of that offense occurs within the State of Florida, Florida has jurisdiction to prosecute the crime. Lane at 1027,1028. The fact that Appellant actually murdered the victim outside of the territorial jurisdiction of Florida cannot defeat Florida's jurisdiction over this matter where an essential element of the offense, i.e., premeditation, occurred within the state. Lane, supra; Heath supra; Conrad v. State, 317 N.E. 2d 789 (Ind. 1974); State v. Harrington, 260 A. 2d 692 (Vt. 1969); see also Leonard v. U.S., 500 F.2d 673 (5th Cir. 1974).

Appellee would further submit that only if all of the elements of the crime of first degree premeditated murder occurred outside the territorial jurisdiction of Florida would the Federal Courts have exclusive jurisdiction over this matter. Where, as here, the essential elements of a crime occur partly within a states territorial jurisdiction and partly within the Federal Court's jurisdiction, both may assume concurrent jurisdiction over the matter. Hoopingarner v. U.S., 270 F.2d 465 (6th Cir. 1959); Murray v. Hildreth, 61 F.2d 483 (5th Cir. 1932).

Appellee would therefore submit that the trial court correctly denied Appellant's Motion to Dismiss Indictment for Lack of Jurisdiction where Florida's jurisdiction over this matter was established beyond a reasonable doubt.

POINT II

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR MISTRIAL.

Appellant complains that the trial court erred when it denied his motion for mistrial made after the prosecutor questioned Appellant about a prior incident involving violence. Appellee maintains however that the trial court correctly denied Appellant's motion.

Appellee would initially point out that Appellant has failed to preserve this issue for purposes of appeal since he didn't request a curative instruction after his objection to the prosecutor's statement was sustained (R 1269). The proper procedure to take when objectionable comments are made is to object and to request an instruction from the court that the jury disregard the remarks. Duest v. State, 462 So.2d 446 (Fla. 1985); Ferguson v. State, 417 So.2d 639(Fla. 1982). No request was made in this case. In fact, defense counsel made the tactical decision not to request any instruction at all, even though the trial court questioned him repeatedly as to this strategy (R 1269-1270,1272). Appellee would also point out that the statement by the prosecutor was not so egregious that it could not have been cured by a instruction to the jury. Marek v. State, 11 FLW 285(Fla. June 26, 1986); Jennings v. State, 453 So.2d 1109 (Fla. 1984). Appellee submits that Appellant should not now be heard to complain about the prejudice he suffered as a result of the statement when Appellant himself obviously didn't think it was prejudicial enough to request a curative instruction. Even if the objection and request for mistrial absent a request for a curative instruction were enough to properly preserve this point for appellate review, Appellee would submit that the trial court correctly denied the motion for mistrial.

Florida Case law clearly states that a motion for mistrial is addressed to the sound discretion of the trial judge. Ferguson, supra; Salvatore v. State, 366 So.2d 746 (Fla. 1978). Further, it is a long-established rule that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity. Salvatore, supra; Smith v. State, 365 So.2d 405 (Fla.3d DCA 1979). The standard of prejudice which must be met by the department in order to obtain a new trial varies adversely with the degree to which the conduct of the trial has violated fundamental motions of fairness. Salvatore, supra; Kyle v. U.S., 297 F.2d 507 (F2d Cir. 1961). It should not be presumed that if error did occur it injuriously affected the substantial rights of the defendant. Salvatore, supra.

Appellee would submit that although the prosecutor's question to Appellant regarding the 1973 incident was improper, it did not deprive Appellant of a fair trial. In Darden v. Wainwright, ___U.S.___(No.85-5319, June 23,1986), the United States Supreme Court held that when determining whether a prosecutor's comments require reversal the relevant question is whether the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." In Darden, the prosecutor made numerous prejudicial comments directed to Darden which were condemned by the Supreme Court. The Court held however, that these comments did not deprive Darden of a fair trial. The Court noted that the trial court had instructed the jury tha their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. The Court also noted that the weight of the evidence against Darden was heavy and referred

to the overwhelming evidence of his guilt. Under these circumstances the Court held that the likelihood that the jury was influenced by the improper comments were reduced. The Court thus held that although the prosecutor's comments were undesirable and universallly condemned, they did not rise to the level of reversible error, and did not render Darden's trial unfair.

The analysis used by the Supreme Court in Darden, supra, is consistant with the approach used by this Court in analyzing various improper prosecutional comments, in order to determine whether such comments warrant a reversal of a conviction which is otherwise based on sufficient overwhelming evidence of guilt. State v. DiGuilio, 11 FLW 339 (Fla. July 17, 1986); State v. Marshall, 476 So.2d 150 (Fla. 1985); Murray v. State, 443 So.2d 955 (Fla. 1984).

The common denominator of all of those decisions is whether the complained of comments are of such a nautre that they deprive a defendant of a fundamentally fair trial and of due process where there is overwhelming evidence of guilt. These concerns are also present in deciding cases such as this, where improper evidence in violation of the Williams Rule, (Williams v. State, 110 So.2d 654 (Fla. 1959)), finds its way into a trial. Colwell v. State, 448 So.2d 540 (Fla. 5th DCA 1984); Adam v. State, 453 So.2d 1195 (Fla.3d DCA 1984), Clark v. State, 378 So.2d 1315 (Fla.3d DCA 1980). Where, as here, improper Williams Rule evidence is brought out at trial, such error will be considered harmless where there is overwhelming evidence of guilt. Colwell, supra. This is especially true where the improper evidence is only incidental to and not a feature of the trial.

Appellee submits that in cases such as this, where there is

overwhelming evidence of guilt,(See Argument Point V infra), the comment made by the prosecutor must be considered harmless since there was only one isolated reference to the 1973 incident, which was never again brought up by the prosecutor. In Wilson v. State, 330 So.2d 457 (Fla. 1976), this Court found that references to collateral crimes on almost 600 pages of the transcript did not rise to the level of error. Most certainly, the isolated reference by the prosecutor cannot support any contention that the 1973 incident became a feature of the instant case, mandating reversal. Appellee would further argue that the trial court judge, who was in the best position to assess the alleged prejudice resulting from this reference, found that it was not so prejudicial as to vitiate the entire trial (R 1260). It is important to note that the trial court denied the motion for mistrial only after hearing the lengthy arguments of counsel both pro and con. The trial court's ruling on this matter should not be lightly set aside by this Court since it's ruling was proper under the circumstances of this case, i.e., where there was only one improper reference, and where defense counsel even found it unnecessary to request a curative instruction. Salvatore, supra. Appellee would therefore submit that this case is unlike Peek v. State, 11 FLW 175 (Fla. April 17, 1986), where there undoubtedly was more than one damaging reference to the collateral crime involved.

Appellee would finally submit that no useful purpose would be served by reversing this case based on the single transgression by the prosecutor where the evidence of Appellant's guilt is totally overwhelming, and the error harmless beyond a reasonable doubt. It would be a grave injustice if this Court were to reverse Appellant's

conviction based on this single isolated reference, where there is obviously overwhelming evidence of guilt and the trial is otherwise "clean". This is especially true where the Florida Legislature his specifically decreed that no judgment shall be reversed on appeal unless the error asserted "injuriously affected the substantial rights of the appellant"; furthermore, there is no presumption that error injuriously affects said substantial rights. § 924.33, Fla. Stat. (1983). In addition, the legislature has specifically provided in a section to be liberallyl construed, that no judgment shall be set aside or reversed on the basis of the improper admission of evidence unless it shall appear that the error complained of has resulted in a miscarriage of justice, i.e., no judgment shall be reversed if the error alleged was merely "harmless". § 59.041, Fla. Stat.(1983). These requirements as announced by the legislature serve as a clear restrictions on a criminal defendant's right to appeal which is also accorded [as provided by the State Constitution - Art. V, § 4(b); Art. V, § 5(b); Art. V, § 6(b)] by general law. Thus, the legislature's accompanying proviso that appellate courts once vested with jurisdiction must consider the applicability of the harmless error doctrine before reversing a conviction must not be transgressed.

Appellee thus maintains that the prosecutor's reference to the 1973 incident did not render Appellant's trial fundamentally unfair and must not be considered reversible error. Darden, supra; DiGuilio, supra; Marshall, supra; Murray, supra. Accordingly, the trial court correctly denied Appellant's motion for mistrial.

POINT III

APPELLANT WAS NOT DENIED A FAIR TRIAL

BY ANY ACTIONS ON THE PART OF THE STATE.

Appellant alleges that misconduct on the part of the prosecutor prevented him from receiving a fair trial. Appellee submits however that no misconduct occurred and that Appellant did receive a fair trial.

