IN THE SUPREME COURT OF FLORIDA

JUDIAS V. BUENOANO a/k/a
JUDY GOODYEAR,

Appellant,

v.

CASE NO. 68,691

STATE OF FLORIDA,

Appellee,

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TOPICAL INDEX

PAGE

AUTHORITIES CITED.....ii-iv

STATEMENT OF THE CASE AND FACTS.....1-9

SUMMARY OF ARGUMENT.....10-11

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED SIMILAR FACT EVIDENCE IN REGARD TO THE ARSENIC POISONING AND DEATH OF BOBBY JOE MORRIS AND THE POISONING OF JOHN GENTRY.....12-19

II. THE STATE PROVED THE CORPUS DELICTI IN THE PRESENT CASE INDEPENDENT OF THE CONFESSION AND SIMILAR FACT EVIDENCE AND THE TRIAL COURT PROPERLY DENIED THE MOTION FOR DIRECTED VERDICT OF ACQUITAL.....20-24

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S UNTIMELY MOTIN FOR A MISTRIAL ON THE BASIS OF A GRATUITOUS COMMENT MADE BY A WITNES ON CROSS-EXAMINATION.....25-27

IV. THE TRIAL COURT DID NOT COMMIT ERROR IN THE SENTENCING PROCEEDING BY ALLOWING TESTIMONY ABOUT THE DETAILS OF TWO PRIOR FELONIES INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.....28-32

V. THE TRIAL JUDGE PROPERLY FOUND THAT THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.....33-34

VI. THE TRIAL JUDGE PROPERLY FOUND THAT THE CAPITAL FELONY WAS AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL HOMICIDE.....35-38

CONCLUSION.....39

CERTIFICATE OF SERVICE.....39

AUTHORITIES CITED

CASES — PAGE

Alvord v. State,
322 So.2d 533 (Fla. 1975) 29

Alvord v. Wainwright,
725 F.2d 1282 (11th Cir. 1984) 29

Antone v. State,
382 So.2d 1205 (Fla. 1980) 34

Blake v. State,
156 So.2d 511 (Fla. 1963) 20

Breedlove v. State,
413 So.2d 1 (Fla. 1982) 38

Buenoano v. State,
478 So.2d 387 (Fla. 1st DCA 1985) 28

Buenoano v. State,
484 So.2d 11 (Fla. 1st DCA 1986 28

Buenoano v. State,
488 So.2d 829 (Fla. 1986) 28

Buford v. State,
492 So.2d 355 (Fla. 1986) 30

Castor v. State,
365 So.2d 701 (Fla. 1978) 25

Chandler v. State,
442 So.2d 171 (Fla. 1983) 17

Clark v. State,
363 So.2d 331 (Fla. 1978) 25

Deaton v. State,
480 So.2d 1279 (Fla. 1985) 37

Delap v. State,
440 So.2d 1242 (Fla. 1983) 21,29

Drake v. State,
400 So.2d 1217 (Fla. 1981) 18

Elledge v. State,
346 So.2d 998 (Fla. 1977) 29

Ferguson v. State,
417 So.2d 639 (Fla. 1982) 27

AUTHORITIES CITED CONTINUED

CASES PAGE

Frazier v. State,
107 So.2d 16 (Fla. 1958).....20

Green v. State,
427 So.2d 1036 (Fla. 3d DCA 1983).....13

Jennings v. State,
453 So.2d 1109 (Fla. 1984).....27,38

Johnson v. State,
465 So.2d 499 (Fla. 1985).....37

Justus v. State,
438 So.2d 358 (Fla. 1983).....29

Mann v. State,
453 So.2d 784 (Fla. 1984).....29

Mason v. State,
438 So.2d 374 (Fla. 1983).....37

Michael v. State,
437 So.2d 138 (Fla. 1983).....34

Mitchell v. State,
11 F.L.W. 1574 (Fla. 1st DCA 1986).....15

Nelson v. State,
450 So.2d 1224 (Fla. 4th DCA 1984).....13,14,16

Norris v. State,
158 So.2d 803 (Fla. 1st DCA 1964).....16

Parker v. State,
458 So.2d 750 (Fla. 1984).....37

Peek v. State,
395 So.2d 492 (Fla. 1980).....30

Perri v. State,
441 So.2d 606 (Fla. 1983).....32

Rivers v. State,
226 So.2d 337 (Fla. 1969).....27

Salvatore v. State,
366 So.2d 745 (Fla. 1978).....27

Sias v. State,
416 So.2d 1213 (Fla. 3d DCA 1982).....19

AUTHORITIES CITED CONTINUED

CASES PAGE

Smith v. State,
464 So.2d 1340 (Fla. 1st DCA 1985).....13

Stano v. State,
473 So.2d 1281 (Fla. 1985).....29

State v. Cumbie,
380 So.2d 1031 (Fla. 1980).....26

State v. Dixon,
238 So.2d 1 (Fla. 1973) cert. denied 416 U.S. 943,
94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).....36

Thompson v. State,
389 So.2d 197 (Fla. 1980).....38

Townsend v. State,
420 So.2d 615 (Fla. 4th DCA 1982).....16

Wicker v. State,
445 So.2d 581 (Fla. 2d DCA 1983).....12

Williams v. State,
110 So.2d 654 (Fla. 1959).....12,13,15,18

Wilson v. State,
330 So.2d 457 (Fla. 1976).....19

OTHER AUTHORITIES

§90.404(2)(a), Fla. Stat. (1983).....12,18
§921.141(1), Fla. Stat. (1984).....29

STATEMENT OF CASE AND OF THE FACTS

The state rejects the statement of the facts set forth by the appellant as slanted and sets forth its version of the same below with additional pertinent facts, in an order more chronologically appropriate.

