IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,075

HENRY GARCIA, etc.,

Appe11ant

vs.

THE STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

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BRIEF OF APPELLEE

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INTRODUCTION

This is an appeal from a judgment of guilt and sentence of death imposed by the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. The Appellant, Henry Garcia, was the defendant below. The Appellee, the State of Florida, was the prosecution. In this brief the symbols "R.", "T." "2S.R.", and "3S.R." will be used to designate respectively, the record on appeal, the transcript of proceedings, the second Supplemental Record consisting of the proffered payroll records and the third Supplemental Record consisting of the Pre-Sentence Investigation Report. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE

The State accepts the defendant's statement of the Case as a substantially accurate account of those proceedings below subject to the following. After the State rested its case defense counsel moved for a judgment of acquittal stating that the State has failed to prove a prima facie case as to each and every count and waived argument. (T.1499).

STATEMENT OF THE FACTS

The State must reject the defendant's statement of the facts because although it represents some of the facts it is inaccurate, argumentative and improperly puts the prosecutor on trial rather than the defendant.

Rose Flight, a friend and neighbor of the two elderly victims was the first witness for the state. She testified that on Friday, January 14, 1983 she took Mabel Avery, her 86 year old neighbor, for their weekly grocery shopping trip. (T.1023). Mabel's daily routine was to get up early and read the newspaper. (T.1024). Her frail 90 year old elder sister Julia Ballentine's "pride and joy" was to work the crossword puzzle every morning. (T.1024).

On the following Monday, another neighbor came over to ask whether Mabel and Julia were alright. (T.1025). The neighbor had observed the drapes were drawn, there were newspapers on the lawn and a bag of fruit was by the front door. (T.1025-1026). The neighbor knocked on their bedroom window and called their name. (T.1026). There was no answer. (T.1026).

Since Rose had a key to their front door, several neighbors met in front of the sisters' house to check on them. (T.1026). After having no success at opening the front door with the key, Rose and the others went around to the back of the house. (T.1026-27). The screen door by the patio had been slashed and was hanging down and the glass from the jalousie door was broken and all over the patio. (T.1027). One of the neighbors, Mr. Diaz tried the latch to the door but couldn't turn it so he kicked the glass in and went inside the house. (T.1027). When he came out the police were soon called to investigate the murders of Mabel Avery and Julia Ballentine. (T.1034).

Later that day, Rose contacted one of the next-of-kin, a nun, to notify the other family members. (T.1027-28). Shortly after that Rose went to the morgue and identified the two victims. (T.1027-28). She also identified the victims by photographs. (T.1029).

Sergeant Ann Griffins, an officer with the Metro-Dade Police Department, responded to the victims' home located at

28910 Main Road in Leisure City. (T.1034). Without disturbing anything, she went inside the house through the front door and located one body in one bedroom and one in the other. (T.1035). Sergeant Griffins determined both victims were dead, came out of the house and contacted the crime lab, the homicide department, and her supervisor. (T.1035). Thereafter, her function in the investigation was to secure the house so that no one could disturb the crime scene. (T.1035; 1045).

The police determined that the perpetrator made a forced entry through the patio screen door and the jalousie door which led into the kitchen. (T.1045, 1087). Broken glass from the jalousie door was found on the kitchen floor. (T.1036). The screen door was cut and pushed in and was standing ajar. (T.1046). There were no other signs of forced entry. (T.1090). The only other areas in disarray were the two bedrooms where the victims were discovered. (T.1036).

Sergeant Griffins identified several photographs of the house and the victims. (T.1040-46). She also identified a photograph which depicted Saturday's Miami Herald in the trash can. (T.1050-51).

On cross-examination, the officer described that Mrs. Avery's body was found in the southwest bedroom slumped against the closet door. (T.1056-57). Nothing was disturbed in the room. (T.1057). In contrast in Julia Ballentine's bedroom there was

evidence of a struggle since the lamp was knocked down on the floor and still burning, a large clock was on the floor next to a bed, one of the two single beds was full of blood in disarray and pushed out of position. (T.1058-59, 1063, 1096). Between the two bedrooms there were a few drops of blood in the hallway. (T.1061).

Detective David Gilbert, the Supervisor of the crime scene was the next state witness. (T.1081, 84). Detective Gilbert participated in a walk-through of the house. (T.1085). He located the two elderly victims' bodies in their respective bedrooms. (T.1086). Mabel Avery's bedroom had two twin beds, one made and the other with the sheets and bedspread turned down as if prepared for sleeping. (T.1088). Mabel was discovered slumped against the closet door next to a chest of drawers. (T.1088-89). There was no indication that a struggle took place in this room. (T.1095). Mabel was clothed with a pajama top and bottom. (T.1115).

Julia's bed was bloody and unmade. (T.1099). Her body was lying on a green shag rug. (T.llOO). The rug was not clean and contained a lot of fiber hairs. (T.llOO-01). There was blood on the bed, on the floor and the rug beneath her and on the nightstand. (T.1146). Her pajama top was pulled up around her armpits and neck area while the bulk of her body area was exposed and non-clothed. (T.1115). One of the photographs depicted the location of stab wounds penetrating through her pajama top. (T.1135).

The police processed the house for latent fingerprints, but they were of no evidentiary value. (T.1107, 1114, 1123, 1152). Several officers also searched for the victim's personal property, wallets, and identification but did not find any. (T.1060, 1124, 1154).

Dr. Mariccini, the medical examiner, arrived at the victims' home at approximately 3:15 p.m. on January 17th while the investigation was ongoing. (T.1170). After conducting an initial examination of the bodies he observed rigor mortis had set in and the bodies were cold. (T.1170). This was indicative that the victims were dead for some time. (T.1170).

The autopsy of Mabel Avery revealed fifteen (15) stab wounds on her body. (T.1172, 1174). The most serious stab wounds were to her lungs, her heart, and a wound that penetrated through Mabel's abdomen and intestines that was deep enough to reach her abdominal cavity and caused internal bleeding. (T.1176-1180). There were eight (8) defensive wounds present on her arms, hands, and legs. (T.1180). The longest stab wound was 4 3/8 inches on her leg. (T.1187). There was no indication that Mabel was sexually battered. (T.1188). The internal autopsy revealed that two of the stab wounds to the heart and abdomen were sufficient to cause her death. (T.1188). The cause of death was multiple stab wounds. (T.1188).

Julia Ballentine's autopsy revealed thirty (30) stab wounds and cuts present on the body. (T.1189). The deepest wound was five (5) inches long to her heart. (T.1193). There were three separate stab wounds to her heart which punctured her lungs and liver. (T.1193-94). Any of these heart wounds would have been lethal. (T.1193-94). Julia also sustained three defensive stab wounds to her arm as well as slashes present in the area of her right thumb severing tendons in her hand. (T.1200). The cause of death was multiple stab wounds. (T.1201). The medical examiner also determined there was physical evidence of sexual battery. (T.1189). There was a bluing or discoloration of her labia adjacent to the vaginal area, abrasions on the outer third of her vagina, hemorrhaging of the wall of the vagina as well as a one eighth inch long anal laceration. (T.1190). The hemorrhaging was significant because it established that the victim was alive when she was sexually battered and sustained these injuries. (T.1190).

With respect to the sexual battery of Julia Ballentine, Dr. Marricini opined that the injuries could have been caused by a variety of objects. (T.1204). He stated that these injuries were more common with a foreign object than with a penis. (T.1205). It was possible that the injuries were caused by a knife. (T.1205).

Dr. Marricini approximated the time of death between midnight Saturday and Sunday noon based upon the stiffening of the muscles, the blood lividity, and the coldness of the body.

(T.1202-03). He also relied upon the fact that there was no food in their stomachs, his observations of uneaten cut grapefruit in bowls, and that the Sunday newspaper had not been picked up. (T.1203).

The testimony of Helen McMakin, a letter carrier, was completely omitted in the defendant's statement of the facts. (T.1210). She was called to help establish the time of death. (T.1210-1215). She attended a baby shower on a Saturday night in January of 1983. It was held at a friend's house located at Louisiana Road around the corner from the victim's home. (T.1213). Several cars were parked on the street. (T.1214). She left the party at about 11:00 p.m. (T.1214).

Xemina Evans was the next state witness. (T.1218). She lived immediately behind the victims' home on Louisiana Road. (T.1219-20). On a Saturday night in the middle of January in 1983 at about 11:00 p.m. her dog started to bark. (T.1222). Mrs. Evans then looked out the window and saw many cars parked outside. (T.1222).

The next morning at 6:00 a.m. she was awakened by the sound of glass breaking. (T.1223). She heard the breaking two times and thought it was the window to her back door. (T.1224). The back door to her house faces the back door of the victims' home. (T.1224). She was certain it was 6:00 a.m. when the glass broke because her baby woke up crying and she looked at the clock when she fed him. (T.1225).

Elizabeth Feliciano testified next and was one of the three key witnesses for the state's case. (T.1248). She lived with her husband, her son Feliciano Aguayo, and his family at 289 Terrace in Leisure City. (T.1249). The defendant, known to her as Henry Garcia was a friend of the family. (T.1251-52). She identified him in court. (T.1251).

She recalled that at about 7:00 a.m. on a Sunday in the middle of January of 1983 she was in the bathroom when she saw a man through the window running towards her house. (T.1253, 1261). She did not recognize him at that moment. (T.1253). Mrs. Feliciano told her husband to take care of someone that was arriving at the house. (T.1253). She looked out the window next to the front door and saw the defendant. (T.1254). She invited him inside, but the defendant said "no". (T.1254). He looked like he was in a hurry to get home and wanted her son Feliciano Aguayo to give him a ride. (T.1255-56).

