IN THE SUPREME COURT OF THE STATE OF FLORIDA

CLEO DOUGLAS LeCROY, Appellant, Cross-Appellee, v. STATE OF FLORIDA, Appellee, Cross-Appellant.	)	CASE NO. 69,484

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

An Appeal from the Fifteenth Judicial
Circuit Court for Palm Beach County

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OTHER AUTHORITY

PRELIMINARY STATEMENT

The Appellant/Cross Appellee, Cleo D. LeCroy, was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the State of Florida, the Appellee/Cross-Appellant, was the prosecution. In the brief, Mr. LeCroy will be referred to as the Appellant and the State by name or as the Appellee.

The symbol "R" will designate the Record on Appeal.

STATEMENT OF THE CASE

The Appellant and his brother, Jon LeCroy, were indicted for the murders of John and Gail Hardeman and for the robbery of both victims.[1] (R. 4098-4099). The crimes occurred on January 4, 1981.

The trial court entered a lengthy order ruling on both LeCroys' pretrial motions. (R. 4267-4285). The order, inter alia, dismissed the robbery counts and suppressed a statement that the Appellant made to Detective Browning on the basis that the Miranda warnings were impermissibly diluted when the Appellant was told, "This statement is taken primarily in order to refresh your memory at the time you may be called to testify if and when this matter goes to court."

The State took an appeal to the Fourth District Court of Appeal. The Court reversed the dismissal of the robbery counts and affirmed the suppression of the Statement. State v. LeCroy, 435 So.2d 354 (4th DCA Fla. 1983). On rehearing, the Court certified the suppression issue to this Court. State v. LeCroy, 441 So.2d 1182 (4th DCA Fla. 1983). This Court took jurisdiction of the case and reversed. Although finding the "refresher" advice inappropriate, the Court held that in the totality of the circumstances, the statement was voluntarily given and should be admitted. State v. LeCroy, 461 So.2d 88

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[1] A fifth count charging obstruction of justice was dismissed.

(Fla. 1984), cert. denied, 473 U.S. 913 (1985).

The case was then returned to the Circuit Court for trial. The Appellant and his brother were tried separately. The Appellant was tried first and convicted on all counts (R. 4499); Jon LeCroy was later acquitted. As to the murders, the jury verdicts specified that John Hardeman's murder was felony/murder and that Gail Hardeman's murder was premeditated. (R. 4499). Judgment was entered accordingly. (R. 4865).

At the sentencing phase of the trial, the jury by an eight to four vote recommended life imprisonment for the murder of John Hardeman (R. 4526) and by a vote of seven to five recommended death for the murder of Gail Hardeman. (R. 4527).

The trial judge entered a lengthy sentencing order (R. 4870-4878) in which he followed the jury's recommendation, i.e., he imposed a life sentence on the John Hardeman murder (R. 4871), and a death sentence for the murder of Gail Hardeman. (R. 4872-4877). In support of the death sentence the judge found three aggravating factors which he determined outweighed the two mitigating factors. Sentences of thirty years subject to a three year mandatory minimum were imposed on each of the robbery counts of the indictment. (R. 4877-4878); (R. 4866-4869).

The Appellant filed a notice of appeal (R. 4880-4881), and the State subsequently filed a notice of cross-appeal. (R. 4889-4890).

STATEMENT OF THE FACTS

A. Pretrial Hearing on the Motion to Suppress

John and Gail Hardeman failed to return from a camping trip over the New Year's weekend, 1981. Joyce LeCroy, the Appellant's mother, responded to a radio broadcast conceerning the missing couple. (R. 552). On January 9, 1981, Detective Welty contacted Mrs. LeCroy and she told him her family had been camping and had seen the Hardemans. (R. 552-553). The LeCroy family participated in the search on January 9 and 10 (R. 553-554), and again on the 11th. (R. 557). After the first-body was found on the 11th, the officers requested pieces of the LeCroys' clothing and they all, including Appellant, agreed to this to show they were not suspects. (R. 558). The LeCroys were free to refuse this request. (R. 558-559). At that time, they were advised of their Miranda rights. (R. 559).

After consulting with his superior, Detective Welty asked the LeCroys if they would be willing to go to the substation for questioning. (R. 563). Mr LeCroy, Appellant's father, said he would be glad to go to show they were not suspects. (R. 564). Mr LeCroy gave Welty permission to speak to the Appellant. (R. 564-565).

Detective Welty once again advised the Appellant of his rights. (R. 565). The Appellant gave a taped statement, on which the rights advsory was again given at the outset. (R. 568-569). As to this statement, the trial court found it was given

freely and voluntarily and with an understanding of the Appellant's rights; no threats, promises or improper inducements were made. (R. 4274). The correctness of the trial court's ruling on this point is not at issue in the present appeal.

The taped statement given to Officer Welty concluded at 2:20 p.m. (R. 623). Some time later, the Appellant asked to speak to Detective Browning. (R. 660). He stated he had not been completely truthful in his prior statement and he now wanted to tell the truth. (R. 661). Browning again advised the Appellant of his rights (R. 662), and took a taped statement which began with a traditional rights waiver. (R. 671-673). Before questioning, Browning made the "refresher" admonition that was the subject of the prior appeal (See Statement of the Case, supra).

B. Trial

The Appellee accepts the Appellant's statement as generally accurate, subject to the following additions:

On January 10, the day before the bodies were found and when the searchers still hoped to find the victims alive, the Appellant told Elsie Bevan, "Why worry? They are both dead." (R. 2275).

The victims' bodies were found four hundred feet apart; because of the thick underbrush, one could not be seen from the location of the other. (R. 1821).

The jury did not hear from any of the victims' family

members at the sentencing phase of the trial. Their comments were heard solely by the trial court at a separate hearing. The trial court stated that although these people would be given an opportunity to speak, he would base his decision on the evidence and the law and disregard any opinions. (R. 3817, 4018-4019).

SUMMARY OF THE ARGUMENT

The Appellant's challenge to the admissibility of his confession is foreclosed by this Court's prior decision on the matter, which is the law of the case. Moreover, the totality of the circumstances establish that the confession was voluntary. The refresher admonition was not a comment on the Appellant's failure to testify. Even if it was, the Appellant waived his objection by declining the prosecutor's offer to excise it from the tape. If the Court finds the statement was inadmissible for any of the reasons advanced by the Appellant, then its admission was harmless error.

The co-indictee's hearsay statements were properly excluded pursuant to § 90.802 and § 90.804(2)(c) Fla.Stats. Even if the statements should have been admitted, the error was harmless because the jury heard other evidence implicating Jon LeCroy in the crimes and the evidence of the Appellant's guilt was overwhelming.

The robbery counts of the indictment adequately charged the crime and the Fourth District's prior determination of this issue is the law of the case.

Florida's death penalty law has been repeatedly found to be constitutional by both this Court and the Supreme Court of the United States. The Appellant's assertions to the contrary are without merit. The youthful age of an offender, while appropriate for consideration as a mitigating factor, does not

automatically prevent application of the death penalty.

The trial judge correctly followed the jury's recommendation and sentenced the Appellant to death on the basis of three valid aggravating factors which outweighed the two mitigating factors.

The prosecutor's comments did not render the Appellant's trial fundamentally unfair. The trial judge's action is sustaining the defense objection to the single reference in the guilt phase to the victim John Hardeman's father was sufficient. The prosecutor's sentencing phase remarks were fair comment on the evidence, and in any event, were cured by the trial court's curative instruction and admonition to the prosecutor to change the subject. The victim impact statements which were heard only by the judge do not require reversal in view of the judge's on the record statements that he would base the sentence only on the aggravating and mitigating circumstances.