In June of 1971, Sergeant James Goodyear returned from a tour of duty in South Vietnam. (R 245) He returned home to a wife, the defendant Judy A. Buenoano, who was unfaithful during his tour of duty. (R 642-643)

Connie Lang was as close as a sister to Buenoano. (R 461) Lang testified that prior to Sergeant Goodyear leaving, Buenoano, on numerous occasions, expressed her unhappiness in her marriage; that they had grown apart. (R 462-463) She joked about ending their problems by lacing their husbands food with arsenic and poisoning them. (R 463) This was prior to Mr. Goodyear leaving, but after Mr. Goodyear's return, Buenoano was still unhappy in her marriage and continued to talk about her unhappiness. (R 469) She joked that one way out would be to put arsenic in macaroni and cheese or tomato juice. She said words to this effect approximately five times. (R 470) Buenoano denied this. (R 1224) Buenoano later told Lang that Goodyear died of the black plague. (R 471)

Debra Sims went to live with Buenoano and her husband one month before he left for Vietnam. (R 569) She testified that when Sergeant Goodyear returned, he was in good health. (R 570) She testified that he began to get sick slowly; that one day she went into his room and there he lay in a weakened, sick

condition. He picked at the bed linens and was hallucinating and spoke about a rabbit being on his bed. She was in his direct line of sight but he didn't know she was there. (R 571-572) Sims asked Buenoano why she didn't take him to the hospital. Buenoano replied that he had been given medicine and she would wait and see if he got better. (R 573) Goodyear was finally hospitalized September 12, 1971 and died the evening of September 16, 1972. (R 245)

Upon his death Buenoano received $5,245.47; $8,039.45 (R 425-426) $15,000 and $5,000 (R 435-436; EXH.6) as the beneficiary of various insurance policies, as well as $62,642.46 in dependency indemnity compensation from the veteran's administration. (R 447)

Robert Crawford testified that Buenoano used to work for him, and he left and moved to Pensacola. (R 639,640) He told her if she ever wanted to go out to give him a call. (R 641) Sometime after that, Sergeant Goodyear went to Vietnam. (R 642) He got that call. (R 641) Crawford testified that he came down to Orlando between five and six times and was sexually intimate with her. (R 642-643) Buenoano testified that he was confused and they were not intimate until after the death of her husband. (R 1231) He said he felt a little strange when she asked him to go to the funeral, but he did. (R 644) While Sergeant Goodyear was sick and dying, Crawford got a call from Buenoano asking him to come down. (R 644) By the time he had arrived Goodyear was dead. (R 644) Buenoano told him Goodyear had become addicted to narcotics in Vietnam and they were giving him something to

counteract it. (R 645)

Buenoano testified that she only saw Mary Owens twice and did not know her. (R 1208) Owens, however, testified that she and Buenoano became friends. Buenoano told her that Goodyear was a Green Beret in Vietnam and had picked up a virus and died after he got home. (R 659) She and Buenoano would go shopping together and they would talk. (R 658) Owens testified that at that time she (Owens) was experiencing marital difficulities. (R 659) Buenoano was over one day when she received an upsetting phone call from her husband. She and Buenoano went to the grocery store and Buenoano told her she ought to poison her husband. She said that she could get some arsenic right there at the grocery store. She also told her that she would have to have the stomach for it because of the nausea and the sickness. (R 660-661) She advised her to take out more life insurance. (R 662) Buenoano told her that she had to give it to Sergeant Goodyear several times and that she treated him at home, and she could probably do the same. (R 663) She told her that arsenic was something that builds up slowly in your system. (R 661) She also told her that arsenic cannot be detected by a routine autopsy unless they are really looking for that. (R 661) Buenoano denied such a conversation took place. (R 1209)

Doctor Auchenbach, Sergeant Goodyear's treating physician, testified that Goodyear presented symptoms that he had no explanation for whatsoever; that his history could not account for his medical condition. Goodyear experienced nausea, vomiting, weakness and light-headedness and lab tests revealed liver injury

or damage. (R 239) Doctor Auchenbach tried to stabilize his condition and to save his life, but he failed. (R 243,244,264) He was given I.V.'s to increase blood pressure and establish urine output which was stopped because of kidney problems. The I.V.'s did not cause kidney problems or death. (R 317) When armed with the information that arsenic was found in Goodyear's body, pursuant to the 1984 toxicological report prepared by Doctor Leonard Bednarczyk, he testified that looking back, knowing what he knows today, in his medical opinion, the patient could have died as the consequence of acute arsenic toxication. (R 264-266) Circulatory collapse, kidney problems, confusion, smelling things, auditory hallucinations and picking at things are manifestations of acute arsenic toxication. (R 265-266) His progressive illness, culminating in pulmonary vascular collapse was secondary to his arsenic toxication. (R 267)

Doctor Hegert, the medical examiner who re-autopsied Goodyear's remains in 1984, testified to the same thing. He said it was a case of chronic arsenic poisoning done over a period of time. (R 500-511)

Doctor Bednarczyk, a forensic toxicologist, who analyzed tissue samples from the exhumed body of Goodyear, testified that arsenic was present in the liver, kidney, hair and nails of Goodyear in levels indicative of chronic exposure to arsenic poisoning. (R 338-347) He ran a blank to eliminate foreign matter. (R 373) Then he ran a regeant blank to make sure there was no interference. (R 374) Then he ran his tests. (R 371)

Analysis of the liver reflected that it contained 4.5

milligrams per kilogram of arsenic. (R 343) The kidney contained 8.3 milligrams per kilogram of arsenic, 95 milligrams per kilogram was found in the hair closest to the root, 30 in the center portion and 10 at the end of the shaft. (R 344)

The Curry scale suggests a fatal range for the liver of 10 to 500 milligrams per kilogram and for the kidney of 5 to 150 milligrams per kilogram. (R 1295) The Bhsalt scale suggests a fatal range of 2 to 120 milligrams per kilogram for the liver and 0.2 to 70 milligrams per kilogram for the kidney, with the average fatal range being 29 milligrams per kilogram for the liver and 15 milligrams per kilogram for the kidney. (R 1296-1297) The level found in Goodyear's kidney is well within this range. (R 906) While the level of arsenic in the liver does not fall within these scales, it is still not difficult to conclude that arsenic poisoning was the cause of Goodyear's death. (R 906) These tables are applicable to <u>acute</u> arsenic poisoning. (R 887) The literature is incomplete in regard to <u>chronic</u> arsenic poisoning because many people do not succumb to the effects, thus the data for their tissue levels are not available. (R 888) Doctors are left to conclude, therefore, that the range for chronic poisoning lies somewhere between the normal and acute range. (R 887) In chronic arsenic poisoning there is a gradual build-up of arsenic in the system through repeated exposure and the levels of arsenic in the tissues would be lower than in an acute case. (R 882) The differing levels of arsenic found in the root, center and ends of Goodyear's hair shaft indicate <u>chronic</u> exposure to arsenic poisoning. (R 347) The defendant's own

expert, Dr. Loomis, who devoted very little work to arsenic poisoning, testified that the causes of death listed on the death certificate could be consistent with chronic arsenic poisoning. (R 1333).

