IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,251

DONNIE GENE CRAIG,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ANSWER BRIEF OF APPELLEE

****

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TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER AUTHORITY

PRELIMINARY STATEMENT

Donnie Gene Craig, was the defendant in the trial court and is the Appellant before this Court, therefore, he will be referred to herein as "Appellant". The State of Florida was the prosecution in the trial court and is the Appellee before this Court, and, therefore, will be referred to as the "Appellee: herein.

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Okeechobee County, Florida.

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

The following symbols will be used:

"R" Record on Appeal

"AB" Appellant's Initial Brief

STATEMENT OF THE CASE AND FACTS

The State accepts Appellants's statement of the case and facts as it appears in his initial brief, to the extent the statement represents an accurate, non-argumentative recitation of the proceedings below, and only to the extent necessary for the resolution of the issues raised on appeal. The State accepts the statement subject to the following emphasis and clarifications:

MOTION TO SUPPRESS STATEMENTS MADE TO SCHUMACHER AND STONE

After the Appellant's Okeechobee trial for the death of Clifton Ellis was over, Officer Schumacher and Corrections Officer Al Stone transported Appellant to Lake Butler from Okeechobee (R 50-51). Prior to transporting the Appellant the police had received an anonymous call which indicated that someone might try to get at Appellant. Schumacher asked Appellant if he knew of anyone who would make a call to this effect. Appellant said no (R **58**). While in transit a red Camaro did harass the patrol car. Schumacher sped up to try to lose the red Camaro. A trooper did pull Schumacher over. After finding out about the red Camaro the trooper left to catch up with that car. The tag number on the red Camaro indicated that the car belonged to a wanted person (R **60-61**).

During the drive to Lake Butler, Appellant began to talk about getting the death penalty and how he had wanted to testify in that case (R **51-52**). After talking about the fact that he had

been sentenced to death, Schumacher asked the Appellant how the bullets had gotten underneath the victim, Clifton Ellis. Appellant explained how the shells got under the body and then was quiet for a while (R **53**, **54**, **64, 66, 68).** The Appellant then began to speak voluntarily. Schumacher could not shut him up. He talked like he had "diarrhea of the mouth" (R **54**). Appellant talked about the incident in both Okeechobee and in Palm Beach County. Appellant did not appear to be under any stress or strain (R **55**).

Schumacher and Stone did not ask the Appellant any questions to get him to talk. No threats were made. No coercion was used. No pressure of any kind was used. He was not being interrogated (R **53, 56**, **57**, **65).** Neither officer asked the Appellant any questions about the Palm Beach County case (R **68).** When the party finally got to Lake Butler Officer Schumacher wrote down the incident to the best of his recollection (R *66).*

Appellant testified that Schumacher told him about the anonymous phone call and informed Appellant that the Appellant would be the first to get it if any attempted was made to snatch him. Appellant took that as a threat (R **79**). In addition Schumacher was driving very fast on a heavily foggy road in the morning. This he also considered as a treat to his life (R **82, 88).** The Appellant assumed that the reason why they were driving so fast was to scare the Appellant into making a statement (R **82,** 88, **89).**

According to Appellant, Schumacher asked the Appellant if he was "fucking Laura Mayo." Then the two officers continued to ask Appellant yes and no questions to which Appellant responded because he was in fear of his life (R **82, 83, 84).** Appellant did not initiate the conversation nor was he advised of his rights (R **81).** The officers asked him about some other people like Pete Andrews but he can't remember what was said. He does know that they got to Lake Butler an hour earlier (R **84, 85).**

Motion denied (R **99).**

On August **17, 1988** the defense counsel filed with the trial judge a motion to draw venire from all Palm Beach County. The State did not receive this motion until August **18, 1988,** Thursday, the day it was argued. The trial was set for the following Monday, August **22, 1988** (R **154).** The trial court noted that other attorneys have requested a county wide jury and have received it. However, this motion was filed in an untimely manner. Therefore, it was denied (R **155, 157).**

A motion was filed again at the last minute asking the court to suppress the statement of the Appellant taken by the Okeechobee police. The defense called Officer Eugene O'Neill to the stand. He testified that on April 13, **1987** they arrested the Appellant for violation of probation. Appellant was asleep when the police officers arrived. Detective LaFlam was with him (R 162). While the officers were waiting for the Appellant to dress Appellant's mother handed Det. LaFlam Appellant's shoes (R 166). LaFlam noticed that the shoes had the same pattern on them that

the police was looking for as evidence found at the scene of the murder of Ellis (R **168-172).**

Appellant was taken to the police station and advised that the police wanted to talk to him abut the death of Ellis. He was even told in the police car to think about the death of Mr. Ellis on the way back to the station (R **176, 178, 189).** At the station the Appellant was read his Miranda rights from a standard rights form (R **179).** Appellant understood the Miranda right and did not indicate that he wanted an attorney or that he did not want to talk (R **182).** In his statement to the police Appellant denied killing Ellis. Fifteen to Twenty minutes into the statement, the Appellant decided not to talk anymore and requested an attorney. No more questions were asked at that point (R **188, 191, 192).** The Appellant was arrested for the murder of Ellis after the shoes were identified **as** matching the footprint in Ellis' house, combined with the inconsistencies in Appellant's statement and the palm print found in Ellis' car (R **180, 181).** The motion to suppress Appellant's statement and **the** shoe identification was denied (R **195).**

After voir dire the defense struck a black juror using one of his preemptory strikes (R **674, 675).**

The jury trial began August **22, 1988,** on Monday.

Detective Edward Johnston was called to the stand. He testified that he and his partner, Lt. Conklin, arrived at the residence of Thomas Sisco (R **728).** The body **of** Thomas Sisco was found on the floor in the fetal position near the broken out

panel of the sliding glass door with the head toward the kitchen area and the feet toward the dining room. He was clad in a terry cloth bathrobe (R **734, 737).** On the living room floor was a spent brass casing and a damaged projectile. In the kitchen/dining room area, adjacent to the body was another spent brass casing (R **738).** There was a bloody portable phone in the dining room kitchen area. Underneath the left side of the cheek of the victim was the cover of the battery portion of the portable phone (R **739, 742).** In the bedroom was a disheveled wallet with no cash in it (R **746, 747).** Sgt. Perez recovered a box that had contained a Lucien Picard watch (R **754, 764, 765).** This lead to the questioning of Nathaniel Brice, Laura Mayo, Cheri Mayo and Wallace Luttermoser (R **768).** A photographic line-up was prepared and all of the above named witnesses picked out the Appellant as the man who sold them the watch (R **769, 774-775).** The investigation also revealed a gold colored metal lighter was missing. Also credit cards were missing; including, a Teltec card. The Teltec card was given to the police on April 20, **1987** at **8:45 A.M.** by Laura Mayo (R **775-777).**

Laura Mayo testified that the Appellant came to her apartment late one night at the end of March in order to buy cocaine (R **812, 813, 815).** He gave Cheri Mayo, her daughter, a hundred dollar bill to buy some cocaine. Cheri actually made two trips that night in Appellant's car. He also gave Laura a hundred dollar bill to buy beer and cigarettes (R **816-817).** According to Laura Mayo, Appellant's craving for cocaine was so

vociferous that he would have sold his mother to get more (R **818**). After he ran out of money, Appellant brought out a Lucien Picard, **14** karet gold, **17** diamond watch to sell for cocaine. After he traded the Lucien Picard watch for cocaine he tried to use these credit cards (R **822**). Earlier in the evening he had told Laura that the real reason he had come by was to get her daughter Cheri Mayo, to go with him to drop some marijuana in Tennessee and he would pay her **$200.00** to keep him company. The marijuana was in the car (R **822**). Laura took the credit cards in order to steal marijuana from Appellant. She knew it was too late at night to use the credit cards to get cash for more cocaine. So she decided to take the reefer. Wally and Laura checked out the car (R **823**). She found a gun in the glove compartment and some checks which interested her since she was a professional check writer. She remembers that the checks had Okeechobee City on them. She also found a spent shell casing in the front. She threw the spent shell casing into the back seat (R **824, 825**). She identified State's exhibit **13** as the car that she and her daughter drove around in that night. She also identified Thomas Sisco's gold lighter as the lighter that the appellant had given to her daughter that night for her birthday. Late that night the gun appeared in the apartment. The gun was sold by Nathaniel Brice (R **827, 828**). About 2:00 to 2:30 in the morning the Appellant made a phone call from the pay phone near the apartment. She heard the Appellant say, "Well, I'll be there about 11:00 o'clock tomorrow morning, but I'll be there" (R **829**).