Despite the fact that it had rained all Saturday night, (T.1260) neither the defendant or his shoes were wet. (T.1261). The defendant's clothes were bloody on the right side of his shoulders, his shirt, his pants, and on his tennis shoes (T.1256, 1265). Blood was splattered on his pants from the knees down. (T.1265). Both his hands were bloody. (T.1266). A few minutes later her son went outside, they talked, got in the car and left. (T.1256). Her son came back a half hour later. (T.1257).

Later that day, Mrs. Feliciano, her son Feliciano Aguayo, and daughter-in-law, and her daughter drove to Florida City to look at the place where the defendant told her son that he had some problems with four people. (T.1257-58). The defendant said he killed three of them and the other ran toward a corn field. (T.1258). She recalled getting out of the car and examining both the pavement and dirt area. (T.1259, 1272). Everything looked normal. (T.1259). She did not see any blood or bodies. (T.1259).

The State's next key witness was Feliciano Aguayo. (T.1276). He was friends with the defendant back in January of 1983. (T.1278). Aguayo knew the defendant as Henry Garcia. (T.1277). They met through a mutual friend, Wally Gomez, and also worked together in the fields. (T.1278-79).

Aguayo spent most of the day with the defendant on the day before the murders. (T.1279). He picked the defendant up in the afternoon from the South Dade Labor Camp where he lived with Mr. Gomez. (T.1279). They stopped at the Circle K where the defendant bought a beer and then drove to the Sky Vista Amusement Center in Homestead to play pool. (T.1281). This was sometime before 7:00 p.m. (T.1281). They played pool for about 40 minutes and then stopped at the Circle K again for more beer for the defendant and a coke for Mr. Aguayo. (T.1282). Next, they drove back to the labor camp because the defendant was supposed to meet a date. (T.1282). When they arrived, the defendant saw his date with her old boyfriend which made the defendant upset. (T.1283).

Afterwards, the two left the labor camp, picked up another beer for the defendant at the Circle K and returned to play pool at the Sky Vista Amusement Center. (T.1285). Mr. Aguayo left the pool hall for a while to run an errand and then returned at about 11:00 p.m. and offered to take the defendant home. (T.1286). The defendant did not want to go home so Aguayo dropped him off at the Leisure City Lounge pursuant to his wishes. (T.1286). The defendant said he would find a ride home. (T.1286). Aguayo told the defendant to call him if he needed a ride. (T.1286). Mr. Aguayo then went home to bed and did not receive any phone calls from the defendant. (T.1287).

Early Sunday morning, Mr. Aguayo's father woke him up because Henry was at the door and wanted to speak with him. (T.1287). When Feliciano walked out to see Henry he was "full of blood." (T.1287). Henry was wearing tennis shoes, blue jean pants, a shirt, a blue levi jean jacket and a black cap with "Jack Daniels" on it. (T.1288). Specifically, the defendant had blood on his shirt, on the front of his pants, on the bottom of the pants legs and on his tennis shoes. (T.1288). The defendant also had blood on the top of his hands, but not on his palms. (T.1308). The blood was drying but not completely dry. (T.1308).

Feliciano asked the defendant what happened to him. He explained that he got in a fight down by the Cuervo Bar with some guys and a woman. (T.1289-90). The defendant did not explain how

he got to the Cuervo Bar which is more than 10 miles from the Leisure City Lounge. (T.1290). The defendant said he began walking home early Sunday morning from the Cuervo Bar and as he passed the Everglades Trailer Park towards Florida City a car stopped and three men and a lady exited the car. (T.1291). With no reason they started beating him up with a tire jack and different things. (T.1291). The defendant got his knife out and stabbed one of the men and started stabbing the lady and they threw him down and then he got up and ran away. (T.1292). The fight took place in front of the corn field. (T.1350). The only injury Feliciano observed was a scratch around the defendant's eye. (T.1292). The defendant was not bleeding and had no lumps, bumps or bruises. (T.1292). There was nothing to indicate that he had been struck by a tire jack or some other weapon. (T.1292). Garcia said he stabbed the woman more then twenty times. (T.1295).

Despite his condition, the defendant did not want to see a doctor or go to the hospital. (T.1295). He just wanted to go home to the South Dade Labor Camp. (T.1295).

When the defendant first told Aguayo what happened at his mother's house Aguayo explained:

> Q. Then explain to the members of the jury, please.
>
> A. Okay. I asked him what happened when he told me, you know, that he was walking home that morning and they stopped and they started beating on him for no reason at all

and that is when he told me how he stabbed the woman, whatever and he just kept repeating, "I told them not to make me mad, that I had an animal inside of me" and "I told them not to make me mad, that I had an animal inside of me, I told them not to make me mad, that I had an animal inside of me" he kept repeating and repeating that all the time; after that I walked back in the house and got a T-shirt on or a towel or whatever and we went down to the South Dade Labor Camp and he just kept saying the same thing, "I told them not to make me mad, that I had an animal in me, I told them not know (sic) make me mad, that I had an animal in me, I told them not to make me mad, that I had an animal in me" and we headed down South Dade.

Q. Are you saying that he said, "I told them not to make me mad"?

A. Yes.

Q. What is that you said about an animal I didn't hear you.

A. He kept saying that he just -- you know, like, he was repeating a bunch of times, then he said, "I told them not. to make me mad, I had an animal inside of me.''

Q. "I told him not to make me mad, I have an animal side of me"?

A. "I told them not to make me mad, I had an animal inside of me."

[DEFENSE COUNSEL]: Your Honor, I object to her repeating it.

[PROSECUTOR]: Judge, if it wasn't constant noise outside the courtroom, perhaps I would be able to hear the testimony.

THE COURT: I will overrule the objection.

> **[PROSECUTOR]:** I have no objection to the court reporter reading it back, I would just like to hear it.
>
> **THE COURT:** I overruled the objection.
>
> **[PROSECUTOR]:** Thank you, Judge.
>
> (T. 1296-97).

Mr. Aguayo then described at length and in detail the route taken by the defendant from the Cuervo Bar until he arrived at Aguayo's house. (T.1298-1300). The defendant ran through the cornfield, then continued on a dirt road behind Dade Correctional Institution (T.1298). Next the defendant took Palm Drive to enter Florida City. (T.1299). Then he went through Florida City across US 1 and then took Palm Drive toward the South Dade Labor Camp. (T.1299). The defendant then passed by the South Dade Labor Camp where he lived and ran to Aguayo's house. (T.1300).

Mr. Aguayo then testified that the defendant had a regular folding knife that he carried on the side in a case. (T.1305). That morning the defendant took it out of his case and opened the knife. (T.1306). It had a bent tip and was full of blood. (T.1306). Aguayo had seen the knife before but not with the bent tip. (T.1307). The blade of the knife was still wet but was drying up inside. (T.1307). The length of the blade was more than four inches. (T.1315).

After the defendant came over that morning, Feliciano drove him home to the labor camp. (T.1309). When they arrived the defendant would not let him stop and insisted that they drive around the block a few times before they finally wound up at Gomez's house. (T.1309). The defendant did not want to go inside. (T.1310). They both went to the side door (T.1310). Gomez's daughter opened the door and they went inside. (T.1310).

Thereafter the defendant essentially told his story to Gomez except for a few differences from the version the defendant told Feliciano Aguayo earlier at his house. (T.1311). Then Aguayo went home. (T.1312).

Aguayo confirmed his mother's testimony that later that day they drove to the area near the cornfield and the Everglades Trailer Park where the fight allegedly took place. (T.1312). When they arrived at the cornfield, they looked around for signs of blood or bodies. (T.1314). The area was clean. (T.1314). The reason they checked the area was because they knew there was a lot of dirt, water holes and a dirt road, but the defendant did not have any dirt on him. (T.1315).

Shortly after that Sunday, Mr. Aguayo heard a news report that there were two old ladies killed in his neighborhood. (T.1316). He contacted the police and told them about the defendant coming over that morning and described his appearance. (T.1316). Aguayo subsequently gave the police a sworn statement

and showed them the route that the defendant said he took. (T.1317). On cross-examination Aguayo testified that he worked with the defendant in January of 1983 a few times. (T.1335). He also stated that he did not know Henry by the name of Enrique Juarez. (T.1337).

The State's other key witness who tied the defendant to the murders was Rufina Perez. (T.1359). She was a migrant worker who worked in the fields with the defendant. (T.1361). She learned of the murders of the two ladies from the news. (T.1362). After she heard about the murders, she worked in the same fields with the defendant. (T.1362). One day shortly after the murders she overheard the defendant's conversation with some of his friends. (T.1364). They were only ten to twelve feet away. (T.1364). The conversation was as follows:

> **A.** [A]nd [the defendant] said, "Do you know what happened?" And the other guy said, "No, what?" He said, "I got in a fight, I got in trouble with these ladies."
>
> **Q.** These ladies, plural?
>
> **A.** Yes, these ladies. And then he said to--the other one said, "What did you do?" He said, "I don't have to worry about them because they already in hell."
>
> And then the other guy said, "Te las chingates?"
>
> **Q.** "Te las chingates?"
>
> **A.** "Te las chingates?" That is a word in Spanish.

Q. Now, Mrs. Perez, I have to ask you, please, to translate--I'm, sorry-but please translate for the jury what this means.