The Appellant was properly sentenced for both the robbery and murder of John Hardeman. The robbery was not a lesser offense of the murder. State v. Enmund, 476 So.2d 165 (Fla. 1985).

Consecutive three year mandatory minimum sentences were properly imposed on the two robbery counts. The offenses did not occur simultaneously and there were two victims. Thus the crimes

are sufficiently distinct so the decision in Palmer v. State, 438 So.2d 1 (Fla. 1983), is inapplicable.

The State, on cross appeal, maintains that the trial court erred in excluding an admission by silence. The Apellant's silence in the face of an accusation by his brother that he killed a woman and a man, was admissible pursuant to §90.803 (18)(b), Fla.Stats.

ARGUMENT

POINTS RAISED ON APPEAL

POINT I

THIS COURT'S PRIOR DECISION THAT THE APPELLANT'S STATEMENT TO DETECTIVE BROWNING WAS ADMISSIBLE IS THE LAW OF CASE AND THE APPELLANT HAS SHOWN NO BASIS FOR REOPENING THE ISSUE.

The Appellant contends his taped statement to Detective Browning was inadmissible because the Miranda warnings were "diluted" by the admonition that "This statement is taken primarily in order to refresh your memory at the time you may be called upon to testify, if and when this matter goes to court." The Appellant recognizes that this issue has been determined adversely to him by this Court in the State's pre-trial appeal, State v. LeCroy, 461 So.2d 88 (Fla. 1984), cert. denied, 473 U.S. 913 (1985), but seeks reconsideration. The Appellee relies upon this Court's 1984 ruling as the law of the case.

In Preston v. State, 444 So.2d 939, 942 (Fla. 1984), this Court stated that points of law which have been adjudicated become the law of the case. Although an appellate court has the power to reconsider its rulings, it should do so "only in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." Id. In Preston, this Court did reconsider an issue on appeal in a capital case which had been decided by a district court of appeal in an interlocutory appeal, as part of this court's duty to review all

capital cases. However, since this Court, by way of a certified question, has already ruled the confession admissible in the present case, the law of the case doctrine is applicable to bar further review.

The Appellant can point to no manifest injustice or exceptional circumstances to warrant further review; this Court correctly held that under Miranda v. Arizona, 384 U.S. 436 (1966), the totality of the circumstances must be examined. California v. Prysock, 453 U.S. 355 (1981). After doing so, this Court concluded:

> [W]hen the totality of the circumstances is expanded to include the "refresher" advice it is still clear that the statement was voluntarily given and should have been admitted. Cleo received and acknowledged numerous Miranda warnings and there is nothing in the record to suggest that he did not understand his rights or that he was coerced or deceived into making the statement.

State v. LeCroy, supra, 461 So.2d at 90.

This finding in the prior appeal forecloses the Appellant's argument that there were other circumstances, in addition to the unfortunate "refresher" advice, which rendered the statement inadmissible under Miranda. He says it is unlikely the rights were understood, since he thought the right to bear arms was one of the Ten Commandments (R. 2460), and he did not appear to appreciate the seriousness of the situation, due to his age and inexperience. As did this Court in the prior appeal, the

trial court rejected the contention that aside from the refresher advice, the statement to Detective Browning was involuntary. The Court found the first statement to Detective Welty which did not contain the refresher advice "was given freely and voluntarily and with an intelligent understanding on the part of the defendant of his rights under Miranda . . ." (R. 4274). Concerning the challenged statement to Detective Browning, the trial court held, "had it not been for the above-quoted admonition, the Court would have denied the motion." (R. 4275).

This conclusion is correct under controlling law. In Connecticut v. Barrett, ___ U.S. ___, 93 L.Ed.2d 920, 929 (1987), the Supreme Court held that where a defendant understands the Miranda warnings, the fact that he may be ignorant of the full consequences of his decisions does not vitiate their voluntariness. Citing Barrett, the Third District recently held that where a defendant admitted to a peripheral part in an offense based on a mistaken belief that as the drive of the get away car he could not be convicted of the substantive offense, the fact that he misunderstood the legal consequences of his actions made the confession no less admissible. State v. Ferrer, 507 So.2d 674 (3 DCA Fla. 1987). Therefore, the Appellant's ignorance of the Ten Commandments and his apparent belief he would be released did not vitiate his understanding of the rights advisory.

Regarding the Appellant's age and inexperience, youthful age is but one factor to be considered in determining the voluntariness of a statement. It will not render inadmissible a confession which is shown to have been made voluntarily. Thomas v. State, 456 So.2d 454, 458 (Fla. 1984). There was no coercion nor were threats made by the interrogating officers. The Appellant told Detective Welty only that some unknown person made a threat at the search site prior to the discovery of the bodies, but he did not know who it was or even whether the threat was directed at him. (R. 2402-2403). Detective Welty then asked the Appellant if any police officer had threatened the Appellant or treated him unfairly. The Appellant responded, "No. I think you are doing an excellent job". (R. 2403). The fact that a threat may have been made by some other unknown person does not render the statement invalid; to render a confession inadmissible, it must have been visited upon the suspect by his interrogators. Gardner v. State, 480 So.2d 91 (Fla. 1985); Thomas v. State, 456 So.2d 454, 458 (Fla. 1984) Again, voluntariness is determined by viewing the totality of the circumstances. Roman v. State, 475 So.2d 1220, 1232 (Fla. 1985); Frazier v. Cupp, 394 U.S. 731 (1969). In this case, the Appellant initiated the challenged statement by asking to speak to Detective Browning (R. 660-61), which evidences the fact that his decision to speak was made voluntarily. Cf., Edwards v. Arizona, 451 U.S. 477 (1981).

The Appellant next contends the statement to Detective Browning, preceded by the "refresher" admonition, was inadmissible because the admonition was a comment on the Appellant's decision not to testify. The Appellee maintains the comment was not improper and that even if it was, by refusing to accept the State's offer to excise it from the tape, the Appellant waived the objection.

The allegedly improper comment was, "this statement is being taken primarily in order to refresh your memory at the time you may be called to testify if and when this matter goes to Court." (R. 2523). The prosecutor offered to excise it from the tape but the defense declined "because the record has got to be complete." (R. 2360-2361). It is well settled that if a comment on failure to testify is not objected to at trial, the matter is deemed waived for appellate purposes. Clark v. State, 363 So.2d 331 (Fla. 1978); Jackson v. State, 359 So.2d 1190, 1193-1194 (Fla. 1978). The defense in the instant case made a tactical choice to allow the jury to hear the comment and having made that decision, is bound by it. The case of State ex rel Johnson v. Edwards, 233 So.2d 393, 395 (Fla. 1970), which holds that an accused is not required to have to choose between his right to speedy trial and to a charge of venue, does not support the appellant's claim that here he was entitled to suppression of the confession as it concerns entirely different facts and legal rights. Here, the State was entitled to introduce the confession

into evidence and the Appellant was offered the choice of whether or not the jury would hear the "refresher" statement. His decision to leave it in was a voluntary election on his part which binds appellate counsel. Castor v. State, 365 So.2d 701 (Fla. 1978).