Laura Mayo testified that she destroyed the credit cards that the Appellant gave her but later found the Teltec card in the apartment. She testified that the Teltec card came from the Appellant (R **830-831).**

On cross examination Laura Mayo stated that the car she drove is the car in the State's exhibit **13.** Appellant had told her that he had put up a thousand dollars and his Dad had put up a thousand dollars in order for him to get the car (R **864).**

Nathaniel Brice testified that when he went to the apartment he saw Laura Mayo, Cheri Mayo, Babyface, and Wally. The were all aping or wanting more cocaine. Mostly it was Babyface who was aping (R **874, 875).** Babyface offered a watch in exchange for the cocaine. He traded the watch for two rocks (R **875-876).** He first saw the pistol when the Appellant brought it into the room (R **904).** Babyface also traded a pistol for cocaine (R **879, 889).** The watch he gave to Danny Wall to sell in a pawn shop and the pistol he sold to Jamaica Red (R **877, 883).** When the police showed him the photo line-up he picked out the Appellant as the man who gave him the watch and pistol (R **882).** He also testified that Babyface is Donnie Craig (R **916).** Brice also identified Ellis' car as the car he saw Appellant driving that night (R **873, 883).**

Daniel William Wall testified that Nathaniel Brice had given him a watch to pawn, which he did. He pawned it for **$250,** and the return of his bicycle (R **928-930).** The date on the pawn ticket is **3/31/87** at **2:15** P.M. (R **946-947).** On March 30th he saw

Cheri Mayo driving a car on Hibiscus Street. She made two deals with Wall that night. She first bought **$20** to **$30** worth of cocaine then later came back for some more (R **948, 949, 951, 953, 954).** He testified that it was about **9:00** when he first saw Cheri Mayo (R **949).**

James Wilburn, Jr. testified that he is a sergeant with the West Palm Beach police and that he worked with Sgt. Perez on the case involving the homicide of Thomas Sisco (R **211).** When he arrived at the victim's house it was determined that all the doors and windows were secure. There were no pry marks anywhere (R **218-221, 1159).** Upon entering the living room Wilburn observed a casing that was on the carpet near the door (R **223, 1165, 1175).** It was a **.25** Gecro caliber spent casing. Nearby this first casing was a projectile or bullet (R **1155, 1165).** The next item Wilburn observed was the casing at the edge of the dining room and the living room. It was the same brand and caliber as the first casing (R **225, 226, 1156, 1166).** Next to the edge of the living room/dining room there was a chair with blood on it. The sliding glass door was broken out and there was a hole through the curtains which indicated that something passed through the curtains from the inside of the house to the outside of the house (R **229, 232).** **On** the carpet next to the bloody chair was a third spent casing. This was close to the area the victim was found (R **235, 1157, 1167).** In the area of the fireplace, which is in the living room, Wilburn observed the ceiling and the wall adjacent to the fireplace, a fresh

indentation in the paint, and the ceiling area. It appeared that a projectile had hit the block wall, then deflected upward, striking the ceiling, and then making a U-shape curvature coming back and landing in the living room floor (R 232-233, 1166). The victim had a wound to the back of the head and a braze mark on his head. There were some major scrape marks on his knuckles on his left hand (R 240, 241). There was also a white plastic covering that goes over the battery box of the cordless telephone stuck to the victims forehead underneath the body (R 241, 250 251). The bloody telephone was on top of the glass dining room table (R 241, 1168). Outside the house, in line with the hole in the glass sliding door, Wilburn found an impression on the concrete block wall which indicated a fresh impact point. He was not able to locate any remains of a projectile anywhere (R 255, 1169). In the master bedroom the detective found a wallet with the contents spread out on the dresser top. There was no currency in the wallet (R258, 259). Detective Wilburn also identified the watch box which was found in the top drawer of the five drawer dresser (R 1161, 1172).

Mark Steven Bennet testified that he saw the victim, Thomas Sisco, leaving Rooster's, a gay bar, at 11:10 P.M. the night of March 30th. He left the bar at 11:30 P.M. and drove by the victim's house about 11:35 P.M. He was going to stop but there was a torrential downpour which prevented him from stopping (R 1204-1205). No one left the bar with the victim (R 1212). He identified the gold lighter that belonged to the victim (R 1217).

Delores Jean Andrews testified that her phone number is 813-783-9304 and that she lived in a mobile home parked called Town and Country (R 1226). She knows the Appellant (R 1227). She remembers giving her March phone bill to the police which she identifies for the court (R 1228-1229). The phone bill indicates that on 3/31/87 at 1:15 A.M. she received a collect phone call from West Palm Beach (R 1232). She also remembers giving a sworn statement to the police regarding the circumstances surrounding the phone bill and the phone call (R 1233). In that statement she told the police that she received a collect phone call from the Appellant about 1:00 in the morning on Tuesday, the 31st. After the phone call of March 31st, 1987 the Appellant did come by her place in the morning hours around 10:00 or 11:00. In her statement she says that the Appellant was wearing Reebok tennis shoes (R 1245, 1246).

On cross Delores Andrews stated that she saw Appellant on or about the 31st of March. That she took him back to where he had left his car but it was not there. She testified that she saw the car and it had two or three different colors (R 1252, 1254). State's exhibit 13 was not the car she saw (R 1254).

Gerald Styres is a forensic firearms and tool marks examiner who examined the fired bullets, cartridge casings and shot shells and components (R 1256). He testified that all of the shelling casings from the house and the one found in the car had been fired from the State's exhibit number 1, which was Ellis' Raven caliber .25 semiautomatic pistol (R 1262-1266).

Styres also examined two undischarged caliber .25 cartridge casings that were found under the body of Clifton Ellis, the victim in the Okeechobee case. He found that they had been worked through the action of the Raven semiautomatic which belonged to Ellis and was traded by the Appellant for cocaine (R 1266, 1310).

Detective Sergeant Francis O'Neill testified that he responded to a call regarding a homicide in Okeechobee of one Clifton Ellis on March 31st, 1987 (R 1314). There were no signs of forced entry. The master bedroom was ransacked. The telephone wires had been cut. There were bloody footprints on the floor. A bloody knife was laying just above the head of the victim, Clifton Ellis. Ellis' wallet was empty of any currency or credit cards (R 1315, 1316, 1319). There were numerous stab wounds in Ellis. It was definitely a homicide type killing (R 1320). Later that day the victim's car was found at a bar on 441 South, named Cricket (R 1321, 1322). O'Neill identified Ellis' car in State's exhibit 12-14 (R 1322). The ownership of the car was determined by the VIN number (R 1327). The Town and Country Mobile Home Park is right behind the Cricket Lounge where the vehicle was found. There are no other residential areas other than the Town and Country Mobile Home Park in the immediate vicinity (R 1328).

While the police were picking up the Appellant at his mother's house, the mother handed Detective LaFlam the Appellant's shoes. LaFlam looked at the soles of the shoes and

the police advised the Appellant that the shoes were being confiscated. The pattern on the bottom of the shoes was similar to the bloody shoe print that the police found on the song book at Ellis' residence.

At the police station the Appellant was read his Miranda rights (R **1333, 1337-1339**). Appellant signed the Miranda rights form, waiving his rights (R **1334**). Appellant appeared to understand his right and to freely and voluntarily cooperate (R **1339**). Appellant said that he had not driven Ellis' car, but he had been in it about a year and a half previously. Appellant said that the Reebok shoes were his and that he had not loaned them out to anyone (R **1342**).

Detective O'Neill testified that underneath Ellis' body were two live **.25** caliber cartridges (R **1343, 1345**).