A. Te las chingates? In words, sometimes we use. "Did you fuck them up?"

And he said, "Yes, but I don't have to worry about it because they already in hell."

Q. Now, the conversation between the defendant and the other men that were around him, was anything said?

A. Yes, they asked him, "How you do it?"

And he said, "I went to the back door, I ripped out the screen door." And he know, he find out, I mean, that I was listening because I come to listen--1 mean, because it comes to my mind what I have heard in the news about these two ladies that were murdered, I mean, murdered in there and when it comes in the news, they say he used the back door and rip up the screen door and he say the same thing.

Q. So you began to listen?

A. So I began to listen.

Q. Did you see what the defendant and the other men did as you began to pay attention to the conversation?

A. He stopped.

Q. Was the conversation in Spanish or English?

A. In Spanish.

Q. Do you speak Spanish?

A. Yes, ma'am. That is my language.

(T.1365-1367).

Mrs. Perez then gave a statement to the police. (T.1367-68). She was certain it was the defendant who had that conversation. (T.1368-69). She knew the defendant because he picked the same fields with her most of the time. (T.1369). She could not recognize the other men with the defendant because she had not seen them. (T.1380).

Mrs. Perez had been working for Mr. Trevino, her crew leader, since 1964. (T.1379). She gave her social security number to Mr. Trevino to use for her payroll records. (T.1381). She stated that a lot of times crew leaders don't use the social security numbers because they cheat and don't want to send the money. (T.1381).

Next, the State called John Tanner with the Dade County Public Works Department. (T.1395). He is the records custodian of the county's aerial maps. (T.1396-97). During his testimony, the state introduced various photographs and aerial maps of the Homestead and Leisure City areas which corresponded to the area where the defendant was allegedly attacked and the path he took to Mr. Aguayo's house. (T.1401-1404).

The State's final witness was John LeClaire the lead detective in this case (T.1405). As a member of the cold case squad he began his investigation of the murders in September of

1985. (T.1409). After obtaining Feliciano Aguayo's sworn statement, they went to the southwest section of Dade County and covered the route allegedly taken by the defendant as explained to Aguayo. (T.1417-21). LeClaire then explained the same route that Mr. Aguayo testified to previously using a grid map of the area. (T.1412). LeClaire added that Florida City Police Department is located on Palm Avenue in Florida City east of Krome Avenue, and the distance between Mr. Aguayo's home and the Everglades Labor Camp is fifteen miles. (T.1417).

Detective LeClaire came in contact with the defendant in Texas two and one half years after the murders. (T.1433-35). LeClaire advised the defendant of his Miranda Warnings and obtained a signed waiver form. (T.1436). The defendant was advised that he had been seen by several people with blood on him the morning after the murders. (T.1439). He then recounted a similar explanation he gave two and one-half years previously to Mr. Aguayo with a few significant inconsistencies. (T.1440-47). This time the defendant said only two white males and one female exited the car. (T.1442). When it became obvious that one of the men was going to attack him with the tire iron, the defendant positioned the female between himself and the two men. (T.1444). As the man began swinging the tire iron at him, the defendant stabbed the white female only five or six times as opposed to the twenty times he told Aguayo. (T.1444). The defendant never gave a description of the car allegedly driven by the men and woman involved in the attack. (T.1486). The

defendant said he was wearing blue jeans, a grey jacket and a hat that day. (T.1447). After speaking to the defendant for almost an hour, the defendant said he did not want to talk anymore and essentially cut off any further questioning. (T.1472-73). LeClaire did not get a recorded or transcribed statement because the defendant cut off the questioning. (T.1484).

As part of the investigation, Detective LeClaire checked the records for January of 1983 and discovered this was the only homicide involving a stabbing. (T.1449-50). No bodies were found in the south dade area. (T.1450). The Florida City Police Department had no reported stabbings. (T.1450). LeClaire also checked the local hospital records for January which revealed only one reported stabbing that was self-inflicted. (T.1450).

During his testimony, the aerial maps of southwest dade were laid across the courtroom floor so that the officer could demonstrate to the jury the route allegedly taken by the defendant. (T.1457-1462). The jury also walked the path on the diagrams. (T.1462). The distance between the homes of Mr. Aguayo and the victims' measured to one-half mile but if someone cut through backyards it would be shorter. (T.1464).

Contrary to the defendant's representation that LeClaire "knew" the defendant as "Enrique Juarez", LeClaire stated it was mentioned in a report that the defendant used the names David

Garcia, Henry Garcia, and Enrique Juarez. (T.1474). Detective LeClaire was also aware that hair samples were taken from the defendant. (T.1477). He believed pubic and head hair samples were submitted to the lab from both the defendant and the victims. (T.1477-78). The defendant said he used a pocket knife when he had a fight with the men but the tip was not bent. (T.1478).

On redirect examination, Detective LeClaire said the grey jacket belonging to the defendant was obtained from Mr. Garcia's relative two and one-half years after the murders. (T.1487). However, a jean jacket he was described as wearing that morning was never impounded. (T.1487). The officer concluded his testimony and the state's case by saying there was nothing to .indicate to the jury that based on the submission of the hairs of the defendant that he was eliminated as the individual that committed the murders. (T.1491).

The defendant put on two witnesses in his defense. After the court resorted to issuing a Rule to Show Cause Aida Paz appeared in court to testify. (T.1514, 1522). Aida Paz is the daughter of the defendant's boss Mr. Trevino. (T.1523). She claimed she was the custodian of the payroll records. (T.1523). Pursuant to defense counsel's request she checked the payroll records for Rufina Perez and Enrique Juarez. (T.1523). The records did not reflect any employee named David or Henry Garcia. (T.1524). Ms. Paz said she kept the records in the

regular course of business and marked down the records at the time the people worked. (T.1525). She stated the records truly and accurately depicted the records as they were in January and February of 1983. (T.1525).

The State then voir dired the witness. (T.1526-29). The prosecutor elicited the fact that the witness' sister Irma worked for their father also on payroll records. (T.1526). The record relating to "Enrique Juares" was in Irma's handwriting. (T.1526-27). Ms. Paz was unaware of any supporting documentat-on. (T.1526-27). Ms. Paz admitted there were no social security numbers on the documents (T.1529). She claimed that they usually obtain the social security numbers from the workers but sometimes the employee never gives them the number. (T.1529-30). Ms. Paz did not know the defendant's name and had never seen him before. (T.1539). She did not know if her sister or father knew him. (T.1530). The witness admitted there was no authenticating information whatsoever that would tie defense exhibit A-2 to anyone. (T.1531). She did not know if this exhibit belonged to the defendant. (T.1531). The prosecutor then objected to the admission of these purported "business records" on numerous grounds that essentially attacked the reliability, trustworthiness, relevance, and authenticity of the records. (T.1531-32). Defense counsel argued the records were admissible because the witness was the records custodian and the proper predicate for admission had been established. (T.1531-32).

The Court then inquired of the witness and revealed that the records were on file in 1983 because Ms. Paz kept them at her house. (T.1535). She again acknowledged that she had no knowledge as to who Enrique Juares was. (T.1535). Ms. Paz then claimed that both she and her sister Irma were records custodians. (T.1536).

The Court denied admission of the documents on the basis that they have not been established as a matter of law to be trustworthy. (T.1536).

Defense counsel then moved for leave to call the sister who was out of town as a witness. (T.1536). The State responded that it would make the same objection if the sister testified because 1) the records themselves were inadequate to establish the requisite reliance and competency and 2) there was nothing that tied the man in court to the record being offered. (T.1537). The defense then rested and renewed his motions for judgment of acquittal which were denied. (T.1540).

The following day defense counsel made a proffer regarding the business records. (T.1556). According to defense counsel, the business records would have indicated that Enrique Juarez (allegedly the defendant) only worked one day of the week ending, January 7, 1983 for Jose Trevino. (T.1556). This would have been inconsistent with Rufina Perez's testimony that she worked with the defendant for Trevino and overheard him talking

to his friends about the murders. (T.1556). The State responded that the records refer to Enrique Juarez. (T.1557). Both Feliciano Aguayo and Rufina Perez testified they knew the defendant as Henry Garcia and not any other names. (T.1557). Until the testimony of Ms. Paz there was no attempt to link the name of Enrique Juarez to the person in the courtroom, the defendant, known as Henry Garcia. (T.1557).

The prosecutor then specifically argued the records were unreliable and irrelevant because:

> 1) the witness did not personally prepare the record;
>
> 2) the witness had no idea who the person represented to be;
>
> 3) there could be many people named Enrique Juarez;
>
> 4) the records could be tainted;
>
> 5) there was no substantiation as to the documents purportedly admitted;
>
> 6) although defense counsel indicated he worked one day during the week and earned $27.60, that is not what the record reflects;
>
> 7) their was no way of telling from the record if defendant worked one day, one week or one hour;
>
> 8) there was no social security number;
>
> 9) no address;
>
> 10) no date of birth;
>
> 11) no photograph;
>
> 12) it was irrelevant because the records were unreliable as to the

documents attesting to this defendant. (T.1557-60).

The Court then reiterated its ruling and stated as follows:

> **THE COURT:** And my ruling is the same, and I find specifically that the documents contained insufficient, woefully insufficient, wholly insufficient linkage between the persons or person purported to be listed on the document and the defendant, and I lacked any confidence -- as I said yesterday, I had no confidence whatsoever that those documents were reliable; that they were adequately authenticated and that they were talking about this individual, and the possibility that they could have referred to so many other people made them, in my judgment, to be worthless and did not justify their admission.
>
> (T.1561).

