IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,358

MICHAEL SCOTT KEEN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY CRIMINAL DIVISION

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BRIEF OF APPELLEE

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INTRODUCTION

This is an appeal by the Defendant/Appellant of a conviction and sentence of death for the first degree murder of his wife, Lucia Anita Lopez Keen, imposed by the Honorable Patti Henning, Circuit Court Judge of the Seventeenth Judicial Circuit In and For Broward County, Florida in case number 84-9474.

Throughout this brief, the Defendant/Appellant, **Michael Scott Keen**, will be referred to as "the defendant" while the prosecution below and Appellee herein, **the State of Florida**, will be referred to as "the State." For the convenience of the Court, the State will adopt the references to the Record on Appeal utilized by the defendant in his initial brief.

The State disputes the defendant's version of the Statement of the Case and Statement of the Facts and therefore includes its own hereinafter.

STATEMENT OF THE CASE

The State's Case

The defendant's first conviction for first degree murder, in 1985, was overturned by this Court in Keen v. State, 504 So.2d 396 (Fla. 1987). His second trial, the subject of the instant appeal, occurred from August 26 through September 2, 1987. (2R. 82-1248). The defendant was once again convicted of first degree murder and the jury, following a penalty phase conducted September 8, 1987, recommended imposition of the death penalty by a vote of seven to five. (2R.1465-71). The trial court, on October 15, 1987, imposed the death penalty finding that the murder was committed for pecuniary gain, was heinous, atrocious and cruel and was committed in a cold, calculated and premeditated manner without pretence of moral or legal justification. (2R.1387-1391). The trial court found no mitigating circumstances to exist, despite considering the defendant's lack of disciplinary problems while in various prisons, stating that this factor was insufficient to mitigate a warranted death sentence. (2R.1391-2).

STATEMENT OF THE FACTS

Kenneth Shapiro, (hereafter referred to as Shapiro), a graduate of Cornell, came to Florida in December 1977; he stayed with his grandparents, seasonal residents, at their condo in

Miami Beach for several months. (2R.482). Shapiro, who was upset over not being accepted to dental school, answered an ad in the Miami Herald for a salesman's position at an electronic sign company where he met the defendant, who was a regional manager. (2R.482-4, 533). Shapiro was, on occasion, a good salesman but was not in the same league as the defendant or his brother, Patrick Keen. (2R.485). After several months of working together, Shapiro moved into the defendant's Hialeah apartment which they shared with Patrick. (2R. 484). Shapiro liked to go to pari-mutuel establishments, but had bad luck. (2R.486). The defendant lent him money and paid his share of the rent when he was not able to. (2R.485-6). Towards the end of 1979-80, Shapiro accepted a job with a company that transferred him to Tampa, but was laid off after a few months. (2R.487-9). Shapiro returned to work for and live with the defendant and his brother who had since moved to a house in Fort Lauderdale on S.W. 42nd Terrace. (2R. 487-9).

The defendant told Shapiro that he wanted to find an unsuspecting girl to insure and kill for the insurance money. (2R.490). The defendant wanted to find a girl who was not too bright, who was dependent upon a man, and who was searching for "Mr. Right." (2R.491). Keen initially planned to push the girl off a balcony. (2R.490).

The defendant indicated to Shapiro that he thought the girl he was looking for was Anita Lopez, someone Patrick had initially dated. (2R.491). Anita moved into the house and was on friendly terms with Shapiro. (2R.492). Eventually, Keen told Shapiro that Anita was, in fact, the girl for the plan. (2R.492). Shapiro was overwhelmed but didn't resist. (2R.492). He became aware that the defendant was taking out insurance on Anita after the defendant told him that he had arranged to have an agent come over one night. (2R.493). Later Keen indicated he had Anita insured, but Shapiro did not know the type of policies involved. (2R.493). The defendant married Anita who became pregnant. (2R.493-4). Anita was very happy about the baby; the defendant did not want the baby and told Shapiro he would have to step up his plans as a result of the pregnancy. (2R.494).

In late October or early November of 1981, the defendant told Shapiro that if the weather was good on Sunday November 15, he would proceed with his plan by taking Anita out on the boat and pushing her overboard. (2R.495-6). The defendant told Shapiro that Anita and he would board at the house and that he was to met them 'accidentally' at Tugboat Annie's, a dockside restaurant and lounge. (2R.496-7). They would then all go out together so that Shapiro would be present to corroborate his story. (2R.496). The defendant did not discuss the specifics of the plan; Shapiro was scared and did not want to believe it. (2R.495).

On November 15th, during the late morning or early afternoon, Shapiro went to Tugboat Annie's where he met the defendant and his wife who were playing video games and having a few drinks. (2R.497). Shapiro did not leave from the house with them since Keen felt Anita wanted to go alone with him and would be more receptive to Shapiro's presence if he joined them by "accident." (2R.496-7). The three left the restaurant on the boat via the Intracoastal Waterway, past Port Everglades and out into the Ocean. (2R.498). Shapiro estimated they went out twenty miles because he could barely see the tops of the highest buildings on the coast; he had never gone out that far before. (2R.501).

Near sunset, they were all on the fly bridge of the boat listening to the Dolphins/Raiders game and then to some music as the home team was losing badly. (2R.502-3). Anita climbed down the ladder and began walking around the lower deck railing. (2R.503). The defendant, who was driving the boat, placed it in neutral and also went down the ladder. (2R.503). Shapiro knew this was the moment, so he went down the ladder freezing at the bottom. (2R.503-4). He did not try to interfere because he was afraid he couldn't do anything to stop Keen and also feared that if he did something would happen to him. (2R.503-4). The defendant approached from behind and pushed his pregnant wife over the railing; no other boats were in sight. (2R.504-

5,508,511). Shapiro did not see Anita enter the water and did not recall hearing a splash. (2R.508,514). Keen told Shapiro to reengage the motor and take the boat out of range before Keen resumed control of the boat. (2R.506). Shapiro saw Anita swimming and doing everything she could to stay afloat; he did not recall her saying anything. (2R.509). Keen planned to recover Anita's body after she drowned but it got dark and she was still swimming so Keen finally decided to head back to port. (2R.510).

The return trip took a minimum of two hours; although they passed the coast guard station on the way, they did not stop. (2R.511). Keen operated the boat on the trip and obeyed all the speed limits. (2R.512). Keen came up with the idea that they would tell the authorities that upon their arrival home they discovered Anita missing and that they had no idea how she had disappeared. (2R.511). When they arrived at the house, Shapiro called the coast guard to report a missing person and have a search initiated. (2R.512-3). Later that night, a representative of the Broward Sheriff's Office came to the house to take a statement. (2R.513). The officer talked mainly to the defendant although Shapiro was present. (2R.513). The account they gave was exactly what Keen had planned for them to say. (2R.513). Shapiro did not tell the truth about what happened since the defendant had threatened him that if he went to the authorities or deviated from the planned story either he or his grandparents, who Keen knew, would die. (2R.514-5).

Shortly after Anita's death, Keen purchased a motor home and Shapiro accompanied him to California. (2R.515). After about a week, Keen returned to Florida by car; Shapiro drove back in the motor home a week or two thereafter. (2R.515). Shapiro then returned to his family in New York where he was employed for a period of time. (2R.515-6). The defendant maintained periodic contact with him from the time he left Florida until August of 1984, warning him to keep quiet and make sure he didn't say anything. (2R.517-8). He returned to Florida in late June of 1983. (2R.516).

On August 24, 1984, Shapiro was contacted by Detectives Amabile and Scheff of the Broward Sheriff's office regarding the death of Anita Keen on November 15, 1981. (2R.518). The two Officers told Shapiro they already knew the truth, but just wanted to hear it from him. (2R.518). Shapiro initially lied to the officers, telling them the same story he related in 1981. (2R.518). Shapiro accompanied them downtown at their request. (2R.518). After several hours, Shapiro decided to tell them the truth about what happened since he believed that they already knew it but could not proceed legally without his help. (2R.519).

The Officers provided him with a tape recording device so that if the defendant tried to call him from jail he would be able to record the conversation. (2R.519-20). Shapiro was

agreeable to the plan and when Keen did in fact call, he recorded their conversation. (2R.520-538). During the call, Keen repeatedly told Shapiro that he was playing God, that he shouldn't send him to die since it wouldn't bring Anita back, that what happened was an accident, and that he had been good to Shapiro since they met. (2R.526-38).

Shapiro testified that he acted out of fear with regard to his behavior during and after Anita's death and that for Keen, his presence was a means of extinguishing the financial debt that Shapiro owed him. (2R.548-9). He decided to tell the truth to do justice, not because he felt that he had to cooperate to stay out of trouble. (2R.544). In fact, he believed that he was still subject to prosecution for his involvement in Anita's death. (2R.546).

Donald R. Johnson, a sales representative for Life of Virginia Insurance Company, testified that in June of 1981 he had contact with the defendant after his insurance policies were transferred from the company's Orlando office to Fort Lauderdale. (2R.588-0). Mr. Johnson contacted Keen to set up a meeting to review the existing policies; as a sales representative he naturally hoped to update the policies or sell additional coverage. (2R.589-90,599-600). At the meeting, the defendant brought up the subject of coverage for Anita and in fact took out a double indemnity policy for $50,000 on her naming him as

beneficiary. (2R.590-1). On August 30, 1981, Anita filled a request for a name change to her married name. (2R.594). The premium was paid quarterly; Keen renewed the policy in June of 1982 and the premiums were paid by him through September 9, 1984. (2R.594-5). The continued payments were consistent with wanting to create the impression the payee did not know the insured was dead. (2R.610).

Mattie Genova, assistant manager of the Fort Lauderdale office of Prudential Insurance Company, testified that agent Fidula, of the Miami office, sold a $50,000 whole life double indemnity policy on Anita which named the defendant as beneficiary on June 19, 1981. (2R.623-5). While the policy showed that this was an agent initiated call, it did not indicate that the named party possessed other insurance although it should have. (2R.629-30). A name change application was made on September 29, 1981.

Broward Sheriff's Office Detective Don Scarbrough testified that on December 10, 1981 he had contact with the defendant at his attorney's office for the purpose of talking about Anita's disappearance. (2R.631). A tape recording was made of the defendant's sworn statement which was made in his attorney's presence. (2R.633-4). The defendant stated that on a Sunday, that he believed was November 15, 1981, he took out his boat, called "the Foreplay Too," since Anita had been bugging him

to go boating. (2R.637, 647). He realized that they were low on fuel, so he stopped at Tugboat Annie's where they drank a few beers and played video games. (2R.638). They had told Shapiro where they would be if he decided to go; after Shapiro showed up, they made their way up to Port Everglades and into the Atlantic. (2R.638). The water was very calm; he did not know how far they went out, but believed it was under eighteen miles. (2R.639).

In this statement, the defendant told Detective Scarbrough that they listened to the Dolphins-Raiders game which by then was already in the second half. (2R.639). All three of them were top side talking sports; when the game ended they put on some music and turned west to enjoy the beautiful sunset. (2R.640-1). Anita, who was four to five months pregnant, got tired and went down to the cabin to rest. (2R.641-2). He saw her enter the cabin and close the door. (2R.642). It was dark by then, so they headed home, reaching the dock about an hour and a half later. (2R.642-3). The engine was running badly and music was on; he did not see or hear anything. (2R.643). When they returned home he checked the cabin to find that Anita was missing. (2R.644). The defendant stated he was in a chaotic state of mind and wanted to jump back into the boat to go and look for her. (2R.644). Shapiro told him not to, suggesting he call the coast guard because she might have fallen off the boat and already be safe. (2R.644). They called the coast guard around 9-10:00 p.m. which referred them to the Broward sheriff's office which dispatched an officer who took statements. (2R.644).

The defendant told Detective Scarbrough that he had married Anita on August 1, 1981 in Miami where her family resided. (2R.651). Anita was ecstatic about the baby she was expecting; the defendant admitted he was less than thrilled when he first learned of the pregnancy, but insisted he grew to love the idea of a son. (2R.652). Anita had several insurance polices; he believes one agent from Prudential approached her at her job in Miami from whom she purchased a $50,000 policy. (2R.652-3). He asked her to cancel a second policy from Life of Virginia, the value of which he did not know, which he believed was not in effect. (2R.653).

Former Broward Sheriff, Hector Mimoso, was dispatched to the Keen residence at 11:03 p.m. on November 15, 1981, as a result of the defendant's call. (2R.663). The defendant told him that when they had been boating his pregnant wife became tired and went into the cabin to rest. (2R.665). When they arrived home, she was not on board and they could not find her although they heard no splash while at sea. (2R.666). Officer Mimoso testified that during the interview the defendant was very calm and that Shapiro was the one who was excited and in fact kept interrupting to answer questions posed to the defendant. (2R.667,672). Based upon his experience, he stated that persons in shock were normally very excited and that the only time he had seen an individual in shock act calmly was when the person was

unconscious. (2R.673-4). When Shapiro kept interrupting, Officer Mimoso told him that he wanted to hear the story from Keen since he was the person who had reported Anita missing; the only thing he asked Shapiro was if he'd been on board the boat. (2R.668). The defendant gave a detailed description of Anita, including her attire. (2R.668-9). Officer Mimoso asked Keen for the names, address and phone number of Anita's family; Keen said he did not know the information. (2R.669).

Broward Homicide Detective Phil Amabile testified that their office reopened the case on Anita Keen in August of 1984. (2R.682). Both he and Detective Scheff had contact with Shapiro in Margate Florida when they went to his grandparents' condo. (2R.683). Shapiro accompanied them to their office where they questioned him for several hours. (2R.683-4).

They contacted the defendant, on August 23, 1984, at his place of business in Castleberry, in Seminole County Florida, where he was using the name Michael Kingston. (2R.683-4,735-7). They arrested Keen, pursuant to a warrant, for the first degree murder of his wife and Mirandized him. (2R.685,737-8). The defendant told them he was curious why they arrested him three years after her death and they informed him that they had obtained new evidence and statements to the effect that Anita had not disappeared or suffered an accident, but had been murdered, which resulted in the reopening of the case and the warrant being

issued for his arrest. (2R.686,738-9). The Detectives mentioned the name Shapiro. Shapiro, providing the defendant, at his request, with a brief synopsis of what Shapiro had said; the defendant stated that he could not understand why Shapiro was lying, that the original account they gave of what happened was the truth. (2R.686,739). The defendant asked them what the penalty for first degree murder was. (2R.687,739-40). When they told him it could mean the death penalty or life imprisonment with a minimum mandatory sentence of twenty-five years, he responded that in his opinion both sentences were the same since he did not believe he could survive twenty-five years in prison. (2R.687,740-1). Moments later, however, he asked if a confession would guarantee him a lessor sentence, although he never actually admitted killing Anita. (2R.741). They told him they could not predict the effect of a confession on sentencing at which time the defendant said that he could see no strategic reason to confess. (2R.687,741).