On cross examination, the Detective stated that the Rights waiver form was changed by him to read "may" at the time he read the form to Appellant (R **1353**). He also said something to the effect that it would go easy on him if he cooperated (R **1355, 1356**). But he never indicated that he would try to see that the Appellant did not get the chair for this murder or that he would tell the appellant that he would make it easy on the appellant (R **1355**). At no time did he indicate that they were talking off the record (R **1356**). O'Neill testified that he followed the mandates of Miranda. (R **1357**) O'Neill told the court that he did not tell Appellant that O'Neill would go easy on him if Appellant cooperated. What he would have told him is

that O'Neill would tell the State Attorney of his cooperation and that Appellant did cooperate (R **1357, 1358).**

After O'Neill's testimony the Court read the jury instructions on statements made by the defendant. That the jury must determine if the statement was freely and voluntarily made (R **1366, 1367).**

George Miller testified that he is one of nine certified latent Fingerprint examiners in the United States **(R 1370).** He responded to the scene at the Ellis' residence on March 31st, **1987** (R1372). He testified to the general conditions of the residence corroborating O'Neill's testimony (R **1372, 1379).** Later he examined Ellis' car and found in the upper right-hand corner on the glass surface of the interior or rear view mirror a latent print (R **1383, 1386).** The Detective testified that the latent print was placed there by the Appellant's right hand when he reached up to adjust it so he could see out the rear view mirror. Based on the Detective's experience the latent print was placed there by someone sitting in the driver's position (R **1398).** The latent print found on the rear view mirror of Ellis' car belonged to the Appellant **(R 1387).**

There was also a spent casing found in the back seat of the car (R **1399).**

George Miller compared the Reebok tennis shoes belonging to the Appellant to the bloody shoe print or impression on the song book cover that was found in the Ellis' residence on **3/31/87 (R 1404-1406).** Miller concluded that the bloody shoe print came form the Reebok shoes belonging to the Appellant (R **1421-1424).**

Detective LaFlam testified that the Reebok shoes were handed to him by the Appellant's mother (R **1481).** He had been looking at the bloody shoe impression found in Ellis' residence and recognized it on the Appellant's Reeboks (R **1483, 1486).**

Deputy Sheriff Schumacher testified that he and Corrections Officer Al Stone were transporting Appellant to Lake Butler when Appellant started talking to them. No questions were asked of the Appellant, and the Appellant was not coerced into talking. Appellant was not being interrogated (R **1492, 1495, 1505).** Appellant began to talk about both incidents in OKeechobee and Palm Beach County. He talked for better part of an hour to an hour and a half (R **1495).** Appellant said that he and Pete Andrews had gone inside Ellis' residence. Pete Andrews was guarding Ellis in the bedroom. Appellant heard a scuffle. Ellis had Pete Andrews by the hair. Ellis had pulled a gun from some place under the pillow or mattress. Appellant went to assist. At that point Ellis was stabbed and fell to the floor (R **1496).** Following that the Appellant and Pete Andrews went to Palm Beach and met with some other people. They went to West Palm Beach to buy some cocaine. When they ran out of money, Appellant told the people at this cocaine party that he knew Thomas Sisco because he had worked for Sisco. Sisco had a lot of money. So they decided to rob Sisco. Appellant knocked on the door. When Sisco opened the door they rushed in and someone shot Sisco. He does not know who shot Sisco with the **.25** caliber automatic (R **1497).**

Schumacher testified that he did ask the Appellant how the bullets had gotten under the victim Clifton Ellis (R **1515, 1519).** After that no one could shut him up (R **1524).**

Defense counsel objected to the State calling Styres regarding the photomicrographics of the extractor marked for identification regarding the undischarged cartridges. A Richardson Hearing was held (R **1529).** At the Richardson hearing Styres testified that Richard Dale Carter, Appellant's expert witness, was shown all the evidence pertaining to this case on August **23, 1988.** Carter a forensic firearms examiner, examined all the evidence including these pictures for the Appellant (R **1530).** The State did not even know about these photographs until after the defense expert Carter had examined them (R **1531, 1533).** Styres does not remember when he told the State about the photographs (R **1531, 1532).** The prosecuting attorney stated that the first time she had ever heard about these photos was when Styres mentioned them on the stand (R **1532).** The defense counsel stated that Carter did not mention the photographs to him and as far as he knows the State did not know of these photographs either. The court noted that the testimony of Styres on the stand and the testimony of Carter, per the defense counsel's motion, regarding these photos, are the same. In other words the undischarged bullets were worked through the Raven pistol belonging to Ellis (R **1533).** The trial court further noted that if he allowed the defense to get another expert and that expert agreed with Styres and Carter when is it going to stop? (R **1536)** The Trial court overruled the objection to the photos (R **1537).**

Richard Dale Carter was called to the stand by the State. He is a forensic firearms examiner. He met with Styres to examine a semiautomatic Raven pistol, four expended cartridges, two unfired cartridges, and two .25 caliber bullets (R 1545, 1548). State's exhibit number 3 are the two unfired cartridges that Carter examined and he also examined the photographs that Styres had taken regarding these two bullets. He examined these unfired bullets and compared them to the Raven firearm as well as the four expended cartridges: three found in the Sisco's house and one that was found in Ellis' car. In this expert opinion all of the spent casings and projectiles came were fired from the Raven firearm identified as belonging to Ellis. In addition the unfired bullets also came from the Raven pistol belonging to Ellis (R 1550-1552-A).

Detective Guillermo Perez testified that the Southern Bell pay telephone near the apartment of Laura Mayo has the number (305) 655-9843. He identified the Southern Bell telephone number as the same number recorded in the phone bill belonging to Delores Andrews (R 1561).

Dr. Marraccini, the deputy chief medical examiner, testified that, based on his expert opinion, Sisco was first braised by a gunshot in the front of the scalp. As Sisco retreated, he was then shot in the back of the head (R 1604-1605). Upon receiving the gun shot to the head Sisco would have immediately dropped to his fee and lapsed into unconsciousness (R 1603, 1605, 1607). The only reasonable sequence of events is

that Sisco received the braise on his forehead first and the lethal shot second (R **1605).**

Sisco had bruises on both hands, more on the left hand than the right. Some of these were consistent with fresh wounds occurring at or about the time of his death, and others appear to be hours or perhaps days old. These wounds are consistent with defensive injuries and it is very unlikely that these wounds were self-inflicted, based on the entirety of the scene and the autopsy (R **1605, 1606, 1607).**

The time of death is not very accurate from a medical vantange point of view because Sisco could have lingered on in an unconscious state preventing roger mortis for sometime after the gun shot wound (R **1611).**

There was no cocaine found in the victim's system beyond a reasonable doubt (R **1624).**

Donnie Gene Craig, the Appellant, took the stand on his behalf. On direct he testified that he took Clifton Ellis' car to West Palm Beach to visit Cheri Mayo, Laura Mayo's daughter. Appellant saw Cheri at the McDonald's parking lot. He told her it was his uncle's car. They smoked some cocaine. It was about **9:00** in the evening. They then went to her place and arrived about 9:30. At the Mayo's place he smoked some more cocaine. About **9:45** P.M. he and Cheri went to Tom Sisco's residence. He let himself in with his personal key, took the watch, and left. He later gave the watch to Cheri Mayo. He admitted making a phone call to Okeechobee (R **1686-1690).**

On cross examination, Appellant stated that he did know Ellis and had been to his house. He also knew Delores Andrews and had gone to her house on March 31, 1987. He arrived at her house at 7:00 A.M. not 10:00 A.M. as she had testified (R 1692-1693).

He does not remember if he owned Reebok tennis shoes in March, 1987. When the police came to pick him up he did tell his mother to get his shoes but she did not do it. Fifteen cops came to his residence to arrest him (R 1693-1696). The police did not say they were taking his shoes as evidence (R 1698). He admitted that the police did not drag him out of bed. He got out on his own (R 1699).

At the police station, Appellant admitted that the Miranda rights were read to him, that he signed the card, that he understood his rights; especially, the right to an attorney (R 1700). He did talk to O'Neill for awhile before he invoked his right to an attorney (R 1701). Prior to reading the Miranda rights, Appellant was informed that he was a suspect in a murder (R 1701). He did not really tell the police anything (R 1707). He does not know if the police were playing good cop/bad cop routine (R 1708).

He admitted calling Delores Andrews at 1:15 A.M. on March 31st. However, he does not remember if he drove the car to her place or had someone drop him off or if he walked to her place (R 1704).

The appellant does not know anything about Ellis' gun (R **1706, 1709).** He did take Ellis' car to West Palm Beach. If he got in Ellis' car he may have adjusted the rear view mirror (R **1710, 1711).** He picked up Ellis' car in the late evening hours of March **30, 1987** (R **1711).** He does not remember if he borrowed the car from Ellis. He finally refused to answer any questions regarding the Okeechobee trial. He refuses to answer the State's question on how he got Ellis' car (R **1716-1717).**

When he arrived in West Palm Beach he saw Cheri Mayo walking down the street near the McDonald's (R **1709).** When Cheri Mayo and Appellant went to Sisco's house he did not knock because he had a key to the house. The security chain did not cause him any trouble. He used the key, opened the door and walked into the house. Cheri did not go inside with him. It was **9:00** or later. He was not concerned that Sisco would be a little upset that he had entered the house uninvited (R **1712-1714).** Nor was his concerned that Sisco would notice the watch missing (R **1729).** He did not go to Sisco's house just to rob him (R **1720).**

He was smoking cocaine that night but not out of the Sprite can found in Ellis' car (R **1729).**

He has never seen the gold lighter belonging to Sisco and he did not give it to Cheri Mayo. Nor did he give her the Teltec card (R **1717, 1736).** Finally, the Appellant denies ever making a statement to Deputy Sheriff Schumacher and denies everything in the statement (R **1718-1722).** When Schumacher was driving him to Lake Butler, he first states that he was not in fear for his

life. After awhile Appellant changes his mind. Schumacher was driving so fast that the was in fear for his life (R **1724-1724**). Schumacher and Stone were interrogating him but he just answered yes and no (R **1726**).