Furthermore, the statement was not a comment on failure to testify; it simply advised the Appellant that at some future point when he "may be called to testify" his taped statement would be available to refresh his memory. This did not call the jury's attention to the Appellant's failure to testify, and it was not "fairly susceptible" of such an interpretation. State v. Kinchen, 490 So.2d 21 (Fla. 1985).[2]

In McKay v. State, 504 So.2d 1280 (1 DCA Fla. 1986), the Court held a police officer's comment that he "attempted an interview" with the defendant was not susceptible of interpretation as a comment on silence since the officer did not indicate the defendant's response. As in McKay, there was no implication in the challenged comment that the Appellant should testify at his trial; rather, the Appellant was advised at the time he made the statement that it would be available for his future use. In a similar situation, in State v. Rowell, 476

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[2]The additional statement complained of on appeal "you are going to have to con a jury, you know," (R. 2410), was not a comment on silence; it was simply a statement made to the Appellant during the interrogation to which he responded. (R. 2411). Moreover, the ground for the objection wasn't stated so the issue is not preserved. (R. 2644).

So.2d 149 (Fla. 1985), this Court held that testimony the defendant didn't answer a specific question while answering others was not a comment on silence. Here, as in Rowell, the challenged comment preceded the Appellant's taped statement which was admitted into evidence. The jury couldn't have construed it as a comment on silence when it was obvious the Appellant did not remain silent, but made a full confession.

Finally, the State maintains that even if the taped statement to Detective Browning was inadmissible on any of the grounds argued by the Appellant, its admission was harmless error. In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court held that an improper comment on silence is subject to harmless error analysis. Likewise, in Barfield v. State, 402 So.2d 377 (Fla. 1981), this Court held that even if a statement was inadmissible because it was obtained in a manner contrary to Miranda, its admission could be harmless error. See also, Harrington v. California 395 U.S. 250 (1969). Of course, the State recognizes that it has the burden of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict, or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. State v. DiGuilio supra, at 1138.

In the instant case, the Appellant made a taped statement to Detective Welty which did not contain the refresher admonition and the admissibility of it is not at issue. In the

statement, the Appellant claimed he shot at a pig but the bullet hit John Hardeman. (R. 2373). He then shot at a jacket three times, and discovered he had shot Gail Hardeman. (R. 2377-2379). The Appellant also told his girlfriend, Carol Hundley, that he shot the Hardemans and she testified to that effect. (R. 2181-2184). He likewise told fellow inmate Roger Slora that he'd shot the victims in what started as a robbery. (R. 2691-2698). Additionally, he sold John Hardeman's rifle to a friend, William Ellett. (R. 2083-2086). The Appellant's statements and behavior at the site during the search for the victims were also incriminating: before the victims were found he said they were dead (R. 2614-2615; 2269; 2275), and he located their knapsack immediately although the officers previously had not found it. (R. 2143). He was seen talking to the victims shortly before shots were heard. (R. 2050-2054; 2056-2057).

Therefore, the State submits that the admission of the taped confession, even if error, was harmless in light of the overwhelming evidence of guilt including the Appellant's earlier confession to Officer Welty and incriminating statements to Carol Hundley and Roger Slora which were correctly admitted. Ferrey v. State, 437 So.2d 1122 (3 DCA Fla. 1984).

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE HEARSAY STATEMENTS OF THE CO-DEFENDANT.

The Appellant contends the trial court erred in ruling that statements made by his brother, Jon LeCroy, to the effect that he had seen dead bodies before and that he had last seen the victims at 11:00 a.m. (R. 2165-2166; 2174; 2297-2298), were inadmissible hearsay.[3] The State maintains the trial court did not abuse its discretion in so ruling.

The statements were hearsay and therefore properly excluded under § 90.802, Fla.Stats. They did not fall within the declaration against penal interest exception. § 90.804(2)(c), Fla.Stats., because in criminal cases, the rule is as follows:

> A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

The case of Brinson v. State, 382 So.2d 322 (2 DCA Fla. 1979), cited by the Appellant, was tried before the above-referenced section was effective and therefore, is not controlling. Brinson, f.n. 1.

Rather, in this case the trial court's ruling was correct under authorities which hold that Statements by co-defendants which implicate both themselves and the accused are

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[3]Jon LeCroy was tried separately at a later date.

inadmissible. Walker v. State, 426 So.2d 1180 (5th DCA Fla. 1983); Pierce v. Mims, 418 So.2d 273 (2 DCA Fla. 1982). The statements here were made by Jon LeCroy, who was also indicted for the crimes, and therefore were inadmissible.

Moreover, the surrounding circumstances showed the statements were ambiguous, unreliable, and untrustworthy. As this Court will recall from its prior review of this case, Jon gave a statement to the police in which he admitted having seen both bodies soon after the murders but denied participating with his brother, Cleo, in committing the crimes. State v. LeCroy, 461 So.2d 88, 91 (Fla. 1984). This statement is consistent with the statements Appellant wanted to have admitted, and had the trial court allowed the hearsay into evidence, certainly the state would have been permitted to present the full picture, which would have been damaging to the Appellant's case. The trial court therefore correctly ruled Jon's statements inadmissible. Ards v. State 458 So.2d 379 (5th DCA Fla. 1984); United States v. MacDonald, 688 F.2d 224, 231-233 (11th Cir. 1982), cert. denied 450 U.S. 1103 (1983).

In any event, even if the ruling was error, the State maintains it was harmless. In both Palmes v. State, 397 So.2d 648, 653-654 (Fla. 1981) and Campbell v. State, 227 So.2d 873, 877 (Fla. 1969), the Court held that where erroneously excluded evidence was elicited on substantially the same subject at another point in the trial, the error can be deemed harmless.

Here, the jury was aware that Jon had also been indicted. They heard that Jon LeCroy took Elsie Bevan to the bodies (R. 2279), and Gail Hardeman's .38 pistol was recovered from Rose Harris, a friend of Jon LeCroy's. (R. 2491, 2494). In his closing argument, the defense attorney argued that Jon committed the murders, based on the evidence. (R. 3157-3160). Therefore, the trial court's ruling did not prevent the Appellant from presenting his theory of defense.

The ruling is also harmless error, if error at all, because the State established through overwhelming evidence that the Appellant killed the victims. The Appellant told Elsie Bevan and Detective Welty that the victims were dead before their bodies were found. (R. 2614-2615; 2269; 2275). He immediately located their knapsack, although the trained officers who had been searching for the victims hadn't found it. (R. 2143). The Appellant was seen talking to the victims shortly before shots were heard. (R. 2050-2054; 2056-2057). The Appellant told Carol Hundley (R. 2182-2188), Roger Slora (R. 2692-2698), Detective Browning (R. 2524-2527), and Detective Welty (R. 2373-2379), that he murdered the victims. He sold John Hardeman's rife to William Ellet. (R. 2083). In view of the strength of the State's case, if Jon LeCroy's hearsay statements had been admitted, the verdict would not have changed and therefore the error is harmless. State v. DiGuillo, 491 So.2d 1129 (Fla. 1986).

POINT III

THE FOURTH DISTRICT'S HOLDING THAT COUNTS III AND IV OF THE INDICTMENT WERE LEGALLY SUFFICIENT IS THE LAW OF THE CASE; THE INTENT ELEMENT OF ROBBERY WAS ADEQUATELY ALLEGED.

The Appellant contends he is entitled to reversal of his robbery convictions because the charging document failed to allege the requisite element of intent to permanently deprive. The Appellee maintains the Fourth District's previous determination of this issue is the law of the case and further, that the allegations adequately charged the intent element.