Lodell Morris, the mother of Bobby Joe Morris, testified that Buenoano told her that she had killed her husband, that he didn't deserve to live. (R 698) "She had to work her butt off and he was no help to her and every time her back was turned he was in bed with a thirteen year old, so she killed the son of a bitch". (R 698)

Sometime after the death of Goodyear, Buenoano met Bobby Joe Morris and they began living together as man and wife. In regard to this relationship, Lodell Morris testified that "they didn't just fight all the time but had no real love or companionship in their relationship." (R 700).

On the morning of November 28, 1977, Buenoano went to an insurance agent because Bobby Joe Morris, who she held out to be her husband, after Goodyear's death, was too busy to come by for them to explain the policy. She took the application then returned with it signed. (R 721-717) Bobby Joe, however, was at home the night when another agent from State Farm came and took yet another application for insurance. (R 735-737) The agent was lead to believe there was no other insurance or pending applications. (R 738) Another policy was obtained, as well, from Agent Carlos Chacon. (R 743-748)

Suddenly, on January 4, 1978, Bobby Joe Morris became ill, exhibiting the same syptoms, hallucinations, vomiting, nausea,

and fever that James Goodyear had previously exhibited. (R 757-761) Bobby Joe eventually improved and came home from the hospital. (R 761) Two days later, he was admitted to the emergency room in the same exact shape. (R 772-778) This time, he didn't make it out. (R 778) The defendant again received insurance money. The checks from separate policies were in the amounts of $10,000; (R 730-731) $3,697.51 (R 740) and $10,000 (R 747). The mortgage on the house was paid off as well. (R 752) Morris' remains were later exhumed. (R 858) Tissue analysis revealed acute arsenic poisoning. (R 873;927).

Buenoano's children testified that her son Michael, who had been institutionalized, swore to kill Morris because he had sexually assaulted her daughter Kimberly. (R 1078-1079) Kimberly testified that Michael put something in a bottle that Morris drank from, and in his beer. (R 1095-1096) On cross-examination she admitted that Michael is dead and in a prior deposition had stated that Morris did not try to sexually assault or molest her. (R 1100)

Buenoano then returned to Pensacola after Morris' death, where she met John Gentry at a mud wrestling match. (R 949;1219) Buenoano invited him to live with her and they lived together as man and wife for two and a half years. (R 950) She told him that Bobby Joe Morris died of alcoholism and that her late husband, James Goodyear died in a plane crash in Vietnam. (R 951) Although he could not afford the premiums, Buenoano convinced him to each take out a half million dollar life insurance policy, naming each other as beneficiaries, and

volunteered to make the payments. (R 953) She later told him the policy had been cancelled but he called the insurance company and found out it was still in effect. (R 953) Gentry also made her a beneficiary in his will and upon his death she was to receive fifty percent of his estate. (R 952) She also had a $10,000 policy on him with her as the beneficiary through one of her credit cards. (R 964)

In late November 1982, Gentry contracted a cold and Buenoano gave him Vicon C tablets to treat it. (R 955) He became ill in December with extreme nausea and vomiting and checked into a hospital on December 15, 1982. (R 954;956) He recovered and felt great when he came home. The same day Buenoano gave him Vicon C and the convulsions and vomiting returned. (R 957-958) He did not take the pills the next day. He took them the day after and the convulsions and vomiting came back. (R 959) The next day she brought more pills and he refused to take them and saved them. (R 960) Buenoano suggested doubling the dosage if they weren't doing him any good. (R 986) After he stopped taking the pills he had no further problem. (R 960) Gentry gave the pills to the police and they were chemically analyzed at the FBI laboratory in Washington and found to contain paraformaldehyde, a class III poison. (R 1012-1013) After he stopped taking the pills, the nausea and vomiting later returned after Gentry ate a Waldorf salad Buenoana had prepared. (R 961) Buenoano told her associates that Gentry was suffering from terminal cancer. (R 997;1004) She confided in Vickie Lewis that she was dissatisfied with Gentry living at the house because he wasn't contributing to

the household or making any monetary contributions. (R 997)

The state accepts the statment of the case except where disputed herein, and sets forth the following additional facts.

In its order of factual findings supporting the imposition of the death penalty, the sentencing judge found that (1) Buenoano was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (2) the capital felony was committed for pecuniary gain (3) the capital felony was especially heinous, atrocious, or cruel and (4) was committed in a cold, calculated and premeditate manner. No mitigating circumstances were found. (R 2342-2348) Buenoano therefore was sentenced to death. (R 2331-2335)

SUMMARY OF ARGUMENT

(1) The trial court properly admitted similar fact evidence that Buenoano also murdered Bobby Joe Morris by arsenic poisoning as she also took out and collected on life insurance policies on his life; arsenic was found in his body, and was the cause of death; they held themselves out as man and wife and had a loveless relationship; and while in the hospital, Morris was reluctant to take liquids from home she insisted on giving him. The same sort of scenario is present in the case of John Gentry and the fact he was given paraformaldehyde rather than arsenic does not make the crimes dissimilar.

(2) The state proved the fact of death, the criminal agency of another and the identity of the deceased without Buenoano's confession or the use of similar fact evidence.

(3) The trial court properly denied the appellant's untimely motion for a mistrial on the basis of a gratiutous comment by a witness that Buenoano had burned her home and collected on the insurance. Moreover adequate curative instructions were given, dissipating any prejudicial effects of this testimony.

(4) The trial court properly allowed testimony as to the details of prior felonies involving violence under relevant case law, rather than just limiting the state to introducing copies of such judgments.

(5) The trial court properly found that the capital felony was committed for pecuniary gain based on the insurance money Buenoano received and her advise to Mary Owens to take out

insurance on her husband and poison him.

(6) The capital felony was especially heinous, atrocious or cruel as it was the result of plotting and continuous efforts to effect a slow agonizing death.

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED SIMILAR FACT EVIDENCE IN REGARD TO THE ARSENIC POISONING AND DEATH OF BOBBY JOE MORRIS AND THE POISONING OF JOHN GENTRY.