The Officers drove the defendant from Seminole County to Broward. (2R.742). They initially engaged in small talk, then the defendant asked them if Shapiro had been arrested as well. (2R.742). They told him no, and he asked if Shapiro had been granted immunity from prosecution. (2R.742). They again told him no, but added they felt it was likely. (2R.742). The defendant was perturbed and first discussed with them the possibility of making a statement to them which would render Shapiro less

important to the State's case before concluding that he had no strategic reason to confess. (2R.743). At one point during the trip, the defendant told them he had not physically killed Anita. (2R.744).

After being re-Mirandized upon his arrival in Broward County, the defendant repeated the same story he originally told Officer Scarbrough in 1981. (2R.692-3,744). When they told him they didn't believe him, the defendant hung his head, appeared to be thinking for some time, and then stated that Shapiro had it all wrong and that he would tell them the truth. (2R.699,744).

The defendant admitted that he had talked to Shapiro about the possibility of killing Anita for the insurance money, but added it was a hypothetical plan, a fantasy. (2R.697,744-5). The defendant told them that he and Anita had been hugging when Shapiro came up and pushed them into the water, causing Anita to hit her head on the dive platform of the boat. (2R.695,746). He saw Shapiro speed off circling them at ten knots and he was able to get on board by swimming to a point he thought the boat would be at, like shooting clay pigeons. (2R.695,746-7). After getting on board, he fought Shapiro for control of the boat. (2R.695,747). After he regained control of the vessel, the defendant said he went back for Anita who was still in the water. (2R.695,698). He was not able to find her. (2R.699).

When the Officers asked why Shapiro would do such a thing, the defendant told them that Shapiro was jealous of his relationship with Anita, did not like her, and knew about the insurance money. (2R.695,747-8). The Officers then asked what the money had to do with Shapiro since he would not benefit from the insurance policies which named Keen as beneficiary and Keen amended his response saying that it was all just an accident and Shapiro had not meant to do it. (2R. 697).

The Oficers were forced to take a statement from the defendant in which they wrote out questions, asked them and then wrote out his answers since he refused to make a taped statement after orally recounting his version of what really occurred. (2R.699,717-19,748-9). The Officers purposely made two mistakes regarding Anita's favorite drink and the dive platform of the boat, so that the defendant would correct them, thus proving he had read the statement. (2R.700). In that statement, the defendant told the officers that Shapiro had pushed them into the water and that Anita had hit her head on the dive platform of the boat. (2R.706-7). They pointed out that earlier he had admitted discussing a murder for insurance money with Shapiro, but the defendant, in this rendition, denied it, blaming it on his emotional state. (2R.712). The defendant also told them that he stuck with Shapiro's story that Anita had disappeared off the boat without their knowledge because Shapiro did not want to look like a liar. (2R.713-14).

Michael Hickey/Moran, an Iowa State Penitentiary inmate, testified that the last time he was in Broward County, he was returned regarding charges pending from a 1980 incident for armed robbery and credit card theft. (2R.789-91).[1] At the Broward County Jail, he was placed in a six man cell; one of the other occupants was the defendant. (2R.791-2). He spent a week with the defendant before the defendant was transferred to a different facility in Pompano. (2R.792,857-8). During the time they were together, they discussed their respective legal problems; the defendant was very interested in the fact that Hickey had previously been arrested in Kansas on two counts of murder. (2R.793,796). Keen asked Hickey when he thought he'd be out of jail and Hickey told him in a month or so since his Iowa sentence was being discharged and he believed he would be released on bail for the Broward charges. (2R.794).

On Friday, Keen began to talk about his situation, asking Hickey what he had going for himself on the street and if he'd be interested in making some money. (2R.797). Hickey told him he was interested; Keen told him that he'd been arrested for the first degree murder of his wife and that the State would have no

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[1] The jury was fully apprised of Hickey's prior criminal record and was informed of the stipulation entered into by the parties to the effect that although no promises had been made to him regarding the disposition of his Broward charges, it was likely they would be resolved favorably to him.(2R.789-91,796,838-44).

evidence against him if he could eliminate a key witness, his codefendant, Shapiro. (2R.797-8). Keen added that the only reason he'd been arrested was because his brother had turned him in. (2R.798). Keen admitted killing Anita. (2R.820). He told Hickey that on the third Sunday in November, 1981, he went boating during the late afternoon with his pregnant wife going three to four miles out into the ocean. (2R.821). Keen told him that they had been drinking and he kept pushing drinks on his wife to get her drunk. (2R.821). She became ill and threw up over the side. (2R.821). The defendant told Hickey he came up behind her, holding her arms down and Shapiro came up to them pretending to bump them causing them to fall into the water. (2R.821). Keen said that he let go of his wife in the water, got back onto the boat, and circled her for an hour watching her drown. (2R.821-2). He admitted to Hickey that he had planned the murder months in advance with his brother, Patrick, for the insurance money, but that Shapiro was substituted for Patrick because his brother had already been involved in a similar thing and would not be a credible witness like Shapiro would. (2R.822,876).

Keen's main concern was whether or not Hickey was willing to kill a guy for him; when Hickey told him yes, Keen provided him with several ways to locate Shapiro. (2R.798-9). Keen gave Hickey Shapiro's grandparents' address in Margate, as well as, additional background information relating to his parents

residence on Long Island, their liquor store in Oceanside, and information relating to Shapiro's two sisters. (2R.799-800,804,808,813). If he was unable to find Shapiro at his grandparents or a sleazy hotel on A1A, he was to have a girl call Shapiro's parents pretending to be a friend of his sister Debbie's who had met Shapiro and was trying to locate him. (2R.804,810,819-20). Keen also told Hickey that he could find Shapiro at a deposition of him his attorney had scheduled providing the date, time and place of the deposition. (2R.814-15). Hickey wrote down all the information dictated to him by Keen on an envelope. (2R.810,817-19).

The defendant stated that he would provide Hickey with enough cash to purchase a gun and a polaroid camera. (2R.804,869). Keen planned for Hickey to follow Shapiro out of the deposition and get Shapiro to a hotel or other safe location where he would have him stand on a chair and place a noose around his neck which went over a door and was rigged to a door handle. (2R.805-6). The defendant wanted Hickey to pretend as though he was going to tie Shapiro's hands and then give him some paper telling him that he was there on behalf of Keen. (2R.806). Hickey was to have Shapiro write out two identical statements saying that he had lied to the authorities about being present, confessing, and saying he was disappearing. (2R.806). Shapiro was to believe he would be released and that he should disappear from the state; in reality, Hickey was instructed to kick the

chair out from under Shapiro, making it appear Shapiro had committed suicide. (2R807-8). Afterwards, Hickey was to mail one of the two statements to Keen's lawyer and leave the other on the scene. (2R.808).

Before leaving the body, Hickey was instructed to use the camera he was to purchase to take photographs to prove Shapiro was dead. (2R.812). Keen himself wrote down a name and address for J. Patrick Knight on the envelope, telling Hickey that the name and address was that of his brother. (2R811-12). Hickey was to take the photographs to his brother who would pay him for the murder. (2R.812,873).

Dale Nelson, a Broward Sheriff, received documents from Hickey in October of 1984, including the envelope with the phone number of Shapiro's family's liquor store on Long Island. (2R.781,785-6). Nelson forwarded these items to the Federal Bureau of Investigation's Washington crime lab for analysis. (2R.782). Mr. Nelson also obtained from the defendant his fingerprint standards. (2R.786).

Max Jarrell, a fingerprint expert from the FBI's Washington office testified that after he received evidence from the Broward Sheriff's Office for analysis, he compared a latent print found on a paper submitted to him with the defendant's standards and found them to be a match. (2R.891,893-4,897).

Mike Waddle testified that he met the defendant while they were both incarcerated in the Broward County Jail in 1984.[2] (2R.900-1). He observed the defendant and Hickey frequently withdraw from the other occupants of the cell, going into a separate room alone to have private conversations. (2R.901-2). Waddle and the defendant discussed the reasons why they were both in jail since they were there because of their wives. (2R.902). The defendant told him that he had been charged with the murder of his wife and was arrested because his brother had talked to an insurance investigator. (2R.902-3). He added that his brother, who had been in on the plan and with whom he was supposed to split the proceeds, had gotten impatient and gone to the insurance investigator. (2R.903).

The Defense's Case

The sole witness for the defense was the defendant. (2R.913-1102). The defendant denied ever discussing a plan to murder his wife for money and asserted that everything contained in the statement given to Officers Amabile and Scheff was out of context. (2R.1029-31). He denied discussing his case with Waddle

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[2] Mr. Waddle testified that he was in jail on charges related to the alleged sexual battery of his stepson.(2R.901). Waddle negotiated a plea of nollo contendre for which he received probation; he later served two years on the sentence after violating his probation. (2R.903).

and Hickey and stated that he did not care how many "State snitches" had been paid to come in and testify, what they had said was not true. (2R.1040). He claimed that Hickey's knowledge of his case resulted from Hickey going through his files when he wasn't in the cell. (2R.1043).

The defendant admitted that he had been convicted of a felony approximately eleven years ago and some misdemeanors early on, but denied other convictions involving dishonesty. (2R.1040). He testified that he changed his name following Anita's death because he was unable to obtain credit for his new business under his real name. (2R.1041). Although he admitted that he had done this to trick creditors into giving him money they wouldn't give Michael Keen, he felt that it didn't matter as long as he paid them back. (2R.1042).

Keen stated he was stunned when he was arrested, but conceded that he knew the story he had previously told about Anita's mysterious disappearance was a lie. (2R.1046-7). He believed that Shapiro was the cause of his wife's death but covered that fact up and did not tell the police until he was arrested and returned to Broward County since he did not wish to implicate Shapiro. (2R.1047-51).

After they talked with Agent Johnson, who brought up insuring Anita, the defendant instructed Anita to cancel her Life

of Virginia policy. (2R.1057). Nevertheless, he believed that he paid the premiums on the Life of Virginia and Prudential policies until his arrest; a lot of payments were made upon the advise of legal counsel his mother obtained for him. (2R.1056-8). The defendant admitted signing a false petition in Broward County to have Anita declared dead, but asserted that he did not recall reading all of it. (2R.1082-3). He claimed that the only reason he signed it was because his mother, who was in a financial crunch, asked him to so that he could collect on the insurance policies. (2R.1083-4).

The defendant claimed that he may have misspelled the name of his boat for Detective Scarbrough. (2R.1082). He did in fact claim to know the names and addresses of Anita's family and did not recall speaking to Scarbrough about it. (2R.1072,1085). He denied knowing that Anita was not an American citizen despite the fact their marriage license contained that information. (2R.1100-1). He also denied recalling everything he said to Shapiro during their phone conversation. (1092). He did not confront Shapiro although he knew he lied because he did not want to scare him off and wanted him to call his girlfriend and attorney so he would come to his senses. (2R.1092-3).

ISSUES ON APPEAL

I.

DID THE TRIAL COURT ERR IN FAILING TO DECLARE A MISTRIAL AFTER IT DETERMINED THAT TWO MEMBERS OF THE JURY WHO HAD READ A TIME MAGAZINE ARTICLE REGARDING TRIAL TACTICS WERE EXAMINED UNDER OATH AND WERE FOUND NOT TO HAVE BEEN INFLUENCED BY IT?

II.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S RENEWED MOTION TO DISCLOSE THE GRAND JURY TESTIMONY OF KEN SHAPIRO WHEN NO PRETRIAL RIGHT EXISTS JUSTIFYING SUCH DISCLOSURE FOR THE PREPARATION OF A DEFENSE AND SAID ISSUE WAS PREVIOUSLY RAISED AND REJECTED BY THIS COURT?

III.

DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S RENEWED MOTION TO SUPPRESS HIS STATEMENTS WHERE THE ISSUE WAS PREVIOUSLY RAISED AND REJECTED BY THIS COURT?

IV.

IS THE DEFENDANT ENTITLED TO A NEW TRIAL WHEN HE WAS TRIED BY A JUDGE WHO WAS IMPARTIAL AND WHEN NO OBJECTION TO COMPLAINED OF COMMENTS WAS MADE AND NO MOTION TO RECUSE WAS FILED?

V.

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XIII.

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XVI.

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XVII.

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XVIII.

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XIX.

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XX.

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XXI.

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XXII.

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XXIII.

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XXVIII.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REJECTING PROPOSED MITIGATING FACTORS WHICH WERE EITHER UNSUPPORTED BY THE RECORD OR WHICH WERE

OF INSUFFICIENT VALUE TO OUTWEIGH THE SUBSTANTIAL AGGRAVATING CIRCUMSTANCES FOUND TO EXIST.

XXIX.

DID THE TRIAL COURT CORRECTLY DENY THE DEFENDANT'S REQUESTED INSTRUCTION ON DISPARATE TREATMENT WHEN THE RECORD ESTABLISHED THAT THE PROPOSED INSTRUCTION WAS NOT SUPPORTED BY THE EVIDENCE?

XXX.

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XXXI.

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XXXII.

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XXXIII.

DID THE TRIAL COURT IMPROPERLY DOUBLE ITS CONSIDERATION OF CCP AND PECUNIARY GAIN AS AGGRAVATING FACTORS?

XXXIV.

DID THE TRIAL COURT ERR IN REFUSING TO GIVE THE INSTRUCTION PROPOSED BY THE DEFENDANT ON THE DISPARATE TREATMENT OF KEN SHAPIRO?

XXXV.

DID THE TRIAL COURT PROPERLY INSTRUCT THE JURY AS TO THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS HEINOUS ATROCIOUS AND CRUEL?

XXXVI.

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XXXVIII.