The Appellee relies on the rule that all points of law which have been adjudicated become the law of the case, to bar any further consideration of the Appellant's challenge to the robbery counts. See, Preston v. State 444 So.2d 939 (Fla. 1984). In the instant case, the trial court entered a pretrial order which, inter alia, dismissed Counts III and IV of the indictment because they failed to allege the intent to permanently deprive. (R. 4267-4268). The State appealed. The Fourth District Court of Appeal reversed the trial court's ruling on this point, holding:

> While the counts in question do not contain the specific language "with the intent to deprive" they do contain an allegation that the property was taken "unlawfully by force", and that appellees did "feloniously rob, steal and take away" the items in question. These terms are sufficient to apprise appellees of the nature of the crimes of which they are accused and are clearly not "so

> vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense."

State v. LeCroy, 435 So.2d 354, 355-356 (4th DCA Fla. 1983).

Thus, the issue presently raised has been conclusively determined in the State's favor and is not subject to reconsideration. Although reconsideration is warranted in exceptional circumstances and where reliability on the previous decision would result in manifest injustice, Preston v. State, supra, no such exception is applicable in the instant case. The Fourth District's decision is consistent with the result in other cases which have resolved the issue. In Kearse v. State, 464 So.2d 202 (1 DCA Fla. 1985), quashed in part, other grounds, State v. Kearse, 491 So.2d 1141 (Fla. 1986), the First District held an information which alleged "taken by force, assault or putting in fear", was sufficient to imply the intent to permanently deprive. In State v Harris, 439 So.2d 265, 270 (2 DCA Fla. 1983), discr. rev. denied, 450 So.2d 486 (Fla. 1984), the Second District held an indictment which alleged the accused did "steal" was sufficient to allege specific intent. In Harpham v. State, 435 So.2d 375 (5th DCA Fla. 1983), the Court held an information which alleged the defendants did "by force, violence, assault or putting in fear, take away ..." was not fundamentally defective. Therefore, the Fourth District's 1983 decision in this case reached a just result which is binding.

In the event the Appellant argues in rebuttal that because this is a death penalty appeal, this Court can review the issue, Preston v. State, supra, the argument is without merit for two reasons. First, the robbery convictions did not result in the death sentence. Second, the instant case was previously before this Court. In State v. LeCroy, 435 So.2d 354, on rehearing 441 So.2d 1182 (4th DCA Fla. 1983), the Fourth District certified a suppression issue to this Court, which took jurisdiction. State v. LeCroy, 461 So.2d 88 (Fla. 1984). Once this Court accepted jurisdiction on the basis of the certified question, it had discretion to consider any other issues properly raised and argued. Tillman v. State, 471 So.2d 32 (Fla. 1985). The Appellant did not seek to have this Court review the District Court's reinstatement of Counts III and IV, although he had the opportunity. In these circumstances, the Appellee is clearly entitled to rely on the previous Fourth District decision as the law of the case.

In any event, the robbery counts of the indictment were not fatally defective. As the Fourth District held, the allegations that the property was taken "unlawfully by force" and that the Appellant did "feloniously rob, steal and take away" the victim's property (R. 4098), sufficiently charged the requisite element of intent. State v. LeCroy, 455 So.2d 354, 355-356 (4th DCA Fla. 1983). There is absolutely no indication that the Appellant was in any way misled or embarrassed in the preparation

of his defense. Thus, there was no legal basis for dismissal of Counts III and IV of the indictment. Fla.R.Crim.P. 3.140(0); Kearse v. State, supra; State v. Harris supra; Harpham v. State, supra.

POINT IV

FLORIDA'S CAPITAL PUNISHMENT STATUTES ARE CONSTITUTIONAL BOTH FACIALLY AND AS APPLIED TO THE APPELLANT.

The Appellant, in summary fashion, has challenged the constitutionality of the Florida capital punishment statutes, §921.141; §775.082(1); and §782.04, Fla.Stats. Binding precedent compels rejection of the first fifteen grounds the Appellant has enumerated. Concerning the sixteenth, whether the death sentence can be constitutionally imposed on one who was a juvenile at the time of the commission of the capital felony, the Appellee maintains that it can.

The Appellant first complains of the failure to specify the aggravating circumstances in the indictment. In Sireci v. State, 399 So.2d 964, 970 (Fla. 1981), this Court held that adequate notice is afforded by the statute, §921.141(5), which enumerates the exclusive list of the aggravating factors.

The Appellant's contention that the statute which defines the offenses of first and second degree murder, §782.04(1) and (2), Fla. Stats. fails to adequately distinguish between the two crimes has also been rejected. In State v. Dixon, 283 So.2d 1, 11 (Fla. 1973), this Court held the two degrees are easily distinguishable, depending upon the presence of the defendant as a principal in the first or second degree. Dixon was further amplified in Adams v. State, 341 So.2d 765 (Fla. 1976), where the Court held only if a felon is an accessory

before the fact and not personally present does liability attach under second degree murder of the applicable statute.

The assertion that the Florida statutory scheme constitutes the arbitrary infliction of punishment has been conclusively rejected by the United States Supreme Court. In Proffit v. Florida, 428 U.S. 242 (1976), the Court held the statutes are not arbitrary because in imposing punishment, the judge and jury are required to focus on aggravating and mitigating circumstances, thus considering the circumstances of the crime and the character of the defendant. The risk of arbitrariness is further reduced by this Court's appellate review. Id.

As discussed above, the decisions in State v. Dixon, supra; Adams v. State, supra; and Proffit v. Florida supra; mandate rejection of the Appellant's claim that the statutes are vague and make it impossible to prepare a defense.

The Appellant next contends that §921.141, Fla.Stats., unconstitutionally requires the defendant to prove mitigating circumstances and that the instruction to recommend death unless mitigating circumstances outweigh aggravating circumstances violates the accused's right to the benefit of a reasonable doubt. In Jackson v. Wainwright, 421 So.2d 1385, 1388-1389 (Fla. 1982), the Court rejected this argument, and held that mitigating circumstances aren't rebuttal evidence, but are offered to show the totality of circumstances warrants less than the death

penalty, so there is no improper burden shifting. The Court further held the instructions regarding aggravating and mitigating factors inform the jury to weigh the total in arriving at a reasoned judgment. See also, Tafero v. State, 403 So.2d 355, 362 (Fla. 1981).

Neither life imprisonment without parole for twenty-five years nor the death penalty for the taking of human life is prohibited by the Eighth Amendment. In Banks v. State, 342 So.2d 469 (Fla. 1976), and Godwin v. State, 369 So.2d 577 (Fla. 1979), this Court held the twenty-five year mandatory minimum is not cruel and unusual punishment. The death penalty has been upheld as not violating the Eighth Amendment by both this Court and the United States Supreme Court. Proffitt v. Florida, supra; Gregg v. Georgia, 428 U.S. 153 (1976); Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982); Chambers v. State, 339 So.2d 204, 207 (Fla. 1976).

The Appellant's claim that the statutory mitigating factors are too vague and that insufficient emphasis is given to nonstatutory factors is likewise without merit. In Proffitt v. Florida, supra, 428 U.S. at 257-258, the United States Supreme Court held the mitigating factors are not too vague and they are adequate to channel sentencing discretion. In Peek v. State, 395 So.2d 492, 497 (Fla. 1980), this Court stated:

> While we do not contend that the statutory mitigating circumstances encompass every element of a defendant's character or culpability, we do maintain

> that the factors, when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death.

Therefore, the Appellant's contentions are foreclosed by the Proffitt and Peek decisions.

The Appellant cites no authority to support his assertion that the State must prove a compelling interest to justify imposition of the death penalty. On the contrary, as this Court acknowledged in Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984), "it is well settled that the legislature has the power to define crimes and to set punishments."

