IN THE SUPREME COURT OF FLORIDA

JERRY CORRELL,

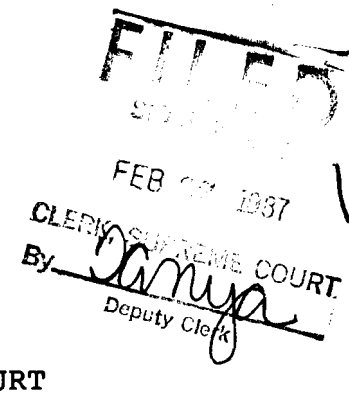
Appellant,

v.

CASE NO. 68,393

STATE OF FLORIDA,

Appellee.



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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts appellant's Statement of the Case and Facts which, however presented, contains the facts in support of appellant's convictions. Due to constraints of space, the State, at this juncture, would not set forth its own recitation. Because appellant specifically attacks on appeal the sufficiency of the evidence against him, a full explication of the facts relevant to appellant's four convictions of first-degree murder can be found in the argument section of this brief at Point XI, infra. Likewise, the facts relevant to support the four sentences of death in this case are discussed in detail in Point XV, infra.

SUMMARY OF ARGUMENT

POINT I: Denial of appellant's motion to suppress the statement given on July 1, 1985, was not error. Although appellant was not advised of his rights pursuant to the Miranda decision, such advisement was not necessary, in light of the fact that appellant was not a suspect at the time and a reasonable man in his position would not have believed that his freedom of movement had been significantly restricted.

POINT II: Admission into evidence of certain photographs and slides depicting the crime scene and the fatal wounds of the victims was not error. This point is not properly presented, in that appellant in his brief has not specified the individual exhibits to which he takes exception. In any event, reversible error has not been demonstrated, in that the photographs are relevant, non-cumulative and not of so shocking a nature as to inflame the jury.

POINT III: Denial of the public defender's motion to withdraw was not error, where, even though one of the state's witnesses was also represented by such counsel, that witness waived all privileges of confidentiality and was appointed new counsel, prior to trial. Appellant has cited no authority for his position that the public defender should have been allowed to withdraw from appellant Correll's case, and it is clear that the court below properly resolved any contention of conflict of interest.

POINT IV: Denial of appellant's challenges for cause of veniremen Beiler and Cullen was not error. This point is not

properly presented, in that appellant did not exhaust all of his peremptory challenges and then request more; likewise, appellant has, on appeal, changed the basis for his challenge of Miss Beiler. Appellant's challenge of Miss Cullen was properly denied, in that a fair reading of her testimony indicates that she could have followed the law.

POINT V: Admission into evidence of certain testimony of witness Donna Valentine, to the effect that Susan Correll displayed fear of appellant after the breakup of their marriage, was not error. This evidence was not hearsay, and was relevant, in that it contradicted representations in appellant's statement and went toward the existence of premeditation or intent; the state suggests that the overall relationship between the parties was relevant.

POINT VI: Granting of the state's motion to redact portions of appellant's statement of July 1, 1985, was not error, and, through failing to introduce into evidence or otherwise proffer the redacted portions, appellant has failed to preserve or properly present this issue. Additionally, from what little can be determined about the excluded evidence, it is clear that it lacked relevancy and was totally inadmissible.

POINT VII: Admission into evidence of certain Williams Rule evidence, regarding a prior act of aggression of appellant toward one of the victims, was not error. This evidence, which concerned an incident in which appellant slashed the tires of Susan Correll's car, was relevant to show identity, absence of mistake and motive, in that, on the night of the homicides, all

four tires of a vehicle belonging to a boyfriend of Susan Correll were slashed. Additionally, this point is not properly preserved for review, in that no contemporaneous objection was interposed at the time of the admission of this evidence.

POINT VIII: Admission into evidence of testimony regarding an earlier threat by appellant to kill Susan Correll was not error, in that the evidence was not too remote in time to be admissible, and in that it was obviously relevant to show premeditation, prior difficulties between the parties, and the overall relationship between appellant and one of his victims.

POINT IX: Admission into evidence of testimony regarding blood analysis, obtained through electrophoresis, was not error. As the parties below recognized, such evidence has previously been admitted in courts throughout this state, and the state's expert witness testified that the scientific process was reliable and accepted by those in the forensic chemistry field. Additionally, the process has, with some exceptions, been accepted by other jurisdictions, and the trial court sub judice did not abuse its discretion in admitting this evidence.

POINT X: The trial court, likewise, did not abuse its discretion in finding Judith Bunker sufficiently qualified to testify as an expert witness in the field of bloodstain pattern analysis. The witness had substantial experience in the field, given her years of employment with the district medical examiner, and she had previously testified as an expert in Florida, as well as in other jurisdictions.

POINT XI: Denial of appellant's motions for judgment of

acquittal was not error, and sufficient evidence exists for this court to affirm the four convictions of first-degree murder in this case. Five bloody palm or fingerprints belonging to appellant were found at the scene of the crime, and the state adduced sufficient evidence from which premeditation could be inferred, including the manner in which the victims were killed, and the previous difficulties between appellant and the victims.

POINT XII: Reversible error has not been demonstrated in regard to the trial court's handling of defense counsel's stated "desire" to call an undisclosed witness. Although appellant seeks to cast this point as one involving an alleged failure on the part of the trial court to hold a Richardson hearing, it is clear that defense counsel never sought to affirmatively call the witness in question during the defense case; appellant likewise did not proffer the expected testimony of this witness and, from what little is known of it, it is clear that her testimony would have been both cumulative and/or irrelevant.

POINT XIII: Appellant has failed to demonstrate reversible error in regard to the seven assorted "sub-points" raised in this point. A number of these sub-points are not properly preserved for review, including that relating to the calling of two witnesses as court witnesses. Further, those involving the denial of appellant's various motions for mistrial are without merit, in that the assorted alleged errors complained of, whether considered in isolation or cumulatively, were not of sufficient magnitude to vitiate the trial. Likewise, appellant's contentions regarding admission of certain evidence and the trial

court's handling of a question from the jury does not provide a basis for reversal.

POINT XIV: Denial of appellant's motion for a twenty-four hour continuance of the penalty phase was not error, where defense counsel had had months to prepare for both phases of the trial, and where appellant's contentions of prejudice are expressly refuted by the record.

POINT XV: Appellant's four sentences of death should be affirmed, in that each is supported by sufficient aggravating factors, and in that the sentencing court's finding of nothing in mitigation is not error. There can be little doubt that the homicides in this case are among the most heinous in the history of the State of Florida, and death is the only appropriate penalty.

POINT XVI: Appellant has failed to demonstrate that cumulative error occurred at the penalty phase of his trial. Fundamental error has not been demonstrated in regard to the prosecutor's closing arguments therein, to which no objection was interposed, and the exclusion of certain testimony of a defense witness was proper, in that such evidence was completely without relevance, bearing no relationship to appellant's background and character.

POINT I

DENIAL OF APPELLANT'S MOTION TO SUPPRESS STATEMENT WAS NOT ERROR.

On December 3, 1985, appellant filed a motion to suppress any and all statements made by him to law enforcement officials on July 1 and 2, 1985, on the grounds that such had allegedly been obtained illegally; in reference to his statement of July 1, 1985, appellant specifically contended that such statement should be suppressed because, at the time it had been given, he had not been informed of his right to an attorney, under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966) (R 3939-3940). The motion was called up for a hearing on December 5, 1985, at which three witnesses, Detective Payne, Deputy McCann and Captain Buchannan, testified (R 2088-2119). At the conclusion of that portion of the hearing, Judge Stroker denied the motion, setting out the findings below,

> As to the July 1st statement, I think the evidence is fairly clear in this case that Mr. Correll at the time he gave that statement was not in custody or quasi-custody at the time, that he was not at that time the suspect or the subject of an investigation that had focused upon him and that Miranda warnings were not required.
>
> It appears that the statement at that time was voluntarily given (R 2132).

A written order of denial was also rendered (R 3963).

The testimony presented at the hearing indicated that appellant had come into contact with the authorities while both were at the scene of the homicides, after the bodies had been discovered, on July 1, 1985 (R 2096). Captain Buchannan testified that the sheriff had suggested that appellant possibly

be removed from the scene, given the presence of the media and the manner in which appellant was behaving; the sheriff also apparently suggested that elimination fingerprints be obtained (R 2118). The officer testified that elimination fingerprints are those taken to eliminate persons who might have been present at the scene of the crime and left behind fingerprints which, in fact, have no bearing upon the offense being investigated (R 2118-9). Accordingly, Buchannan directed Detective Payne to have appellant removed from the scene and to interview and obtain the elimination fingerprints, if appellant was agreeable (R 2117, 2101).

Detective Payne testified that appellant was taken to the sheriff's office by members of his own family, his brother-in-law and sister (R 2090). She stated that she interviewed appellant for approximately half an hour to one hour, and that the information she was primarily seeking pertained to the full names of the victims, the identity of the persons normally living at the scene and "just basically family information" (R 2090, 2092). The officer testified that appellant was interviewed because he was a family member and that the authorities were trying to determine the habits of the victims, the friends that they had had and other information which would be useful in solving the crime (R 2095-6). According to Detective Payne, appellant was free to leave at any time during the interview, although, because he never expressed any desire to do so, he was never expressly advised of this (R 2101). Appellant was not under arrest, was not handcuffed at any time, and at no time

during the interview did he ever object to a question or refuse to talk (R 2091, 2100). Although in answer to a question as to why she had not advised appellant as to his Miranda warnings, Detective Payne answered that such step had not been taken because appellant "was" a suspect, appellee respectfully suggests that such answer represents either a misstatement on the part of the witness or, perhaps, a mistranscription by the court reporter (R 2091); further down on the same page of transcript, the following can be found:

> Q. All right, sir [sic]. Now, you said that Mr. Correll was not a suspect at the time that he was initially interviewed by you on the 1st of July, 1985?
>
> A. That's correct. (R 2091-2).

Detective Payne testified that after the interview, appellant voluntarily consented to having his elimination fingerprints taken and to being photographed (R 2091); she stated that other persons subsequently were asked to supply fingerprints (R 2100). Appellant then left the station with those family members who had brought him (R 2091). A subsequent interview took place the next day, at the conclusion of which appellant was formally arrested (R 2107); appellant gave another statement at such time, and prior to that statement, he was advised of, and waived, his Miranda rights (R 2104-7).

Only the first statement, that of July 1, 1985, which apparently was tape recorded, was introduced at trial (R 1088, Transcript of Evidence). On appeal, appellant contends that such admission constitutes reversible error, in that appellant was "in custody" for purposes of Miranda at the time that he gave such

statement. Appellant argues that a reasonable man in appellant's position would have believed himself in custody, and points to certain language in the testimony of Deputy McCann, who took appellant's statement of July 2, 1985, as evidence that appellant had been a "suspect" earlier in the investigation (R 2114; Brief of Appellant at 24). Appellee disagrees with both the legal argument, and the latter reading of McCann's testimony, but would initially draw this court's attention to the rather interesting procedural posture of this point.

While it is true, as appellant notes in his brief, that his counsel objected at the time that the tape recorded statement was played for the jury in open court, stating that at such time counsel "would object on the grounds that I made earlier" (R 1088), this objection, assuming that it is specific enough to preserve the point under Routly v. State, 440 So.2d 1257 (Fla. 1983), came after Detective Payne had testified, without any objection, to the substance of her pre-statement conversation with appellant (R 1075-1081). This testimony would seem, in all material respects, virtually identical to the contents of the tape recorded statement. Appellee would suggest that by failing to object to this testimony, which, in effect, was a "summary" or a "preview" of the tape, appellant waived his objection to the tape itself; appellee would also suggest that because the tape turned out, in a sense, to be cumulative to the earlier unobjected-to testimony, its admission cannot constitute reversible error, the jury already having been apprised of the same information through a different, unchallenged, source. Cf.,

Teffeteller v. State, 439 So.2d 841 (Fla. 1983); Palmes v. State, 397 So.2d 648 (Fla. 1981); Echols v. State, 484 So.2d 568 (Fla. 1985).

Should one wish to proceed to the merits, it is clear, under such decisions as Oregon v. Mathiason, 429 U.S. 711, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) and California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983), as well as Miranda itself, that no Miranda warnings were required in regard to the July 1, 1985 statement. Appellant was neither "in custody" nor "deprived of his freedom of action in any significant way" at the time the statement was given; there is no testimony in the record which would support either conclusion. From all indications, appellant willingly proceeded to the police station and consented to a short interview with the detective, such interview, as stated at the hearing, primarily relating to matters pertaining to the victims. Appellant was free to go at any time, and did in fact leave at the conclusion of the interview. As Mathiason clearly holds, Miranda warnings are not required every time an interview takes place at a police station nor are they required every time a questioned person is "one whom the police suspect"; here, appellee finds Detective Payne's testimony, to the effect that appellant was not a suspect, persuasive. It is also clear that appellant's fingerprints were not sought with the immediate intention of prosecution, but rather as a part of the investigation process.

Although appellant relies upon this court's decision in Roman v. State, 475 So.2d 1228 (Fla. 1985), appellee cannot see

how such helps his position. A reasonable man in appellant's situation would in fact have believed himself free to go, as, the record shows, that appellant did. The trial court's resolution of this point seems in accordance with not only Mathiason and Beheler, but also with such Florida decision as State v. Clark, 384 So.2d 687 (Fla. 4th DCA 1980) and Lovell v. State, 250 So.2d 915 (Fla. 2d DCA 1971), and appellant's reliance upon Drake v. State, 441 So.2d 1079 (Fla. 1983), would seem misplaced. In contrast to the defendant in Drake, appellant never requested counsel during the statement of July 1, 1985, and the record is bereft of any evidence tending to support a "coercive" atmosphere. Assuming this issue is properly preserved, appellant has failed to demonstrate reversible error in regard to the admission into evidence of his statement of July 1, 1985, such taped statement, as noted earlier, cumulative to other unobjected-to testimony. The instant convictions should be affirmed.

POINT II

ADMISSION INTO EVIDENCE OF VARIOUS UNSPECIFIED PHOTOGRAPHS WAS NOT ERROR.

On November 26, 1985, appellant filed a motion for pre-trial hearing to determine admissibility of photographs, in which he contended that most of the photographs which the state would likely seek to introduce at trial were objectionable on the grounds that they were prejudicial to appellant, irrelevant or cumulative (R 3934-5). At the hearing on said date, the judge set the matter for further hearing, which was held on December 10 and December 12, 1985 (R 2074-5). At the hearing of December 10, 1985, the state proferred the slides which it wished to introduce depicting the crime scene (R 4181-4250); at a similar hearing on December 12, 1985, the state proferred the autopsy slides (R 2399-2442). Whereas the majority of appellant's objections to individual slides were overruled (R 4184, 4192, 4193, 4197, 4199, 4204, 4205, 4215, 4216, 4220, 4221, 4222, 4223, 4225, 4226, 4227, 4242, 4243, 4246, 4247, 2412, 2413, 2414, 2416, 2418, 2419, 2422, 2428, 2431, 2433, 2434, 2435, 2436, 2437, 2438, 2439), a number were sustained, and the state, at times, withdrew certain exhibits in the face of objection (R 4185, 4194, 4199, 4211, 4213, 4214, 2433, 2434, 2439).

At trial, the state introduced into evidence as state's exhibits 6, 7 and 8, one hundred and ninety-seven (197) slides of the crime scene (R 629); similarly, the state introduced into evidence as state's exhibits 107 and 108, one hundred and twenty-seven (127) autopsy slides of the four (4) victims (R 738,

800). At the time that these exhibits were introduced into evidence, appellant's counsel stated that he had no objection to the exhibits except for the "other" objections "already on the record" (R 629, 758, 800). On appeal, appellant contends that many of the photographs introduced into evidence were "merely cumulative", and that "therefore", such photographs were irrelevant to any of the issues presented at trial (Brief of Appellant at 29). Appellant also contends that the photographs were gory and gruesome and that the prejudicial effect of such greatly outweighed their probative value. Relying largly upon Young v. State, 234 So.2d 341 (Fla. 1970), appellant contends that he is entitled to a new trial.

Appellee would begin by questioning the extent to which this point is properly before this court. As noted above, there were three hundred and twenty-four (324) slides introduced into evidence. Neither appellant's brief nor counsel's in-court objections can be said to specifically apprise this court, or the court below, as to the identity of those individual slides which appellant finds objectionable. On the basis of such precedents as White v. State, 446 So.2d 1031 (Fla. 1984) and Castor v. State, 365 So.2d 701 (Fla. 1978), appellee would contend that appellant has failed to sustain his burden of preserving or of even alleging reversible error. Should one proceed to the merits, however, the state suggests that an abuse of discretion below has not been demonstrated in regard to the admission of the slides or photographs.

This court, in capital appeals, has had great occasion to

consider the issue of the admission into evidence of allegedly inflammatory photographs. Young represents one of the seemingly rare instances in which reversal has been predicated, at least in part, due to the admission of photographic evidence; in such case, this court concluded that an excessive number of photographs of the victim had been introduced, such inflammatory photographs "unnecessary to a full and complete presentation of the state's case." Young, itself, however, recognized that relevancy remains the basic test for admission of such evidence,

> The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs, particularly in large numbers must have some relevancy, either independently or as corroborative of other evidence. Id. at 347.

Subsequently, in Henninger v. State, 251 So.2d 862, 865 (Fla. 1971), this court approved the admission into evidence of photographs of the victim, graphically depicting the fatal injuries, observing,

> There is no question that the three photographs of the victim in the instant case are gruesome. The crime itself is so revolting that it would have been impossible to take pictures of the scene or the victim that were not gruesome. As we have indicated, however, the pictures in question were relevant and properly admitted into evidence.

Admission into evidence of graphic photographs of both the murder scene and of the murder victim, autopsy or otherwise, has repeatedly been sustained where it has been shown that they properly depict the factual conditions relating to the crime and are relevant, in that they aid the court and jury in finding the

truth. See, Swan v. State, 322 So.2d 485 (Fla. 1975); Booker v. State, 397 So.2d 910 (Fla. 1981). As this court noted in Jackson v. State, 359 So.2d 1190, 1192 (Fla. 1978), citing from an even earlier authority,

> The current position of this court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the profferred evidence. Under this conception, the issues of 'whether cumulative', or 'whether photographed away from the scene' are routine issues basic to a determination of relevancy, and not issues arising from any 'exceptional nature' of the proferred evidence.

Thus, this court has approved the introduction into evidence of photographs which cast light on the atrocious manner in which the victim was murdered, see, Foster v. State, 369 So.2d 928 (Fla. 1979), upon the existence of premeditation and circumstances of death, see, Adams v. State, 412 So.2d 850 (Fla. 1982) and upon the nature and extent of the victim's injuries. See, Wilson v. State, 436 So.2d 908 (Fla. 1983).

Two recent precedents with great applicability sub judice, are Bush v. State, 461 So.2d 936 (Fla. 1984) and Henderson v. State, 463 So.2d 196 (Fla. 1985). In Bush, the photos at issue were closeup shots of the fatal wounds to the victim. This court upheld their admission, noting that photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted; apparently, the examiner used the exhibits during his testimony as an illustrative aid. In Henderson, the photos at issue

depicted the location of the victims' decomposing bodies. This court found such evidence properly admitted, holding,

> Persons accused of crimes can generally expect that any relevant evidence against them will be presented in court. The test of admissibility is relevancy (citations omitted). Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments. The photographs were relevant to show the location of the victims' bodies, the amount of time that passed from when the victims were murdered to when their bodies were found, and the manner in which they were clothed, bound and gagged. **It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused** (emphasis supplied). Id. at 200.

In this case, while the aggregate number of photographs or slides admitted may seem large, it must be remembered that a quadruple homicide was involved. It should also be noted that not every autopsy photograph which the state wished admitted was in fact admitted. As the physical exhibits themselves make plain, there would seem to have originally been fifty-one (51) slides prepared of the autopsy of victim Marybeth Jones, slide numbers 335-386; of these, thirty-six (36) were actually admitted. Likewise, there would seem to have originally been forty-six (46) slides prepared of the autopsy of victim Mary Lou Hines, slide numbers 423-469, of which thirty-one (31) were admitted, and thirty-four (34) slides originally prepared of victim Tuesday Correll, slide numbers 388-422, of which twenty-six (26) were admitted. Finally, as to victim Susan Correll,

there would seem to have originally been fifty-two (52) slides prepared, slides numbers 481-533, of which thirty-four (34) were actually admitted. Thus, it is likely that a number of cumulative slides were removed and not admitted into evidence. The slides actually admitted depict the wounds suffered by the victims, first in isolation, and then in relation to each other. The number of slides necessary in this case can be explained by the manner in which the victims were murdered--multiple stab wounds, Susan Correll fourteen (14) times, Tuesday Correll ten (10) times, Mary Lou Hines fourteen (14) times and Marybeth Jones fourteen (14) times. These figures are based upon the identification and numbering of the wounds as depicted by the slides and as discussed by the pathologist during his in-court testimony (R 734-853); at the preliminary hearing, the doctor testified that Mary Lou Hines had been stabbed twenty-three (23) times, Susan Correll twenty (20) times, Tuesday Correll ten (10) times and Marybeth Jones seventeen (17) times (R 2312-2316).

The number and positioning of the stab wounds was obviously relevant to the issues of premeditation, manner of the victims' death, and heinous, atrocious and/or cruel manner in which the homicides were committed. Foster, supra; Adams, supra; Wilson, supra. As in Bush, the slides were utilized by the pathologist in his in-court testimony and, as such, aided the jury in their understanding of the nature and manner in which the wounds were inflicted. While it cannot be denied that a certain number of the slides would seem at least in part unpleasant, as this court noted in Williams v. State, 228 So.2d 377, 378 (Fla. 1969), no

photograph of a dead body is pleasant. Further, it cannot be said that any individual slide is so shocking in nature as to overcome the value of its relevancy. Williams, supra. Again, as this court held in Henninger, the crime itself in this case was so revolting that it would have been impossible to take pictures of the victims that were not at least in some part gruesome.

A similar result is dictated as to the photographs or slides of the crime scene. Just as there were multiple victims in this case, there were, in a sense, multiple crime scenes. Appellant turned Mary Lou Hines' home into a virtual slaughterhouse. Bloodstains and bodies were found in the foyer, hall, living room, kitchen, bathroom, utility room, as well as in each of the four bedrooms. This bloodstain or blood splatter evidence was extremely relevant, in that at times, blood of a type consistent only with that of appellant, was found at the scene (R 1444-6). The jury needed to be apprised of the exact location of such blood stains so that it could form a clear picture of the manner in which the murders were committed, cf., Williams, supra, Wilson, supra, and the slides were utilized as an illustrative aid during the testimony of various police and medical personnel who had been present at the scene. Given the size of the house and the number of rooms and areas that had to be covered, it is understandable that a high number of photographs and/or slides were necessary. It can honestly be said, after examining such, that the individual exhibits were not cumulative or duplicative, and that the number of photographs depicting any of the dead bodies is comparatively small. As was the case with the autopsy

photographs, it cannot be said that any photograph its so shocking as to lose is relevancy, and, again, as noted in Henninger, the nature of the instant crime must be considered.

In conclusion, appellant has failed to demonstrate reversible error in regard to the admission into evidence of the photographs and slides depicting the crime scene and the murder victims. Such failure is due in large part to his failure to identify with any specificity the precise exhibits which he considered objectionable. Having reviewed all such exhibits admitted, the state contends that all possess relevance and that the "sin" of the Young case was not committed sub judice. Whereas the sum total of the slides admitted may seem large, such number does not represent prosecutorial overkill; rather, it represents, if anything, the sheer enormity of the crimes committed by appellant--the murder of four (4) persons, such murders committed in a brutal and revolting manner. In order to fully and completely present its case, especially that relating to the number and location of the victims' wounds, it was necessary for the state to introduce the instant photographic exhibits. This case should be resolved in accordance with Henderson and Bush, and the instant convictions should be affirmed.

POINT III

DENIAL OF THE ORAL MOTION TO WITHDRAW, FILED BY APPELLANT'S COUNSEL, WAS NOT ERROR.

Shortly after his arrest on July 2, 1985, the office of the public defender was appointed to represent appellant (R 3767, 3770, 3773). On January 10, 1986, the state attorney served upon defense counsel a supplemental state witness list, naming Lawrence Anthony Smith as a state witness (R 4036). On such date, defense counsel appeared before the trial court and orally moved to withdraw, asserting that a conflict of interest existed, in that the public defender's office also represented Smith in some unrelating pending charges; apparently, the office had also represented him in the past as well (R 4255). Although the individual assistant representing appellant was not the same assistant representing Smith, Assistant Public Defender Kenny asserted that he had learned that Smith's file contained a great deal of impeachment material, which the defense would have to use, in the interests of appellant, should it cross-examine Smith (R 4256).

The assistant state attorney present at the hearing reported that he had in fact only been in contact with Smith the day before, and learned of his potential testimony at such time; he further stated that it was his understanding that Lawrence Smith would be willing to waive any privilege of confidentiality he might have with the office of the public defender (R 4259). After listening to argument, Judge Stroker stated that he would continue the hearing, and that his opinion as of that time was

that it would be appropriate for the office of the public defender to withdraw from its representation of Lawrence Smith (R 4271). Accordingly, the public defender himself was directed to review Smith's files to determine what information therein might present a conflict, and an unrelated private attorney, Simeon Tyler, was appointed to advise Smith of the possible consequences of any waiver of his attorney-client confidentiality privilege between himself and the public defender (R 4037).