Evidence of other crimes, wrongs and acts is admissible if it is probative of a material issue other than the bad character or propensity of an individual. Williams v. State, 110 So.2d 654 (Fla. 1959). The so-called "Williams Rule" states a general rule of admissibility of relevant evidence even though the evidence may indicate that the accused has committed other uncharged crimes or may otherwise reflect adversely upon the accused's character. Section 90.404(2)(a), Florida Statutes (1983) purports to codify the Williams Rule. The statute lists several purposes for which such evidence is deemed to be admissible, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Although evidence of collateral crimes will not be admitted solely on the basis of mere similarity between the crime charged and collateral crimes, if there is something particularly unique or unusual about the crime, such that the crime itself becomes a means of proving, for example, identity of the perpetrator, evidence of the collateral crimes becomes admissible. Wicker v. State, 445 So.2d 581 (Fla. 2d DCA 1983). To be admissible, there must be something so unique or particularly unusual about the perpetrator or his modus operandi that it would tend to independently establish that he committed the crime charged.

Green v. State, 427 So.2d 1036 (Fla. 3d DCA 1983). It has been held that arsenic poisoning is a sufficiently unusual modus operandi to warrant the introduction of collateral crime evidence. Smith v. State, 464 So.2d 1340 (Fla. 1st DCA 1985).

It is clear that evidence of criminal activity not charged is admissible if relevant to an issue of material fact. Williams v. State, 110 So.2d 654 (Fla. 1959). In the case of Nelson v. State, 450 So.2d 1224 (Fla. 4th DCA 1984) the court addressed issues identical to those in this case. Nelson was convicted of the premeditated murder of his wife, Linda Nelson, by drowning on September 12, 1979 and with the attempted premeditated murder of his wife by poison on August 30, 1979. Nelson was also the beneficiary of a large life insurance policy on Linda Nelson's life. With reference to the attempted murder by poisoning, a doctor testified that Linda Nelson, while in the hospital on August 30, 1979, was hyperventilating, drooling and complaining of muscle pain, among other things. Some of her symptoms were consistent with poisoning. A pharmocologist testified that the symptoms exhibited by her on August 30, 1979, were consistent with aconitine poison. On the attempted murder count the state introduced similar fact evidence regarding Nelson's conduct with his first wife, Sherrie Braswell. There was a striking similarity between illnesses and symptoms suffered by the two women while with Nelson. The hospital admissions records of the two women reflected both evidenced the same symptoms: nervousness, heart flutter, numbness, tingling and drooling, all of which were shown to be consistent with aconitine poisoning.

Nelson had also purchased a large life insurance policy on Sherrie Braswell's life. Prior to the purchase of that policy Sherrie Braswell had never experienced any of the symptoms mentioned above. Thereafter, however, when she had those symptoms, they generally related to occasions when Nelson would furnish her pills. Eventually, she cancelled the life insurance policy against Nelson's wish and never had any further such distressful episodes.

Nelson contended that the admission of the similar fact evidence was error, since it bore no relevancy to the crimes charged in the present case. The court held that the similar facts were relevant to the charge of attempted murder of Linda Nelson by poison; that it was probative of a common design and of his motive for wanting to do away with both women; that while the time span between the two attempts is substantial, ten years, the close similarity of symptoms evidenced by the two women, Nelson's intimate proximity to the intended victims, and the inference that aconitine poison was used renders the time span less a problem. 450 So.2d at 1223.

In the case sub judice Buenoano lived with all three men, Goodyear, Morris and Gentry, and was the beneficiary of life insurance policies on all three men and collected on the same and all three men displayed symptoms of poisoning. Two of the three died as a direct result of arsenic poisoning. The similar fact evidence in this case, as in Nelson would be probative of a common design, motive, plan, absence of mistake or accident, and a system or general pattern of criminality.

Under the Williams Rule relevant evidence is admissible even though it may indicate that the accused has committed other uncharged crimes. Mitchell v. State, 11 F.L.W. 1574 (Fla. 1st DCA 1986). As evidenced in the statement of the case and facts John Gentry's illness was directly attributable to the Vicon C tablets provided to him by Buenoano, which contained a class III poison. Simply because Bobby Joe Morris did not survive to testify, as did Gentry, does not exonerate Buenoano or create an evidentiary shield which prevents the jury from hearing of such similarities. To hold otherwise would reward Buenoano for her choice of lethal means, deliberately employed to avoid detection. Aside from the above similarities, we also have Buenoano's own admissions that she killed Goodyear, her suggestion that her friend do the same to her husband, all of which preceded the death of Bobby Morris. Added to these facts is the testimony of Lodell Morris, Bobby Morris' mother that when she visited her son in November of 1977 he was the picture of health; (R 699,701) that "Buenoano and Morris didn't just fight all the time, but there was never no real companionship or love, or nothing like that"; (R 700) and that Buenoano was employed at the hospital at the time of his death and brought him Hawaiian Punch in big cans from home and had to pry his mouth open to force it down, while Morris would open his mouth and readily take liquids from Lodell Morris and her daughter. (R 666, 708-709) It is clear that such similarity between Morris and Goodyear's deaths and the actions of Buenoano in regard to Morris constituted much more than a "mere opportunity" to poison Morris,

as in the case of Norris v. State, 158 So.2d 803 (Fla. 1st DCA 1964), cited by the appellant.

The appellant also argues that the evidence presented concerning the attempted poisoning of John Gentry was in no way similar to the arsenic poisoning of Goodyear. The Nelson case, previously discussed is also dispositive of the issues of similarity and remoteness in time.

The time span between Goodyear's death and Morris was six years. The time span between the death of Morris and the attempted poisoning of Gentry was only four years. The time span between the death of Goodyear and the attempted poisoning of Gentry was eleven years. Thus, the average time span between each incident was between 5-7 years. Based upon the Nelson case, the similar fact evidence was not too remote in time, but showed common design or plan by Buenoano to murder her male companions to collect insurance proceeds and other monetary benefits. A substantial period of time is required under such a serial murder scheme to form relationships strong enough to culminate in the procuring of large life insurance policies. Again, Buenoano should not be rewarded on the basis of the means she employed to accomplish her lethal ends.

In the case of Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982) the defendant contended that the trial court erred in admitting similar fact evidence because the evidence was not similar. In order to corroborate the defendant's confession regarding the homicides for which he was on trial, the state adduced similar fact evidence of six other homicides which occured

in 1979, involving black women, except for one white woman, all between the ages of thirteen and thirty. The victims were either known prostitutes or had been seen walking the street, leading the defendant to believe they were prostitutes. All of the incidents occurred in the same geographical area of Northwest Fort Lauderdale, except for two which occurred in Miami in close proximity to each other. All of the homicides occurred on open lots surrounded by debris or weeds or structure to hide the victims. They were all found partially nude or nude from the waist down with their clothing located nearby. Most of them were lying on their backs with their legs in spread eagle fashion. In all but two of the homicides, the cause of death was strangulation.