The argument that §921.141 Fla.Stats. is invalid because it deals with procedural matters in contravention of article V, Section 2(a) of the Florida Constitution, must likewise be rejected on the authority of Dobbert v. State, 375 So.2d 1069 (Fla. 1979); Booker v. State, 397 So.2d 910, 918 (Fla. 1981); and Smith v. State, 407 So.2d 894, 899 (Fla. 1981). As this Court reasoned in Morgan v. State, 415 So.2d 6 (Fla. 1982), the aggravating and mitigating circumstances are substantive law. Further, to the extent the statute pertains to procedural matters, it has been incorporated by reference in Fla.R.Crim.P. 3.780, so it has been properly adopted.

The Appellant contends next that it is invalid to apply the death penalty to a felony murder without a finding of intent to kill because it is disproportionate and has no deterrent

effect. In Tison v. Arizona, ___ U.S. ___, 95 L.Ed.2d 127 (1987), the Court held that major participation in the felony committed, combined with a reckless indifference to human life, will justify imposition of the death penalty, and there need not be a specific showing of intent to kill. Moreover, this argument has no application in the present case, because the jury returned a verdict specifically finding the Defendant guilty of first degree premeditated murder for Count II, the offense for which the death penalty was imposed. (R. 4499). Thus, the felony-murder rule was not the predicate for the Appellant's death sentence.

The Appellant's discrimination claim has been rejected numerous times by this Court. This Court's view was recently confirmed by the United States Supreme Court's decision in McCleskey v. Kemp, ___ U.S. ___, 95 L.Ed.2d 262 (1987).

The Appellant's complaint that the death penalty is applied irregularly because this Court's rulings lack uniformity, and the statute does not obligate this Court to review the life case for comparison, does not raise a Constitutional question. In Pulley v. Harris, 465 U.S. 537 (1984), the Court held comparative proportionality review is not constitutionally required. This Court explained its review function in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), as having two components: it determines if the judge and jury have acted with procedural rectitude in applying the sentence and further seeks to ensure

relative proportionality among death sentences which have been approved statewide. This Court has further explained that although proportionality review is done in all cases, it need not explicitly cite other decisions in the written opinion. Booker v. State, 441 So.2d 148 (Fla. 1983); Messer v. State, 439 So.2d 875 (Fla. 1983). The Appellant therefore cannot support his claim that the Court's rulings lack uniformity, and there is no authority which requires review of life sentences for comparison purposes. See also, Lindsey v. Smith, 1 F.L.W. Fed. C250, 255-256 (11th Cir. Op. filed Feb. 6, 1987); Dobbert v. State, 375 So.2d 1069 (Fla. 1979).

As to the claim that the Florida Statutes fail to give notice of whether felony murder is relied on, §782.04(1), Fla.Stats., provides that felony-murder or premeditated murder constitutes a capital felony. In Knight v. State, 338 So.2d 201 (Fla. 1986), this Court held an indictment charging premeditation allows the State to proceed on either theory. Knight was reaffirmed in Bush v. State, 461 So.2d 936 (Fla. 1984). Thus, this matter too has been conclusively resolved against the Appellant.

Finally, the Appellant, who was just sixty days short of his eighteenth birthday at the time he committed the capital felony (R. 4023), asserts that the death penalty cannot be constitutionally applied to minors. This issue will be resolved by the United States Supreme Court in the coming term. Thompson

v. State, 724 P.2d. 780 (Okl. Cr. 1986), cert. granted, 479 U.S. ___, 94 L.Ed.2d 143 (1987). However, should this Court decide the present case prior to the disposition of Thompson, the State maintains that the age of the offender, while certainly a factor to be considered in mitigation, does not alone require imposition of a life sentence. As this Court explained in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973):

> [T]he age of the defendant may be considered pursuant to Fla.Stat. §921.141(7)(g). This allows the judge and jury to consider the effect that the inexperience of the defendant on the one hand, or, in conjunction with subsection (a), the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life.

The State respectfully urges this Court to follow the result reached by courts in Maryland, Mississippi, Kentucky, Oklahoma, Georgia, South Carolina, Arizona, Ohio, and Louisiana, that it is not cruel and unusual punishment to impose the death penalty on a juvenile. See Trimble v. State, 300 Md. 387 A.2d 1143 (Md. 1984); Cannaday v. State, 455 So.2d 713, 725 (Miss. 1984); Ice v. Commonwealth, Ky., 667 S.W. 2d 671 (1984); Eddings v. State, 616 P.2d 1159 (Okl. Cr. 1980); High v. State, 247 Ga. 289, 276 S.E. 2d 5 (1981); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979); State v. Valencia, 124 Ariz. 139, 602 P.2d 807, 809 (1979); State v. Harris, 48 Ohio St. 2d 351, 359 N.E.2d 67 (1976); State v. Prejean, 379 So.2d 240 (La. 1970).

In particular, the State relies upon the in-depth analysis of the Eighth Amendment issue set forth in the opinion in Trimble v. State, supra. The Court therein first noted the fact that Maryland, as well as twenty-eight of the thirty-nine death penalty states, (including Florida), permits the execution of juveniles in some circumstances, which shows that contemporary society has not rejected capital punishment of juveniles. Trimble, 478 So.2d at 1160-61. After extensive analysis, and relying on the discussion in Gregg v. Georgia, supra, of the social purposes of the death penalty, the Maryland Court concluded it is not cruel and unusual punishment to impose the death penalty on a juvenile simply because of that person's chronological age. The court emphasized a case-by-case approach afforded the juvenile the individualized consideration essential to death penalty cases and, more importantly, avoided the "arbitrary line-drawing that is endemic to any hard-and-fast distinction between juveniles and non-juveniles." Id.

In Florida, §39.02(5)(c)(1), Fla.Stats. mandates that a child of any age indicted for violating a Florida law punishable by death or by life imprisonment "shall be tried and handled in every respect as if he were an adult." Section 39.02(5)(c)(3) expressly speaks to punishment in such cases: "If the child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult." The Appellant has in no way rebutted the presumption of

constitutional validity afforded these statutes. The Appellant's age was considered to be a mitigating factor. (R. 4875-4876). It did not ipso facto entitle him to a sentence of life imprisonment.

POINT V

THE TRIAL COURT DID NOT ERR IN FOLLOWING THE JURY'S RECOMMENDATION AND SENTENCING THE APPELLANT TO DEATH FOR THE MURDER OF GAIL HARDEMAN.

The Appellant challenges his sentence of death, contending that there are no aggravating factors and further the disparate treatment of the co-defendant requires a reversal for resentencing. The Appellee maintains the trial court properly weighed the aggravating and mitigating factors and its decision to follow the jury's recommendation and impose a death sentence for the murder of Gail Hardeman should be affirmed.

The trial court's sentencing order appears in the record at (R. 4870-4878). Concerning the murder of Gail Hardeman, the trial court found three statutory aggravating factors to be applicable: the Appellant was previously convicted of another violent felony, § 921.141(5)(b); the murder was committed while the Appellant was engaged in the commission of robbery with a firearm, §921.141 (5)(d); and the murder was committed to avoid arrest, §921.141(5)(e). (R. 4872-4873). The Court found two statutory mitigating circumstances: lack of significant history of prior criminal activity, §921.141(6)(a); and the Appellant's age of 17 years, 10 months, at the time of the crime. §921.141(6)(g). (R. 4874-4875). The Court considered and rejected the non-statutory mitigating evidence. (R. 4875).