Proceedings reconvened on January 13, 1986, at which time Attorney Tyler delivered his report (R 4165). The judge noted that if Smith was unwilling to waive his right of confidentiality, the public defender might have to withdraw from both cases (R 4165). Lawrence Smith was present at the hearing and, at such time, made a knowing and intelligent waiver of his privilege of confidentiality (R 4166-9); Smith indicated that he fully understood, that should he be a witness at appellant's trial, he would be cross-examined or impeached upon information which he had supplied to the public defender, his former attorney (R 4168-9). Additionally, Attorney Tyler indicated that Smith was aware that the public defender would have to withdraw from his case and that new counsel would have to be found (R 4176). Finally the judge stated,

> THE COURT: Well, in this case, I am going to deny the motion to withdraw. If, in fact, it was a motion to withdraw that was raised on Friday. I think that was at least the remedy that we were seeking at that point.
>
> With the recommendation Mr. Kinane [Smith's public defender] at this point move to withdraw from further representation in the case of Lawrence Anthony Smith. I believe I

> would need to rule on the motion but laying out a factual background we have here (R 4176).

Appellant contends on appeal that denial of the motion to withdraw was error, on the basis of such precedents of this court as Foster v. State, 387 So.2d 344 (Fla. 1980) and Babb v. Edwards, 412 So.2d 859 (Fla. 1982). Appellee suggests instead that this case bears great similarity to Mills v. State, 476 So.2d 172 (Fla. 1985). In such case, Mills had been represented by the office of the public defender, as had Vincent Ashley, another individual involved in the same homicide; Ashley, however, had only been represented by such counsel in reference to unrelated charges, and his involvement in the homicide was not immediately apparent. When such fact did become evident, the public defender withdrew from repesentation of Ashley, and, Ashley, in fact, later testified as a state witness against Mills. This court rejected Mills' contention that, in light of Foster, supra, he had been denied effective assistance of counsel, due to any conflict of interest.

Such result should obtain sub judice. In this case, as soon as Lawrence Smith's "potential" as a state witness had been disclosed, the public defender, with Smith's consent, was allowed to withdraw from his representation; the only difference between this case and Mills would seem to be that in Mills, the public defender's withdrawal from the non-capital case was apparently more of his own volition. Here, however, once Smith waived all privilege of confidentiality between himself and his former counsel, and agreed to accept counsel other than the public

defender, any conflict of interest in this case was ended, and no necessity existed for the public defender's withdrawal from representation of appellant Correll. Compare also, United States v. Partin, 601 F.2d 1000 (9th Cir. 1979); Takacs v. Engle, 768 F.2d 122 (6th Cir. 1985); United States v. Paone, 782 F.2d 386 (2d Cir. 1986). It must be noted that when Smith did testify, appellant's counsel engaged in a vigorous cross-examination of such witness, focusing in depth not only upon Smith's prior record of convictions, but also upon the existence of the pending charges against him, his status as a probationer and any prior lack of veracity on his part (R 1277-1285; 1285-1299).

This case, thus, is clearly distinguishable from Foster, or Jennings v. State, 413 So.2d 24 (Fla. 1982), in that, as noted, any conflict of interest in this case ceased with Smith's waiver of confidentiality and the withdrawal of the office of the public defender from his case. At the time appellant's counsel proceeded to cross-examine Smith, he had no conflicting loyalties; he represented only appellant, and there is nothing in this record to indicate that he did so less than effectively. Appellee can see no application of Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) sub judice. Appellee likewise suggests that Babb v. Edwards is inapposite, and would note that the public defender below never formally sought to implement the procedures of Section 27.53(3), Florida Statutes (1983). Further, while for whatever reason the public defender would seem to have expressed a preference for withdrawing from the representation of appellant, as opposed to that of Smith,

appellee does not regard such expression as binding upon the trial court. Judge Stroker recognized that should Smith be unwilling to waive the privilege or to accept other counsel, withdrawal of the public defender would be necessary in one, if not both of the cases. Upon Smith's choice, there was no necessity for withdrawal in the instant case. Reversible error has not be demonstrated.

Finally, appellee would note that one of the precedents relied upon by appellant would actually seem more to support the action of the court below. In Olds v. State, 302 So.2d 787 (Fla. 4th DCA 1974), an assistant public defender was held in contempt for attempting to cross-examine a former client, who had in fact been a former co-defendant in the same case, and who testified at trial against his present client. The district court reversed the finding of contempt, noting that many of the matters about which counsel had sought to inquire were not, in fact, privileged. The court noted with some sympathy the dilemma in which counsel had been, but went on to state,

> What happens when there are multiple indigent participants in a crime, all represented by the Public Defender, when one of the defendants earlier on negotiates a plea and later turns up at trial as a cooperative State's witness against his former co-defendant? We do not believe that that fact alone automatically and instantly disqualifies or hamstrings the Public Defender in his examination of the witness or justifies a mistrial. **Confidentiality rights may be waived** or the Public Defender may not choose to examine into confidential areas (emphasis supplied). Id. at 792.

Thus, even Olds would seem to have recognized that no conflict of interest exists where a former client waives his confidentiality

rights. See also, Webb v. State, 433 So.2d 496 (Fla. 1983). The trial court's handling of this situation below was correct, and the instant convictions should be affirmed.

POINT IV

DENIAL OF APPELLANT'S MOTION TO EXCUSE FOR CAUSE VENIREMEN BEILER AND CULLEN WAS NOT ERROR, ASSUMING THAT SUCH POINT IS PROPERLY BEFORE THIS COURT.

Prior to trial, appellant, on November 26, 1985, moved for additional peremptory challenges, pursuant to Florida Rule of Criminal Procedure 3.350(e), contending that more than ten (10) such challenges were required, due to the fact that a multiple homicide was involved, appellant being charged with four (4) counts of first-degree murder, and due to the fact that there had been extensive publicity about the crime and that difficulty was expected in picking a jury (R 3894-6). Judge Stroker subsequently granted this motion in part, ordering that both sides would be allowed fifteen (15) peremptory challenges (R 2154, 3955). After venue was changed, however, the judge noted that the extra challenges were no longer necessary, and reduced the number again to ten (10) peremptories (R 8-9). As voir dire progressed, defense counsel requested reinstatement of the fifteen (15) peremptories, on the grounds that it seemed as if a great number of the venire would not be appropriate jurors, even though they could not be challenged for cause; the request was denied (R 232-5). Subsequently, however, at the close of all voire dire, appellant again requested reinstatement of all the fifteen (15) challenges, and the judge ruled that each side would have twelve (12) (R 424-5).

During the course of voir dire, one of the potential jurors examined was one Tamara Beiler (R 77-83). Miss Beiler's answers

to a number of primary questions on her views on capital punishment seemed to betray a certain amount of confusion, and Judge Stroker then posed the following:

> THE COURT: Let me ask you a question in this regard, please. That question, because of its length and because of it being asked kind of backwards, it might be confusing to you, but the law in Florida is that a person who commits first-degree premeditated murder, if the jury after a trial finds beyond a reasonable doubt that that person did commit first-degree premeditated murder, does not automatically receive the death penalty.
>
> Then we go to the Jury and I will be explaining certain additional aggravating factors that also would have to be proved before the death penalty could be considered, and mitigating factors that the Jury can consider in order to vote for not imposing a death penalty or life in prison, and what both counsels are asking you in a round about way is whether or not you will put aside your personal feelings concerning whether the death penalty should be imposed or not and following the instructions of the Court and apply it to the facts in this case in making a determination in accordance with the law. Could you do that?
>
> MS. BEILER: Yes, I could. You explained a lot easier. (R 82-83).

No challenge for cause was made at this time. (R 83).

Another potential juror examined was Gloria Cullen (R 146-151). During questioning by the prosecutor, the following took place:

> MR. PERRY: Do you understand not all cases involving first-degree murder warrant the imposition of the death penalty?
>
> MS. CULLEN: Yes.
>
> MR. SHARPE: Because of that, we have certain laws in the State and the Judge will instruct you according to those laws. He will instruct you as to certain aggravating and

certain mitigating factors. Then you will take the facts of the case and the evidence and apply those against the Court's instructions to arrive at a recommendation.

If the facts of this case would warrant the imposition of the death penalty according to the law as instructed to you by the Court, could you vote to recommend the death penalty?

MS. CULLEN: Yes.

MR. PERRY: On the other hand, if the facts of this case did not warrant the death penalty but warranted a sentence of life imprisonment, could you recommend to the Court according to the laws of this state that life imprisonment be imposed?

MS. CULLEN: Yes.

MR. SHARPE: What I'm simply asking, ma'am, in a nutshell is lay aside your personal feelings about the death penalty and follow the law concerning this imposition or non-imposition. Can you do that?

MS. CULLEN: Yes. (R 146-7)

Miss Cullen was then questioned by one of the assistant public defenders representing appellant, during which the following occurred:

MS. CASHMAN: Okay, Let me go back. Sorry about that. During the first phase, ma'am, you are only concerned with the guilt or innocence of Jerry Correll, you are not concerned with the sentence at all. Do you understand that?

MS. CULLEN: Right.

MS. CASHMAN: If you came back guilty of second degree murder or not guilty or guilty of manslaughter, you won't even get to the second phase. Do you understand that?

MS. CULLEN: Uh-huh.

MS. CASHMAN: Okay, If by some chance you did, the Jury were to come back guilty of first-degree murder, and we got to the penalty

phase, the Judge would explain to you certain aggravating factors, certain mitigating factors, the burden of proof and the law, and you understand that you would have to follow his instructions and then decide on either the death penalty or life in prison?

MS. CULLEN: Right.

MS. CASHMAN: Do you think you would have a problem voting for life in prison?

MS. CULLEN: Probably.

MS. CASHMAN: Probably. Do you feel like anyone who is convicted of first-degree murder should automatically get the death penalty?

MS. CULLEN: I think it depends on the circumstances of the case itself.

MS. CASHMAN: So you would follow the law based on --

MS. CULLEN: You have to.

MS. CASHMAN: --what the Judge explains to you?

MS. CULLEN: Yeah. (R 148-9)

At the conclusion of this examination, appellant's counsel challenged Ms. Cullen for cause, contending that by her comments she had indicated that she "probably" would have had a problem voting for life in prison (R 150). The state responded by noting that venireman's particular answer at issue was in all likelihood caused by some confusion stemming from the question, and that the gist of all her other answers indicated that she could follow the law (R 150). Judge Stroker then stated,

THE COURT: I agree. We seem to ask the same questions four and five different ways, and even though she indicated that she would probably have difficulty imposing life, she immediately thereafter indicated that she does not feel that [the] death penalty should be automatic; she would consider all the

> circumstances, not only could she, she would follow the law as spelled out by the Court. So the challenge is denied. (R 150-151).

At the conclusion of all voir dire, appellant's counsel stated that he wished to challenge Ms. Beiler for cause, not, apparently due to her views on capital punishment, but due to some perceived "intellectual inability" to perform as a juror (R 421). Counsel based this challenge on the fact that Ms. Beiler, as well as other prospective jurors, seemed to have had a difficult time when questioned by the attorneys (R 421). Judge Stroker denied the challenge, observing,

> I can't excuse people for cause based upon their apparent lack of intellectual problems without making an IQ list (R 422).

Counsel then stated that he wished to renew his challenge as to Miss Cullen "on the standard of the Witt standard." (R 423). Such challenge was denied (R 423).

On appeal, appellant contends that reversible error occurred in the trial court's denial of these challenges, in that both prospective jurors had allegedly demonstrated that their views toward capital punishment "would have prevented or at least substantially impaired the performance of their duties as jurors"; appellant also contends that it was clearly established that the jurors "would automatically vote to impose the death penalty in all first-degree murder cases or at the least they would have great difficulty in any first-degree murder case to vote to recommend life in prison regardless of the law and the evidence." (Brief of Appellant at 40-41). The record then reveals that appellant successfully exercised eleven (11)

peremptory challenges or strikes (R 427, 428, 429, 430, 431, 432). When counsel expressed the view that he had exhausted his peremptories, the judge pointed out that one remained (R 433). Counsel then, rather inexplicably, renewed his requests for additional challenges, which the judge understandably denied (R 433-4). The record clearly indicates that defense counsel consciously refused to exercise this last strike, subsequently utilizing only one of his two strikes for the alternative jurors on one such proposed alternative juror (R 434). Neither of the "objectionable" prospective jurors served on appellant's jury (R 435).

A number of initial observations are in order. Appellee contends, under this court's prior precedents of Hill v. State, 477 So.2d 503 (Fla. 1985), and Toole v. State, 479 So.2d 731 (Fla. 1985), appellant has failed to preserve this point, in that, in contradiction to the above decisions, appellant failed to exhaust all of his peremptories and to seek, and be denied, an additional challenge. Further, it must be noted that the basis for appellant's challenge of prospective juror Beiler was not any alleged inability on her part to recommend life, or to follow the law, but rather, as the judge noted, a belief on his part that she was not intelligent enough to serve on the jury. It is well established that a defendant cannot argue one basis for his challenge for cause at trial, and another on appeal. See, Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Maggard v. State, 399 So.2d 973 (Fla. 1981). No point on appeal is preserved in regard to potential juror Beiler.

Even if this point was properly before this court, it is clear that denial of the challenges for cause was not error. Neither prospective juror indicated an unalterable conviction that only death could be imposed in this case; each, in response to specific questioning, stated that she could follow the law as instructed and return an advisory verdict based upon the law and evidence (R 83, 146-9). As this court held in Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984), the test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely upon the evidence presented and the instructions on the law given to him by the court. Judge Stroker completely complied with this test, as well as with the dictates of Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Appellee would suggest that this case bears no similarity to Thomas v. State, 403 So.2d 371 (Fla. 1981) or O'Connell v. State, 480 So.2d 1284 (Fla. 1985).

In short, this case does in fact bear great similarity to Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983) and Davis v. State, 461 So.2d 67 (Fla. 1984). In Fitzpatrick, in passing upon a claim of error relating the trial judge's failure to excuse a prospective juror based upon defense challenges for cause, this court held,

> A judge need not excuse such a person unless he or she is irrevocably committed to voting for the death penalty if the defendant is found guilty of murder and therefore unable to follow the Judge's instructions to weight the aggravating circumstances against the mitigating. Id. at 1076.

No view of the answers given by the prospective jurors sub judice

supports the contention that they met the above standard, and, assuming this point is properly preserved, denial of the challenges for cause was not error. The instant convictions and sentences of death should be affirmed.

POINT V

ADMISSION INTO EVIDENCE OF TESTIMONY REGARDING SUSAN CORRELL'S FEAR OF APPELLANT WAS NOT ERROR, ASSUMING THAT SUCH POINT IS PROPERLY BEFORE THIS COURT.

At trial, the state called Donna Valentine, a family friend of the victims, as a witness (R 515-545). Miss Valentine was one of the last persons to see Susan and Tuesday Correll before their deaths, when the two visited her on Sunday night (R 522). During the course of her direct testimony, the witness was asked about the relationship between appellant and his ex-wife during the period of their separation, divorce, and the aftermath thereof (R 527-8). Over objection, she stated that they were friendly with each other, although Susan Correll would "get upset many times because of the mental abuse." (R 528). Miss Valentine was then asked whether during this period of time, Susan Correll had displayed or exhibited fear of appellant; the witness replied in the affirmative (R 528).

The transcript reveals the following:

> Q All right. Now, during this period of time, did she display or exhibit fear of the Defendant?
>
> A Yes, she had.
>
> MR. KENNY: Your Honor, I'm going to object to this once again. This is basically hearsay testimony and doesn't go to any question of whether or not Jerry Correll committed these particular acts.
>
> This is merely a characterization on the part of this witness, and I don't think that this is the kind of thing that is anything more than hearsay testimony and opinion testimony on her part.

MR. SHARPE: I asked her to describe what she saw exhibited, not anything that she might have said to her.

MR. KENNY: That was not the way the question was phrased.

THE COURT: With that understanding, the qustion is: Did she in fact at any time display any fear to you.

MR. KENNY: Once again, Your Honor, I think that is something that is hearsay and an opinion, and she can say what exactly she did provided it's not merely hearsay.

THE COURT: I will overrule the second objection. Respond to the question, please. (R 528-9).

The following then occurred:

BY MR. SHARPE:

Q The question was, did Susan Correll display or exhibit fear of the Defendant?

A Was she afraid of Jerry?

Q Did she display anything that appeared to you as fear of the Defendant?

A Yes, in language.

Q Now, during the time that Susan Correll was divorced from the Defendant did she see other men?

A Yes.

Q All right. How about during the period of their separation?

A I'm not sure. I wasn't present at the separation.

Q How did the Defendant react to Susan seeing other men in--

MR. KENNY: Once again, Your Honor, I'm going to ask that this be limited to what she actually saw as opposed to what she might have heard or opinions she may have.

THE COURT: Sustained.

MR. KENNY: Thank you. (R 529).

Subsequently, the witness testified concerning specific instances in which appellant, shortly before the murders, displayed anger or aloofness toward his daughter and ex-wife (R 532-3; 535-6).

On appeal, appellant contends the trial court committed reversible error in admitting evidence that Susan Correll was afraid of her ex-husband, in that such evidence was "complete and total hearsay" and irrelevant to any issue in the case. Appellant cites to a number of cases which have held that the victim's state of mind is generally not probative in a homicide prosecution. Compare, Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983); Kennedy v. State, 385 So.2d 1020 (Fla. 5th DCA 1980); Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982). Appellant also points to the fact that this testimony was noted by the prosecutor in his closing argument, wherein the prosecutor noted that appellant's claim, as set out in his statement of July 1, 1985, to the effect that he and his ex-wife were "super good friends" and only argued about "trivial junk" (R 1767, 1773; Transcript of Evidence), was not in conformity with the testimony of other witnesses, including Donna Valentine.

A number of initial observations are in order. The state, while mindful of this court's holding in Jackson v. State, 451 So.2d 458 (Fla. 1984), would question the preservation of this point. While appellant undoubtedly expressed his objection to Miss Valentine's testifying as to any hearsay, i.e., any statement which Susan Correll had made to her, counsel expressed

the view that the witness could say "what exactly she [Susan Correll] did provided it's not merely hearsay." (R 528-9). In appellee's opinion, this is exactly what the witness did. Miss Valentine was asked whether or not Susan Correll had "displayed" or "exhibited" fear of appellant in the time since the break-up of their marriage; she replied in the affirmative. Such display or exhibition need not necessarily have taken the form of an express statement, such as, "I am afraid of Jerry," whose truth would have been the object of its admission; a subsequent witness testified to Susan Correll's turning "white as a ghost" and locking and bolting all of the doors and windows due to an altercation with appellant (R 1244). Although, in answer to a subsequent question, the witness stated, without further objection, that Susan Correll had displayed fear to her "in language", to appellee this response still does not conjure up the spectre of inadmissible hearsay. The language at issue could have been a statement such as, "I just bought a new deadbolt for the front door, and you know why," and appellee suggests that if appellant felt that Miss Valentine's subsequent answer was inconsistent with the court's ruling on his prior objections, he should have renewed his objection or moved to strike the testimony. Cf., Ferguson v. State, 417 So.2d 639 (Fla. 1982); Castor v. State, supra; Thompson v. State, 55 Fla. 189, 46 So. 842 (1908).

It is the state's contention that Miss Valentine's testimony as to the fact that Susan Correll exhibited fear of appellant was not hearsay, in that such testimony was a result of the witness'

own observations and could be tested by cross-examination. To the extent that such testimony represented the opinion of a lay person, the state suggests that such was proper under the circumstances. Cf., Sealey v. State, 89 Fla. 439, 105 So. 137 (1925); Rivers v. State, 458 So.2d 762 (Fla. 1984). As the prosecutor noted in his closing argument, this evidence, coupled with the testimony of other witnesses regarding individual acts of hostility or aggression committed by appellant toward his ex-wife and her family following the break-up of the marriage, conflicted with appellant's representations in his statement, to the effect that he and Susan Correll had been "super good friends." The state suggests that the over-all relationship of the parties was relevant in this case, and that if Susan Correll displayed fear of appellant, such fact, coupled with others, shed light on the existence of motive or premeditation in this case. If nothing else, such facts certainly shed light upon the veracity of appellant's statement. As this court held in Sireci v. State, 399 So.2d 964 (Fla. 1981), evidence from which premeditation may be inferred includes such matters as previous difficulties between the parties.

Sireci was relied upon by the Second District in a highly pertinent decision, Hyer v. State, 462 So.2d 488 (Fla. 2d DCA 1984). Such case represented a prosecution for attempted first-degree murder, in which the defendant had shot at his estranged wife, as well as others. The court, relying upon Sireci, held that testimony to the effect that the estranged wife had obtained a restraining order against her husband was relevant to the issue

of premeditation, and, thus, properly admitted. Surely, evidence that an estranged wife, an intended victim, obtained a restraining order against her husband can be equated with evidence that such wife, or another similarly situated ex-wife, was afraid of her husband. Appellee contends that Sireci and Hyer support the evidentiary ruling below. See also, Roberson v. State, 258 So.2d 257 (Fla. 1971); Peede v. State, 474 So.2d 808 (Fla. 1985) (testimony that victim "seemed" nervous and scared apparently was not erroneous).

Because the testimony at issue was not hearsay, it is the state's contention that extended discussion of Section 90.803(3)(a), Florida Statutes (1983) or distinguishment of such cases as Kennedy v. State, supra, or Hunt v. State, supra, is unnecessary. Appellee would note, however, that the testimony at issue sub judice would not seem on par with that before the courts in those precedents. Donna Valentine did not testify that Susan Correll had stated to her that she thought that appellant was going to kill her; the state can well understand the difficulty an average jury would have understanding the theory of limited admissibility in reference to such a statement. In this case, by contrast, the jury was merely advised that, at least in the opinion of Donna Valentine, Susan Correll had displayed fear of her ex-husband after the break-up of her marriage. Because the admission into evidence of specific acts of hostility or threats between the parties, the subjects of Points VII and VIII, infra, was unquestionably proper under Sireci, appellee contends that even if admission of the instant evidence was improper, any

error was harmless. Applying the standard set out in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), there is no reasonable possibility, given the other evidence in this case, that the jury placed undue reliance upon this evidence, contributing to the verdict. Assuming this point is preserved for review, reversible error has not been demonstrated, and the instant convictions should be confirmed.

POINT VI

GRANTING OF THE STATE'S MOTION TO REDACT PORTIONS OF APPELLANT'S STATEMENT OF JULY 1, 1985, WAS NOT ERROR, ASSUMING THAT SUCH POINT IS PROPERLY BEFORE THIS COURT.

As was noted in Point I, supra, appellant gave two statements in this case, one on July 1, 1985, and the second on the next day. Following the denial of his motion to suppress these statements, appellant, on January 23, 1986, moved the court to redact portions of the July 1, 1985 statement, which he contended to be irrelevant and prejudicial (R 4049-4053). At a hearing held on such date, the matter was discussed, and Judge Stroker agreed with appellant in some respects, and ordered certain portions of that statement stricken or otherwise inadmissible (R 2244-2267).

Subsequently, during trial, the state, prior to the admission of the other statement, i.e., that of July 1, 1985, moved to redact certain portions of that statement, on the grounds that the last six pages of such statement consisted of "just basically a rambling dialogue" by appellant, in which he accused Susan Correll of being a drug dealer or drug user (R 877). The state suggested that such evidence, in contrast to that preceding it, was not relevant to any issue in the case, and asked the court's permission to stop the tape at a certain point prior to the presentation of this testimony (R 877). Defense counsel argued that appellant had not in fact been rambling, and that his answers had been made in response to questions by the officer (R 880); counsel also stated that if the state wished to

introduce the statement, it should have to introduce it in its entirety (R 881). The state again noted the irrelevancy of the evidence, and observed that much of it represented personal attacks upon the victims and other witnesses which would not be admissible in any other circumstance; in the alternative, the state noted the defense's ability to seek to introduce this evidence, upon a proper showing of relevancy or admissibility, during its own case or on cross-examination (R 883). Noting that he had previously granted a defense motion to redact, under similar circumstances, the judge subsequently granted the state's motion (R 884, 890-1).

It is clear from appellant's representations that the only theory of relevancy that could be argued in reference to the admissibility of the evidence was that appellant's statements would allegedly have shown that other persons had motives to kill Susan Correll, in that she dealt drugs (R 888); counsel conceded, however, that appellant's statements could not have placed any person positively at the murder scene (R 886). Summarizing his ruling, the judge noted,

> I'm not going to require that the State present the evidence constituting the Defense's theory in this statement. The Defense can, if it wishes (R 890)
>
> .....
>
> The basis of this at this point is I see no tie-in, no relevancy to any issue in this trial whether or not either the victims or the Defendant had at one time or another used drugs.
>
> It simply constitutes an attack on the character of either the victims or the Defendant, and until such time as it's shown

> to me to be relevant, other than by theorizing, I will not require the State to present that portion of the Defendant's responses (R 891).

After this ruling, defense counsel then moved to redact two additional portions of the transcript, such motions being denied (R 891-893). During a subsequent break in proceedings, defense counsel sought to reinstate certain portions of the redacted statement, that request also denied; the court noted, that upon a proper showing of relevancy, the defense retained the option of seeking to admit such evidence (R 934-9). The record reveals that the state did, as permitted by the court's ruling, stop the tape at a certain point (R 1085-8) and it should be noted that at this point, defense counsel pointed out the necessity of having a partial transcript made for the jury's use, such partial transcript necessary because the tape had not been introduced in its entirety (R 1085-7). During his cross-examination of the witness, defense counsel made no mention of the "redacted" portions of the statement, and during the defense case he likewise made no attempt to introduce such evidence (R 1089-1099; 1696-1748).

Although the allegation of error sub judice is framed as if in reference to the granting of the state's motion to redact, it would seem, in a sense, to relate to what could be regarded as the exclusion of defense evidence. To the extent that it does relate to the exclusion of evidence, it must be noted that the record on appeal does not contain the redacted or excised portions of appellant's statement of July 1, 1985. Accordingly, appellee would question the preservation of this point, as well

as the sufficiency of the proffer of the evidence below, inasmuch as this court, in reviewing the instant claim of error, apparently must speculate as to the nature or content of the excluded evidence. As this court observed in Jacobs v. Wainwright, 450 So.2d 200, 201 (Fla. 1984),

> The purpose of a proffer is to put into the record testimony which is excluded from the jury so that an appellate court can consider the admissibility of the excluded testimony. Reversible error cannot be predicated on conjecture. (Citations omitted.)

