IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,106

DAVID YOUNG

Appellant,

vs.

STATE OF FLORIDA

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA CRIMINAL DIVISION

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ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTE PAGE

OTHER AUTHORITIES

PAGE

PRELIMINARY STATEMENT

Appellee, the State of Florida, was the prosecution and Appellant, David Young, was the defendant in the Criminal Division of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

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

References to the record on appeal will be made by the following symbols:

"R"	=	Record on Appeal
"SR"	=	Supplemental Record on Appeal
"AB"	=	Appellant's Initial Brief

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee **generally** agrees with Appellant's statement of the case and facts as set out in his Initial Brief at pages 1 through 11. However, the state takes issue with the argumentative nature of some of the sentences setting out the facts, for example the third full paragraph at page 5 is very argumentative. The sentence "Holmes stated that Young brought the shotgun in case they became involved in a fight with another gang. (R. 3460)" at AB 3, is inaccurate in that the record reflects that during his testimony on direct examination, the co-perpetrator Holmes made no mention that on that night any of them was worried about or looking to become involved in a fight with another gang (R. 3417 -3443). The insinuation came only during cross-examination as a result of the following statements made by defense counsel, Mr. Wilson, and the witness' single-word answers:

> Q. [BY DEFENSE COUNSEL]: There was no mention made by David of using that gun to steal a car or anything, was there?
>
> A. [BY WITNESS HOLMES]: No.
>
> Q. And you felt yourself at that time that you all might be riding down to West Palm or another municipality where you might have a conflict or fight with other guys, is that right?
>
> A. Yes.

(R. 3460). Likewise, the sentence "These clicks could not be heard from four hundred yards. (R. 2834)" (AB 6) is also inaccurate. Mr. Melhorn testified he heard the five shots from where he was standing at about 80-90 feet away from the parking

lot (R. 2831); and testified he did not know whether he could have heard the shots if he were over by the tennis courts which were situate approximately four hundred yards from the parking lot (R. 2832 -2836).

Lastly, the State points out that from the middle of page 9 to page 11 Appellant fails to make reference to the appropriate pages of the transcript in contravention of Fla. R. App. P. 9.210(b)(3).

In addition to the aforementioned specific disagreements with Appellant's statement of the facts, the State supplies the following additions, corrections, clarification or exceptions for an accurate and more complete statement of the facts:

1. Both Gerald Saffold and Tony Holmes testified that after Appellant picked them up at "S" Avenue in Riviera Beach, Appellant drove to his own home and picked up a sawed-off shotgun, which he took with him in the car to Jupiter (R. 3343, 3421 respectively). Saffold testified that when Appellant first brought the shotgun into the car, he said, "If anybody points a gun at me and don't shoot, I am going to shoot them." (R. 3385).

Saffold stated that when they arrived at the apartments in Jupiter, Harris pointed to the car he wanted [the brown Trans-Am] (R. 3350). Saffold testified that he and Holmes remained in the car (R. 3354), while Appellant accompanied Harris to the brown Trans-Am (R. 3353).[1] While Saffold was waiting in

[1] While Saffold testified he and Holmes remained in the car the entire time, Holmes testified that Saffold initially accompanied Harris to the TransAm, (R. 3423, 3445) but that when Appellant joined them (R. 3423) at the TransAm, then Saffold came back to Appellant's car (R. 3425); Appellant and Harris remained trying

Appellant's car, he heard lot of noises coming from the TransAm, like something cracking or breaking (R. 3354- 3355). Holmes stated that Harris and Appellant remained at the TransAm about five (5) minutes trying to steal the car (R. 3424). When they heard someone come out of a house, Appellant and Harris returned to the car (R. 3355; 3427). They saw an older white man (hereinafter called "victim") and a young white man (hereinafter called "the victim's son") come out of the house and approach Appellant's car (R. 3356). When the victim pointed the .357 revolver at Appellant's face, Appellant grabbed the shotgun in his hand (R. 3357; 3429). The victim told the people in Appellant's car to get out of the car (R. 3359), and told his son to go call the police (R. 3359). Appellant came out of the car first, **taking the shotgun with him; as Appellant laid down on the ground on his stomach, he had the shotgun at his side** (R. 3360 - 3361; 3431).

The victim then asked the rest of the passengers in Appellant's car to come out of the car (R. 3360). Appellant was laying on the ground next to the car's front door on the driver's side (R. 3362, 3431), Harris, Saffold and Holmes laid next to each other behind the car near the license tag (R. 3430 - 3431). The four of them must have laid on the ground about 10 minutes before anything happened (R. 3432). Although in the statement he gave the police when apprehended the same

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to steal the TransAm (R. 3426). Further, it must also be noted that a latent fingerprint was obtained from the back window of the TransAm which **matched** Saffold's fingerprint (R. 2516; 2867-2871).

day of the incident, Saffold stated **Appellant shot first** (R. 3390), at trial Saffold said the victim fired first (R. 3386, 3403). The victim allegedly fired at the ground somewhere between Appellant and Harris (R. 3403), or between Holmes and Harris (R. 3433). When the first shot was fired, Harris jumped and ran (R. 3361, 3404, 3434). After the first shot, Appellant, who was laying on his stomach, rolled over and fired while still laying on his side (R. 3405; 3436), hitting the victim (R. 3436). The victim yelled "I've been shot," and was moaning with pain (R. 3366). Appellant ran to the front of the car for cover (R. 3436). The victim got up and shot two times **at Harris**, who was running (R. 3434). The victim asked Appellant to come from around the car (R. 3437) and again lay down on the ground (R. 3368). Appellant answered "okay, sir" (R. 3368, 3437), but instead ran to the other side of the car and shot the second fatal shot at the victim (R. 3369, 3437). Holmes testified that the lapse between the first shot and the second shot fired by Appellant was between 15 and 30 seconds (R. 3436). When the first shot was fired, Harris ran from the scene on foot and did not join the others in the car (R. 3370, 3434); Holmes ran inside the car (R. 3435), and so did Saffold (R. 3370). Appellant entered the car, but it would not start, so he came out of the car, opened the hood, shook the battery cables, then the car started (R. 3370, 3438). The shotgun was in the car, but as they were driving out, Appellant threw it out the window (R. 3376-3377, 3439). Holmes testified that he asked Appellant to stop the car and let him out, but Appellant said that if he

stopped the car, they would all go to prison (R. 3439), and reminded Holmes that he had warned them that if anyone pulled a gun on him [Appellant], he would shoot them if they did not shoot him first (R. 3439).

Holmes testified he heard Appellant complaining about having chest pains when he was laying on the ground prior to any shots being fired (R. 3442). And that when they were driving away from the scene, Appellant said he had been faking chest pains to try to get the victim closer to him so that he could shoot the victim (R. 3440-3441). Holmes explained that the victim was standing by the three of them behind the car when he first fired (R. 3454), and not by Appellant who was laying by the car door.

2. Michael John Bell, the victim's son, testified that on August 31, 1986, he and his father had two cars parked outside their townhouse in Jupiter, a blue 1984 TransAm and a brown 1984 TransAm (R. 2284). That night, Michael had just gone to bed, when at 2:00 a.m. his father came downstairs and said, "Come on, Michael, somebody's trying to steal your car (R. 2283), so they went outside, and went up to Appellant's car, which had the windows tinted very dark (R. 2293). The victim and Michael looked through the windshield, and saw a gun pointing at them (R. 2293). The victim yelled, "put the gun down" (R. 2293). The victim was carrying a .38 pistol (R. 2294). The victim was experienced in the use of guns (R. 2281); he occasionally went shooting in the woods, and was a veteran from Korea, where he had learned to use guns (R. 2281). When Appellant put the gun

down after being requested to do so by the victim, the victim told Appellant and his companions to get out of the car and lay on the ground (R. 2294). At some point the driver of the car, came out of the car and laid on his stomach (R. 2298), and the victim moved around the door to get the rest of the people out of the car (R. 2298). Michael testified that his father appeared nervous and scared (R. 2299); his voice was elevated, he was shocked, surprised because he did not know they had a gun, and appeared frightened (R. 2299-2300). The driver of the car [Appellant] laid down by the driver's door; the rest of the people went around and laid down behind the car (R. 2300-2301). When everyone was out of the car, the victim stepped back towards the sidewalk, about five to ten feet away from the people on the ground (R. 2301, 2302); his father was just covering the people laying on the ground (R. 2303). The victim was not pointing the gun at anyone, he was just holding it up (R. 2304). At that point, the victim asked Michael to go call 911 (R. 2302). Michael ran inside the house, and called the police (R. 2302); then he ran back outside to his father's side (R. 2303). By then the victim had calmed down somewhat; Michael noticed his voice had settled, but his father still appeared nervous (R. 2303). When he came back out, the victim asked Michael to go turn the TransAm headlights on so they could see what was going on, so Michael went back inside the house to get the car keys (R. 2304).

Michael testified that at all times, his father remained about ten (10) feet away from Appellant (R. 2305). Michael also

testified he heard the driver of the car complaining his stomach was hurting and he wanted to roll over (R. 2306). The victim just ignored the request and told Appellant to stay where he was (R. 2307).

As Michael was coming out of the house with the car keys, he was two or three steps from the gate, when he heard two, maybe three shots and sounds of clicking. Michael testified, he thought the clicking sounds were empty chambers (R. 2308); it sounded like someone reloading a shotgun (R. 2309). Michael ran towards the TransAm and opened the car door, then he heard his father yell, "Michael, come here." (R. 2308), so Michael ran towards his father, but about midway he heard another shot, he stopped, spun around and ran back to the TransAm and started it up and turned the car lights on (R. 2308). When he was running towards the car, he heard people moving about, so he figure they were trying to leave, so he wanted to get identification for the police (R. 2311). Michael saw the driver go to the front of Appellant's car, and open the hood, play with the battery, run back in his car and pull out, so Michael followed him in the TransAm (R. 2312). As Michael was driving out, he looked over to his father laying on the ground and noticed that there was blood on his pajamas (R. 2313); his father was not moving (R. 2343).

Michael testified that as he was driving out, he saw a Jupiter Police car coming in, so he waived and told them to follow the Toyota; that they had shot his father (R. 2343). Michael turned around and went back into the parking lot, where

he saw his father laying on the ground bleeding (R. 2344). Michael said he noticed the clock in the house when he first went in to call the police, and it said 2:10 a.m. (R. 2405). Michael did not think the entire incident took more than ten minutes (R. 2405).

The record also shows on Sunday or Monday, Michael went to identified the brown TransAm at the police station, and noticed it had the steering column broken up (R. 2285-2286). He also said that when he saw the Toyota at the police station, he saw something inside that belong to him (R. 2349-2350). Michael testified that the night of the incident he had left a pair of brand new white and blue, Nike high-top sneakers, size 11 or 12 (R. 2356, 2372) in the back seat of the TransAm (R. 2355, 2372), but the sneakers were not there after 2:00 a.m. on August 31, 1986 (R. 2372); however Michael saw a pair of sneakers matching the same description as his, in Appellant's Toyota car when he saw the car at the police station the next day (R. 2371).

3. Several of the victim's neighbors testified as to what they heard the night of the shooting:

a. Christopher Griffiths, who resides in Unit 17-C, on the southeast corner in relation to the parking lot (R. 2621-2622), testified that on August 31, 1986 he was awaken at 2:00 a.m. by a man with a loud voice (R. 2622-23), so he got up from bed and went to the window so he could hear better (R. 2623). He heard mention of a .357 pistol and threats to kill (R. 2623) so he called 911 (R. 2624). Mr. Griffiths testified that having been involved in competition target shooting for approximately

twenty years, he is very experience with guns and can distinguish between the sound of a shotgun shooting versus a pistol shooting (R. 2625 - 2626). On that night, while he was on the telephone with 911, he heard shots being fired (R. 2624).

Mr. Griffiths testified he heard three separate groups of shots for a total of five shots (R. 2624). Griffiths stated he heard the first shot, **it was a loud bang**, then heard three shots, **that sounded like pistol cracks, quieter.** These three middle shots were more of a pop than a blast, so more consistent with a pistol. They were even, in a manner that could not be achieved with a shotgun. The three middle shots were **uninterrupted**, even and appeared to come from the same pistol (R. 2630). Then Mr. Griffiths heard a last shot which was **similar in volume to the first, and louder than the middle three** (R. 2627, 2628 - 2631). Mr. Griffiths estimated that there was no more than half a minute in time between the first and the last shots (R. 2647).