The evidence showed beyond a reasonable doubt that the murder occurred while the Appellant was engaged in a robbery. Although the Appellant may not have actually taken the guns until after the victims were killed, the evidence showed that his desire to obtain the victims' guns was the reason he initiated the fatal encounter. The Appellant told Carol Hundley he shot John Hardeman because Mr. Hardeman caught him with his rifle and he shot Gail Hardeman when she ran from the bushes. (R. 2182-2183). In a taped statement, he said he shot John Hardeman, took his guns, and then shot Gail Hardeman when she came up and started yelling and asking what he was doing with the guns. (R. 2524). Roger Slora testified the Appellant told him his case had started as a robbery. (R. 2692). The jury convicted the Appellant of the robbery with a firearm of both John and Gail Hardeman, and of the first degree felony murder of John Hardeman. (R. 4499). Judgment was entered accordingly. (R. 4865).

Consequently, the aggravating factor of §921.141(5)(a), was correctly found by the trial judge. In Melendez v. State, 498 So.2d 1258 (Fla. 1986), the Court held that where the jury convicted the defendant of robbery and its verdict was supported by substantial evidence, the robbery/murder aggravating factor was appropriately found. The Court should reject Appellant's contention that there was no robbery, as it did in Melendez when the same arguments was advanced. See also, Rogers v. State, 12

F.L.W. 398 (Fla. July 9, 1987) [when murder occurred during flight from robbery, felony/murder aggravating factor existed].

The Appellant next contends there is insufficient evidence to support the trial judge's finding that the murder was committed to avoid arrest. The trial judge, citing Riley v. State, 366 So.2d 19 (Fla. 1978), recognized that since Mrs. Hardeman was not a law enforcement officer the proof of this factor must be strong, and found it to be so in this case where the "defendant admitted in his pretrial statements to law enforcement that he shot and killed Gail Hardeman because he intended to eliminate her as a witness and thereby avoid arrest and detection." (R. 4873); See, (R. 2379; 2524). The instant case is factually on point with Hooper v. State, 476 So.2d 1253 (Fla. 1985), where this Court held the factor of avoiding arrest was correct where the second victim witnessed the murder of the first victim. As in Hooper, in this case, Gail Hardeman was killed in order to prevent her from identifying the Appellant as the murderer of her husband. See also, Gore v. State, 475 So.2d 1205 (Fla. 1985); Wright v. State, 473 So.2d 1277, 1282 (Fla. 1985).

The Appellant cites no authority to support his contention that the State cannot rely on both of the above aggravating factors. They are not inconsistent with each other, nor are they "doubled". The existence of both is established in the record.

The third aggravating factor found by the trial court was that the Appellant had prior convictions for violent felonies, those being the murder of John Hardeman and the robberies of the Hardemans. While, pursuant to Wasko v. State, 505 So.2d 1314, 1317, 1318 (Fla. 1987), the contemporaneous conviction for the robbery of Gail Hardeman can't be used to support the aggravating factor, that finding was mere surplusage because the robbery and murder of John Hardeman amply establish its existence. In Wasko, the Court reaffirmed its prior holdings that contemporaneous convictions can qualify as pevious convictions of violent felonies and may be used as an aggravating factor when they involve multiple victims in a single incident. See, King v. State, 390 So.2d 315, 320 (Fla. 1980). This holding was recently reaffirmed in Craig v. State, 510 So.2d 857, 868 (Fla. 1987). It is clear then, that the trial court properly relied on the Appellant's contemporaneous convictions to establish an aggravating factor under §921.141(5)(b).

Turning to the mitigating factors, the trial court found the Appellant did not have a signficant history of prior criminal activity and his youthful age was mitigating. The Appellant contends the Judge should have considered as mitigating the fact that Jon LeCroy, who was also indicted for the same crimes was acquitted by a jury in a separate trial. He further alleges new sentencing hearing before a jury so this factor could be considered. This argument is without merit, because this

Court has held on numerous occasions that where the evidence shows the defendant was the dominant force, it is permissible for lesser sentences than death to be imposed on accomplices. Williamson v. State, 511 So.2d 289 (Fla. 1987); Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986); Palmes v. Wainwright, 460 So.2d 367 (Fla. 1981). In the instant case, the jury heard from the Appellant's own statements that his brother Jon had nothing to do with the crimes. (R. 2534). The fact that Jon was acquitted in a separate trial held after the trial in this case does not require resentencing; the jury was aware that Jon was also charged with this crime and was free to consider that fact when it deliberated its sentence recommendation.[4]

In closing, the State submits that the sentence imposed in this case on the basis of three aggravating factors and two mitigating factors is proportionate to the death sentences affirmed in Hargrave v. State, 480 So.2d 1 (Fla. 1979) [Robbery/murder; three aggravating factors and two mitigating including the defendant's age of eighteen], Herring v. State, 446 So.2d 1049 (Fla. 1984) [four aggravating factors, two mitigating, including the defendant's age of nineteen], and Seaton v. State, 480 So.2d 1279 (Fla. 1985) [three aggravating factors, one

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[4]The record indicates that the only evidence the State had to show Jon LeCroy was a triggerman was that Roger Slora would testify he heard Jon tell the Appellant, "I killed for you." (R. 4578-4580). Obviously, Jon's jury didn't find this testimony credible, and even if it is considered, the statement indicates whatever Jon did was done for Appellant, at his behest.

mitigating, even if youthful age of eighteen considered as additional mitigating factor, death still appropriate]. The jury and trial judge carefully weighed the aggravating and mitigating factors present in the instant case. Their conclusion, as a result of the weighing process, that the Appellant deserved to be sentenced to death for the murder of Gail Hardeman, should be affirmed.

POINT VI

THE TRIAL COURT'S PROMPT ACTION CURED ANY ERROR IN THE PROSECUTOR'S REFERENCES TO THE VICTIMS' FAMILIES; THE TRIAL COURT CONSIDERED ONLY THE STATUTORY AGGRAVATING FACTORS IN SENTENCING THE APPELLANT.

The Appellant, citing the recent decision in Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440 (1987), claims he is entitled to a new sentencing proceeding based on the prosecutor's comments in his argument to the jury and the fact that the victims' family members made statements at the sentencing before the judge only. The State maintains there is no reversible error. First, however, Appellee would note that this point is actually two separate issues. There were no victim impact statements heard by the jury; these were heard solely by the judge. Thus, the prosecutor's comments are not controlled by Booth v. Maryland, which concerns victim impact statements, but must be analyzed in light of Darden v. Wainwright, ___ U.S. ___, 91 L.Ed.2d 144 (1986); i.e., whether the trial was rendered fundamentally unfair. The Appellee will separately address these matters.

A. The Prosecutor's Remarks

The Appellant complains of just one comment made by the prosecutor during the guilt phase of the trial. The prosecutor asked a witness, Edward Santamarina, what sort of gun John Hardeman used to hunt. Mr. Santamarina replied John used a 30.06 which his father had given him as a Christmas present. The

prosecutor then asked if the witness knew John Hardeman's father, and receiving an affirmative answer, asked if he was present in the courtroom. The witness answered "Yes". At that point the defense objected "on the grounds of relevancy" and the court sustained the objection. (R. 2561). The direct examination continued, and no additional requests were made by defense counsel concerning this matter.

In Duest v. State, 462 So.2d 446, 448 (Fla. 1985), this Court held that the proper procedure when an objectionable comment is made is to object and request a curative instruction; a mistrial is appropriate only when the error committed is so prejudicial as to vitiate the entire trial. Likewise, in State v. Cumbie, 380 So.2d 1031, 1034 (Fla. 1980), the Court held that where an objection to a prosecutor's remark was sustained and a curative instruction given, if the defendant wanted any further remedial action he was obligated to make a timely request.