The court in affirming the use of similar fact evidence said that: "one would suppose that no two crimes could be identical; thus, the key is similarity, not identity. The similarity in the commission of the collateral crimes referred to above is no mere general likeness. Rather, we hold the similar facts are identifiable and they pervade the compared factual situations. Therefore, the collateral crime evidence was relevant to prove identity and similar mode of operation as well as motive." 420 So.2d at 615.

In Chandler v. State, 442 So.2d 171 (Fla. 1983) this court addressed the issue of whether Chandler's previous convictions were similar to those charged in his present case. The victim in the similar fact case had been abducted against his will, taken to a remote area, and with his hands tied behind his back, beaten

about the head with a blunt instrument and robbed. The defendant contended that the coincidence of one or two details, such as the tying of the victim's hands behind their backs, was not sufficiently relevant to the issue of identity to be admissible under section 90.404(2) and the Williams Rule, based upon Drake v. State, 400 So.2d 1217 (Fla. 1981)

This court distinguished Drake, as in Drake, there were a number of significant dissimilarities between the collateral crime and the crime charged, including the fact that the previous crime involved only sexual assault, while the later crime was murder with little if any evidence of sexual abuse. The dissimilarities pointed to such as time of day the crimes were committed and the specific blunt instrument used, "suggest differences in the opportunities with which Chandler was faced with rather than significant differences in modus operandi as in Drake." 442 So.2d at 173. This court held that, although both crimes may not be sufficiently unique or unusual, when considered individually, to establish a common modus operandi, when those points are considered one with another, they established a sufficiently unique pattern of criminal activity to justify admission of evidence of Chandler's collateral crime as relevant to the issue of identity in the crime charged. 442 So.2d at 173.

In the present case, the evidence in all three factual situations reflects that Buenoano established a close relationship with all three men, including Gentry, either as a wife, common-law wife, or fiance, as in the case of Gentry. Shortly after obtaining life insurance on their lives, they

became ill, displaying similar symptoms. A poison was used in all cases. Buenoano was the beneficiary of life insurance policies and monetary benefits of all three. The factual situations in all three are similar and not just a general likeness. That Gentry was given paraformaldehyde rather than arsenic has to do with opportunity rather than any significant difference in modus operandi.

It is obvious that the jury's judgment was not overwhelmed by the quantity of the collateral crime evidence, especially in view of the fact that Buenoano made several admissions that she had committed the present crime. A good portion of the transcript pages represents appellant's cross-examination of the state witnesses. See, Sias v. State, 416 So.2d 1213, 1216 (Fla. 3d DCA 1982). Costance Lang's tetimony only fleetingly referred to Morris (R 474-477), as did Mary Owens'. (R 655; 664-665) Lodell Morris also testified as to the facts relevant to the Goodyear case. (R 697-698) Beginning with the testimony of insurance agents, until the time the state rested, approximately three hundred pages of transcript dealt purely with collateral crimes, including cross-examination. (R 719-1038) The state called ony those witnesses necessary to establish the similar fact evidence and did not practice over-kill. See, Wilson v. State, 330 So.2d 457 (Fla. 1976). There is no indication that the jury misunderstood the purpose for which this evidence was admitted and the appellant has failed to demonstrate reversible error.

II. THE STATE PROVED THE CORPUS DELICTI IN THE PRESENT CASE INDEPENDENT OF THE CONFESSION AND SIMILAR FACT EVIDENCE AND THE TRIAL COURT PROPERLY DENIED THE MOTION FOR DIRECTED VERDICT OF ACQUITAL.

The term "corpus delicti" as applied to any particular offense means that the state must establish that the specific crime charged has actually been committed. The corpus delicti in homicide cases consists of (1) the fact of death and (2) the existence of the criminal agency of another as the cause of death, conected with (3) the identity of the deceased. Blake v. State, 156 So.2d 511 (Fla. 1963). It is not necessary that the corpus delicti be proved beyond a reasonable doubt as the basis for the introduction of a confession. It is enough if the evidence tends to show that the crime was committed. Frazier v. State, 107 So.2d 16 (Fla. 1958).

Doctor Auchenbach testified as to the fact of death below, stating that Goodyear was hopsitalized from September 15, 1971 through September 16, 1971. (R 245) A certified copy of the death certificate was introduced into evidence. (R 225; 230) The defense stipulated that the remains in the casket were those of Goodyear. (R 233-234)

As indicated in the statement of the case and facts, numerous medical experts testified that in their medical opinion, the cause of death was arsenic toxication. Expert medical testimony as to the cause of death does not need to be stated with reasonsable certainty in a homicide prosecution and is competent if the expert can show that, in his opinion, the occurrence could cause death or that the occurrence might have or

probably did cause death. Delap v. State, 440 So.2d 1242 (Fla. 1983).

The confusion over the arsenic level of the liver not falling within the fatal range listed on the Curry and Bhsalt scales has been fully discussed in pages 4-5 of the statement of the facts, and suffice it to say that the levels for chronic arsenic poisoning are below the ranges indicated on these two scales. Contrary to the appellant's assertion, the levels were high enough to determine that Goodyear died of chronic arsenic poisoning. Dr. Leonard Bednarczyk, a forensic toxicologist, analyzed the samples from the autopsy performed on Goodyear in 1984. (R 334-337) He prepared arsenic standards and the samples were analyzed by spectrophotometry. (R 338) His method of analyses and tests is an accepted method recognized in the scientific community. (R 389) While Dr. Robert Braman, an analytical chemist, quetioned the validity of the test results of Dr. Bednarczyk, he is not familiar with any guidelines that forensic toxicologists must follow. (R 1171) He admitted that in hospitals life and death decisions are made based on tests run once and that acid digestion, used by Dr. Bednarczyk in this case, will destroy formaldehyde so you can get at the arsenic. (R 1169-1171) Moreover Dr. Braman neither analyzed the samples nor talked to Dr. Bednarczyk. (R 1176) He further admitted that symptoms of arsenic poisoning were present in the medical records of Goodyear and that the concentrations of arsenic in the hair is consistent with chronic arsenic poisoning. (R 1176) Thus the findings were never shown to be inaccurate.