See also, Sullivan v. State, 303 So.2d 632 (Fla. 1974); Whitted v. State, 362 So.2d 668 (Fla. 1978). It must be noted that, at the time that the tape recorded statement was introduced, appellant's counsel pointed out the necessity of having a partial transcript also admitted (R 1085-7). It obviously would have been a simple matter for him to have introduced into evidence, for the purposes of preserving or creating a record on this point, a transcript of the excluded portions of the statement. His failure to do so waives this point on appeal. See also, A. McD. v. State, 422 So.2d 336 (Fla. 3d DCA 1982); Woodson v. State, 483 So.2d 858 (Fla. 5th DCA 1986).

Additionally, appellee would question appellant's premise of law, to the effect that everything an individual defendant says must be admitted, regardless of relevancy, and that such admission must be done by the state. The state would note that in Henderson v. State, supra, this court found it to be error, although harmless, for the state to have introduced into evidence a statement by the defendant which included references to his

being wanted in other jurisdictions; this court held that reference to such other crimes should have been excluded. Additionally, the state would note that in Moseley v. State, 60 So.2d 167 (Fla. 1952), this court held that, where the state had introduced an oral confession of the defendant, it was not error for the trial court to have precluded defense counsel from cross-examining the person to whom the confession was given regarding yet another confession to another offense, which the defendant wished admitted; this court simply found such testimony to be inadmissible. See also Adams v. State, 445 So.2d 1132 (Fla. 2d DCA 1984) (deletion of portions of one co-defendant's statement which implicated other co-defendant not error). Thus, it would seem that not every portion of a defendant's confession need be admitted by the state, and that, in light of Moseley, such excluded portion need not be regarded as per se admissible by the defense, either.

Further, while appellant is correct that, as a general principle of law, a defendant is entitled to bring out exculpatory portions of any confession which has been introduced against him, appellee does not regard such maxim as applicable sub judice. Initially, it must be noted that the statement given by appellant on July 1, 1985, was neither a confession nor an expressly exculpatory admission; as this court noted in Louette v. State, 12 So.2d 168 (Fla. 1943), the term "confession" does not apply to a mere admission or declaration of an independent fact which tends to prove guilt or from which guilt may be inferred. Likewise, there has been no showing that the excluded

portions of the statement are exculpatory or even in relation to the same matter as discussed in those portions admitted. While mindful of the precedents relied upon by appellant, such as Ackerman v. State, 372 So.2d 215 (Fla. 1st DCA 1979) and Burch v. State, 360 So.2d 462 (Fla. 3d DCA 1978), appellee does not regard them as controlling, and would respectfully suggest that such decisions may in fact have impermissibly expanded the prior decisions upon which they themselves relied.

The earliest decision in this field would seem to be Thalheim v. State, 38 Fla. 169, 20 So. 938 (1896). Such case involved an instance in which the state had introduced evidence of exculpatory statements made by the defendant, and the defendant, on cross-examination of the witness, had unsuccessfully sought to bring out statements deemed exculpatory made in the same conversation, in reference to the same subject matter. This court held that such evidence should have been admitted, in that, the state having opened the door, it could not close the door when the defense, on cross-examination, sought to offer "the other part of the conversation which relates to the same subject matter." A similar result was reached in Morley v. State, 72 Fla. 45, 72 So. 490 (1916), and it should be noted that the approach taken toward oral confessions or exculpatory statements would seem consistent with that afforded writings or other recorded statements under Section 90.108 Florida Statutes (1983). Such provision provides that once a writing or recorded statement or part thereof is introduced, an adverse party may request the introducing party, at that time, to introduce any

other portion or any other writing which "in fairness" ought to be considered contemporaneously. It is, thus, clear that the case law in relation to a defendant's oral confession and the provisions regarding written statements both require some showing of relationship to a certain issue or "fairness", before the excluded portion of the evidence need be presented; it is interesting to note that the Law Revision Counsel Note to Section 90.108 states that "conversations" are not covered by the provision, due to the fact that cross-examination has been judged to be the most efficacious means of developing the entire subject.

Here, as noted, the oral statement by appellant was not a confession or exculpatory statement; in it, appellant sought to exculpate himself entirely, and the state's usage of the statement was merely for its "contrast" value, i.e., what it revealed about appellant's veracity when measured against other evidence; such being the case, as noted, it is appellee's contention that neither Ackerman nor Burch can be said to apply. Appellee also suggests that, under Morley and Thalheim, appellant has further failed to demonstrate that the redacted portions of the statement "related to the same subject matter." The state contended below that the last portion of appellant's statement had little to do with his alleged alibi, and instead constituted an unbridled attacked upon his ex-wife's drug habit (R 877, 883). Due to his failure to sufficiently proffer the excluded evidence below, appellant has little to rebut this allegation of irrelevancy, and appellee suggests that an abuse of

discretion has not been demonstrated sub judice in reference to the trial court's handling of this matter.

Appellee would note that in Proffitt v. State, 315 So.2d 461 (Fla. 1975), this court upheld the trial court's refusal to allow defense counsel, on cross-examination, to pose questions dealing with whether the victim had been a drug dealer and whether his death had been a result of such dealings; this court noted that the introduction of such evidence would only have served to confuse the ultimate issue at trial. Likewise, in Card v. State, 453 So.2d 17 (Fla. 1984), this court approved the exclusion of evidence which allegedly would have shown that other persons had the motive or intent to rob the same business with which appellant was charged with robbing. Thus, it would seem that both of the bases argued below for the excluded evidence's admissibility relate to matters specifically disapproved by this court. Appellee would suggest that, under Hitchcock v. State, 413 So.2d 741 (Fla. 1982), appellant, as the proponent of the evidence at issue, has failed to demonstrate its relevancy.

Finally, appellee would note that even if the redacted portions of the statement should have been admitted, appellant has failed to cite any authority which would have required the state to offer it. Even the primary cases upon which he relies, Ackerman and Burch, involved the curtailment of defense cross-examination. In this case, despite the assertion to the contrary in appellant's brief, absolutely nothing prohibited defense counsel, on cross-examination of Payne, and upon a proper showing a relevance, from seeking to introduce the redacted portions of

the statement; likewise, defense counsel could have, at any point during the defense case, upon a proper showing of relevancy, sought to introduce these statements or other like evidence. The trial court, in setting out its rulings below, made plain the fact that it was prohibiting only the prosecution from being required to introduce this evidence, and at more than one point, the judge observed that the defense could seek to introduce the evidence if it wished (R 890; 938). The state would suggest that appellant was afforded the opportunity to put on this evidence, if it truly wished to do so, and if it truly could demonstrate its relevancy or admissibility. Appellant having spurned this opportunity to "cure" any error in the court's prior ruling, he should not now be allowed to complain on appeal. See Sullivan, supra. Assuming this point to be properly presented, reversible error has not be demonstrated, and the instant convictions should be affirmed.

POINT VII

ADMISSION INTO EVIDENCE OF CERTAIN SIMILAR FACT EVIDENCE WAS NOR ERROR, ASSUMING THIS POINT IS PROPERLY BEFORE THIS COURT.

On January 6, 1986, the state filed its notice of intent to offer similar fact evidence, pursuant to Section 90.404, Florida Statutes (1983); in such motion, the state announced that it intended to offer evidence of an incident on May 15, 1982, wherein appellant had slashed the tires of Susan Correll's car (R 4034). The matter was taken up on January 29, 1986, immediately before trial was to commence (R 437-440). At such time, defense counsel stated that he objected to the introduction of such evidence, on the grounds that it was too remote in time and irrelevant (R 437); at the same time, counsel indicated that he understood that there would be evidence presented at the trial regarding the fact that all four tires of the vehicle belonging to an individual whom Susan Correll had dated had been slashed or slit on the night of the murders (R 437).

In response, the state noted that its evidence would show that shortly before the murder appellant had observed Susan Correll in the company of one Richard Henestofel, that on the night of the murders, the tires of Henestofel's car were found slashed, and that, on top of the car, there had subsequently been found a key ring belonging to one of the victims in this case (R 438-9). The state suggested that the evidence would show a common link. In 1982 when Susan Correll had been seeing another man, appellant had slit the tires of her car; in 1985, in regard to the instant incident, when Susan Correll had been seen in the

company of Richard Henestofel, the tires to his car had been slashed and incriminating evidence planted thereon (R 439). The court ruled that the evidence was admissible, in that it went toward lack of mistake, identity and motive, and further stated that an appropriate instruction would be given the jury at the time the evidence was admitted (R 440).

At trial, Richard Henestofel testified that he had known Susan Correll several months before her murder, having been introduced to her by appellant (R 1020). He stated that they were not romantically involved, but had, several days before the murders, met at an ABC bar for drinks; he stated, at such time, they had been observed by appellant (R 1023). Henestofel also stated that he had seen appellant at this bar, two nights later on the night of the murders, and that appellant had seemed aloof at the time (R 1021-2). The witness stated that he had seen appellant leave the bar, and that when he himself went out to the parking lot, he found that all four tires of his car were flat (R 1024, 1025). The next morning, Henestofel found two cuts in each tire and, to his surprise, a set of keys on his trunk lid (R 1026-7); subsequently, the keys were found to have belonged to Marybeth Jones, one of the victims, and to have included keys not only to the house in which all the victims had been murdered, but also to the vehicle which Miss Jones had used, such vehicle having been taken by the murderer and abandoned at a shopping center parking lot (R 1205-8).

Subsequently, two witnesses testified as to the similar fact evidence (R 1132-7; 1138-1145). James Rucker testified that

Susan Correll had been living in his home when, on the morning of May 15, 1982, appellant had come over and had begun screaming at her (R 1138, 1139). When she did not come out of the house, Rucker saw appellant standing by his wife's automobile with a buck knife in his hand (R 1140). Although the witness did not actually see appellant slash the tires, he stated that he could hear the sound of air hissing, and that he then saw appellant go over to his own vehicle and drive away (R 1140). When Rucker went outside, all four tires were flat; each had been slashed along the side (R 1141). The witness stated that appellant had returned to the scene twenty minutes later, claiming that he [appellant] had seen someone slash the tires and had chased him (R 1142). The police officer who was dispatched to the scene also testified (R 1132-7). Prior to any substantive testimony regarding the incident, the judge instructed the jury as to the limited purpose for its admission (R 1135).

On appeal, appellant contends that his four convictions of first degree murder must be reversed due to the admission of this evidence, in that the above testimony went merely toward "bad character" and was irrelevant and too remote to be probative. Initially, however, it must be noted that at the time the similar fact evidence was introduced, appellant interposed no objection (R 1132-1145). Assuming one wishes to rather generously characterize appellant's pre-trial objection to the evidence as a defense motion in limine, it is clear that renewal of objection was required. In Phillips v. State, 476 So.2d 194 (Fla. 1985), this court held that failure to object at the time collateral

crime evidence is introduced, even when a prior motion in limine has been denied, waives the issue for appellate review. See also German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980). This point is not properly before this court.

Were the merits to be considered, the state would contend that the evidence was properly admitted for the reasons enunciated by the trial court. Although appellant focuses upon the three years which elapsed between the tire slashings, as well as such "dissimilarities" as the times of day and locations involved in each instance, such factors are not of overwhelming import. The purpose of the admission of the prior incident was not to show that appellant was a random tire slasher; it was to bring out a prior act of aggression or hostility on the part of appellant against one of the victims in this case. As Section 90.404(2) and the numerous decisions applying it have recognized, evidence of similar fact evidence is admissible when relevant to prove not only the identity or absence of mistake, but also to show motive or intent. See, e.g., Sireci v. State, 399 So.2d 964 (Fla. 1981).

While the amount of time between incidents is greater than in such decisions as Phillips v. State, supra, or Herzog v. State, 439 So.2d 1372 (Fla. 1983), the state contends that the relevancy of the above evidence is beyond dispute, and that its admission, especially coupled with a cautionary instruction, was not error. Additionally, while the slashing of tires is not, admittedly, a particularly unique activity, the similarities between the two incidents are sufficient, such, to the extent

that the earlier incident was offered to prove identity, that its admission is not inconsistent with this court's holding in either Drake v. State, supra, or Peek v. State, 488 So.2d 52 (Fla. 1986). It must be recognized that both instances occurred at a time when appellant and Susan Correll were separated and, again, apparently at a time when appellant was jealous of her involvement with another male; additionally, both instances of tire slashing were apparently followed by attempts by appellant to shift the blame onto another. The evidence was certainly admissible to show a course of conduct or pattern.

Finally, while the state is mindful of this court's holding in Straight v. State, 397 So.2d 903 (Fla. 1981), regarding the presumed harmful effect of any erroneous admission of uncharged criminal activity, a holding which may in some respects be inconsistent with the more recent State v. DiGuilio, supra, appellee would note, on occasion, in capital cases, such errors have been found to have been harmless. Compare Heiney v. State, 447 So.2d 210 (Fla. 1984); Smith v. State, 424 So.2d 726 (Fla. 1982). Given the strength of the evidence against appellant, to be more fully discussed in Point XI, infra, there is no reasonable possibility that the jury in this case gave undue weight to this rather fleeting evidence of the earlier tire slashing, especially given the nature of the criminal conduct for which appellant was charged. Under the test enunciated in State v. DiGuilio, supra, it can be said that this evidence had no undue effect upon the verdict sub judice, and that reversible error has not been demonstrated. This point has not been

preserved for appellate review, given appellant's failure to object at the time the evidence was introduced, Phillips, supra, but, even it were, reversible error has not been demonstrated. The instant convictions should be affirmed.

POINT VIII

ADMISSION INTO EVIDENCE OF TESTIMONY REGARDING APPELLANT'S PRIOR THREAT TO KILL SUSAN CORRELL WAS NOT ERROR.

Prior to the testimony of David Murray, appellant's counsel objected on the grounds of relevancy, claiming that the events which the witness would describe were too remote in time to be admitted (R 1235). The state briefly proferred the witness' testimony, stating that the witness would testify that Susan Correll had been a boarder in Murray's home, approximately two and one-half years prior to the homicide, during the time that she and appellant had been obtaining a divorce, and that, one day, when Susan would not let appellant into the house, he had yelled at her and threatened to kill her, frightening her a great deal (R 1236). The state argued that such evidence was admissible to show the stormy relationship between appellant and Susan Correll, noting that there would be other testimony that appellant, at one point, had stated that he had sought to have someone kill his ex-wife (R 1238-9). At the conclusion of the proffer, Judge Stroker ruled the testimony admissible, finding that it would help establish a pattern and that it was not too remote in time (R 1241).

David Murray then testified that, approximately two and one-half years before, he and his wife had rented a room in their home to Susan and Tuesday Correll (R 1242-3); at such time, Susan Correll had been separated from appellant (R 1243). The witness stated, at one point, appellant knocked at the front door and that when Susan Correll saw who was there, she turned as "white

as a ghost" and would not go to the door (R 1244). Seeing her fear, Murray went outside with her, at which point he heard appellant state that he wanted Susan Correll to come back with him (R 1245). When she refused and asked him to leave her alone, appellant became quite angry and, before leaving, stated that if she dated or went out with another man, he would kill her (R 1245). This exchange upset Susan Correll, leaving her crying, upset and afraid (R 1245). The witness stated that after this incident, in the subsequent time she lived there, Susan Correll would lock all the doors and windows when she knew that the Murrays were going out, and would bring the guard dog into the house (R 1246).

Appellant contends on appeal that admission into evidence of the testimony constitutes reversible error, in that the incident was too remote in time to be relevant, the testimony as to Susan Correll's fear of appellant was irrelevant, and her state of mind was not at issue. As to this latter argument, which is similar to that raised in reference to the testimony of Donna Valentine, see Point V, supra, appellee would note that no objection was interposed to any portion of the testimony of David Murray on this basis (R 1235-1248). Because this was not the basis for objection below, it cannot now be asserted on appeal. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Peede v. State, supra. Additionally, appellee would note that the state, as when questioning Donna Valentine, confined itself to matters which the witness observed; no hearsay problem exists in reference to the witness' testimony, that after her encounter with appellant,

Susan Correll locked and bolted all the doors when alone. Further appellee renews its arguments contained in Point V, supra, and asserts that the evidence as to the fact that Susan Correll was afraid of appellant was relevant, especially given appellant's representation in his statement regarding their "super good" relationship, to the issues of premeditation or motive.

Evidence of the entire incident, including appellant's threat, was relevant, and properly admitted. Likewise, the evidence was not too remote in time to be admissible. As appellant notes in his brief, while there may come some point in time after which evidence of a defendant's past criminal activity is too remote to be relevant, this point in time will vary from case to case. See, Rossi v. State, 416 So.2d 1166 (Fla. 4th DCA 1982); Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982); Crosby v. State, 237 So.2d 286 (Fla. 2d DCA 1970). Additionally, as the Third District observed in Holliday v. State, 389 So.2d 679, 681 (Fla. 3d DCA 1980), remoteness in time relates to the weight, rather than the admissibility of evidence, unless so far removed from the events as to deprive the circumstances of any evidentiary value. On the basis of the above precedents, which often discuss periods of time much longer than that involved sub judice, the state cannot regard the two and one-half years between the incident at issue and the homicides as depriving the instant incident of all evidentiary value. Further, the fact that the parties may, subsequently, at times, have lived in apparent harmony, does not render the evidence either irrelevant

or inadmissible. The other evidence in this case, especially the testimony of Lawrence Smith, Donna Valentine, James Rucker and Joyce Stone, indicates a clear pattern--whenever appellant was angry with his ex-wife, or upset at the thought of her dating other men, either real or threatened violence materialized.

The primary case upon which appellant relies, Barwicks v. State, 82 So.2d 356 (Fla. 1955), is completely inapposite to the instant case, in that it involves the exclusion of defense evidence regarding a prior altercation between victim and defendant. In Barwicks, the defense had sought to utilize such evidence in support of a claim of self-defense. This court, unsurprisingly, found that an incident occurring three to four weeks prior to the homicide could not, under any stretch of the imagination, lead appellant to perceive "the presence of imminent danger to himself," so as to justify either admission of the evidence or an instruction upon self-defense. While, in such decision, this court noted, as had the trial court, the fact that the parties had apparently reconciled prior to the homicide, and discussed such fact when considering the evidence to be too remote, appellee finds admission of this incident, a part of an on-going, if some times interrupted, chain of events or course of conduct nevertheless proper. Evidence which is too "remote" for one purpose, need not be deemed inadmissible in every respect.

Appellee would note that this court, in other capital cases, has upheld the admission of similar evidence, see, King v. State, 436 So.2d 50 (Fla. 1983), Herzog v. State, supra, and would contend that the evidence at issue was relevant, as to the

existence of premeditation or motive, in that it went toward previous difficulties between the parties. See, Sireci, supra. In Goldstein v. State, 447 So.2d 903 (Fla. 4th DCA 1984), the district court upheld the admission of the defendant's statement "I ought to kill her," apparently uttered many months before the actual murder, on the grounds that it went toward intent. Compare also, Hutchinson v. State, 102 So.2d 44 (Fla. 2d DCA 1958); Powell v. State, 131 Fla. 254, 175 So. 213 (1937); Roberson v. State, supra. In this case, it was clear that appellant's anger over his wife dating other men was an anger which returned on several occasions, and, it must be noted, as Lawrence Smith testified, that despite appellant's self-serving statement of July 1, 1985, appellant admitted at one point that he had not gotten along with his wife after the divorce, that he did not like her dating other men and that he had tried at one point to arrange to have her killed (R 1259-60). The fact that appellant's plans were delayed, with intermittent periods of good relations between the two, and the fact that he decided to do the job himself in the end, does not deprive the instant evidence of its relevance. Admission of the testimony of David Murray was not error, and the instant convictions should be affirmed.

POINT IX

ADMISSION INTO EVIDENCE OF TESTIMONY REGARDING BLOOD ANALYSIS, PERFORMED THROUGH ELECTROPHORESIS, WAS NOT ERROR.

As part of its case in chief, the state called David Baer, a forensic serologist; without objection, the witness was qualified as an expert in the field of forensic serology (R 1325). After the witness had already provided the jury with a detailed explanation of the manner in which he performed blood analysis, including a description of principles of the electrophoresis method, appellant's counsel approached the bench, and stated that he was objecting to any test results obtained through electrophoresis, in that he was aware of certain out of state cases which had found such evidence inadmissible (R 1332). Both the judge and prosecutor expressed surprise at the timing of appellant's objection, in that the witness had previously been deposed and the trial was then well underway (R 1333-7).

The judge agreed to study the cases provided by appellant, and the testimony resumed (R 1337). Baer went on to describe the process used, and stated that in his experience he found the tests to be reliable; previously, the witness had stated that his personal background included a masters of science degree, which had encompassed a one year course of forensic serology, as well as six years experience with the Florida Department of Law Enforcement, analyzing evidence and functioning as the serologist training coordinator (R 1322-4). When the state moved into evidence a chart upon which the witness had placed test results, defense counsel again approached the bench, and Judge Stroker

conducted a short examination of the witness. In answer to the judge's questions, Baer stated that he had performed the electrophoresis test "hundreds of times" and that electrophoresis was accepted in the forensic community (R 1342). The witness noted that while there was a controversy in California regarding the accuracy of the test, such controversy was apparently the creation of one individual, who was "opposed by just about everybody in the field." (R 1342). Baer specifically stated that the consensus of persons in the field was to the effect that electrophoresis was an accurate and reliable test (R 1342-3). On cross-examination, the witness did note that the individual in California responsible for the controversy was Doctor Benjamin "Gumbaum", a figure who, apparently, had been at least partly responsible for the creation of the chart which Baer himself used (R 1343).

Following this testimony, appellant renewed "his motion", based on the two out of state decisions presented earlier, People v. Young, 418 Mich. 1, 340 N.W.2d 805 (Mich. 1983) and People v. Brown, 40 Cal. 3d 512, 220 Cal. Rptr. 637, 709 P.2d 440 (Cal. 1985) (R 1344). The judge, while noting the proponent's burden when presenting evidence derived from a novel scientific procedure, observed that testimony based upon electrophoresis examinations had repeatedly been admitted within the judicial circuit (R 1345). The judge reiterated displeasure over the lateness of appellant's challenge (R 1345). When asked whether or not appellant had any witnesses who could challenge the reliability of the test, appellant replied that he did not (R

1346). Finding, from his own experience, that the tests had been accepted, the judge found that the existence of the cases relied upon by the defense was an insufficient basis to exclude the testimony (R 1346). The chart was then admitted, and Baer testified as to the specific test results he had obtained (R 1348-1351); the witness noted that he had utilized both calculations based upon a California study and those developed in his own laboratory, and had stated earlier that when testing samples, he did make a "call" if there had seemed to be any doubt (R 1348, 1338).

During a subsequent break in testimony, defense counsel was allowed to more fully state his objection (R 1384-1390). At such time, counsel stated that the basis for such objection was that, under the test enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the state had failed to show that the evidence was scientifically accepted (R 1385). Counsel noted that, while there was no question that courts in Florida, especially within Orange County itself, had previously accepted testimony based upon electrophoresis, such fact did not mean the test was scientifically accepted (R 1385-6). The court provided the state with an opportunity to respond, such response taking place the next morning (R 1389-90). At such time, the prosecution again questioned the timeliness of appellant's challenge, and likewise noted the prior admission of electrophoresis results within Florida (R 1394); the state also pointed out that other jurisdictions, including the State of Georgia, had accepted the process as reliable and allowed admission of test results so

obtained (R 1395). At the conclusion of the argument, Judge Stroker found that the cases relied upon by appellant did not cast the reliability of the test into doubt or shift the burden onto the state to establish the reliability or acceptance of electrophoresis (R 1397); the motion to strike was denied (R 1397). Subsequently, during his testimony, Baer stated that he had learned some of the electrophoresis techniques at the Federal Bureau of Investigation, and that the FBI crime lab in Washington had found electrophoresis to be reliable, and in fact, utilized it (R 1405-6).

On appeal, appellant contends that denial of his motion to strike was error, in that the two out of state precedents relied upon below, People v. Young and People v. Brown, allegedly established the unreliability of electrophoratic evidence, and in that the state, as proponent of the evidence, failed to establish that the process was accepted by the scientific community. Appellee disagrees, but, before turning to the specific standards for admission of this evidence in Florida, would simply note that Young and Brown do not necessarily represent the "mainstream" in legal thinking on the issue of the admissibility or reliability of evidence obtained through electrophoresis. A number of jurisdictions have expressly approved admission of such evidence. Compare, State v. Washington, 229 Kan. 47, 622 P.2d 986 (1981); State v. Rolls, 389 A.2d 824 (Me. 1978); Robinson v. State, 47 Md.App. 558, 425 A.2d 211 (1984); Jenkins v. State, 156 Ga.App. 387, 274 S.E.2d 618 (1980); Plunkett v. State, 719 P.2d 834 (Okl. Cir. 1986); People v. Crosby, 498 N.Y.S.2d 31, 116

A.D.2d 731 (N.Y.A.D. 2 Dept. 1986). Additionally, from studying the case law from around the country, it is clear that the Frye standard, discussed by defense counsel below, and relied upon by the Michigan and California courts in Young and Brown, has not been accepted nationally, and that many state supreme courts have expressly rejected its restrictive approach, often preferring to opt instead for a general relevancy test for the admission of scientific evidence. Compare, State v. Brown, 297 Or. 404, 687 P.2d 751 (1984); Watson v. State, 64 Wis.2d 264, 219 N.W.2d 398 (1974); Whalen v. State, 434 A.2d 1346 (Del. 1980); Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982); State v. Hall, 497 N.W.2d 80 (Iowa 1980); State v. Catanese, 368 So.2d 975 (La. 1979); State v. Williams, 388 A.2d 500 (Me. 1978).