When the Appellant drove back to Okeechobee he does not remember if he parked Ellis' car outside the Cricket Lounge and walked to the Town and Country where Delores Andrews lives (R **1735**).

A juror asked the question: How did he have Mr. Ellis' car? Appellant stated he did not want to answer that question (R **1738, 1740**). After five minute consultation with defense counsel, Appellant again stated that he was not going to answer that question (R **1742**).

SUMMARY OF ARGUMENT

1. The murder of Clifton Ellis in Okeechobee two hours before the murder of the victim in West Palm Beach and the buying and selling of cocaine after the murder of the victim in this case was not Williams rule evidence. This was inseparable crime evidence so inextricably intertwined with the crime charged that an intelligent account could not have been given without reference to the other crime and is admissible under Section 90.402 as relevant evidence.

2. Appellant made one very weak objection to the lack of a county-wide jury venire two day before the trial after he had failed to receive the continuance that he had requested the week before at motion hearing. Appellant did not renew this objection even in his motion for a new trial after the trial. The issue of the jury districts has been around for years. Had the Appellant made a timely objection the State could have cured the defect. The issue has been waived and was an untimely motion.

3. The statement the Appellant gave to the police in Okeechobee was freely and voluntarily given after his Miranda rights were read to him and waived. Furthermore, there was no police coercion.

4. The statements the Appellant made to Deputy Sheriff Joe Schumacher while Appellant was being transported to Lake Butler after his conviction and sentencing for the murder of Clifton Ellis were spontaneous statements. No questions were asked of the Appellant and the Appellant was not threatened or coerced into talking.

5. The evidence indicated that the Appellant's shoes were handed to Officer La Flam by his mother. The police officer confiscated the shoes when he recognized that the soles of the shoes matched the shoe print left at the scene of Ellis' murder. This was seizure incident a valid arrest.

6. A statement of the particulars is within the discretion of the trial court and need not be granted when the information sufficiently enables the Appellant to prepare his defense.

7. The state's expert witness testified that the live cartridges found under the body of Clifton Ellis had been worked through the action of the murder weapon. The photographs corroborated that testimony. On cross examination by the Appellant the state's expert testified that he had made these photographs. The Appellant's expert had also examined these photographs when the Appellant had sent his expert to the state's expert's officer to examine the evidence. Even the Appellant's expert agreed with the state's expert that the live cartridges had been worked through the murder weapon. The Appellant struck their expert from the defense witness list. He was then called as a state witness. There was no discovery violation and no prejudice incurred to the Appellant.

8. The Appellant did not specifically ask that a jury instruction on other crime evidence be given to the jury. Nonetheless, these were not other crimes but relevant evidence as explained above.

9. Testimony regarding the telephone number on the public telephone that existed close to apartment building where the Appellant had gone after he murdered Tom Sisco is not hearsay.

10. The jury found the Appellant guilty of robbery and murder which warrants a finding in aggravation that the murder was committed during the commission of a robbery.

11. The victim in this case was well acquainted with the Appellant. The Appellant killed him to avoid detection. In order to make sure the Appellant did not tell any one while he was dying he removed the portable phone from the dying man's hand. The record supports a finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The victim was a court official.

12. The record supports the fact that the Appellant drove an hour and a half to two hours to reach West Palm Beach. He killed a man in order to get the car to drive to West Palm Beach and to get the gun to commit the crime. He tested the gun on his way to West Palm Beach which was proven by the spent casing found in the front of the car. During the penalty phase of the trial the Appellant testified that "nothing clouded his mind" and that he was not under the influence of drugs when he went to the victim's house. The record supports the finding that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner with out any pretense of moral or legal justification.

13. There was no evidence submitted that supported the contention that the Appellant was mentally retarded. Even the Appellant testified that he knew right from wrong.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ALLOWING EVIDENCE OF OTHER CRIMES.

The Appellant claims that he was denied a fair and impartial trial by the introduction of evidence showing he was involved in the murder of Clifton Ellis and in the buying and selling of cocaine. The State disagrees.

Under Florida Statute Section 90.404(2) evidence of other crimes, wrongs, or acts is admissible when relevant as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity. Evidence of collateral crimes may be admitted to establish the entire context out of which the criminal conduct arose. Smith v. State, 365 So.2d 704, 707 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981); Jamison v. Wainwright, 719 F.2d 1125 (1983). Inseparable crime evidence or evidence of a crime which is so inextricably interwined with the crime charged that an intelligent account could not have been given without reference to the other crime is admissible under Section 90.402. Austin v. State, 500 So.2d 262 (Fla. 1st DCA

1986). Inseparable crime evidence is admissible for the same reason as other evidence which is a part of the so-called "res gestae" it is necessary to admit the evidence to adequately describe the deed; it is simply relevant evidence. Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986).

The following facts were adduced at trial:

Appellant admitted in his testimony that he drove Clifton Ellis' car from Okeechobee to West Palm Beach on March 30, 1987 (R 1686). He admitted to going to Thomas Sisco's house in Ellis' car and arriving there about a quarter to 10:00 P.M. (R 1688). He admitted to taking Sisco's watch and giving it to Cheri Mayo (R 1688, 1690). Appellant admitted calling Delores Andrews at 1:15 A.M. on March 31st (R 1704). He also admitted to driving back to Okeechobee in Ellis' car (R 1735) and arriving at Delores Andrews' mobile home in the morning on March 31st (R 1693). Appellant refused to answer any questions regarding how he came to possessing Ellis' car (R 1716, 1717, 1740, 1742).

Ellis' car was found on March 31, 1987 at the Cricket Lounge which is within walking distance of the Town an Country Mobile Home Park where Delores Andrews lives (R 1321, 1322, 1328). A latent print found on the right hand corner of the interior or rear view mirror belonged to the Appellant (R 1387). It was placed there when the Appellant adjusted the rear view mirror from the driver's seat (R 1398). A spent bullet was found in the back seat (R 1399). This shell had originally been found in the front seat (R 824, 825). It is presumed that the spent casing

was ejected from the semiautomatic Raven pistol when the Appellant tested the gun on the way to West Palm Beach (R **1765).**

A bloody shoe print found at Ellis' residence belonged to the Appellant's Reebok tennis shoes (R **1421-1424).** Appellant admitted to Deputy Sheriff Schumacher and Corrections Officer Al Stone that he was at Ellis' residence when Ellis was murdered (R **1496).** He also admitted to Schumacher that he was at Sisco's residence when Sisco was murdered (R **1497).**

Gerald Styres, a forensic firearms and tool marks examiner, compared the spent casings and projectiles found at Sisco's residence and the spent casing found in Ellis' car and determined that they were all fired from Ellis' Raven caliber **.25** semiautomatic pistol (R **1262-1266).** Two unfired bullets found underneath the body of Clifton Ellis was also compared to Ellis' Raven Caliber **.25** pistol. It was determined that they had been worked though the action of Ellis' pistol (R **1266, 1310).**

Laura Mayo testified that she saw Ellis' pistol in the glove compartment of the car that Appellant drove to her apartment. She identified Ellis' car as the car Appellant was driving that evening (R **864).** Ellis' gun was traded by Appellant for cocaine later in the evening. Appellant also traded Sisco's watch for cocaine that same evening (R **875, 876, 879, 889).**

Nathaniel Brice testified that he saw Appellant bring the pistol into the room (R **904).** He later sold Ellis' pistol to Jamaica Red (R **827, 928, 877, 883).** Brice gave the Lucien Picard watch to Daniel Wall to trade at a pawn shop for **$250.00** (R **877,**

883). The pawn ticket is dated 3/31/87 at 2:15 P.M. (R 946-947). Brice also identified Ellis' car as the car the Appellant was driving (R 873, 883).