While it is true that Dr. Bednarczyk could not determine the type of arsenic from the sample he examined, the levels were, in any event, lethal, and accidental or environmental exposure was ruled out. If you breathe air contaminated by arsenic you will not find assayable amounts. (R 288) The fact that he could have gotten arsenic from the environment was excluded because if it was in the atmosphere in that concentration, other individuals would have to have been poisoned also. (R 276) There was nothing in Goodyear's history to indicate that he had any contact with pesticides or that his family or other airmen suffered from the same symptoms. (R 313-314) Nor was there any support for the theory of a one time exposure of Agent Blue in Vietnam. There was a period of several weeks from the time he left Vietnam until he became symptomatic in Orlando. The levels indicate chronic exposure. If he were exposed to an agent in Vietnam that same exposure would have to have continued in Orlando to have such chronic exposure. If there were such one-time exposure, the levels of arsenic in the hair would tend to go down rather than up after his return to the United States. (R 383-384)

The Armed Forces Institute Report stated "this death is suspicious for arsenic and lead intoxication. However, there is not sufficient information to determine the cause or manner of death from the materials examined." (R 323) This report, however, was just a reassessment of the autopsy findings from the paraffin blocks that had been preserved from his previous autopsy in 1971. It showed the presence of some heavy metals but not the amount. (R 305) The report makes no mention of Dr. Bednarczyk's

or Dr. Hegert's later reports or findings. (R 331)

The levels of arsenic found by Dr. Bednarczyk are indicative of the actual levels of the organs at the time of death. Arsenic is not used in embalming. (R 405-408;414) The levels would not increase by intermingling of organs. (R 388) Moreover the levels found in the hair were not shown to be subject to change with passage of time. Dr. Loomis further agreed that the causes of death listed on Goodyear's death certificate could be consistent with chronic arsenic poisoning if it were terminal. (R 1333)

The evidence further reflected that Buenoano was unhappy in her marriage before and after Goodyear returned from Vietnam and discussed arsenic poisoning as a solution on numerous occasions. (R 462-463; 469; 470) During his absence she had been unfaithful. (R 642-643) At the time of Goodyear's return he was healthy, then started to deteriorate. (R 570-572) Although he was hallucinating, Buenoano would not take him to a hospital. (R 573) She collected insurance proceeds upon his death. (R 425-426; 435-436; 447) She lied to numerous people as to his cause of death, attributing it to black plague, (R 471) narcotics addiction, (R 645) a virus (R 659) and finally a plane crash in Vietnam. (R 951)

Thus, in the absence of a confession, the state proved a prima facia case by showing a prior statement about a potential cause of death and an actual cause of death consistent with that statement and a motive, marital unhappiness and insurance proceeds, as well as a further act indicating a desire for death to occur - the refusal to hospitalize Goodyear, and later

concealment of the actual cause of death. Coupled with Buenoano's admissions that she killed Goodyear, as well as evidence of other poisonings which reflects a pattern showing lack of mistake or accident and motive and modus operandi, it is clear that a directed verdict of acquittal was not warranted either at the close of the state's case or at the close of all the evidence.

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S UNTIMELY MOTION FOR A MISTRIAL ON THE BASIS OF A GRATUITOUS COMMENT MADE BY A WITNESS ON CROSS-EXAMINATION.

As a predicate to a motion for mistrial, the defendant also must object or move to strike the improper material. Failure to object or move to strike waives appeal of this issue, regardless of whether a motion for mistrial is made properly. Clark v. State, 363 So.2d 331 (Fla. 1978). To meet the objectives of any contemporaneous objection rule, the objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The colloguy in the present case is as follows:

> Q. Where was Judy living at that time?
>
> A. I only went into Judy's apartment one time, and she was living at Royal Arms Apartments, and that's where she lived.
>
> Q. She wasn't living in Orlando?
>
> A. Not in January she wasn't, because---.
>
> Q. Are you sure about that?
>
> A. She told me she had burned her house, Mr. Johnston, and had collected the insurance, and her home was burned.
>
> MR. JOHNSTON: I move to object to that.
>
> THE COURT: Sustain the objection. The witness is required to answer the question asked by the lawyer.

BY MR. JOHNSTON:

Q. If you will be responsive to my question. I asked you was she not living in Orlando in January of 1972?

A. No, she wasn't.

(R 674)

It is clear that no contemporaneous objection was made below on the basis of the argument now raised on appeal, thus such issue cannot be considered adequately preserved for appeal. Furthermore the general objection appears to have been sustained by the trial judge on the basis that the answer was non-responsive and the answer was neither stricken nor requested to be stricken so it would appear, as well, that the trial judge was not adequately apprised of the nature of the putative error.

The record further reveals that no timely motion for mistrial was ever made. (R 674) It was not until nine subsequent witnesses completed their testimony that the defense moved the court to declare a mistrial on the basis that witness Owens' testimony during cross-examination accused Buenoano of the crime of burning her home in Orlando, Florida. The sole reason given for this delay was that "At the time she made the statement I contemplated asking the Court for a mistrial, but the jury was seated and I simply didn't want to do it at that time." (R 820) It is clear that a motion for mistrial should immediately follow the improper testimony. By waiting until final jury instructions, the defendant is deemed to have waived the motion. State v. Cumbie, 380 So.2d 1031 (Fla. 1980). (R 823)

At the time the motion for mistrial was untimely interjected and denied by the trial court, the trial judge suggested that a curative instruction by given and defense counsel agreed to the same and formally requested such instruction. (R 823-824) The jury was subsequently instructed:

> She stated that she was in Pensacola because she indicated she burned her house down in Orlando. That was a gratuitous statement. You are to disregard that statement. It was inappropriate and its not to be used in any consideration of the testimony in this case.

(R 831)

A motion for mistrial is directed to the sound discretion of the trial court and should be granted only when it is necessary to ensure that the defendant recieves a fair trial. see, Ferguson v. State, 417 So.2d 639 (Fla. 1982); Salvatore v. State, 366 So.2d 745 (Fla. 1978). Even in the event this court may deem this issue sufficiently preserved for appeal, the trial court correctly denied the motion for mistrial and, in any event, the curative instruction given in this case was sufficient to dissipate any prejudicial effects of this testimony. See, Jennings v. State, 453 So.2d 1109 (Fla. 1984); Rivers v. State, 226 So.2d 337 (Fla. 1969).