Many of these states have adopted evidence codes, like our own, which in turn are modeled upon the federal rules, providing that all evidence, including expert or scientific evidence, is admissible if it is relevant and its probative value outweighs its prejudicial. See e.g., State v. Brown, supra; Jones v. State, 716 S.W.2d 142 (Tex. App. Austin 1986). Some, it must be noted, like Kansas and Maryland, see, State v. Washington, supra, and Robinson v. State, supra, apparently both apply Frye, and, in contrast to Michigan and California, accept electrophoretic evidence. Two other interesting cases for comparison are State v. Dirk, 364 N.W.2d 117 (S.D. 1985) and State v. Onken, 701 S.W.2d 518 (Mo. App. 1985), both of which involve the admission of expert testimony regarding a blood analysis technique virtually identical to electrophoresis. In Onken, the Missouri

appellate court specifically approved the admission of such evidence, applying the Frye test, finding that the process had received sufficient scientific acceptance. In Dirk, the Supreme Court of South Dakota likewise approved the admission of the evidence, while expressing doubt as to the continuing validity of Frye.

While, in his brief, appellant cites to such precedents of this court as Bundy v. State, 471 So.2d 9 (Fla. 1985), in support of the proposition that the proponent of a "new" method of scientific proof must first demonstrate its reliability or acceptance within the scientific community, it is clear, despite the dearth of published appellate decisions in Florida on electrophoresis, that the process is not "new". Even defense counsel below conceded that evidence obtained through its use had previously been admitted throughout the state, as well as within the courts of Orange County itself (R 1385-6). Likewise, the witness testified that he had performed the electrophoretic examination hundreds of times in the past, and had previously testified in court concerning its results (R 1342). The state suggests that, in fact, it was appellant's burden to demonstrate some "novelty" or "unreliability" in the test, before the state was called upon to present any further evidence. Further, defense presented absolutely nothing to rebut or contradict David Baer's testimony to the effect that electrophoresis is accepted in the forensic community and that a consensus of opinion in that field finds it to be an accurate and reliable test (R 1342-3); the witness likewise testified that electrophoresis was accepted

as reliable and utilized by the Federal Bureau of Investigation.

Appellee would contend that Baer's testimony as to the test acceptance and reliability was sufficient to render the evidence admissible, especially in the absence of any testimony to the contrary. The state would further analogize Baer's testimony to that adjudged sufficient by a number of out of state precedents. In Robinson v. State,* supra, the Maryland court approved the admission of testimony a forensic chemist employed by the Montgomery County Police Department, regarding her analysis, through electrophoresis, of certain blood samples. The witness, who had degrees in both biology and forensic chemistry, had stated that electrophoresis was utilized by various police agencies in Maryland, as well as by the Federal Bureau of Investigation. The court noted, as here, that her testimony was uncontradicted. Likewise, in State v. Onken,* supra, the only testimony before the trial court had been the testimony of the forensic serologist who had performed the test at issue. In adjudging such sufficient to satisfy Frye, the court noted that the witness had stated that the test was accepted by the scientific community, that it was used by a number of forensic chemistry laboratories and recognized reliable, that it was used by Missouri Highway Patrol and that, in the witness' opinion, it was accurate. Further, in State v. Dirk,* supra, the South Dakota Supreme Court accepted the evidence based solely on the

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*A copy of this decision is provided in the appendix to this brief.

testimony of the serologist who had performed the test, such testimony, as here, to the effect that electrophoresis was reliable and accurate. As in the case sub judice, it would appear that the defense's only contrary evidence was in the form of a published opinion to the contrary, in that instance, a law review article. Appellee would contend that, to the extent that the Frye test must be satisfied in Florida, such test was met in this case, and that on the basis of Robinson, Onken and Dirk, the evidence below was properly admitted. Appellee would also suggest that this court may take judicial notice of the number of jurisdictions which have accepted electrophoresis, as evidenced by the published opinions to such effect.

It must additionally be noted that, while, this court, in Bundy, did discuss the Frye test for admissibility, it did not expressly indicate whether or not such test was the law in Florida, and at least one district court of appeal has noted that the holding in Bundy, to the effect that evidence obtained through hypnosis is not admissible, need not be grounded upon an outright acceptance of Frye. See, Hawthorne v. State, 470 So.2d. 770 (Fla. 1st DCA 1985) (Ervin, C.J., concurring). In the absence of any clear statement, certain district courts of this state have concluded that the Frye test is not in fact the law, and have noted its incompatibility with the Florida Evidence Code, enacted in 1979; as such courts have noted, it would seem impossible to reconcile Frye's rigid requirement of acceptance within the scientific community, as a prerequisite for admission of evidence derived from a scientific test, with the more

generous provisions of sections 90.401, 90.402, 90.403 and 90.702, Florida Statutes (1983), which hold, inter alia, that all relevant evidence is admissible, and that opinion by an expert is admissible, as long as it will aid the finder of fact in determining a fact at issue. See, Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986); Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983). In Brown, the First District conducted a lengthy analysis of Florida decisions, including Coppolino v. State, 223 So.2d 68 (Fla. 2d DCA 1968) and Kaminski v. State, 63 So.2d 339 (Fla. 1952), as well as Jent v. State, 408 So.2d 1024 (Fla. 1982) and Stevens v. State, 419 So.2d 1058 (Fla. 1982), and concluded that the Frye test had in fact never been adopted in Florida, despite some arguably ambiguous language in certain decisions.

It is likely that, as in Bundy, this court can resolve the instant appeal without having to make an express "stand" one way or the other on the applicability of Frye; such is the case because, as noted, Baer's testimony regarding the reliability and acceptance of electrophoresis in the forensic community was unrebutted. Nevertheless, the state would briefly take this opportunity to argue, to the extent that the question is open, that Frye should not be followed. As support for its position, the state would not only rely upon the cogently written opinions of Hawthorne, Brown and Kruse, but also upon McCormick, On Evidence. After reviewing recent developments in the law, including the growing number of jurisdictions which have rejected or modified Frye, McCormick argues:

> A drumbeat of criticism of the Frye test provides the background music to the movement

> away from the general acceptance test. Proponents of the test argue that it assures uniformity in evidentiary rulings, that it shields juries from any tendency to treat novel scientific evidence as infallible, that it avoids complex, expensive, and time-consuming courtroom dramas, and that it insulates the adversary system from novel evidence until a pool of experts is available to evaluate it in court. Most commentators agree, however, that these objectives can be attained satisfactorily with less drastic constraints on the admissibility of scientific evidence. In particular, it has been suggested that a substantial acceptance test be substituted for the general acceptance standard, that a panel of scientists rather than the usual courts screen new developments for acceptance, and that the traditional standards of relevancy and the need for expertise - and nothing more - should govern.
>
> The last mentioned method for evaluating the admissibility of scientific evidence is the most appealing. It avoids the difficult problems of defining how "general" the general acceptance must be, of discerning exactly what it is that must be accepted, and of determining the "particular field" to which the scientific evidence belongs and in which it must be accepted. General scientific acceptance is a proper condition for taking judicial notice of scientific facts, but it is not a suitable criterion for the admissibility of scientific evidence. Any relevant concusions supported by a qualified expert witness should be received unless there are distinct reasons for exclusion. These reasons are the familiar ones of prejudicing or misleading the jury or consuming undue amounts of time. McCormick §203 at 607-8 (3rd Ed. 1984) (footnotes ommitted).

Additionally, the state finds to be persuasive a number of out of state decisions, including that of the Supreme Court of Georgia, in Harper v. State, and that of the Supreme Court of Iowa, in State v. Washington. See also. McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 Iowa L. Rev. 879 (1982).

Measuring the evidence at issue against such provisions of Florida's Evidence Code as §§§90.402, 90.403 and 90.702, it is clear that its admission was proper. The evidence was relevant, and the witness properly qualified to offer an opinion on the subject. In contrast to evidence derived from hypnosis, truth serum or polygram, evidence derived from an electrophoretic analysis of blood is based upon proven scientific principles, and any alleged "weakness" in the technique utilized or potential unreliability of the result derived is a matter of weight of the testimony, to be brought out through cross-examination or the presentation of independent evidence of impeachment. In Jent v. State, supra, this court noted that, as a general rule, the problem presented to a trial court is whether scientific tests are so unreliable and scientifically unacceptable that admission of such test results would constitute error. This court coupled such pronouncement with the well known observation that a trial court has wide discretion concerning the admissibility of evidence and, in the absence of an abuse of such discretion, a ruling regarding its admissibility will not be disturbed on appeal. Id. at 1029.

Appellee suggests that it was no accident that these twin statements of law are together in the same paragraph of the Jent decision, and that **both** were utilized in resolving the claim of error regarding the admission of evidence of certain testimony regarding hair analysis. Obviously, if a scientific test is unreliable, any evidence derived from it would be irrelevant, in that it would be misleading to the jury or unlikely to lead them

to the truth. A showing of reliability, however, need not be made, as Frye demands, by "counting heads" within the scientific community, and requiring a showing of such sort, prior to the admission of any scientific evidence, would seem to have the effect of needlessly excluding otherwise reliable evidence. See, Harper v. State, supra, and State v. Hall, supra. Rather, the relevancy of evidence can be determined, as it was here, by the testimony of an expert in the field, and the propriety of the admission of such evidence, whether derived from a scientific test or not, is properly left to the sound discretion of the trial court, which must resolve all other questions of evidentiary admissibility. See also, Johnson v. State, 393 So.2d 1069 (Fla. 1980) (a trial court has broad discretion in determining the range of subjects upon which an expert may be allowed to testify). Applying Jent and Johnson, and a legion of similar precedents of this court to the same effect, see e.g., Maggard v. State, supra, it is clear that Judge Stroker did not abuse his discretion in admitting the instant evidence.

In short, while each jurisidiction is, of course, free to adopt its own standards for the admissibility of evidence, it is clear that the present holdings of the state supreme courts of California and Michigan are based upon the particular set of facts which existed in the individual case which the court was based upon to decide. In both Brown and Young[1], it is clear

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[1]A similar result was reached following remand. See, People v. Young, 425 Mich. 470, 391 N.W.2d 270 (1986).

that, in contrast to the situation sub judice, the defense did more than cite out of state precedents; in each case the defense called experts of its own who affirmatively rebuted the testimony of the state witnesses regarding the reliability and/or acceptance of electrophoresis. In this case, as in Robinson, Onken and Dirk, the testimony of the state's experts was unrebutted as to the acceptance and reliability of electrophoresis. Similarly, appellee respectfully suggests that the matter which was of great concern to the Michigan Supreme Court, i.e., that aged blood samples could deteriorate and lead to unreliable readings, is a matter that goes more to the weight of the evidence, as opposed to its admissibility, cf. Troedel v. State, 462 So.2d 392 (Fla. 1984), (defendant's attacks upon neutron activation tests more in nature of attack upon manner in which individual test conducted, as opposed to admissibility of any evidence derived from such tests); similarly, the state would note, in contrast to the situation in Young, that the samples sub judice were not collected from outdoors, where they could be subject to certain contamination, but rather were taken from the victims' home, which had sealed immediately after the murders. As noted, David Baer testified that if it had seemed as if any enzyme in question was weak due to the age of the sample, he did not make a call (R 1338), and appellee suggests that it was properly left to the jury what weight to the give the instant evidence derived through electrophoresis.

Given the fact that, as in Jent, it cannot be said that electrophoresis is so unreliable and scientifically unacceptable

that admission of any results derived from it would be error and, again as in Jent, that it was not an abuse of discretion for Judge Stoker to admit the instant evidence, reversible error has not been demonstrated. The instant convictions should be affirmed.

POINT X

ADMISSION INTO EVIDENCE OF THE EXPERT TESTIMONY OF JUDITH BUNKER, ON THE ISSUE OF BLOODSTAIN PATTERN ANALYSIS, WAS NOT ERROR.

At trial the state called Judith Bunker, a forensic expert consultant in bloodstain pattern analysis and crime scene reconstruction (R 1470). Miss Bunker stated that she had been employed for twelve (12) years as an assistant and technical specialist with the district medical examiner and that, in addition to her on-the-job training, she had completed over two hundred (200) hours of continuing education in various aspects of the legal and medical determination of death (R 1470-1). The witness testified that she was a consultant to law enforcement agencies and attorneys throughout the country and that she was a member of the International Association for Identification and the International Association of Bloodstain Pattern Analysis (R 1471). Miss Bunker indicated that she had conducted over forty (40) workshops throughout the country for law enforcement officials, and that she had previously been qualified as an expert in the area of bloodstain pattern analysis some twenty-five (25) times in the past (R 1471-2). Her testimony indicates that she was qualified as an expert not only in Florida, but also in certain jurisdictions in Louisiana and Texas as well (R 1472, 1473).[2] Miss Bunker estimated that she had participated in several hundred cases involving crime scene reconstruction and

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[2]Miss Bunker's testimony is discussed by the Louisiana Supreme Court in State v. Graham, 422 So.2d 123 (La. 1982).

bloodstain analysis (R 1472).

On voir dire, defense counsel brought out the fact that the witness had no advance degree in chemistry or biology or medical degree (R 1473). Following such testimony, defense counsel contended that Miss Bunker should not be qualified as an expert, due to her "lack of educational qualifications" (R 1473-4). The state responded that Miss Bunker's field did not require an extensive knowledge of either chemistry or biology, as exemplified by a degree, and pointed out that her experience had been extensive (R 1474). Judge Stroker ruled that he would allow the witness to give opinion testimony regarding bloodstain analysis (R 1474). On appeal, appellant contends that this ruling was error, in that, as he argued below, Miss Bunker's credentials were allegedly insufficient to allow her to be qualified as an expert.

As this court observed in Huff v. State, 495 So.2d 145, 148 (Fla. 1986),

> It is axiomatic that it is within the province of the trial court to determine whether to admit the testimony of a purported expert witness. The decision of the trial court is conclusive unless erroneous or founded upon error in law.

This holding is in accord with a number of other decisions in which this court has noted the wide discretion enjoyed a trial court as to the admission of evidence and the range of subjects about which an expert can testify. See, Stano v. State, 473 So.2d 1292 (Fla. 1983); Johnson v. State, 438 So.2d 774 (Fla. 1983). Additionally, as noted by the First District in Rivers v. State, 425 So.2d 101 (Fla. 1st DCA 1982), a trial judge likewise

has broad discretion in passing upon the qualifications of an expert witness. See also, Tully v. State, 69 Fla. 662, 68 So. 934 (1915). Appellee suggests that appellant has failed to demonstrate an abuse of discretion sub judice.

Section 90.702, Florida Statutes (1983), expressly provides that a witness qualified as an expert "by knowledge, skill, experience, training or education" may testify about such specialized knowledge in the form of an opinion. Although appellant places great emphasis upon the fact that Miss Bunker possesses no advanced degrees, it is clear that an individual may be qualified as an expert through experience or simply knowledge however obtained. Miss Bunker testified that she had been a technical specialist with the district medical examiner for twelve (12) years and that, as part of her duties, she had assisted the examiner in the "medical and legal investigation of death." (R 1470-1). Miss Bunker estimated that during such period she had worked on "several hundred cases" involving crime scene reconstruction and bloodstain analysis (R 1472). Appellee suggests that Miss Bunker was properly qualified as an expert in bloodstain analysis.[3]

It should noted that the content and presentation of Miss

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[3]While there would not seem to be precedent in Florida on the qualification of an expert witness in the field of bloodstain pattern analysis, appellee would note that other jurisdictions have allowed such, and that the witnesses so qualified have had qualifications comparable to those of Judith Bunker. See State v. Hall, 297 N.W. 2d 80 (Iowa 1980); Jordan v. State, 464 So.2d 475 (Miss. 1985); People v. Knox, 121 Ill. App. 2d 519, 459 N.E.2d 1077 (Ill. App. 3 Dist. 1984).

Bunker's testimony fully bears out such conclusion. The witness very clearly and concisely introduced the jury, by means of a slide presentation, to the field of bloodstain pattern analysis, a study of the static aftermath of blood in motion (R 1474-1487). Following such general introduction, Miss Bunker then testified in detail as to the times she had spent at the crime scene, studying the bloodstains, as well as in regard to the other reports and photographs she had utilized (R 1498-9). Again using slides, the witness narrated for the jury the location and appearance of the more significant bloodstains at the scene, and finally offered her opinion as to the probable manner in which such had been created (R 1502-1533; 1534-1540). Her testimony was significant, in that Miss Bunker was able to identify the location at which each victim was stabbed and, in many cases, such locations varied from those in which the bodies were ultimately discovered. It is respectfully submitted that her testimony was precisely that of an "expert", i.e., one whose specialized knowledge is of assistance to the jury. No error was committed in the admission of the instant testimony, and the instant convictions should be affirmed.

POINT XI

DENIAL OF APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WAS NOT ERROR; SUFFICIENT EVIDENCE EXISTS FOR THIS COURT TO AFFIRM APPELLANT'S FOUR CONVICTIONS OF FIRST-DEGREE MURDER.

At the close of the state's case, appellant moved for judgment of acquittal, contending that the state had failed to prove premeditation; defense counsel also contended that the circumstantial evidence did not exclude every reasonable hypothesis of innocence, in that while appellant's fingerprints had been found at the murder scene, the state had failed to show that such fingerprints could only have been placed there at the time of the homicides (R 1690-2). The motion was denied at that point, as well as upon renewal (R 1694, 1749), On appeal, appellant renews these contentions of evidentiary insufficiency and, as he did below, relies upon Jaramillo v. State, 417 So.2d 257 (Fla. 1982), a previous capital case in which this court reversed the murder conviction at issue, where the only evidence against the defendant had been the presence of his fingerprints at the murder scene and where the defendant had provided a reasonable explanation to account for such presence; of course, as part of its reviewing function, this court will, pursuant to Florida Rule of Appellate Procedure 9.140(f), independently determine the sufficiency of the evidence in support of the instant convictions. Appellee contends that denial of the motions for judgment of acquittal was not error, and that this court should affirm appellant's four convictions of first-degree murder in all respects.

About the only thing this case has in common with Jaramillo

is the fact that fingerprints are involved in each. In contrast to the situation in Jaramillo, five sets of appellant's fingerprints or palm prints were found at the scene of the murders. These fingerprints were located: (1) by the air conditioner control box in the living room; (2) on one of the walls in the hallway by Tuesday Correll's room; (3) on a pharmacy bag contained in a dresser drawer in Susan Correll's room; (4) on one of the drawers of the dresser in Susan Correll's room and (5) on a credit card receipt found inside of Mary Lou Hines' purse (R 1556, 1560, 1561, 1589, 1590, 1593, 1595, 1596, 1597). Additionally, in contrast to the lone fingerprint in Jaramillo, appellant's prints were found **in blood** (R 1556, 1560, 1561); although the evidence technicians could not analyze the blood in greater detail, i.e., to determine whose it could be, in that to do so would have destroyed the prints, there is absolutely no doubt that appellant's fingerprints were made in blood. Compare, Ross v. State, 474 So.2d 1170 (Fla. 1985) (defendant's fingerprints "made with human blood" found at murder site). Although appellant argues that there could have been an "innocent" explanation for the presence of these fingerprints, in that appellant, some months previously had resided at the house, this "explanation" cannot be seriously countenanced. Assuming that the prints could have survived the intervening months, appellant offered no explanation for the fact that the prints were found in blood or as to how such prints came to be found in such "accessible" locations as within his mother-in-law's purse.

Further, although not discussed in great detail in

appellant's brief, the forensic serologist in this case determined that at least fifteen (15) items at the scene of the murders, such items including a purse and wallet of the victims, the knife holder in the kitchen and a pillow which was found on top of the body of Susan Correll, were stained with blood which was inconsistent in type with any of the victims, but consistent with that of appellant (R 1444-6). Following appellant's arrest on July 2, 1985, a search warrant was obtained for his residence (R 1202). A number of items were seized from appellant's bedroom, including a pair of shoes, a pair of blue jeans, a white towel and a syringe (R 1225, 1227-1230); forensic analysis indicated the presence of human blood on the shoes, towel and jeans (R 1427-8). Likewise, at the time of appellant's arrest, a number of items were found on his person, including an amount of United States currency and a "butterfly-type" knife (R 1189, 1201). Forensic analysis of these items likewise indicated the presence of blood (R 1429-30); there was testimony that all the purses belonging to the adult victims in this case had been rifled through and that, when found, none had contained any paper currency (R 1309-1310). Finally, at the time of his arrest, numerous cuts and scratches were observed on appellant's forearms, hands and fingers, and photographs were taken of such wounds and introduced into evidence (R 599, 1074; Transcript of Evidence).

In addition to the above physical evidence linking appellant to the murders, the state adduced a wealth of evidence from which premeditation could be inferred. Appellant was, of course, the

ex-husband of Susan Correll and the father of Tuesday Correll; Mary Lou Hines and Marybeth Jones were, respectively, appellant's former mother-in-law and sister-in-law. Although appellant has contended, despite the break-up of his marriage, that he and Susan Correll remained "super good friends", such would not seem to be the case. State witness Lawrence Smith, who had been incarcerated along with appellant, testified that appellant had made certain statements or admissions to him, while the two were incarcerated awaiting trial (R 1259-1271). According to Smith, appellant stated that he and Susan Correll had not gotten along for quite some time after the divorce, and that appellant did not like his ex-wife dating other men (R 1259-60). According to Smith, appellant stated that, at one point, he had sought to arrange for the murder of Susan Correll, and had investigated paying a member of a motorcycle gang to do the job (R 1260); Correll apparently also stated that his mother-in-law and sister-in-law had not gotten along with him and that they had, in essence, driven him from the house (R 1260, 1268). According to Smith, while appellant would not admit to having committed the murders, he did acknowledge being at the scene of the crime and removing several items, including some methadrine and syringes from Susan Correll's bedroom (R 1263). Appellant also admitted taking Marybeth Jones' automobile and abandoning it in a parking lot (R 1263); the vehicle was in fact taken from the crime scene and abandoned, and, when found, the police noted that the handle on the driver's door had been wiped clear and that a spot of blood was on the driver's seat (R 997, 1426). According to

Smith, appellant, while maintaining his silence as to any culpability in the murders, also stated at one point that the jury would believe that anybody who would kill his own daughter would have to have been insane (R 1289).

Aside from Smith's testimony, the state also presented considerable evidence regarding the relationship between appellant and the victims, including testimony of specific acts of aggression or hostility. Thus, at appellant's trial, David Murray testified that, approximately two and one-half years before the murders, after the Correll marriage had broken down and Susan and Tuesday Correll had moved into his home, appellant had come over to the house to see Susan (R 1243). Upon seeing appellant at the door, Susan Correll had turned "white as a ghost", and became completely afraid (R 1244). When she did go out on the porch, Murray testified that he heard the two argue, appellant angrily threatening Susan Correll that if she dated another man, he would kill her (R 1245). Similarly, James Rucker testified that approximately three years before the homicides, again at a point in time after the Correll marriage had fallen apart, Susan Correll was over at his home, when appellant came over looking for her, screaming for her to come out (R 1139). When she did not, appellant took a buck knife and slashed all four of the tires of her car (R 1139-1141); appellant then drove away, and returned some time later, claiming to have seen someone slash Susan's tires and to have chased this person (R 1142). This later testimony was significant, because, on the night of the homicides, all four tires of an automobile belonging to

Richard Henestofel, a man dating Susan Correll, were found to have been slashed (R 1035); additionally, when the witness checked upon the damage the next day, he found a set of keys on top of his trunk, such keys belonging to Marybeth Jones (R 1026-7; 1205-8).

The state also presented the testimony of Donna Valentine, a close friend of Susan Correll and her family (R 515-6). Miss Valentine testified that, after the breakup of the marriage, Susan and Jerry Correll seemed friendly, but that Susan was upset many times "because of mental abuse" (R 528); the witness likewise stated that Susan Correll exhibited fear of appellant at such time, and that she had seen appellant act as if he were jealous of Susan seeing other men (R 529, 530). Miss Valentine stated that, within a week of the homicides, she had been present when appellant had paid a visit to the house on Tampico Drive (R 531). At such time, she had heard appellant argue with Susan Correll, and had seen him completely ignore the joyful greetings of his daughter, Tuesday (R 532). The witness also stated that, within a month of the homicides, she had been in an automobile in the company of appellant, Susan and Tuesday Correll. At such time, Tuesday had apparently displayed a well beloved set of family pictures, which she particularly prized, in that they depicted her with both of her parents (R 535). Appellant threw these photographs out of the window of the car, and later told Susan that he had done so because there "should not" be any more pictures, because "that was not the way it was any more" (R 536).

This testimony of Donna Valentine must be read in

conjunction with that of Richard Henestofel and Joyce Stone. Henestofel testified that he had encountered appellant at the ABC bar a number of times in the days prior to the homicides. On the 26th of June, four days before the murders, Henestofel had a conversation with appellant, during which Correll had mentioned that he still had a key to Susan Correll's house and that, as a result, she could not hide (R 1024). Henestofel and Susan Correll then encountered appellant at the ABC two nights later, at which time appellant apparently observed the two together (R 1022-3). Finally, Henestofel saw appellant at the ABC on the night of the homicides, he stated that he had attempted to talk to appellant, but that appellant ignored him, (R 1021-2). It was on this night that Henestofel discovered the tires of his car slashed (R 1026). Joyce Stone was a security guard at another ABC lounge, and she testified that she knew appellant, Susan Correll and Marybeth Jones (R 1062). She stated that on the 29th of June, appellant had come to the rear entrance of the lounge, and had asked her to summon Susan; appellant was not able to enter the bar, because he was not dressed in conformity with the dress code (R 1063). Miss Stone observed the encounter between appellant and Susan Correll, and testified that she had heard Susan Correll say to appellant, "I don't want to talk to you. I want you out of my life. I don't want to see you anymore." (R 1064). Appellant's reaction was to grab Susan Correll by the arm, and Miss Stone stated that she had to order appellant to let her go (R 1064).