Laura May testified that the Appellant made a phone call about 2:00 A.M. and told the person on the other end that he would be there about 11:00 in the morning (R 829). Mayo also turned over Sisco's Teltec card which the Appellant had given her daughter, Cheri Mayo (R 830-831). Delores Andrews phone bill indicated that she received a collect call from West Palm Beach at 1:15 A.M. 3/31/87 (R 1232). In a statement to the police she testified that she received a collect call from the Appellant on Tuesday, the 31st and that the Appellant came by her place around 10:00 or 11:00. He was wearing Reebok tennis shoes (R 1245, 1246).

There were similarities between the two murders which indicated that the two murders were part of one criminal episode. The gun that killed Sisco belongs to Ellis. Appellant knows both victims. The Appellant cut the telephone wires in Ellis' residence to prevent him from calling anyone. He took the phone out of Sisco's hand and laid it on the glass table for the same reason. In both places the wallets of the two victims had been rifled through. Cash and credit cards were removed. Both residences showed no signs of forced entry and both residences were burglarized, and the victims robbed. Ellis' car was used to transport Appellant to West Palm Beach. Ellis' gun was used to murder Sisco.

These facts place the murder weapon in the Appellant's hands before and after Sisco's murder. The murder of Clifton Ellis and the murder of Thomas Sisco and the events afterwards are so inextricably intertwined that an intelligent account of the criminal episode could not have been given without reference to them. Ellis' murder and what the Appellant did after murdering Sisco is admissible simply because it is relevant evidence under Section 90. 402. However, this evidence is also admissible, and necessary, to prove premeditation, as well as, motive, opportunity, intent, plan, knowledge, identity, and absence of mistake or accident. Fla. Stat. Section 90.404(2). The evidence was not submitted to prove the bad character or the criminal propensity of the Appellant. Furthermore, it is not Williams rule evidence. Relevant evidence is not excluded merely because it points to the commission of separate crimes. McCrea v. State, 395 So.2d 1145, 1152 (Fla. 1980), cert. denied, 454 U.S. 1041 (1981). The Supreme Court of Florida has found no problem with the admission of collateral murders. Ashley v. State, 265 So.2d 685 (Fla. 1972).

In conclusion the evidence was relevant and its probative value outweighed any improper prejudicial effect. This evidence was admitted for the same reason any other piece of evidence is admitted. It is a part of the "res gestae". Consequently, the Appellant's conviction and sentence should be affirmed.

POINT II

THE APPELLANT WAS NOT DENIED EQUAL PROTECTION RIGHTS PURSUANT TO ARTICLE I, SECTION 11, FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY DENIAL OF MOTION TO DRAW JURY POOL FROM ENTIRE COUNTY WHERE THE MOTION WAS UNTIMELY MADE TWO DAYS BEFORE TRIAL AND NEVER RENEWED.

As Appellant pointed out in his brief on August **11, 1988** he requested that the trial be continued because he was still trying to get ready for this case (Appellant's Brief page 23, R 20). On August **17, 1988** the Appellant filed with the trial judge's secretary a motion to draw the venire from all Palm Beach County. The State did not receive it until August **18, 1988** which was when the motion was heard (R **154).** The State objected to the motion as being untimely. Had the defense counsel filed the motion in a timely fashion at any time during the proceedings it would have given the State a chance to correct any problems. However, as prosecuting attorney pointed out, the grand jury would not be meeting next week and the jury pool had already been picked (R **154).**

The trial court noted that he has granted these type motions in the past when they were timely filed. Since this motion was not filed in time for the State to act on it, the trial judge ruled that it was untimely. The trial judge specifically noted that the trial had been set for Monday, August **22, 1988.** The motion was being heard on Thursday, August 18th (R **157).**

Furthermore, the trial date was set March 4, 1988 and was "sealed in blood" (R 4). There was a sufficient amount of time to file a timely motion.

At no time during the hearing did the Appellant offer any statistics for the trial court to base its decision. The Appellant does not make any furhter objects during the course of the jury voir dire or at the end of the trial. No objection is made at the beginning of the State's jury voir dire. No objection is made at the end of Appellant's voir dire (R 669). Appellant does not make a record of how many blacks and whites are in the jury pool. The only reason the records indicates that Appellant struck a black juror is because the State made the record (R 675). Appellant did move for a mistrial because Mr. Roberts, a juror, had read in the newspaper that the case involved two murders (R 683). After the jury was picked the Appellant did not object on the Spencer issue. He was only interested in getting another preemptory strike (R 684). After the jury was impaneled the Appellant moved for a mistrial and asked for another strike. This time he moved for a mistrial in reference to Ms. McCarthy. She had indicated that she had a bad situation with a knife pointed at her. Appellant also wanted another strike (R 697). Appellant did not move for a mistrial or dismissal at any time during or after the trial based on the Spencer issue. His motion for a new trial is void of any reference to the jury pool question (R 2573-2577). However, the record does reflect that the Appellant did strike a black juror for no apparent reason (R 674-675).

Although there is no special procedural rule regulating the time in which such a special motion can be timely filed the Appellee would submit that the question of the special districting process to select jurors in Palm Beach County has been known for many years. Appellant had a year and half to move the court as he did two days before the trial. Had he done *so* the State could have corrected any error. The Appellee submits that this type of motion should be filed in a timely fashion as to give the State the requisite time to make the necessary adjustments. Otherwise, a motion of this type could be used for purposes of delay and not for constitutional reasons.

Appellant is correct in noting that this Court in Spencer v. State, 545 So.2d 1352 (Fla. 1989) ruled that the administrative order creating the jury pool districts created an unconstitutional systematic exclusion of a significant portion of the black population. However, this Court did not rule that it could not be waived by the defendant. In this case the Appellant did not preserve his objection. At no time after the initial objection did the Appellant raise the issue again. In fact, he did not even waive it in his motion for new trial.

This case can be distinguished from Spencer, supra. Appellant in this case is white and from Okeechobee. His victim was also white. Spencer, on the other hand, was black and was from the western half of Palm Beach County where most of the residence are black. However, Spencer's crime was committed in the eastern district where his trial was held. Prior to his

trial Spencer moved to have the jury drawn from a county wide jury pool. This was denied. Spencer then moved to transfer his trial to the Glades Jury District for trial. This was denied. Spencer then renewed his motion for a county-wide jury venire, asking the Court simply to re-set his trial to a week when a Grand Jury was scheduled to be drawn. This motion was denied. On the day of trial Spencer renewed his motion for a county-wide jury pool. He renewed his motion after the jury was selected and about to be sworn. Finally after the entire jury including alternates were accepted, it was agreed by the Court that the jury-district question was preserved, i.e., that it was not waived by Spencer's acceptance of this jury. After trial, Spencer raised the issue again in his motion for new trial, which the court also denied. Spencer also bitterly objected to any Blacks being dismissed for cause and again bitterly and strenuously objected when two black jurors were dismissed for arriving to court too early. In other words Spencer objected to any diminishing of the potential black jurors from the jury venire. These facts can be found in the Statement of the Facts in Spencer's Brief to the Supreme Court of Florida, which is attached hereto for the convenience of the Court and by reference made a part hereof.

Nothing of the sort happened in this case. The Appellant made an objection to the lack of a county-wide jury too late for the State to do anything about it. He did not continuously raise the issue. He did not even renew the objection in his motion for

a new trial after the trial. He did not make a record of how many blacks were on the jury venire. Appellant even used one of his preemptory strikes to strike a black juror. Appellant did not proffer any statistics as to the make-up of the jury and how it would prejudice him, a white defendant. Appellee would submit that the Appellant has failed to preserve this issue for appellant review in much the same manner as a motion for judgment of acquittal is not preserved if not renewed. Florida Rules of Criminal Procedure, 3.380.

Since the Appellant did not set forth a proffer of the statistical analysis as to his denial of equal protection due to the Palm Beach County's jury district system and in light of the fact that most constitutional error can be harmless, the Appellee would submit that any error in the jury venire selection was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The Appellant did not preserve the objection and, therefore, waived it.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENT TO OKEECHOBEE POLICE DETECTIVE EUGENE O'NEILL.

The Fifth Amendment guarantees that the government may not force any citizen to be a witness against himself. Remembering that the Miranda rule demonstrates a judicial concern over police misconduct and abuse, neither Miranda nor the Fifth Amendment values which it protects, may be read as prohibiting confessions

where there is no police coercion. Sound policy dictates that, absent police exploitation of a known mental susceptibility, there can be no violation of Miranda of the Fifth Amendment. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). If the evidence shows that the Appellant was promised nothing in return for the statement, voluntarily waived his Miranda rights, did not appear to be in pain or intoxicated and the Appellant states that he understood that he knew what he was doing, the confession should not be suppressed. Parker v. State, 456 So.2d 436 (Fla. 1984).