Appellant first complains that the prosecutor appealed to the sympathy of the jury and prejudiced the Appellant when he "purposely elicited the highly prejudicial and totally irrelevant fact that the victim was known to be pregnant at the time of her death" (AB 24). Appellee would initially point out however, that Appellant has totally failed to preserve this argument for purposes of appeal since he never objected to the prosecutors elicitation of this testimony at trial (R 784). Clark v. State, 3653 So.2d 331 (Fla. 1978); State v. Cumbie, 380 So.2d 1031 (Fla. 1980). Even if this testimony had been objected to it certainly was not improper in view of the fact that defense counsel mentioned the victims pregnancy in his opening argument (R 749), as well as during the direct examination of Appellant (R 1227-1228), and again in his closing argument (R 1340). Clearly the prosecutor did not engage in misconduct when he elicited testimony that the victim was pregnant since the jury was made well aware of that fact throughout the trial by defense counsel.

Appellee would also point out that even if the prosecutor's elicitation of testimoney that the victim was pregnant was the only time the pregnancy was mentioned, it would still not be improper. Anita Lopez Keen's pregnancy was a fact in the case. A defendant must take his victims as he finds them. See e.g.,Heath, supra, (victim was nine months pregnant); Ruffin v. State, 397 So.2d 277

(Fla. 1981)(victim was seven months pregnant); Jackson v. State, 366 So.2d 752 (Fla. 1978)(victim was eight months pregnant). Indeed, the fact that Appellant's wife was pregnant hastened her demise. (R 835-836). Appellee therefore maintains that the testimony regarding the victims pregnancy was not improper or prejudicial.

Appellant next complains that the prosecutor engaged in misconduct when he gave false credibility to State witness, inmate Mike Waddle, by eliciting the fact that another inmate, George Porter, had been given a polygraph examination and had been rejected as a witness since he failed the polygraph (AB 25). Appellee maintains however that the complained of actions by the prosecutor were not improper, and when read in context with the line of questioning initiated by Appellant's counsel on cross examination of Detective Amabile, were entirely warranted.

In the case sub judice Mike Waddle, who had shared a cell with Appellant at the Broward County Jail, testified as to certain inculpatory statements made to him by Appellant (R 1003-1020). Defense counsel, during cross examination of Waddle, made much of the fact that Waddle was in jail for sexual battery and was not a credible witness (R 1009-1019). Thereafter, the State called Detective Amabile to testify (R 1022). During defense counsel's cross examination of Amabile he brought up the name George Porter for the first time and asked the witness whether he ever discussed this case with Porter (R 1083). Amabile stated that he met with Porter regarding another homicide (R 1084). Defense Counsel asked Amabile if he ever discussed with Porter the prospect of making an accusation against Appellant (R 1084). Amabile answered no and stated he never discussed this case with Porter (R 1084). In

response to this line of questioning, the prosecutor on redirect asked Amabile about the "other" case (R 1096). Amabile explained that that case involved a rape/murder of an eight year old girl and was referred to as the Frank Lee Smith Case (R 1096). Amabile testified that he polygraphed Porter regarding the Smith case and tha he did not pass the test (R 1096). Defense Counsel objected to the polygraph reference "even though I brought it up" (R 1097).

It is clear that the complained of testimony allegedly elicited by the prosecutor, when read in context with the cross examination of Amabile by defense counsel, was entirely proper and warranted. See Nelson v. State, 416 So.2d 899 (Fla. 2d DCA 1982). A careful reading of the entire testimony of Detective Amabile, rather than only the cropped out portions which Appellant has chosen to complain about, reveals that the prosecutor's question regarding George Porter was in response to a line of questioning initiated by Appellant's counsel during his cross examination of the witness. Clearly, the prosecutors question fell within the bounds of a "fair reply" which was permissible in this instance. Ferguson, supra; Helton v. State, 424 So.2d 137 (Fla. 1st DCA 1982). Indeed, even defense counsel was aware of the fact that he had provoked the prosecutor into asking the complained of question (R 1096-1097).

Aside and apart from the fact that the prosecutor's question, and subsequent witness testimony, fell within the bounds of "fair reply", is the fact that George Porter and his credibility as a witness had absolutely nothing to do with the instant case (R 1095-1097). Dectective Amabile unequivocably stated during his cross and redirect examination that George Porter was not

questioned at all in regard to Appellant's case and was not involved in the case in any capacity whatsoever. Although it is unclear what defense counsel hoped to gain by inquiring of George Porter during his cross examination of Detective Amabile, it can be said with certainty that George Porter's polygraph examination was unrelated to the instant case (R 1097), and had nothing to do with Mike Waddle.

Appellee would further submit that even if the mere mention of a polygraph result could be considered error in and of itself the present in context, that error would have to be viewed as invited under the circumstances of the present case. George Porter and his polygraph results would never have been mentioned by the prosecutor if not for the insistence of defense counsel in pursuing this line of questioning during cross examination. Appellant should not now be allowed to cry foul since it was his initial questioning during cross examination which led the prosecutor to ask the complained of question on redirect examination. Appellant cannot initiate alleged error and then seek reversal based on that error. Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert.denied 439 U.S. 1102 (1979); LaRocca v. State, 401 So.2d 866 (Fla. 3d DCA 1981); United States v. Trujillo, 714 F.2d 102 (11th Cir. 1983).

Appellant also complains that the polygraph reference along with the prosecutor's statements during closing argument regarding Mike Waddle, worked together to vouch for the credibility of a state witness. Appellee would point out however, that Appellant never objected to the prosecutor's argument concerning Waddle (R 1348-1349). Clark, supra; Cumbie, supra. In any event, the statement

made by the prosecutor concerning Waddle and his credibility as a witness was already brought out at trial when Waddle testified that if he testified falsely he would be guilty of perjury and would be sent back to jail (R 1008). Again, this testimony was unobjected to by Appellant. Appellee would submit therefore that the State in no way vouched for the credibility of Mike Waddle at any point in the proceedings. Any statements made by the prosecutor during closing argument regarding Waddle, were fair comments upon the evidence adduced at trial, White v. State, 377 So.2d 1149 (Fla. 1979), cert. denied 449 U.S. 845 (1980), and were made after defense counsel attacked the credibility of Waddle and referred to him as a "low-life" in closing argument (R 1335-1336). It was perfectly proper for the prosecutor to rebut the aspersions cast by defense counsel upon the witness. United States v. Johns, 734 F.2d 657 (11th Cir.1984). Courts give wide latitudes to arguments by counsel during the heat of trial, especially when made in relation to prior arguments by opposing counsel. Evans v. State, 178 So.2d 892 (Fla. 3d DCA 1965); Gosney v. State, 382 So.2d 838 (Fla. 5th DCA 1980). Appellee would also point out that the prosecutor did not express his personal views and did not suggest to the jury that other evidence of Appellant's guilt existed. Appellant's suggestion that the jury could have thought other evidence existed based on the prosecutor's statements is pure speculation. This Court has stated that reversible error cannot be based on speculation. Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. den. 428 U.S. 911 (1976). Appellee therefore maintains that the prosecutor did not engage in any misconduct whatsoever. It should be noted that even if error did occur, it should not be presumed that it injuriously affected the substantial

rights of the defendant. Salvatore,supra. Reversal of a conviction occurs only when the appellate court cannot say the error was harmless. Murray, Where, as here, evidence of guilt is overwhelming, error if any must be considered harmless. (See Point V infra).

POINT IV
THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS.

Appellant complains that the trial court erred in denying his motion to Suppress Statements for several reasons. Appellee maintains however, that the trial court correctly denied Appellant's motion.

Initially, Appellee must point out that Appellant failed to contemporaneously object to the statments when they were brought out at trial.[1] Not having done so, he cannot now raise this issue on appeal. Routly v. State, infra; Steinhorst v. State, 412 So.2d 332 (Fla. 1982)Castor v. State, 365 So.2d 701 (Fla. 1978). Even if this issue were properly preserved, Appellee maintaining that Appellant's argument is without merit and would point out that the ruling of the trial court on Appellant's motion to suppress is clothed with a presumption of correctness and will not be disturbed absent a showing of an abuse of discretion. Smith v. State, 378 So.2d 281 (Fla. 1979).