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XXXIX.

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B. ARE THE STANDARD JURY INSTRUCTIONS CONSTITUTIONAL?

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F. DO PROCEDURAL PREREQUISITES TO APPELLATE REVIEW RENDER THE STATUTE UNCONSTITUTIONAL?

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I. IS THE BURDEN OF PROOF FOR MITIGATING FACTORS CONSTITUTIONAL?

J. IS FLORIDA'S INSTRUCTION THAT JURIES SHOULD NOT CONSIDER PREJUDICE, BIAS, OR SYMPATHY UNCONSTITUTIONAL?

K. IS ELECTROCUTION CRUEL AND UNUSUAL PUNISHMENT?

L. IS THE DEATH PENALTY RACIALLY BIASED?

SUMMARY OF THE ARGUMENT

The trial court did not err in failing to declare a mistrial after it discovered that two members of the jury had read a magazine article regarding defense trial tactics in view of the inquiry which it conducted which revealed the two jurors had not been affected by the article having already reached their verdict.

The trial court acted appropriately in denying the defendant's renewed motion to disclose Ken Shapiro's grand jury testimony since no pretrial right to disclosure for purposes of preparation of a defense exists and this Court's prior determination of the issue in his first appeal constitutes law of the case.

The defendant's renewed motion to suppress his statements was correctly denied by the trial court which was bound by law of the case as determined by this Court's prior determination of the matter.

The defendant is not entitled to a new trial given the fact he was tried by an impartial judge and did not either object to the comments he now complains of or move to recuse the judge.

The trial court did not err in prohibiting cross-examination of Detectives Amabile and Scheff regarding collateral matters which were irrelevant to and without bearing on this case.

The defendant is not entitled to discharge since, as determined by this Court in his first appeal, the prosecutor did not intentionally provoke a mistrial.

The trial court properly denied the defendant's renewed motion for dismissal based on lack of jurisdiction, given this Court's prior determination of this issue in his first appeal. The defendant's challenge to venue was previously addressed by this Court and is barred by the principle of law of the case. The defendant's motion for change of venue was correctly denied by the trial court since he was tried and convicted by an impartial jury.

The trial court did not err in denying the defendant's motion for new trial since the record contains sufficient evidence to support the verdict.

The trial court did not err in allowing the bailiff to provide the jury with items admitted into evidence without reconvening when the defendant so stipulated and when the law does not require either the defendant or his counsel to be present.

Testimony regarding the defendant's efforts to solicit the murder of Ken Shapiro was correctly admitted when the testimony was highly relevant to the underlying charges and since it did not become an undue feature of the trial to the defendant's prejudice.

The trial court correctly allowed evidence of the defendant's attempt to solicit the murder of Ken Shapiro in view of the fact the State provided the defense with notice of its intent to rely on said evidence.

Testimony regarding bad acts of Patrick Keen was properly admitted into evidence when the defendant failed to object to the testimony and it did not imply a collateral bad act by the defendant.

The trial court did not err in allowing hearsay statements of Patrick Keen into evidence when the defendant failed to object to the comments which did not improperly implicate the defendant.

The trial court did not err in allowing Detective Amabile to testify that the police had statements to the effect that Anita had not died as the result of an accident since the Officer could testify to the facts surrounding the arrest and the testimony did not improperly bolster Shapiro's testimony.

Testimony regarding the defendant's use of an alias at the time of his arrest was properly admitted into evidence given the defendant's failure to object and the fact that the testimony was relevant.

The trial court did not err in either allowing Detectives Amabile and Scheff to testify that the defendant recanted his original version of what occurred after they told him they did not believe him or in allowing Shapiro to testify that he decided to tell the truth because he believed the officers already knew it. The defendant did not object to these matters which do not constitute opinion testimony prohibited by the Rules of Evidence.

Testimony relating to the victim's pregnancy was properly admitted into evidence since not only did the defendant fail to object, the testimony was highly relevant to the case.

The trial court did not err in allowing Detective Scarbrough to testify that he took a statement from the defendant at his attorney's office shortly after Anita's death when no objection was made and the testimony did not constitute an improper comment upon the defendant's right to counsel.

Testimony regarding the accuracy of a phone number was properly admitted into evidence in the absence of an objection by

the defendant when the testimony revealed the witness had personally verified the number.

The defendant's motion for judgment of acquittal was correctly denied by the trial court in view of the inherent unreasonableness of the defendant's account of what transpired on the day of Anita's death which justified the trial court's rejection of it.

The trial court did not err in failing to give non-death lessor included offenses when the defendant did not request any and fully concurred in the instructions given.

The trial court did not reversibly err in giving the jury the short form excusable homicide instruction when the defendant neither requested the long form nor objected to the use of the short form.

The defendant's conviction need not be reversed when he has not established that cumulative error rendered his trial fundamentally unfair.

The defendant's death sentence is not disproportionate since the trial court acted within its discretion in finding that either the mitigating factors urged by the defendant did not exist or were insufficient to outweigh the aggravating factors it found to exist.

The trial court was correct in denying the defendant's proposed instruction on the disparate treatment of Ken Shapiro when the evidence produced at trial did not support the instruction since Shapiro was not equally culpable.

The jury instructions as a whole reveal that the trial court utilized the proper standard of proof in evaluating whether mitigating circumstances urged by the defendant did in fact exist.

The record establishes that the trial court utilized the appropriate standard of proof in determining the existence of aggravating factors.

The record supports the trial court's finding that the murder of Anita Keen was heinous, atrocious, and cruel as it establishes that Anita struggled for her life for over an hour before she was abandoned at sea at dark by her new husband who ensured there was no hope of her rescue.

The trial court did not improperly double its consideration of CCP and pecuniary gain as aggravating factors since both were founded upon independent elements of the crime.

The trial court did not err in failing to give the proposed instruction on the disparate treatment of Ken Shapiro when the proposed instruction was neither supported by the facts nor a correct statement of the law and the court did instruct the jury that it was to consider if the defendant was an accomplice as well as any other aspect of the defendant's character or record, and any other relevant aspect of the offense.

The trial court did not err in utilizing the standard jury instruction on the aggravating factor of heinous, atrocious, and cruel.

The jury instructions as a whole reveal that the trial court did not improperly lead the jury to believe that it had no responsibility with regard to the ultimate sentence which would be imposed. The defendant's acquiescence in the curative instruction waives any prior objection.

The trial court did not err by informing the jury that a vote of six or more would result in a life recommendation.

The record reflects that the trial court did not consider impermissible victim impact evidence, opinion evidence, hearsay or unproven allegations of criminal activity in imposing its sentence.

The defendant is not entitled to a new sentencing proceeding before a new judge since, as established by the arguments contained herein, the record fails to support his claim that the proceeding was tainted by numerous errors.

Florida's death penalty, both the aggravating and mitigating circumstances found to exist in this case, the standard jury instructions for the penalty phase, and the use of majority verdicts have all been upheld as constitutional since meaningful appellate review is afforded by this Court.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN FAILING TO DECLARE A MISTRIAL AFTER IT DETERMINED THAT TWO MEMBERS OF THE JURY WHO HAD READ A TIME MAGAZINE ARTICLE REGARDING TRIAL TACTICS WERE EXAMINED UNDER OATH AND WERE FOUND NOT TO HAVE BEEN INFLUENCED BY IT.

The defendant asserts that he is entitled to a new trial because two members of the jury were exposed to what he terms "an inflammatory" magazine article regarding trial tactics in the Lavin and Hansen cases in New York. It is clear however, that when the facts of this event are stripped of the defendant's dramatic rendition of them, the trial court did not err.

In the instant case, the defendant moved for a hearing regarding the possibility of juror misconduct on September 15, 1987. (2R.1285). The defense claimed that the jury had been improperly influenced by the presence of a magazine article in the jury room which was later found by the defendant's attorney from his first trial and brought to his present defense counsel's attention. (2R.1290). The panelists were thereafter brought in individually by the court for questioning by it and counsel for the defense as to whether or not they had seen or read the article. All of the jurors, with the exception of Jurors Frischetti and Rodriguez, testified that they had not even seen the article. (2R.1302, 1305, 1307, 1317, 1319, 1335, 1337, 1339-

40, 1342, 1343). These same jurors also testified that they had not heard either the article or its contents discussed at any time during their deliberations by these two jurors or anyone else. (2R.1302, 1305, 1307, 1318, 1319-20, 1323, 1336, 1337-8, 1340, 1342, 1343-4).

Only two of the panelists, Jurors Frischetti and Rodriguez, had any contact whatsoever with the article. Juror Frischetti testified that he read the article the second day of deliberations after having already reached his verdict. (2R.1316, 1349, 1354). After giving the matter some thought, Juror Frischetti believed he might have drawn Juror Rodriguez's attention to the article while they were sitting next to each other near the men's room in the outer circle of chairs surrounding the conference table. (2R.1314,1349-50). Significantly, Juror Frischetti testified that the article did not affect his verdict in any way whatsoever, that he had previously determined his verdict, the correctness of which he did not doubt. (2R.1354).

> The Court: Mr. Frischetti, if I can ask you, having read that article, did it in any way influence you in the facts of this case or your verdict in this case?
>
> Juror Frischetti: No it did not. Again, I had my verdict the first day...it did not influence me, no. (2R.1316).

Juror Frischetti also unequivocally stated that at the time he showed the article to Juror Rodriguez, the latter's position on the verdict was no different than his own. (2R.1350).

Juror Rodriguez also testified that at the time the article was shown to him, he had already reached his verdict in the case. (2R.1328). None of the other jurors was a participant in their review of the article nor did they discuss trial tactics of defense attorneys between them. (2R.1328-9). Juror Rodriguez testified that the article had no effect whatsoever upon his verdict. (2R.1327-8,1330).

> The Court: Was one of the things that played a part in your reaching your verdict or change of verdict or ultimate decision this article?
>
> Juror Rodriguez: No.
>
> The Court: Any of the concerns that you have in reaching your verdict an issue that was raised in this article?
>
> Juror Rodriguez: No, absolutely not.
>
> The Court: Do you feel that without even having seen this article, that your verdict would have been what you arrived at during the trial?
>
> Juror Rodriguez: Yes. (2R.1332).

Before a mistrial may be granted as a result of the presence of unauthorized materials in the jury room, the defendant must somehow be prejudiced. Clark v. State, 443 So.2d 973, 976, (Fla. 1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984); Bottoson v. State, 443 So.2d 962, 966 (Fla. 1983), cert. denied, 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984). The determination of whether substantial

justice warrants the granting of a mistrial is within the discretion of the trial court. Doyle v. State, 460 So.2d 353, 357 (Fla. 1984). Dealing with the conduct of jurors is likewise left to the sound discretion of the court in view of its unique position which places it in the best position to determine credibility. Doyle v. State, supra. Only in those instances where an alleged error is substantial and the defendant is materially harmed should a motion for mistrial be granted. Fla.R.Crim.P. 3.600; Perry v. State, 146 Fla. 187, 200 So. 525, 527 (Fla. 1941). Here, the voir dire established that the defendant was not prejudiced since the jurors testified that they had already reached their verdict prior to the time they read the article.

This Court, in Hamilton v. State, 16 FLW S129 (Fla. January 17, 1991), set forth the appropriate procedure to be utilized in cases where the jury is alleged to have had contact with unauthorized materials during their deliberations. The trial court must determine whether there was a reasonable probability that the consultation of the unauthorized materials was prejudicial to the defendant. The trial court in this case did just that. Although the defendant asserts that the inquiry conducted in this case violated the limitations prescribed by Hamilton, by examining the processes by which the jury reached its ultimate decision, it is apparent that the questions asked regarding whether the article affected their verdicts were proper questions. It would, concededly, have been inappropriate for the

inquiry to seek to determine which evidence or witnesses weighed heavily or lightly in the jury's determinations. The questions posed here, however, did not go behind the rationales supporting those verdicts and are thus appropriate. "...Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78, 86 (1982). The Supreme Court went on to add that as it is virtually impossible to shield jurors from every contact or influence which might affect their vote, so that due process only requires a jury that is capable and willing to decide the case based upon the evidence before it and a trial court watchful to prevent prejudicial occurrences and to determine the effect of such occurrences upon them at hearings. In this case, as in Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983), the hearing conducted by the trial court was more than adequate to establish that the two jurors who read the article were not effected by it, particularly since both testified they had reached their verdict before even reading it. See: Adjami v. United States, 346 F.2d 654 (5th Cir. 1965), cert. denied, 382 U.S. 823, 86 S.Ct. 54, 73, 15 L.Ed.2d 69 (1965); United States v. Boatwright, 446 F.2d 913 (5th Cir. 1971).

The State takes issue with the defendant's characterization of the article as "highly inflammatory." The

article, contrary to the defendant's assertion is not a general attack on defense tactics. In reality, it deals with two specific cases in New York City, the Levin and Hansen trials and discusses the trial technique of attacking the victim's credibility on the stand. It thus has little, if any, applicability to this case since the victim, Anita Keen, never took the stand and her credibility was never at issue. The defendant asserts that the nature of the article was not considered by the court in its determination that no prejudice resulted. The record refutes this, however, since it was clear that not only was the article before the court, it was discussed at length during the hearing. Furthermore, as the trial court pointed out, defense counsel in this case did not utilize any of the trial techniques criticized in the article. (2R.1346-7). Thus, the article was not inflammatory and did not deal with defense techniques used in this case. Nevertheless, the defendant tries to expand the scope of the article to encompass defense counsel's cross-examination of State witnesses. This argument fails because the defense did not elicit from Mr. Hickey or Mr. Waddle their prior criminal records, the State did. Additionally, the trial court repeatedly instructed the jury that the credibility of witnesses was its sole dominion and also instructed that they were not to consider anything said or done by the lawyers who were not on trial. (2R. 444-5,1453).