The final witness in the trial was criminalist David Rhodes. (T.1562). His involvement in the investigation was a hair analysis he performed on hair samples from the victims hair removed from the crime scene and hair standards from Henry Garcia. (T.1566-68). A head and pubic hair samples were collected from Julia Ballentine. (T.1568). Two pubic hairs were collected from Julia Ballentine. (T.1568). A pubic and head hair sample was also collected from Mabel Avery. (T.1568-69). Mr. Rhodes removed one hair strand from the green rug where Julia Ballentine's body was found and a crime scene technician removed another hair sample. (T.1568).

Mr. Rhodes explained the three conclusions which can be reached in a hair comparison as 1) similar, 2) inconclusive and 3) different. (T.1575). The first hair exhibited similar characteristics to both victims' head hair. (T.1575). The second hair found at the crime scene was described as "unusual." (T.1571). It had a crusty foreign material on the outside of the hair. (T.1571). It was thicker than normal and appeared to be a body hair originating from the arms or thorax. (T.1572). Rhodes described it as a brown Caucasian hair. (T.1572).

This second hair strand was "significantly different" from the head and pubic hair samples which were collected from both victims. (T.1573). Mr. Rhodes also testified that this hair strand was also different from the pubic and head hair standards provided by the defendant. (T.1573). However, Rhodes admitted this latter comparison and conclusion "would not be valid" if the origin of the hair found in the rug was known to be a body hair. (T.1594-95, 1616-17). He explained that you cannot compare head hair with pubic hair or body hair and make a proper conclusion. (T.1594, 1617). In this case no body hair samples were collected from the defendant. (T.1569).

The prosecution extensively cross-examined the reliability of the hair analysis performed in this case. (T.1579). Important factors contributing to the reliability of the analysis include that you correctly determine the origin of the hair strand, the samples be taken from the same source on the

body, and that the samples be taken as close in time as possible to the standards being removed and under similar living conditions. (T.1579, 1594-95).

In this case, the hair samples from Henry Garcia were submitted to the lab on January 13, 1986, almost three years after the murders. (T.1584). This factor was very significant here because the hair found at the scene had "inclusive material" on the sample and part of the analysis required comparing the condition of the hair. (T.1585). Rhodes also admitted he had no way of knowing how long the hairs that were collected had been at the crime scene (T.1583). As stated above the hair sample was of unknown origin and was compared only with head and pubic hair of the defendant. (T.1616-17). Another fact which discredited the comparison was that Rhodes did not know the defendant's living conditions in 1983 or now. (T.1595). Finally, the witness admitted if the source of the hair found on the victim's body was actually a body hair from the thorax rather than a pubic or head hair then the comparison would be improper. (T.1596, 1617).

In his report Rhodes stated that 1) the hair probably originated from the thorax, abdomen or pubic region meaning that he did not know the origin exactly, (T.1618), and 2) that it is possible that one pubic from Henry Garcia could exhibit "signigicantly different" characteristics from another pubic hair of Henry Garcia, even in the same area of his body. (T.1619). This testimony concluded the evidence at trial.

The jury returned a verdict of guilty as charged on the two counts of first degree murder, sexual battery and armed burglary. (T.260-63, 285-86).

Sentencing Phase

During the penalty phase of the trial, the State introduced evidence in support of the aggravating factors for the death penalty establishing that a) the defendant was under a sentence of imprisonment, by virtue of his federal parole at the time the capital felonies were committed (T.268-71, 288-89, 1826); b) The defendant was previously convicted of a felony involving the use or threat of violence to a person in that he was convicted of armed robbery in the State of Texas (T.272-84, 288-89, T.1827), c) the capital felonies were committed while the defendant was engaged in the commission of both an armed burglary and an armed sexual battery of victim Julia Ballentine as supported by Dr. Mariccini, the medical examiner's testimony (R.289-89, T.1839-41) and d) the capital felonies were especially heinous, atrocious and cruel. (R.288-289, T.1828-18411). Defense counsel did not present evidence with respect to any statutory or non-statutory mitigating factors. The Court found the defendant had been drinking beer the evening before the assaults. (T.289-90). After considering the evidence and arguments of counsel, the jury returned an advisory twelve-zero verdict recommending the imposition of the death penalty. (T.282-86). The Court then ordered a presentence investigation (PSI). (R.287).

The PSI report included as part of the victim impact statement a letter written by Jeanne Cavanagh Mealey. (3 SR.5-6). At the final sentencing hearing on August 5, 1988, the Court asked both counsel if they were prepared to aid the Court in sentencing by pointing out the deficiencies or errors and to argue the persuasiveness of the PSI report. (T.1879). Defense counsel did not object to the victim impact statement and essentially stated:

> I understand that the task that was placed upon me was to review the PSI and make some notes and notations or whatever as it relates to whether or not there are any conflicts in the PSI. It is basically a factual type PSI. I don't see anything, except some misspellings, that is totally wrong with the PSI.

(T.1881).

Following this hearing, the trial court announced it would impose a sentence of death and subsequently entered a five page written order with Findings of Fact and Sentence. (T.288-292).

This appeal ensued.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING BUSINESS RECORDS WHICH WERE INHERENTLY UNRELIABLE AND UNTRUSTWORTHY? (Restated).

II.

WHETHER THE STATE PROPERLY PRESENTED THE DEFENDANT'S FALSE EXCULPATORY STATEMENTS AS SUBSTANTIVE EVIDENCE TENDING TO PROVE GUILT? (Restated).

III.

WHETHER ANY PROSECUTORIAL MISCONDUCT OCCURRED WHICH WOULD RISE TO THE LEVEL OF A DUE PROCESS VIOLATION? (Restated).

IV.

WHETHER THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT TO DEATH WHERE DEFENSE COUNSEL DID NOT OBJECT TO THE EXISTENCE OF A VICTIM IMPACT STATEMENT CONTAINED IN THE PRESENTENCE INVESTIGATION REPORT? (Restated).

SUMMARY OF THE ARGUMENT

I.

The trial court did not abuse its discretion in excluding the business records because; 1) the records themselves were inherently unreliable and untrustworthy and did not even comply with the recordkeeping requirements for migrant workers; and 2) the records were not established to be relevant because the defendant failed to establish how the exhibit, a ledger sheet with the name "Enrique Juares," which was a misspelled version of one of the defendant's aliases, was connected to the defendant.

II.

Appellant's second issue that the State shifted the burden of proof to the defendant to prove the truth of his pre-arrest alibi is likewise devoid of merit. The defendant's false exculpatory statements were admissible in the state's case to: 1) show that the statements were calculated to defeat or avoid prosecution, 2) to demonstrate that his incredible explanation was false .3) to establish that he had guilty knowledge; and 4) to prove that the evidence was inconsistent with any reasonable hypothesis of innocence.

III.

The Appellant's allegations of prosecutorial misconduct during closing argument did not constitute fundamental error or deprive the defendant of a fair trial. The defendant did not object to these statements at trial and is therefore barred from raising this issue on appeal. Notwithstanding this Appellant's

contentions are either refuted by the record, fair comments on the evidence or the submission of a conclusion that could be drawn from the evidence. Accordingly, the comments individually or taken as a whole did not deprive the defendant of a fair trial.

IV.

Appellant is procedurally barred from claiming it was error to sentence the defendant to death where the trial court merely saw the victim impact statement contained in the presentence investigation report. Even if the alleged error was preserved by an objection, receipt of this evidence was clearly harmless error under the circumstances of this case.

AKGUMENT

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING BUSINESS RECORDS WHICH WERE INHERENTLY UNRELIABLE AND UNTRUSTWORTHY.

The Appellant contends that the trial court erroneously excluded business records relating to the defendant's employment that were critical to the defense. (AB at 33, 39). The purported business records were being offered to rebut state witness Rufina Perez' testimony, the migrant farm worker who worked with the defendant. Perez testified that she overheard the defendant bragging in the fields about committing the crimes and his damning statement that he did not have to worry because the women were already in hell. After the trial court excluded the business records, defense counsel proffered that the records would have established that Enrique Juarez worked only one day of the week ending January 7, 1983, for Trevino (T.1556).

The State maintains that the trial court did not abuse its discretion in excluding the purported business records because a) the records themselves were inherently unreliable, untrustworthy and did not even comply with the record keeping requirements for migrant workers; and b) the records were not relevant because the defendant failed to establish how a ledger sheet with the name "Enrique Juares" was connected to the defendant, Henry Garcia.

The starting point for this analysis is with the statutory language of the business records exception. Section 90.803(6), Florida Statutes (1983) specifically provides:

> **(6) Records of regularly conducted business activity. -**
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. (e.s.)

In addition to the foundation which must be laid through the testimony of a records custodian or "other qualified witness" a requirement of minimum reliability of a record is contained in the statute. See Ehrhardt, Florida Evidence §803.6 (2d Ed. 1984); National Car Rental System, Inc. v. Holland, 269 So.2d 407 (Fla. 4th DCA 1972) (The trustworthiness of a business record can only be satisfactorily assured if the trial court requires as a predicate among other things that the sources of information, method and time of preparation were such as to justify its admission.)