After the last shot was fired, Mr. Griffiths went to the door, and he only heard silence, some muted voices, a door slamming, lights go on on a small import [car], and on the TransAm (R. 2634). He saw the import drive out of the parking lot, followed by the TransAm. A minute later he saw security lights, a police car blue lights; he saw the police car make a U-turn and follow the import; then a minute and a half later the TransAm drove back into the parking lot, followed by a police car (R. 2635).

b. Mr. Robert Melhorn, who resided in Unit 16-A, in a townhouse right next to the victim's (R. 2813-2814), testified he was awaken by his wife at 2:00 a.m. (R. 2814). He got out of bed and went to the sliding glass door so he could hear better. He heard the victim's voice, which was raised, excited, like he was in trouble (R. 2816). The victim sounded scared, frightened (R. 2817). After listening to the commotion, Mr. Melhorn decided to go outside and help. He realized the people involved had guns, so he was careful (R. 2816). Prior to stepping out from the fenced-in area around his townhouse, he looked through the fence to see where everyone was. At that time he heard a **loud boom** (R. 2816). Mr. Melhorn testified he was about 80 to 90 feet away from the parking lot when he heard the shots (R. 2831).

Mr. Melhorn testified that he has used rifles and guns for 37 years so he is familiar with the sound each makes when fired (R. 2818). He has used .357 guns and knows they are louder than .38's (R. 2818). Mr. Melhorn testified that the first shot he heard was louder than a pistol (R. 2818), and more consistent with **a shotgun blast** than with a pistol (R. 2818-19). After that shot, he heard someone say, "Oh, Jesus," and some scuffling (R. 2819), then he heard two clicks and then either another click or a faint pop (R. 2819), then another **loud boom** (R. 2820, 2840). Mr. Melhorn testified that the middle shots sounded like a trigger on a pistol being pulled and just letting the hammer snap [these clicks sounded like a pistol firing without cartridges (R. 2831)]; then another pop - like something

misfiring, (R. 2820) then the pop sounded like a revolver firing (R. 2821). The last loud bang was the same sound as the first shot he heard (R. 2821).

c. Ms. Dana Louise Thomas testified she resided in Unit 14-C of the Jupiter Plantation Townhomes, and had a clear view of the parking lot on the night of August 31, 1986 (R. 2964-2965). That night Ms. Thomas was watching television at 2:00 a.m., when she heard some people arguing outside so she went upstairs to the bedroom window (R. 2966). Ms. Thomas opened the window that faces directly towards the parking lot and heard the argument of the people (R. 2967-68). Ms. Thomas could see the white male (the victim) in the parking lot, his back was to Ms. Thomas (R. 2969). She testified that the victim was standing by the island and the sidewalk (R. 2970).

Ms. Thomas also testified that she has heard sawed-off shotguns being shot and guns being shot when she has gone shooting with her girlfriend and the girlfriend's father (R. 2971-2973). Ms. Thomas testified that from prior experience she knows that a shotgun blast sounds like a small cannon (R. 2972), and that a pistol or revolver sounds like a cap gun when it is shot (R. 2973-74). Further that the shotgun blast is much louder than the shooting sound of a gun (R. 2974).

Ms. Thomas testified that on the 31st day of August, 1986, she **saw** a 4-6-inches-big flash come from the shotgun first, and not from the victim's gun (R. 2975-76). Then she saw and heard three small cap shots (R. 2979, 2982), which came from where the victim was standing (R. 2984); and a final shot from where the

first one came from (R. 2979-80, 2981). Ms. Thomas testified the first shot she heard came from the shotgun (R. 2974).

After the shots were fired, Ms. Thomas saw a black male -- wearing white shorts with a green stripe up the side of the shorts with loose Nike shoes and no socks and no shirt (R. 2986) -- run to the right and someone else run to the left (R. 2985). Ms. Thomas testified that the entire incident lasted between 10 and 15 minutes (R. 2968).

4. Trooper Michael L. Bricker, who works for the Florida Highway Patrol, was doing off-duty security service for the Jupiter Plantation the night of August 30-31, 1986 (R. 2764). Trooper Bricker testified that he has had experience with firearms since he was 13 years old when he started hunting (R. 2764-65). He stated that the sound of a sawed-off shotgun when it is fired is clearly **distinguishable** from a .38-round pistol being fired (R. 2768-69).

The Trooper testified that the night of the incident, at about 2:00 a.m., he was parked by the tennis court -- which are located approximately 400 yards away from where the shooting occurred (R. 2794) -- reading a book (R. 2764). When he saw it was 2:00, he decided to do his security rounds, but then he heard a loud bang (R. 2769), which was consistent with a blast from a sawed-off shotgun (R. 2770). Upon hearing this, the Trooper put his book down and listened; three to four seconds later (R. 2773) he heard two rapidly fired, a lot quieter and shorter, snappier rounds, which sounded like they were being made by a .38 pistol (R. 2770, 2771). The Trooper started his

car, and began driving toward the direction of the shots, then he heard a fourth and last loud bang which sounded like the shotgun, or similar to the first loud bang (R. 2773).

As the Trooper was driving into the Jupiter Plantation he saw a car with no lights, and another car following the first one. The Trooper let the first car go by, and approached the second car, which had its windows down (R. 2775-76). At that point the first car sped-off very fast (R. 2779), so the Trooper made a U-turn to follow the Toyota (R. 2779). As he proceeded behind the Toyota, the Trooper saw the car stop at the stop-sign, turn its lights on and go left, eastbound on Center Street (R. 2779). At that point the Trooper encountered a Jupiter Police Officer who was responding to the 911 call, so the Trooper told the Jupiter Officer that he was following the Toyota, and for the Jupiter Police to take care of the second car (the victim's son) (R. 2779-80).

Trooper Bricker proceeded on a high speed chase of Appellant's car (R. 2779-81), until an unidentified car pulled in front of him, making the Trooper loose control of his car and go into the woods (R. 2781).

5. The high speed chase of Appellant's car was continued by Trooper Danny C. Jowers (R. 2799). Trooper Jowers testified how the Toyota proceeded at speeds up to 120 m.p.h., going through red lights, and back yards, barely missing other traffic (R. 2799 - 2804). When the Toyota reached a street in Riviera Beach, the car slowed down, and the Trooper saw a Black male (R. 2806) run out of the car, and down the field (R. 2804). The

brakes on Trooper Jowers' car were gone, so he stopped the car by driving it over a curb, and jumped out to pursue the person that came out of the Toyota (R. 2805). The officer, at first thought the car was going to stop, but then noticed as the Toyota continued [the Toyota did not seem to have any kind of mechanical problem (R. 2806)], so Trooper Jowers ran on foot to see where the car went, but soon lost sight of it (R. 2805).

At that point, the Trooper called in the Toyota's tag number and the Trooper's location to the dispatcher, and waited for a back up (R. 2806). When the backup officer picked him up, they drove around the neighborhood looking for the Toyota (R. 2807). Then he came upon Sergeant Nelson Berrios, a special agent with the railroad police (R. 2853-2859) who led Jowers to the Toyota (R. 2807). When Trooper Jowers saw the Toyota again, it was about two blocks from where he first lost sight of it (R. 2809-2810). At that point the Toyota had flat tires and had hit another car (R. 2808). A license check on the Toyota showed that the car was owned by David Young, Appellant (R. 2809).

6. Detective Paul Friedman, a crime scene restoration expert (R. 2426) testified that when he arrived at the scene at approximately 3:30 a.m., on August 31, 1986, it was raining. He saw that the victim had crawled some from where he originally fell (R. 2429-30). The Detective found a handgun on the ground next to the victim (R. 2431). The gun still had three live cartridges in it (R. 2586).

7. Officer Frank Bennett testified that he responded to the Jupiter Plantation and was instructed to follow the chase

route to look for evidence (R. 2850). At the corner of Whitney Drive and Center Street, which is a couple of blocks from where the shooting occurred (R. 2852), he found the shotgun and recovered it (R. 2850). Detective Friedman was handed the shotgun that was found at the scene (R. 2473) by Detective Brown that night (R. 2578). At the scene, Detective Friedman found two spent twelve-gauge shotgun shells; fragments of a center-fire cartridge; more than one bullet, and a fragmented bullet (R. 2435). Officer Friedman also identified some lead fragments found at the scene, as having been discharged from a .38 and having hit the ground (R. 2554-55). Officer Friedman also testified that when he inventoried the Toyota at the Police Station, he found one live shotgun shell inside the Toyota (R. 2433).

8. The firearms expert (R. 2670), Greg Scala who works with the Florida Department of Law Enforcement at the Orlando Crime Lab (R. 2662), testified that he examined the 12-gauge, sawed-off shotgun. The shotgun was in generally poor condition (R. 2685); that normally, this shotgun magazine can hold two shot shells (R. 2680), but the extractor of this particular shotgun was not working properly (R. 2680). The extractor was not extracting the fired shot, and the spent shot shell was remaining in the chamber, so in order to shoot the shotgun again, one had to **manually** pry out the spent shell and **manually** reload through the magazine again before shooting the shotgun again (R. 2681-82). Officer Scala testified that this procedure of reloading the shotgun through the magazine was difficult even with a removed fired shot shell from the chamber (R. 2682).

Officer Scala testified that he received two spent shotgun shells (R. 2687); he fired some shells of the same kind with the shotgun, and compared these to the two he had received (R. 2688), and determined that all shells had been fired with this same shotgun (R. 2690). From his shooting tests with the shotgun, Scala determine that the shot to the victim's chest was made at a distance of greater than five feet and less than fifteen feet from the muzzle at discharge (R. 2720). And that the shot to the groin area, was made at a distance greater than three feet but less than ten feel from the muzzle at discharge (R. 2721).

9. Dr. Frederick Hobin, the medical examiner, testified that the autopsy revealed a single gunshot wound to the front part of the victim's chest area, and a single gunshot wound to the victim's lower abdomen area (R. 2895). The cause of death was the gunshot injury to the chest (R. 2895).

Although both shots had lethal potential (R. 2910), the lower abdomen injury was relatively minor (R. 2910), but the gunshot injury to the chest injured major internal organs, i.e., both lungs were penetrated, the heart was penetrated, the major vascular structures inside of the upper chest area were penetrated, as well as the airway structures were penetrated by shotgun pellets (R. 2902). There was internal hemorrhage as a result of the chest wound (R. 2911), so that the major organs bled into the chest area and both circulation and respiration were interfered with so that the victim could not maintain a blood pressure to effectively exchange air (R. 2902). This

chest wound was so devastating and caused such disruption to the major internal organs, that there was no reasonable possibility the victim could have survived this injury (R. 2910). It was the doctor's expert opinion that the victim had been shot from a distance of more than four feet but less than forty feet (R. 2924), and more like between 10 and 15 feet (R. 2925), and did not believe the gunshot could have been at a closer range than four feet (R. 2927-28).

The doctor also testified that from his examination of the body, his expert opinion was that when the victim discharged his gun, he was already on the ground, injured, then attempted to defend himself by discharging his own gun (R. 2929, 2934-35). The autopsy also revealed that the two wounds to the victim had been cause by different type of ammunition each (R. 2941).

10. The State reserves the right to bring out additional facts or clarification to Appellant's statement of the facts as it relates to the specific issue of Appellant's statement to the police; the motion to suppress; as well as the erasure of the 911 tape.

SUMMARY OF THE ARGUMENT

GUILT PHASE ISSUES

A. Sufficiency of the evidence for premeditated murder.

1. The record supports the position that the state presented sufficient evidence to support the first degree murder conviction on the basis that Appellant committed the murder with a premeditated design.

2. A special verdict form is not required under Florida Law for the jury to provide whether it found that a defendant's first degree murder conviction is based upon premeditated murder or felony murder.

B. Sufficiency of the evidence for felony-murder.

A person who is charged in an indictment with commission of a crime may be convicted on proof that he aided and abetted in the commission of such crime. The evidence presented at trial supports the conviction of felony-murder as a result of the underlying burglary of a conveyance.