Finally, the defendant argues that the article somehow changed Juror Rodriguez's perception of the level of proof necessary to sustain a conviction and asserts that because the margin for death was seven to five the article had great impact on a deadlocked jury. He is apparently mixing the levels of proof necessary to support the conviction with that required to make a recommendation of death. In the first instance, the record shows that during the guilt phase of the trial, the jury was repeatedly instructed by the trial court as to the concept of reasonable doubt both before the case began and prior to the time it rendered its verdict. (2R.440-5,11445). Similarly, the jury was properly instructed with regard to its findings during the penalty phase. It is widely accepted that a presumption exists that juries act in accordance with the instructions provided to them. Greer v. Miller, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987). Also apparent is the fact that Juror Rodriguez did not say that Frischetti in fact told him that he did not have to believe the defendant guilty beyond all conclusiveness before entering a verdict of guilt, this was his own impression. Again, however, the impression is meaningless in view of the fact both testified they had reached their verdict before ever reading the article and both had been instructed as to reasonable doubt. Thus, it is apparent, that the defendant may not prevail on this issue.

II.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE DEFENDANT'S RENEWED MOTION TO DISCLOSE THE GRAND JURY TESTIMONY OF KEN SHAPIRO WHEN NO PRETRIAL RIGHT EXISTS JUSTIFYING SUCH DISCLOSURE FOR THE PREPARATION OF A DEFENSE AND THE ISSUE WAS RAISED AND REJECTED BY THIS COURT.

The defendant asserts that the trial court erred in denying his renewed motion to disclose the grand jury testimony of Ken Shapiro. However, not only has this issue been raised by the defendant in his first direct appeal and soundly rejected for consideration by this Court, no right to pretrial disclosure exists for use in the preparation of a defense.

In his first trial, the defendant filed a motion to disclose the grand jury testimony of Ken Shapiro alleging entitlement to this material "because said testimony is material and relevant to the preparation of the defense. (1R1651-2). The original motion was heard and denied by the first trial court on October 18, 1984 which indicated it would revisit the matter upon the defendant's request following the deposition of Ken Shapiro; no such request was forthcoming. (1R.8). This issue was fully briefed by the defendant in the direct appeal following his first trial. (See parties' briefs in Case No. 67,384). However, this Court found the issue to be without merit since it did not even bother to address it in its opinion appearing at 504 So.2d 396

(Fla. 1987). During pretrial proceedings prior to the defendant's second trial, he moved to readopt all prior pretrial motions, without supplementation; the trial court again denied the motion. (2R.4-7,1415A). Based upon the principle of law of the case, the trial court acted within its discretion in once again denying the defendant's motion to disclose the grand jury testimony. See: F.S.905.24 (West 1970); Gonzalez v. State, 220 So.2d 393 (Fla. 3d DCA 1969); Jent v. State, 408 So.2d 1024 (Fla. 1982); Minton v. State, 113 So.2d 301 (Fla. 1959); Soloman v. State, 313 So.2d 119 (Fla. 4th DCA 1975); State v. Gillespie, 227 So.2d 550 (Fla. 2d DCA 1969).

The defendant seemingly asserts an automatic right to disclosure simply because Ken Shapiro gave conflicting accounts of the events of November 15, 1981, all of which were fully explored during Mr. Shapiro's deposition and trial testimony. He contends there is a growing trend to allow such disclosure relying on Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966) and Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). These cases are however easily distinguishable from the instant case. In Dennis, the government conceded that the importance of preserving secrecy of the grand jury minutes was minimal and also admitted the persuasiveness of the reasons advanced by Dennis in favor of disclosure pursuant to Federal Rule 6(e). Here, in contrast, the government strongly contested the motion. Additionally, in

Dennis, the charge could not be proven absent the evidence involved. Here, other testimony, independent of Shapiro's, supported the jury's belief that the defendant had killed his wife for the insurance money. Ritchie is also distinguishable since it dealt with a state child welfare agency's records and the compelling state interest in maintaining the integrity of grand jury proceedings is infinitely higher than that of an agency's records, some of which were contemplated by that state's legislature for use in trial proceedings. It is therefore clear that this Court was correct in finding this issue to be without merit in the defendant's first appeal and the State respectfully urges that it do so once again.

III.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S RENEWED MOTION TO SUPPRESS HIS STATEMENTS WHEN THE ISSUE WAS PREVIOUSLY RAISED AND REJECTED BY THIS COURT.

The defendant contends that the trial court erred in denying his renewed motion to suppress his statements. (1R.1665-71:2R.4-7,1415A). This argument fails for a number of reasons.

The defendant's original written motion to suppress and memorandum of law in support thereof, which was adopted without amendment thereto, is a bare-bones motion seeking suppression of the defendant's statements on the grounds that they were not

freely and voluntarily made, that they were obtained in violation of his right to counsel and his right against self-incrimination and that they were obtained as a result of the violation of his right to a judicial hearing within twenty-four hours of his arrest. (1R.1665-71). These issues were fully litigated by the defendant in his first direct appeal and were found to be without merit by this Court. Keen v. State, 504 So.2d 396 (Fla. 1987). The original findings of this Court on these issues have become law of the case and are therefore no longer open to the review and consideration of this Court. Haddock v. State, 192 So. 802, 141 Fla. 132 (Fla. 1940). Thus, the trial court properly denied the defendant's motion to suppress his oral statements and the written transcript of his statements.

The sole new matter raised by the defendant in his second trial relates to his motion to suppress the taped telephone conversation between the defendant and Shapiro pursuant to F.S.934.09(9)(a). (2R.10,1414-15). He first argues that the taped conversation was improperly admitted since it was made after he was already under arrest. This argument is without merit. In Stewart v. State, 549 So.2d 171 (Fla. 1989), this Court upheld the admission of testimony by a police officer who, with the permission of Stewart's grandparents, listened in to a phone call made by Stewart from jail. Here, the police, with Shapiro's consent and cooperation, listened to a tape of his conversation with the defendant.

Additionally, in view of the fact that prison officials are empowered to monitor the conversations of inmates, other than those with counsel, the defendant had no legitimate expectation of privacy in the call. United States v. Paul, 614 F.2d 115 (6th Cir. 1980); Pires v. State, 419 So.2d 358 (Fla. 1st DCA 1982). The defendant also asserts that the admission of this evidence violated his right to counsel and his right of self incrimination. The admission of such evidence under these circumstances has been found not to violate a defendant's right to counsel when the conversation is not solicited by a government agent. Stewart v. State, supra. Here, the defendant initiated the call to Shapiro who was not a government agent as he had not been promised payment or anything else for his cooperation should Keen call. The admission of this evidence did not violate the defendant's right against self-incrimination. In Odom v. State, 403 So.2d 936 (Fla. 1981), this Court held that for the right against self-incrimination to be involved when statements are made, there must be some kind of compulsion. Here, as in Odom, there was no compulsion or other custodial interrogation-type situation; therefore, the defendant's Fifth Amendment rights were not violated. Also, since Shapiro could have testified from memory as to his recollection of the conversation, there should be no bar to the admission of an more reliable rendition of the evidence, the tape itself. Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 462 (1971).

Finally, the defendant challenges the admission of the tape asserting that Shapiro did not freely and voluntarily consent to the recording. This argument is clearly ludicrous in view of Shapiro's testimony at the motion to suppress hearing that he was not promised anything yet nevertheless consented to tape record the conversation. (2R.90). It is also apparent that given the circumstances in which the call was taped, Shapiro did in fact consent since the officers were not present when the defendant called and he had to attach the recording devise to the phone himself so that he could tape the call. (2R.95). The trial court thus properly found that Shapiro freely and voluntarily consented. (2R.115).

IV.

THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL WHEN HE WAS TRIED BY A JUDGE WHO WAS IMPARTIAL AND WHEN NO OBJECTION TO COMPLAINED OF COMMENTS WAS MADE AND NO MOTION TO RECUSE WAS FILED.

The defendant contends that he was deprived of a fair trial because the trial court had allegedly prejudged him as guilty and indicated it would not, for political reasons, override a jury recommendation of death. The record supports the fact that not only was the trial court impartial and the comments the defendant now complains of taken out of context, it also establishes that the defendant neither objected to the remarks he now challenges nor moved to recuse the judge.

The defendant fails to discuss in each instance the totality of the circumstances in which the comments he complains of were made. In the first case, a hearing was conducted regarding the defendant's motion to re-depose Shapiro. (1SR.22). The State pointed out to the court that Mr. Shapiro "was the object of an alleged solicitation that Mr. Keen made of another person to kill him... I think that he is legitimately apprehensive of his safety based on the alleged solicitation that Mr. Keen made of a fellow named Moran." (1SR.25). The record, through the testimony of Mr. Hickey/Moran, adequately supports this contention. The trial court granted the defense's motion for limited purposes, but was indicating its concern for the

welfare of Mr. Shapiro, in view of the prior alleged solicitation for his murder. (1SR.27-8). This was a legitimate concern and the fact that the court commented that enough people were already dead is reflective of the facts. It is not, as the defendant asserts, a finding of his guilt. Not only was this comment made at a pretrial hearing, no objection or motion for recusal was ever made by the defendant. Ross v. State, 396 So.2d 271 (Fla. 1980).

In the second instance, which is again presented out of context, the parties were at side bar, out of the jury's presence, for argument on the defendant's motion for mistrial which claimed that the trial court had improperly diminished the importance of the jury's recommendation in sentencing. (2R.289-90). The comment complained of referred to the fact that under the current state of the law it is equally difficult for a trial court to override a jury recommendation, regardless of whether it was for life or death. (2R.291-2). The comment, Shapiro in context with the court's other instructions, simply did not improperly diminish the role of the jury in sentencing. Harich v. Duggar, 813 F.2d 1082 (11th Cir. 1987), reh. granted, vacated, 844 F.2d 1464, cert denied, 109 S.Ct. 1355, 103 L.Ed.2d 822 (1989). Additionally, the defendant waived any error, if the comment was error, since he asked for and was given a curative instruction which he helped draft. (2R.293-5,302-6,310-11). After the court clarified the matter for the jury, no objection was made.

Furthermore, the record establishes that the trial court was not predisposed to sentence the defendant to death following rendition of the verdict and, in fact, had "an open mind" about it. (2R.1370). The mere fact that a trial judge has heard some of the evidence against an accused is insufficient to support a claim of bias. See: Moser v. Coleman, 460 So.2d 385 (Fla. 5th DCA 1984), rev. denied, 467 So.2d 1000 (1985). Nor was the defendant prejudiced by the mere reference in the sentencing order to the fact that this jury, like the first, recommended death. Teffeteller v. State, 495 So.2d 744 (Fla. 1986); Rutherford v. State, 545 So.2d 853 (Fla. 1989).

Both comments which the defendant now asserts as error took place either pretrial or before the jury was sworn. Despite this fact, he at no time availed himself of the procedures available pursuant to Fla.R.Crim.P. 3.230 to have the trial court disqualified from proceeding with the case. His failure to do so precludes his complaints at this stage of the proceedings.

V.

THE TRIAL COURT DID NOT ERR IN PROHIBITING CROSS-EXAMINATION OF OFFICERS AMABILE AND SCHEFF REGARDING COLLATERAL MATTERS WHICH WERE IRRELEVANT TO AND HAD NO BEARING ON THE INSTANT CASE.

The defendant asserts that the trial court improperly prevented him from cross-examining Officers Amabile and Scheff regarding what he claims was their use of improper interrogation techniques in other cases. The trial court was correct in preventing such cross-examination when the matters the defendant sought to pursue were irrelevant to and had no bearing whatsoever on this case.

Prior to trial, the State moved in limine to prevent the defense from questioning the officers regarding disciplinary actions unrelated to this case instituted after Keen's arrest. (2R.434). This disciplinary action arose after a homicide suspect escaped during questioning; it did not relate to interrogation techniques utilized by the detectives. (2R.437). The trial court correctly ruled that the defense could not pursue this line of questioning. See: Diaz v. State, 441 So.2d 1125 (Fla. 1st DCA 1983) and West v. State, 503 So.2d 435 (Fla. 4th DCA 1987). In Jackson v. State, 545 So.2d 260 (Fla. 1989), this Court found that a trial court had properly restricted a defendant's cross-examination of a detective regarding two alleged police department reprimands as those reprimands did not relate to the officer's truthfulness. As this Court recognized

> under Section 90.609...a party may attack the character of a witness only by reputation evidence referring to character relating to truthfulness. No character witnesses testified to the

> detective's reputation in the community for truthfulness. The evidence proffered by appellant concerned general acts of misconduct, and, under our existing law, that type of evidence must be excluded.

The issue is thus without merit.

VI.

THE DEFENDANT IS NOT ENTITLED TO DISCHARGE.

The defendant asserts that he is entitled to discharge because he claims the prosecutor, in the first trial, intentionally provoked a mistrial. He claims that the trial court could not rule against him on this matter without an evidentiary hearing and briefing by the parties and most significantly, asserts that the matter has never been fully considered by any court.

This exact claim was raised and rejected by this Court in the defendant's first direct appeal. Keen v. State, 504 So.2d at 402.)

> We find no double jeopardy problem with a retrial of Keen from the prosecutorial misconduct here. In Oregon v. Shapironedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), the United States Supreme Court held that for prosecutorial misconduct to be the basis for barring retrial under the double jeopardy clause, the prosecutor must intentionally "goad" the defense into requesting a mistrial; mere overreaching by a prosecutor is not enough. Id. at 676, 102 S.Ct. at 2089. In our view, the misconduct sub judice was engaged in by

> the prosecutor in the heat of trial in order to win his case, and was not done intentionally in order to afford the state "a more favorable opportunity to convict the defendant." Id. at 674, 102 S.Ct. at 2088.

Thus, since the underlying issue has been fully considered and rejected by this Court, that adverse finding is the law of the case and the trial court properly denied the defendant's motion for discharge. LeCroy v. State, 533 So.2d 750 (Fla. 1988); Haddock v. State, 192 So. 802, 141 Fla. 132 (Fla. 1940).

VII.

THE STATE OF FLORIDA HAD JURISDICTION TO PROSECUTE THE DEFENDANT.

The defendant contends that the State lacked jurisdiction to prosecute him because the crime took place at sea, outside the three mile jurisdictional limit of the State. While he recognizes the fact that this Court has dealt with this issue on his initial direct appeal and found against him, 504 So.2d 398-399, he nonetheless argues that this Court reached the wrong decision by improperly relying on Lane v. State, 388 So.2d 1022 (Fla 1980). It is clear, however, that not only was this Court correct in its original finding that jurisdiction existed to prosecute Keen, it is also apparent that the defendant is bound by this Court's prior findings which have become law of the case. See: LeCroy v. State, 533 So.2d 750 (Fla. 1988); Haddock v. State, 192 So. 802, 141 Fla. 132 (Fla. 1940).