Florida Courts have uniformly held that the trial judge has broad discretion in determining whether admission of such business records is justified. Specialty Linings, Inc. v. B.F. Goodrich, 532 So.2d 1121 (Fla. 2d DCA 1988); LEA Industries, Inc. v. Raelyn Intern., Inc., 363 So.2d 49 (Fla. 3d DCA 1978); Mastan Co. v. American Custom Homes, Inc., 214 So.2d 103 (Fla. 2d DCA 1968).

In the present case, the unreliability and untrustworthiness of the purported payroll records offered by the defendant is readily apparent from examining them. (2 SR. 1-2). The record consisted of a piece of paper with the name of "Enrique Juares" under the heading of "Name", "1-7-83" under the heading of "week ending" and "27.60" under the column for "wages" and "total first quarter." The payroll record has space available to provide a social security number, address, nature of work, the duration of one's employment and withholding status. (2 SR.l-2). All of these categories were left blank. (2 SR. 1-2). The missing information was critical because the only information on the record arguably tying the exhibit to the defendant was the name "Enrique Juares" which was a misspelled version of one of the defendant's aliases.

The State's voir dire of Ms. Paz revealed that the witness' sister also worked on the payroll records, that this particular record was in her sister's handwriting, that she did not know

the defendant's name and had never seen him before. (T.1526-30). Therefore, she did not know whether the bare information in the proffered exhibit was correct nor indeed if this exhibit belonged to the defendant at all. (T.1531). The witness also admitted there was no authenticating information whatsoever that would tie the defense exhibit to anyone. (T.1531). After initially testifying that she was the records custodian, Ms. Paz claimed that both her and her siser were records custodians. (T.1536). Ms. Paz did not state that she was a supervisor over her sister. Here, the record itself was patently incomplete and untrustworthy and the "records custodian's'' testimony only further placed into doubt the reliability of the record since 1) she did not prepare this exhibit and therefore did not know whether the bare information in the proffered exhibit was accurate nor indeed if chis exhibit even belonged to the defendant and 2) since she revealed this record was not made in conformance with her regular bookkeeping practice when she could not explain without speculating why the social security number and other verifying information was left blank (T.1529).

Appellant's reliance on Holley v. State, 328 So.2d 224 (Fla. 2d DCA 1976) and McEachern v. State, 388 So.2d 244 (Fla. 5th DCA 1980) is clearly misplaced because the thrust of the State's argument is that the business record itself was inadmissible notwithstanding the "records custodian's" testimony. In Holley the defendant was charged with robbing a Plant City gas company on February 19. The State introduced

"Williams Rule" testimony that the defendant committed a similar robbery at another gas company on February 4. The defendant testified and denied committing both robberies. He said he was in Houston, Texas, on February 4th. While he admitted being in Plant City on February 19, he insisted that he was visiting relatives about the time the robbery occurred. Id. at 225. Holley unsuccessfully attempted to introduce a copy of the motel registration card with a machine stamped date reflecting that one Bobby Holley was registered at a Texas Hotel on February 4. Id. Appellant sought to authenticate the card through the testimony of the Assistant Comptroller of the motel. The Court held it was reversible error to refuse to admit a copy of the motel registration card where the original had been destroyed. The Assistant Comptroller was clearly the custodian of the motel records and was prepared to testify concerning the method by which the registration cards were filled out. Id.

The primary distinction between Holley and the present case is the nature of the record which was sought to be admitted. In Holley the State was objecting on the grounds of authenticity to a copy of a competent business record where the original was destroyed. Here, the State objected to an original purported "payroll record" which was essentially blank except for the name "Enrique Juares" which was a misspelled version of one of the defendant's aliases. Thus, it is clear that Holley has no application to the facts of the case sub judice.

Furthermore, both Florida[1] and federal[2] statutory provisions set forth recordkeeping requirements imposed upon employers of migrant laborers. The records in the instant case were woefully deficient in complying with these regulations in that, the payroll record did not list the employee's address, social security number, the basis on which his wages were paid, and the specific sums withheld. See 29 C.F.R. 500.80 (1983); 29

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[1] 450.33(6), Fla. Stat. (1987) provides in pertinent part:

> Every farm labor contractor must:
> *(6)* maintain such records as may be designated by the division.

[2] 29 CFR 500.80 (1983) which is a subchapter of the Migrant and Seasonal Agricultural Worker Protection Act provides:

> 500.80 Payroll records required.
>
> (a) Each farm labor contractor, agricultural emp1oyer and agricultural association which employs any migrant or seasonal agricultural worker shall make and keep the following records with respect to each worker <u>including the name, permanent address, and Social Security number</u>:
>
> (1) The bases on which wages are paid.
>
> (2) The number of piecework units earned, if paid on a piecework basis.
>
> (3) The number of hours worked.
>
> (4) The total pay period earnings.
>
> (5) The specific sums withheld; and the purpose of each sum withheld; and
>
> (6) The net pay.

U.S.C. §1821 (1983). The record itself was thus suspect. One looking at it could and would form conflicting opinions as to the status of the record.

Business records have been held inadmissible where the form of the record did not comply with governing statutory provisions. In Harwell v. Blake, 180 So.2d 173 (Fla. 2d DCA 1965) the defendant in a civil action arising out of an automobile collision moved for a new trial in part based on the fact that the trial court erred in failing to admit into evidence a purported copy of a traffic court docket sheet. The docket sheet stated the defendant was charged with 1) failure to have the vehicle under control and 2) failure to present a driver's license. The docket sheet also indicated the defendant pled guilty. The defendant had denied any plea of guilt. On appeal the Court held the trial. court should not have granted a new trial for refusing to admit into evidence a document which was not in admissible form. The Court explained:

> The only written notations on the record were the charges, the name of the defendant, the dates and the notation "sentence suspended." As it was presented to the trial court, it is patent that the docket sheet itself was ambiguous. One looking at it could, and would, form conflicting opinions as to the true status of the record. Although it wasn't argued to the trial court, it was also obvious that the form of the record did not comply with the provisions of section 92.10, Florida Statutes, F.S.A. At the very least, someone should have testified with knowledge of the record to explain

> the method of entries. As the record was presented to the trial court, it would have been error to admit it. Under these circumstances, the trial court should not have granted a new trial for its failure to admit into evidence a document which was not in admissible form.

Id. at 175.

Similarly, in this case as in Harwell, because of the incompleteness of the records and the form of the records which did not comply with the controlling statutory provisions, the trial court. did not abuse its discretion in denying admission of the records.

The fact that the records were facially incomplete and therefore unreliable supports the State's position that the records were not logically or legally relevant because the defendant failed to establish how a ledger sheet with the name "Enrique Juares" was connected to the defendant Henry Garcia and furthermore would show that someone other than the defendant committed the murders. ~~See Bla~~nco v. State, 452 So.2d 520, 523 (Fla. 1984) cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1984).

Appellant's argument that Enrique Juarez was the same person as Henry Garcia is inapposite, despite the fact the defendant used the alias of Enrique Juarez (different spelling)

(in Texas as established by prior convictions in the penalty phase). There was no corroborating evidence to establish the defendant also used this alias while working for Mr. Trevino. The defendant's friend and co-worker Felciano Aguayo, his mother Elizabeth Feliciano and co-worker Rufina Perez all testified that they only knew the defendant as Henry Garcia. (T.1251-52, 1277). Furthermore, even though there were no payroll records under the names of Henry or David Garcia, the defendant could have been using another alias other than Enrique Juarez. Another fact indicating the payroll record was not connected to this defendant was the last name "Juares" on the payroll record was spelled differently from the defendant's alias. Without a social security number, an address, a signature, or a pay stub in the defendant's possession, there was simply nothing to connect this piece of paper to the defendant.

Thus, under these circumstances, the trial court did not abuse its discretion in refusing to admit the documents due to the insufficient logical connection between the purported business record and the defendant, and the inherent unreliability of the record.

Assuming arguendo the business record should have been admitted, Appellant has failed to present any reasonable theory upon which the admission of the record would have tended to exculpate him. Blanco, supra at 523. The mere fact that the defendant was not paid for working in the fields on the date

that the migrant worker Mrs. Perez overheard him talking about the murders would not have exculpated him. Simply because there was no record of the defendant being paid does not establish that the defendant was not present in the fields talking to his friends.

II.

THE STATE PROPERLY PRESENTED THE DEFENDANT'S FALSE EXCULPATORY STATEMENTS AS SUBSTANTIVE EVIDENCE TENDING TO PROVE GUILT.

Appellant next contends that his convictions for first degree murder should be reversed because the prosecution introduced and then disproved an alibi which the defendant never raised. (AB at 46). Appellant further claims that this "strategy" misled the jury to believe that the defendant had the burden of proving his innocence and consequently violated defendant's fifth amendment right to silence relying upon Kindell v. State, 413 So.2d 1283 (Fla. 3d DCA 1982); Bayshore v. State, 437 So.2d 198 (Fla. 3d DCA 1983), and Brown v. State, 524 So.2d 730 (Fla. 4th DCA 1988). Unlike the present case, the defense in all of the cited cases was that the victims' misidentified the defendants. (AB at 42-44). The State maintains that Appellant has created a "red herring" issue by arguing a misapplication of the law to the facts in the present case.

It is well settled law that "evidence of a defendant's acts or statements calculated to defeat or avoid his prosecution is admissible against him as showing consciousness of guilt." Brown v. State, 391 So.2d 729, 730 (Fla. 3d DCA 1980) and cases cited therein; See Moore v. State, 530 So.2d 61, 66 (Fla. 1st DCA 1988). In Brown the court rejected the defendant's contention that where the State elicits from its own witness the

defendant's alibi, the State may not impeach that alibi unless and until the defendant adopts it or has an opportunity to deny or explain it. Id. The Court held this evidence was admissible to show that the defendant lied about his whereabouts on the date of the crime and hence as tending to prove the defendant's guilt. Id.