The eight-page handwritten statement which Appellant complains should have been suppressed by the trial court was given by Appellant to police the day after his arrest. At the hearing on the

[1]Although Appellant did pose an objection at trial when the statements in question were brought up this objection was to "time frame" and lack of foundation and not to the statements themselves (R 1030-1031).

motion to suppress, it was established by State's witnesses Detective Amabile and Detective Scheff of the Broward Sheriff's Office that Appellant was arrested on August 23, 1984 at his place of employment in Seminole County, Florida (R 122). The arrest occurred at approximately 10:00 A.M. (R 122). Amabile personally advised Appellant of his rights and Appellant acknowledged that he had been so advised (R 123-125,164). Amabile and Scheff both testified that prior to being read his rights, Appellant asked employee Sam Sparks to get him an attorney for bail (R 163,206). Appellant was then transported to the Seminole County Detention Center where at approximately 2:00 P.M., he was booked and again advised of his rights by the booking officer (R 124). Appellant acknowledged in the booking form that he had been so advised (R 124). While at the detention center, Appellant initiated a conversation with police (R 208). Appellant asked why after three years, he was being arrested (R 208). Scheff asked Appellant if he wanted to talk about it and Appellant indicated that he would (R 208). Appellant then asked what evidence they had against him and stated "You might as well tell me what it is. As soon as I have an attorney he is going to file for discovery and I am going to know what the evidence is" (R 135,208). Appellant was then told Ken Shapiro had talked (R 208). Appellant asked what the penalty for first degree murder was and Scheff told him death or life imprisonment (R 216). Appellant asked if a confession could get him a life sentence and Scheff answered stating that he couldn't make any predictions (R 217). Thereafter, Appellant had no contact with Amabile and Scheff until 8:00 A.M. the next day, August 24th (R 174). At that time Amabile again read Appellant his rights before transporting him by car back to Broward County (R

123). The car trip from Seminole County to Broward County took about four and a half (4 1/2) hours (R 128). Amabile and Scheff testified that during the trip, they were speaking about sports with Appellant when Appellant all of a sudden asked if Shapiro was in jail (R 209). Scheff told Appellant that Shapiro was not in jail and Appellant asked if that meant Shapiro had been granted immunity (R 209), Appellant then told Amabile and Scheff that he couldn't understand why Shapiro would tell such a story and that he couldn't see any strategic reason to confess to the murder (R 130). Appellant also stated that he didn't physically kill the victim (R 130,193). This conversation was not recorded at the time it occurred but was later reduced to handwritten notes by Amabile (R 129-130). Appellant and the detectives arrived in Broward County at approximately 12:30 P.M. (R 131) and was advised of his rights for the fourth time (R 135). Appellant signed a rights waiver form which was witnessed by Amabile and Scheff (R 139,142). Appellant was then taken to an interview room and indicated a willingness to talk (R 131,140). Appellant told another version of the story to Amabile and Scheff (R 146). In this version, Appellant said Shapiro pushed him and the victim overboard and that Shapiro had made up the earlier story they told to the police and that he went along with it because he didn't want Shapiro to appear as a liar (R 149). Amabile told Appellant that he wanted to tape record what Appellant had just told him but Appellant wouldn't agree (R 150). Appellant said there were too many ways for a tape to be altered and referred to Richard Nixon and the missing 18 minutes of tape (R 150,219). Appellant still wanted to talk however, and said he wanted someone to handwrite his statement and also wanted a member of the press present so that his side of the

story would be told (R 150). Thereupon, Amabile wrote out the contents of the conversation he had just had with Appellant in a question and answer format (R 150-151,194). Appellant refused to sign the statement but added certain things to it and corrected others in his own handwriting (R 152). Amabile testified that when he told Appellant that he didn't have to talk, Appellant responded that he didn't need a lawyer because he knew more than they did (R 183). Amabile also testified that Appellant never requested to call a lawyer (R 164), and never said he wouldn't talk without an attorney present (R 190). Both Amabile and Scheff testified that Appellant seemed very intelligent (R 133), and didn't appear to be under the influence of drugs or alcohol at any time whatsoever (R 134). Appellant was fed and offered coffee during his time with police and was alert (R 145,217). The detectives testified that Appellant was not threatened or coerced into giving the statement (R 156,197). Appellant had his first appearance around 9:00 P.M. that night (R 172).

Appellant testified that he asked for Sam Sparks to get him an attorney after he was read his rights (R 224). He testified that he told the detectives he would talk only after getting an attorney (R 225). Appellant acknowledged however, that he did understand his rights when he was so advised and that he did sign a rights waiver form (R 234,244-245).

Based on the evidence adduced at the hearing, the trial court denied Appellant's motion to suppress. Appellant challenges the propriety of the trial court's ruling on several grounds. Appellant first complains that the failure to take him before a committing magistrate within 24 hours of his arrest rendered his

later statement inadmissible. Appellee disagrees.

Rule 3.130 Fla.R.Crim.P., provides that every arrested person shall be taken before a judicial officer within twenty-four (24) hours of his arrest. The rule also provides that the judicial officer inform the arrested person of that time of the charges against him, advise him that he is not required to say anything and that he has a right to counsel. Lack of a first appearance within twenty-four hours, however, does not render a confession given after twenty-four hours inadmissible per se. It will not be presumed that the delay in itself induced the challenged statements. Romanello v. State, 160 So.2d 529 (Fla. 1st DCA 1964). Each case must be examined upon its own facts to determine whether a violation of Rule 3.130, considering its purpose and effect, has induced an otherwise voluntary statement, Hendrick v. State, 366 So.2d 1190 (Fla. 1st DCA 1979). Lack of a first appearance within twenty-four hours does not render a confession inadmissible where it is obtained after a defendant is advised of his rights and the confession is voluntary, with no indication that the delay induced the confession. Williams v. State, 466 So.2d 1246 (Fla. 1st DCA 1985), cert.denied 475 So.2d 696 (Fla. 1985).

Appellee submits that there is no evidence in the case sub judice that would indicate that a delay in Appellant's first appearance induced his statement. Appellant's statement was given only one day after his arrest. Prior to giving the statement, Appellant was advised of his rights no less than four times (R 172-173). Each time Appellant was advised of his rights he was specifically told of his right to remain silent and his right to counsel. Each time Appellant acknowledged his rights. Further,

Appellant signed a rights waiver form just prior to giving the statement in question (R 139). Appellant himself admitted that he understood his rights when he signed the waiver (R 234). Appellant never indicated an unwillingness to speak at any time during his custody and in fact made gratuitous statements to the police several times prior to giving the eight page statement (R 208,209). When Appellant was told by Dective Amabile that he didn't have to talk, Appellant stated that he didn't need an attorney because he knew more than they did (R 183). Clearly, Appellant had no reservations about talking and was in fact eager to talk. Appellant even told Amabile that he wanted someone from the press present when he gave his statement so that his side of the story would be told (R 150). Appellee thus maintains that Appellant's eight-page statement was not induced by the delay of his first appearance. Williams, supra; Hendrick, supra.

Appellee would also point out that this case is factually and legally distinguishable from Anderson v. State. 420 So.2d 574 (Fla. 1982), upon which Appellant relies. In Anderson, the defendant was indicted by the Grand Jury, and after his indictment was arrested in Minnesota. Anderson was then transported by car back to Florida, a trip which took four days. During this trip, Anderson gave a statement to police. Anderson had previously been represented by counsel in Minnesota and had told the Florida deputies that he fully expected to receive appointed counsel once in Florida. Based on these facts, this Court held that Anderson's statement should have been suppressed because the filing of the indictment commenced the adversary proceedings against him and he was therefore entitled to the assistance of counsel. This Court said Anderson was denied this

right due to the deputies obtaining a statement from him before he was appointed counsel at his first appearance. This Court held that Anderson had indicated he wanted counsel and never relinquished or abandoned his right to counsel, and therefore his conviction was reversed and a new trial ordered. In the case sub judice, the indictment against Appellant was filed after he was arrested, thus his statement to police was given prior to the commencement of adversary proceedings. Further, Appellant waived his right to counsel when he signed a rights waiver form and even stated that he didn't need a lawyer (R 139,183). Clearly, Anderson, supra, is legally factually distinguishable from the instant case, where the Appellant's statement was not the product of delay, and is thus inapplicable.