VIII.

THE PROSECUTION ESTABLISHED VENUE.

The defendant alleges that the prosecution failed to establish venue in Broward County. However, once again, this issue was previously addressed by this Court in the defendant's initial appeal and adversely decided against him. This Court's decision in that prior appeal is the law of the case and bars reconsideration of this matter. See: LeCroy v. State, supra and Haddock v. State, supra.

IX.

THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION FOR CHANGE OF VENUE.

The defendant claims the trial court improperly denied his motion for change of venue on the grounds that the adverse pretrial publicity relating to the crime denied him a fair trial. The record below, however, totally belies his claim.

The test for a change of venue is whether the general state of mind of local inhabitants is so infected by knowledge of the incident and is accompanied by prejudice, bias, and preconceived opinions that prospective jurors could not possibly put those matters out of their minds and try the case solely upon evidence presented in the courtroom. Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979). Mere knowledge of the incident itself is not,

in and of itself, grounds for a change of venue. Pitts v. State, 307 So.2d 473, cert. dismissed, 423 U.S. 918, 96 S.Ct. 302, 46 L.Ed.2d 273 (1975). Here, the jurors, without exception did not evidence prejudice, bias, or preconceived opinions that would render the jury impartial.

Interestingly enough, the record citations referred to by the defendant relate to articles appearing during his first trial which took place several years before. Not one relates to an article published in close proximity to this trial. All the panelists were questioned regarding a Sunday article and another item which appeared the first day of voir dire; only one had read either of them. Significantly, only several of the jurors had any prior knowledge of this 1981 incident and all of the jurors unequivocally stated they would not be affected by that knowledge which they unequivocally and without exception stated they would set aside and decide the case on the evidence presented during trial. (2R.150-154,158,162,164,170-3,409,413,414). Additionally, the defendant did not exercise all of his peremptory strikes, utilizing only nine on the panel and one on the alternate. At no time did he indicate any dissatisfaction with the panel. (2R.419-20). He should not be heard to complain now.

X.

THE TRIAL COURT DID NOT FAIL TO CONSIDER THE WEIGHT OF THE EVIDENCE WHICH WAS SUFFICIENT TO SUSTAIN THE VERDICT IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL.

The defendant contends that the trial court failed to consider the weight of the evidence in denying his motion for new trial. He bases this claim on the absence of any specific reference to the weight of the evidence in the Order. (2R.1484). While he is correct in stating that the weight of the evidence is a factor which the trial court must consider in determining whether or not it will grant a new trial, his assumption that the trial court failed to do so in this case is clearly without record support. There is no requirement, either in the rules of this Court or established by case precedent, which obligates a trial court to formally announce or set forth in writing every single factor considered in reaching any decision it makes. The defendant's argument fails since it is not supported by the record.

XI.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE BAILIFF TO PROVIDE THE JURY WITH EVIDENCE WITHOUT RECONVENING WHEN THE DEFENDANT SO STIPULATED.

The defendant asserts the trial court erred in allowing the bailiff to provide the jury with physical evidence upon their request without reconvening. His claim totally ignores the fact that defense counsel, in his presence, stipulated that this would

be the procedure utilized before the jury retired. Fla.R.Crim.P. 3.410 (d), which is controlling in situations in which a jury is provided with items previously introduced into evidence, does not require the presence of either counsel or a defendant when the trial court responds to a jury request for such evidence. Morgan v. State, 471 So.2d 1336 (Fla. 3d DCA 1985), app'd. 492 So.2d 1072 (Fla. 1986). Nor is there any record support to show that matters not admitted into evidence were supplied to the jury. Mere conjecture on the defendant's part cannot be deemed a cognizable issue ripe for this Court's determination.

XII.

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY REGARDING THE DEFENDANT'S SOLICITATION TO HAVE KEN SHAPIRO MURDERED.

The defendant contends that the trial court erred in allowing testimony regarding his attempt to hire Mr. Hickey/Moran to murder Ken Shapiro since he asserts that this testimony was both irrelevant and unduly prejudicial causing it to become a feature of the trial. The record establishes the defendant's position is meritless.

The trial court correctly allowed the complained of testimony which was highly relevant to the underlying charge and since it did not become a feature of the trial, it did not unduly prejudice the defendant. Sirici v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72

L.Ed.2d 862 (1982), reh. denied, 458 U.S. 1116, 102 S.Ct. 3500, 73 L.Ed.2d 1378 (1982). This evidence established that Anita Keen's death resulted from a plan orchestrated by the defendant, not from mistake or accident. It is also reflective of the defendant's own consciousness of guilt since Mr. Hickey testified that Keen told him that without Shapiro, the State would not have any case against him and he needed to get rid of Shapiro. This case is thus similar to cases in which evidence of a defendant's flight or bribery provides relevant support to that defendant's guilt. See: Christopher v. State, 407 So.2d 198 (Fla. 1981), cert. denied, 456 U.S. 910, 102 S.Ct. 1761, 72 L.Ed.2d 169 (1982); Dawson v. State, 401 So.2d 819 (Fla. 1981); Hernandez v. State, 397 So.2d 435 (Fla DCA 1981).

XIII.

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY REGARDING THE DEFENDANT'S ATTEMPT TO SOLICIT THE MURDER OF KEN SHAPIRO WHEN THE STATE PROVIDED PROPER NOTICE OF ITS INTENT TO RELY ON IT AT TRIAL.

The defendant asserts that the trial court erred in allowing collateral offense evidence relating to the defendant's attempt to solicit Mr. Hickey to murder Shapiro since he claims he received no notice of the State's intention to introduce said evidence. Contrary to this claim, the record establishes that the State did file a "Notice To Offer Evidence Of Other Crimes Pursuant To Section 90.404(2)(b)(1), Florida Evidence Code."

(2R.1413). It is obvious from the testimony adduced at trial that the solicitation of Mr. Hickey was part of an ongoing pattern of threats and coercion by the defendant against Ken Shapiro and his family.

XIV.

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY REGARDING BAD ACTS OF PATRICK KEEN WHICH WERE NOT OBJECTED TO AND WHICH DID NOT IMPLY A COLLATERAL BAD ACT BY THE DEFENDANT.

The defendant claims the trial court erred in allowing Michael Hickey to testify regarding Patrick Keen's involvement in a plan to murder his own wife. He asserts that this was improper because it brought up a collateral bad act of Patrick and because it implied the defendant's involvement in his brother's plan. Initially it must be noted that no objection was made at the time the answer was given. It therefore is not preserved for the appellate review of this Court. See e.g.: Welty v. State, 402 So.2d 1159 (Fla. 1981); Whittington v. State, 511 So.2d 749 (Fla. 2d DCA 1987). Secondly, even if the matter were properly preserved, in no manner could such evidence be construed as an attack upon the defendant's character. The defendant's reliance upon Fulton v. State, 335 So.2d 280 (Fla. 1976) is thus misplaced, since here, the testimony was relevant to establish that Shapiro was substituted for Patrick because Shapiro would be a more credible witness to the "accident."

XV.

THE TRIAL COURT DID NOT ERR IN ALLOWING INTO EVIDENCE HEARSAY STATEMENTS OF PATRICK KEEN.

The defendant contends that the trial court improperly allowed the State to introduce hearsay statements of Patrick Keen in violation of the defendant's rights of due process and confrontation. The record reveals that the defendant failed to object to either of the two comments complained of and the comments were properly admitted.

In the first instance, the defendant complains of a line of questioning to Detective Amabile regarding his contact with Patrick Keen in August of 1984. (2R.681-2). He asserts that the unmistakable inference to be drawn from these questions is that Patrick implicated his brother in violation of Postell v. State, 398 So.2d 851 (Fla. 3d DCA 1981).

In Postell, the only evidence against Postell was a weak identification by one of the victims. To bolster the case, the State attempted to introduce the statements of a mystery woman who did not testify at trial through the testimony of an officer that based upon a conversation he had with a citizen in the area, Postell was arrested. The trial court, over repeated defense objections allowed the testimony. The Third District held that it was error for the trial court to allow the evidence over defense objection where the inescapable inference was that

the unidentified woman identified Postell. Here, the testimony was not the sole evidence against the defendant and did not lead to the inescapable conclusion that Patrick Keen implicated his brother.[3] The issue, if properly preserved, still does not merit relief since the evidence was not hearsay prohibited inferentially.

In the second instance, the defendant complains of testimony by Mr. Waddle regarding information supplied to him by the defendant to the effect that his brother, who had been in on the plan, had gotten tired of waiting for his share of the money and had Shapiro to an insurance investigator resulting in his arrest. (2R.902-3). However, the speaker of the words related by Mr. Waddle was not Patrick Keen but was the defendant himself who testified at trial, therefore no confrontation problem resulted. Again, no objection was made to preserve this issue for review.

XVI.

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY THAT THE POLICE HAD STATEMENTS TO THE EFFECT THAT ANITA HAD NOT DIED AS THE RESULT OF AN ACCIDENT.

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[3] This is apparent through the testimony of the Detectives and Ken Shapiro. The Detectives spoke with Ken Shapiro in August of 1984 and the record clearly established that it was as a result of his decision to tell the truth that Keen was arrested, not because of anything Patrick Keen said to a third party.

The defendant contends that the trial court improperly allowed Officer Amabile to testify that he told the defendant, who expressed surprise at his arrest, that they had statements that Anita's death was not accidental. (2R.686). He asserts that this testimony is an improper bolstering of Shapiro Shapiro's testimony through a hearsay recitation of the substance of his prior consistent statement. Not only may an officer testify to facts surrounding the arrest of a defendant, the testimony complained of simply does not rise to the level of improper admission of prior consistent statements in violation of the Florida Evidence Code. See: Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1989). Even if they were, any error would clearly be harmless since the testimony did not give significant additional weight to Shapiro's trial testimony. Hutchinson v. State, 559 So.2d 340 (Fla. 4th DCA 1990).

XVII.

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY REGARDING THE DEFENDANT'S USE OF AN ALIAS AT THE TIME OF HIS ARREST WHERE THE TESTIMONY WAS RELEVANT.

The defendant contends that the trial court erred in allowing Detectives Scheff and Amabile to testify regarding the defendant's use of an alias at the time of his arrest and in allowing the prosecutor to cross-examine the defendant on the same subject. Regardless of the merits of his claim, no objection to any of the testimony complained of was made and therefore it is not preserved for review.

The defendant asserts that the prosecution improperly elicited information relating to the defendant's use of an alias which he claims is irrelevant since this took place years after Anita's murder and because it had no relationship to the offense charged. Here, the Officers' testimony was not only admissible testimony regarding the circumstances surrounding the defendant's arrest, their testimony was directly relevant to the defendant's criminal intent. As recognized in Lee v. State, 410 So.2d 182, 183-4 (Fla. 2d DCA 1982), reference to a defendant's alias is not reversible error and is admissible where relevant and material to prove or disprove an issue. The jury, on the issue of criminal intent, may consider the defendant's conduct before, during, and after the alleged crime. See: Mercer v. State, 347 So.2d 733 (Fla. DCA 1977); Cooper v. Wainwright, 308 So.2d 182 (Fla. DCA 1975). Nor does this case fall within the line of cases where a defendant was deprived of a fair trial since the defendant's credibility as a witness and reputation for truthfulness was also at issue and he admitted using a false name to fool his creditors into giving him money which he was unable to obtain under his own name due to business failures. The testimony is thus also relevant to rebut his claim that he had never been guilty of any fraudulent acts.

XVIII.

THE TRIAL COURT DID NOT ALLOW THE POLICE TO OFFER IMPROPER OPINION EVIDENCE.

The defendant asserts the trial court erred in allowing into evidence what he terms "hearsay opinion evidence" through the testimony of Shapiro and Detectives Amabile and Scheff. He claims that in the first instance, Shapiro's testimony to the effect that he decided to tell the truth because the Detectives told him they already knew it constitutes improper opinion testimony. In the second, he asserts that testimony of Detectives Scheff and Amabile wherein they related the sequence of events which led to the defendant recanting his original story after they told him they did not believe him was similarly improper opinion evidence. The testimony complained of simply does not fall within the category of improper opinion testimony.

Only testimony in which one witness on the stand gives his opinion as to the truthfulness of another witness' testimony is prohibited. Boatwright v. State, 452 So.2d 666, 668 (Fla. 4th DCA 1984). In Boatwright, for example, that court held it was error for the trial court to allow the prosecutor, over defense objection, to have one witness who was testifying give his opinion as to whether or not prior witnesses had been lying. In this case, not only was no objection to any of these lines of questioning was made to preserve the issue for appellate review, the testimony complained of is not comparable to the example set forth above. The defendant's argument would preclude testimony from any witness to a crime as to why they went forward with the truth or from any police officer as to why they questioned a

suspect whose story they did not believe. This is simply not the type of opinion testimony as to truthfulness precluded by the Rules of Evidence.

XIX.

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY BY DETECTIVE AMABILE THAT THE DEFENDANT WAS ARRESTED PURSUANT TO A WARRANT ABSENT A DEFENSE OBJECTION.

The defendant contends that the trial court erred in allowing Detective Amabile to testify that the defendant was arrested pursuant to a warrant claiming that this testimony put a judicial stamp of approval on the State's case by suggesting the State felt he was guilty. In support of this proposition, he cites to Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984) and Buckhann v. State, 356 So.2d 1327 (Fla. 4th DCA 1978).

The Appellee is not aware of any law which prohibits testimony concerning the manner of a defendant's arrest. The cases cited to by the defendant are distinguishable from this case. Both Ryan and Buckhann, held that it was error for a trial court, over defense objection, to allow a prosecutor in closing argument to imply or overtly say that the State believed the defendant was guilty or it would not have prosecuted the case. They do not hold that it is improper for a witness to testify in the manner complained of here.

XX.

THE TRIAL COURT DID NOT ERR IN ALLOWING REPEATED REFERENCES TO THE VICTIM'S PREGNANCY WHEN THAT FACT WAS RELEVANT TO THE CASE AND THE DEFENSE DID NOT OBJECT.

The defendant contends that the trial court erred in allowing the prosecutor and witnesses to repeatedly refer to the victim's pregnancy since this was designed to elicit sympathy for the deceased and was irrelevant to the case. This argument is without merit.