In addition to this testimony regarding the previous

difficulties between the parties, the manner in which the homicides were committed was such that premeditation was clearly shown. All three of the telephones at the murder site had been disabled, the lines cut, and one of them thrown in the trash (R 587, 591, 594). When the bodies were found, it was discovered that the thermostat in the house had been turned down to its lowest setting, possibly so as to delay decomposition; appellant's bloody palm print was found by the thermostat (R 594). All four of the victims had been stabbed repeatedly, and expert testimony indicated that the bodies had been moved and arranged after the wounds had been inflicted (R 1534-5, 1540-1). The pathologist testified that Susan Correll had fourteen (14) stab wounds, Tuesday Correll ten (10), Mary Lou Hines fourteen (14) and Marybeth Jones fourteen (14) (R 773, 797, 802-8, 822-3). The adult victims all had defensive wounds on their hands, indicating that they had fought for their lives, and Mary Lou Hines had a number of bruises and abrasions consistent with having struggled fiercely with her attacker (R 773, 808, 813, 822-3). Dr. Hegert testified that it appeared as if a knife had been held up against the throat of Tuesday Correll, and that so much pressure had been exerted that the knife had left an impression (R 790-1). A torn and bloody teeshirt was found by Susan Correll, indicating that she had been stabbed while wearing such article of clothing, although she was nude when she was found (R 778); additionally, a knife was found in her hand, and the pathologist testified that her torso had been wiped clean and that there was sperm in her vagina (R 552, 753, 1430). From the

testimony of other witnesses, it would appear as if Mary Beth Jones, who had been visiting with her boyfriend until around midnight, was, in all likelihood, the last person killed, and that she may have been out of the house at the time that her mother, sister and niece were murdered; the pathologist and bloodstain pattern expert hypothesized that Miss Jones could have been attacked from behind as she made herself a midnight snack in the kitchen. When the bodies were discovered, a number of knives were found in the kitchen sink, and it was noted that the water therein had a pinkish tinge (R 746); the pathologist stated that the knives found in the sink could have been used to inflict the fatal wounds (R 827-8).

Finally, the state introduced into evidence a statement which appellant gave the police on July 1, 1985, the day that the bodies were discovered, and one day prior to his arrest. In addition to representing that he and Susan Correll had been "super good" friends, and that they had, allegedly, talked about getting back together again, (R 1080), appellant stated in this tape recorded statement that he had last seen his ex-wife on the Wednesday or Thursday before the murders; such statement, of course, is inconsistent with the testimony of Joyce Stone, regarding the encounter between appellant and Susan Correll at the ABC on Saturday night. Appellant also recounted in the statement his whereabouts on the night of the homicides. Appellant stated that he had left his mother's house, where he had then been living, at around 8 p.m., and that, while walking to the ABC, had been picked up by a friend of his named Dickie.

Dickie had driven appellant around to various places, and had eventually dropped him off by the ABC at around 9 p.m. After unsuccessfully trying to call Susan Correll, appellant had gone into the bar and proceeded to have a number of drinks. While he was there, he had met a girl named June, and the two were mutually attracted to each other, and ended up leaving together; appellant stated that they left before closing time, some time between 11 p.m. and midnight. The two departed in June's dark blue charger, and drove to Central Park where they smoked marijuana for several hours. They then proceeded to Kissimmee, where they stayed by a lake for another couple of hours, again smoking marijuana and making love. Eventually, June dropped appellant off at his mother's house at around 5:30 a.m. (Transcript of Evidence; 1080).

Also as part of its case in chief, the state called a number of witnesses to rebut this statement. Dickie Watson testified that while he had, in fact, run into appellant on the day of the homicides, such meeting had taken place at a little before noon, and not in the evening (R 1249). Likewise, the bartender on duty at the ABC testified that while appellant had been present on the night of the homicides, having arrived at between 9 and 9:30 p.m. (R 1118), he had been alone the entire evening and had left, **alone**, by 11:30 p.m. (R 1119-1120). Two friends of appellant who lived across the street from the ABC, Jim Nagle and Guy Kettlehone, testified that appellant had been at their home between 11:40 p.m. and 12:30 a.m., and that he had been alone at the time (R 1166). Appellant's mother testified that appellant

had left the house that evening at around 9:30 p.m., as opposed to 8 p.m., and that he had returned briefly at 3 a.m., leaving again and not returning until 6 a.m. (R 1158-1160). The state also called an officer with the Kissimmee Police Department, whose patrol area included East Lake Toho, who testified that no vehicle matching the descriion of that belonging to June had been seen parked at the lake at anytime on that night (R 1127-8). At trial, the defense did not call "June" as a witness, and Lawrence Smith testified that at one point, appellant had displayed great amusement at the idea that anyone might be able to find "June" for him, remarking that there was "no way in the world" that she could be located (R 1262).

The state suggests that the above evidence was more than sufficient to establish a jury question, and that the instant convictions are amply supported by sufficient evidence. In cases involving circumstantial evidence, it is well established that the question of whether the evidence fails to exclude all reasonable hypothesis of innocence is one for the jury to determine, and where there is substantial, competent evidence to support a jury's verdict, an appellate court will not reverse such judgment based upon a verdict returned by the jury. See, Heiney v. State, 447 So.2d 210 (Fla. 1984); Rose v. State, 425 So.2d 521 (Fla. 1982). In this case, it was up to the jury to resolve the "reasonableness" of the hypothesis advanced by the defense, to the effect that appellant's fingerprints "could" have been made at a time prior to the murders and that appellant could have been with the mysterious June at the time the murders were

committed. The state suggests that the jury properly resolved these matters. Compare, Huff v. State, supra; Williams v. State, 437 So.2d 133 (Fla. 1983); Peavy v. State, 442 So.2d 200 (Fla. 1983) (jury rejected defendant's explanation for presence of fingerprint on cashbox belonging to victim); Ross v. State, supra (jury rejected defendant's story that bloody fingerprint at the scene of the homicide was the result of a clumsy attempt to fix a broken window.) Peavy and Ross dictate affirmance sub judice.

Likewise, on the specific issue of premeditation, this court has held that premeditation can be shown by circumstantial evidence, and that premeditation may be inferred from such matters as the nature of the weapon used, presence or absence of adequate provocation, previous difficulties between parties, the manner in which the homicide was committed and the nature and manner of the wound inflicted. See, Larry v. State, 104 So.2d 352 (Fla. 1958); Sireci v. State, supra. In Preston v. State, 444 So.2d 939, 944 (Fla. 1984), this court, in resolving the sufficiency of the evidence as to premeditation, observed:

> There is substantial evidence from which premeditation could have been inferred by the jury. The victims sustained multiple stab wounds. The nature of the injuries sustained were particularly brutal. There was almost a complete severence of her neck, trachea, carotid artery and jugular vein. The medical examiner stated the murder weapon was probably a knife of four or five inches in length. Such deliberate use of this type of weapon so as to nearly decapitate the victim clearly supports a finding of premeditation.

In this case, there was obvious evidence regarding the previous difficulties between appellant and his victims, with the possible exception of Tuesday Correll, and there was further

evidence as to the absence of adequate provocation. As in Preston, the manner in which the victims were so cruelly dispatched, by means of multiple stab wounds, often six or seven inches in depth (R 769, 770, 805-6), inflicted with particular brutality, was evidence from which the jury could infer premeditation. Although it cannot be said, as in Preston, that any of the victims risked decapitation, it is clear from the testimony of the medical examiner that the wounds were painfully and painstakingly inflicted. Further, the severence of all telephone lines, the turning down of the thermostat to the lowest level and the subsequent deliberate attempt to shift the blame onto Richard Henestofel are all actions which bespeak the existence of a cold and calculating intent. There can be little doubt that appellant, furious at his ex-wife's continued attempts to seek romance elsewhere, deliberately chose to end her life, as well as the lives of all those unfortunate enough to be under the same roof at the time. Appellant's destruction of the family pictures was a chilling indication of what was in his mind. The jury's verdicts sub judice are supported by sufficient, competent evidence, and the instant convictions should be affirmed.

POINT XII

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE TRIAL COURT'S HANDLING OF DEFENSE COUNSEL'S "DESIRE" TO CALL AN UNDISCLOSED WITNESS.

On the fifth day of trial, and during a break in the testimony of state witness David Baer, defense counsel noted, during a discussion of "housekeeping matters", that his investigator, Barbara Pizzaroz, had been brought up several times in the case (R 1401). Counsel stated that he had not expected "to use her at all" and that he had talked to her "about some of the things, etc., etc."; he further acknowledged that he had never listed her as a prospective witness (R 1401). The assistant public defender then stated that it seemed to him that "it would be important" to have her testify as to her conversation with Jim Nagle and Guy Kettlehone, in that such conversation had come up during the prior testimony of those two witnesses (R 1402); he also noted that Miss Pizzaroz could testify as to various distances involved in the case, as could another investigator whom he had listed as a witness (R 1402). Defense counsel then stated the following:

> I think because that's happened, I would ask that we be allowed to call her as a witness for those purposes.
>
> I know that she's not on the list, and that's why I'm bring it up now. If you rule that that's not proper then, obviously, I'll have to have Mr. DePrizio come down to testify as to the distances. Otherwise, I'll have Barbara do both of those things (R 1402).

In response, the state noted that it had had no opportunity

to depose the witness, due to her lack of disclosure, and that, her now being disclosed almost at the close of the state's case, had further prevented the state from discovering what her testimony might be or what she had done (R 1403). Additionally, the trial judge noted that there had been no discrepancy in the testimony of Nagle and Kettlehone regarding their discussion with Miss Pizzaroz, and thus, presumably, there would be no basis for any impeachment of these witnesses (R 1403-4). When defense counsel responded that he wished to call the witness because the state had made such a "very big deal" about the fact that Nagle and Kettlehone had not contacted the police earlier with their information, the judge again noted that this witness could shed little light upon such matter (R 1403-4). Judge Stroker then noted that if the state had sought to interject a witness at that stage in the proceedings based upon what had gone on in the course of the trial, he did not think he would allow it (R 1404). He then said, "So I don't think I would allow the Defense, to do it either," whereupon defense counsel replied, "All right." (R 1404).

On appeal, appellant contends that his four convictions of first-degree murder must be reversed, because Judge Stroker did not conduct a hearing in accordance with Richardson v. State, 246 So.2d 771 (Fla. 1971), in reference to the defense discovery violation. Appellant correctly cites the current state of the law, see Smith v. State, 500 So.2d 125 (Fla. 1986) to the effect that the harmless error doctrine cannot be applied to a trial court's failure to conduct an adequate inquiry into a

discovery violation. Given such rule of per se reversible error, it is perhaps understandable why appellant would wish to characterize this as a "Richardson" point. Appellee, however, agrees with neither the characterization nor the ultimate relief sought.

On the basis of the transcript, a fair question would seem to be, "Was appellant denied the opportunity to do anything which he truly wished or intended to do?" To appellee, the proceedings below indicate, at most, a defense counsel thinking aloud on the record, and it is clear that such counsel himself clearly recognized the multitude of problems raised by his own suggestion. Additionally, to appellee, Judge Stroker's statement at the conclusion of the discussion can hardly be regarded as a definitive ruling; while not seeking to overemphasize semantics, the state would note that the judge did not expressly deny appellant the opportunity to call either this, or any other witness. It has to be recognized that the discussion at issue took place during the state's case-in-chief, at a point in time when appellant would be unable to call any witness. It must also be recognized that appellant made absolutely no attempt to actually call Barbara Pizzaroz as a defense witness during his own presentation of evidence (R 1696-1748); he did, however, call Douglas DePrizio to testify as to the various distances in the case (R 1718-1728).

This point is simply not preserved for review. As this court stated in State v. Barber, 301 So.2d 7, 9 (Fla. 1974), an appellate court must confine itself to a review of only those

questions which were before the trial court and upon which a ruling adverse to the appealing party was made. Because all that occurred below would seem to have been in the nature of a preliminary discussion regarding the possibility of the defense calling this witness, and because no actual attempt was made to call Barbara Pizzaroz or any adverse ruling imposed at such juncture, this point on appeal would seem to be, in large part, hypothetical. As support for its position, the state would rely upon Lucas v. State, 376 So.2d 1149 (Fla. 1979). In such case, the state called an undisclosed rebuttal witness and, at the time the witness was called, defense counsel pointed out the fact that he had not been furnished with the witness' name; the trial judge responded that the names of rebuttal witnesses need not be furnished, and no further objection was interposed. This court held that defense counsel had failed to interpose a timely objection and thereby to allow the trial court to specifically rule on the issue, stating,

> The record shows that while defense counsel brought the state's non-compliance to the attention of the court, he did not interpose an objection; but rather, he differed to the trial court's statement of the applicable law. This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law. Under the circumstances, the trial judge was not required to make further inquiry. Id. at 1152.

In this case, it certainly can be said that defense counsel deffered to the trial court's statement of its initial

inclination. As in Lucas, it is entirely possible that, had appellant formally sought to call Barbara Pizzaroz as a witness during his case, further inquiry would have been conducted; as in Lucas, however, appellant never created a necessity for such further inquiry, and reversible error cannot be predicated upon "presumption" or speculation. See also, Sullivan, supra. No claim of error has been preserved in this regard, and appellee would further note the absence of an adequate proffer of the uncalled witness' testimony. To the extent that this point involves the "sheer" exclusion of evidence, it is clear that such proffer is a prerequisite to appellate review. See, Jacobs v. Wainwright, supra. Additionally, to the extent that this point can be said to involve a Richardson issue, a proffer is likewise still required. As the Fourth District held in Nava v. State, 450 So.2d 606, 609 (Fla. 4th DCA 1984), in which it relied upon Jacobs,

> ...we believe the better rule to be, and we so hold, that a defendant who fails to proffer or otherwise establish on the record the nature of the testimony of a witness, whose identity has not properly been disclosed to the state, is foreclosed from asserting the exclusion of such witness' testimony as error on appeal. We have also considered the fact that our adversary system of justice is substantially predicated on the responsibility of the parties to object or otherwise alert the trial court when error is claimed and to establish the basis of that error on the record.

On the basis of Lucas, Jacobs and Nava[4], this point is not

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[4]Nava certified a question of great public importance to this court, regarding the above-noted need for proffer, although, to appellee's knowledge, the case was never pursued.

preserved.

Should this court disagree with the above contentions, reversal would still not be required. It is well established that a court's failure to call an inquiry a "Richardson" hearing or to make formal findings concerning each of the pertinent Richardson considerations does not constitute reversible error. See, Baker v. State, 438 So.2d 905 (Fla. 2d DCA 1983); Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985). Given the anamolous manner in which appellant broached the entire subject below, appellee suggests that, to the extent that a Richardson inquiry was required, an adequate one was conducted; the state's assertion of prejudice is clear, and understandable, given the fact that Miss Pizzaroz possessed no direct testimony and was in fact an employee of defense counsel. An abuse of discretion has not been demonstrated sub judice. Cf., Woody v. State, 423 So.2d 971 (Fla. 4th DCA 1982); Morgan v. State, 405 So.2d 1005 (Fla. 2d DCA 1981).

While mindful of this court's holding in Bradford v. State, 278 So.2d 624 (Fla. 1973), regarding the applicability of "reverse-Richardson" to defense discovery violations, appellee respectfully questions the wisdom of such holding, especially when such is coupled with the rule of per se reversal. It is clear that a defendant is "injured" in different respects by a discovery violation, depending upon whether or not such violation has been committed by the state or by the defense. When the state fails to disclose a potential witness, and such witness testifies at trial, the defendant's ability to prepare its case

has obviously been impaired; the state is able to put on a witness whose testimony is unknown to the defendant and the defendant is without the traditional recourse of knowledgable cross-examination or impeachment. This situation is obviously one fraught with potential prejudice for the defense. Yet, when the defense itself has been the "culprit" and has impaired the prosecution's ability to prepare its case, the prejudice suffered the defense by exclusion of its own undisclosed witness may, in fact, be non-existent. Thus, the state respectfully suggests that situations involving the exclusion of a defense witness, whether on grounds of relevancy or Richardson, should be handled alike. In order to preserve the point for appeal, an adequate proffer is required, see, Jacobs, supra; Nava, supra, and, in order to constitute reversible error, some prejudice to the defense must be shown; in other words, the defense must show that the witness' testimony would have been admissible, relevant, and non-cumulative, as well as of some benefit to the defense.

That showing has not been made here, and it is clear from the limited summary of the potential testimony of Barbara Pizzaroz that her testimony was cumulative and largely irrelevant. As noted earlier, another witness testified as to the actual distances involved in the case. Additionally, as both the judge and prosecutor pointed out, no dispute existed as to the fact that Jim Nagle and Guy Kettlehone had spoken with the investigator or what they had talked about at the time (R 1401-4; 1173-4; 1183-4); indeed, appellee's subsequent failure to formally seek to call the investigator as a witness may simply

have been in recognition of the fact that she had no testimony of any value to offer. Inasmuch as it would seem that all of Barbara Pizzaroz's prospective testimony was offered and admitted through other witnesses, appellee cannot see how her exclusion could constitute reversible error. In Palmes v. State, supra, this court noted that while the trial court's exclusion of certain evidence which the defense had wished to present had been erroneous, the error was harmless where substantially the same matters were presented to the jury through the testimony of another witness. Palmes has obvious implications sub judice, and no reversible error has been demonstrated.

Finally, appellee respectfully suggests that this case, although, as contended earlier, presenting no true Richardson issue, does present a good example of why Richardson should not apply to defense discovery violations, as well as why the per se rule of reversible error is unwarranted in such circumstance. Appellee respectfully states its agreement with the cogent and compelling dissenting opinion of Chief Justice McDonald in Smith, supra, and suggests that his observations regarding the unwarranted triumph of form over substance are very much to the point. If the discovery rules are not designed to afford a defendant a procedural device to escape justice, see Leeman v. State, 357 So.2d 703 (Fla. 1978), it could hardly be said to further justice to allow a defendant, who himself has violated the discovery rules, to, in essence, plant the seed of reversible error, and "sand bag" the court into not conducting what might be regarded as an adequate Richardson hearing. This is especially

true, when it is clear from the record that the defense would suffer no prejudice by exclusion of the undisclosed witness. Any claim of error in regard to an allegedly insufficient Richardson hearing following a defense discovery violation should be suceptible to analysis under section 933.24, Florida Statutes (1983), and State v. DiGuilio, as is any other claim of perceived error in a criminal trial; as the dissent in Smith points out, there is no compelling reason for a mere error of procedure to be an exception to the above-statement of legislative intent.

To the extent that this court wishes to continue to adhere to Smith, the state would draw its attention to its earlier decision of Wright v. State, 473 So.2d 1277 (Fla. 1985). In such decision, this court found that the exclusion of a defense witness due to a violation of the rule of sequestration had been erroneous, but held that such error had been harmless, in that the excluded witness' testimony would not have affected the verdict. It is unclear to the state why a defendant whose witness is excluded in the name of Richardson, as opposed to a violation of sequestration rule, should be allowed to count on automatic relief on appeal, whereas another defendant, whose defense has been just as "deprived", must demonstrate prejudice before any relief could be awarded. To the extent that this court regards the instant point as raising a Richardson issue, and to the extent that this court concludes that any error was committed below, appellee respectfully urges this court to recede from Smith and Bradford, and to apply a harmless error analysis to the claim at issue, inasmuch as it is clear from the record

that the exclusion of Barbara Pizzaroz's cumulative and irrelevant testimony had no effect upon the verdict sub judice.

In conclusion, appellant has failed to preserve the instant claim of error for appellate review, due to his failure to formally call or seek to call Barbara Pizzaroz as a witness during his own case, thus allowing the trial court below to issue a definitive ruling and/or conclude that further inquiry was not necessary; likewise, this point has not been preserved due to defense counsel's failure to formally proffer the testimony of Barbara Pizzaroz. To the extent that this court regards the instant issue as preserved, appellee would contend that the trial court below correctly resolved the matter of the defense discovery violation. Appellee would further contend that any claim of error in this case should be resolved in accordance with section 933.24 and State v. DiGuilio, inasmuch as it is clear from the record that any error committed in reference to the exclusion of Barbara Pizzaroz was harmless beyond all reasonable doubt. The instant convictions should be affirmed.

POINT XIII

APPELLANT HAS FAILED TO DEMONSTRATE THE EXISTENCE OF "CUMULATIVE" ERROR, SO AS TO JUSTIFY A NEW TRIAL.

In this potpourri of purported errors, appellant has raised seven (7) discrete claims of error, which he apparently believes benefit from proximity to each other. Appellee respectfully states its disagreement with this approach to appellate advocacy, and suggests that if each asserted claim of error was with briefing, it was worth raising as a separate point on appeal. As will be noted, a number of arguments raised herein were not properly raised for review, and the state suggests that preservation cannot be conferred through osmosis. Although each point will be considered separately, whether viewed in isolation or in conjunction, reversible error has not been demonstrated.

A. DENIAL OF APPELLANT'S MOTIONS FOR MISTRIAL, IN REFERENCE TO TESTIMONY ALLEGEDLY REGARDING HIS STATUS AS AN INDIGENT, WAS NOT ERROR.

During the testimony of Delores Taylor, the prosecutor asked her whether or not "someone from the Public Defender's Office" had ever shown her a schedule of movies for the night of June 30, 1985. When the witness replied in the affirmative, appellant objected, claiming that the state was seeking to impeach its own witness (R 611-612); the objection was, apparently, overruled (R 612). Following this ruling, and subsequent testimony, appellant cross-examined the witness, and proceedings concluded for the day (R 613-615). The next morning, appellant's counsel moved for a mistrial, contending that his client had been prejudiced by the state's reference to the public defender's office, and the jury

could assume that his indigency could have served as a motive for robbery (R 620). Judge Stroker denied the motion, finding no indication of sufficient prejudice (R 621). Subsequently, during the testimony of state witness Baer, the forensic serologist, the witness stated that he had received a sample of appellant's blood which had been submitted to him "by the Public Defender's Office." (R 1341). No objection was interposed at the time, and, several pages later in the transcript, defense counsel renewed his motion for a mistrial, due to the reference to the public defender's office, which was denied (R 1341, 1344).

Initially, it must be noted that neither motion for mistrial was interposed contemporaneously with the allegedly objectionable question or answer, and that further, neither was preceded by a formal objection or motion to strike. Accordingly, the state questions the preservation of this point. See, Jackson v. State, supra; Ferguson v. State, supra; State v. Cumbie, 380 So.2d 1031 (Fla. 1980). Additionally, it is well established that a mistrial is only appropriate when the error committed is so prejudicial as to vitiate the entire trial, see, Cobb v. State, 376 So.2d 230 (Fla. 1979), and that a trial court enjoys wide discretion when passing upon a motion for mistrial. See, Salvatore v. State, 366 So.2d 745 (Fla. 1978). Assuming preservation of this point, appellant has failed to demonstrate an abuse of discretion in the court's ruling below. To accept appellant's contention that indigency can be equated with "bad character", would not only be illogical, but also insulting to a percentage of the population of Florida. It is unlikely that

this "news" of appellant's indigency caused any surprise to the jury or that it played even a minute part in their deliberations. Extended discussion of this issue would not be necessary, and the instant convictions should be affirmed.

B. ADMISSION INTO EVIDENCE OF TESTIMONY REGARDING DETECTIVE McCANN'S ATTEMPTS TO VERIFY APPELLANT'S STORY WAS NOT REVERSIBLE ERROR.

The state called Deputy Tom McCann as a witness, and during direct examination asked him whether or not he had done anything in an attempt to verify appellant's statements concerning his whereabouts on the night that the homicides had occurred (R 1197); appellant's tape recorded statement of July 1, 1985, in which he had recounted for the police his activities on the date in question, had already been played for the jury (R 1088). After the witness had answered in the affirmative, and had then proceeded to state that he had gone to the ABC bar to look for the bartender on duty at the time that appellant had claimed to be there, defense counsel objected (R 1197). The basis for this objection was that the state was seeking to impermissably bolster the testimony of the bartender, Patty Babcock, who had already testified (R 1197-8; 1117-1123). The prosecutor stated in response that the testimony was being offered to show that the police had attempted to checkout appellant's story, such issue relevant, in that, on cross-examination of other police witnesses, appellant had sought to show that the police had only been interested in arresting appellant (R 1198). Judge Stroker overruled the objection, and the witness then briefly testified that when he had attempted to verify appellant's statements

concerning his whereabouts, he had not been able to do so (R 1199).

On appeal, appellant contends that this testimony was error, apparently on the basis of this court's decision of Huff v. State, supra. In such case, this court found that under the particular circumstances, it had not been reversible error for a police officer to testify on redirect that his investigations had failed to reveal anything to change his mind that the defendant was guilty, and that he adhered to such belief at the time he testified. Appellee is respectfully unable to fathom the applicability or lack thereof, of Huff, sub judice. The only basis for objection below was that the testimony was improper bolstering; it was not, in that the officer was simply recounting his own activities, and not seeking to repeat prior statements of any other witness. To the extent that appellant is arguing anything else, which would be impermissible under Steinhorst v. State, supra, it is clear, as the state argued below, that defense counsel had sought to imply in its examination of other witnesses that appellant had been unfairly singled out for prosecution (R 1096, 1106). Inasmuch as a good part of the state's case involved blowing holes in the statement given by appellant, for the completely proper purpose of showing to the jury that appellant had offered a less than truthful account of his whereabouts, the state finds nothing objectionable in the instant testimony. Reversible error has not been demonstrated, and the instant convictions should be affirmed.

C. THE CALLING OF JAMES NAGLE AND GUY KETTLEHONE AS COURT WITNESSES, ASSUMING THAT SUCH POINT IS PRESERVED, DOES NOT

CONSTITUTE REVERSIBLE ERROR.