Regarding Appellant's argument that he was denied his right to counsel, Appellee would submit that Appellant never invoked his right to counsel at any time whatsoever. Both Detective Amabile and Detective Scheff testified that Appellant asked Sam Sparks to get him an attorney before he was read his rights (R 163,206). This request was not made to police was not made in response to Appellant being read his rights, and was not made in the context of questioning. After Appellant was read his rights, he acknowledged them and never stated that he would not talk without an attorney being present (R 123-125,164). After Appellant was read his rights for the second time at the Seminole County Jail, and acknowledged his rights on the booking form, he explained to the detectives that he wanted an attorney for the limited purpose of obtaining bail (R 163-164). Thereupon, Amabile correctly advised Appellant that first degree murder was not a bailable offense (R 109). After being told this,

Appellant never asked to call a lawyer (R 164), and never stated that he wouldn't talk without an attorney being present.(Compare, Smith v. State, No. 64,670 (Fla. July 17, 1986), Where the defendant specifically stated during questioning that he wanted to talk to a lawyer). It is important to note that Appellant at this point had specifically been advised of right to counsel two times and had acknowledged those rights. Appellant's request for counseling regarding bail and not for questioning did not require the police to obtain counsel for Appellant since it was for a purpose unrelated to questioning. Stone v. State, 378 So.2d 765 (FLa. 1980). Thus, the dictates of Edwards v. Arizona, 451 U.S. 477 (1921) did not even come into play. Appellant was fully aware of his right to remain silent and his right to have counsel present and never invoked those rights.

Even if this Court could construe Appellant's request for counsel for the unrelated purposes of obtaining bail as the equivalent of a request for counsel for purposes of questioning, Appellee would submit that Appellant later waived his right to counsel when he initiated further conversation with police by asking what the evidence was against him and stating that he may as well know what it was since he would find out through discovery (R 208). Edwards, supra; Bassett v. State, 449 So.2d 803 (Fla. 1984). Appellee would also point out that after Appellant was read his rights for the third time the next morning, he acknowledged his rights then again initiated a conversation with police regarding the murder (R 123,209). Further, once Appellant arrived in Broward County, he was advised of his rights for a fourth time and signed a rights waiver form before giving his statement to police (R 135,139,142). Clearly, Appellant waived his right to counsel.

Hoffman v. State, 474 So.2d 1178 (Fla. 1985), Cannady v. State, 427 So.2d 723 (Fla. 1983).

Appellee would also point out that contrary to Appellant's assertions otherwise, he was allowed to make a phone call as soon as it was possible for him to do so (R 185), and that his reference to an attorney for discovery purposes did not mean that he wouldn't talk to police without an attorney being present (R 135,208). In fact, Appellant even said that he didn't need an attorney for questioning because he knew more than they did (R 183).

Appellee thus submits that Appellant never invoked his right to counsel and that even if he did, he subsequently waived that right not only by his conduct in initiating conversation with police but also by his express actions in signing a rights waiver form. Hoffman, supra, Edwards, supra.

Appellant also complains that the trial court erred in denying his motion to suppress because his statement was not freely and voluntarily given. However, Appellant's argument involves nothing more than re-argument of Appellant's trial testimony, which conflicted with the consistent testimony of State witnesses, Detectives Amabile and Scheff, who were involved in the taking of Appellant's statement. In affording the trial court's denial of suppression ruling a presumption of correctness, and in resolving all inferences in favor of affirming said ruling, it is evident that, based on its review of the circumstances, the trial court correctly found Appellant's statement to be freely and voluntarily given. DeConigh v. State, 433 So.2d 501 (Fla. 1983); Brewer v. State, 386 So.2d 232 (Fla. 1980).

Appellee submits there is ample evidence in the record to

support the trial court's determination that Appellant's statement was freely and voluntarily given. Appellant was advised of his rights no less than four times before he signed a rights waiver form and gave his statement to police (R123-125,135,164). Appellant himself acknowledged that he signed the waiver and never even alleged that he didn't understand what he was signing (R 234,244-245). Instead, Appellant argues that his statement was not freely and voluntarily given because 1) he was not cooperative with police; 2) he was promised leniency if he gave a statement; and 3) he was upset when he was arrested. Appellee submits however that the record belies Appellant's arguments.

Appellant did cooperate with police. Appellant never indicated an unwillingness to speak at any time during his custody and in fact initiated conversation with the police regarding the murder several times prior to giving the eight page statement (R 208,209). When Appellant was told he didn't have to talk, Appellant stated that he didn't need an attorney because he knew more than they did (R 183). Appellant had no reservations about talking and was in fact eager to talk. Appellant even told Amabile that he wanted someone from the press present when he gave his statement so that his side of the story could be told (R 150). Although Appellant did refuse to sign the eight page statement, he added certain things to it and corrected others in his own handwriting when he reviewed it (R 152). Clearly, Appellant did cooperate with police.

Appellee would also point out that Appellant was never promised leniency in exchange for his statement. Both Amabile and Scheff testified that Appellant was told that he would not be guaranteed anything if he gave a statement (R 212-214). Appellant

undoubtedly understood that he would not be offered leniency in exchange for his statement because he later told police that he couldn't see a stratigic reason to confess (R 130). Further, both detectives testified that Appellant was not threatened or coerced into giving the statement (R 156,197). Futher the fact that Appellant might have been motivated to give the statement to get back at Shapiro does not render his statement involuntary or coerced. Coleman v. State, 245 So.2d 642 (Fla.2d DCA 1971). Clearly, the trial court had ample evidence to conclude that Appellant had not been coerced into giving his statement. See, Smith v. State, 378 So.2d 281 (Fla. 1979).

Further, the fact that Appellant was shocked, amazed and upset when he was arrested is perfectly understandable given the fact that he had gotten away with murder for three years prior to his arrest. Cullars v. State, 97 So.2d 40 (Fla.2d DCA 1957).

Both Amabile and Scheff testified that Appellant understood what was being said to him when he was advised of his rights (R 161). Appellant himself testified that he understood those rights when he signed the waiver (R 234,244). Appellant seemed very intelligent to Amabile and Scheff and well versed in the law (R 133). He did not appear to be under the influence of drugs or alcohol at any time whatsoever (R 134). Appellant was fed, offered coffee and allowed to use the bathroom and was at all times alert. His demeanor and manner stayed the same throughout his contact with police (R 145,155). The evidence presented clearly established Appellant's statement to be voluntarily and freely given. The fact that Appellant was upset at his predicament does not vitiate the voluntariness of his statement. State v. Caballero, 396 So.2d 1210

(Fla.3d DCA 1981). Appellee submits that the State more than met its burden of showing by a preponderance of the evidence that the statement was voluntarily given. Brewer, supra; McDale v. State, 283 So.2d 553 (Fla. 1973). Having done so, the trial court correctly found that the statement was freely and voluntarily given. This Court is not a liberty to substitute its view of the credibility or weight of the conflicting evidence for that of the trial judge, and her ruling should thus not be distrubed.

Finally, Appellee would submit that even if it was error to admit Appellant's statements into evidence, such error was clearly harmless. Appellant's statement was not a confession of any sort and was merely cumulative to the testimony of other witnesses at trial.Appellant's statement was actually even exculpatory. Further, due to the overwhelming nature of the evidence of Appellant's guilt, any alleged errors, would not warrant a reversal of Appellant's conviction (See Argument Point V infra). U.S. v. Hasting, 461 U.S. 499 (1983); Chapman v. California, 386 U.S. 824 (1967); Marshall, supra.

POINT V
THERE EXISTED SUBSTANTIAL COMPETENT, EVIDENCE TO SUPPORT THE CONVICTION AND SUSTAIN THE DETERMINATION OF GUILT. (Restated).

When it is shown that the jurors have performed their duty faithfully and honestly and have reached a reasonable conclusion, more than a mere difference of opinion as to what the evidence shows is required for this Court to reverse. Hitchcock v. State, 413 So.2d 741 (Fla. 1982). On appeal from conviction, this Court will review the record for the purpose of determining whether it contains substantial, competent evidence, which, if believed, will support the

finding of guilt by the trier of fact; the weight of the evidence is ordinarily a matter which falls within the exclusive province of the jury to decide, and this Court will not reverse a judgement based upon a jury verdict when there is competent evidence which is also substantial in nature to support the jury's verdict. Rose v. State, 425 So.2d 521 (Fla. 1982), cert.denied, 1035 S.Ct 1883 ( ); Welty v. State, 402 So.2d 1159 (Fla. 1981).

There existed in this case clear, substantial, and competent evidence to support the verdict and judgment. There was substantial evidence given by the State's witnesses to lead the jury to believe that Appellant both planned and carried out the murder of his wife. Although State's witnesses Ken Shapiro, who was with Appellant on the boat when the victim was murdered and Mike Waddle, a fellow inmate of Appellant's in the Broward County Jail, were not "pillars of the community", the reviewing Court is not to reweigh the evidence to determine its sufficiency to support the conviction, because the determination of the credibility of witnesses is within the province of the jury; it is the jury's duty to resolve factual conflicts, and, absent a clear showing of error, its findings will not be disturbed. Jent v. State, infra. It is, therefore, well settled that the credibility of witnesses, and the weight to be given testimony, is for the jury to decide. Hitchcock, supra; Coco v. State, 80 So.2d 346 (Fla. 1955), cert.denied, 76 S.Ct 57 (1955); United States v. Molinares, 700 F.2d 647 (11th Cir. 1983).