The defendant at no time objected to either the testimony of witnesses or the argument of the prosecutor relating to the victim's pregnancy. (2R. 494, 505-6,650-1,653,665,1159-63,1261-2). Given the defendant's failure to object, the matter is not preserved for review. Roseman v. State, 293 So.2d 64 (Fla. 1974). Additionally, the fact that the victim was pregnant was highly relevant to the case both from a guilt and penalty phase analysis since the fact she was five months pregnant accounted for the acceleration of the defendant's plan to do away with her and the fact that Anita was a good candidate for drowning because of her condition. It is also clear that had Anita's body been found, photographs of the deceased, which would of necessity have depicted her condition would have been admissible into evidence. Significantly, the record clearly refutes the defendant's claim that it affected either phase of the trial, as a large portion of voir dire was used by the defense to examine

the panel's attitude toward the victim's pregnancy. All of the panelists stated that they would not be influenced by the victim's pregnancy. (2R.152,153,157,160,164,171,175,177).

XXI.

THE TRIAL COURT DID NOT ERR IN ALLOWING DETECTIVE SCARBROUGH TO TESTIFY THAT HE TOOK A STATEMENT FROM THE DEFENDANT AT HIS ATTORNEY'S OFFICE WHEN THE DEFENSE DID NOT OBJECT.

The defendant claims the trial court erred in allowing Detective Scarbrough to testify that he took a statement from the defendant at his attorney's office shortly after Anita's death on the grounds that this was an improper comment on the exercise of his right to counsel. This testimony does not rise to the level of a comment upon a defendant's right to counsel and therefore does not warrant reversal.

The defendant's failure to object to the testimony bars consideration of this issue on appeal. See: Simpson v. State, 418 So.2d 984 (Fla. 1982), cert. denied, 459 U.S. 1156, 103 S.Ct. 801, 74 L.Ed.2d 1004 (1983). Nevertheless, he apparently likens this case to State v. Burwick, 442 So.2d 944 (Fla. 1983), Jackson v. State, 359 So.2d 1190 (Fla. 1978), and Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976). These cases are, however, totally distinguishable from the case at bar. Both Burwick and Jackson deal with comments upon a defendant's right to silence and to an attorney after arrest. In Reed, an over-zealous

prosecutor told the jury that innocent people were not prosecuted, commented on the role of defense counsel, and appealed to the jury's animosity against drug dealers. The testimony at issue here does not fall within the purview of comments upon a defendant's failure to talk to an officer following his arrest or to his request for counsel under similar circumstances.

XXII.

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY AS TO THE ACCURACY OF A PHONE NUMBER WHEN NO PROPER OBJECTION WAS MADE.

The defendant contends that the trial court erred in allowing Investigator Nelson to testify, over a defense hearsay objection, that the phone number written on the envelope was that of the Oceanside Liquor Store belonging to the Shapiro family. (2R.785-6). It is clear that this contention is without merit since the identification of the phone number was not a matter of hearsay. The record reflects that Mr. Nelson and others checked the phone number themselves and ascertained that the number was in fact that of the Oceanside Liquor Store. (2R.785-6). Any individual may make such an identification from personal knowledge having called the number. Additionally, if the testimony was objectionable a specific objection that Mr. Nelson could not authenticate the number from personal knowledge should have been made. Even if one assumes that the testimony was objectionable and a proper objection was made, any error

resulting is, at best, merely harmless. DiGuilio v. State, supra.

XXIII.

THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

The defendant contends the trial court erred in denying his motion for judgment of acquittal since he claims that his version of Anita's death created a reasonable doubt. This position is meritless since his version of what occurred was not reasonable and the trial court thus could and did reject it. It is not reasonable to assume that Anita's death was an accident and that the defendant kept quiet about it, instead telling an inherently unreasonable story to protect someone who caused her death. His version of the manner in which Anita obtained life insurance policies and his continued payments so that he could later seek to collect on them to help his mother is also unreasonable. See: Lynch v. State, 293 So.2d 44 (Fla. 1974); Jones v. State, 466 So.2d 301 (Fla. 3d DCA 1985); Holland v. State, 129 Fla. 363, 176 So. 169 (Fla 1937); Weldon v. State, 287 So.2d 133 (Fla 3d DCA 1973); Shepherd v. State, 46 So.2d 880 (Fla. 1946), rev'd. on other grs., 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740, conf'd. to 52 So.2d 903.

XXIV.

THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE INSTRUCTIONS ON NON-DEATH LESSOR INCLUDED OFFENSES WHERE THE DEFENDANT

DID NOT REQUEST THEM AND CONCURRED IN THE INSTRUCTIONS AS GIVEN.

The defendant asserts the trial court erred in failing to instruct the jury on any non-death lessor included offense. This argument fails for several reasons. The defendant asserts that there was doubt as to Anita's actual death and the manner in which she died. This is patently absurd given the fact she was abandoned at sea, approximately seventeen miles out, with no boats in sight at dusk. It is clear that this woman, who was already four to five months pregnant, drowned as a result of the defendant's actions. Furthermore, the defendant admitted to several cell mates that he did indeed kill Anita and circled her in the water for over an hour watching her drown. The facts do not support the instructions the defendant only now asserts he was entitled to. Anderson v. State, 16 F.L.W. S61, S63 (Fla. January 3, 1991).

The defendant seems to claim that Harris v. State, 438 So.2d 787 (Fla. 1983) and its progeny stand for the proposition that instruction on all lessor included offenses must be given if supported by the evidence and may only be omitted by a personal waiver of the defendant. Harris, however, does not stand for this proposition. Rather, it holds that the failure to instruct on all necessarily included lessor offenses of capital murder, without obtaining a personal waiver of the defendant, is reversible error. Id. at 797. In this case, the defendant was

charged with premeditated first degree murder and the necessarily included lessor offenses of second-degree murder and manslaughter were given. Thus, absent a request for a charge on aggravated battery, battery, or attempted murder, all of which are category two offenses, and evidence to support those charges, no error occurred. Here, the defendant acquiesced to the instructions as given and did not request these additional instructions. (2R.1205-27). Thus, he may not be heard to complain at this point in the proceedings since he did not request these instructions which were not necessarily included lessor offenses. See: Jones v. State, 485 So.2d 577 (Fla. 1986). No personal waiver was required.

XXV.

THE TRIAL COURT DID NOT REVERSIBLY ERR IN ITS INSTRUCTION ON EXCUSABLE HOMICIDE WHEN THE DEFENDANT DID NOT OBJECT TO THE INSTRUCTION.

The defendant contends that the trial court committed reversible error in its jury instruction on excusable homicide. It is clear, however, that absent an objection to the short-form instruction, he has waived the issue. In its recent opinion in State v. Smith, 15 F.L.W. S659 (Fla. December 20, 1990), this Court determined the issue against the defendant;

> [T]o hold fundamental error occurred because of the failure to give the long-form instruction on excusable homicide when it was not requested "would place an unrealistically severe burden upon trial judges concerning a matter which should properly be within the province and responsibility of defense counsel as

> a matter of trial tactics and strategy." Smith v. State, 539 So.2d 514, 517 (Fla. 2d DCA 1989).
>
> In normal cases the failure to request an instruction precludes a later contention that such instruction should have been given. ... The failure to give the long-form instruction when it was not requested did not constitute fundamental error.
>
> 16 F.L.W. at S85.

The defendant thus may not prevail.

XXVI.

> THE DEFENDANT'S CONVICTION NEED NOT BE REVERSED WHEN CUMULATIVE ERROR DID NOT OCCUR.

The defendant claims that he is entitled to a new trial because of the presence of cumulative trial errors which deprived him of a fair trial. As the proceeding and subsequent issues clearly show, he is mistaken in his claims of error. Any error present at the trial level was so insignificant that it was merely harmless. DiGuilio v. State supra. The defendant is not entitled to a new trial.

XXVII.

> THE DEFENDANT'S DEATH SENTENCE IS NOT DISPROPORTIONATE.

The defendant contends that the sentence of death imposed by the trial court, based upon the jury's recommendation, is disproportionate. He bases this assertion on his claims that the trial court failed to find mitigating factors which he contends were supported by the record, and because Anita's death resulted

from what he terms a domestic killing. The cases relied upon by the defendant are not comparable since the aggravating and mitigating factors are not the same. Furthermore, this case, unlike those in which a heated domestic confrontation immediately leads to violence, presents a dramatically different picture of a man who marries for the sole purpose of insuring his wife and then systematically goes about planning her demise for his own financial gain. The record clearly supports the trial court's determination as to sentence which was not disproportionate.

XXVIII.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REJECTING PROPOSED MITIGATING FACTORS WHICH WERE EITHER UNSUPPORTED BY THE RECORD OR WHICH WERE OF INSUFFICIENT VALUE TO OUTWEIGH THE SUBSTANTIAL AGGRAVATING CIRCUMSTANCES FOUND TO EXIST.

The defendant first contends that the trial court erred in failing to find three mitigating factors: 1) his success in business despite a disadvantaged upbringing; 2) his good adjustment to prison; and 3) the fact that an equally culpable codefendant received no punishment. In each instance, it is clear that the trial court found these factors not to exist. The finding of mitigating factors is within the sole discretion of the trial court and that discretion will not be disturbed on appeal in the absence of a clear showing that it was abused. Stano v. State, 473 So.2d 1282 (Fla. 1985). A trial court need only find as a mitigating factor each proposed factor which is

mitigating in nature and which has been reasonably established by the weight of the evidence. Campbell v. State, 16 F.L.W. S1 (January 4, 1991). "This is a question of fact and one court's finding will be presumed correct and upheld on review if supported by "sufficient" competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327,1331 (Fla. 1981). When the foregoing principles are applied to the evidence adduced below, it is apparent the trial court was eminently correct in rejecting the foregoing nonstatutory mitigating circumstances.

1) The defendant succeeded in business despite a disadvantaged upbringing.

The record is devoid of any evidence to the effect that the defendant overcame a disadvantageous upbringing to become a success in business. To the contrary, the record supports the rejection of this factor. The defendant himself testified that his family had a large land development investment in another state. (2R.1083-4). Absolutely no evidence of a "disadvantaged" upbringing was presented. The record also does not support the contention that he succeeded in business through honest efforts since he admitted that he changed his name and went into business in the Orlando area so that he could fool creditors into giving him money they would otherwise refuse to lend him due to business reverses in South Florida. (2R.1041-3). The trial court thus acted within its discretion in rejecting this nonstatutory mitigating circumstance.

2) The defendant adjusted well to prison.

The defendant contends that the trial court improperly failed to find his adjustment to prison life as a mitigating factor. The trial court did consider the fact, as stipulated to by the parties, that he had no disciplinary problems during his time on death row. The trial court's sentencing Order stated "the Court has even considered the fact that the Defendant had no disciplinary problems during his sentence to Death Row between July 15, 1985 and May 5, 1987 when he was transferred back to Broward County for his second trial. However, this unremarkable time in prison is not sufficient, in and of itself to mitigate a warranted death sentence. Indeed, the facts of this case and the aggravating circumstances outlined above heartily outweigh any possible mitigation two years of good behavior might carry." (2R. 1489). Since the finding of mitigating circumstances is discretionary with the trial court, it is clear that the court did consider the defendant's good behavior while on death row, but found that it did not rise to a level sufficient to outweigh the aggravating factors. Tompkins v. State, 502 So.2d 415 (Fla. 1986). Thus, the trial court could, within its discretion, find that this fact did not rise to the level of a mitigating circumstance.

3). The disparate treatment of Ken Shapiro.

The defendant asserts that the trial court erred in failing to consider the disparate treatment of Shapiro who he contends was "an equally culpable codefendant" who was not prosecuted. This argument is without merit since it is obvious Shapiro was not equally culpable. While the record shows that Shapiro knew of the plan and did nothing to prevent its being carried out, it also shows that the defendant was the originator of the plan who carried it out for his own personal benefit. The defendant's characterization of Shapiro's participation and his underlying rationale is without record support. Where the defendant's culpability is much greater than Shapiro's any disparity in treatment is justifiable and is neither unreasonable nor capricious. Salvatore v. State, 366 So.2d 745 (Fla. 1979); Smith v. State, 365 So.2d 705 (Fla. 1978).

B. The Trial Court Did Not Fail To Exercise Reasoned Judgment.

The defendant asserts the trial court failed to exercise reasoned judgment in determining that no mitigating circumstance existed. He cites to recent decisions by this Court to support his contentions that because the sentencing order did not expressly evaluate each proposed circumstance it made no findings whatsoever. The defendant improperly compares this case to Bouie v. State, 559 So.2d 1113 (Fla. 1990). In Bouie, the

trial court's order merely stated that it had weighed the aggravating and mitigating circumstances and found death the appropriate penalty because insufficient mitigating circumstances were present to outweigh the aggravating circumstances. That order did not say which aggravating factors were found to exist and which if any mitigating factors were found. Unlike Bouie, the trial court below did articulate the aggravating factors it found and also stated that although it considered possible mitigating circumstances, including the defendant's lack of disciplinary problems while on death row, it found that they either did not exist or did not rise to the level necessary to outweigh the aggravating factors present. (2R.1489). The instant case is most closely comparable to Johnson v. Dugger, 520 So.2d 565 (Fla. 1988) since, although the defendant disagrees with the trial court's findings, the order and instructions given to the jury show that adequate consideration was given to nonstatutory mitigating circumstances prior to sentencing and the court's ultimate rejection of mitigating circumstances was not the result of a lack of reasoned judgment.

Although this Court's ruling in the recent case of Campbell v. State, 16 F.L.W. S1 (Fla. January 4, 1991), has set forth new procedural guidelines by which this Court intends to review sentences of death entered below, it did not establish a retroactive rule of law to the effect that the failure of a

trial court to comply with its guidelines would automatically result in a remand for resentencing to a life sentence. Thus, the trial court's order which did not set forth each specific factor which it considered in mitigation while not in exact compliance with Campbell is not fatally flawed either. If this Court were to require a specific rendition of which factors were considered in mitigation, the most that would be required would be a remand for the entry of such a specific order. Grossman v. State, 525 So.2d 833 (Fla. 1988).