IV. THE TRIAL COURT DID NOT COMMIT ERROR IN THE SENTENCING PROCEEDING BY ALLOWING TESTIMONY ABOUT THE DETAILS OF TWO PRIOR FELONIES INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

Buenoano was previously convicted of the attempted first-degree murder of John Gentry by bombing his car in State v. Goodyear, Case Number 84-1390-CF-01, in the Circuit Court of Escambia County. This case was affirmed in a per curiam decision on February 5, 1986. Buenoano v. State, 484 So.2d 11 (Fla. 1st DCA 1986). The case was dismissed by the Florida Supreme Court on May 2, 1986. Buenoano v. State, 488 So.2d 829 (Fla. 1986). Buenoano was also convicted of the first-degree murder of her invalid son, Michael Goodyear, by drowning him and then stealing more than twenty thousand from Prudential Life Insurance Company by defrauding the company of insurance proceeds on the son's life. The murder conviction was affirmed by the First District Court of Appeal. Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985). This court has granted review of the decision of the First District Court of Appeal in Case Number 68,1074 in an order dated June 3, 1986. Oral argument was entertained on September 25, 1986. The case now awaits decision by this court.

In the sentencing phase the state introduced copies of the information, judgment and sentence in these two cases into evidence. (R 1520-1521;1553-1554) Prosecutors also testified as to the details of the two prior violent felonies. (R 1518-1533;1551-1575) The defense objected on the grounds that the tesimony was hearsay. (R 1522;1555)

Florida has a wide-open rule of admissibility at penalty hearings. See, Alvord v. Wainwright, 725 F.2d 1282, 1294 (11th Cir. 1984). The penalty hearing is geared to consider any facts or opinions which may be relevent in determining the statutory mitigating and aggravating circumstances. Alvord v. State, 322 So.2d 533, 539 (Fla. 1975). This court has previously approved admission of testimony giving the details of a separate crime of violence where the defendant has been convicted of that crime. Elledge v. State, 346 So.2d 998 (Fla. 1977). It is clear that in a sentencing proceeding the state may introduce testimony as to the circumstances of a prior conviction, rather than just the bare fact of that conviction. Stano v. State, 473 So.2d 1282, 1289 (Fla. 1985); Mann v. State, 453 So.2d 784 (Fla. 1984); Justus v. State, 438 So.2d 358 (Fla. 1983); Delap v. State, 440 So.2d 1242 (Fla. 1983).

The purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant, to assertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is a matter that can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate total arbitrariness and capriciousness in the imposition of the death penalty. Elledge v. State, 346 So.2d 998, 1001-1002 (Fla. 1977). Indeed, section 921.141(1), Florida Statutes (1984) provides, in part, that all legally obtained probative evidence, including hearsay, is admissible during the penalty phase,

"provided the defendant is accorded a fair opportunity to rebut any hearsay statements." As the thorough cross-examination in this case reveals, the evidence employed here was certainly susceptible to fair rebuttal, especially given the fact that defense counsel in the present case also represented Buenoano in the prior cases. In the present case, it was the facts of the crime, rather than reputational evidence, that was testified to and such facts were certainly susceptible to fair rebuttal. Cf. Buford v. State, 492 So.2d 355 (Fla. 1986).

Although Buenoano complains of such testimony in general, no complaint has been lodged as to biased or incorrect information as to the attempted murder conviction in Escambia County. This conviction was affirmed on appeal and it is clear that its consideration by the trial judge as an aggravating circumstance in sentencing Buenoano was proper. Peek v. State, 395 So.2d 492 (Fla. 1980). Regardless of whether this court ultimately reverses the Santa Rosa murder conviction or finds that the details of the same should not have been brought out at sentencing in this case, the fact still remains that this aggravating factor was properly found on the basis of a valid judgment and sentence for attempted murder in the Escambia County case, which was subsequently affirmed on appeal.

In regard to the Santa Rosa first-degree murder conviction for the death of her son, it should be noted that while the Escambia County records were made a part of the instant appeal, the record reflects by the existence of an affidavit of a non-existent item (R 3383), that the Santa Rosa records were not made

a part of the record on appeal nor entered into evidence below and citation to the same, at this point in time, without equal availability to both parties, is improper. Moreover, the record reveals thorough cross-examination on the details of the Santa Rosa crime.

It should also be remembered that the penalty phase of a murder trial results in a recommendation which is advisory only. Such testimony was certainly not so egregious as to taint the validity of the jury's recommendation. This is the same jury that sat in the guilt phase and which was well aware of Buenoano's propensity for poisoning, murdering, and collecting insurance benefits, aside from any revealed details in the sentencing phase in regard to the Santa Rosa case. Aside from this aggravating factor, three other factors were properly found and supported by the evidence beyond any reasonable doubt, i.e., that the capital felony was committed for pecuniary gain; that it was especially heinous, atrocious and cruel and that it was committed in a cold, calculated and premeditated manner. No mitigating factors were found. Even were the details of the Santa Rosa case improperly testified to, the fact remains that (1) this aggravating factor is supported by the judgment and sentence which was affirmed on appeal in the Escambia County case (2) the jury which rendered the advisory verdict was the same jury as in the guilt phase, which heard prior testimony of Buenoano's poisoning proclivities, and was hardly prejudiced by hearing the details of the Santa Rosa case (3) it is the judge, in any event, and not the jury who is the sentencer in the state

of Florida, who is presumed to know the law, and Buenoano has hardly demonstrated that the details of these cases were improperly considered by him in imposing sentence and (4) even assuming that such details should not properly have been testified to, they pertained only to the aggravating factor of a prior conviction for a violent felony and even eliminating this factor from the sentencing matrix results in a fully supported sentence of death in view of the fact that the crime was heinous, atrocious and cruel, cold and caluculating, and committed for pecuniary gain, with no mitigating factors.

It is the state's position, in any event, that no error was committed. A similar case is Perri v. State, 441 So.2d 606 (Fla. 1983). In Perri the trial court, during the sentencing proceeding allowed two police detectives to testify as to the details of his prior convictions and Perri contended on appeal that such testimony was hearsay. This court determined that details of a prior felony involving the use or threat of violence to the person is properly admitted. 441 So.2d at 607.

V. THE TRIAL JUDGE PROPERLY FOUND THAT THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

The trial judge, in his factual findings supporting the imposition of the death penalty, found that the capital felony was committed for pecuniary gain. This finding is correct as there was sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt.