The evidence in the present case that the defendant gave two inconsistent exculpatory statements to Feliciano Aquayo and Detective LeClaire were introduced to demonstrate that the defendant's exculpatory explanation was false. The defendant's incredible explanation for having blood all over him on the morning of the murders was that the defendant was walking to Mr. Aguayo's house at 7:00 a.m. after he defended himself from an attack by a female and several men near a cornfield. He claimed he stabbed the female numerous times in self-defense.

Both Florida and Federal caselaw have established that a false explanatory statement may be viewed by a jury as substantive evidence tending to prove guilt and is admissible in the state's case in chief. See Brown, 391 So.2d at 730; (Evidence was not introduced to impeach Brown, but to show that Brown lied about his whereabouts on the day of the crime.); See also State v. Frazier, 407 So.2d 1087 (Fla. 3d DCA 1982) (Even if one of the defendant's two versions of stabbing of his wife was sufficient to warrant a dismissal of second-degree murder charge, the second inconsistent, but not thoroughly exculpatory,

version of the event would be evidence of the falsity of the completely exculpatory statement, not only justifying rejection of that statement, but affirmatively showing consciousness of guilt and unlawful intent.) United States v. Eley, 723 F.2d 1522 (11th Cir. 1984) (Wholly incredible explanations may form sufficient basis to allow jury to find that defendant has requisite guilty knowledge); United States v. Holbert, 578 F.2d 128 (5th Cir. 1978) (When a defendant voluntarily and intentionally offers an explanation and this explanation is later shown to be false, the jury may consider whether the circumstantial evidence points to a consciousness of guilt and the significance to be attached to any such evidence is exclusively within the province of the jury.)

Thus, introduction of the defendant's false statements through Feliciano Aguayo and Detective LeClaire was proper. Brown, 391 So.2d at 730. Moreover, the state's other witnesses were allowed to testify in detail regarding the police investigation to prove the defendant's story was false. The State simply proved the defendant was the perpetrator of these murders and established that the evidence was inconsistent with his "reasonable" hypothesis of innocence which was presented through the testimony of Feliciano Aguayo and Detective LeClaire. Accordingly, no error has been shown.

Appellant's argument is a misapplication fo the law to the facts of the present case. The common and pivotal fact which is

present in Kindell, Bayshore, and Brown and missing in this case is that the prosecutor adduced evidence of the defendant's failure to produce alibi witnesses at trial and later exploited that improper issue by arguing it to the jury during summation. See Kindell, 413 So.2d at 1285; Bayshore, 437 So.2d at 199; Brown, 524 So.2d at 731. Here, the prosecutor did not comment on the defendant's failure to call alibi witnesses. Instead, the state introduced the defendant's explanations as to why he had blood all over him to: 1) show that it was calculated to defeat or avoid prosecution; 2) to demonstrate that his incredible explanation was false; 3) to establish that the defendant had guilty knowledge; and 4) because in circumstantial evidence cases the state has the special burden of establishing that the evidence was inconsistent with any reasonable hypothesis of innocence. State v. Law, ___ So.2d ___ (Fla. July 28, 1989) [14 FLW 387, 388]. Accordingly, Appellant's second point is completely devoid of merit.

III.

NO PROSECUTORIAL MISCONDUCT OCCURRED WHICH WOULD RISE TO THE LEVEL OF A DUE PROCESS VIOLATION AND THEREBY DENY DEFENDANT OF A FAIR TRIAL.

The defendant also seeks reversal of his conviction on the basis of allegedly improper prosecutorial misconduct. He concedes in his brief however, that most of the alleged improper misconduct was not objected to at trial by defense counsel. (AB at **47).** Thus, the trial court did not have an opportunity to cure any alleged error with an appropriate instruction. Therefore, Appellant argues that the prosecutor engaged in a pattern of misconduct that resulted in fundamental error. (AB at **49).**

At the outset, the State maintains that the prosecutor's alleged misconduct during closing argument was not fundamental error and therefore was waived by defendant's failure to object and to request a mistrial. Craig v. State, **510** So.2d **857, 864** (Fla. **1987);** Groover v. State, **489** So.2d 15, **16** (Fla. **1986);** Brown v. State, **473** So.2d **1260, 1264** (Fla. **1985);** State v. Cumbie, **380 So.2d 1031, 1033** (Fla. **1980);** Steinhorst v. State, **412** So.2d **332** (Fla. **1982);** Clark v. State, **363** So.2d **331, 335** (Fla. **1978);** State v. Jones, **204** So.2d **515, 519** (Fla. **1967);** Joiner v. State, **382** So.2d **1357** (Fla. 1st DCA **1980).**

Nevertheless, the State will address each of the alleged acts of prosecutorial misconduct. Appellant argued that the

prosecutor's alleged improper comments fell into the categories of 1) inflammatory arguments by seeking sympathy for the state's witnesses and appealing to the emotions and fears of the jurors; 2) repetitive questioning of witnesses; 3) attacking the personal integrity of defense counsel, 4) criticizing defense counsel for attacking the credibility of the witnesses, 5) calling the non-testifying defendant a liar which resulted in either an improper comment on silence or an impermissible attack on defendant's character; 6) prosecutor distorted the evidence and 7) gave her personal opinion that the defendant was lower than an animal; 8) prosecutor gave her personal opinion of the consequences of a verdict in favor of the defendant, and 9) commented on facts not evidence.

The alleged emotional and inflammatory arguments came up during closing argument when the prosecutor reviewed the evidence and stated:

> You heard the testimony of Mrs. Flight, of Rose Flight who identified the bodies of Julia Ballentine and Mabel Avery, her friends, and I was sorry to have to put her in that position. However, the law requires that a legal -- requires a legal identification, so there's no question as to the first element of proving the crimes of first degree murder; that those are the bodies of Julia Ballentine and Mabel Avery. You can dispense with that.

(T.1660).

Although Mrs. Flight became emotional on the witness stand when she identified the victims' from a photograph, the prosecutor was required to present identification evidence of the victims. She was simply doing her job.

Appellant's reliance on Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982) is misplaced. In Harris, the prosecutor in closing argument not only referred to the victim's tearful breakdown on the witness stand, but also implied that such was due to tactics of defense counsel. In the present case, it is quite obvious that Mrs. Flight cried on the witness stand after identifying the victims' from gross photographs which can only be attributed to the defendant following the murder.

Likewise, reliance on Hill v. State, 515 So.2d 176 (Fla. 1986); Adams v. State, 192 So.2d 762 (Fla. 1966) and Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), ~~cert~~. ~~den~~., 386 So.2d 642 (Fla. 1980) is also misplaced. Unlike this case, in those three cases the prosecutors all made a "golden rule" argument by asking the jurors to place themselves in the position of the victim of the crime involved. Appellant has again argued a misapplication of the law to the present case.

Next, the defendant argued the prosecutor engaged in misconduct when she argued on rebuttal that she was "sick and tired of sitting there and listening to this assault on the State's witnesses." (AB at 49). The defendant quoted this out

of context and stopped in mid-sentence. The prosecutor continued:

> Now, I'm sick and tired of sitting there and listening to this assault on the State's witnesses, without grounds, with no response from defense, and I'm going to tell you why he's wrong in each and every count and, please, I invite you to rely on your own recollection of the testimony, because I believe when you do *so* and when you look at the exhibits you will find that Mr. Pitts was not entirely candid in his comments to you.

(T.1713).

First of all, the prosecutor's comment was a fair reply to defense counsel's argument that:

> People are not telling you the truth in this case. 1 think you need to go back there and you need to tell them somebody is not telling us the truth, and Feliciano, you are not telling us all the truth and Rufina Cruz, you are not -- Perez, you are not telling us all the truth and Elizabeth Feliciano, you are not telling us the truth and you are the only folks other than David Rhodes who is trying to show whether or not Henry Garcia was involved because David Rhodes told you he couldn't have been. . .

(T.1704-05).

Second, a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury. White v. State, 377 So.2d 1149 (Fla. 1979) The testimony of State witnesses Feliciano Aguayo, Elizabeth Feliciano and

Rufina Perez was uncontradicted and uncontroverted by defense counsel in this case. Accordingly, the prosecutor's comments in her rebuttal were proper.

The next baseless attack by defense counsel was that the prosecutor asserted that the defendant is accountable and in the same breath she complained that the persons who testified for the state were victims too[,]. . .vilified as witnesses. (T.1731) (AB at 49).

The comment read in the context in which it was made was proper:

> You have two choices here. You can either accept [defense counsel's] argument that every person who came before you on behalf of the State lied to you and you can find the defendant not guilty if you believe that, or you can accept what is the logical and only conclusion to be drawn in the evidence and the testimony in this case and that is the defendant is directly responsible and must be held accountable for the brutal murder and sexual battery of Julia Ballentine and Mabel Avery, because the person who committed those crimes is seated before you in this courtroom, and he has admitted the same to witnesses who have absolutely no motivation to lie and absolutely no motivation to come to this court but for the fact that they were victims too, and by an act of circumstances were in a position to know the truth, were in a position to have contact with that man and simply came before you and told you what happened, and because of that they have to be vilified as witnesses in this case. These people are without motive.