C. The Mitigating Circumstances Urged By The Defendant Need Not Be Found As A Matter Of Law.

The defendant urges that the trial court erred, as a matter of law, by refusing to find the mitigating factors he argued. However, it is clear the trial court did not err since, as established above, the mitigating factors he urged were not supported by uncontroverted proof. The State therefore readopts, as though set forth herein in its entirety, the argument above with regard to factors one and three. The trial court did not err in regard to its finding that the defendant's lack of disciplinary reports during his time on death row rose to the level necessary to outweigh the numerous aggravating circumstances present in this case.

Since a significant difference exists between a defendant who, while in the general prison population shows an amenability to rehabilitation and good behavior, and a prisoner on death row who is kept apart from the general population and who, because of twenty-four hour a day surveillance does not have the opportunity to get into trouble so as to generate disciplinary reports. See and compare: Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (exclusion of testimony relating to defendant's good behavior while in jail while awaiting trial and likelihood of future good behavior error). Even if one were to assume arguendo that the defendant's lack of disciplinary problems while on death row were indeed a mitigating circumstance, no remand is required where, as here, the trial court specifically stated that it considered the factor but found it insufficient to outweigh the aggravating circumstances found to exist.

XXIX.

THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S REQUESTED INSTRUCTION ON DISPARATE TREATMENT WHEN THE RECORD ESTABLISHED THAT THE PROPOSED INSTRUCTION WAS NOT SUPPORTED BY THE EVIDENCE.

The defendant contends that the trial court erred by refusing to instruct on the mitigating effect of the disparate treatment of Shapiro who he asserts was an equally culpable codefendant. The trial court did not err in refusing to give this instruction because it was not supported by the evidence.

Shapiro is not equally culpable since he did not devise the plan, did not push Anita overboard, and did not stand to gain financially from her death. There was no support in the record for the instruction proposed by the defendant and the trial court thus correctly rejected this instruction.

Additionally, the jury was instructed that it could consider any factor relating either to the defendant or to the crime itself in making its recommendation and the defense argued extensively that it should consider the disparate treatment received by Shapiro. Finally, the defendant is not correct in asserting the trial court failed to even consider this factor in reaching its sentence since its sentencing order itself establishes the court considered many things in mitigation but found they did not exist or rise to the level necessary for them to be mitigating. The record simply does not support the defendant's contention that the trial court failed to apprehend the mitigating nature of disparate treatment of a codefendant who was, in fact, equally culpable. Rather it shows the court did not feel that, based upon the facts presented below, such an instruction was warranted.

XXX.

A REVIEW OF THE JURY INSTRUCTIONS AS A WHOLE REVEALS THAT THE TRIAL COURT DID NOT UTILIZE THE WRONG STANDARD OF PROOF IN EVALUATING THE EXISTENCE OF MITIGATING CIRCUMSTANCES.

The defendant contends that he is entitled to a new trial because an erroneous standard was utilized in determining the existence or nonexistence of mitigating factors. However, when the penalty phase instructions are read as a whole, it is clear that the jury was not misled by the instructions, to which the defendant had no objection and which contained the proper standard of proof.

The record below reflects that the trial court instructed the jury that

> A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established. (Emphasis added). (2R.1274).

It is thus clear that the judge was fully cognizant of the correct standard of proof as to mitigating evidence.

The sole support for this claim that the defendant has raised is simply a misreading of the judge's comments as to the applicability of the defendant's requested instruction as to the disparate treatment of Shapiro who he contended was an equally culpable actor. The record reflects that during a conference between the prosecutor, defense counsel, and the court, the judge stated:

> THE COURT: Regarding that instruction on Shapiro, I don't believe it's a legal statement of the law or the situation in this case necessarily shown to them, so that will be denied. (2SR.13).

The judge obviously felt that the requested instruction was neither correct under the law nor shown to be established by the evidence. The defendant's interpretation of this comment is overboard and Shapiro out of context. When viewed in the framework of the conversation in which it was made, it is abundantly clear that the trial court did not say that it was utilizing a standard of proof that mitigating circumstances must be necessarily shown before the jury could find they exist. This is even more apparent given the fact that defense counsel did not interpret the court's comments to mean what the defendant now asserts since he did not object to or seek to correct or clarify the court's comment. This is also supported by the fact that the court did give the correct instruction on burden of proof as to mitigating circumstances.

XXXI.

THE TRIAL COURT DID NOT USE AN INCORRECT STANDARD IN EVALUATING THE EXISTENCE OF AGGRAVATING FACTORS.

The defendant contends that the trial court utilized the wrong standard of proof in evaluating whether aggravating circumstances were present. He bases this contention on the trial court's oral and written assessments of the aggravating factors it found to exist in which it states that certain factors were proven by competent substantial evidence or that the only evidence presented supported certain findings.

While the defendant correctly asserts that the trial court may only find aggravating circumstances that are proven beyond a reasonable doubt, his claim that the trial court failed to utilize this standard is unsupported since the record below does, in fact, establish the existence of each aggravator beyond a reasonable doubt. The trial court was obviously aware of and utilized the correct standard of reasonable doubt as shown by its instructions that "each aggravating circumstance must be established beyond a reasonable doubt before it may be considered." (2R.1274).

The defendant seemingly asserts that the State's case was composed of wholly circumstantial evidence through the testimony of impeached witnesses and therefore the aggravating factors the trial court found were not proven beyond a reasonable doubt. His argument totally ignores the fact that the jury was fully aware of both any possible motivations for these witnesses to lie and the existence of their prior criminal records and nevertheless chose to believe them over the defendant. The fact that some circumstantial evidence was involved does not change this fact. Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert. denied, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985).

XXXII.

THE TRIAL COURT CORRECTLY FOUND THAT THE MURDER OF ANITA KEEN WAS HEINOUS, ATROCIOUS, AND CRUEL.

The defendant asserts that the trial court erred in finding that Anita's death was heinous, atrocious, and cruel (HAC). He bases this claim on his contention that the court relied upon improper factors and unsubstantiated conjecture. It is clear, however, that the trial court was totally correct in its finding of this aggravating factor.

Shapiro testified that after going out into the ocean approximately twenty miles, so far out he could barely see the tops of the tallest buildings, near sunset, the defendant pushed his pregnant wife overboard. (2R.502,504,509,569). They watched Anita doing anything to stay afloat; they watched her trying to stay afloat for nearly an hour while the defendant circled her with no hope of other rescue in sight. (2R.509,571,573). Shapiro did not recall hearing Anita say anything, but stated that her hand movements could have been waiving. (2R.509,575). Shapiro testified that Anita was still struggling to stay afloat when it grew dark and they headed into shore. Mr. Hickey testified that the defendant told him that they circled Anita for an hour while she was in the water and that he saw her drown. (2R.821-22,872). These facts support the trial court's findings regarding HAC since ample testimony was presented to the effect that Anita tread water for approximately an hour, while being watched by her new husband who had no intention of rendering her any assistance. The State has not found any cases dealing with murders committed in fashion similar to this case

that have been before this Court. The case is most comparable to cases in which a victim dies of suffocation or strangulation since drowning is similar. Although the defendant claims there was no mental anguish involved here, this Court has found HAC in cases in which a victim must have experienced a helpless anticipation of impending death Clark v. State, 443 So.2d 973 (Fla. 1984), cert. denied, 104 S.Ct. 2400 (1985), in which a victim struggled and fought against strangulation Tompkins v. State, 502 So.2d 415 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987), and in which a father knew he was about to be shot by his own son Huff v. State, 495 So.2d 145 (Fla. 1986). All of these factors were present here under identical or similar circumstances. It is thus clear the defendant's argument is without merit.

The defendant alleges the court improperly relied upon Anita's incapacity as a result of her pregnancy and her grief at the death of her child in making its findings. However, it is clear from the order itself that these assumptions, while not illogical under the circumstances of this case, were not the basis upon which the finding of HAC was made. It is clear that the court focused upon Anita's own struggle to survive in the face of her knowledge that her new husband and the father of her unborn child had not only pushed her overboard, but circled her for over an hour watching her drown. (2R.1487-8). Given the facts of this case it is not, as the defendant asserts, improper

conjecture for the trial court to have determined that this aggravating factor was present. If his argument were correct, it would virtually never be possible to prove HAC since it would be virtually impossible to know what a victim actually thinks or feels absent the gift of clairvoyance.

XXXIII.

THE TRIAL COURT DID NOT IMPROPERLY DOUBLE ITS CONSIDERATION OF CCP AND PECUNIARY GAIN AS AGGRAVATING FACTORS.

The defendant asserts that the trial court improperly doubled its consideration of the cold, calculated, and premeditated and pecuniary gain factors. This argument is without merit since doubling is improper only where it is based upon the same factor. Cherry v. State, 544 So.2d 184 (Fla. 1989). Here, as recognized by this Court in Echols v. State, 484 So.2d 568 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986), CCP and pecuniary gain are not based upon the same factor. (See also: Middleton v. State, 426 So.2d 548 (Fla. 1983), cert. denied, 463 U.S. 1230, 103 S.Ct. 3573, 77 L.Ed.2d 1413 (1983)). As this Court stated

> The two aggravating factors are not based upon the same essential feature of the crime or of the offender's character. (Citations omitted). There is no doubt that appellant was motivated by a desire for pecuniary gain. There is also no doubt that the murder was planned and carried out in a cold, calculated, and premeditated manner without any pretense of moral or legal justification well above that required

> to prove premeditation. There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or a murder committed to eliminate a witness and murder committed to hinder law enforcement. (Citations omitted). 484 So.2d at 574-475.

Here, the same rationale applies. The murder was planned and premeditated not only for the money but because the defendant sought to rid himself of an unwanted wife and child and was also committed for pecuniary gain. The trial court did not err in considering both aggravating factors. To adopt the defendant's argument would preclude the finding of these two aggravators regardless of the presence of additional indicia of CCP.

XXXIV.

> THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE THE INSTRUCTION PROPOSED BY THE DEFENDANT ON THE DISPARATE TREATMENT OF KEN SHAPIRO.

The defendant claims that the trial court erred in failing to instruct as to the disparate treatment received by Ken Shapiro, who he asserts was an equally culpable codefendant. Since Shapiro was not equally culpable, the defendant is incorrect in stating that the trial court failed to understand the mitigating effect of Shapiro's treatment; rather, it is clear it did not find the instruction either a correct statement of the law or warranted by the facts.

The defendant concedes that the trial court instructed the jury that it was to consider both whether the defendant was an accomplice to another individual whose culpability was greater than his own (2R.1273) and any other aspect of the defendant's character, record, or any other aspect of the offense. (2R.1274). The accomplice instruction comports completely with his own version of the murder. The other instruction encompasses all non-specified nonstatutory mitigators as there is no requirement that the jury be instructed on anything other than statutory mitigating circumstances. See: Stewart v. State, 558 So.2d 416, 420 (Fla. 1990); Robinson v. State, 487 So.2d 1040 (Fla. 1986). To require otherwise would result in potentially hundreds of instructions on nonstatutory mitigators in any given case. This is particularly absurd in cases, such as this one, where substantial amounts of argument are devoted to those factors that are urged upon the jury. (2S.R.49-51). White v. Dugger, 523 So.2d 140 (Fla 1988), cert. denied, 109 S.Ct. 184, 102 L.Ed.2d 153 (1988). Significantly, in this case, like Mendyk v. State, 545 So.2d 846 (Fla. 1990), relied upon by the defendant, Shapiro "was not equally culpable" with the defendant, and while present on the boat, did not plan the murder before even finding an appropriate victim, did not push Anita into the water, did not circle her for an hour, and did not turn back in leaving her behind. Although the defendant urges that the jury misapprehended the instructions, it is clear that not only were

standard instructions approved by this Court utilized, the presumption that a jury will follow them to the fullest letter of the law has not been overcome.

XXXV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS HEINOUS ATROCIOUS AND CRUEL.

The defendant contends that the trial court erred in instructing the jury that it could find this aggravating factor if it found the evidence established the murder was especially wicked, evil, atrocious, or cruel. Not only is this the instruction authorized by the Florida Standard Jury Instructions, the defendant himself had no objection to the instruction. Thus, there was no error.

The defendant states that the instruction given was impermissibly vague pursuant to Maynard v. Cartwright, 484 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Maynard, however, has no application to this State's sentencing scheme and the issue has been decided against the defendant in Smalley v. State, 546 So.2d 720 (Fla. 1989).

XXVI.

THE ROLE OF THE JURY IN SENTENCING WAS NOT IMPROPERLY DIMINISHED BY THE TRIAL COURT.

The defendant claims that the jury was improperly led to believe that they had no responsibility whatsoever with regard

to imposition of a sentence. The record reveals, however, that this was not the case.

Although the defendant correctly states that defense counsel moved for mistrial when the trial court allegedly implied it was solely responsible for the determination of a sentence, he does not add that the trial court gave him an opportunity, which he used, to formulate a reinstruction to cure any potential error. (2R.295). The defendant's participation and acquiescence in the curative instruction and his failure to renew any objection thereafter waives the issue. Additionally, when the instructions are viewed as a whole, it is clear the jury was informed that the court placed great weight upon the verdict recommended by the jury (2R. 141-2) even though it was the ultimate arbiter of the defendant's sentence. Thus, no error occurred since the instructions as a whole were a correct statement of the law and the defendant waived any objection by drafting the curative instruction and failing to renew his objection.

XXXVII.

THE TRIAL COURT DID NOT REVERSIBLY ERR IN TELLING THE JURY THAT SIX VOTES WOULD DETERMINE THE SENTENCE.

The defendant contends that he is entitled to a resentencing since the trial court instructed the jury that "the fact that the determination of whether six or more of you recommend a sentence of death or six or more recommend a

sentence of life imprisonment in this case can be reached by a single ballot should not influence you." (2R.1275). However, as previously stated, jury instructions must be viewed as a whole Diecidue v. State, 131 So.2d 7 (Fla. 1961), and it is clear that the jury knew that if six or more felt the defendant should not be sentenced to death their advisory sentence would be for life imprisonment. (2R.1275-6). The trial court instructed the jury that "if a majority of the jury determines that Michael Scott Keen should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of blank advises and recommends to the Court that it impose the death penalty upon Michael Scott Keen. On the other hand, if by six or more votes the jury determines that Michael Scott Keen should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the Court by a vote of blank that it impose a sentence of life imprisonment upon Michael Scott Keen without possibility of parole for 25 years." (2R.1275-76). (Emphasis added). The defendant's failure to object to this instruction constitutes a waiver of this argument on appeal. Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986), cert. denied, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986). In view of the instructions as a whole, the defendant's failure to object, the fact that a majority of the panel voted for death, and the fact that the jury's determination was reevaluated by the trial court, no error resulted. Cave v. State, 476 So.2d 180 (Fla. 1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d

993 (1986). The cases relied upon by the defendant are thus totally distinguishable both on the facts and on the law since they deal with improper instructions in Allen charge situations.