Pursuant to Duest and Cumbie, the Appellant has failed to preserve this matter for review. The defense attorney's objection was sustained and he was oviously satisfied at that time since there was no request for a curative instruction. There is no basis for review of the matter now. Irizarry v. State, 496 So.2d 822 (Fla. 1986),

In any event, the single reference to the victim's father was not reversible error. State v. Murray, 443 So.2d 955 (Fla. 1984). The witness did not point him out to the jury and

there was no further mention of this subject during the guilt phase of the trial. Accordingly, the trial court's action in sustaining the objection adequately remedied the matter at the trial level.

The remainder of the prosecutor's comments the Appellant complains of occurred during the prosecutor's argument at the conclusion of the sentencing phase of the trial. (R. 3655-3661). The prosecutor first stated that the jury should not feel sympathy and pity for the family members of the Appellant who had testified because they were not the persons who committed the crimes. He added, "Further, to have sympathy or pity, any sympathy should be felt for us all." (R. 3656). The trial judge immediately sustained the defense objection and granted the request for a curative instruction. (R. 3657). The Court informed the jury the defense objection had merit and they were to disregard the remark. (R. 3658).

When the prosecutor subsequently made a comment that "sympathy or pity should be divided fairly for those who deserve such," the Court again sustained the defense objection but decided another curative instruction was not needed because the jury had heard the objection being sustained. (R. 3659).

The final objected-to comment was the statement that life imprisonment was not sufficient punishment and the jury shouldn't be persuaded that in prison the Defendant would be punished enough because he wouldn't "be able to enjoy his life,

his wife and his child because I submit neither will John and Gail Hardeman". (R. 3659). The Court overruled the defense objection but admonished the prosecutor to "get off this sympathy and pity kick you are on for the last five minutes." (R. 3660-3661). The prosecutor complied with the court's directive and concluded his argument. (R. 3662).

The Appellee maintains the above-cited statements did not render the trial fundamentallly unfair. Darden v. Wainwright, ___ U.S. ___, 91 L.Ed.2d 144 (1986). They occurred at the close of the penalty phase, during which the Appellant's relatives[5] had appeared before the jury and asked for a life sentence recommendation. Viewed in this light, the remarks were fair comment on the evidences. DuFour v. State, 495 So.2d 154, 160-161 (Fla. 1986); Whitfield v. State, 479 So.2d 208, 216 (4th DCA Fla. 1985). The prosecutor, in essence, was asking the jury not to be swayed by feelings of sympathy for the Appellant's family, but to keep in mind the brutality of the Appellant's acts and the deaths of the victims. Muehleman v. State, 503 So.2d 310 (Fla. 1987).

Even if this Court finds the comments were erroneous, the State maintains the trial court sufficiently remedied any error. The trial judge sustained the first objection and gave a curative instruction, sustained the second objection, and the

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[5]His mother (R. 3581), father (R. 3589), two sisters (R. 3597, 3616), brother-in-law (R. 3603), brother (R. 3610), and wife (R. 3622).

third time admonished the prosecutor to desist from the line of argument. In so doing, the judge followed this Court's directive in Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985), to vigilantly exercise his responsibility to insure a fair trial. Having done so, it cannot be said that the prosecutor's statements at the penalty phase require resentencing in Bertolotti, supra, at 133, "In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial."

In a case similar to this one, Johnson v. State, 442 So.2d 185, 188 (Fla. 1983), the Court held that where the prosecutor made a comment regarding the victim's family and the defense objection was sustained, and the comment was responsive to the testimony of the defendant's relatives in his behalf, the comment was not reversible error. The court found the comment to be improper, but not so prejudicial as to have influenced the jury to have rendered a more severe recommendation that it would have otherwise.

Similarly, in Bush v. State, 461 So.2d 936 (Fla. 1984), which also involved a 7-5 death recommendation as did this case, this court held a prosecutor's appeal to sympathy for the victim's family was of minor impact, not a clear abuse, and did not rise to the magnitude of a denial of fundamental fairness.

Likewise, in Valle v. State, 474 So.2d 796 (Fla. 1985), vacated on other grounds, ___ U.S. ___, 90 L.Ed.2d 353 (1986), this Court held that a prosecutor's statement that the victim's family would never see him again, though improper, was not so prejudicial as to have influenced the jury to have rendered a more severe recommendation than it would have otherwise. See also, Jennings v. State, 453 So.2d 1109, 1113-1114 (Fla. 1984).

The remarks at issue in the present case were far less prejudicial than the comments held not to be reversible in the foregoing cases. Johnson, Bush, and Valle, all involved specific comments about the loss felt by the victims' families. By contrast, the statements where were a more general appeal to the jury not to misplace its sympathy (R. 3656, 3658-3659), and a statement of the obvious fact that the deceased victims were no longer able to enjoy life. (R. 3660). It was the weight of the aggravating circumstances that led to the death recommendation and not prosecutorial misconduct; hence, the Appellant has failed to demonstrate reversible error.

B. The Victim Impact Statements

The jury did not hear testimony from any of the victim's family members. At the sentencing hearing conducted before the trial judge, he stated he was required by statute [§921.143 Fla.Stats.] to hear from the family members but "nothing they say is binding on me". (R. 3997-3998). At the conclusion of the hearing the judge told all assembled (the

Appellant's family as well as the victims) that his decision would be based on the evidence, not on emotion or sympathy. The Judge further stated, "I am limited only to those aggravating circumstances in the statute that have been proven beyond a reasonable doubt. The mitigating circumstances, by law, are unlimited". (R. 4018-4019)[6] The prosecutor then prefaced his argument for the death penalty by stating he would base his comments on the mitigating and aggravating circumstances, which are the only proper considerations. (R. 4022-4023).

It is evident the trial judge kept to his word to base his decision only on the aggravating and mitigating factors, because the death sentence on Count II for the murder of Gail Hardeman lists just the statutory aggravating factor and finds three applicable. (R. 4872-4873). After addressing the mitigating factors (R. 4874-4877), the Court then weighed the aggravating and mitigating circumstances to arrive at the conclusion that death was appropriate. (R. 4877). There was no reference to or consideration of the victim impact statements.

The decision in Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440 (1987), does not require reversal in the present case, for in Booth the Court held that introduction of a victim impact statement before the jury in a capital sentencing proceeding, which the applicable statute required that the jury

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[6]The Court also made it clear at several points in the record that he intended to base the sentence on the evidence and the law and not anyone's opinion. (R. 3817, 3824-3825, 3893).

consider, violated the Eighth Amendment. The Maryland statute declared invalid in Booth specifically required that the victim impact statement be considered in a capital case. Md. Ann. Code, Art. 41 §4-609(d) (1986). By contrast, the Florida Statutes, §921.143 requires that the victim or victim's next of kin be permitted to make a statement in any felony sentencing, but there is no concommittant directive that it be considered in imposing sentence in a capital case.

The trial court below correctly recognized that the limited aggravating circumstances enumerated in §921.141(5), controlled his decision. The fact that he heard from the victim's family does not mean he considered their wishes in imposing the sentence. In Brown v. Wainwright, 392 So.2d 1327, 1333 (Fla. 1981), this court recognized that judges are often cognizant of information that they disregard in the performance of their judicial tasks. Just as factors outside the record play no part in this court's death sentence review role, Brown, supra, the victim impact statements made before the trial judge did not enter into his decision. See, Alford v. State, 355 So.2d 108, 109 (Fla. 1977) [even if judge was "made aware" of certain facts, that does not mean he "considered" them].