In the case sub judice, the evidence presented established that Appellant planned to murder his wife before he even met her. Appellant planned on finding an unsuspecting girl, marrying her, insuring her and killing her to collect the insurance proceeds.

Anita Lopez Keen was the unfortunate victim of Appellant's plan. Ken Shapiro testified that after Appellant met the victim and began dating her, Appellant told Shairo "I feel Anita is the girl" (R 839). Shapiro said that a short time later Appellant began discussing ways to murder the victim so it would look like an accident (R 777). After Appellant got engaged to the victim, who was only twenty-one years old and worked in a tractor factory, two insurance policies for $50,000.00 each were taken out on her life (R 931,941,984,989). Each policy had a double indemnity clause which provided that in the case of accidental death, the policy would pay twice its face amount. Appellant was the beneficiary of both policies. Shapiro testified that after Appellant married the victim, he spoke more and more frequently of killing her. Finally, in either late October or early November 1981, three months after the marriage, Appellant crystallized his plans to murder his then pregnant wife (R784-785). Shapiro testified that Appellant told him that on November 15th he would carry out the plan and wanted Shapiro there as an alibi or buffer (R 785). On November 15th, according to plan, Appellant and the victim went out for a day of boating. Appellant "invited" Shapiro along for a ride. When the boat was many miles out into the ocean, Appellant pushed his unsuspecting wife overboard and circled her waiting for her to die. When he was unable to recover her body due to nightfall, he piloted the boat back to shore. On the way, Appellant outlined a story that he would tell to cover-up the murder. Shapiro testified that Appellant told him to say the victim must have fallen over, disappeared. Appellant told this story to authorities on many occassions. Shapiro corroborated this story in statements given to authorities after the "accident". Hector Mimoso

and Don Scarbrough both of the Broward Sheriff's Office testified that Appellant told them the victim disappeared after she went to the boats cabin to get some sleep (R 849,919). Shortly, thereafter, Appellant, as the victim's beneficiary, made claims against the insurance companies for payment of the insurance proceeds. When the insurance companies refused to pay, he filed a Petition for Order of Prosumption of Death in Broward County Circuit Court which the court declined to issue. In the meantime Appellant continued to pay the premiums on both policies. Three years later, the insurance companies received a tip from Appellant's brother Patrick, that the victim's death was not an accident and that Appellant murdered the victim (R 1025). Based on this information, Appellant was arrested in 1984 in Seminole County, where he was living under the name Michael Kingston (R 1027). After Appellant was read his rights and told that Shapiro had talked, Appellant asked what the penalty was for first degree murder (R 1031). Amabile told him and Appellant asked if a confession could get a life sentence (R 1031). Amabile testified that when he told Appellant he couldn't make any predictions or promises, Appellant said that he couldn't see any strategic reason to confess (R 1031). Appellant maintained the truthfullness of his earlier story given to police in 1981 and stated that "I did not physically kill Anita" (R 1033). Soon, Appellant changed his story stating that, "It was all a big fuck-up" (R 1041). Appellant told Amabile that he had discussed murdering the victim for the insurance money but that "playing and fantasizing and actually doing it are two different things" (R 1042). Appellant then told Amabile that Shapiro pushed him and the victim off the boat and that the victim drowned after she went under (R 1042-1043).

Appellant said he told the earlier story to police because Shapiro told him to and he didn't want to make Shapiro out a liar (R 1047). Mike Waddle, who shared a jail cell with Appellant at the Broward County Jail testified that Appellant told him tha he was in jail because he took his wife for a "swim she never came back from" for insurance money (R 1006). The Appellant's testimony at trial was severly impeached by the prosecution, and properly disbelieved by the jury.

Appellee thus maintains that there existed substantial, competent evidence to support the conviction and the determination of guilt. The Appellant, in this case, is far from the "in the interest of justice" relief exception set forth in Tibbs v. State, 397 So.2d 1120 (Fla. 1981), as no fundamental injustice can be shown. Indeed, the evidence of Appellant's guilt was overwhelming. The evidence adduced at trial established that Appellant, before he even met the victim, planned her murder. Her "drowning" death was engineered to look like an accident, and was to be Appellant's key to financial security, and an early retirement. Appellant took great pains to ensure the success of this horrible plan and got away with it for three years before his arrest. Clearly, the evidence against Appellant was overwhelming and he is not entitled to a new trial in the interest of justice. Tibbs, supra.

POINT VI

THE TRIAL COURT DID NOT COMMIT ERROR, REVERSIBLE OR OTHERWISE, IN MAKING VARIOUS RULINGS.

Appellant alleges that the trial court made various errors, which taken cumulatively, prevented the Appellant from receiving a fair trial. Appellee submits however that the trial court's various rulings on evidentiary and procedural matters were either not error or if error were harmless, not affecting Appellant's right to a fair trial.

A. THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION BY DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

Appellant alleges that the trial court improperly denied his motion for change of venue because the amount of publicity surrounding his case prevented him from receiving fair trial in Broward County. Appellee would initially point out however that a motion for a change of venue is a matter addressed to the sound discretion of the trial court and will not be distrubed on appeal absent a showing of an abuse of discretion. Johnson v. State, 351 So.2d 10 (1977). It is Appellee's position that there was no necessity for a change of venue and that the trial court did not abuse its discretion when it properly denied Appellant's motion.

Knowledge of a criminal incident because of its notoriety is not, in and of itself, grounds for a change of venue. McCaskill v. State, 344 So.2d 1276 (Fla. 1977). The test for determing a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case soley upon the evidence presented in the courtroom. Id. at

1278. Appellee submits that Appellant has failed to demonstrate that it was impossible for him to receive a fair and impartial trial in Broward County because of pre-trial publicity. Of the thirty-six (36) prospective jurors examined only nine (9) had read about the case or had heard something about it. The trial court individually voir dired those persons who had prior knowledge of the case. All of the jurors who sat at trial either had no prior knowledge of the case or indicated that despite their prior knowledge they could decide the issues based upon the evidence heard, the exhibits examined in the courtroom, and the instructions on the law given by the court. Thus, there is nothing in the record to indicate that the trial court abused its discretion in denying Appellant's motion for change of venue. See, e.g., Dobbert v. Florida, 432 U.S. 282 (1977); Tafero v. State, 403 So.2d 355 (Fla. 1981); Straight v. State, 397 So.2d 903 (Fla. 1981); Jackson v. State, 359 So.2d 1190 (Fla. 1978).

B. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON ALLEGED JUROR MISCONDUCT.

Appellant also complains that the trial court erred in denying his motion for new trial because alleged juror misconduct prevented him from receiving a fair trial. Appellee maintains however, that the trial court correctly denied the motion.

On June 7, 1985, Appellant was found guilty for first degree murder. (R 1747). Appellant filed on June 14, 1985 a motion for new trial alleging that juror number 6 was guilty of misconduct in that she was overheard by Appellant's girl friend, Carol Martin, telling juror number 5 that she had read an article on Appellant that appeared in the Miami herald on June 4, 1985 (R 1756). The alleged misconduct took place on June 4, 1985, the second day of voir dire after a news article regarding Appellant's trial appeared in that

morning's Miami Herald (R 1567,1568). Based on those allegations, the trial court held a hearing on Appellant's motion.

At the hearing Carol Martin testified that on June 4th, the second day of voir dire, she was seated outside of the court-room when she overheard one woman say to another that she had read an article in that morning's Miami Herald concerning Appellant (R 1573). Martin testified that only one of the women acknowledged reading the paper (R 1575). Martin testified that the conversation occurred before the proceedings commenced that day (R 1578). Martin testified that she immediately told defense counsel counsel of what she had overheard (R 1578,1579), but that both of the women wound up serving on the jury. Martin testified that she told defense counsel a total of three times what she had overheard (R 1580). On cross-examination Martin also testified that she was Appellant's girlfriend and had been living with him at the time he was arrested (R 1580). She admitted that she was interested in the outcome of the case on personal grounds (R 1580). Martin said she came to Appellant's trial everyday except one and did "all of the investigation to help build Appellant's defense." (R 1581). She testified that she had continued to investigate the case despite Appellant's conviction because she wanted "to prove his innocence without a reasonable doubt." (R 1582). Martin further testified that she always believed that the press influenced the jury and had in fact done research on that point (R 1588). After Martin was cross-examined by the state, the trial court asked her to again repeat what she heard the jurors say (R 1591). Martin repeated the alleged incident to the trial court (R 1591). The court asked Martin if that was all that was said and Martin said yes (R 1591). The court then asked Martin if the

woman said how she knew about the article and Martin answered "No" (R 1591). The court asked if whether she said she read it and Martin answered "She said she read it, yes." (R 1591). The court asked Martin if the juror said the article influenced her and Martin answered no (R 1592), and that the juror didn't say anything about the Appellant after that (R 1592).