C. Suppression of the confession.

No threats or promises were exerted upon Appellant to cause his statement to be invalidated. Appellant's statements were made voluntarily and were therefore admissible. Under the totality of the circumstances, the trial court's ruling must be affirmed.

D. Erasure of the 911 Reel-to-Reel Tape.

It cannot be said that the content of the 911 tape would have been favorable to the defense. Consequently, there was no violation of Appellant's due process and no grounds for reversal have been made.

E. Submission of the case to the jury on alternate theories.

No error occurred in the trial court's refusal to instruct that the jury must unanimously agree upon the particular theory upon which a verdict of first degree murder is based.

F. There was sufficient evidence to sustain a conviction of felony murder with burglary as the underlying felony.

PENALTY PHASE ISSUES

A. The record supports the finding that this murder was committed with **heightened premeditation**, sufficient to support the aggravating factor that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

B. The record supports the finding that the dominant motive for the murder of Mr. Bell was the elimination of a witness, and to make good his escape from the burglary scene before the police arrived. That the murder was committed for the purpose of avoiding or preventing a lawful arrest was proven beyond a reasonable doubt.

C. The trial court is entitled to use a presentence investigation report in capital cases. In the present case, it is clear that the trial court did not rely on improper facts taken from the PSI to arrive at the conclusion that the death sentence was the appropriate sentence to be imposed against Appellant.

D. The trial court did not exhibit bias toward jurors who opposed the death penalty. The record is clear that the trial court applied the appropriate standard and ascertained itself that Appellant would be tried by a fair and impartial jury.

E. Florida's death penalty statutes have been found to be constitutional both facially and as applied in this case by this Court and the United States Supreme Court.

F. The death penalty is not disproportionate. The aggravating factors far outweigh any evidence submitted in support of mitigating.

G. Appellant's arguments on the constitutionality of the death penalty have been consistently rejected by the Courts.

ARGUMENT

I. GUILT PHASE ISSUES

A. THE RECORD DEMONSTRATES THAT THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR PREMEDITATED MURDER.

Appellant contends that the trial court erred in denying his motion to dismiss the indictment charging him with premeditated murder. Appellant argues that the practice of allowing the State to proceed on alternative theories of premeditated and felony-murder, without specifying which theory it will proceed on, denies due process of law. The State points out that following its ruling in Knight v. State, 338 So.2d 201 (Fla. 1976), this Honorable Court has consistently found the argument to be without merit, Green v. State, 475 So.2d 235, 236 (Fla. 1985); Bush v. State, 461 So.2d 936, 940 (Fla. 1984); Lightbourne v. State, 438 So.2d 380, 384 (Fla. 1983); O'Callaghan v. State, 429 So.2d 691, 695 (Fla. 1983); Tafero v. State, 403 So.2d 355, 361 (Fla. 1981); Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981).

In the case at bar, the indictment also charged Appellant with burglary of the automobile under count II. Thus, Appellant because of Florida's reciprocal discovery rules, had full knowledge of both the charges and the evidence that the state would submit at trial. It is abundantly clear, therefore, that Appellant was not prejudiced by the manner in which he was charged or by the instructions given to the jury on the crime as charged in the indictment, O'Callaghan, supra, at 695.

1. **Premeditated murder.**

Appellant claims that there was insufficient evidence of premeditation to sustain his conviction for first degree murder. Appellant's position is that, while he shot the deceased, he was provoked into shooting by the actions of the victim, or that he shot Mr. Bell in self defense. As the state will show below, Appellant's allegations are belied by the evidence presented to the jury. Further, the record supports the position that the State presented sufficient evidence to support the first degree murder conviction on the basis that Appellant committed the murder with a premeditated design.

It is settled law, that premeditation can be shown by circumstantial evidence. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit reflection, and in pursuance of which an act of killing ensues. Weaver v. State, 220 So.2d 53 (Fla. 2d DCA), cert. denied, 225 So.2d 913 (Fla. 1969). Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Premeditation must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. Larry v. State, 104 So.2d 352 (Fla. 1958), Sireci v. State, 399 So.2d 964, 967 (Fla. 1981).

In the instant case, the evidence shows that after picking up the co-perpetrators, Appellant purposefully went back to his home to pick up the shotgun in preparation and for protection while assisting Harris in getting the fast car he wanted to take (R. 3343, 3421). Saffold testified that while in the car, Appellant announced to his co-perpetrators that he was bringing the shotgun because if someone pulled a gun on him and did not shoot him, **he would shoot anyone that came in his way** (R. 3384-85). This was corroborated by Holmes, who in his testimony stated that after the murder, when they were driving away with the police following them, Holmes became frightened and asked Appellant to stop the car and let him out, but Appellant responded he would not stop the car, because if he did, they would all go to prison. Then Appellant reminded Holmes and Saffold of what he had said on the ride up to Jupiter, that "If any one pulls a gun on him, he would shoot them if they don't shoot him" first (R. 3439). These facts are sufficient to support premeditation on the part of Appellant, Fitzpatrick v. State, 437 So.2d 1072, 1076, (Fla. 1983) (The defendant stated to the three hostages that he was going to shoot them after shooting the police); Sireci v. State, supra, 399 So.2d at 967, the defendant stated that he was not going to leave any witness to testify against him; Williams v. State, 249 So.2d 743, 745 (Fla. 2d DCA 1971) (The defendant told the rape victim, he would use the gun on anybody who got in his way.)

The facts in this case are even more compelling in support of premeditation when the testimony of the firearms expert is

taken into consideration. Greg Scala testified that he examined the 12-gauge, sawed-off shotgun. That normally, this type of shotgun magazine can hold two shot shells (R. 2680), but the extractor of this particular shotgun was not extracting the shell properly after it was fired. This caused the spent shot shell to remain in the chamber. So in order to shoot the shotgun twice, the Appellant had to **manually** pry out the first spent shell and **manually** reload through the magazine again before firing the second shot (R. 2681-82). Officer Scala testified that this procedure of reloading the shotgun through the magazine was difficult even with a removed fired shot shell from the chamber (R. 2682).

Officer Scala testified that to shoot the shotgun twice, Appellant must have had to shoot once, stop, and make a separate **conscious** effort to reload and prepare the gun to fire the second time (R. 2684-85). The shotgun was in generally poor condition (R. 2685), so even someone familiar with the shotgun in order to reload the shotgun, the perpetrator would have had to take the separate and **conscious** steps to reload. The reloading procedure would still take about a minute to complete (R. 2684).

The testimony of Holmes, Saffold, all the neighbors who heard the shots, as well as Trooper Bicker, and Michael Bell clearly show that there was at the very least a half minute lapse of time between the first shotgun blast that hit the victim in the lower abdomen and the second fatal shotgun blast that hit the victim in the chest. Both Holmes and Saffold

testified that after the first shot fired by Appellant which disabled the deceased, Appellant ran to take cover behind the car. Mr. Bell called out to Appellant to come out and lay back down on the ground. Appellant acknowledged the call and pretended he was laying down his shotgun, only to buy himself sometime to reload the shotgun and hit Mr. Bell with the second fatal blast (R. 3366-3369, 3436-3437). The evidence also showed that Appellant brought the shotgun with him when he came out of the car and laid it next to him, hidden from the victim's view. Appellant then feigned stomach cramps in order to turn around and have a better aim when shooting Mr. Bell. Finally when Appellant found the first opportunity, and while still on the ground, he turned on his side and shot the fatal shot that killed Mr. Bell (R. 3436).

It has been held by this Court that where, as here, a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed, Buford v. State, 403 So.2d 943, 949 (Fla. 1981). See also, Cochran v. State, 547 So.2d 928, 930 (Fla. 1989); Hill v. State, 133 So.2d 68 (Fla. 1961); McConnchead v. State, 515 So.2d 1046, 1048 (Fla. 4th DCA 1987) (premeditation may be inferred from the nature of the weapon used, ... and the nature and manner of the wounds.)

Appellant's position that he shot the deceased in self defense is further belied by the facts in this case. It is

evident from the record that Mr. Bell only wanted to retain the four individuals that were trying to steal his car until the police arrived. Appellant, however, had no intention of remaining on the ground awaiting for the police to apprehend him, and he was going to shoot Mr. Bell, **or anyone that got in his way.** The testimony presented by Saffold and Holmes was that although Mr. Bell allegedly threatened to shoot Appellant in the head if anyone moved, Mr. Bell never shot at Appellant. Allegedly Mr. Bell only shot at Harris when Harris ran. Thus, the record shows that Appellant could have remained on the ground awaiting the arrival of the police without any danger of being killed by Mr. Bell. Appellant, however, had made the decision that he was going to get away from Mr. Bell, no matter the cost. The rule is that, when a suspect endeavors to evade prosecution by flight, such fact may be shown in evidence as one of the circumstances from which guilt may be inferred, Spinkellink, supra, 313 So.2d at 670.

Since the State presented sufficient competent evidence which is inconsistent with Appellant's theory of events, the trial court properly denied Appellant's motion for judgment of acquittal, and the jury verdict of premeditated murder should be affirmed, Law v. State, 14 FLW 387, 388 (Fla. July 27, 1989), Heiney v. State, 447 So.2d 210 (Fla. 1984).

2. **Special Verdict of Premeditated Murder.**

Appellant argues that he is entitled to a reversal of the first degree murder conviction because the trial court denied a defense request that a special verdict be utilized where the

jury could indicate whether the conviction for first degree murder was based upon a finding of premeditation or upon a felony murder theory. However as argued above (infra, at page 20), a special verdict is not required, under Florida Law, to determine whether a defendant's first degree murder conviction is based upon premeditated murder, felony murder, or accomplice liability, Buford v. State, supra, at 358. See also, Knight v. State, supra, and its progeny up to Haliburton v. State, ___ So.2d ___ (Fla. No. 72,277, April 5, 1990). Further, as this Court pointed out in Green v. State, supra, 475 So.2d at 236:

> [T]his Court, in its opinion adopting the amended jury instructions, expressly rejected the recommendation of the Supreme Court Committee on Jury Instructions in Criminal Cases that we recede from *Knight* and require specific allegations of felony murder in an indictment. *In the Matter of Use by Trial Courts of Standard Jury Instructions in Criminal Cases*, 431 So.2d 594, 597 (Fla. 1981).

Appellant's reliance on Mills v. Maryland, 486 U.S. ____, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) is misplaced. That decision merely holds that jury instructions given during capital sentencing proceedings which imply that the jurors to return a life sentence must make unanimous findings as to the existence of particular mitigating circumstances, but not as to the existence of aggravating circumstances, are unconstitutional under the Maryland death sentencing statute.

In any event, in the instant case, because there was sufficient evidence to support a finding of premeditation, this issue is moot, Cochran v. state, supra, n. 1, at 930.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF FELONY MURDER.

Appellant claims the State failed to prove Appellant intended to burglarize the decedent's TransAm, arguing that his mere presence at the scene is not sufficient to convict him as a principal in the commission of the burglary. It is settled law, however, that a person who is charged in an indictment with commission of a crime may be convicted on proof that he aided and abetted in the commission of such crime, State v. Hall, 403 So.2d 1321 (Fla. 1981); State v. Roby, 246 So.2d 566 (Fla. 1971); M.D.V. v. State, 469 So.2d 944 (Fla. 5th DCA 1985). Thus the evidence heard by the jury at trial clearly belies Appellants allegations.