In the instant case, it is uncontested that the Appellant was arrested on outstanding warrants (AB 25, R 162). Appellant admits that Detective O'Neill informed him that the police wanted to talk to him about the death of Mr. Ellis, and subsequently advised Appellant of this Miranda rights (AB 25, R 176, 178, 179, 189). Detective O'Neill testified that the Appellant understood his Miranda rights, did not indicate that he wanted an attorney, and freely and voluntarily gave the police a statement denying he killed Clifton Ellis (R 182, 188, 191; AB 25). Detective Eugene O'Neill, who arrested the Appellant on the outstanding warrants, also conducted the investigation into the death of Clifton Ellis'. Detective LaFlam was also involved in that investigation. So Appellant was arrested by the same officer who conducted the questioning of Appellant.

At trial Detective O'Neill testified to the same thing (R 1333, 1334, 1337-1339). Detective O'Neill testified that at the

time the rights waiver form was read to the Appellant he changed the form to read ''may" instead of "can" (R **1353).** He also affirmatively stated that he never told the Appellant that he would see that the Appellant did not get the chair for the Ellis' murder or that he would make it easy on the Appellant (R **1355).** By way of explanation, Detective O'Neill explained that he would have told the State Attorney that Appellant cooperated (R **1256, 1357, 1358).**

> **Defense Counsel:** And you tried to see that he didn't get the chair for this?
>
> **O'Neill:** **No** sir, **I** never made that kind of a statement.
>
> **Defense Counsel:** **So** how-- did you tell him how you were going to make it easy for him?
>
> **O'Neill:** **I** can't make it easy for anybody, Mr. Sullivan.
>
> **Defense Counsel:** **I** know you can't. But I am asking you: Didn't you tell him that you were going to make it easy for him?
>
> **O'Neill:** No, **I** did not tell him I would make it easy for him. Why would I tell him something like that?
>
> **Defense Counsel:** **I** don't know. To get him to talk to you, to tell him what a great guy you were, the statement was off the record between you and him and was never going to be used in Court. That is why.
>
> **O'Neill:** That is an assumption you are making, Mr. Sullivan.

(R 1355). O'Neill testified that he did not remember the exact words but that what he would have told him was that any cooperation would have been told to the State (R **1356).**

Thus, the testimony of Detective O'Neill is that he did not promise any benefit or leniency to the Appellant if he made a statement. The alteration of the form to read "may" instead of "can" does not alter the meaning of the sentence, "Anything you say can (or may) be used against you in a court of law".

Appellant testified that prior to the reading of his Miranda rights he was informed that he was a suspect in a murder (R 1701). He admitted that his Miranda rights were read to him, that he understood his rights; especially, the right to an attorney. In fact, after talking to O'Neill for awhile he did exercise his rights to any attorney (R 1700-1701).

Appellant presented no testimony that the police exploited a known weakness. In fact at the penalty phase of the trial it became apparent that the Appellant was not a newcomer to the criminal justice system. This is not the Appellant's first brush with the law. Appellant testified that he is in control of his life, knows that it is wrong to kill someone, can function in society, can make his own decisions and he understands that a gun can kill someone (R 2003-A, 2005, 2007, 2019). Appellant also testified that the has never been treated for mental problems and that he understands right from wrong (R 2006).

The courts have never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates the voluntary nature of the confession. Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 1297, 84 L.Ed.2d 222 (1985). Thus, where the record reveals evidence to support the trial court's

findings, the reviewing court must accept these findings. State v. Spurling, 385 So.2d 672 (Fla. 2nd DCA 1985). Here there was ample evidence to support the trial court's order denying the motion to suppress.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENT TO DEPUTY SHERIFF JOE SCHUMACHER.

Appellant claims that his statements to Joe Schumacher were not spontaneous and voluntary. He claims that the statement was illicited by a question posed by Deputy Schumacher. In order to bolster this idea Appellant quotes from a supplemental record containing a transcript of an interview given by Correction Officer Al Stone and Deputy Sheriff Joe Schumacher. This interview was not placed into evidence by anyone and it was not used to impeach the testimony of Schumacher either at the motion to suppress hearing or at the trial. It is not signed or authenticated in any manner. Appellant states that Sgt. Schumacher elicited the incriminating statement by asking the question: "Now that it's all over, what really happened to Mr. Ellis (AB 30).

However, this is Al Stones account of the conversation (Supp. R-2). Sgt. Schumacher stated in the interview that he asked a question about how the bullets got underneath Ellis' body (Supp. R-10). At the motion to suppress hearing and the trial Sgt. Schumacher testified that Appellant started talking about

getting the death penalty and that he then asked the Appellant how the bullets got underneath the body of Ellis (R **53, 54, 64, 66, 86, 1515, 1519).** Appellant's quoting Al Stone's interview is an incorrect rendition of the facts of this case. Moreover, Appellant did not use Al Stone's interview to impeach Schumacher and the interview was never placed into evidence. Appellant's use of Al Stone's unauthenticated, unsigned interview to bolster his argument that his statements made to Schumacher were involuntary does not wash with the Appellee.

Sgt. Schumacher testified that no questions were asked to get the Appellant to talk (R **53).** No threats were made. No coercion was used. No pressure of any kind was used. Schumacher was not interrogating the Appellant (R **53, 56, 57, 65).** Neither officer asked the Appellant any questions about the Palm Beach County case (R **68).** Schumacher testified that Appellant began to talk and would not shut up (R **54).** Since the Appellant was not being questioned or interrogated his Miranda rights were not read to him. Furthermore, Schumacher only asked a question about the bullets under Ellis' body. Appellant had already been tried and convicted of this crime and any information regarding the specifics of Ellis' death would not be significant to the trial involving Sisco's death. At least not at the time the question was asked. It was only the reference to the Palm Beach case that made the Appellant's statement significant. Consequently, Miranda rights would not have been read to Appellant because the only question asked related to a murder Appellant had already

been tried and convicted. Furthermore, Schumacher was not interrogating Appellant.

The trial court noted that all Schumacher asked was how the bullets got under Ellis' body and from there the Appellant went on and on some of which related to aspects of this case involving Sisco's murder (R 75, 1509).

Appellant testified at the hearing also. He stated that Schumacher was asking yes and no questions regarding Laura Mayo, Pete Andrews and others. Appellant answered yes or no because Schumacher was driving very fast (R 81, 82, 85). Appellant admits that he does not remember what was said but that "he was just telling them anything" (R 85).

Appellant states in his brief that the officers had built up a friendly rapport with him and this induced him to make the statement (AB 30-31). However, in his testimony at the hearing and at trial, Appellant testified that Schumacher always treated Appellant unfairly and that Schumacher threatened him (R 86, 8788, 1721-1725). Furthermore, familiarity is not abusive police tactics which would require a finding of a violation of Miranda.

It is a well settled point of law that statements that are not the product of interrogation are spontaneous, and are admissible in evidence even though the defendant is in custody when he makes them. Rosher v. State, 319 So.2d 150 (Fla. 2nd DCA 1975). Voluntary statements made prior to Miranda rights being read to an accused which are not the result of any interrogation or police tricks, coercion, force, over-reaching, or entrapment

are admissible into evidence. Brown v. State, 222 So.2d 793 (Fla. 1st DCA 1969). This case is not unlike Sikes v. State, 313 So.2d 436 (Fla. 2nd DCA 1975) where it was held that defendant's confession which was spontaneously made to prison employees while her first appeal was pending was admissible at defendant's second trial, although custodial authorities had knowledge of the appeal and defendant had counsel but was not advised of her Miranda rights.

If there was any error that error was harmless beyond a reasonable doubt as the Appellant denied killing anyone and also admitted at trial that he was driving Ellis' car that night and did go to Sisco's house to steal his watch. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

As Appellant points out in his brief, "Once Appellant invoked his right to remain silent and to have counsel present further interrogation was not permissible unless counsel was made available to him unless Appellant himself had initiated further communication. State v. Deville, 513 So.2d 807 (Fla. 2nd DCA 1987)" (AB 31). The facts adduced at the motion hearing and at trial indicate that the Appellant initiated the communication and, therefore, the trial court did not abuse its discretion in denying the Appellant's motion to suppress.

POINT V

TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE SHOES AS EVIDENCE.

When a police officer lawfully arrests a suspect he may, for the dual purposes of protection and preventing the destruction of evidence, conduct an incidental search of the suspect and the area within the suspect's immediate control, and seize any incriminating evidence. Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); Newton v. State, 378 So.2d 297 (Fla. 4th DCA 1979). This will be so regardless of whether the arrest was undertaken pursuant to a warrant. See Range v. State, 156 So.2d 534 (Fla. 2nd DCA 1963).