Defense counsel, Harry Gulkin, told the court that the first time he spoke to Martin regarding the alleged juror misconduct was either after the jury began deliberations or during the sentencing phase (R 1595). He acknowledged to the court that the jury had in fact been questioned on June 4th if whether they had read the article in the Miami Herald (R 1595-1596). He also acknowledged that his recollection of his conversation with Martin regarding the juror misconduct was "hazy". (R 1596).

The court deferred ruling on the motion until it could review a transcript of the proceedings which took place on June 4th, the date of the article and the alleged juror misconduct. (R 1603). Thereafter, on July 17, 1985, the trial court denied the motion for new trial based on the alleged misconduct and stated that the jury at numerous times throughout the proceedings had been warned by the court not to read or listen to anything and had been questioned by the court regarding any outside influences and that the jury repeatedly answered that they had not read or listened to anything that would affect them.(R 1607-08). The court also found that it had specifically questioned the jury on June 4th regarding the article and that neither of the two jurors indicated that they had been exposed to it or had read the article. (R 1608). The court further noted that the testimony given by Carol Martin at the hearing

on the Motin for New Trial was less then credible and that even assuming that she had heard what she said she did, there was no reason to believe tha the jurors had their minds changed as a result of the article or would be unable to be fair and impartial jurors in the case (R 1608). Appellee maintains that the trial court correctly denied Appellant's Motion for New Trial.

Appellee would point out that Appellant has waived this issue for purposes of appeal since the evidence adduced at the hearing indicated that defense counsel was told of the alleged misconduct early in the proceedings but did not bring it to the court's attention and instead continued with the trial. Long v. State, 63 So. 420 (Fla. 1913); Kelly v. State, 22 So. 303 (Fla. 1897); Hair v. State, 428 So.2d 760 (Fla. 3d DCA 1983). Even if this issue was properly before this Court, Appellant would still not be entitled to relief. The granting or denial of a motion for new trial is a matter within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion. Yates v. State, 7 So. 880 (Fla. 1890). Further, before a court will vitiate an entire trial based on alleged juror misconduct a defendant must establish a prima facie case that the alleged conduct is potentially prejudicial. Amazon v. State, 11 FLWSCO 105 (Fla. March 13, 1986). Appellee maintains that not only has Appellant failed to show the alleged misconduct was potentially prejudicial, he has failed to establish that the alleged misconduct even occurred.

The only "evidence" of juror misconduct presented at the hearing was the unsubstantiated allegation of Appellant's live-in girlfriend, Carol Martin that she supposedly overheard one juror say to another that she had read an article about Appellant in that

morning's paer. It is important to note that this alleged misconduct took place on the second day of voir dire, June 4th 1985, before that day's proceedings commenced. Martin testified that she told the defense attorney of the incident immediately but that he didn't pay attention to her. She further testified that she told Gulkin two more times of the incident but that he still failed to pay attention. Martin admitted that she was interested in the outcome of the case on personal grounds and continued to "investigate" the case even after Appellant was convicted because she wanted to prove his innocence. It is perhaps more important to note that Martin testified that she always believed that the press could influence the jury and that she had even researched the issue. Clearly, Martin's testimony was not credible. Martin testified on Appellant's behalf at his sentencing hearing and had made threatening remarks to state witness Ken Shapiro at one point in the trial in violation of the rule.(R 299-302). Without a doubt, Martin was personally interested in this case and would do anything to help Appellant. Further, her testimony that defense attorney Harry Gulkin did nothing at all after being told three times of juror misconduct is patently unbelievable. It is hard to believe that a defense attorney would ignore such "helpful" information. Indeed, Harry Gulkin himself testified that he only spoke to Martin about this incident either after deliberations had begun or during the sentencing phase. Further, his whole recollection of the conversation was "hazy". Clearly, Martin's testimony totally lacked any credibility whatsoever. It was totally within the trial court's discretion to discount the credibility of this testimony. Yates, supra.

Martin's allegations also lacked credibility due to the fact

that the trial court took great pains, throughout the trial to insure that the jury had not been exposed to any media reports of the trial. The trial court warned the jury at the conclusion of each days proceedings not to read or listen to anything about the case (R 886-888;1158;1275,1276,1384), and questioned them each morning about any outside exposure to the case. (R 405, 632-637, 893,894,1171,1315,1316). On each occasion the jury indicated that they had not heard or read anything about Appellant's case. Further, the trial court at Appellant's express request, specifically questioned the jurors on June 4th if they had read the article in that mornings Miami Herald (R 632-637). Each juror indicated that they had not read the article. Compare, Robinson v. State, 438 So.2d 8 (Fla. 5th DCA 1983); Kruse v. State, 11 F.L.W. 333 (Fla. 4th DCA Feb. 5, 1986). Appellee thus maintains that Appellant has failed to establish a prima facie case that juror misconduct even occurred.

Even if Appellant has established a prima facie case of juror misconduct Appellee would submit that he has failed to show that the conduct was potentially prejudicial. Russ v. State, 95 So.2d 594 (Fla. 1957). Only one juror allegedly saw the article in the Miami Herald. That juror did not express an opinion about Appellant's guilt or innocence according to Carol Martin, and did not indicate that she was influenced by the article. Amazon, supra. There was absolutely no indication whatsoever that the jury did not decide this case based on the evidence heard, the exhibits examined in the courtroom and the instruction on the law given by the court. Thus, Appellant has failed to show that any prejudice, real or potential, occurred. Appellee thus maintains that based on the foregoing argument the trial court did not abuse its discretion in

denying Appellant's Motion for New Trial. Rolle v. State, 449 So.2d 1297 (Fla. 4th DCA 1984); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979).

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION TO DISCLOSE THE GRAND JURY TESTIMONY OF KENNETH SHAPIRO.

Appellant complains that the trial court erred in denying his motion to disclose the grand jury testimony of Kenneth Shapiro. Appellee maintains however, that the trial court properly denied Appellant's motion.

In the case sub judice Appellant filed a motion to disclose the grand jury testimony of Kenneth Shapiro (R 1651, 1652). Appellant alleged in his motion that he was entitled to the grand jury testimony of Shapiro "because said testimony is material and relevant to the preparation of the defense" (R 1652). The motion was heard before the trial court on October 18, 1984. The trial court denied Appellant's motion but stated that the court would revisit the motion at the Appellant's request after the defense took the deposition of Kenneth Shapiro. (R 8). Appellant never asked the court to revisit the motion after the deposition was taken.

Appellee submits that the trial court properly denied Appellant's motion to disclose the grand jury testimony. Pursuant to § 905.24 Florida Statutes, grand jury proceedings are to be kept secret. There is no pretrial right to inspect grand jury testimony as an aid in preparing one's defense. Jent v. State, 408 So.2d 1024 (Fla. 1982). To obtain access to grand jury testimony, a proper predicate must be laid. Minton v. State, 113 So.2d 301 (Fla. 1959); Soloman v. State, 313 So.2d 119 (Fla. 4th DCA 1975). The allegation that the testimony is necessary to prepare a defense is not a proper

predicate Minton, supra. Appellee therefore submits that the trial court properly denied Appellant's motion.

Appellee would also submit that Appellant was obviously not prejudiced by the trial court ruling. Appellant did not ask the trial court to revisit the motion after Kenneth Shapiro was deposed and was able to draw attention to inconsistences between Shapiro's earlier statements and his testimony at trial during Shapiro's cross-examination. Jent at 1027-1028. Clearly, the trial court did not abuse its discretion in denying Appellant's motion to disclose the grand jury testimony.

POINT VII

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE JURY'S RECOMMENDATION AND IMPOSING A SENTENCE OF DEATH.

The primary standard for this Court's review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appears strong reasons to believe that reasonable persons could not agree with the recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975). The standard is the same regardless of whether the jury recommends life or death. LeDuc v. State, 365 So.2d 149 (Fla. 1978).

In the instant case the jury unanimously recommended that the Appellant be sentenced to death (R 1558;1751). The trial court, after finding three (3) aggravating circumstances to be applicable, accepted the jury's recommendation and sentenced Appellant to death (R 1765). Appellant argues that the trial court erroneously imposed a sentence of death for several reasons. Appellee will address each of Appellant's contentions seperately and show that each is without merit.