The co-perpetrator Saffold testified that while the four of them were in Appellant's car, Harris said "let's go get a car." (R. 3345). Appellant was driving his car, and had just armed himself with the shotgun he had taken from his house (R. 3343). When they arrived at Jupiter Plantation, Appellant accompanied Harris to the TransAm, and remained with Harris while he burglarized and attempted to hot-wire the TransAm (R. 3352-55). Holmes corroborated Saffold's testimony. Holmes testified that Appellant drove up to Jupiter from Riviera Beach (R. 3422). When they arrived at the Jupiter Plantation, Appellant drove slowly through the apartments when they decided to try to get a car (R. 3423). Holmes testified that originally Harris, Appellant and Saffold approached the TransAm (R. 3423), then when Saffold came back to sit in the car with Holmes, Appellant remained with Harris, while Harris burglarized the TransAm (R. 3425). The

evidence showed that the TransAm had been broken into, and the steering column broken in an effort at hot wiring the car (R. 2873, 2874). Also Michael Bell testified when his father came downstairs, he said, "Come on, Michael, somebody's trying to steal your car." (R. 2283). Then, when Michael and the deceased victim came outside, they found Appellant and his friends trying to hide in Appellant's car behind the dark tinted windows (R. 2293). Further that when the victim told the occupants to get out of the car, someone said, "Come on, man. Let us go. We thought it was a friend's car. We are just messing with it." (R. 2296). From this testimony, it defies logic to insinuate that Appellant was anything but an accomplice to the burglary of the TransAm, and that he was only in the presence of Harris while Harris burglarized the car, either as an innocent bystander or forced to drive Harris to burglarize a "fast car," since Appellant is the one with the shotgun. The evidence in this case shows that Harris burglarized the TransAm, and that Appellant was an aider and abettor.

Appellant argues, however, that even if there was burglary of the TransAm, when they heard Mr. Bell approaching the car, they abandoned the attempt to steal the car, thus the murder of Mr. Bell was not a consequence of the burglary, thus the theory of felony murder must be rejected (AB 25-26). The facts at bar, however, clearly demonstrate, that Mr. Bell prevented Appellant and his accomplices from leaving the scene after he caught them red-handed burglarizing his TransAm. But for the burglary, Mr. Bell would not have been in the parking lot at 2:00 o'clock in

the morning receiving a fatal shotgun wound to the chest. Under the felony murder theory, the State is not required to show either intent or the elements of the underlying felony. Once the State proved that Appellant shot Mr. Bell in an attempt at fleeing from prosecution for the burglary, the evidence was sufficient to sustain a finding by the jury that defendant was guilty of felony murder. Sireci v. State, supra, at 968.

C. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

Appellant claims the statements made by him were involuntarily given, having been induced by various promises made by the police. The allegations are not supported by the facts as presented in the record.

At the hearing on the motion to suppress the statements (R. 3190-3293), the testimony of Detective Mark Murray shows that he first met Appellant at the Riviera Beach Police Department on 8-31-86 at 10:26 a.m. (R. 3192). At that time, Detective Martin and Appellant's mother were present at the station in Riviera Beach (R. 3203), but the interview was conducted between Detective Murray and Appellant alone (R. 3209). Detective Murray testified that the first thing he did was read Appellant his Miranda[2] rights (R. 3193-3195). After Appellant acknowledged he understood his rights, signed the rights card and freely and voluntarily waived his rights, the officer asked him if he had been involved in the shooting incident at Jupiter Plantation, and

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Appellant denied having any involvement or being there at all (R. 3195).

At that time, Detective Murray asked Appellant if he would go view his car at the Sheriff's Office in West Palm Beach (R. 3207-08). By this time, Gerald Harris was already in custody (R. 3203), and a statement had already been taken from Harris in which he stated that the victim shot first (R. 3204). Once Appellant agreed to go to headquarters, Detective Murray, Appellant and Detective Martin drove to the sheriff's office headquarters in a police car, but no discussions were held while en route to headquarters (R. 3208).

While at Headquarters, Detective Murray took a taped statement from Appellant (SR 1-36), beginning at 1:25 p.m. on the 31st of August, 1986 (R. 3208). The taped statement, introduced as State's Exhibit 40 was played to the trial court, outside the presence of the jury (R. 3198-3200). The transcript shows that Detective Murray again read the Miranda rights to Appellant, and he acknowledged he understood his rights by signing a second waiver of his rights (R. 3196-98, SR 3-4).

Detective Murray explained that Appellant's mother showed up at headquarters before the taped interview began (R. 3112), but that Appellant did not talk to her before the interview began (R. 3214). Further, Detective Murray stated there was no pre-tape interview between Appellant and he at headquarters, except for the talk they had at Riviera Beach (R. 3209). Detective Murray stated he heard Detective Martin telling Appellant his cooperation was important, and then Detective Murray told

Appellant he would be contacting the State Attorney's Office reference charges (R. 3214). All statements made by the officer were done on the tape, and nothing was said off the tape (R. 3215). Detective Murray explained that the statement began at 1:25 p.m. until 1:42 p.m. (R. 3215), at which time Detective Murray left the room to consult with his supervisor regarding what degree of murder Appellant would be charged with (R. 3215, 3216). After discussing the possible charges with his supervisor, Detective Murray was under the impression that Appellant would be charged with second degree murder (R. 3216); that is what he told Appellant; and that is why he prepared the probable cause affidavit for second degree murder (R. 3217). He did not contact the prosecuting attorney, Paul Moyle, until the next day on September 1, 1986, and that is when he became aware Appellant was to be charged with first degree murder, not second degree murder as he thought (R. 3202).

The transcript of the taped interview shows that after Appellant is read the Miranda rights, he gave a version of the facts acknowledging he was at the scene, but blaming Harris for being the one in possession of the shotgun, and doing the actual shooting (SR. 4-18). At that point, the following exchange took place:

> BY DETECTIVE MURRAY:
>
> Q. Okay. Anything else you'd like to tell us?
>
> A. (No verbal response.)
>
> Q. Okay. Did anybody force you to say this, to make you make a statement?

A. [By Appellant] **Except I don't want to be charged with first degree murder.**

Q. Let me just explain to you how things are. The way the situation is. It's like we said before, your cooperation is ... important, too, because we want to know what happened out there. Because the story we had before, that Gerald was telling us, was that you did the shooting.

I told you, ... we want your side of the story so we could just find out who actually did the shooting.

A. So, if I go in and take that polygraph test, **I know you can't make any promises**, but if I take that test and it comes up that I'm telling the truth, that I did not shoot that guy, how can I be charged with murder?

Q. Because you were involved in it. You were there.

A. That will mean that --

DETECTIVE MARTIN: It will sure help you though.

BY DETECTIVE MURRAY:

Q. **The final decision is going to be with the State Attorney's Office.** We're going to get a hold of them on the phone.

I told you before, before we even came on tape, I told you we were getting with the State Attorney's Office. And we were going to ask them. We're going to tell them how things went, okay? And we want to see about the polygraph and stuff, to see what we can do. Okay?

A. Then -- so then they would charge me?

Q. **That's only the State Attorney's Office.**

It's not going to be like we're going to stick you over there and forget you. No. We're going to know exactly what it is, very shortly. Okay?

But, like I said before, we wanted

to know what your side of the story was before we went ahead and called them, and then find out maybe that it wasn't exactly what the other guys have said.

Okay?

Everything that you told us is the truth? Nobody's forced you to come in here and say anything, right? Nobody's physically pushed you around, or anything like that, right?

A. No.

DETECTIVE MURRAY: Nothing else, Mike?

DETECTIVE MARTIN: No.

DETECTIVE MURRAY: Okay, I'm going to conclude this interview, the time is 1342 hours.

(Recess.)

(SR. 18-21). At the hearing, Detective Martin explained his statements as above set out by stating that when he told Appellant that he would be contacting the State Attorney's Office, and the State would charge him shortly, he was trying to calm Appellant's fears that they would arrest him, put him in jail and then forget him without filing charges against him (R. 3220). Also Detective Murray stated bond may have been discussed **after** the taped interview, **and** only **after** Appellant was already under arrest (R. 3220).

Detective Murray also stated, that Appellant made the incriminating statements, changing his original story that it was Harris' gun and that Harris had done the shooting, after Appellant was told that Harris was in custody and that Appellant's statement was in conflict with the statements given by the other three youths, particularly as it referred to the

person doing the shooting (R. 3218-19). The officer's version of events is corroborated by the taped statement:

> DETECTIVE MURRAY: This is Detective Mark Murray, ID 2151. It's still 8/31/86. The time is 1355 hours. Okay.
>
> BY DETECTIVE MURRAY:
>
> Q. David, we got a little problem, okay? I want to be honest with you, we got a little problem.
>
> I just went and reviewed the statements that Mr. Harris made, and Mr. Saffold made, and your story is close, but it's just not making it, okay?
>
> So, everything is okay, except for the part of the shooting. All right?
>
> Now, you know, in order for us to help you out at all, we try -- and, you know, **when we talk to the State Attorney's Office**, we need your honesty, okay? So, like I told you before, we need your honesty.
>
> So, let's just back up a little bit, and I'll stick to the part of the shooting, and give me the story the way it happened this time. Okay?

(SR. 21-22). The record is clear, that it was after the officers confronted Appellant with the differences between his version and that of the other three co-perpetrators (SR. 22-25), and without any promises being made by the officers, that Appellant freely, willingly and voluntarily changed his prior story and conceded that he was the one that shot Mr. Bell (SR 25-35).

Detective Murray steadfastly maintained that he made no promises to Appellant to the extent that if he confessed, the State would only charge him with second degree murder (R. 3239). Rather Detective Murray testified that when he determined the

charge against Appellant would be second degree murder and so advised Appellant, it was out of a misunderstanding, and not in an effort to induce Appellant to change his story (R. 3243-44, 3245). Detective Michael Martin corroborated Detective Murray's testimony in all substantive subjects (R. 3268-3293), and reiterated that no promises were made to Appellant that if he confessed he would be charged with second degree murder and bond set for his release (R. 3275, 3279-82).

After listening not only to the detectives' testimony, Appellant's (R. 3248-3267) and his mother's (R. 3221-3238) testimony, argument of counsel (R. 3293-3313), but also listening to the tape recording closely (R. 3479), the trial court made the following findings of fact and found Appellant's taped statement to be **admissible** in evidence:

> I am thinking back to the tape itself, which I **did listen to closely**, and I am going to find that the change in the account that the defendant gave **is due to his being confronted with the co-defendant's, or co-conspirators' unchanged versions of the facts.** It is at that point in the tape that he changes his story. ...
> But, nevertheless, listening to the statement itself ... Exhibit Number 40, ... it was obviously custodial interrogation, the defendant was properly Mirandized, the statements were **voluntarily made**, **it wasn't coerced**, the question was whether or not there was improper inducement, and the improper inducement being the promise of a second degree murder charge and bond.
> And I am finding that the evidence has convinced me, in terms of allowing the jury to hear all this, that on the tape -- it is Exhibit 40 offered for identification -- the change in the story comes not so much from inducement but from the fact that he is confronted

> with other conspirator's statements different from his.
>
> So I made the ruling, and I will admit the tape itself.

(R. 3479-3481).

The ruling of a trial court on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. McNamara v. State, 357 So.2d 719 (Fla. 1978). A reviewing court must defer to the fact-finding authority of the trial court and should not substitute its judgment for that of the trial court. Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987); De Conigh v. State, 433 So.2d 501, 504 (Fla. 1983).

The test for admissibility of a confessions is whether it is freely and voluntarily made. Christopher v. State, 407 So.2d 198, 200 (Fla. 1981). The applicable standard for determining whether a confession is voluntary is whether, taking into consideration the totality of the circumstances, the statement is the product of the accused's free and rational choice. The determination must be made on a case-by-case basis. Schneckloth v. Bustamante, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Palmes v. State, 397 So.2d 648, 653 (Fla. 1981). As shown above, the trial court, after listening to the tape, listening to the testimony, and argument of counsel, and otherwise reviewing the totality of the circumstances, ruled that Appellant's confession was freely and voluntarily made after proper waiver of the right to remain silent. The trial court's findings should be affirmed.

An analysis of controlling law on this issue must begin with the conclusion that Appellant's allegation that his confession was not voluntarily given, having been induced by promises made by Detective Murray, is not supported by the record, despite alleged dispute between the testimony of the detectives and the testimony of Appellant and his mother. Roulty v. State, 440 So.2d 1257 (Fla. 1983), cert. denied, 468 U.S. 1200, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). The transcript of Appellant's statement **clearly** shows that Detective Murray advised Appellant that he was making Appellant "no ... promises to induce you to make a statement," (SR 3); that "[t]he final decision is going to be with the State Attorney's Office" to determine what charges would be filed against Appellant (SR 19-20); and that **Appellant acknowledged on the tape "I know you can't make any promises,"** (SR. 19). Oats v. State, 446 So.2d 90 (Fla. 1984) (Defendant's own testimony that police told him "officer's couldn't promise him anything" vitiated his argument.)