Under the rule of Chimel v. California, 396 U.S. 752 (1969), an officer is not allowed to search any other areas of the premises except the limited area in which the defendant was arrested. There may, however, be circumstances justifying an officer's visit to other areas to merely observe. For example, an officer, for his own protection, may look in other rooms to search for other persons. Also, he may find it necessary to go through other rooms in leaving the premises. These movements of the law enforcement officer are not considered searches because the officer is not looking for weapons or incriminating evidence. Nevertheless, if an officer observes such evidence lying open to view, he may seize it, and it will be admissible in court under the "plain view" or "open view" doctrines.

For example, in United States v. Tutus, 445 F.2d 577 (2nd Cir. 1971), cert. denied, 404 U.S. 940 (1971), the defendant was arrested in his girlfriend's apartment regarding a bank robbery. At the time of the arrest, the apartment was dark and the defendant was nude. One of the officers went to get clothing for the defendant and found two jackets of the type that had been described as having been worn by the bank robbers. On the way out of the apartment, one of the officers turned on the kitchen light so he could see his way out. On the floor was money from the robbery. The court held that both jackets and the money were admissible in evidence. All the items were properly seized under the "plain view" doctrine.

Detective O'Neill testified at the motion to suppress hearing that the shoes were given to Detective LaFlam by Appellant's mother (R **166**). The shoe had the same pattern on them that the police were looking for as evidence found at the scene of the Ellis murder (R **168, 169, 171, 172**). Whether or not the shoe print matches is another question for the jury. In other words, it is a question of fact not law (R **174**).

Appellant states that there was nothing unusual about the soles of the shoes. This totally ignores the testimony of Detective George Miller who testified to the unique characteristics of the sole of the shoes which belonged to the Appellant (R **1405, 1406, 1415, 1420-1426, 1445, 1446**). In addition, Detective LaFlam testified that he had been studying the bloody shoe impression left at Ellis' residence for several

days. So when he saw he little flower impression in the middle of the circle he recognized the shoe (R 1483, 1486). He also testified that he received the shoes from Appellant's mother (R 1481). Appellant testified that he had asked his mother for his tennis shoes but that she did not bring them (R 1695).

The facts adduced at trial prove that the shoes were not found as part of any search conducted by the police officers. The officers had a right to be where they were due to arrest warrant. The shoes were not seized due to idle curiosity. They were seized because the soles of the shoes matched the impression found at the victim's house. The shoes were properly admitted into evidence under the "plain view" or "open view" theory and as a seizure incident an arrest. The trial court did not err in denying the Appellant's motion to suppress. The Appellant's conviction and sentence should be affirmed.

POINT VI

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR STATEMENT OF PARTICULARS.

When the indictment or information upon which a defendant fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense the defendant may motion the court for a statement of particulars. Fla.R.Crim.P. 3.140(n). Where variance between the allegations in an information and proof is not such as to have misled defendant or subject him to substantial possibility of reprosecution for the same offense, the variance is immaterial

and does not preclude conviction. A variance in an information is fatal only if the record reveals a possibility that the defendant may have been misled or embarrassed in the preparation or presentation of his defense. Grissom v. State, 405 So.2d 291 (Fla. 1st DCA 1981). "Variance" between indictment and proof at trial occurs when evidence at trial proves facts different from those alleged indictment, as opposed to facts which, although not specifically mentioned in indictment are entirely consistent with its allegation. U.S. v. Caporale, 806 F.2d 1487 (C.A. 11th Cir. 1987).

Appellant claims that he was prejudiced by the lack of information concerning the exact time of Sisco's death since it effected his alibi. He further states that Laura Mayo testified that the Appellant arrived at her place at 11:00 P.M. on March 31, 1987 and that the State, knowing the time of Sisco's death, set the time of death at 12:01 A.M., which would make the date of the offense April 1st. Thus, the Appellant was prejudiced in his presentation of his defense when the state charged the Appellant with the offense on March 31 and then proved the offense to have occurred on April 1st (AB 38).

These facts grossly misrepresent the facts in the record. First the indictment in this case charged the Appellant with certain crimes occurring "on or about the 31st day of March, 1987" (R 2193). Second, there was not a piece of evidence presented that suggested that the date of the murder of Sisco occurred on April 1st. Everyone of the officers testified that

they arrived at the residence of Sisco on March 31, 1987 (R 728, 213, 1314, 1371). It is hard to see how the police can be at Sisco's house examining his dead body when he didn't die until April lst, as the Appellant claims the State proved.

In her closing arguments the prosecuting attorney stated that the "crime occurs in the very, very early morning hours, probably when the clock is striking about 12:01 A.M., is when the murder occurred'' (R 1779). Thus, the 12:01 A.M. time period that the Appellant refers to in his brief indicates that the crime occurred on March 31, 1987 in the very, very early morning, not April 1st. This is quite consistent with the indictment. Nathaniel Brice testified that the day after Appellant traded Sisco's watch for cocaine he took the watch to Daniel Wall to sell to a pawn shop (R 875-877). 'The date on the pawn shop ticket is 3/31/87 at 2:15 P.M. (R 946, 947).

Laura Mayo testified that the Appellant came to her apartment in the late evening hours, at the end of March, some three weeks after her daughter's birthday (R 877). While Appellant was at her apartment, he traded Sisco's watch and Ellis' pistol for cocaine. Nathaniel Brice took the pistol to sell.

Both Laura Mayo's and Nathaniel Brice's testimony point to the late evening hours of March 30th or the early morning hours of March 31st as the date of Sisco's death.

The Appellant claims that the date and time of Sisco's death was crucial to Appellant's alibi. The rules of criminal

procedure require that a defendant who intends to rely on alibi must serve upon the State no less than ten days before the trial a written notice of its intent to rely upon such alibi. The notice must contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses by whom be proposes to establish such alibi. Fla.R.Crim.P. 3.200 Appellant filed no such alibi notice and offered no such alibi at the trial.

Appellant did testify that he did take Ellis' car to West Palm Beach in the late evening hours on March 30, 1987 (R 1711). At one point he testified that he picked up Cheri Mayo at 9:00 P.M. in West Palm Beach, went to Mayo's apartment at 9:30, drove with Cheri to Sisco's at 9:45, and went back to Mayo's apartment arriving at 10:15 (R 1688, 1689). On cross he stated that he was at the Sisco's house at 9:00 P.M. (R 1713). He admitted to making a phone call to Delores Andrews the morning of March 31st, at 1:15 A.M. and arriving at Andrew's house at 7:00 A.M. (R 1693, 1703). The testimony of the Appellant supports the allegations of the State and offers no alibi. The exact time when Sisco was murdered cannot be pinpointed with accuracy but this is not fatal to the presentation of the Appellant's case.

The indictment in this case gave the Appellant adequate notice of the charge he is expected to defend against. The granting of a bill of particulars in a criminal case is not founded upon a legal right but is a matter resting within the

sound discretion of the trial court and depends entirely upon the nature and circumstances of each particular case. The trial court did not err in denying Appellant's motion for a bill of particulars seeking date, time and place of allege offense where the place and date were stated in the indictment and the exact time was not known. Winslow v. State, 45 So.2d 339 (Fla. 1949); Williams v. State, 344 So.2d 927 (Fla. 3rd DCA 1977).

Based on the foregoing arguments the Appellant's conviction and sentence should be affirmed.

POINT VII

THE TRIAL COURT DID NOT ERR IN ALLOWING PHOTOGRAPHS WHICH WERE DISCLOSED TO APPELLANT.

On August 18, 1988 the State made an oral motion to compel the Appellant to provide it with a defense witness list and a list of his experts (R 126, 127). At that point the Appellant gave the State the name of Richard Dale Carter as their ballistics experts (R 127). No objection was made. The trial ordered the Appellant to supply the names of his witnesses by the next day or he would not be able to use any of them (R 205-206). Pursuant to that court order the Appellant listed Richard Dale Carter on his witness list (AB 42). On August 26, 1988 Appellant announced to the court that he was striking Carter from the witness list. At that time, the State prosecutor told the court that she had contacted Dr. Carter, who informed the proseutor that the defense counsel had instructed him not to talk to anyone. The state prosecutor then moved for a Court Order

telling Dr. Carter that he was instructed wrongly and ordering Dr. Carter to talk to the State (R **716**). Appellant claimed, as he does in his brief, that whatever information he derived from Dr. Carter was work product (R **717**). The trial court noted that the Appellant was obliged under the law to disclose (R **719-721**). See Fla.R.Crim.P. 3.220(d)(2).