(T.1730-31).

First, it is proper for a prosecutor to refer to the evidence as it exists before the jury, White v. State, 377 So.2d at 1150, and then suggest the inferences to be drawn from the evidence. Second, the prosecutor's comment with respect to its witnesses was another fair reply to the defense counsel's accusation, without any impeachment of the witnesses, that most of the state's witnesses were lying.

The next alleged misconduct Appellant complains of is the prosecutor unfairly prejudiced the defendant through repetitive questioning. (AB at 50-51). However, Appellant has not cited any authorities which find this to be egregious misconduct warranting a new trial.

Appellant's most vehement complaint concerns the testimony of Feliciano Aguayo. The defendant told Mr. Aguayo on Sunday morning that he told his attackers, when he fought them off near the cornfield "I told them not to make me mad, I have an animal inside me.''(T.1296-97). Although when Mr. Aguayo testified he initially repeated the statement several times demonstrating how the defendant made the statement it was apparent from the prosecutor's request to repeat the statement that she could not hear the testimony due to noise outside the courtroom. (T.1297). Contrary to Appellant's assumption that the prosecutor was "disingenuous,''since the trial judge who was in the courtroom,

allowed the witness to repeat the testimony, the prosecutor's request must have been genuine or the court would not have allowed this.

Appellant also ironically contends the prosecutor attacked the personal integrity of defense counsel and thus improperly invited the jury to "try" defense counsel. (AB at 55-56). In Briggs v. State, 455 So.2d 519, 520 n.1 (Fla. 1st DCA 1984), the only case Appellant relied upon, there is a lengthy excerpt from the trial in which the judge admonished the prosecutor to quit accusing the defense counsel of impropriety. The trial court here did not give any admonition. The comments complained of here are again misstated and quoted out of context.

> [I] believe that counsel made certain representations to you as to what was to be believed that the evidence would show, and I believe that that representation that was made in the form of opening statement is an IOU to you members of the jury. It should tell you what it is that you expect to hear during the course of these proceedings and what it is upon which you would base your verdict.

(T.1656).

* * *

> The comments of the attorneys are not to be considered as evidence. They are merely to guide you in the acceptance and the understanding of the evidence as it has been presented.

> I would like to review with you certain points that defense counsel promised you in his opening statement.
>
> There are six salient areas that Mr. Pitts covered when he stood before you at the beginning of this trial, and he told you the evidence would prove to you or disprove to you these areas, and I'd like you to join with me and reflect on whether those representations have, in fact, been established by the proof.

(T.1656-57).

This argument was perfectly proper. Later, on rebuttal closing the prosecutor said:

> I take no exception to the fact that Mr. Pitts can make argument before you and examine the witnesses to his heart's content, but I believe you should take exception to misstatements of fact and misstatements of evidence, and I believe that you have to be the sole judges of that evidence and those attempts.

(T.1733).

Clearly, Appellant's accusations that the prosecutor invited the jury to "try" defense counsel are meritless.

The defendant's fourth baseless claim of prosecutorial misconduct is that the prosecutor criticized defense counsel for attacking the credibility of witnesses and suggested that defense counsel is not being honest with the jury. (AB at 57). Appellant has again cited to cases which do not apply to the

facts in the present case. Harris held inter alia, the prosecutor's comments in closing argument referring to the victim's tearful breakdown on the witness stand and implying that such was due to defense counsel's tactics deprived defendant of his fundamental right to a fair trial. Harris, 414 So.2d at 558. This is completely inapplicable to the present case. Here, the prosecutor objected to defense counsel calling the state witnesses a liar without attacking their credibility on cross-examination. Likewise, Ryan v. State, 457 So.2d 1084, 1089 (Fla. 4th DCA 1984) is inapposite where the prosecutor referred tc defense counsel as a "fancy attorney" and "out-of-towner" who was not being totally honest with you. The Court simply held resorting to personal attacks on the defense counsel is an improper trial tactic. Id. at 1089.

Appellant next contends that not only did the prosecutor "try" defense counsel, she threw in a claim that even defense counsel knew his client was a liar. (AB at 57). Appellant has again twisted the prosecutors words which were as follows:

> You are going to tell me it makes sense that instead of going directly home he goes all the way through Leisure City, past the Leisure Lounge, up through here and ends up at the home of Feliciano Aguayo simply to get a ride home when he was already there? Why doesn't Mr. Pitts address that story?
>
> You know why, because he doesn't want you to address it either because he knows that only one version can be the truth here, and you either have to accept the

> version of the State's witnesses or you have to accept the version of the defendant.
>
> The defendant's version is totally and completely without any reliability, without a grain of truth, with no foundation and no support, and he knows it, and so rather than address the version that his own client has supplied, he chooses to attack the little pieces here and there that he can try and make an issue of in this trial.

(T.1724).

In this Court's decision in Craig v. State, 510 So.2d 857 (Fla. 1987) cited by Appellant. the Court found the prosecutor did not exceed the bounds of proper argument and stated:

> When counsel refers to a witness of a defendant as being a "liar," and it. is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration. There was no impropriety.

Id. at 865.

In the other case cited by Appellant on this point, State v. Murray, 443 So.2d 955 (Fla. 1984) the defendant testified at his trial and denied that he ever possessed a firearm. Id. at 957. The prosecutor argued:

> I suggest to you, ladies and gentlemen, that here is a man who thinks he knows the law; thinks he can twist and bend the law to his own advantage and lie to you in court, *so* that he is acquitted and not sent to prison as a result or otherwise adjudicated in any fashion. *Murray,* 425 So.2d at 158.

Id. at 956. This Court held:

> Under these circumstances, the credibility of defendant as a witness was subject to attack in closing argument. While the prosecutor's comments were excessively pungent, the court admonished him upon objection and the remarks do not rise to the level of harmful error.

Id. at 957.

Counsel for Appellant also alleges the prosecutor distorted the evidence regarding defendant's statement to Feliciano Aguayo "I told them not to make me mad, I had an animal inside of me.." and then gave her personal opinion that the defendant was lower than an animal. (AB at 52-53). Again, the Appellant continues his tactic of taking the prosecutor's words out of context. (AB at 52). The prosecutor's argument was simply a fair comment on the evidence:

> Feliciano Aguayo told you that when the defendant explained to him the circumstances of that night he said, "I told them not to make me mad. I told them not to make me mad. When I get mad it brings out the animal in me."
>
> Well, I will show you a picture right now and I will tell you that

> what happened to Julia Ballentine and Mabel Avery that morning was certainly animalistic behavior, and I think its's an insult to the animal kingdom to have to even describe it that way, but there is no question that when you consider. the absolutely interlocking circumstances of this case, the fact that Feliciano Aguayo's home lies directly in the path of the home of the victims, the fact that that home is due west and the defendant is seen running from that exact direction, the fact that the distance of 15 miles separates his home from the Cuevo Bar, the fact that the home of the defendant is right here just east on Campbell Drive some miles closer to the home of Feliciano Aguayo, the fact that he says repeatedly, " I told them not to make me mad. I told them not to make me mad." You think he's talking about three men and a woman on a road outside of a corn field in South Dade County?
>
> Well, what he was telling Feliciano Aguayo in his own way was a confession to these murders and it is that confession to Feliciano Aguayo and that confession to Rufina Perez, "Te las chingaste?" "Yeah, but I'm not worried about them. They're already in hell," and the circumstances of these locations and the ridiculousness of that story, that is the evidence in this case against the defendant.

(T.1729-30).

The prosecutor was merely submitting her view of the evidence and the logical inferences which can be drawn. Appellant's allegation that the prosecutor gave her personal opinion that the defenaant was lower than an animal is simply devoid of record support. (T.1729). As quoted above, the prosecutor's

description of the murders of Julia Ballentine and Mabel Avery was a fair comment on the evidence. The following statement by this Court in Darden v. State, 329 So.2d 287, 290 (Fla. 1976) is equally applicable here:

> How is it possible to use language which is fair comment about these crimes without shocking the feelings of any normal person? The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes. The law permits fair comment. This comment was fair.

Appellant also argues the prosecutor gave her personal opinion of the consequences of a verdict which accepted the defense argument. (AB at 57). As before, the Appellant has taken the prosecutor's comment out of context and thereby distorted her argument. The record reflects the prosecutor said the following in response to defense counsel's argument that the State had no physical evidence against the defendant and therefore should not be convicted:

> If [defense counsel] could argue successfully to you that physical evidence is required before you can convict anybody of any crime, then I can assure you, ladies and gentlemen, that every single time a burglary is committed without fingerprints and no witnesses, every single time a murder is committed with circumstantial evidence, every single time any crime is committed without an eyewitness then there could never be a conviction, and if you bring in an eyewitness, then the argument is, well, who knows if they

> are accurate in their description, in their identification.
>
> What I'm saying to you, ladies and gentlemen, is simply that you follow the law. I'm not interested in comments from myself or Mr. Pitts. I'm interested in instructions from the Court and that's what the Court is going to tell you the law is.

(T.1715-16).

The prosecutor's argument here is unlike the arguments made in Gomez v. State, 415 So.2d 822 (Fla. 3d DCA 1982) and McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982). In those cases the prosecutors put fear into the jury's mind that if they vote for acquittal, the defendant will commit more crime in the community. In the present case, the prosecutor simply explained that in many types of criminal cases, only circumstantial evidence is presented and is sufficient for conviction. Thus, this contention, like all the others before it is completely devoid of merit.