The evidence reflects that Buenoano's husband James E. Goodyear served a tour of duty in Vietnam from May of 1970 to May of 1971. Connie Lang testified that prior to his leaving for Vietnam, Buenoano expressed her unhappiness with her marriage. (R 462-463) Buenoano joked about ending their problems by lacing their husbands' food with arsenic. (R 463)

After Goodyear returned home from his tour of duty in Vietnam Buenoano continued to express to Connie Lang her unhappiness with her marriage. (R 469) Buenoano, however, never discussed separating or getting a divorce. (R 465) She continued to "joke" that one way out would be to put arsenic in macaroni and cheese or tomato juice. (R 470) As a direct result of Goodyear's death Buenoano received a large amount of money in insurance payments and veteran's benefits. (R 425-426;430;436;447) Had Buenoano chosen to solve her marital problems by divorce she would not have received any life insurance proceeds nor would she have been entitled to any veteran's widow's benefits. In later conversations with Mary Owens she advised her not to divorce her husband but to take out additional life insurance and poison him. (R 659-663) Buenoano

later contrived fictitious stories to account for her husband's death, telling Robert Crawford that he had become addicted to narcotics in Vietnam; telling Mary Owens that he was a Green Beret in Vietnam and had picked up a virus and died after he got home; and finally telling John Gentry that he had died in a plane crash in Vietnam. (R 645;659;951) She further admitted to Lodell Morris that she had killed Goodyear because "she had to work her butt off and he was no help to her...". (R 698)

Thus, the evidence was clearly sufficient to prove a pecuniary motivation for the murder. Buenoano was the beneficiary of Goodyear's estate, see, Michael v. State, 437 So.2d 138 (Fla. 1983) and that, coupled with her later admissions was sufficient to prove a pecuniary motive for the murder itself, along with the fact that she ultimately received and enjoyed the proceeds and benefits. See, Antone v. State, 382 So.2d 1205 (Fla. 1980).

VI. THE TRIAL JUDGE PROPERLY FOUND THAT THE CAPITAL FELONY WAS AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL HOMICIDE.

The trial judge, in his factual findings supporting the imposition of the death penalty, found that the capital felony was especially heinous, atrocious or cruel. (R 2344) This finding was based on the fact that Sergeant Goodyear's death was not a swift and painless one but was the result of Buenoano slowly and methodically poisoning him.

Debra Sims testified that Goodyear became ill several days prior to being taken to the hospital. He was very weak and hallucinating and saw non-existent rabbits. Although she was in his line of sight he did not acknowledge her presence. Buenoano did not take him to the hospital at this point in time, but stated that if he did not get better in a couple of days, she would take him to the hospital. (R 571-573) Goodyear's treating physician testified that Goodyear had returned home three months before from Vietnam and had not been ill during the time he was in Vietnam. (R 239) Since his return he had not been feeling well and approximately two weeks prior to his admission to the hospital had developed nausea, vomiting, chills, fever, abdominal pain and diarrhea. (R 237-239) Upon his admission to the hospital he was chronically ill and dehydrated. (R 241-242) During his hospital stay from September 13, 1971 to September 16, 1971, the day he died, Goodyear suffered with circulatory collapse problems, poor cardiac functioning, renal failure, hallucinations and fevers. (R 245-254)

Based on the above supported facts of the case, the trial judge concluded:

> The defendant systematically over a period of time poisoned the victim in this case. She watched him go from good health to a state of pain, suffering and hallucinations. Despite the pleas of Debra Sims to take the victim to the doctor, she waited while the victim suffered. I can think of no better factual situation that fits the description of shockingly evil, outrageously wicked and vile and designed to inflict a high degree of pain with utter indifference to the suffering of others than this case. Mary Owens testified that the defendant told her she would have to have the stomach to poison her husband, because it made the victim very ill. The court finds that this capital felony was especially heinous, atrocious or cruel.

(R 2345-2346)

Under the standard set forth in State v. Dixon, 238 So.2d 1,9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), an especially heinous, atrocious, or cruel homicide is one "where the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." It is this court's interpretation that "heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others." 283 So.2d at 9.

It cannot seriously be argued that systematically poisoning

one's own husband over a period of time, until his actual demise, and witnessing the results of such handiwork, does not set this crime apart from the norm of capital felonies. This is clearly an unusual manner and method of effecting a homicide. Cf. Parker v. State, 458 So.2d 750 (Fla. 1984). This factor pertains to the nature of the killing itself. Mason v. State, 438 So.2d 374 (Fla. 1983). The nature of the present homicide reflects that the husband and father of Buenoano's children was extended all the milk of human kindness by Buenoano usually reserved for vermin aboard a ship. Medical terminology can not adequately describe the horror of such a fate. The only word that comes to mind is "agony." The nature of the crime is purely Machiavellian.

That the crime is heinous and atrocious is further reflected by the fact that Buenoano, in her own terms, had the "stomach" to methodically kill her husband, watch him weaken and hallucinate and withhold hospitalizing him to ensure death. Contrary to the appellant's assertion, there was no lack of evidence that Buenoano "enjoyed" the death of Goodyear. She profitted enormously from his death as the beneficiary of insurance policies. In speaking of such a fate to others she displayed not remorse but levity and encouraged such deadly bravado in others. This is clearly a conscienceless, pitiless crime, see, Deaton v. State 480 So.2d 1279 (Fla. 1985), especially in view of the fact that death occurred not through a single effort but by virtue of continued efforts. See, Johnson v. State, 465 So.2d 499 (Fla. 1985).

Goodyear's death was not instantaneous and all medical descriptions reveal he suffered considerable pain and torture. See, Breedlove v. State, 413 So.2d 1 (Fla. 1982); Thompson v. State, 389 So.2d 197 (Fla. 1980). The mental anguish of weakening and approaching death in the face of advanced medical treatment and technology without explanation or reason cannot be ignored. See, Jennings v. State, 453 So.2d 1109 (Fla. 1984) vacated on other grounds, _____ U.S. _____, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985). Goodyear's helpless anticipation of impending death or further physical deterioration is no less compelling simply because he did not know Buenoano was the guiding force behind this turn of events. Clearly, Goodyear's grave condition replete with hallucinations of rabbits, and his slow death was cruel, and Buenoano was utterly indifferent to the same, even recommending the same course of action to Mary Owens. (R 658-661) This murder is the epitome of a heinous, atrocious and cruel capital felony.

CONCLUSION

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

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Margene A. Roper

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished, by mail, to James A. Johnston, Attorney for appellant, at 1375 West Garden Street, Pensacola, Florida 32501, this 30th day of October, 1986.

Margene A. Roper

Margene A. Roper
Of Counsel