XXXVIII.

THE TRIAL COURT DID NOT ERR IN SENTENCING SINCE IT DID NOT IMPROPERLY CONSIDER VICTIM IMPACT EVIDENCE, OPINION EVIDENCE, HEARSAY, AND UNPROVEN ALLEGATIONS OF CRIMINAL ACTIVITY.

The defendant alleges that the trial court erred by considering victim impact information, opinion evidence, hearsay evidence, and unproven allegations of criminal activity contained in the PSI. The record establishes that the trial court did not make improper use of the PSI or otherwise base its sentence on impermissible evidence.

Fla.R.Crim.P. 3.710 provides that a trial court may, at its discretion, order the preparation of a PSI prior to sentencing so long as it is provided to both the defendant and the State so that the defendant may object to and rebut any portions he does not agree with. In this case, the trial court ordered a PSI which was prepared (1SR.70-90), prior to the sentencing hearing on October 15, 1987. (2R.1374-96). As required by the rules, the defendant was given the opportunity to object to and rebut anything contained in the PSI with which he did not agree. The defendant's only objections were to the comments of the legal counsel of the two insurance companies, the failure to include the disparate treatment of Shapiro, the

statements by Patrick Keen, and the fact the PSI did not discuss the defendant's adjustment to prison.[4] (2R.1374-83). At no time did the defendant object to the statement of the victim's sister or to the list of his prior criminal involvements.[5] Any such complaint is waived. Additionally, the trial court specifically stated that it did not consider any material contained in the report which was not testified to; thus it is clear it did not consider any of the things the defendant now complains of. (2R.1377). The defendant's argument that the report contained inadmissible hearsay is ludicrous since all similar reports are not by first hand observers and must, of necessity, contain information supplied by other people. Lastly, the defendant's argument also fails since even though the report did contain the things the defendant now complains of, they were not presented to the jury and the trial court stated it did not consider them. Reed v. State, 560 So.2d 203 (Fla. 1990).

XXXIX.

THE DEFENDANT IS NOT ENTITLED TO A RESENTENCING BEFORE A NEW JUDGE.

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[4] This was remedied by the supplemental report, not to mention the stipulation entered into by the parties, as to his lack of disciplinary reports. (2R.1384).

[5] The trial court is not limited to crimes of which the defendant has been convicted. It may consider competent evidence of other crimes. Quince v. State, 414 So.2d 185 (Fla. 1982). Here, the defendant himself admitted having committed a felony and numerous misdemeanors, in addition, to several crimes involving fraud. (2R.1040,1042,1082-4).

The defendant contends that the numerous errors he complains of relating to sentencing necessitate a new sentencing proceeding before a new judge. However, as shown by the foregoing arguments, the defendant simply is not entitled to a new sentencing proceeding in this case nor is he entitled to such a new proceeding before a different judge.

XL.

FLORIDA'S DEATH PENALTY IS CONSTITUTIONAL.

A. THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST IN THIS CASE ARE CONSTITUTIONAL.

The defendant contends that the aggravating circumstances found to exist in this case are unconstitutional. This argument has, however, been consistently rejected by this Court and, as a result, he may not prevail.

In the first instance, the defendant contends that the aggravating factor HAC is unconstitutionally vague, citing to Maynard v. Carwright, 484 U.S.____,108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Maynard simply has no applicability to Florida's sentencing scheme. The defendant's argument has been considered and rejected by this Court in Smalley v. State, supra. See also: Dixon v. State, 283 So.2d 1 (Fla. 1073); Hildwin v. Florida, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), reh. denied, 109 S.Ct. 3268, 106 L.Ed.2d 612 (1989).

Similarly, the use of the aggravating factor CCP has also been construed in an appropriately limited fashion by this Court.[6] Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), cert. denied, 109 S.Ct. 1355, 103 L.Ed.2d 822 (1989).

B. THE STANDARD JURY INSTRUCTIONS ARE CONSTITUTIONAL.

The defendant contends that the standard jury instructions for the three aggravating circumstances found to exist in this case are unconstitutional. This issue has been previously addressed by this Court which has held the standard instructions are proper. Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); Vaught v. State, 410 So.2d 147 (Fla. 1982). As a result, the issue is meritless.

C. THE USE OF MAJORITY VERDICTS IS CONSTITUTIONAL.

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[6] The defendant's analysis of Herring v. State, 446 So.2d 1049 (Fla. 1984) in which a defendant shot a store clerk, who he believed was making threatening gestures, twice in rapid succession, is incorrect. In Rodgers v. State, 511 So.2d 526 (Fla. 1987), this Court receded from Herring since it found that CCP did not exist because no evidence of calculation, i.e. a careful plan or prearranged design, was present. Swafford v. State, 533 So.2d m270 (Fla. 1988) did not resurrect Herring. Rather it found that degree of heightened premeditation required where a defendant shot a victim numerous times, then stopped to reload and fire again. Schafer v. State, 537 So.2d 988 (Fla. 1989), like Rogers, and Swafford, found evidence of calculation was required to substantiate a finding of CCP.

The defendant asserts that the use of majority verdicts by juries recommending death is violative of the due process and cruel and unusual punishment clauses. This argument has, however, been previously rejected by this Court and its ruling, that unanimity is not required under the United States Constitution, has been upheld by the highest Court of this Country. James v. State, 453 So.2d 786 (Fla. 1986), cert. denied, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984).

D. THE USE OF MAJORITY VERDICTS DOES NOT MAKE AGGRAVATING CIRCUMSTANCES ELEMENTS OF THE CRIME.

The defendant contends that Florida law makes aggravating circumstances into elements of the crime, thus making the defendant death eligible and the use of majority verdicts makes this sentencing scheme unconstitutional. As shown above, the use of majority verdicts has been upheld both by this Court and the Supreme Court of the United States. Furthermore, the defendant Shapiro claims that aggravating circumstances are "elements" of the crime.[7] Ford v. Strickland, 693 F.2d 804 (11th Cir. 1983), cert. denied, 104 S.Ct. The mere existence of aggravating factors does not mandate imposition of the death penalty as Florida law does not contemplate a tabulation of the number of aggravating circumstances but instead requires a weighing of those circumstances to determine whether the death penalty is

[7] This argument is more fully addressed in a subsequent section.

appropriate to the facts of the case. White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983).

E. MEANINGFUL APPELLATE REVIEW IS AVAILABLE.

The defendant asserts that Florida's capital punishment scheme is unconstitutional because of the lack of meaningful appellate review. He bases this claim on a history of ambiguities in the sentencing scheme which has resulted in the absence of evenhanded appellate review and the absence of a reweighing process contemplated under Proffitt v. Florida, 428 U.S. 242 (1976). A review of the capital sentencing process, as viewed through this Court's opinions, however, reveals that the defendant is incorrect in asserting this Court fails to provide meaningful appellate review.

Contrary to the defendant's analysis, it is clear that where supported by the record adduced below, this Court will not reweigh the aggravating and mitigating factors found to exist by the trial court. It will do so when the record fails to contain insufficient support for those factors. As this Court recognized in Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), "Our function is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate." Thus, a proportionality analysis inherently includes a review of those cases in which death was found not to

be the appropriate remedy. Additionally, also contrary to the defendant's claim, Cochran v. State, 547 So.2d 928 (Fla. 1989) clearly establishes that the present Court is interpreting Tedder with great consistency. His claim that meaningful appellate review is thus without merit since he seemingly states that the review provided by this Court is only meaningful when a defendant agrees with the result.

F. PROCEDURAL PREREQUISITES TO APPELLATE REVIEW DO NOT RENDER THE STATUTE UNCONSTITUTIONAL.

The defendant finds fault with the procedural requirements of contemporaneous objections to preserve nonfundamental errors and the principle of retroactivity which operate to bar otherwise meritorious claims. This analysis purposely overlooks the purpose behind such requirements and seeks, in effect, to reverse a long history of case precedent and do away with the Rules of this Court. The defendant seeks to make all errors that occurs in a criminal trial fundamental so as to obviate the need for procedural safeguards to appellate review. Not every error that occurs rises to the level that it may properly be deemed fundamental, so serious that it vitiates a defendant's constitutional right to a fair trial. To suggest that all errors should be reclassified to fall within that narrow category would lead to absurd results, at best, since few trials, due to their complex nature, are completely without error of any kind. The same analysis applies to the defendant's

argument on retroactivity since to apply a new rule of law retroactively would wreck undue hardship on the parties, as well as, the court system.

G. FLORIDA'S STATUTE ALLOWS THE DEFENDANT TO OFFER MITIGATING EVIDENCE.

The defendant contends that the fact that Fla.R.Crim.P. 3.800 does not allow mitigation of a death sentence is unconstitutional. He ignores the fact that mitigation is indeed allowed during the penalty phase and the possibility of mitigation is fully presented to the court for its determination prior to rendition of the actual sentence. The constitutionality of Florida's death penalty scheme has long been upheld. The issue is without merit.

H. FLORIDA LAW DOES NOT CREATE A PRESUMPTION OF DEATH.

The defendant first asserts that a presumption of death is created in felony-murder cases and cases in which a murder is premeditated under Florida law since a single aggravator is already present. This analysis ignores several key facts, however.

In the first instance, no such presumption of death is present under the law. F.S. 921.141 requires a weighing, not merely a counting of both aggravating and mitigating factors present, prior to the determination of the sentence appropriate to that individual case. Hargrave v. State, 366 So.2d 1 (Fla.

1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176, reh. denied, 444 U.S. 985, 100 S.Ct. 493, 62 L.Ed.2d 414 (1979). Thus, the existence of one aggravating factor may be outweighed by other circumstances of the crime. Secondly, the fact that a murder is premeditated is not enough to justify a finding of CCP. CCP requires a heightened form of premeditation, beyond that required to support a conviction of premeditated first-degree murder. Hardwick v. State, 461 So.2d 79 (Fla. 1984), cert. denied, 105 S.Ct. 2369 (1984); Card v. State, 453 So.2d 17 (Fla. 1984), cert. denied, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

The defendant erroneously asserts that the aggravating factor of HAC applies to every murder regardless of its circumstances. HAC has been restrictively applied to only those case in which the capital felony has been found to have been especially heinous, atrocious, or cruel. To support such a finding, the murder in question must present such additional acts which set it apart from the norm of capital felonies as in those cases where it is a consciousless or pitiless crime that is unnecessarily tortuous to the victim. Blanco v. State, 452 So.2d 520 (Fla. 1984), cert. denied, 105 S.Ct. 940, 83 L.Ed.2d 953 (1984). This factor thus does not apply to every murder and does not create a presumption of death. Finally, the defendant claims that this presumption of death which he asserts exists restricts the trial court's consideration of mitigating

evidence. Not only does no presumption exist, it is clear that the law, both by statutory and nonstatutory interpretation, have expanded those facts which may be considered in mitigation.

I. THE BURDEN OF PROOF FOR MITIGATING FACTORS IS CONSTITUTIONAL.

The defendant contends that the burden placed upon the defendant, that the jury may only find mitigating evidence if it is reasonably convinced of its existence, is unconstitutional. The validity of this aspect of the statute has been repeatedly upheld both by this Court and the United States Supreme Court. Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 79 L.Ed.2d 725 (1983); Songer v. State, 365 So.2d 696 (Fla. 1978), 60 L.Ed.2d 1060 (1979).

J. FLORIDA'S INSTRUCTION THAT JURIES SHOULD NOT CONSIDER PREJUDICE, BIAS, OR SYMPATHY IS NOT UNCONSTITUTIONAL.

The defendant contends that Florida's standard jury instruction that

> Feelings of prejudice, bias or sympathy are not legally reasonable doubts, and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence, and on the law contained in these instructions.

is unconstitutional since it prevents the consideration of mitigating evidence. In support of his claim he cites to the United States Supreme Court's opinion in Saffle v. Parks, 495 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 415 (1990). In that case,

however, the Supreme Court rejected Park's claim that an antisympathy instruction ran afoul of Lockett and Eddings as a violation of the Eighth Amendment. Thus, this argument has been rejected by the United States Supreme Court and the defendant accordingly may not prevail.

K. ELECTROCUTION IS NOT CRUEL AND UNUSUAL PUNISHMENT.

The defendant asserts that death by electrocution constitutes cruel and unusual punishment since other forms of execution are available. Not only does he fail to provide any legal or scientific support for his contentions, this Court has held, on more than one occasion, that "death by electrocution is not cruel and unusual punishment." Buenoano v. State, 565 So.2d 309, 311 (Fla. 1990). See also: Marek v. State, 492 So.2d 1055 (Fla. 1986).

L. THE DEATH PENALTY IS NOT RACIALLY BIASED.

As his last point on appeal, the defendant claims that the death penalty is racially biased. However, not only did the defendant fail to object on these grounds below so as to preserve his right to appeal on this basis, this Court and the Supreme Court of the United States have rejected this argument. Spinkellink v. Wainwright, 578 F.2d 582 (11th Cir. 1978), cert. denied, 440 U.S. 976. 99 S.Ct. 1548, 59 L.Ed.2d 796, reh. denied, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667 (1979); Thomas v. State, 421 So.2d 160, (Fla. 1982).

As shown by the foregoing arguments as to this issue the defendant's position is without merit and he may not prevail.

CONCLUSION

Based upon the arguments set forth herein, the Appellee, the State of Florida, respectfully requests that this Honorable Court affirm the conviction and sentence of death imposed below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to RICHARD B. GREENE, Assistant Public Defender, Governmental Center/9th Floor 301 North Olive Avenue, West Palm Beach, Florida 33401 on this 23rd day of May, 1991.

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