To render a confession inadmissible, delusion or confusion must be visited upon the suspect by his interrogators; if it is originated from the suspect's own apprehension, mental state, or lack of factual knowledge, it will not require suppression. Thomas v. State, 456 So.2d 454 (Fla. 1984). Further, a police statement suggesting leniency to the accused are objectionable only if they establish *quid pro quo* bargain for confession. State v. Moore, 530 So.2d 349 (Fla. 2d DCA 1988). The presence of Appellant's mother at the police station and being allowed to

talk to her son when requested, tends to assure that no coercive police behavior occurred, Postell v. State, 383 So.2d 1159 (Fla. 3d DCA 1980).

The record sub judice clearly shows that neither Detective Murray, nor Detective Martin, used any improper tactics or made any promises to Appellant to induce him to change his story. Bush v. State, supra, (Voluntariness of confession was not vitiated by implied suggestion by investigating officers that defendant would benefit if he confessed, since statements made to defendant did not overcome his will and produce confession.) Gilvin v. State, 418 So.2d 996 (Fla. 1982) (Trial court did not err in denying defendant's motion to suppress his confession on the basis that defendant was induced to give confession by promises by police detectives to talk with prosecutor about speeding up his case, where defendant was **repeatedly** advised of his Miranda rights and **no** promises were made to induce the confession.) Brooks v. State, 117 So.2d 482 (Fla. 1960) (A confession merely telling defendant he should tell the truth and that it will be better for him if he does so does **not** render confession involuntary.) Bova v. State, 392 So.2d 950 (Fla. 4th DCA 1980) modified on other grounds, 410 So.2d 1343 (Fla. 1982) (A simple representation to a cooperating confessor that the fact of his cooperation will be made known to prosecuting authorities or the court is insufficient to render a confession involuntary.) Smith v. State, 422 So.2d 1065 (Fla. 1st DCA 1982), approved, 450 So.2d 480 (Fla. 1984) (It is not per se and unlawful inducement to promise to notify parole authorities,

prosecutor or court, of accused's cooperation under questioning.) U.S. v. Ballard, 586 F.2d 1060 (5th Cir. 1978) (Encouraging a suspect to tell the truth and suggesting that his cohorts might leave him "holding the bag" does not, as a matter of law, overcome confessor's will. Neither is statement that accused's cooperation would be made known to court, a sufficient inducement to render subsequent incriminating statement involuntary.)

Under the particular circumstances of this case, Appellant has failed to show that the trial court erroneously denied the motion to suppress. It is clear that no threats or promises were exerted upon Appellant to cause his statement to be invalidated, Appellant's statements were made voluntarily and were therefore admissible, thus the trial court's ruling should be affirmed. Webb v. State, 433 So.2d 496, 498 (Fla. 1983); U.S. v. Perkins, 608 F.2d 1064 (5th Cir. 1979); U.S. v. Klein, 592 F.2d 909 (5th Cir. 1979).

D. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS COUNT I OF THE INDICTMENT ON THE BASIS OF THE INADVERTENT DESTRUCTION OF THE 911 TAPE. (Restated.)

Appellant claims that the unavailability of the 911 tape was a denial of due process which necessitates dismissal of the first degree murder charge. Brady[3] however, applies only to evidence which is favorable to the defendant and which is material to issues of guilt and punishment. There is no lack of due process if the requested material would not have been

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[3] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

beneficial. State v. Sobel, 363 So.2d 324 (Fla. 1978). Appellant herein merely raised the possibility that the FBI could have analyzed the tape and then give testimony favorable to the defense that Mr. Bell shot his .38 revolver before Appellant fired the shotgun. However, because it cannot be said with certainty that the FBI would have been able to determine by analyzing the tape who shot first, Appellant cannot demonstrate that the 911 tape would have been favorable to his defense. Consequently, the destruction of the 911 tape is **not** grounds for reversal of the conviction. Tupica v. Wainwright, 765 F.2d 1087 (11th Cir. 1985); United States v. O'Neill, 767 F.2d 780, 786-787 (11th Cir. 1985); United States v. Burroughs, 830 F.2d 1574, 1577-1480 (11th Cir. 1987); Melendez v. State, 498 So.2d 1258, 1260 (Fla. 1986); Doyle v. State, 460 So.2d 353, 356 (Fla. 1984); James v. State, 453 So.2d 786, 790 (Fla. 1984).

The record on appeal reveals the following facts relevant to this issue:

At the Case Disposition Hearing heard March 4, 1987, before the trial court, Appellant sought and obtained travel expenses for a Deputy Sheriff to travel to FBI Headquarter in Washington, D.C., so that an analysis of the 911 tape could be conducted (R. 42-46, 4296, 4297-4298). The matter came for disposition again on July 7, 1987, at that time defense counsel informed the court that by the time the FBI received the 911 Tape, "there was no sequence of events that were still recorded that covered this incident." (R. 54) The Court then allowed defense, at the county's expense, to have the tape and machine

tested to determine how, or why the tape was erased (R. 56-59, 61).

Thereafter, Appellant filed a Motion in Limine (R. 4322-4326) requesting the trial court to "enter its Order prohibiting the State of Florida from introducing Det. Murray's **'copy'** of the subject telephone conversation and/or any opinions addressing whether or not any particular sound on the **'copy'** are reports of a firearm and/or which particular report came from any particular firearm that was used by either the victim, John Bell, and/or the Defendant, David Young, during the course of this incident." (R. 4326). At the evidentiary hearing on the Motion in Limine held October 2, 1987, Detective Mark Murray testified that he received the reel-to-reel tape from Detective Martin of the Jupiter Police Department on September 3, 1985, - three days after the murder occurred (R. 136-137). The detective then placed the reel-to-reel tape in a marked bag, and kept it in his possession, until the 12th of the month, when he placed it in the evidence locker (R. 137). The detective testified that between the 3d and the 12th, he kept the tape with the case file in a locked desk (R. 138). That on the 11th of September he took the reel-to-reel tape to Palm Spring Police Department -- as that is the only station with the appropriate equipment that would allow him to listen to this type of reel-to-reel recording (R. 138). While at the Palm Spring Police Department, Detective Murray played the tape and heard the shots recorded during the 911 call. The detective then played it again and made a copy of the reel-to-reel into a cassette

recorder tape. When the copy was made, Detective Murray removed the tape from the machine (R. 145), and took it to the Sheriff's office and placed it into evidence (R. 146), where it remained until he went back to Palm Springs Police Department to listen to the reel-to-reel tape, **while accompanied by defense counsel and the prosecutor** on February 23, 1987 (R. 146, 150-151). That was the first time he noticed that the **relevant** portion of the reel-to-reel tape was missing (R. 146).

At the evidentiary hearing, Linda Pellar, Jupiter Police Department Dispatcher on duty on the 31st day of August, 1986, (R. 155-156) also testified and stated that Detective Murray's cassette **'copy'** was an accurate reproduction of the 911 telephone calls she handled the night of the shooting (R. 159). The court then listened to the arguments by counsel (R. 204-219); then after making the following findings of record:

> THE COURT: **I'm not finding bad faith.** ... I am finding that the original was either lost or destroyed, but I'm not finding that that was bad faith or it was done in bad faith. The original cannot be obtained. It is obviously missing. It is a controlling issue in the case.

(R. 219-220), the court granted counsel an opportunity to file memoranda of law (R. 222-228). Counsel complied: Appellant filed a Memorandum of Law in Response to Defendant's Motion in Limine (R. 4361-4419), and the State filed its Memorandum of Law in Response to Defendant's Motion in Limine (R. 4361-4419). Then at the hearing held October 16, 1987, after noting the procedural posture of the case, and the relief sought by Appellant, which **had some bearing on the court's ruling** (R. 224-

246), the court **GRANTED** Appellant's Motion in Limine (R. 246-248, 4424).

Taking a cue from the trial court, Appellant filed a "Motion to Dismiss Count I of the Indictment" (R. 4428-4430), which came to be heard October 26, 1987. In **DENYING** Appellant's motion the court stated:

> THE COURT: I am going to deny the motion. In addition to the findings the Court made before this motion, I think I additionally could find **we don't know what the FBI would have determined had they had the original reel-to-reel tape.** The evidence may have assisted in the defense, may very well have assisted the State, so I don't think the defense could show that what is lost would in fact prejudice them. It may, in fact, prejudice the State. We don't know. Coupled with the fact that I have found it was inadvertent, unintentional, and without malice, or wasn't willful in any way, and the fact that we don't know, whether it could have helped the State as opposed to the defense, the motion is denied. Okay. **The motion to dismiss is denied.**

(R. 286-287). One of the basis of Appellant's "Motion in Limine" was that Detective Murray could testify as to what the 911 tape could prove (R. 4323). Based on this erroneous statement, the State made its own Motion in Limine to preclude the defense from mentioning that any detective in this case or any police officer could render an opinion as to who fired first (R. 2231). The Motion was granted; the court stated the inadmissibility of **Murray's "copy"** applied to both sides, so there would be **no comments** from any witnesses or in argument by counsel regarding the existence of the 911 tape (R. 2231-2239).

At the deposition taken December 1986 (Depositions Vol. Two, p. 166), Detective Murray stated:

> I have a . . . tape recording of the Jupiter Police Department's telephone lines. You can hear in the background some shots being fired. It's hard to tell exactly which shots are which, but two sound louder than the other when you listen to them.

(Depositions, Vol. Two, page 186).

The State maintains that in view of the fact that the "copy" of the 911 tape was **suppressed** on **Appellant's Motion**; that the FBI never had the opportunity to analyze the tape, nor was anyone from the FBI brought down to testify as to what could or could not have been detected from such analysis; that, Detective Murray did not testify or allege that the tape was clear as to who shot first; that all the witnesses who heard the shot, including Mr. Griffith -- the person who made the call to 911 --(R. 2627), at trial said the first shot sounded like a **shotgun**; that the defense had Saffold and Holmes to testify that Mr. Bell shot at the ground near Appellant's head **first, or before Appellant fired the shotgun**, a lack of prejudice has been made, and Appellant was **not** denied any measure of due process on this ground, Doyle v. State, supra.

As this Court pointed out in State v. Sobel, 363 So.2d 324, 326 (Fla. 1978), when confronted with the question of whether the prosecutor's failure to tender certain evidence deprived the defendant of a fair trial, the Supreme Court, in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), described the requirements of Brady and defined what

is meant by "materiality," which gives rise to the duty of the state to disclose:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.
>
> * * * *
>
> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. 427 U.S. at 109, 112-113, 96 S.Ct. at 2400, 2401.

And held that a defendant is not denied due process where the contents of a lost or destroyed tape recording would not have been beneficial to the accused, thus demonstrating a lack of prejudice. Id., at 328. In the instant case, the trial judge found that since Appellant could not establish that the FBI's analysis would have been determinative of who fired the first shot, the state met its burden of showing that there was no prejudice to Appellant. Thus, the trial court acted correctly in denying the Appellant's motion to dismiss, Id.; Salvatore v.

State, 366 So.2d 745, 750-751 (Fla. 1978) (the mere fact that a tape recording which might have been used in evidence was inadvertently destroyed does not ipso facto lead to reversal. It must be demonstrated that the destroyed evidence was material and that the defendant was prejudiced by the destruction); Strahorn v. State, 436 So.2d 447, 449 (Fla. 2d DCA 1983) (When the destruction of evidence was less than a flagrant and deliberate act done in bad faith, the conviction may be overturned only if the record shows that the defendant's case was prejudiced by the omission of the nonpreserved evidence. The mere possibility that nonpreserved evidence **might** have helped the defendant is not a sufficient showing of prejudice.); Johnson v. State, 427 So.2d 1029 (Fla. 1st DCA 1983) (The purpose of the discovery rule is to help a defendant prepare his case. The rules are not designed to provide a procedural escape hatch on appeal for avoidance of the jury's verdict, absent a showing of prejudice or harm to the defendant.); Wiese v. State, 357 So.2d 755, 758 n. 2 (Fla. 4th DCA 1978) (We feel due process requirements can be met where a showing is made that the contents of the lost or destroyed tape would not have been beneficial to the accused thus demonstrating a lack of prejudice.); State v. Smith, 342 So.2d 1094 (Fla. 2d DCA 1977) (The dismissal of the charges against a defendant under these circumstances is an extreme sanction that should only be utilized with caution after a great deal of deliberation. In the record there is no evidence that would demonstrate that the tape contained material favorable to the defendant.); Hernandez

v. State, 273 So.2d 130, 134 (Fla. 1st DCA 1973) (the mere contention by defendant that evidence suppressed might have been beneficial to the defense is insufficient and without merit.)