During a break in proceedings in the state's case, the prosecutor stated that two state witnesses were prepared to give testimony that the state would prefer not to have to vouch for (R 873). The two, James Nagle and Guy Kettlehone, were friends of appellant and were prepared to testify that they had seen him at 11:40 p.m. on the night of the homicide; the prosecutor noted that the two had been to see appellant frequently in jail and that another witness would state that appellant had, while in jail, boasted that he was seeking to create an alibi (R 873-4). Accordingly, because the witnesses did have some evidence of benefit to the state, the state asked that they be called as court witnesses (R 874). A general discussion occurred as to the proper procedure to be utilized, during which defense counsel observed

> If the State feels that they are going to be adverse witnesses and the Court rules that's true, then I think the State does have a right to have them called as Court witnesses, I guess. (R 875)

At the conclusion of the hearing, the judge ruled that the witnesses would be called as court witnesses, thus allowing all parties to cross-examine them (R 876). The record reveals that no objection was interposed at this time, and that the two witnesses similarly testified as court witnesses without objection from the defense (R 876, 1165-1176, 1177-1184).

This court held in Steinhorst v. State, supra, that, except in cases of fundamental error, an appellate court will not consider an issue unless it has been presented to the lower

courts. Here, it is clear that appellant interposed no objection to Nagle and Kettlehone being called as court witnesses, despite numerous opportunities to do so; indeed, it would seem, as in Lucas v. State, supra, that appellant acquiesced in the court's statement of the law and ruling below. Accordingly, this point is not preserved for appellate review. Even if it were, reversible error has not been demonstrated. As this court held in Brumbley v. State, 453 So.2d 381 (Fla. 1984), it is within the discretion of a trial court to call a witness as a court witness, pursuant to section 90.615, Florida Statutes (1983), if the moving party does not wish to vouch for the credibility of such witness. See also, Williams v. State, 353 So.2d 956 (Fla. 1st DCA 1978). Although this court has recently held in Jackson v. State, 498 So.2d 906 (Fla. 1986), that court witnesses should be limited to those eyewitnesses to the crime whose veracity or integrity is reasonably doubted, appellee respectfully notes that the court below did not have the benefit of such decision at the time of appellant's trial.

Appellee would contend that the greater "evil" in Jackson, as well as in the Jackson v. State, 451 So.2d 458 (Fla. 1984), relied upon by appellant, was that the court witness in each case had been improperly impeached, pursuant to section 90.608(2), Florida Statutes (1983), with prior inconsistent statements which could not have been admitted but for the witness' "adversity". Thus, a basis for reversal in each Jackson case was the admission of this improper evidence; this court noted in McCloud v. State, 335 So.2d 257 (Fla. 1976), that there is a distinction between a

party impeaching its own witness, and a party merely being allowed to ask leading questions. In this case, the prosecution attempted no impeachment of either Nagle or Kettlehone, and sought to impeach neither witness on the basis of prior inconsistent statements. Rather, the state was simply allowed to examine the witnesses by asking leading questions. Even if, under this court's recent Jackson decision, the witnesses should not have been called as court witnesses, in that they were not eyewitnesses, appellee is unable to see irretrievable prejudice to the defense stemming from the manner in which the witnesses were examined. Assuming this point is preserved, and utilizing the harmless error test of State v. DiGuilio, supra, reversible error has not been demonstrated, in that it can be said beyond a reasonable doubt that the witnesses' testimony had no effect upon the verdict. The instant convictions should be affirmed.

D. DENIAL OF APPELLANT'S MOTION FOR MISTRIAL, INTERPOSED DURING THE TESTIMONY OF WITNESS SMITH, WAS NOT ERROR.

During the testimony of state witness Lawrence Smith, the following occurred:

> Q. Did he indicate anything to you about attempting to escape?
>
> MR. KENNY (Defense Counsel): Your Honor, may we approach the bench for a moment? (R 1264).

Defense counsel then immediately moved for a mistrial, contending that any escape attempt on the part of appellant would have occurred months after the homicide, and would have been irrelevant to any assertion in regard to flight (R 1264-5). The state responded that the evidence was relevant to show guilty

knowledge on the part of appellant, in that an attempted escape would have indicated a desire to avoid prosecution (R 1265). Appellant renewed his contention that unrelated prejudicial criminal acts were at issue, and that a mistrial was required (R 1266). Judge Stroker found that it was a close question as to whether or not the evidence could be admitted, and concluded that the prejudicial effect of the evidence was probably greater than its evidentiary value (R 1267). Accordingly, he sustained the objection, and instructed the jury to disregard the last unanswered question (R 1267).

Initially, appellee would note that appellant failed to comply with the dictates of Ferguson v. State, supra, in that his precipitous motion for mistrial was not preceded by a formal objection or request for curative instruction. Despite such fact, it must be noted that the question was never answered, and that the jury was, in fact, instructed to disregard it. Appellee would analogize the situation at bar to that in Monroe v. State, 396 So.2d 241 (Fla. 3d DCA 1981), in which the court found no reversible error in regard to a question never answered; the court noted that the question was not suggestive of an improper answer and that the jury need not have presumed the worst. Obviously, the same can be said sub judice, and the state would further suggest that, given the lack of answer and the curative instruction to the jury, any error committed was not so prejudicial as to vituate the entire proceeding. See, Cobb v. State, supra; Marek v. State, 492 So.2d 1055 (Fla. 1986).

Appellee would contend, however, that the existence of any

error is clearly open to dispute. It is well recognized, as the state argued below, that evidence that a suspected person in any manner endeavors to escape or evade threatened prosecution by flight, concealment, resistance to lawful arrest, or other ex post facto indication of a desire to evade prosecution, is admissible against the defendant as evidence from which a consciousness of guilt can be inferred. Compare, Mackiewicz v. State, 114 So.2d 684 (Fla. 1959); Straight v. State, supra; Sireci v. State, supra; Washington v. State, 432 So.2d 44 (Fla. 1983). Any attempt to escape from jail while awaiting trial, or verbalized intention to do so, was relevant sub judice, and the evidence at issue could have been admitted, in accordance with the precedents stated above. The trial court gave appellant the benefit of the doubt in excluding this evidence, and no relief is warranted on appeal. Judge Stroker did not abuse his discretion in denying the instant motion for mistrial, and the instant convictions should be affirmed.

E. ADMISSION INTO EVIDENCE OF CERTAIN TESTIMONY OF DONNA VALENTINE WAS NOT REVERSIBLE ERROR, ASSUMING THAT SUCH POINT IS PROPERLY PRESERVED FOR REVIEW.

During the testimony of Donna Valentine, the witness was asked whether or not she had seen appellant act as if he were jealous that Susan Correll had been, since the time of the break-up of their marriage, seeing other men (R 530). After the witness answered in the affirmative, appellant objected on the basis that such question had called for the witness' "opinion"; the objection was overruled (R 530). Subsequently, the witness was asked whether, in the time since the divorce, she had seen

appellant behaving unusually toward his daughter and ex-wife (R 531). Appellant's counsel objected that this question was over-broad, but noted that if the prosecutor wanted to ask more specific questions he could; the objection was overruled (R 531). Without objection, Donna Valentine then testified that, in the week before the homicides, appellant had come over to the house to pick up some items which he had left behind from an earlier outing with Tuesday (R 532). At such time, appellant had had an argument with Susan Correll and had failed to acknowledge the joyful greetings of his daughter (R 532).

On appeal, appellant contends that this testimony constituted improper character evidence or opinion testimony. Initially it must be noted that no objection was interposed in regard to the specific testimony as to the incident occurring one week before the homicides; appellant's earlier objection to the more general predicate question obviously does not preserve this point, in that at such time, defense counsel expressly noted that the state could inquire as to specific instances of unusual behavior on the part of appellant, if it wished (R 531). Inasmuch as defense counsel would seem to have indicated a positive lack of objection to the testimony now at issue, appellee would contend that this point is not preserved. See, White v. State, supra; Steinhorst, supra. As to the portion of this point that is preserved, appellee, in accordance with its argument in Point V, supra, would contend that Donna Valentine was qualified to testify as to her own observations, and that her testimony to the effect that appellant had acted as if he were

jealous was proper. See, Sealey v. State, supra; Rivers, supra. This evidence, as well as the evidence regarding appellant's argument with Susan Correll and aloofness toward Tuesday Correll, was properly admitted, in that it went toward previous difficulties between the parties, such evidence relevant to the existence of premeditation, intent or motive. See, Sireci, supra. Reversible error has not been demonstrated, especially when the analysis set forth in State v. DiGuilio, supra, is applied, and the instant convictions should be affirmed.

F. DENIAL OF APPELLANT'S MOTION FOR MISTRIAL, MADE DURING THE STATE'S CLOSING ARGUMENT IN THE GUILT PHASE, WAS NOT ERROR.

During the initial portion of the state's closing argument, the prosecutor reviewed the wealth of evidence against appellant, including the physical evidence linking him to the crime and the many proven inconsistences in the statement which he had given to the police (R 1772-1781). As counsel was winding up, the following occurred:

> You've heard all of the evidence. You can take it and add it up. And two and two equals four in this case.
>
> This case got moved to Sarasota County because of the publicity. Because the people in Orange County knew so much about this case that it couldn't be tried there.
>
> MR. KENNY (Defense Counsel): Your Honor, I'm going to object to this. This has only come from the media and everybody --
>
> THE COURT: Counsel, approach the bench. (R 1781).

At this point, defense counsel moved for a mistrial, on the grounds that the prosecutor's argument had clearly implied that

everybody knew so much about the case, "and we were all going to find him guilty; that's why they move cases." (R 1781-2). The court then asked the prosecutor where he had been "going" with the argument, and the prosecutor replied, "Where is June?" (R 1781). Judge Stroker noted that defense counsel had interrupted the prosecutor before he had gotten to the point of asking the question, and stated that the assistant state attorney had clarified the matter to his satisfaction, remarking, "I think that's clear, that's why it was not being moved." (R 1782). The motion for mistrial was then denied, and the prosecutor continued as follows:

> So here we are in Sarasota County with a quadruple homicide case. And where is June? Where is she? The one person who could prove Jerry Correll innocent, if he is innocent, isn't here (R 1782).

As this court noted in Breedlove v. State, 413 So.2d 1,8 (Fla. 1982), the control of prosecutorial comments during argument is with the discretion of the trial court, and an appellate court will not interfere unless an abuse of discretion is shown; a new trial should be granted only where it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise, and each case must be considered on its own merits and within the circumstances surrounding the complained of remarks. Additionally, as this court held in State v. Murray, 443 So.2d 955 (Fla. 1984), prosecutorial error alone does not warrant reversal unless the errors committed are so basic to fair trial that they can never be treated as harmless. See also, Davis v.

State, supra.

In the case sub judice, appellee would contend that the comments at issue, when read in context, were neither improper nor prejudicial. The prosecutor, while summing up, was merely noting that the case had been removed from Orange County to Sarasota County, due to the amount of local publicity about the homicides; the jury was already aware that venue had been changed (R 18). This observation was intended to emphasize that when the case was finally brought to trial, there, in Sarasota, that the missing and mythical "June" or "Junie" had still not been called as a witness; given the role she could have played in establishing appellant's alleged defense, this comment was clearly proper. See, Buckrem v. State, 355 So.2d 111 (Fla. 1978). The prosecutor's statement, while, perhaps, constituting a rather clumsy explanation of a change of venue, was neither sinister nor intended to imply to the jury that appellant would have been convicted if tried in Orlando; similarly, it cannot be said to have such effect, in that the mere existence of publicity does not necessarily mean that such publicity was unfavorable to the defense or indicative of a public opinion as to appellant's guilt or innocence. See, Sullivan v. State, supra, (mention of polygraph).

While this court is justifiably concerned by instances of prosecutorial misconduct, see, Bertolotti v. State, 476 So.2d 130 (Fla. 1985), the state does not find the excerpt of the prosecutor's closing argument complained of sub judice to be of such character or effect so as to justify reversal. Given the

lengthy and extensive file, and the wealth of evidence against appellant, it strains credulity to believe that the jury gave undue, if indeed any attention, to one fleeting remark, sandwiched, as it was, amidst lengthy and proper closing argument. Compare, Teffeteller v. State, 495 So.2d 744 (Fla. 1986) (single reference to prior sentence of death not reversible error). Denial of appellant's motion for mistrial was not an abuse of discretion, see, Salvatore, supra, Cobb, supra; even assuming arguendo that the instant comment was improper, applying the test of Murray, supra, and DiGuilio, supra, reversible error has not been demonstrated. The instant convictions should be affirmed.

G. APPELLANT HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR IN REGARD TO THE MANNER IN WHICH THE TRIAL COURT RESPONDED TO A JURY QUESTION.

During their deliberations in the guilt phase, the jury sent the following question to the trial court:

> Does it matter that they say the murder was committed June 30, when it could have been committed July 1 [?] (R 4086, 4286).

The judge discussed this matter with counsel, observing that the indictment alleged that the murders had occurred on June 30, 1985, and that the evidence indicated that such could have occurred "an hour or two either side of midnight of June 30, 1985" (R 4286). When the judge inquired as to whether or not a statement of particulars had been filed, both counsel indicated that although a motion for such had been filed, it had never been called up for a hearing (R 4286); the record reveals that a motion for statement of particulars was filed on August 13, 1985, and that, although never called up for a hearing, the state, in

its own demand for notice of intention to claim alibi, filed September 12, 1985, stated that that crime had been committed between the hours of 8 p.m. on June 30, 1985 and 9 a.m. on July 1, 1895 (R 3800, 3831).

The judge then consulted Adkins, Florida Criminal Law and Procedure, as to indictments and the allegation of time therein, noting such cases as Chandler v. State, 25 Fla. 728, 6 So. 768 (1889) and Whatley v. State, 46 Fla. 145, 35 So. 80 (1903), and summarizing the holding of such cases, to the effect that when the exact date of the offense is not material, it will be sufficient if the state proves any other date prior to the finding of the indictment and within the statute of limitations (R 4286-7). The state then noted that there was no statute of limitations for first-degree murder, a correct statement of the law pursuant to section 775.15, Florida Statutes (1983) (R 4288). Judge Stroker then stated that he proposed advising the jury that the state did not have to prove that the crime was committed on any particular date (R 4288). Defense counsel argued that while, as a matter of law, it was correct to say that the state did not have to prove the date alleged, time was an issue in the case (R 4289-4290). The judge, however, noted the limited scope of the jury question, and the state attorney pointed out on the record that neither a statement of particulars nor a statement of alibi had been filed (R 4290). Defense counsel stated that he objected, and the judge's written answer to the jury question reads, "The state is not required to prove that the crimes were committed on any particular date." (R

4068).

On appeal, appellant contends that the manner in which the judge responded to the jury's question was error, given the existence of the times set out in the state's Demand for Notice of Intention to Claim Alibi. Appellee disagrees, and notes that this particular argument was not presented to the trial court below; under Steinhorst v. State, it has been waived, as not properly presented to this court. Additionally, appellee would note that appellant has cited no authority for the proposition that a statement of particulars, such document sought and obtained pursuant to Florida Rule of Criminal Procedure 3.140(o), is the equivalent of a prosecution demand for notice of alibi, filed pursuant to Florida Rule of Criminal Procedure 3.200; the purpose of the first document is to formally advise the defendant of the nature and cause of the accusation against him, and to afford him an opportunity to prepare a defense, whereas the purpose of the demand for alibi is obviously to assist the prosecution in anticipating any alibi evidence offered by the defense. In this case, as noted by the parties below, the defense never responded to the state's alibi demand, and, thus, it would seem highly debatable the extent to which the state was "bound" by its representation in such unanswered pleading; additionally, the matter of any lack of compliance on the state's part, in reference to the motion for statement of particulars, was never brought to the attention of the trial court below, an inaction which appellee would contend constitutes an abandonment. See, Leeman v. State, supra.

It must be noted that a trial court has wide discretion in determining whether or not to have testimony reread to jurors upon request or to reinstruct the jury in any manner. See, Henry v. State, 359 So.2d 864 (Fla. 1978); Kelley v. State, 486 So.2d 578 (Fla. 1986). This court has additionally held that a trial court need only answer questions of law, as opposed to that of fact, raised by the jury. See, Kelley, supra; State v. Ratliff, 329 So.2d 285 (Fla. 1976). In this case, the judge chose to answer the narrow question of law put to him and, in doing so, correctly stated the law. As the case cited in Adkins indicated, it is indeed the law that despite the specific allegation of an exact date in an indictment, a different time may be shown at trial and conviction may be had if proof shows that the offense was committed at any time prior to the accusatory date of the indictment and within the statute of limitations. See e.g., Horton v. Mayo, 15 So.2d 327 (Fla. 1943); State v. Clein, 93 So.2d 876 (Fla. 1957). Appellant has failed to demonstrate the existence of error in any regard, in reference to the manner in which the trial court responded to the jury's question sub judice.

Finally, the state would simply note that, to the extent that the alibi demand could be said to constitute a more specific statement of the times of the offenses, as noted earlier, appellant failed to bring this matter to the attention of the trial court; similarly, by its failure to answer such demand, the state would contend that the defense robbed these allegations of any binding import. Additionally, there is no view of the

evidence presented at trial which would not support the instant convictions; whether measured from the date alleged in the indictment, or the more specific times set out in the demand for notice of intention to claim alibi, the state proved its case, given the testimony of the medical examiner. Cf., State v. Beamon, 298 So.2d 376 (Fla. 1974). The jury's question was, in all likelihood, spurred by uncertainty on their part as to the significance, if any, of the fact that some of the victims might have expired after midnight; under the circumstances of this case, the judge correctly responded to that question.

Due to the lack of a formal notice of alibi or statement of particulars, as well as the fact that the defense presented no affirmative evidence of appellant's presence at any other location at the time of the homicides, preferring to "rely" upon the statement of July 1, 1985, introduced, and largely impeached, by the state itself, reversible error has not been demonstrated. Cf. Johnson v. State, 465 So.2d 499 (Fla. 1985) (special instruction on venue not required where only conflicting evidence inconsistent pretrial statement of defendant, submitted as part of state's case); S.B. v. State, 392 So.2d 592 (Fla. 2d DCA 1981); Miller v. State, 389 So.2d 1210 (Fla. 1st DCA 1980). Assuming this point is properly preserved or presented, appellant has failed to demonstrate reversible error, and the instant convictions should be affirmed.

POINT XIV

DENIAL OF APPELLANT'S MOTION FOR CONTINUANCE OF PENALTY PHASE WAS NOT ERROR.

The testimony at appellant's trial concluded on February 5, 1986, and counsel presented closing arguments on such date (R 1748-1818). When proceedings reconvened the next morning, the judge discussed with counsel the verdict forms in the case and, at 9 a.m., charged the jury (R 1822-6; 1827-1849). At the conclusion of such instruction, appellant's counsel stated that the defense wished a full day between the guilt and penalty phases, so as to provide for such latter phase; counsel noted that an expert witness was expected from Gainsville (R 1850). Counsel stated that if the verdict was returned late in the day, it would be difficult to have motions typed in time and to consult with appellant regarding any proposed testimony (R 1850). In response, the court noted that the penalty phase, if warranted, would not begin until the morning of the next day, and that counsel would, in fact, have a day to spend in preparation for such (R 1850-1). The record indicates that proceedings were then recessed at 9:37 a.m., and that the jury returned a verdict at 5:37 p.m. (R 1852).

The request for continuance was not renewed the next morning when proceedings reconvened; however, after presentation of all evidence, defense counsel placed on the record certain statements regarding the amount of preparation time (R 1976). At such point, counsel stated that he and co-counsel had conducted lengthy interviews with appellant on the preceding night and

that, despite such, it had been clear that appellant was insufficiently composed while testifying (R 1976-7). Counsel seemed to say that due to appellant's apparent mental or emotional state, the defense had not been able to ask him about the night of the homicides, and especially as to whether or not he had been intoxicated or under the influence of drugs at such time (R 1976). Judge Stroker simply noted that he felt it appropriate that the case go forward (R 1977).

On appeal, appellant contends that Judge Stroker abused his discretion in denying the requested continuance for the penalty phase, emphasizing the fact that, allegedly, evidence as to mitigation was excluded, due to appellant's mental state at the time he testified. Appellee disagrees, and would rely upon this court's prior decision of Williams v. State, 438 So.2d 781 (Fla. 1983). In such case, the defense had sought a continuance of the penalty phase, on the grounds that counsel had allegedly been unprepared to present any evidence of mitigating circumstances. In rejecting such claim for relief, this court noted the discretion enjoyed a trial court in passing upon a motion for continuance, even in the circumstances of a case where the death penalty is an issue. See also, Cooper v. State, 336 So.2d 1133 (Fla. 1976). This court likewise noted the fact that counsel had been appointed in the case some eleven months previously, and that such time could have been spent in preparation for both phases of the case; this court cited to its prior decision of Valle v. State, 394 So.2d 1004 (Fla. 1981), in which it had expressly held that there need be no continuance between a death

case's trial and sentencing hearing, where counsel has had a reasonable time prior to trial to prepare.

In this case, counsel was appointed in July of 1985, some **seven** (7) months prior to the sentencing hearing, and it is clear from the record that such counsel realized the potential applicability of the death penalty in this case early on (R 3770, 3807, 3845). Similarly, the record indicates that appellant was represented by **two** (2) assistant public defenders, one, it would seem, primarily responsible for the trial, and one, for the sentencing proceedings; it is, thus, likely that one counsel was continuously preparing for the penalty phase, at least during the trial, if not well before. It is also clear that counsel had all of February 5, 1986, to prepare, as well as the following night. Likewise, despite any premature doubts on the subject, the expert from Gainsville, Dr. Michael Radelet, was present at the penalty phase, and the defense was likewise able to call three members of appellant's family as witnesses (R 1908-1933; 1893-5; 1895-7; 1897-1905). Compare, Stewart v. State, 420 So.2d 862 (Fla. 1982). The record likewise reveals that, while no formal written motions were filed in reference to the penalty phase, defense counsel submitted ten (10) written jury instructions for the judge's consideration at such phase (R 4083-4094).

The only tangible assertion of prejudice, relating to appellant's alleged confusion and emotionalism while testifying, such condition allegedly having the effect of depriving the defense of an opportunity to elicit testimony concerning certain

mitigating factors, is largely refuted by the record. The transcript reveals that, during direct examination, appellant, at most, twice stated that he did not wish to discuss something (R 1948, 1951); in each instance, the response was made to such broad inquiry as, "Anything else?" and "Is there anything else you want to talk about?" (R 1948, 1951). The state would respectfully submit that it is unbridled speculation to suggest, as appellant does in his brief, that had appellant been "able" to answer these questions, he would have responded with testimony relevant to a mitigating factor; it is well established that reversible error cannot be predicated upon speculation. See, Sullivan v. State, supra. The state would also submit that the trial judge, who observed appellant's demeanor while testifying, was in the best position to evaluate this contention of prejudice, to the extent that this point was even "raised" following the presentation and close of all testimony. Cf. Lucas v. State, supra; State v. Barber, supra.

Additionally, it is much more likely that the fact that appellant did not expressly discuss his mental condition or whereabouts on the night of the homicides was the result of a tactical decision by counsel, as opposed to appellant's own emotional state. It must be noted that when the state, on cross-examination of appellant, sought to inquire as to his activities on the night of the murders, defense counsel objected, pointing out, successfully, that the issue was beyond the scope of direct examination in that the defense "specifically did not ask him about the night of the murders." (R 1951-3). Additionally, it

would seem unlikely that defense counsel **ever** sought to inquire at the **penalty** phase as to appellant's usage of drugs or alcohol on the night of the homicides. During opening statement, counsel stated,

> And some of the mitigating factors about Jerry Correll are that he had a lot to drink that night. **And you've heard that from testimony during the trial.** And Jerry smoked marijuana that night, **and you heard that from his own taped statement.** You're going to find out that Jerry has a history of drug and alcohol abuse. (R 1867).

The record indicates that defense counsel, on direct examination of appellant, did indeed bring out his involvement with drugs and alcohol (R 1939-40, 1947), and that her contention that there had been testimony at trial regarding appellant's usage of such substances on the night of the homicides was correct (R 1119; Transcript of Evidence).

Accordingly, appellee would contend that denial of the instant requested last minute continuance was not an abuse of discretion. The record reveals that the defense was able to bring out fully all of those matters, which it truly desired, at the penalty phase; appellant's statements during testimony that he, in essence, had nothing to say, such response **not** made in response to any inquiry for specific information, hardly bespeaks the actual exclusion of evidence. The instant sentences of death should be affirmed.

POINT XV

APPELLANT'S FOUR SENTENCES OF DEATH ARE PROPER AND SHOULD BE AFFIRMED.

At the penalty phase, the state recalled the pathologist to testify in greater detail as to the manner in which the victims were murdered, while the defense called appellant, as well as a number of his family members, to present evidence in mitigation (R 1869-1892; 1893-1955). Following the presentation of such testimony, advisory verdicts were returned (R 2009-2011); the jury recommended that appellant receive the death sentence for each of the four convictions (R 2009-2011; 4075-4077, 4079-4081). Following announcement of such verdicts, the court was in recess, while the judge prepared his preliminary findings (R 2015). Subsequently, counsel presented their final arguments to the judge, and after a second short recess, appellant appeared before the court for sentencing (R 2015-2025).

At such time, Judge Stroker sentenced appellant to death in reference to each of his four convictions, and rendered a detailed sentencing order with findings of fact, pursuant to Section 921.141(3), Florida Statutes (1983) (2025-8; 4095-8). In such order the judge found two (2) specific aggravating circumstances in reference to the murder of Susan Correll, two (2) specific aggravating circum- stances in reference to the murder of Marybeth Jones, three (3) specific aggravating circumstances in reference to the murder of Tuesday Correll and one (1) specific aggravating circumstance in reference to the murder of Mary Lou Hines; the judge additionally found that appellant had previously been convicted of another capital

offense, by virtue of his four (4) contemporaneous convictions of first-degree murder (R 4095-7). The judge found no mitigating circumstances to exist, statutory or otherwise, and directed that four (4) sentences of death be imposed (R 4097-8). On appeal, appellant challenges all of the above findings.