It is a well recognized legal principle that judges are capapable of disregarding that which should be disregarded; the trial judge's express statement that he would limit his consideration to the statutory aggravating factors should end the

matter. Harris v. Rivera, 454 U.S. 339, 346-347 (1981); Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983) (en banc). In Lightbourne v. Dugger, 11th Cir. No. 86-3643 (Op. filed September 18, 1987), f.n. 16, the Eleventh Circuit held that resentencing was not required under Booth where victim impact statements contained in a pre-sentence investigation were seen only by the judge and not the jury, when the judge's sentencing order relied solely on the statutorily authorized aggravating circumstances. Therefore, the Appellant is not entitled to a new sentencing hearing.

POINT VII

THE APPELLANT WAS PROPERLY SENTENCED FOR BOTH THE MURDER AND ROBBERY OF JOHN HARDEMAN.

The jury convicted the Appellant of the first degree felony murder of John Hardeman, as well as robbing John Hardeman. The trial judge properly entered judgments and sentences for both offenses.

Fla,Stat. §775.021(4) (1981), provides:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

In the instant case, the felony murder was a violation of §782.04(1)(a), Fla.Stats. (1981), and the robbery a violation of § 812.13(2)(a) Fla.Stats. (1981). Contrary to the Appellant's claim, the robbery was not a lesser offense of first degree murder, so separate sentences were authorized pursuant to §775.021(4), Fla.Stats. (1981).

In State v. Enmund, 476 So.2d 165 (Fla. 1985), this Court held the underlying felony is not a lesser offense of first degree murder and a defendant can be convicted of and sentenced for both felony murder and the underlying felony. Citing Missouri v. Hunter, 459 U.S. 359 (1985), the court determined the legislature intended multiple punishment when both a murder and

felony occur during a single criminal episode. The Court's decision to the contrary in State v. Hegstrom 401 So.2d 1343 (Fla. 1981), was specifically overruled in Enmund. Accord, State v. Snowden, 476 So.2d 191 (Fla. 1985); Vause v. State, 476 So.2d 141 (Fla. 1985).

[Enmund was not overruled in the recent decision of Carawan v. State, 12 F.L.W. 445 (Fla. Sept. 3, 1987). Under the Carawan analysis, the legislative intent to have multiple punishments is clear and the court need inquire no further].

POINT VIII

THE TRIAL COURT DID NOT ERR IN IMPOSING CONSECUTIVE MANDATORY MINIMUM SENTENCES FOR THE TWO ROBBERIES.

The Appellant was charged in Count III of the indictment with the robbery with a firearm of John Hardeman. The property taken was alleged to be a 30.06 rifle, a wallet, and United States currency. (R. 4098). In Count IV, the Appellant was charged with the robbery with a firearm of Gail Hardeman, and the property taken was a .38 caliber revolver. (R. 4098). The trial judge sentenced the Appellant to consecutive mandatory three year minimum sentences (R. 4877-4878), as authorized by § 775.087 (2), Fla.Stats. (1981).

The Appellant, citing Palmer v. State, 438 So.2d 1 (Fla. 1983), argues that there was a single criminal episode so the mandatory minimums can not be consecutive. The Appellee maintains Palmer is inapplicable, because it involved the robbery of a group of people at the same time and place. Following Palmer, in State v. Thomas, 487 So.2d 1043 (Fla. 1986), and Murray v. State, 491 So.2d 1120 (Fla. 1986), this Court has approved consecutive mandatory minimums where there are separate and distinct offenses and/or separate and distinct victims. In Thomas, the defendant shot a woman in her home, she ran outside, and when her son came to her aid, the defendant fired at him. The Court held that in this situation the offenses and victims were separate so the legislature intended for the trial court to

have discretion in deciding whether to impose the mandatory minimums consecutively or concurrently. In Murray, the Court approved consecutive three year sentences involving a single victim who was robbed and sexually battered in two different locations, finding each offense was a separate and additional violation of the victim's most basic rights.

Therefore, even when offenses are separated by just a very brief time, consecutive mandatory minimums are permissible because it is logical to conclude the legislature didn't intend to punish a defendant who continues attacks with a firearm less severely than someone who commits one such offense and then desists. Knight v. State, 509 So.2d 1254 (1 DCA Fla. 1987).

In the present case, the victims' bodies were found four hundred feet apart, and because of the dense growth in the area, one could not be seen from the location of the other. (R. 1821). John Hardeman was shot with a shotgun and Gail Hardeman by a pistol. (R. 1975, 1990). John Hardeman carried a 30.06 rifle (R. 2561), and Gail Hardeman always carried a .38 pistol. (R. 2560). The Appellant stated he shot the man first and then shot the woman because she came up and started yelling. (R. 2182-2183; 2524). This evidence established that the two robberies were sufficiently distinct so as to authorize consecutive mandatory minimums; they did not occur undeer the type of circumstances that would be controlled by Palmer. See also, Gillis v. State, 486 So.2d 706 (5th DCA Fla. 1986); Thorne v. State, 496 So.2d 891 (2 DCA Fla. 1986).

CROSS APPEAL

THE TRIAL COURT ERRED IN SUSTAINING THE DEFENSE OBJECTION TO THE APPELLANT'S ADMISSION BY SILENCE.

The State at trial sought to present an admission by silence as part of its case. The trial court sustained the defense objection on the basis that it was hearsay. (R. 2247, 2252). The Appellee maintains this ruling was erroneous, because the evidence was admissible as an exception to the hearsay rule. Section 90.803(18)(b), exempts from the hearsay rule a statement that is offered against a party and is a statement in which he has manifested his adoption or belief in its truth.

The statement at issue in the instant case was established through a proffer. Richard Freshour, a friend of the LeCroys, testified that on January 9, 1981, he went to the LeCroy residence in Miami. (R. 2245). Mr. Freshour then accompanied Jon and Cleo to a store. While they were at the store Jon asked Mr. Freshour if he liked the sight of blood because he'd had to dig the bullets out of the head of a woman that Cleo had shot. (R. 2249). Cleo heard this statement but said nothing. (R. 2250). Jon also asked Mr. Freshour to keep a pistol for him because it was Cleo's and Cleo had shot a man and wanted to hide it. (R. 2250). Cleo heard this statement as well and again, did not answer. (R. 2250).

These statements were admisible because the Appellant's silence in the face of the accusation constitutes an admission; the circumstances and nature of the statements are such that it would be expected he would have protested them if they were untrue. Tresvant v. State, 396 So.2d 733, 738 (3 DCA Fla. 1981). The essential inquiry in this situation is whether a reasonable person would have denied the statement under the circumstances. Privett v. State, 417 So.2d 805 (5th DCA Fla. 1982). In the instant case, stating in the Appellant's presence that he killed a woman and a man certainly is the type of accusation a reasonable person would deny if it were false. The Appellant heard the statements, yet said nothing. The State was entitled to the benefit of this evidence, and the trial court erroneously excluded it.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Appellee respectfully requests that the judgments and sentences entered by the lower court be affirmed. If however, this case is reversed for a new trial, the Appellee requests pursuant to its cross appeal, that the trial court be directed to admit the subject evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee/Initial Brief of Appellant has been furnished by United States mail to CHARLES W. MUSGROVE, Congress Park, Suite 1-D, 2328 South Congress Avenue, West Palm Beach, Florida 33406 this 30 day of October, 1987.

Of Counsel