In the case at bar, even Murray's accurate **"copy"** of the 911 tape recording was suppressed and not heard by the jury **at the insistence of Appellant.** The court warned every witness not to mention the existence of such tape. The tape was inadvertently erased before an analysis could be done. There was no evidence or testimony that had the tape survived, the results of the FBI analysis would have been beneficial to the defense. The mere possibility that the tape **might** have helped the defendant is not a sufficient showing of prejudice. United State v. Agurs, supra, State v. Sobel, supra. Appellant has failed to show reversible error on the part of the trial court in failing to grant him the extreme remedy of dismissal of these serious charges.

E. FIRST DEGREE MURDER WAS PROPERLY SUBMITTED TO THE JURY ON THEORIES OF PREMEDITATED AND FELONY MURDER. (Restated.)

Appellant contends that the court erred in allowing the prosecution to pursue a felony-murder theory, despite the fact that the indictment contains no notice of a felony-murder theory. This argument is a rewording, with some embellishment, of the argument made by Appellant under its issue I.A.2., "The jury did not return an unanimous verdict of guilt to premeditated murder." (AB 20-21). As stated before, this Court has found the argument to be without merit, See, e.g., Knight v. State, supra; Griffin v. State, supra; Brown v. State, 473 So.2d

1260, 1265 (Fla.), Cert. denied, 474 U.S. 1036 (1985); Castro v. State, 547 So.2d 111 (Fla. 1989).

In Wool v. State, 537 So.2d 630 (Fla. 2d DCA 1988), rev. denied, 547 So.2d 1212 (Fla. 1989), the court relied on Buford v. State, supra, and Brown, supra, to hold that:

> [T]here was [no] error in the trial court's refusal to instruct that the jury must unanimously agree upon the particular theory upon which a verdict of first degree murder is based.

This is so because §782.04(1)(a)(1-2) Fla. Stat. (1987), provides that one may commit the crime of first degree murder and receive a capital sentence when he has caused death either with a premeditated design or while perpetrating one of the enumerated felonies such as the burglary that occurred here. See also, North v. State, 538 So.2d 897 (Fla. 5th DCA 1989).

The State urges this Court to adhere to the precedents of Buford, Brown, and Knight, as interpreted in Wool and North, and find that unanimity as to theory is not required, only unanimity as to the defendant's guilt for the offense charged. Such a holding would also conform to the out-of-state majority rule. See, e.g., People v. Sullivan, 65 N.E. 989 (N.Y. 1903), People v. Milan, 507 P.2d 956 (Cal. 1973), State v. Williams, 285 N.W.2d 248 (Iowa 1979), cert. denied, 446 U.S. 921, 100 S.Ct. 1859, 64 L.Ed.2d 277 (1980) and State v. James, 698 P.2d 1161 (Alaska 1985).

F. THE FIRST DEGREE MURDER CONVICTION, ALTHOUGH URGED ON ALTERNATIVE THEORIES MUST BE UPHELD.

1. Sufficiency of the evidence to prove the underlying felony of burglary.

The argument made by Appellant herein is again nothing more than the argument made under Issues B. of his brief, and has thus already been addressed by the State. [See pages 29 - 31, of this brief.] Suffice it to reiterate that there was sufficient evidence to sustain a conviction of felony murder with burglary as the underlying felony.

2. Jury Unanimity.

This Court has consistently held contrary to Appellant's position. Just this month, this Court stated in Haliburton v. State, ___ So.2d ___, (Fla. No. 72,277, April 5, 1990) [15 FLW ____]:

> Appellant asserts that the trial court erred in refusing to require the jury to return a special verdict identifying whether it found premeditated murder or felony murder. He argues that in failing to require this special verdict, he may have been denied his constitutional right to a unanimous jury verdict. We find this argument without merit. **This Court has previously held that special verdict to determine whether a defendant's first degree murder conviction is based upon premeditated or felony murder is not required.** Buford v. State, 492 So.2d 355,358 (Fla. 1986) Furthermore, in Brown v. State, 473 So.2d 1260, 1265 (Fla.), cert. denied, 474 U.S. 1038 (1985), we noted that **neither constitutional principles nor rules of law or procedure require special verdicts.** [Emphasis added.]

Thus, Appellant's argument is without merit.

c. The first degree murder conviction based on the underlying felony of burglary is constitutionally valid.

Although conceding that Bryant v. State, 412 So.2d 347 (Fla. 1982) is inapplicable to the case at bar, Appellant contends that the principle of Bryant compels reversal of the first degree murder conviction. Appellant argues that "the taking here was well before and unrelated to the killing." (AB 48-50). Appellant's arguments are totally without merit.

A review of the record clearly shows that Mr. Bell went out to the parking lot for the sole purpose of trying to stop the burglary of his automobile, and to detain the culprits until the police arrived. Appellant, once caught, decided to murder Mr. Bell to make good his escape from the authorities. The allegations that the burglary occurred "at a place and time removed from the killing" is not supported by the testimony presented by the victim's son, or the two co-perpetrators, Saffold and Holmes. Thus the argument is unfounded and must be dismissed without further comment.

II. PENALTY PHASE ISSUES

A. THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellant attacks the constitutionality of the aggravating factor of cold, calculated and premeditated. This Court has recently decided this issue adversely to appellant in Brown v. State, 15 FLW 165,166. (FLa. March 22, 1990). Appellant's characterization of the application of this aggravating factor as

"on again, off again" should be summarily dismissed. Any evolutionary refinement that has developed on a case-by-case basis does not render application of this aggravating factor unconstitutional. Rogers v. State, 511 So. 2d 526 (Fla. 1987); Eutzy v. State, 541 So. 2d 1143,1147 (Fla. 1989); Harich v. State, 542 So. 2d 980,982 (FLa. 1989).

This Court has consistently stated that this aggravating factor requires heightened premeditation. Such can be established by showing that the defendant had opportunity to reflect upon his actions. Swafford v. State, 533 So.2d 270, 277 (Fla. 1988). Furthermore this Court has stated that calculated can be established by evidence of a prearranged plan. Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986). In the case sub judice, there was sufficient evidence to establish the existence of this factor as outlined in the trial court's sentencing order (R. 4565 - 4566), as well as other evidence brought out at trial. Such evidence includes the following: when the victim ordered Appellant out of the car Appellant complied but took the shotgun with him, and then hid it from the victim's view (R. 3359, 3359-3360). After Appellant incapacitated the victim with the first shot, and the victim asked him to comeback and lay on the ground where the victim could see the Appellant, Appellant pretended he was complying with the victim's request only to buy time to reload his gun, and shoot the fatal shot. The evidence also shows that due to the poor condition of the gun, prior to firing the second fatal shot, Appellant had to manually remove the spent shell and then manually reload a live round (R. 2681-2682). This

procedure was made more difficult due to the poor condition of the gun (R. 2682). Testimony indicates that approximately fifteen to thirty seconds had elapsed between Appellant's first and second shots (R. 3436). In summation, the evidence indicates that Appellant's actions illustrate a heightened premeditation. Swafford, supra; Melendez, supra, Remeta v. State, 522 So.2d 825,829 (Fla. 1988).

In any event, it is settled that if this Court were to find one of the three aggravating factors to be invalid, the sentence of death may still be affirmed "on the basis that a jury recommendation of death is entitled to great weight and there were no mitigating circumstances to counterbalance the [remaining] valid aggravating circumstances," Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988); Hamblen v. State, 527 So.2d 800 (Fla. 1988); Clemons v. Mississippi, infra.

Similarly, as this Court held in Mills v. State, 476 So. 2d 172, 178 (Fla. 1985), Appellant's attack concerning the felony murder aggravating factor is also without merit. See also, Bertollotti v. Dugger, 883 F. 2d 1503 (11th Cir. 1989).

B. THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The state acknowledges that in order to support this aggravating factor where the victim is not a law enforcement officer, the State must prove beyond a reasonable doubt that the dominant motive for the murder was the elimination of a witness. Correll v. State, 523 So.2d 562, 567 (Fla. 1988). In the instant case the fact that Appellant fired the second fatal shot to make good his escape before the police arrived was proven

beyond a reasonable doubt. See, Jones v. State, 411 So.2d 165 (Fla. 1982).

Gerald Saffold and Tony Holmes testified that when Appellant armed himself on his way up to Jupiter to steal the car, he told them that he was taking the gun because if anyone got in his way, he would shoot them (R. 3384-85, 3439). Saffold also testified that he heard the victim tell his son once or twice to "go call the police." (R. 3359, 3361) Michael Bell, the victim's son also testified that once the victim had the three youths secured on the ground, the victim asked Michael to go call the police (R. 2302). The record is clear, thus, that the victim was detaining Appellant long enough to give the police a chance to arrive and arrest them for burglary of the TransAm. The evidence also shows that Appellant shot at the victim in an attempt to get away before the police arrived. When the victim first approached Appellant's car, one of the perpetrators said, "Come on, man. Let us go. We thought it was friend's car. We were just messing with it." (R. 2296) The victim, however, insisted that all occupants of the car get out of the car and lay on the ground awaiting the arrival of the police (R. 2298). The evidence also shows that once Appellant shot Mr. Bell the first time, Appellant ran for cover behind his car (R. 3362). Although Mr. Bell was disabled, and moaning with pain, he still continued aiming his gun at Appellant, and yelled for Appellant to go back and lay by the side of the car (R. 3368, 3437). Appellant pretended to comply (R. 3368, 3437), but instead fired the second shot fatally injuring the victim (R.

3369, 3437). Appellant then ran in his car; the car would not start, so he got out of the car, opened the hood, shook the battery cables, the car started and Appellant drove the car out (R. 3370, 3438) through the high speed chase for 10 to 15 miles from Jupiter to Riviera Beach (R. 2795-2810). Holmes also testified that while driving out of the Jupiter Plantation parking lot, he asked Appellant to stop the car so he could get out. Appellant, however, refused saying that if he stopped the car then, they would all go to prison (R. 3439).

The statements attributed to Appellant by the co-perpetrators showed that Appellant's predominant motive for murdering Mr. Bell was to eliminate him as a witness, and permit Appellant to leave the scene before the police arrived. Remeta v. State, 522 So.2d 825, 829 (Fla. 1988); Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987) (The co-defendant attributed to the defendant the chilling statement, "Dead men can't tell no (sic) lies."); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986); Elledge v. State, 408 So.2d 1021 (Fla. 1981), cert. denied, 459 U.S. 981 (1982) (During the confession defendant detailed the victim's threats to call the police when he initiated the rape. Such evidence is sufficient to support this factor.); Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978), cert. denied, 444 U.S. 919 (1979) (Appellant's statement that "I was afraid I was going to get caught" proved he killed the victim to avoid later identification.)

Appellant's claims that his life was at stake (AB 64) was rejected by the jury, is not supported by the evidence and is

otherwise without merit. Appellant shot Mr. Bell in an effort to get away, and to avoid arrest for the burglary. There was no valid reason for this senseless killing.

Appellant argues that the aggravating circumstance has a double-dip effect in all felony murder convictions, in that every defendant would kill his victim during the attempt to escape from the felony (AB 65-66). In the case at bar, however, there was sufficient evidence for the jury to have concluded that the murder was **premeditated**, therefore this aggravating factor is dependent upon proof adduced at trial and is not necessarily encompassed by the underlying felony of burglary. See, Toole v. State, 479 So.2d 731, 733 (Fla. 1985); Griffin v. State, 474 So.2d 777, 780 (Fla. 1985).

The record herein supports a finding that this aggravating circumstance was proven beyond a reasonable doubt. Swafford v. State, 533 So.2d 270, 276 (Fla. 1988); Remeta v. State, supra; Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986).