A. APPELLANT'S SENTENCE OF DEATH FOR THE MURDER OF SUSAN CORRELL IS SUPPORTED BY VALID AGGRAVATING CIRCUMSTANCES.

In his findings of fact, Judge Stroker expressly found that this homicide was committed during the course of a sexual battery, pursuant to section 921.141(5)(d), Florida Statutes (1983), and that it was especially heinous, atrocious or cruel, pursuant to section 921.141(5)(h), Florida Statutes (1983) (R 4095-6). Likewise, further in the sentencing order, the judge noted that by virtue of his contemporaneous convictions of first-degree murder, appellant had previously been convicted of another capital felony, that aggravating circumstance set forth in section 921.141(5)(b), Florida Statutes (1983); it is appellee's contention, to be discussed in more detail infra, that this aggravating circumstance was found as part of at least three of the four sentences of death sub judice, if not all. On appeal, appellant challenges all of the aggravating circumstances found as to this sentence, contending that the state failed to prove that Susan Correll was alive at the time that she was sexually battered and that the state further failed to prove that she suffered sufficiently so as to justify the finding of heinousness. Appellee finds neither of these arguments to possess merit, and suggests that the instant sentence should be approved.

The evidence in this case indicated that Susan Correll had at least fourteen (14) separate stab wounds, and that she bled to death from a massive hemorrhage produced by the wounds to her chest and abdomen (R 777, 1871). According to the pathologist, the wounds were inflicted in two "clusters" or "phases", one involving the infliction of superficial yet painful and traumatizing wounds to the neck, followed by the "killing" phase, involving the infliction of fatal wounds to the chest, back and abdomen (R 1869-1870; 1891). Doctor Hegert testified that the wounds, which penetrated the lungs, wouLd have resulted in severe pain, and that they would not have incapacitated the victim or rendered her unconscious (R 1876); indeed the doctor testified that the victim could have lived for as long as ten to fifteen minutes after infliction of these wounds (R 1877). The autopsy slides indicate that Susan Correll suffered an extremely extensive wound to the abdomen, some seven inches deep, which resulted in the exposure of a great deal of her intestine (R 769, 770); the pathologist testified that there were indications that either the victim or the knife had moved while this wound was being inflicted (R 770). Likewise, the testimony and the slides indicate the existence of a significant number of defensive wounds on both of the victim's hands, indicating that she sought to defend herself against the constant onslaught and that, as a result, she cut herself on the knife (R 773-5); slide number 530 reveals that her left thumb was practically severed. The pathologist also noted the presence of a number of bruises and abrasions on the victim's forehead, shoulder blade, thighs and

legs (R 781-2).

The bloodstain pattern expert testified that, in her opinion, Susan Correll had been stabbed in the hallway outside of her bedroom (R 1535-7). She had then been dragged into the bedroom and placed on her bed; the pathologist testified that there was no way that Susan Correll would have been able to travel this distance on her own (R 782,1885). The teeshirt which she had been wearing at the time she had been stabbed was removed, and when she was found, Susan Correll was nude (R 778). Additionally, her body was partially covered by a sheet, and the area from the mid-chest to the feet had been wiped clean of blood, a condition which could not have existed "naturally" given the existence of substantial wounds (R 752-3). A pillow was found on top of the deep abdominal wound, and two different bloodstains were found on the pillow; one type was consistent with that of Susan Correll, while the other was consistent with that of appellant only (R 755, 1375). As best as can be determined, the testimony of the bloodstain pattern expert did not rule out the possibility that these bloodstains were transferred onto the pillow at a point in time when one body was atop the other (R 1524-6). While no evidence of genital trauma was found, intact spermatozoa were found in Susan Correll's vagina (R 756, 1431); David Baer testified that, given appellant's blood type and "secretor status", appellant could not be ruled out as being the "source" of the semen, which could have existed in the victim's body from anywhere between eight hours to three days prior to discovery (R 1433-4). The pathologist

testified that the lack of genital trauma could be consistent with commission of a sexual battery after the victim was dead (R 756-7, 839-40, 851, 1888).

Appellee suggests that the judge's finding that a sexual battery occurred sub judice is supported by the evidence and should be approved. Compare, Lightbourne v. State, 438 So.2d 380 (Fla. 1983). The fact that there was no obvious evidence of genital trauma does not mean, as appellant contends, that the sexual battery could only have occurred after the victim was dead; the pathologist testified that after the chest wound had been inflicted, Susan Correll could have lapsed into unconsciousness, a condition which could likewise explain the absence of trauma (R 1877). In any event, even should the assault have occurred after the victim's death, such would not be to appellant's benefit. This court considered an identical question of error in McCrae v. State, 395 So.2d 1145 (Fla. 1980). In such decision, this court approved the aggravating factor at issue, where the rape had occurred "either shortly before **or immediately following** Mrs. Mears' death." Id., at 1153. McCrae subsequently filed a petition for writ of habeas corpus, in which he alleged, inter alia, that the jury instructions in his case had been defective, because they might have allowed the jury to have convicted him of sexual battery when in fact he might "only" have violated a dead body. See, McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983). This court rejected the claim of error, noting that an attempt to commit rape would have sufficed, stating,

> From the fact that the attacker did in fact have sexual union with the body of the victim, either before or after her death, the jury could have inferred that rape was what he intended to do. The overt act of sexual violation, whether the victim was alive or dead, together with the intent inferable from the circumstances, was sufficient to prove the crime of attempted rape, if in fact the jury believed that the victim was dead. Since it was later unclear from the expert testimony whether the victim was alive or dead at the time, the jury could have concluded that appellant believed she was alive or at least that he originally set out to have forced sexual contact with her while she lived. The fact that a rape may not have occurred because the intended victim was dead at the time of the actual penetration would not have changed the attacker's intent, which was properly inferable from the evidence. Id. at 871.

In this case, it is clear that Susan Correll's death occurred during the same criminal episode as the sexual battery and, as a result, the finding of this aggravating circumstance was proper. Compare, Way v. State, 496 So.2d 126 (Fla. 1986); Adams v. State, supra. Indeed, appellant's desire to be the last man to have sex with Susan Correll may have been the motivating factor underlying all four homicides. On the basis of the above precedents, the instant aggravating circumstance should be approved.

The judge's finding that the instant homicide was heinous, atrocious or cruel should likewise be approved. Appellant's contention that Susan Correll, like the other victims, did not live long enough to suffer is expressly refuted by the testimony of the pathologist. Indeed, the evidence shows that she lived for minutes in great pain and, in all likelihood, great terror, knowing that she and those she loved were to be murdered. As evidenced by the defensive wounds on her hands, she valiantly

sought to defend herself from the onslaught of repeated stabbings; she may have inflicted some of the cuts and scratches later found on appellant. The evidence likewise reveals the conscious intent on the part of appellant to torture Susan Correll, by inflicting a number of terrifying, painful stab wounds to the neck and face, followed by a "phase" of fatal wounds to the chest and abdomen. It is also likely that Susan Correll was forced to watch her own daughter being held hostage, if not worse, prior to the time that Susan herself, living or dead, was forced to submit to appellant's final act of degradation and dominance.

This aggravating circumstance is designed to apply to a homicide which is apart from the norm of capital felonies, one which is a conscienceless or pitiless crime which is unnecessarily torturous to the victim. See, State v. Dixon, 283 So.2d 1 (Fla. 1978); Magill v. State, 425 So.2d 649 (Fla. 1983). Appellee suggests that extended discussion on this point is not necessary, and, based on this court's prior precedents, maintains that the instant aggravating circumstance should be approved. Compare, Floyd v. State, 497 So.2d 1211 (Fla. 1986) (victim lived for two to four minutes after sustaining fatal stab wound to chest, but stabbed a total of twelve times, including defensive wounds); Hooper v. State, 476 So.2d 1253 (Fla. 1985) (victim slashed and stabbed repeatedly, with defensive wounds); Bertolotti v. State, supra (victim stabbed repeatedly, beaten; evidence indicated sexual intercourse, although no genital trauma); Duest v. State, 462 So.2d 446 (Fla. 1985) (multiple stab

wounds); Mason v. State, 438 So.2d 374 (Fla. 1983) (victim lived one to two minutes after being stabbed, choking on her own blood); Waterhouse v. State, 429 So.2d 301 (Fla. 1983) (victim suffered numerous bruises and lacerations, presence of defensive wounds noted); Booker v. State, 397 So.2d 910 (Fla. 1981) (victim stabbed, beaten and raped).

Finally, it is the state's contention that the aggravating circumstance relating to a prior conviction of capital felony was found as to this homicide, and that such finding was proper. After the judge set forth the specific findings and aggravation of each homicide, he included the following paragraph in his findings, prior to that involving a general lack of mitigating factors, applicable to all sentences:

> THE DEFENDANT HAS BEEN PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY
>
> This aggavating factor is supported by the Defendant's contemporaneous conviction of four separate First-Degree Murders. Hardwick v. State, 461 So.2d 79 (Fla. 1984) (R 4097).

Due to its placement in the order, appellee contends that this finding was intended to apply to all four homicides, or, should this court disagree, at least to three; appellant in his brief does not expressly attack this finding; but regards it as applying only to the murder of Mary Lou Hines (Brief of Appellant at 108-9). It is necessary to look to Hardwick, as well as to the cases which have preceded and followed it, to determine the propriety of this finding.

In Meeks v. State, 339 So.2d 186 (Fla. 1976), this court held, largely in dicta, that a contemporaneous conviction for a

crime of violence against the murder victim, i.e., such as robbery, could not be considered as a "previous" conviction for the purposes of section 921.141(5)(b). Subsequently, however, in Lucas v. State, supra, this court held that a contemporaneous conviction for attempted murder of another victim could so qualify, as long as the conviction for the offense was entered "previous" to the capital sentencing; in Lucas, all of the offenses arose from the same course of conduct at issue in the capital trial.

In King v. State, 390 So.2d 315 (Fla. 1980), this court expressly receded from Meeks, and, analogizing the situation to that in Elledge v. State, 346 So.2d 998 (Fla. 1977), held that contemporaneous convictions could indeed be "prior" for these purposes. King and Lucas have been continuously followed, usually, however, in instances where, for a variety of reasons, the defendant faces only one sentence of death. Compare, Fitzpatrick v. State, supra (contemporaneous convictions of attempted murder used as aggravating circumstance in a death sentence); Johnson v. State, 438 So.2d 774 (Fla. 1983) (same); Pope v. State, 441 So.2d 1073 (Fla. 1983) (contemporaneous convictions of first-degree murder of other victim, for which life imposed, used as aggravating circumstance in death sentence); Thomas v. State, 456 So.2d 454 (Fla. 1984) (same); Lara v. State, 464 So.2d 1173 (Fla. 1985) (conviction of lesser degree of homicide of other victim used in aggravation in death sentence); Hoffman v. State, supra (supra). In Hardwick, this court, over a vigorous dissent, approved the use in aggravation

of contemporaneous convictions for robbery and sexual battery of the murdered victim. This court cited Elledge for support, and stated that separate acts of violence against a victim were no less revealing as to the character of the defendant than those acts perpetrated on separate victims; in the dissent, Justice McDonald argued that this procedure was "double scoring" felonies which were already scored under section 921.141(5)(d).

Despite the trial court's reliance, the situation in this case would not really seem to be that at issue in Hardwick. Indeed, the situation in this case would seem to be one without a great deal of precedent - one involving the simultaneous convictions of multiple counts of first-degree murder and the imposition of multiple sentences of death. In contrast to the precedents above, there is no "lesser" felony conviction to "sacrifice" for the satisfaction of section 921.141(5)(b). The only possible prior precedents in this field, to the undersigned's knowledge, would seem to be Groover v. State, 458 So.2d 226 (Fla. 1984), in which the defendant was convicted of three counts of first-degree murder and received two death sentences. Although both death sentences were before this court, the opinion does not extensively discuss the findings in support of each. This court did note, however, that the trial court had correctly found, in support of the death sentence for the murder of victim Padgett, that the defendant had a previous conviction of another capital felony, by virtue of his contemporaneous convictions for the murders of victims Dalton and Sheppard; whether or not the Padgett murder was likewise considered as a

previous conviction in the sentence imposed in the Dalton case is unclear.

In any event, the state would contend that appellant's conduct in murdering four persons was indicative of his character and of his violent propensities. See, Hardwick, supra; Elledge, supra. As such, there would seem to be no reason, under King and Hardwick, why the instant aggravating circumstance should not be found as to all four of appellant's death sentences. Following the return of the verdicts of guilty, Judge Stroker orally adjudicated appellant guilty on each count (R 1855). At the time of the sentencing procedure of Febraury 7, 1986, appellant was a four-time convicted murderer and, in contrast to the situation in Hardwick, there is no "double scoring" sub judice, in that each sentence of death is imposed in regard to an individual victim. In the alternative, to the extent that this court disagrees, and, to the extent that any one of the victims must be "first", i.e., that conviction constituting the "previous" one, such victim would seem to be Mary Lou Hines, in that she was named in Count I of the indictment, and, arguably, at the time of appellant's conviction of her murder, no "previous" conviction existed (R 3820-2; 4070); accordingly, appellee contends that this aggravating circumstance was properly found as to the other three victims, including Susan Correll, and the instant sentence of death should be affirmed.

B. APPELLANT'S SENTENCE OF DEATH FOR THE MURDER OF MARYBETH JONES IS SUPPORTED BY VALID AGGRAVATING CIRCUMSTANCES.

In his findings of fact, Judge Stroker found that the murder of Marybeth Jones had been committed during the course of a

robbery, pursuant to section 921.141(5)(d), Florida Statutes (1983), and that it had likewise been committed for the purpose of avoiding or preventing a lawful arrest, pursuant to section 921.141(5)(e), Florida Statutes (1983); as argued above, it is appellee's contention that that aggravating circumstance pertaining to the previous conviction of a capital felony, pursuant to section 921.141(5)(b), was found as to this offense. On appeal, appellant contends that each of the above findings was error, in that the state allegedly failed to prove that appellant's taking of Miss Jones' automobile did not in fact take place after her death. Appellant likewise argues that, because Miss Jones was not a law enforcement officer, the state failed to prove that her murder was motivated by a desire to avoid arrest and detection. Appellee finds both of these contentions to be without merit, and further suggests, pursuant to Echols v. State, supra, that the record reveals the presence of unfound aggravating circumstances in reference to this homicide.

The evidence in this case indicates that Marybeth Jones suffered at least fourteen (14) stab wounds, and that she bled to death from a massive hemorrhage, as a result of the stab wounds to her chest (R 824). The pathologist likewise testified, as in the case of Susan Correll, that these wounds had been inflicted in two phases, the first involving the infliction of superficial, yet painful and traumatizing wounds to the neck and face, the second involving the "killing" phase, wherein fatal wounds were inflicted to the chest (R 1881-3). Again, as with Susan Correll,

the wounds were not immediately fatal, and the doctor testified that the victim could have lived up to ten minutes after the chest wounds were inflicted (R 1882). Doctor Hegert testified that one of the wounds was consistent with a knife having been drawn across the victim's neck, and further noted that one of the major veins on the neck had been penetrated (R 820). The doctor stated that some of the wounds could have been inflicted from behind or while the victim was lying on the floor (R 820-1). The fatal stab wounds had penetrated the lung, liver and kidney (R 821). The doctor noted the presence of slight defensive wounds on the hands (R 822-3).

In all likelihood, according to the bloodstain pattern expert, Miss Jones was first attacked in the kitchen, her body then dragged through the utility room and into her bedroom (R 747-8, 886, 1539-40). When she was found, Marybeth Jones was wearing only a blouse and a pair of panties (R 814); an ice cube tray was found out on the kitchen counter which was spattered with blood matching that of either Marybeth Jones or appellant (R 271). Blood consistent with that of appellant was found on several items in her room, including her wallet and purse (R 276). At the time she was found, the television and fan in her room were both still turned on, and the door to the outside was locked and bolted (R 595). Additionally, at the time that the wallet was found, it contained no paper currency, although a witness who had been in the company of Miss Jones earlier that day, testified that he had seen bills inside of her wallet (R 583); when appellant was arrested, a bloodstained twenty dollar

bill was found in his possession (R 1429-30). Likewise, when Miss Jones was found, her automobile, a black Mustang, was missing. Her boyfriend testified that he had last seen her drive off toward home at around midnight on the night of the murders (R 573); the car was later found, abandoned in a parking lot, with a bloodstain on the driver's seat, and the keys subsequently turned up on the trunk of Richard Henestofel's disabled vehicle (R 997, 1026-7, 1205-8, 1426).

In his findings, the judge found that the murder of Marybeth Jones had occurred in the course of the robbery of her automobile, the judge noting that appellant had utilized the car as a get away vehicle (R 4096). Appellant's attacks upon this finding would seem misplaced, given the fact that Lawrence Smith testified that appellant admitted driving the car on the night of the homicides, as well as taking his sister-in-law's keys (R 1263, 1268-9, 1276). Additionally, appellant's arguments bear great similarity to those rejected by this court in Bates v. State, 465 So.2d 490 (Fla. 1985). In such case, the defendant was found in possession of the victim's diamond ring, but argued that he had not taken it until after stabbing her to death. This court found that a robbery had occurred nonetheless, observing that "but for the force and violence used against and done to the victim, Bates would not have obtained her ring." Id. at 492. See also, Randolph v. State, 463 So.2d 186 (Fla. 1984)(facts would indicate that defendant shot victim and then took money out of trucks; aggravating circumstance of commission of homicide during robbery found). Additionally, as in Way, supra, it is

clear that the capital murder of Marybeth Jones occurred during the same criminal episode as the robbery. The state suggests that this aggravating circumstance was properly found, in that it is clear that force and violence were used against the victim prior to or contemporaneously with the taking of her property. Cf. Eutzy v. State, 458 So.2d 775 (Fla. 1984).

Likewise, the trial court's finding of avoidance of arrest as an aggravating circumstance was proper. In his brief, appellant correctly states the law, as derived from this court's prior holdings, to the effect that when the victim is not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong; indeed, it must be shown that the dominant or only motive for the murder is the elimination of the witness. See, Riley v. State, 366 So.2d 19 (Fla. 1978); Menendez v. State, 368 So.2d 1278 (Fla. 1979). This court held in Bates v. State, supra, that the mere fact that a witness "might" be able to identify an assailant is insufficient; however, in both Riley and Clark v. State, 443 So.2d 973 (Fla. 1983), this court approved this finding, noting, inter alia, that the victim had in fact known the defendant. Although this factor is often found where the defendant has made an express statement indicating his motivation in killing the victim, such is not a prerequisite, where intent can be otherwise inferred from the evidence. See, Routly v. State, supra. In this case, it is clear that Marybeth Jones knew appellant, her former brother-in-law, quite well, and that appellant murdered her to prevent her from reporting the other murders which he had committed that

night.

All of the evidence indicates that Marybeth Jones was the last victim killed, in that she was out of the house until after midnight; a neighbor may have heard the screams of the previous victims prior to her return (R 610). It would appear that Miss Jones entered the house through her private entrance in the den or family room, and that she then proceeded to prepare for bed; because she had entered the house in this way, she would have had no inkling as to what had gone on in the other rooms. The record indicates that Marybeth Jones started to get undressed for bed, that she turned on the fan and television set and that she went into the kitchen, probably to have a drink or snack. While she was so occupied, she was viciously attacked from behind, and stabbed to death.

It is clear that appellant wished no survivors from his night of murder. All of the telephone lines in the house were cut and, significantly, when one such line was cut, the knife which severed the phone line was already bloody (R 1529); appellant obviously wished no outgoing calls to be made of any sort. It is unclear whether or not Marybeth Jones' return surprised appellant, but, if it did, he obviously had time to prepare himself. Given his appearance at the scene of the murder on the next day, and the fact that the thermostat was turned down to its lowest setting so as to delay decomposition of the bodies, it would seem a reasonable inference that appellant, for whatever reason, had decided to be the one to discover the bodies. Obviously, Marybeth Jones' untimely return would have prevented

this scenario; as it was, of course, the action of Mary Lou Hines' employer likewise frustrated appellant. Judge Stroker was correct in finding this aggravating circumstance, in that witness elimination was the sole motive for appellant's murder of Marybeth Jones; she was an unwitting witness to murder, and she paid with her life. This aggravating circumstance should be approved. Compare also, Hooper v. State, supra (daughter witnesses murder of mother and is executed; avoidance of arrest found); White v. State, 403 So.2d 331 (Fla. 1981)(unexpected visitors at home where "contract" murder to take place murdered; avoidance of arrest found).

Additionally, appellee would contend that the record supports two other aggravating circumstances in this case. In Echols v. State, supra, this court, in reviewing a sentence of death, observed that the trial court had inexplicably failed to find an additional aggravating circumstance. This court stated that it noted the presence of such factor,

> in accordance with our responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence in matters appearing in the record should be considered that support the trial court's decision. (Citations omitted) Id, at 576-7.

In this case, appellee respectfully submits that no reason exists for the court below not to have found Marybeth Jones' murder to be heinous, atrocious and cruel, pursuant to section 921.141(5)(h). Her murder was, in all material respects, carried out in the same manner as that of the other victims; it involved two "phases" of stabbings, great pain and lengthy minutes of

anguish and terror before the infliction of the fatal wounds. While the number of defensive wounds in this case is apparently fewer than that in the case of Mary Lou Hines or Susan Correll, such factor is not dispositive, given the number of stab wounds overall and the manner of death; the presence of what could be appellant's blood in the kitchen and den would seem indicative of resistance on the part of this victim (R 1413-1423). This aggravating circumstance should have been found. Compare, Bertolotti, supra; Floyd, supra; Duest, supra. Likewise, in finding that the homicide had occurred during the course of a robbery, the judge could have found such robbery proven by the theft of money from Miss Jones' purse after appellant's stabbing of her; appellant's blood was found inside the victim's purse, and on her wallet, and a bloodstained twenty dollar bill was found on his person after his arrest. To the extent that this court might disapprove the present finding of robbery as to the automobile, this finding should be considered as an equivalent. In conclusion, the record supports at least four aggravating circumstances in reference to the murder of Marybeth Jones, three of which were found by the judge. The instant sentence of death should be affirmed.

C. APPELLANT'S SENTENCE OF DEATH FOR THE MURDER OF TUESDAY CORRELL IS SUPPORTED BY VALID AGGRAVATING CIRCUMSTANCES.

In support of the death sentence in this case, Judge Stroker found three aggravating circumstances, that the murder had been committed for the purpose of avoiding arrest, pursuant to section 921.141(5)(e), that the murder was especially, heinous, atrocious or cruel, pursuant to section 921.141(5)(h), and that the murder

was committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification, pursuant to section 921.141(5)(i), Florida Statutes (1983); as argued previously, it is also appellee's position that that aggravating circumstance relating to a prior conviction of a capital felony, set forth in section 921.141(5)(b), was found as to this homicide. On appeal, appellant argues that each of these findings was erroneous, in that there was no showing that Tuesday suffered before her death, that the motivation for her murder was witness elimination or that her murderer had premeditatively fully contemplated her death. Appellee finds these contentions to be totally without merit.

The evidence in this case indicates that Tuesday Correll suffered at least ten (10) stab wounds, and that she bled to death from a massive hemorrhage as a result of the multiple stab wounds to her chest (R 798). As with the other victims, the pathologist testified that the wounds were inflicted in two "phases", the first involving the infliction of superficial, yet painful and traumatizing wounds to the head, such "phase" followed by the infliction of fatal wounds to the chest (R 1879-1881). In this instance, one such terrorizing wound was a stab wound to the ear, and the pathologist also noted marks on Tuesday's neck which would have been consistent with the knife having been pressed very hard against it; the doctor stated that such mark was consistent with the child having been held as a hostage, and noted that slight movement had produced a superficial cut (R 790-1, 1879-1880). Likewise, the pathologist

noted the cluster of stab wounds to her chest, including wounds which had penetrated her lungs and heart (R 791-6). The doctor pointed out the "butterfly" or "heart" configuration of one such wound, seemed to indicate that either the knife or the child had moved during the stabbing (R 792-3). Doctor Hegert stated that the wounds to the lung would have been quite painful, and that the child would have lived between two to three minutes after infliction of the chest wound (R 1880-1). The doctor also noted the presence of stabs on the child's back and a number of abrasions or bruises on her legs (R 796-7). When she was found, Tuesday was clad in a nightgown and panties, and the bloodstain pattern expert testified that Tuesday was stabbed while in the hallway, and that she was later moved to the bed in her room (R 788, 1534-5).

Appellee suggests that the above evidence was more than sufficient to justify a finding that the murder was especially heinous, atrocious or cruel. It is clear that this murder was pitiless and unnecessarily torturous to Tuesday Correll. It was not necessary that her father murder her in "phases", that he first terrorize her by slashing at her face and throat, and that he press the knife so tightly against her neck that the slightest movement would draw blood. As the judge noted, it is difficult to imagine the mental anguish that Tuesday Correll must have gone through, knowing that she was to die at the hands of her own father, and, very possibly, after observing her father slash and stab her mother as well; such latter proposition is highly likely, given the presence of bloodstains in the hallway from

both Susan and Tuesday (R 1534-7). Additionally, it is clear that Tuesday lingered in pain for several minutes after the fatal chest wound was inflicted, and the evidence indicated that she was still moving when she was stabbed. Considering the mental anguish of the victim, and the horrible manner in which she died, the finding of this aggravating circumstance was correct. See, Jennings v. State, 453 So.2d 1109 (Fla. 1984); Mann v. State, 420 So.2d 578 (Fla. 1982) (child stabbed to death); Hooper v. State, supra; Rutledge v. State, 374 So.2d 975 (Fla. 1979) (child stabbed to death); Floyd v. State, supra; State v. Dixon, supra.