Turning to the final alleged impropriety, Appellant essentially argues the prosecutor "testified" as to facts not in evidence. (AB at 54). The prosecutor was responding to defense counsel's argument that the defendant was not the person bragging in the fields whom Rufina Perez overheard. Defense counsel argued:

> First of all, he wasn't even there with that lady at all, because if he was, if he was, they would have brought someone in here to tell you

that Henry Garcia worked with Jose Guadalupe Trevino along with Rufina Perez, but they didn't do that, and they are looking for the truth? They are looking to convince you folks that this man committed these crimes.

Well, you tell them that if that's true, why didn't you bring someone in here from Mr. Trevino, that's who the boss was, to tell us, yes, Henry Garcia worked for me along with Rufina Perez, but, no, they say, "Let's go with circumstantial evidence. Don't give them nothing direct because that might confuse them and that might make them use the common sense. Give them a lot of bloody pictures and give them a lot of long distances showing circumstances that's not really direct and not really exact and make them mad as hell because once they get that way, they will convict anybody."

(T.1700).

In rebuttal the prosecutor argued:

[T]revino's records. Interesting, you heard a little conversation, some part of this trial about some records that Mr. Trevino allegedly kept. However, we brought out when 1 had a chance to talk to that witness, they were totally and wholly unsubstantiated records.

MR. PITTS: Objection, Judge,

MS. DANNELLY: And that they had no way --

THE COURT: Overruled.

MS. DANNELLY: -- to establish in any way, shape or form who worked that day or who didn't work that day.

> You heard [defense counsel], and please recall the question to Rufina Perez about work records and social security numbers. [Defense counsel] himself stood at the lectern and he said, "The leaders, they cheat, don't they?'' Remember that, because I remember that word. "They cheat, don't they?
>
> They sure do and that's why you can't get the records. I wouldn't say we didn't look for them. You better believe we looked for them. The police looked for them but they simply didn't exist, and that's why you didn't hear any records in this courtroom, even though you heard testimony from a woman who alleged to have some.

(T.1725-26).

First of all, like all of the other alleged improprieties this one was not preserved for appellate review. Defense counsel did not state any specific grounds for this objection or move for a mistrial at any time. Thus, any error was not preserved for appellate review. Craiq v. State, 510 So.2d 857, 864 (Fla. 1987); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Jones v. State, 466 So.2d 293 (Fla. 3d DCA 1985).

Secondly, this single comment did not deprive the defendant of a fair trial and therefore does not rise to the level of fundamental error. The standard of review is whether

> the improper remarks to the jury were so prejudicial that neither rebuke nor retraction will destroy their sinister influence.

Pait v. State, 112 So.2d 380, 385 (Fla. 1959); Ryan v. State, 457 So.2d 1084, 1091 (Fla. 4th DCA 1984); Peterson v. State, 376 So.2d 1230, 1234 (Fla. 4th DCA 1979); cert. den. 386 So.2d 642 (Fla. 1980).

Defense counsel's argument essentially was that the defendant was not working in the fields on the day Rufina Perez said she overheard the defendant bragging about murders. Although the defendant tried to establish through the alleged business records that he was not paid for working after a certain day in January, the trial judge refused to admit the records because they were unreliable. Defense counsel challenged the prosecutor to explain why they did not call any other witnesses to corroborate Ms. Perez' testimony.

The prosecutor responded in her rebuttal argument based on the evidence at trial. She reminded the jury of Rufina Perez' testimony on cross-examination that the leaders cheat. (T.1726). This supported the state's position that the records being offered by defense counsel were unreliable. However, the prosecutor then inadvertently told the jury about facts not in evidence, i.e., that the police looked for them but they did not exist. This was improper.

Surely though, this one comment was not fundamental error. Even if the jurors concluded that the defendant was not being paid to work in the fields that day, if was certainly plausible

that the defendant was in the fields with his friends that day. After all, he lived very close by in the South Dade Labor Camp. Furthermore, there was no testimony presented to contradict Rufina Perez testimony that she was sure the defendant made the statement. Accordingly, after reviewing the entire record and all the challenged comments which arguably could have influenced the jury in its determination of guilt, the comments individually or taken as a whole did not infect the proceeding as to deprive the defendant if his fundamental right to a fair trial. See Pope v. Wainwright, 496 So.2d 798, 802 (Fla. 1986).

IV.

THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT TO DEATH WHERE DEFENSE COUNSEL DID NOT OBJECT TO THE EXISTENCE OF A VICTIM IMPACT STATEMENT CONTAINED IN THE PRESENTENCE INVESTIGATION REPORT.

Appellant's final issue and only attack on the penalty phase of the trial is that it was error for the trial court to consider the victim impact statement found in the presentence investigation report when it sentenced the defendant to death. (AB at 60). The State maintains that no error has been demonstrated.

First of all, Appellant is procedurally barred from claiming relief under Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) by his failure to make a timely objection. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988); Carter v. State, So. 2d ___ (Fla. Oct. 19, 1989) [14 F.L.W. 525]. This Court has held except for fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. Id. citing Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Moreover, in Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988) this Court recently stated:

> [U]nder Booth, it is error to admit the VIS into evidence before the sentencing or advisory jury. Similarly, it is error for a sentencing judge to consider those

> statements as evidence of aggravating circumstances. However, where a judye merely sees a victim impact statement contained in a presentence investiqation report, but does not consider the statements for purposes of sentencing, no error has been shown.

Thus, even if defense counsel contemporaneously objected, no error has been shown since the sentencing proceedings and the trial judge's order reflects that even if the trial court saw the victim impact statement he did not consider it for purposes of sentencing.

Assuming arguendo any alleged error was preserved, this court in Grossman held the erroneous introduction of victim impact evidence is subject to harmless error analysis on a case-by-case basis. Grossman, 525 So.2d at 845.

Here, as in Grossman it is clear that receipt of the victim impact evidence was harmless error as the death penalty would have been imposed in the absence of that evidence. The salient distinction between Booth and this case is that here the sentencing authority which had presumably seen the victim impact evidence was a judge mandated by case law to give great weight to the jury's unanimous recommendation of death. Here, as in Grossman, contrary to Appellant's contention, the sentencing judge's written findings showed no reliance on the evidence in the victim impact statement. At the final sentencing hearing neither the State or defense counsel argued the persuasiveness

of the victim impact statement. (T.1879). Defense counsel did not object to the victim impact statement and admitted it was basically a factual PSI. (T.1881) Appellant's argument that the entire PSI was implicity incorporated into the written sentencing order is completely devoid of merit. Appellant has quoted language out of context from the court's written order. (AB at 62, R.289). As correctly albeit incompletely quoted in Appellant's brief, the court's written order states:

> This court has evaluated and considered at length all of the evidence and arguments which have been made in this case in reaching its decision. It is the decision of this Court that the death penalty is the appropriate sentence in this case. In support of this determination the Court makes the following findings of fact consistent with section 921.141(5).

(R.289).

Immediately following this language the order sets forth the four statutory aggravating circumstances:

> a) The defendant was under a sentence of imprisonment, by virtue of his federal parole at the time the capital felonies were committed;
>
> b) The defendant was previously convicted of a felony involving the use or threat of violence to a person in that he was convicted of armed robbery in the State of Texas.
>
> c) The capital felonies were committed while the defendant was engaged in the commission of both an Armed Burglary and an Armed Sexual Battery. Specifically, as to the Sexual Battery, he penetrated the sexual organs of victim Ballentine, prior to her death, with his sexual organ or an object.

> d) The capital felonies were especially heinous, atrocious and cruel. The victims were elderly widows, eighty-six (86) and ninety (90) years of age. Mabel Avery, eighty-six (86), was repeatedly stabbed, fourteen (14) times, and suffered numerous defensive wounds to her arms, legs and hands. Julia Ballentine, ninety (90), suffered twenty-eight (28) stab wounds to all areas of her body, including numerous defense wounds to her hands, arms and legs. In addition, she was sexually assaulted prior to her death. The presence of defensive wounds on both Julia and Mabel indicate that both ladies were conscious, aware of the vicious nature of the assaults and in great pain due to the type and depth of the wounds sustained. Dr. John Marricini, Medical Examiner, testified that some knife wounds extended to near five (5) inches in depth and entered vital organs such as the heart and lungs, thereby increasing their difficulty in breathing as they struggled in vain for their lives. The obvious knowledge of their impending deaths is another aspect of the heinousness of these crimes.

(R.289-290).

Addressing any mitigating circumstances the Order states:

> As to mitigating circumstances, the Court finds that there are no statutory mitigating circumstances which have been shown to reasonably exist. As to the non-statutory mitigating circumstances, the Court makes the following findings:
>
> > The defendant had been drinking beer the evening before the assaults.

> Defense counsel has argued the position that the case against the defendant consisted entirely of circumstantial evidence. After considering all the evidence that was presented, this Court does not find that this alleged mitigating circumstances reasonably exists.

(R.290).

Thus, the trial judge found four statutory aggravating factors all of which are valid and only one non-statutory mitigating factor. In view of this evidence, and the fact that the jury recommended death by a twelve to zero vote, the trial judge's discretion was relatively narrow. Accordingly, even if any error was preserved, it was clearly harmless. The death sentence therefore must be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the judgments of conviction and sentence of death must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **MICHAEL ZELMAN,** Attorney for Appellant, 2100 Salzedo Street, Suite 300, Coral Gables, Florida 33134 on this _____ day of December, 1989.

IVY R. GINSBERG
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