C. THE TRIAL COURT DID NOT ERR IN REVIEWING THE PRESENTENCE INVESTIGATION REPORT.

A trial court is entitled to use a presentence investigation report in capital cases, §921.141(1), Fla. Stat. (1987); Engle v. State, 438 So.2d 803, 813 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984); Mikenas v. State, 407 So.2d 892, 894 (Fla. 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Swan v. State, 322 So.2d 485, 488 (Fla. 1975). In the case at bar, upon receipt of the guilty verdict by the jury, the court ordered a Presentence Investigation Report (PSI) stating as follows:

> I will also order a PSI. I am ordering today. ...
>
> I am going to order that no portions of the PSI be kept confidential. The entire thing will be fully disclosed, and ... provide[d] to counsel of both sides. There may not (sic) be information which counsel may wish not to use. I don't know what you are going to do in terms of presentation in phase-two. But at least you will have it. It is awarded.

(R. 3831-3882). There was no objection to the ordering of the PSI at that time by defense counsel (R. 3883; 4127). However, prior to the penalty phase hearing, defense counsel filed a Motion to Strike **Portions** of Presentence Investigation (R. 4558-4560). After addressing each of Appellant's concerns (R. 4123-4135), the trial court denied the motion in part, and **granted** it in part (R. 4135). For the following reasons the State submits that **Appellant has failed to show** the trial court improperly relied on the PSI.

1. Matters outside the record.

Appellant argues the PSI was specifically used in the court's finding when the court found that Appellant's age of 20 years old did not present a mitigating circumstance; and when the court cited to Appellant's prior adult record of burglary, grand theft, fraudulent use of a credit card and dealing in stolen property (AB 69). That the report seems to have been based entirely on matters outside the record since the transcript had not even been ordered at the time of sentencing (AB 68-9). Thus it was a violation of due process for the **State** to present to the fact-finder the hearsay findings and recommendations of a probation officer (AB 69-70).

First and foremost, the State did not present the PSI for the court's recommendation. The Court, pursuant to §921.141(1), Fla. Stat. and Fla. R. Crim. P. 3.710, properly and independently ordered the PSI (R. 3881-82), Swan v. State, supra, at 488-489. Secondly, hearsay is admissible. The trial court is entitled by Rule 3.710 to draw its own conclusion from the information in the PSI in capital cases, Mikenas v. State, supra, at 894. Therefore, where as here the defense, in accordance with the dictates of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), was given and **did attempt to rebut the PSI information, this argument is without merit.** Mikenas, supra.

It must be kept in mind that defense counsel himself advised the court of Appellant's age, and asked the court to take judicial notice of same (R. 3995); and used Appellant's age as a mitigating factor to be considered by the jury in making its recommendation (R. 4050) and the court in considering the appropriate sentence to be imposed (R. 3995-3996, 4131, 4563).

Regarding Appellant's prior convictions, prior to introducing any evidence to the jury at the penalty phase, Defense counsel filed a Motion in Limine to preclude the State from relying on Appellant's prior convictions as an **aggravating** factor during the penalty phase (R. 4505-4506). That motion was agreed to by the State and therefore granted by the court (R. 3903-3910). The subject was raised again, then at the hearing on Appellant's Motion to Strike Portions of the PSI (R. 4133-4135). At that time the court reiterated that he was not using

the prior conviction as an aggravating factor (R. 4131). Rather the prior convictions were introduced by the State for purposes of sentencing on count 2 of the indictment (R. 4131). The court required the State to provide certified copies of judgment of conviction as to each prior conviction, and the State complied (R. 4134-4135). It is undisputed therefore that the court was not relying on hearsay, or improper information on the PSI as to these two facts.

2. Victim Impact Information.

Even though Appellant acknowledges the trial court stated he would not consider the information contained in the PSI (AB 70, R. 4125), Appellant claims "it is still error for the trial court to receive the information when it may not be reviewed by the Appellate Court." (AB 70).

In Brown v. Wainwright, 392 So.2d 1327, 133 (Fla. 1981), this court recognized that judges are often cognizant of information that they disregard in the performance of their judicial tasks. Just as factors outside the record play no part in this Court's death sentence review role, Id., the victim impact statements contained in the PSI did not enter into the court's decision. It is a well recognized legal principle that judges are capable of disregarding that which should be disregarded; the trial judge's express statement that he would limit his consideration to the evaluation of the aggravating and mitigating circumstances should end the matter. Harris v. Rivera, 454 U.S. 339, 346-347 (1981); Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983) (en banc); Alford v. State, 355

So.2d 108, 109 (Fla. 1977) (even if judge was "made aware" of certain facts, that does not mean he "considered" them.)

Recently in Reed v. State, 15 FLW S115, 117 (Fla. March 1, 1990), this Court found that the inclusion of victim impact information in the presentence investigation report is harmless error citing to Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, ____ U.S. ____, 109 S.Ct. 1354 (1989). In Lightbourne v. Dugger, 829 F.2d 1012, 1027 n. 16 (11th Cir. 1987), the Eleventh Circuit held that resentencing was not required under Booth where victim impact statements contained in a PSI were seen **only by the judge and not the jury**, when the judge's sentencing order relied **solely** on the statutorily authorized aggravating circumstances. This issue, too, is without merit.

3. Non-Statutory Aggravating Circumstances.

Appellant claims the juvenile and adult record, and "Defendant's statements" contained in the PSI were aggravating factors improperly considered by the court in reaching its decision to impose the death sentence on Appellant. (AB 71). The record, however, refutes the allegations. The court specifically stated that he was **not going to consider the juvenile history** (R. 4133). The adult criminal history was not received (R. 4130-31), nor relied upon by the court(R. 4561-4570A) as an aggravating factor.

With regard to the "Defendant's Statement," listed in the PSI, the court stated, "I'm going to make my own finding of fact based on what I recall hearing from the evidence in the case,

..." (R. 4125) Thus, as stated above, it is a well recognized legal principle that judges are capable of disregarding that which should be disregarded; the trial judge's express statement that he would limit his consideration to the evaluation of the aggravating and mitigating circumstances should end the matter.

Appellant's contentions citing to Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977) where the original death sentence was vacated because of improper consideration as an aggravating factor of a collateral felony for which Elledge at the time had not been convicted, is totally without merit. In the case at bar, the jury recommended death in a ten to two vote. The trial court, although with trepidation, after considering the aggravating and mitigating factors, and performing the appropriate weighing procedure upheld the jury recommendation (R. 4561-4570A). The record sub judice does not support Appellant's allegations that the court relied on any non-statutory aggravating factors, therefore no re-sentencing of Appellant is required.

Although consideration of all mititgating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the judge and jury. Kight v. State, 512 So.2d 922, 932-933 (Fla. 1987); Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985), and cases cited therein at 887.

A trial court has broad discretion in determining the applicability of mitigating circumstances urged, Kight, at 933, and the weight to be given it, Nibert v. State, 508 So.2d 1, 4

(Fla. 1987). It is clear from the trial court's sentencing order (R. 4561 - 4570A), that the judge considered **all** the evidence presented in both the guilt and penalty phases of the trial and **all** the mitigating circumstances urged by the defense. Rather than ignoring the evidence, the trial court considered it and rejected same. There being competent substantial evidence to support the trial court's rejection of these mitigating circumstances, the sentence cannot be disturbed simply because Appellant disagrees with the conclusions reached, Mason v. State, 438 So.2d 378, 379-380 (Fla. 1983), cert. denied, 465 U.S. 105 (1984); Rose v. State, 472 So.2d 1155, 1158-59 (Fla. 1985).

D. APPELLANT WAS TRIED BY A FAIR AND IMPARTIAL JURY VENIRE. (Restated)

Appellant argues that "[t]he trial court exhibited bias toward those jurors who opposed the death penalty and excused seventeen prospective jurors who stated the (sic) would try or could follow the law but had strong feelings against the death penalty." (AB 72). First the State would point out that a review of the entire "private death qualifying voir dire" proceedings supports a finding that the trial court was only attempting to find jurors that could make a "clear statement of an open mind" towards the death penalty (R. 471). This is all that the law requires, See, Herring v. State, 446 So.2d 1049, 1055-1056, (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). Second, Appellant fails to enumerate the many prospective jurors who were not excused for cause eventhough they stated they were against the death penalty. For

example, Ms. Deabler at R. 422 clearly state she was against the death penalty; Ms. Chavez who stated the death penalty is a bad thing (R. 478), remained over the State's objection (R. 490); and others.

The three (3) -- out of allegedly 17 -- "excused prospective jurors Appellant points to, clearly stated on the record that they were opposed to the imposition of the death penalty under any circumstances, and that although they could possibly listen to the law, they did not know if they could impose the death penalty. The prospective jurors' specific responses to inquiry by the court and counsel, in pertinent part, were as follows:

Ms. Betty Rice, Juror No. 303, was questioned individually at R. 942 - 955 as follows:

> THE COURT: * * *
> My question to you is, making all those very big assumptions, could you make that recommendation? If the State does prove the aggravating circumstances outweight the mitigating circumstances and therefore proved them beyond a reasonable doubt, could you recommend the death penalty?
>
> MS. RICE: I'm going to be totally honest with you, I have no idea.
>
> * * * *
>
> THE COURT: Would you have any trouble if it goes the other way? He is found guilty of first degree murder, the State however can't prove the aggravating circumstances, or they couln't prove they outweigh the mitigating circumstances, and the Court tells you there should be life in prison with no possibility of parole for twenty-five years, could you follow the law and make that recommendation? Yes?

MS. RICE: No problem.

THE COURT: So, your problem is whether or not you, in fact, could vote for the death penalty?

MS. RICE: I guess that is probably the bottom line. I have always felt that I believe in capital punishment if something happened to, obviously, a member of my family. Naturally I would probably be for it. But I don't know. If I could sentence to -- I just don't know that I am capable.

* * * *

Right, I am not sure that I could even have a vote. I don't know.

* * * *

Right. I am not sure. I would probably have to go through it and see at the time. I just really don't know. I have to be honest with you, I can't give you a yes or no because I don't know.

* * * *

THE COURT: . . . .
And the Court has told you that under the law what you are required to do at that point is recommend the death penalty.

MS. RICE: (Indicating no.)

THE COURT: You can't do it?

MS. RICE: I don't know.

THE COURT: You don't know?

MS. RICE: I honestly don't know if I could or not.

I'm not saying I couldn't. I'm not saying I could, either. I just don't know. I just don't know.

* * * *

MS. RICE: I can follow the law, I'm just not sure that I am capable of being a participant in a vote of someone's life. I am just not sure I could do that.

* * * *

[S]trangers are still human beings. I just don't know that I can. I also felt that I could. I have always been a very strong-feeling person, that right is right and wrong is wrong, and I really didn't think too much of it until this came about. And I was really searching myself last night, and I really don't know.

MR. WALSHEIN [the prosecutor]: So you really can't tell me one way or the other?

MS. RICE: No, I can't.

(R. 946 - 953).

With regards to Mr. Wesley H. Olson (R. 955 - 971), the record reflects Mr. Olson's opposition to the death penalty as follows:

THE COURT: . . . Let's assume for a moment that that is what has happened, that the State has proven aggravating circumstances as they have been defined to you, that they outweigh the mitigating circumstances, and the Court tells you, under those circumstances, you should be recommending death, could you do that?

MR. OLSON: I don't think so.

THE COURT: Why do you say that? You are opposed to capital punishment?

MR. OLSON: Yes.

THE COURT: In any circumstances?

MR. OLSON: Not any.

THE COURT: What could you consider than, a case where you might impose it, or recommend it?

MR. OLSON: I couldn't tell at this point.

* * * *

THE COURT: . . . assume . . . the aggravating circumstances . . . have been proven beyond a reasonable doubt, and they outweigh the mitigating circumstances. . . . could you then vote for the death penalty?

MR. OLSON: I don't think so.

[There is an attempt at rehabilitating the prospective juror by defense counsel (R. 961 - 964). Then the Court asked one last time at R. 969:]

. . . would you vote for death under those circumstances? . . . .

MR. OLSON: Maybe not. Possibly not.

THE COURT: Can you be sure, or you don't know?

MR. OLSON: I don't know.

(R. 956 - 970).