A. THE TRIAL COURT WAS CORRECT IN FINDING THREE (3) AGGRAVATING CIRCUMSTANCES TO BE APPLICABLE IN SENTENCING APPELLANT TO DEATH.

Appellee maintains that the trial court was correct in finding that the murder of the victim, Anita Lopez Keen, was committed for pecuniary gain. Pecuniary gain was the dominant motive for the murder. The evidence adduced at trial established that long before he even met the victim, Appellant had planned on finding an unsuspecting girl, marrying her, insuring her life and killing her for the insurance proceeds (R 776-777). Appellant started dating the victim the summer of 1980 (R 1185). By early 1981, Appellant was already discussing ways to kill the victim and to make it look like an accident (R 777-778). The evidence also established that on June 9, 1981 a $500,000.00 life insurance policy was taken out on the life of the victim who was then a twenty-one (21) year old girl who worked in a tractor factory (R 941). Appellant, Michael Scott Keen, was the named beneficiary of the policy (R 940). The policy had a double indemnity clause which provided that in the case of an accidental death, the policy would pay $100,000.00, double its face amount. (R 941). The policy was for term insurance and had no cash value (R 937). Another life insurance policy for $500,000.00 was taken out on the victim on June 19, 1981 (R 989-990). This policy also had a double indemnity clause shich provided that in case of accidental death, the policy would pay $100,000.00 (R 984). Appellant was also the beneficiary of this policy (R 984). Appellant married the victim August 1, 1981 (R 1184).

In either late October or early November, Appellant planned to murder the victim on November 15, 1981. On that day, he, Ken Shapiro, and the victim, headed out for a day of boating according to

plan. When the boat was several miles out at sea, Appellant pushed the victim into the ocean (R 795). Appellant stayed in the vicinity and wanted to make sure the victim was dead so he could recover her body, bring it back to port and make a claim against the two (2) insurance policies (R 796-797). When he was unable to recover the body because of darkness, he headed back to port and told authorities that the victim must have fallen overboard and disappeared (R 798). In March, Appellant filed claims with the two insurance companies but neither would pay without a Court Order of Presumption of Death (R 1114 . Appellant then filed a Petition for Order of Presumption of Death in the Broward County Circuit Court which the Court declined to issue. In the meantime, Appellant continued to pay the insurance premiums. Clearly, Appellant's primary motive for murdering the victim was pecuniary gain. He took great pains to make the victim's death look like an accident so he could recover the maximum monetary benefit. Appellee maintains that the trial court correctly found this aggravating factor applicable beyond a reasonable doubt. Byrd v. State, 481 So.2d 468 (Fla. 1986). Zeigler v. State, 402 So.2d 365 (Fla. 1981).

Appellee would also maintain that the trial court correctly found the murder of the victim to be especially heinous, atrocious or cruel. Appellee submits that beyond a shadow of doubt this aggravating factor is supported by the record.

Testimony established that on the afternoon of November 15, 1981, Appellant took his wife, who was then four or five months pregnant, out on his boat for the purpose of committing her murder (R 792). Appellant had planned that November 15th would be the day of his wife's murder several weeks beforehand and planned to push her

off of the boat and let her drown (R 784). After Appellant took the boat many miles out into the Atlantic Ocean, he put the boat in neutral, walked over to where his wife was standing against a railing, and shoved her from behind off the boat (R 794). The victim was not wearing any life saving equipment (R 796), and was left in the ocean to drown (R 797). It was late in the day and barely still light out (R 794). Appellant maneuvered the boat out of the victim's reach but still stayed in her vicinity so he could watch her drown (R 796-797). Appellant wanted to make sure his wife was dead (R 797). The victim did not immediately die however, she was splashing, swimming and treading water, doing whatever she could to stay afloat (R 797). Soon it was totally dark out. Appellant could no longer see the victim in the water. (R 797). He drove his boat to shore and told authorities that his wife must have fallen off the boat and disappeared.

Clearly, these facts support the trial court's findings that the victim's murder was especially heinous, atrocious and cruel. Although the victim's death was not as grizzly or gruesome as those cited by Appellant in his brief, Appellee maintains that it was entirely correct to apply this factor to Appellant. The victim did not die immediately after she was shoved off the boat. It was proper for the trial judge to consider the fear and emotional strain which the victim, four or five months pregnant, endured as she realized that her newly wedded husband had engineered her murder and was actually watching and waiting for her to die, and to find that the murder was heinous, atrocious and cruel. Garcia v. State, 11 FLWSCO 251 (Fla. June 13, 1986); Adams v. State, 412 So.2d 850 (Fla.) cert. den. 459 U.S. 882 (1982); Francois v. State, 407 So.2d 885 (Fla.

1981), cert. den. 458 U.S. 1122 (1982); Knight v. State, 338 So.2d 201 (Fla. 1976). Clearly, this factor was established to be applicable beyond a reasonable doubt.

Appellee would also submit that the trial court was correct in finding that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justifications. Appellee submits that beyond a doubt, this aggravating factor is also supported by the record. The evidence adduced at trial established that Appellant in 1980 began talking to his roommate, Ken Shapiro, about finding an unsuspecting girl, marrying her, insuring her, and killing her for the insurance proceeds (R 776-777). Appellant who was then thirty-two (32) years old, wanted to retire before the age of forty (40), and believed that the easiest way to do so was to murder someone, collect a large lump sum of money and invest it (R 823). In the summer of 1980, Appellant met the victim, Anita Lopez, who was then twnety-one (21) years old (R 1185). After Appellant began seeing the victim regularly, he told Ken Shapiro "I feel Anita is the girl" (R 839). Thereafter, the victim left her parent's home in Hialeah, Florida and moved into Appellant's home in Fort Lauderdale (R 1185). Throughout his relationship with the victim, Appellant discussed his "plan" (R 776-778). By early 1981, Appellant began to discuss possible methods for killing the victim (R 777), and finally decided upon taking her out to sea in his boat and pushing her overboard (R 782). In June of 1981, two insurance policies were taken out on the life of the victim, Anita Lopez Keen, each paying $50,000.00 dollars upon her death and each carrying a double indemnity clause stating that if her death was accidental, the policies would pay $100,000.00 each (R

931,941,984,989). Appellant, Michael Scott Keen, was the designated beneficiary of both policies.

Appellant and the victim were married on August 1, 1981 (R 1184). After the marrige, Appellant spoke more and more frequently about his plan to murder the victim. In the meantime, Ken Shapiro had amassed a huge debt that he owed to Appellant for things such as rent, food and general loans (R 817-818), and the victim became pregnant (R 784). The victim's pregnancy accelerated Appellant's plan to commit her murder (R 835-836). In either late October or early November of 1981, the Appellant told Ken Shapiro that if Sunday, November 15th was a "nice day", the plan was to proceed (R 784-785). Appellant told Shapiro that on the 15th day of November, he and the victim would go out on his boat and that Shapiro would meet then at a place called Tugboat Annies, on the intracoastal waterway (R 787-788). Therefore the three of them would head out into the ocean (R 788,789). Appellant wanted Shapiro to be part of the plan in order to substantiate the story that the victim drowned (R 785). This would supposedly be Shapiro's way of "pitching in" and repaying his debt to Appellant (R 786,787).