Further, it was proper for the court to have found that the murder was committed for purpose of avoidance of arrest. As in the case of Marybeth Jones, it is clear that the defendant was well known to the victim in this case; he was her father. Likewise, the evidence supports no conclusion but that Tuesday was killed because she had witnessed appellant murder her mother and/or, possibly, her grandmother. See, Riley, supra; Menendez, supra; Clark v. State, supra, (no other motive for slaying readily apparent). This case seems virtually identical to Hooper v. State, supra. In such case, the defendant had been residing with his brother and his brother's family; one night he brutally murdered his sister-in-law and niece and attacked his nephew. This court upheld the trial court's finding that Hooper's murder of the child had been for the purposes of avoidance of arrest, in that, from the evidence, it was clear that the child could have witnessed the murder of her mother; both victims, as here, had already retired to bed and had been awakened by the murderous

act, their bodies being found in various rooms of the apartment. On the basis of Hooper, the instant aggravating circumstance should be approved, in that it is clear that appellant intended to leave no potential witness alive and that, following his initial wounding or incapacitation of Tuesday, a different motivation took over. See, Kokal v. State, 492 So.2d 1317 (Fla. 1986).

Likewise, again as in Hooper, the instant homicide was correctly found to have been committed in a cold and calculated, premeditated manner. This court has held that this aggravating circumstance applies in those murders which are characterized by execution or contract murders or witness elimination murders, although such description is not intended to be all inclusive. See, Herring v. State, 446 So.2d 1049 (Fla. 1984). What is required is that there be heightened premeditation, and that the murderer fully contemplate effecting the victim's death. See, Hardwick v. State, supra. This aggravating circumstance can be shown by the manner in which the crime has been committed. See, Provenzano v. State, 497 So.2d 1179 (Fla. 1986).

It is clear that appellant fully contemplated the death of Tuesday Correll, and this contemplation is evidenced by the manner in which he chose to murder her - the repeated infliction of stab wounds to her chest, lungs and heart. As the sentencing court noted, some of the wounds were inflicted while the victim was moving and/or while the knife was being moved while within her chest; the basis for this finding would seem to be the autopsy slides, showing "L" or "heart" shaped wounds (R 4097).

This type of action exemplifies the heightened premeditation, as one can picture appellant intentionally stabbing the very life out of his five year old daughter, despite her lack of resistance. These fatal wounds, likewise, only followed a preliminary round of torturing and terrorizing, which involved the stab wound to the ear and the holding of the knife to the throat; this court has approved this aggravating circumstance, where it is clear that repeated attacks have been made upon the victim. Compare, Puiatti v. State, 495 So.2d 128 (Fla. 1986).

Again, Hooper is good precedent in this regard, in that in such case the court likewise found that the child, who had been murdered to prevent her from being a witness against the defendant, had also been murdered in a particularly cold and calculated manner. The trial court had based this finding upon the fact that there was no pretense of moral or legal justification for the child's murder, in that, from all the evidence presented, the child had loved the defendant. Aside from Donna Valentine's testimony regarding appellant's aloofness toward Tuesday in the week preceding the homicides, it would seem that the prior relationship between appellant and Tuesday had indeed been good; likewise, from all indications, Tuesday loved her father. The court in Hooper concluded that the defendant had executed the child, given the lack of any proper motive, a conclusion which is inescapable in this case, given the fact that Tuesday Correll, a five year old child, weighing all of thirty-five (35) pounds, was stabbed repeatedly through the heart (R 787).

This execution was the result of a preconceived plan on the part of appellant. It must be noted that he struck in the dead of night, at a time when the victims would be in bed, and that all of the phone lines for the house were cut; as noted, when one of these lines was cut, the knife used was already bloody. Compare, Lightbourne v. State, supra (phone lines cut). Further, the state places significance upon appellant's later statement to Lawrence Smith, to the effect that a jury would have to believe that anyone who would kill their own daughter would have to have been insane (R 1289). To appellee, this statement indicates that appellant contemplated Tuesday's death, as well as possible explanations for it, and that he was "counting on" the apparent senselessness of her murder. While Tuesday's murder apparently had at least one chilling purpose, the elimination of her as a witness, it is clear that appellant had other reasons for killing everyone at that house on Tampico Drive. Should he only have murdered the primary object of his hatred, Susan Correll, suspicion would inevitably have fallen on him. However, should all the occupants of such house be murdered, then, one could argue, as appellant did at trial, that one person was physically incapable of murdering so many people (R 1803-4, 1805). This "defense" seems akin to that unsuccessfully utilized by the infamous Dr. Jeffrey MacDonald, who, after murdering his wife, killed his two young daughters, so that he would be able to concoct a story about an attack by a crazed band of hippies. Cf., United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). Given the manner of Tuesday's death, the

motivation for it and the overall heightened premeditation in this case, appellee maintains that this aggravating circumstance was properly found. See, Hooper, supra.

Additionally, although appellant has not argued this specifically in his brief, appellee would contend that there has been no impermissible doubling in regard to the finding of both avoidance of arrest and cold and calculating manner of death. A number of prior precedents of this court have approved the finding of both of these circumstances in regard to the same homicide. See e.g., Hooper, supra; Herring, supra; Cooper v. State, 492 So.2d 1059 (Fla. 1986). Further as this court observed in Echols v. State, supra, there is no reason why the facts in a given case may not support multiple aggravating factors, providing the aggravating factors are themselves separate and distinct and not merely restatements of each other. Id. at 568. See also, Suarez v. State, 481 So.2d 1201, 1209 (Fla. 1985) (some overlap in facts supporting aggravating factors not fatal, where sufficient distinct facts support and make relevant both findings). In this case, the two findings are based upon sufficiently distinct facts, such that each can be sustained; it is clear that the manner of Tuesday's death, appellant's motivation in effecting it and his overall intent are separate matters for consideration. The finding of the four aggravating circumstances as to this homicide is correct, and the instant sentence of death should be affirmed.

D. APPELLANT'S SENTENCE OF DEATH FOR THE MURDER OF MARY LOU HINES IS SUPPORTED BY VALID AGGRAVATING CIRCUMSTANCES.

In support of the death sentence in this case, Judge Stroker

found that the instant homicide was especially heinous, atrocious or cruel, pursuant to section 921.141(5)(h); as argued earlier, appellee also contends that Judge Stroker found, as to this homicide, that appellant had previously been convicted of another capital felony, pursuant to section 921.141(5)(b). On appeal, appellant contends that the first finding is error, in that the state failed to prove that Mary Lou Hines survived long enough to suffer; appellant makes no attack on the second finding, and apparently concedes that it is correct. His arguments are without merit, and the instant sentence of death should be affirmed.

The evidence in this case indicated that Mary Lou Hines had at least fourteen (14) separate stab wounds, and that she bled to death from a massive hemorrhage of the chest cavity; the pathologist also noted that because of the penetration of her trachea, Mrs. Hines had been forced to breathe in some of her own blood (R 810-811). In contrast to the other victims, the two "phases" of attack were not present in this case. Instead, the evidence indicated that the wounds had been inflicted, for the most part, in one massive cluster (R 1870, 1883). The pathologist specifically identified those stab wounds which had penetrated the lungs, some of which were as deep as seven inches (R 805-6); he likewise noted those which had penetrated the aorta and the windpipe (R 807, 808). Doctor Hegert testified as to the presence of extensive defensive wounds on both of the victim's hands, and the slides introduced indicate that Mary Lou Hines' left hand was severely gashed and that her thumb was almost

severed (R 1883-4; 808-9, slide numbers 451, 452, 453); several of the fingers of her left hand were cut all the way to the bone (R 809). Her body had a significant number of bruises and abrasions in many areas, including around the jaw, forehead, bridge of the nose, legs and shoulder (R 803, 812, 1885). Doctor Hegert testified that the chest and hand wounds would have produced a significant amount of pain, and stated that the victim had, in all likelihood, lived for up to five minutes after infliction of the fatal wounds (R 1884-5).

It is clear from the testimony of both Doctor Hegert and the bloodstain pattern expert that a fierce bloody struggle had ensued between appellant and Mrs. Hines (R 1883-4, 747, 1540). She showed the most resistance of any victim. The struggle was so severe that Mrs. Hines' dental plate was knocked out (R 813). The bloodstain evidence indicated that Mrs. Hines was first attacked while outside of Tuesday's room, and that she was attacked fiercely while within that room; her blood was found spattered on the walls (R 1537-8). The expert likewise noted the presence of blood on the inside of the door and on the carpet, and stated that it was likely that the victim had been stabbed while kneeling on the floor or while backing up toward the bed (R 1538). The witness also stated that Mary Lou Hines had been stabbed while she was lying on the bed, and that the injuries to her forehead were consistent with her having come into contact, forcefully, with the wall (R 813, 1883). When she was found, the victim was wearing a nightgown, (R 800); a police officer testified that the bed in her bedroom was "down like someone had

gotten out of [it] but didn't go back to bed" (R 590).

This aggravating circumstance was properly found. This homicide involved the brutal murder of an innocent grandmother, roused from her sleep in the middle of the night, and stabbed to death in her own home. Compare, Breedlove v. State, supra; Harris v. State, 438 So.2d 787 (Fla. 1983). The evidence indicated that Mrs. Hines was in great pain prior to her death, given the stab wounds to her lungs and to her hands, and that she was aspirating blood (R 1876-7). Likewise, the record fully supports the judge's finding that the victim was bludgeoned about the head and neck and that she valiantly sought to defend herself, resulting in the infliction of grievous defense wounds to her hands; she may have inflicted some of the scratches and cuts observed on appellant's own forearms and hands. Given these facts and the fact that the victim had likewise already witnessed, or could expect to witness, the murder of her daughter and grandchild, her mental anguish and suffering must have been tremendous. This crime was truly unnecessarily torturous to the victim, and the finding of this aggravating circumstance was proper. See, Johnston v. State, 497 So.2d 863 (Fla. 1986); Bertolotti v. State, supra; Hooper, supra; Mason, supra; Booker, supra; State v. Dixon, supra. Given the presence of this valid aggravating circumstance, as well as that pertaining to appellant's prior conviction for another capital felony, the instant sentence of death should be affirmed.

E. THE TRIAL COURT DID NOT ERR IN FAILING TO FIND ANYTHING IN MITIGATION SUB JUDICE.

At the sentencing hearing, the defense presented the

testimony of appellant, as well as that of a number of other family members, and a defense expert (R 1893-1955). The "family" witnesses testified as to appellant's love for his family, his good relationship with his late father, his happy childhood and good character, as well as his recent interest in the Bible (R 1893-1905). Appellant himself testified concerning his upbringing, schooling, relationship with his parents, employment history, and interest in the Bible (R 1933-1945). Appellant likewise testified concerning his involvement with drugs and alcohol; at the guilt phase, testimony had been adduced regarding appellant's usage of such substances on the night of the homicides (R 1939-1940; 1119; Transcript of Evidence). Appellant testified regarding his relationship with the victims and his love for Susan and Tuesday (R 1945-1951).

Appellant argues on appeal that, on the basis of the above testimony, it was error for the court below not to have found appellant's age as a mitigating circumstance, pursuant to section 921.141(6)(g), Florida Statutes (1983) (Brief of Appellant at 107). Appellant also argues that the court should have found that the murders were committed while appellant was under the influence of extreme or emotional disturbance, pursuant to section 921.141(6)(b), Florida Statutes (1983), given the testimony as to the drug and alcohol usage and the testimony that the murders were the result of "an angry domestic dispute" between appellant and Susan Correll (Brief of Appellant at 108). Finally, based on the testimony regarding appellant's new-found interest in the Bible, appellant suggests that the court

below should have found non-statutory mitigating circumstances.

These contentions are without merit. The sentencing order in this case reads as follows:

MITIGATING FACTORS

> The Court has carefully considered all statutory mitigating factors and finds that no mitigating circumstance exists in the evidence of this case. The Court has also carefully examined and considered the record for any other factor or circumstance involving the case and the character of JERRY CORRELL. No mitigating circumstances can be found. (R 2097)

As this court has repeatedly held, it is within the trial court's discretion to determine whether sufficient evidence exists of a particular mitigating circumstance and, if so, the weight to be given it; as long as all the evidence and all the mitigating circumstances are properly considered, a trial court's failure to find a factor in mitigation will not be reversed simply because the defendant draws a different conclusion. See, Daughtery v. State, 419 So.2d 1067 (Fla. 1982); Lemon v. State, 456 So.2d 885 (Fla. 1984); Stano v. State, 460 So.2d 890 (Fla. 1984); Johnston v. State, supra. It is clear from the foregoing section of the sentencing order that Judge Stroker fulfilled his obligation to consider all of the evidence and any potential mitigating circumstances. It is likewise clear that a number of statutory mitigating circumstances, such as those involving the victim being a participant in the criminal act, or the defendant being an accessory or under the domination of another, are simply inapplicable. See, §§§921.141(6)(c), (d), and (e), Fla. Stat. (1983). Additionally, although appellant has not noted it, he

expressly waived that mitigating circumstance set out in 921.141(6)(a), Florida Statutes (1983), relating to any lack of significant history of prior criminal activity (R 1861-2).

Thus, the only potential statutory mitigating circumstances would seem to be those involving appellant's age, see section 921.141(6)(g), any impairment of his capacity to appreciate the criminality of his conduct, see 921.141(6)(f), Florida Statutes (1983), and any finding that the homicides were committed while appellant was under the influence of extreme mental or emotional disturance, pursuant to section 921.141(6)(b). It is clear that the judge was not required to find appellant's age (29) as a mitigating circumstance. See, Peek v. State, 395 So.2d 492 (Fla. 1981); Mason, supra; Cooper, supra. Likewise, it is clear that while evidence was presented which arguably could show some impairment on the part of appellant, i.e., that involving his alleged alcohol and drug use, this court has continually held that evidence of a defendant's usage of alcohol and marijuana on the night of a homicide does not compel the finding of those mitigating circumstances set forth in section 921.141(6)(b) or (f). Compare, Stone v. State, 378 So.2d 765 (Fla. 1979); Hall v. State, 403 So.2d 1321 (Fla. 1981); Hitchcock v. State, supra; Simmons v. State, 419 So.2d 316 (Fla. 1982); White v. State, supra; Cooper v. State, supra.

Further, any allegation of impairment on the part of appellant would seem refuted by his actions after the homicides, which included the theft of Marybeth Jones' car and the placing of her keys on Richard Henestofel's vehicle, in order to shift

the blame to him. Cf. Stone, supra. Additionally, there would not seem to have been any evidence as to any psychological problems suffered appellant, compare, Michael v. State, 437 So.2d 138 (Fla. 1983), and appellant's contentions that the homicides were committed during the course of a domestic dispute between appellant and Susan Correll would not seem worthy of extended discussion or consideration.

Finally, the judge's failure to find any non-statutory circumstance in mitigation, after a clear attempt to do so, was proper. As long as the judge has considered all of the evidence, there is no requirement that he make a particular finding. Compare, Lemon v. State, supra (fact that offense was crime of passion not found in mitigation); Daughtery v. State, supra (defendant's conversion to Christianity not found in mitigation); Porter v. State, 429 So.2d 293 (Fla. 1983) (defendant's employment history and status as a parent not found in mitigation). Additionally, given the fact that the crimes for which appellant was being sentenced were the heinous murders of his ex-wife and daughter, it is perhaps understandable why the court found appellant's latter-day declarations of familial love to ring hollow. The judge's failure to find anything in mitigation sub judice is proper, under the circumstances, and the instant sentences of death should be affirmed.

F. THE SENTENCES OF DEATH IN THIS CASE ARE APPROPRIATE IN ALL RESPECTS AND SHOULD BE AFFIRMED.

As part of its review of the instant sentences, this court will compare them to other sentences of death, which have been approved or disapproved in the past. See, Garcia v. State, 492

So.2d 360 (Fla. 1986). It is perhaps fortunate for the people of the State of Florida that, in the post-1972 history of capital appeals, there would not seem to be another quadruple "family" homicide of this enormity. Cf. Zeigler v. State, 402 So.2d 365 (Fla. 1981). Most instances of multiple homicides seem to involve drug-related executions, see e.g., Steinhorst v. State supra, or homicides occuring during the commission of various felonies, which, for some reason or another, go awry. See, Ferguson v. State, supra; White v. State, supra. To the extent that this case can be said to have any precedent, such precedent would include Hooper v. State, supra, Smith v. State, 407 So.2d 894 (Fla. 1981) and Rutledge v. State, supra. In Hooper, as noted earlier, the defendant savagely murdered his sister-in-law and then murdered her young daughter, his niece, who had, in all likelihood, witnessed the crime; the child was strangled, whereas Hooper repeatedly stabbed his other victim to death. In Smith, the defendant murdered a family friend and her daughter, by luring them into the woods and then strangling both of them; while the two were still alive, he slit the mother's throat and cut open the child's chest so that he could look at her heart. In Rutledge, the defendant attacked an entire family, stabbing the mother and one son to death, and severely wounding the other two children; the children apparently knew the defendant from school.

In each of these cases, the sentencing court found that the homicides at issue were especially heinous, atrocious or cruel, in that they were outside the "norm" of a capital felony. This

court upheld each finding, and, indeed, in Rutledge, such aggravating circumstance was the only basis for the death sentences; in Smith, this court did not expressly decide whether the other aggravating circumstance was correct, in that the trial court had expressly stated that death would have been imposed due to the heinous, atrocious or cruel manner of the killing. While the court below did not make such express statement sub judice, the state would suggest that the fact that the homicides at issue are heinous, atrocious **and** cruel is simply beyond dispute. Additionally, with some possible variation, given the four simultaneous convictions of first-degree murder, appellant must be regarded as having at least three prior convictions for a capital felonies. This court's approval of these two aggravating circumstances would result in the finding of at least one valid aggravating circumstance in each sentence of death. Even should this court disagree with the finding of the other aggravating circumstances, death would still be the appropriate sentence, given the lack of anything in mitigation. See State v. Dixon, supra; Hargrave v. State, 366 So.2d 1 (Fla. 1978); Blanco v. State, 452 So.2d 520 (Fla. 1984); Smith v. State, supra; White v. State, supra.

For these murders, death is not only an appropriate penalty; death is the only penalty appropriate. Appellant murdered four innocent people by repeatedly stabbing them to death. This is an atrocity which is not only beyond the "norm" of a capital felony, compare White v. State, 403 So.2d at 339, but also beyond the pale. One would be hard pressed to decide which of the homicides

at issue is the most shockingly evil or outrageously wicked. Cf., State v. Dixon, supra. To the extent that any one homicide can be singled out, it must be that of Tuesday Correll, and the state respectfully contends that, for that murder, appellant should share the fate of Ernest John Dobbert, whose heinous murder of his own child likewise resulted in a sentence of death, affirmed by this court. See, Dobbert v. State, 328 So.2d 433 (Fla. 1976). The instant sentences of death should be affirmed.

POINT XVI

CUMULATIVE ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO APPELLANT'S FOUR SENTENCES OF DEATH.

A. EXCLUSION OF CERTAIN PROFFERED TESTIMONY OF DEFENSE WITNESS RADELET WAS NOT REVERSIBLE ERROR.

On November 26, 1985, appellant filed a motion for a pre-trial ruling on the admissibility of certain penalty phase evidence, including testimony of various religious leaders against the death penalty, testimony relating to the "nature and consequences of death by legal electrocution" and certain sociological and statistical studies demonstrating that the death penalty was, allegedly, not a deterrant (R 3909-3910). The motion was taken up at the hearing of December 5, 1985, at which time the state expressed doubt as to the admissibility of such evidence, in that it did not appear relevant to any aspect of appellant's character (R 2138-2140). Judge Stroker noted that he would not be allowing the testimony from the religious leaders or the electrocution witness, but that he would consider the admissibility of the sociological or statistical studies (R 2140-1). A formal order was rendered on December 9, 1985 (R 4022).

During the penalty phase, defense counsel proffered the testimony of Doctor Michael Radelet (R 1905-1912), at which time, Judge Stroker noted that Radelet had a "published stand against the death penalty." (R 1907). During the proffer, the witness stated that he taught a course at the University of Florida on the death penalty, and that he had done several studies on it and its imposition, in regard to the social class of the defendant and the race of the victim (R 1909). The witness also stated

that he had, in the course of teaching, "read everything regarding cost and imposition of the death penalty in the United States", and would be prepared to testify as to the cost of appellant's being on death row, as opposed to being sentenced to life imprisonment (R 1910); Dr. Radelet likewise stated that he had, in the course of his research, studied documenting cases of innocent persons being convicted of homicide (R 1910). Finally, the witness stated that he was prepared to testify concerning the alleged lack of deterrent effect of the death penalty and the pattern with which various aggravating and mitigating circumstances had been found in Florida death penalty cases (R 1911).

At the close of the proffer, the prosecutor argued that, with the possible exception of certain testimony regarding appellant's future dangerousness, or lack thereof, the testimony seemed inadmissible (R 1912-13). The judge agreed and found that such matters as the cost of keeping appellant on death row, the frequency with which certain aggravating factors had been found, the alleged number of innocent persons executed, the alleged lack of deterrent effect of the death penalty, the statistical studies as to the race of the victim or the social class of the defendant, and any testimony regarding the effect that appellant's execution might have upon his remaining family, were all matters which did not relate to any issue which the jury would be called upon to decide (R 1914, 1919). During his testimony, Dr. Radelet was allowed to offer his opinion to the effect that Jerry Correll would not be dangerous in the future (R 1927-8); on cross-examination, the witness stated that he had

never met with appellant, but had based this opinion upon statistical data (R 1929).

Appellant argues on appeal that the evidentiary ruling at issue was error, in that, in contravention of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), it allegedly had the effect of excluding mitigating evidence. Appellee disagrees. While Lockett clearly does hold that it is error to preclude, in any way, a sentencer from considering, as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense which the defendant proffers as a basis for a sentence less than death, as well as "any relevant mitigating evidence", the instant proffered evidence simply does not meet that descripton. See also, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Skipper v. South Carolina, _____ U.S. _____, 106 S.Ct. 1669 (1986). Indeed, the excluded evidence had little relationship, let alone relevance, to appellant's individual case, and would seem to bear great similarity to that at issue in Herring v. State, supra. In such decision, this court approved the exclusion of proffered defense testimony regarding the imposition of life sentences in other "similar" offenses, noting,

> Evaluating the sentences of other defendants in unrelated crimes involves a number of variables. There is no requirement in Lockett for the admission of such evidence in the sentencing phase. What Lockett does require is the admission of evidence that establishes facts relevant to defendant's character, his prior record, and the circumstances of the offense in issue. (citation ommitted). The jury's responsibility in the process is to make recommendations based on the circumstances of

> the offense and the character and background of the defendant. Id. at 1056.

Thus, appellee contends that it was not error for the trial court to exclude Radelet's testimony regarding his "innocence" studies, the frequency with which various aggravating and mitigating circumstances had been found or other broad-based testimony relating to the overall status of capital punishment in Florida, or the, perhaps, less than unbiased views of the witness upon such. This court has continually held that a trial court enjoys discretion as to the determination of what is relevant evidence at sentencing, and that a trial court's finding cannot be disturbed unless an abuse of discretion is shown. See, Christopher v. State, 407 So.2d 198 (Fla. 1981); Stano v. State, supra. Appellant has totally failed to demonstrate the relevance of the excluded evidence, which, as the court below noted, had little to do with any issue which the jury had to resolve. Compare, Scott v. State, 411 So.2d 866 (Fla. 1982); Shriner v. State, 386 So.2d 524 (Fla. 1980). The state would suggest that the judge below gave appellant the benefit of the doubt in allowing Radelet to offer opinion testimony as to appellant's lack of future dangerousness, given the witness' lack of familiarity with appellant, and that the proffered testimony as to the impact which appellant's execution would have upon his remaining family, the size of such family, of course, having been reduced by virtue of the homicides at issue, was properly excluded. Compare, Jackson v. State, 498 So.2d 406 (Fla. 1986) (exclusion of testimony of survivor of victim to the effect that death should not be imposed not error). Appellant has failed to

demonstrate reversible error, and the instant sentences of death should be afirmed.

B. FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PENALTY PHASE.

During the summation of his closing argument during the penalty phase, the prosecutor made reference to the funeral of the victims in this case, and urged the jury not to forget the victims, that they had been human beings, and that the jury should put aside sympathy or revenge in returning its advisory verdict and speak "for" them (R 1992-3). The record clearly indicates that absolutely no objection or motion for mistrial was interposed in reference to these remarks (R 1991-3). As this court clearly held in Rose v. State, 461 So.2d 84 (Fla. 1984), there is no "penalty phase" exception to the need for contemporaneous objection in order to preserve a claim of error in regard to prosecutorial argument or comments. See also, Teffeteller v. State, supra. Accordingly, no claim of error has been preserved in this regard.

The remarks at issue, which appellant alleges were impermissibly designed to evoke sympathy for the victims, are comparable to those in such other capital cases as Johnson v. State, 442 So.2d 185 (Fla. 1983), Bush v. State, supra, and Valle v. State, 474 So.2d 796 (Fla. 1985). In each instance, this court held that the comments at issue, which were, in contrast to this situation sub judice, preserved for review, were not sufficiently prejudicial so as to justify reversal. Appellee would contend that, as in Bush and Johnson, the comments sub judice were but a small part of the entire closing argument, such

argument discussing at length the appropriate statutory aggravating circumstances which could support an advisory sentence of death in each of the four cases (R 1982-1990). Inasmuch as it will not be presumed that jurors are led astray to wrongful verdicts by the impassioned eloquence and illogical pathos of counsel, see, Paramore v. State, 229 So.2d 855 (Fla. 1969), Blair v. State, 406 So.2d 1103 (Fla. 1981), it is clear that reversible error has not been demonstrated in this case.

The prosecutor was not acting improperly in seeking to remind the jurors that the victims in this case had been living human beings, as opposed to autopsy slides or mutilated corpses, and, to the extent that he went too far in this regard, fundamental error has not been shown. It can be said, based upon the entire record, that the comments at issue are not sufficiently prejudicial so as to have affected the outcome of the proceeding, given the existence of clear and convincing evidence as to valid statutory aggravating factors. The instant sentences of death, which owe nothing to the contested section of the prosecutor's closing argument sub judice, should be affirmed.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICIATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing Answer Brief of Appellee has been furnished, by mail, to James R. Valerino, Esquire, 229 Pasadena Place, Orlando, Florida 32802, this 25 day of February, 1987.

Richard B. Martell
Of Counsel