Reference Ms. Kathleen Murray (R. 1543 - 1580) the record shows Ms. Murray had very strong reservations about the death penalty (R. 1549, 1550, 1551 - 1553, 1561, 1563), and then stated specifically that **in general she is against the death penalty** (R. 1555). Then regarding the death penalty in a **felony-murder situation**, she denied she could follow the law in considering the death penalty in such a case:

MS. MURRAY: I don't know how someone could be -- how they could be guilty of first degree murder when they didn't intend to murder someone. I --

it just doesn't seem like it would be murder. I mean, it is murder, but not -- it doesn't seem like it would be that serious as first degree murder if it wasn't their intent to kill someone.

THE COURT: The intent is to burglarize?

MS. MURRAY: Yes, right.

THE COURT: In the course of the burglary someone else dies?

MS. MURRAY: Yes.

THE COURT: The law says that is first degree murder. What we are asking is could you follow that [the law]?

MS. MURRAY: I don't know, Your Honor, I really would have a hard time with this.

* * * *

THE COURT: . . . in a felony murder first degree murder case. Could you then follow the law and make a recommendation for the death penalty?

MS. MURRAY: It is not the death penalty that bothers me so much, but the felony murder.

THE COURT: Now I think you told me you would consider it, would you consider it in a felony murder or just premeditated murder.

THE COURT: There is no way you could consider it in a felony murder at all?

MS. MURRAY: **NO, I WOULDN'T. I COULDN'T DO THAT.**

THE COURT: You are sure about that?

MS. MURRAY: **YES.** . . .
Well, even though it is an advisory opinion, I still would vote for the twenty-five years rather than the death sentence.

THE COURT: **IN ANY FELONY MURDER?**

MS. MURRAY: **I BELIEVE SO, YES.**

[Defense counsel attempted to rehabilitate her (R. 1574 -1579), but Ms. Murray went back to saying the same thing.]

THE COURT: . . . whether you . . . could follow the law and vote for the death penalty under those circumstances.

MR. WALSHEIN [the prosecutor]: In a felony murder case, the burglary of a car.

MS. MURRAY: **I HAVE TO SAY NO, BECAUSE I CAN'T SAY HOW SOMEBODY SHOULD DIE BECAUSE THEY WENT OUT TO BURGLARIZE A CAR.**

(R. 1548 - 1580).

"When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause," Hill v. State, 477 So.2d 553, 556 (Fla. 1985). The portions of the transcript as above set out clearly show that none of the three prospective jurors possessed the state of mind necessary to render an impartial recommendation, thus the trial court did not err in excusing these jurors for cause following the standard set out by the United States Supreme Court in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841, 851-852 (1985). See, Mitchell v. State, 527 So.2d 179, 180 (Fla. 1988); Irizarry v. State, 496 So.2d 822, 825 (Fla. 1986); Dougan v. State, 470 So.2d 697, 700 (Fla. 1985).

Appellant also complains that the trial court "erred in denying defense a chance to rehabilitate juror #303, Irene

Anderson" (AB 72). A review of the record clearly shows that Appellant's allegations are unfounded. First, Ms. Anderson when questioned at R. 1452 - 1464 was adamant that she "cannot recommend death, because life is precious" (R. 1457 - 1458). She stated she is **"opposed to death penalty as administered by the state."** (R. 1458), and that **"No matter what, she would vote against the death penalty."** (R. 1461). Second, even after Ms. Anderson made the initial stern comments, the court **did grant defense counsel a full and complete opportunity to rehabilitate Ms. Anderson** (R. 1459 - 1463), that defense counsel was not cut off, nor prevented from questioning Ms. Anderson. The record instead shows that even during questioning by defense counsel, Ms. Anderson stated she could **not** recommend the death penalty, because she does not like the death penalty (R. 1461), at that point the following exchange took place:

> MS. ANDERSON: . . . I just would feel like I am stepping into the wrong spot, taking over somebody elses's authority. To me that is God, and that is the way I feel.
>
> **MR. WILSON [defense counsel]: I HAVE NO OTHER QUESTIONS YOUR HONOR.**
>
> THE COURT: I think, what I gather, the bottom line I think you are telling me is, you answer to a higher authority than this Court?
>
> MS. ANDERSON: That is the way I feel. My conscience feels that way.
>
> THE COURT: I am going to ask you to wait outside the door. We will be with you in just a second.
>
> (Juror complies.)
>
> THE COURT: Counsel?

> MR. WALLSHEIN [the prosecutor]: We ask to excuse the juror for cause.
>
> THE COURT: You object?
>
> MR. WILSON [defense counsel]: Yes, sir.
>
> THE COURT: I will note the objection and overrule it. Ask her to step in.

(R. 1463 -1464) Thus, Appellant's reference to the record (R1463-1465) at AB 72 is erroneous. Ms. Anderson never stated she did not know whether she could follow the law, but rather that she did not believe it was for her, **but for God** to make the decision as to when a person should die.

Lastly, Appellant complains the trial court erred in not excusing Harriet Wojick for cause (AB 74). The State submits that, once again, Appellant's position is without merit. The record is clear that Ms. Wojick would be an impartial juror regarding the death penalty. Ms. Wojick stated she thinks the death penalty **may apply in some cases and not others** (R. 540, 542, 543). She stated that even if she found the defendant guilty in the first phase of the trial, she would wait for the evidence in phase two to decide punishment (R. 548 - 549, 552, 553). Then she stated that she can **listen and follow the law** before deciding the penalty in this case (R. 563 - 563). Thus it is clear that the court did not err in refusing to excuse this prospective juror for cause, Brown v. State, 15 FLW S165, S166 (Fla. March 22, 1990).

Lastly, the State submits that Appellant waived the claim that the trial court erred in failing to grant the challenge for

cause where he had not exhausted his peremptory challenges, but chose not to use the remaining peremptory challenges, and allowed Ms. Wojcik to sit in the jury that sentenced him, Toole v. State, 479 So.2d 731 (Fla. 1985).

A review of the record shows that Appellant has failed to show reversible error on this issue.

E. FLORIDA'S DEATH PENALTY STATUTES ARE CONSTITUTIONAL BOTH FACIALLY AND AS APPLIED TO THE APPELLANT.

Appellant contends that the death sentence statute is unconstitutional because the recommendation by the jury is made without giving any findings of fact which the trial judge and appellate court can review. This is not a persuasive argument. As restated by this Court in Thompson v. State, infra, 553 So.2d at 156 n. 2, the constitutionality and procedure followed in Florida's Death Penalty Statutes has been upheld since 1976 in Proffitt v. State, 428 U.S. 242 (1976), to this date in Haliburton v. State, 15 FLW S___, ___ (Fla. April 5, 1990).

The argument that due process requires that the jury's recommendation be accompanied by written reasons was rejected by this Court in Brown v. State, 473 So.2d 1260, 1271 (Fla.), cert. denied, 474 U.S. 1038 (1985), and by the United States Supreme Court in Clemons v. Mississippi, ___ U.S. ___, [46 CrL 2209, 2213] (No. 88-6873, March 28, 1990); and Hildwin v. Florida, 490 U.S. ___, 109 S.Ct. ___, 104 L.Ed.2d 728, *reh'g denied*, ____ U.S. ___, 106 L.Ed.2d 612 (1989). The reasoning being that regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to

make his own findings regarding aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based and this Court must review every capital sentence to ensure that the penalty has not been imposed arbitrarily. Spaziano v. State, 468 U.S. 447, 466 (1984). At least one member of this Court has elaborated on this issue and soundly rejected what Appellant is now arguing. Grossman v. State, supra, at 852 (Barkett, J., concurring in part, dissenting in part). Just recently, Florida's sentencing scheme was once again cited with approval by the United States Supreme Court in Clemons v. Mississippi, supra. Appellant's argument is, thus, without merit.

F. THE DEATH PENALTY IS NOT DISPROPORTIONATE IN THE CASE AT BAR.

Appellant argues that the death penalty is disproportionate in this case because the **slaying** of Mr. Bell was due to the "irrational acts" of Mr. Bell. He argues that the aggravating circumstances are not particularly compelling and that the evidence in mitigation outweighs these factors. The State respectfully disagrees. The three aggravating circumstances found are supported by competent and substantial evidence and far outweigh the nonstatutory mitigating circumstances that Appellant, a 20-year-old man, had been active in church related activities as a child, and could conform to prison life. Accordingly, the sentence of death was proportionally applied in this case. Carter v. State, 14 FLW 525, 526. October 19, 1989); Brown v. State, 15 FLW S165 (Fla.,

March 22, 1990); Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, 474 U.S. 879 (1985).

G. FLORIDA'S DEATH PENALTY STATUTES ARE CONSTITUTIONAL BOTH FACIALLY AND AS APPLIED TO THE APPELLANT.

Appellant, without trying to apply the arguments to the facts and circumstances of this case, launches an unfounded attack on Florida's death penalty statute. As stated earlier under Ground II.E. above, the Statute has consistently been found to be constitutional since 1976. See, Hildwin v. Florida, ___ U.S. ___, 109 S.Ct. 2055 (1989); Proffitt; Thompson v. State, 553 So.2d 153, 156 n.2 (Fla. 1989); Spaziano; and Lightbourne, supra.

1. The Jury.

Appellant argues that the jury instructions improperly diminished the role of the jury in Florida's capital sentencing scheme contrary to the United State Supreme Court's holding in Caldwell v. Mississippi, 472 U.S. 320 (1985). However, the record clearly reveals that Appellant did not object to any statement or instruction by the court on this ground. This Court has consistently held that the failure to contemporaneously object on Caldwell grounds constitutes a waiver of that issue on appeal, Carter v. State, supra, 14 FLW at 526. Thus this claim must be rejected without reaching the merits.

In any event, even on the merits, this Court has previously held contrary to Appellant's position, finding that the standard jury instructions accurately reflect Florida law,

Combs v. State, 525 So.2d 853 (Fla. 1988), Grossman v. State, supra, Brown v. State, 15 FLW S165 (Fla. March 22, 1990).

Adherence to the contemporaneous objection rule in capital cases has been recognized by this Court on numerous occasions. Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), cert. denied, 480 U.S. 951 (1987); Jones v. State, 473 So.2d 1244 (Fla. 1985); Rose v. State, 461 So.2d 84 (Fla.), cert. denied, 471 U.S. 1143 (1985). Its legitimacy has also been recognized in the United States Supreme Court. Adams v. Dugger, 498 U.S. ____, 103 L.Ed.2d 435 (1989).

2. - 4. Counsel; The Trial Judge; Appellate Review.

Once again the State asserts that Appellant's arguments at pages 85 to 93 of his Initial Brief are totally without merit and can be summarily rejected by once again, as held by this Court in Thompson v. State, supra, 553 So.2d at 156 n.2,:

> The issue of whether Florida's death penalty statute is constitutional **has been resolved by this Court as well as the United States Supreme Court.** *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 1960, 49 L.Ed.2d 913, *reh'g denied*, 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d 158 (1976); *State v. Dixon*, 283 So.2d 1, 11 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). [Emphasis added.]

See also, Haliburton, supra.

5. Other problems with the Statute.

a. As previously stated, special verdicts are not required, Hildwin v. Florida, ____ U.S. ____, 109 S.Ct. 2055 (1989).

b. Appellant claims that the standard jury instructions concerning nonstatutory mitigating circumstances is suspect. This Court has determined that the instructions meet the requirements of Locket v. Ohio, 438 U.S. 586 (1978); and Hitchcock v. Dugger, ____ U. S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), Johnson v. Dugger, 520 So.2d 565 (Fla. 1988).

c. Appellant's claim that the death penalty statute creates a presumption of death has been rejected, Proffitt, Bertolotti v. Dugger, 883 F.2d 1053 (11th Cir. 1989), and Blystone v. Pennsylvania, ____ U.S. ____, [4 FLW Fed. S99] (Feb. 28, 1990).

CONCLUSION

WHEREFORE, based on the foregoing reasons and citations of authority, the State of Florida respectfully submits that the judgments and sentence of death should be **AFFIRMED.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by U.S. Mail to: WILLIAM M. LASLEY, ESQUIRE, Counsel for Appellant, 215 N. Olive Olive Avenue, Suite 130, West Palm Beach, Florida, this 13th day of April, 1990.

Of Counsel