During the days leading up to November 15th, Appellant threatened Shapiro saying he better go along with the plan (R 789). Shapiro was freightened of Appellant and showed up at Tugboat Annies on November 15th (R 709). Appellant, the victim and Shapiro then boarded Appellant's boat and headed out to the ocean according to the plan (R 792). The three were many miles out at sea when Appellant put the boat in neutral and walked over to the victim who was standing along the rail of the boat (R 794,795). Appellant pushed the victim from behind and she fell into the ocean (R 795). After

Appellant pushed the victim overboard he maneuvered the boat out of the victim's range (R 796). The victim did not have any life saving equipment on and was doing whatever she could to stay afloat (R 797). Appellant wanted to witness the victim drown so that he would know for sure she was dead and could collect on her life insurance policy (R 796,797). Appellant planned on recovering the victim's body after her death and bringing it back into port as proof of her death but as night fell, it became increasingly dark and the victim was nowhere to be seen. (R 797). Appellant then decided to head back to Fort Lauderdale and to tell the authorities that the victim apparently had just fallen in the water (R 798). On the way back to Appellant's backyard dock in Fort Lauderdale, Appellant passed a Coast Guard Station and numerous dock-side businesses but did not stop to notify authorities of the victim's disappearance (R 798). Appellant finally had Shapiro call the Coast Guard and the Broward Sheriff's Office later that evening (R 799). Appellant told a fictitious story to the authorities regarding the victims disappearance which he forced Shapiro to corroborate (R 800-801) Appellant continued to pay the premiums on the victim's two life insurance policies after her death and on March 22, 1982 filed a claim against both policies as the beneficiary (R 1114). Neither insurance company would pay on the policies until they received an Order of Presumption of Death (R 1255). On July 28, 1982, he filed in the Circuit Court of Broward County a Petition for Order of Presumption of Death (R 1716,1717), which the court declined to issue. Appellant was not arrested until August of 1984 for the first degree premeditated murder of his wife, Anita Lopez Keen, when the Broward Sheriff's Office received information from an insurance

company who had received a tip from Appellant's brother, Patrick Keen (R 1024) that Appellant had murdered his wife for her insurance money. While in the Broward County jail he told fellow inmate Mike Waddle that he was arrested because his brother Patrick had turned him in because a "deal" between the two didn't work out. (R 1005). That deal was to take Appellant's wife out for a "swim" from which she would not return and that Appellant and Patrick would collect insurance money (R 1006). Appellant told Waddle that his brother turned him in because the insurace company wasn't paying "it" off and he got tired of waiting and went to the insurance company with the result that Appellant was arrested (R 1005-1006).

Appellee submits that these facts speak for themselves and evince the heightened premeditation necessary to establish this aggravating circumstance. Deaton v. State, 480 So.2d 1279 (Fla. 1986); Parker v. State, 476 So.2d 134 (Fla. 1985); Eutzy v. State, 458 So.2d 755 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla. 1983).

Clearly, the trial court was correct in finding that the victims murder was committed for pecuniary gain, was heinous, atrocious and cruel, and was committed in a cold, calculated and premeditated manner. The trial court correctly sentenced Appellant to death. There were no mitigating circumstances applicable to Appellant (R 1765). Even if the trial court improperly considered one or more aggravating factors or committed any other error in sentencing Appellant, such is harmless in view of the fact there were no mitigating factors and there were present at least one or more aggravating factors which are listed in the statute. Sireci v. State, 399 So.2d 964 (Fla. 1981); Elledge v. State, 346 So.2d 948

(Fla. 1975).

B.THE TRIAL COURT WAS CORRECT IN NOT CONSIDERING THE DISPARITY IN TREATMENT BETWEEN APPELLANT AND KEN SHAPIRO TO BE A MITIGATING FACTOR TO BE CONSIDERED IN SENTENCING APPELLANT.

Appellant complains that the trial court erred in not considering the desparity in treatment between Appellant and Ken Shapiro to be a mitigating factor to be considered in sentencing Appellant. Appellee would point out, however, that Appellant never requested the trial court to consider this allegedly mitigating factor. Even if Appellant had requested the trial court to consider the disparity in treatment, Appellee would submit that the trial court correctly sentenced Appellant to death. The evidence in this case clearly established that Appellant bore the greater culpability for his wife's murder.

Before he even met the victim, Appellant, not Shapiro, spoke of finding an unsuspecting girl, marrying her, insuring her and killing her for the insurance payoff. (R 776-777). Appellant told his roommate, Shapiro, of these plans on many occasions in 1980 (R 777). Appellant was then thirty-two (32) years old, wanted to retire before the age of forty (40), and believed the easiest way to do so was to murder someone, collect a large lump sum of money and invest it (R 823). Appellant met the victim during the summer of 1980 and after he began seeing her regularly, told Shapiro, "I feel Anita is the girl" (R 839). The victim moved in with Appellant and by early 1981, Appellant not Shapiro, was discussing ways to kill her and to make it look like an accident (R 777-778). Throughout his relationship with the victim, Appellant, not Shapiro, spoke of this plan. After he became engaged to the victim, he took out two (2)

$50,000.00 life insurance policies on his fiance, a twenty-one (21) year old girl. Each policy had a double-indemnity clause making each policy worth $100,000.00 in the event of an accidental death. Appellant, not Shapiro, was the beneficiary of those policies. Appellant, not Shapiro, married the victim on August 1, 1981. The victim became pregnant with Appellant's child, not Shapiro's. By either late October or early November, Appellant crystalized his plan to murder the victim and to receive the maximum monetary benefit. Shapiro who had just been shrugging off Appellant's plan until now, was now drawn into that plan by Appellant. Appellant told Shapiro that he on November 15th was finally going to proceed with his plan. Appellant told Shapiro to meet him and the victim at Tugboat Annies on the 15th and that he would be "invited" to go out on the boat with them and that he would accept the "invitation". Appellant planned to push the victim overboard and to make it look like an accident (R 788-789). Appellant told Shapiro he wanted him along to act as an alibi or buffer and to substitute the story that would be told to police (R 785). Appellant threatened to kill Shapiro as well as his grandparents if he didn't meet him on the 15th. Appellant also threatened to kill Shapiro and his grandparents if Shapiro told the authorities of the plan (R 809). Shapiro took the threats seriously. He felt boxed in and was scared of Appellant (R 809). Appellant told Shapiro that it would be Shapiro's way of paying back the huge debt he owed to Appellant, a way to wipe the slate clean if you will (R 787). Up until this time Appellant had never mentioned to his good friend Shapiro anything about Shapiro paying back his extravagant generousity. (R 787). This was to be Shapiro's way to "pitch in". (R 787). In the days proceeding the 15th, Appellant

began hammering on Shapiro. (R 789). Appellant told Shapiro he better go along. Shapiro showed up on the 15th and went out on the boat with Appellant and the victim according to plan, Appellant, not Shapiro, piloted the boat many miles out into the ocean. Appellant, not Shapiro walked over to the victim and pushed her overboard. Shapiro manuevered the boat away from the victim only after he was commanded to by Appellant. Appellant soon took over the controls and circled the victim, eagerly waiting for her to die so he could recover her body for insurance purposes. Appellant not Shapiro, made up the phony story to tell authorities and it was Appellant, not Shapiro, who made a claim against the insurance policies and who filed a Petition for Order of Presumption of Death. Appellant, not Shapiro told authorities after he was arrested that he couldn't think of a strategic reason to confess. Appellant, not Shapiro, told Mike Waddle that he took his wife for a "swim" she would never come back from. It is important to note that Waddle testified that Appellant said his brother Patrick was involved with the murder and never mentioned that Shapiro was (R 1006,1012). Clearly, Appellant, not Shapiro bore the greater culpability for the victim's death. Appellant himself formed the plan to murder his wife and carried it out. Shapiro's only role in this horrible plan was to be an alibi as "repayment" for the huge debt Shapiro owed Appellant. Shapiro acted under the threat of death not only to himself, but to his grandparent's as well. Contrary to Appellant's assertions otherwise, Appellant and Shapiro were not "equally culpable" participants in this crime. Appellant was the dominant actor in the criminal episode and was properly sentenced to death. Marek, supra; Tafero, supra; Jackson, supra; Witt v. State, 342 So.2d 497 (Fla.), cert. den. 434

U.S. 935 (1977). Further, the Appellee would submit that the disparity in treatment between Appellant and Shapiro is not unconstitutional as Appellant so claims (AB 50). The Supreme Court has stated that discretionary decisions of state prosecutors to grant immunity to some participants of a crime and not others is not arbitrary or cruel and unusual under the constitution. Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984); see Gregg v. Georgia, 428 U.S. 153 (1976); Proffit v. Florida, 428 U.S. 242 (1976), Routly, supra. Therefore, if a state prosecutor's office has the discretion to grant immunity to some participants it must follow that it also has the discretion not to charge a crime, since the end result is the same. Appellee therefore submits that the trial court correctly sentenced Appellant to death and that the desparity in treatment between Appellant and Shapiro is not unconstitutional since they were not equally culpable prticipants in the murder of Appellant's wife.

C. A PROPORTIONALITY REVIEW BY THIS COURT WILL CONFIRM THAT APPELLANT'S SENTENCE OF DEATH WAS PROPERLY IMPOSED BY THE TRIAL COURT.

Appellee would submit that a proportionality review of this case will reveal that the death penalty was appropriate herein. Appellee maintains that in similar cases where there is a preplanned homicide of a family member this Court has found death to be an appropriate penalty. Byrd, supra; Zeigler,supra.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Appellee respectfully requests that Appellant's conviction and sentence of death be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by United States Mail to: MICHAEL D. GELETY, Attorney for Appellant, 1700 East Las Olas Boulevard, Suite 300, Ft. Lauderdale, FL. 33301, on this 22nd day of July, 1986.

Carolyn V. McCann
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