On August **29, 1988** Gerald R. Styres testified. He is employed as a forensic firearms and tool marks examiner with the Palm Beach County Sheriff's Department (R **1255-1256**). He testified on direct that the two live bullets found under the body of Clifton Ellis had been worked through the action of Ellis' pistol, the Raven pistol (R **1266**). On cross examination, the defense counsel asked Styres if he had made some photographs through his microscope. Styres said he had made some photographs of the extractor markings on the live bullets found under the body of Clifton Ellis (R **1283**). It was the comparison of these extractor markings that proved that the bullets had been worked through the Raven pistol (R **1266-1268**).

The State then sought to have these photographs introduced as evidence. Appellant objected and a Richardson hearing was held. The state prosecutor stated that the first time she knew of the pictures was when Styres had mentioned them on the stand (R **1532**). In fact, Appellant's expert, Dr. Carter, knew of them before she knew of them (R **1533**). Styres testified during the Richardson hearing that Dr. Richard Carter had come to his office on August **23, 1988** to examine the evidence in the case. Carter

examined the photographs at that time. Carter also examined the live cartridges that corresponded with those photographs (R 1530). Styres does not recall telling the State about the photographs (R 1531). The court noted that Appellant had stated in his motion that Styres had testified that the extractor marks were identical and Dr. Carter had said the same thing (R 1533).

Carter testified as a state witness that he had examined the photographs and the two live cartridges. His testimony corroborated the testimony of Styres regarding both the spent cartridges and the live cartridges (R 1548, 1552-A).

It is obvious that the meaning of the photographs would have escaped the state prosecutor had not the Appellant asked the question on cross examination. Furthermore, the photographs only corroborated the testimony of Styres and the Appellant's own expert's testimony. There was no prejudice to the Appellant.

The Appellant removed the name of Carter from the defense witness list because his testimony corroborated the State's expert witness, Styres. Carter would not have known about the ballistic evidence had he not been hired by the Appellant to review the evidence. A Richardson hearing was held and the court correctly determined that there was no prejudice inuring to the Appellant and no violation of the discovery rules. Richardson v. State, 246 So.2d 771 (Fla. 1971).

POINT VIII

THE TRIAL COURT DID NOT ERR IN NOT INSTRUCTING THE JURY REGARDING EVIDENCE OF OTHER CRIMES.

The State in an abundance of caution filed a notice of intent to use other crime evidence. However, it is the State's position that the murder of Ellis and the murder of Sisco are so intertwined as to be virtually indistinguishable. First there is the murder in Okeechobee County and within an hour and a half to two hours there is the murder in Palm Beach County. The car used to transport Appellant and the gun used to kill Sisco are linked to the first murder in Okeechobee County. This is an ongoing criminal episode. As such the ten day notice need not have been followed (R 138-141). Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986).

Inseparable crime evidence is admissible under Section 90.402, Florida Statute, simply as relevant evidence. Therefore, the jury instructions referred to by Appellant is inappropriate. Rule 90.404(2)(a), relating to Williams rule evidence, applies only to evidence of crimes and acts extrinsic to the charged offense. Evidence of offenses arising out of the same transaction or series of transactions as the charged offense is not considered evidence of an "extrinsic" offense within the prescription of Rule 90.404(2)(a). Austin v. State, 500 So.2d 262 (1st DCA 1986); Hall v. State, 403 So.2d 1321 (Fla. 1981).

The cases cited by the Appellant stand for the proposition that a trial court failure to instruct the jury on the limited

purpose for which "Williams' Rule" evidence was introduced at trial is reversible error if the defendant request such an instruction at the time such evidence is presented to the jury. Rivers v. State, **425 So.2d** 101 (Fla. 1st DCA 1983). In this case, the Appellant did not request that the jury be given the instruction.

> Sullivan: Judge, I am going to ask for a mistrial at this time. The jury has not been advised-- this homicide is irrelevant to the main charge (R 1346).

The trial court overruled the defense counsel's motion for a mistrial. The Appellant never moved to have the jury instructions read. He did ask the question "The jury is not being instructed?" This is not a request for the instruction but a question related to his motion for mistrial. No error was committed.

POINT IX

THE TRIAL COURT DID NOT ERR IN ALLOWING HEARSAY EVIDENCE OF TELEPHONE NUMBER.

Appellant alleges that the trial court erroneously allowed testimony from Detective Sgt. Perez regarding the telephone number on the telephone booth which stands some 50 to 100 feet from the apartment where Laura Mayo, Cheri Mayo and Nathaniel Brice resided (AB 46). He alleges that the telephone number constitutes hearsay regarding the identity of a particular outlet.

This issue is hardly worthy of any analysis. Plain and simply this is not hearsay and is not being asserted for the

truth of any material matter being asserted at trial. The detective may testify to anything that is within his personal knowledge. Appellee asserts that this is very similar to the identification of a person after perceiving him, which is not hearsay. Section 90.801(2)(c), Florida Statute. In the instant case the police officer testified that he perceived the telephone number and can testify to its identity. Since he took the stand his identification of the telephone was subject to cross examination.

There was also other testimony offered at trial to substantiate the fact that a telephone booth exist near the apartment and that the Appellant made a phone call from that phone booth. The telephone bill belonging to Delores Andrews was placed into evidence without objection. The testimony of Detective Perez was offered to show that the number on the phone bill matched the number on the telephone near Laura Mayo's apartment. This argument of Appellant is totally absurd. Appellant's conviction and sentence should be upheld.

POINT X

THE TRIAL COURT DID NOT ERR BY FINDING AGGRAVATION CIRCUMSTANCES PURSUANT TO SECTION 921.141(5)(d).

Section 921.141(5)(d), Florida Statutes, has been declared to be constitutional. Clark v. State, 443 So.2d 973, 978 (Fla. 1983); Hitchcock v. State, 413 So.2d 741, 747 (Fla. 1982).

In the instant case, the jury found the Appellant guilty of burglary of a dwelling while armed with a firearm, robbery with a

firearm, and grand theft (R 1913-1914). The contemporaneous conviction of burglary and robbery warranted a finding in aggravation that the murder was committed during the commission of a robbery. Perry v. State, 522 So.2d 817 (1988); Melendez v. State, 498 So.2d 1258 (Fla. 1986). Appellant admitted that he went to Sisco's residence in Ellis' car (R 1711). He admitted going in and taking Sisco's watch (R 1688). The evidence adduced at trial supported the finding of aggravating circumstance that murder was committed while Appellant was engaged in commission of a burglary and robbery, including the testimony by the Appellant in which he admitted to stealing the Lucien Picard watch. Johnston v. State, 497 So.2d 863 (Fla. 1986).

The fact that Appellant drove from Okeechobee to West Palm Beach in Clifton Ellis' car is not an overlap of the trial court's finding of aggravation circumstance that the Appellant was previously convicted of another capital felony, or of a felony involving the use of violence to the person. One is either convicted of another capital felony or he is not. Driving a car from one victim's house to another is not determinative of whether there is a conviction in another capital felony. The court's findings is not based on the same essential features or aspect of the criminal episode. Cherry v. State, 544 So.2d 184 (1989).

POINT XI

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING ESCAPE FROM CUSTODY.

Appellant claims that there was insufficient evidence to prove that Sisco was killed to eliminate a witness, thus, it was improper to consider it in determining whether to impose the death penalty.

In the instant case Diane Berryhill, the victim's office manager, testified that Appellant had done some work for the victim and had been paid for that work. Appellant had come by the office on two occasions that she knows to pick up money for work he had done (R **2173, 2174, 2181).** The last time she saw the Appellant in the law offices was in March, **1987** (R **2183).**

Appellant testified that he knew the victim so well that the victim had given him the keys to victims house (R **1688, 1712).** Appellant stated that he was told he could go in and out of Sisco's house at will (R **1714).** He also stated that he had gone to Sisco's law offices to get money for work he had done (R **1715).**

If Appellant knew the victim, and had a key to the victims house with carte blanc to come and go as he pleased, then why did the Appellant kill the victim? Obviously, the victim was well acquainted with the Appellant and could identify him as the robber. In order to prevent detection the Appellant killed the victim and removed the phone from his hand so that the police could not be called.

In DuFour v. State, 495 So.2d 154 (Fla. 1986) the victim did not know the defendant. The defendant had announced his intention to kill a homosexual, which he did. There is no evidence that the victim could have identified the Appellant. The victim in Caruthers v. State, 465 So.2d 496 (Fla. 1985) was a convenience store clerk. There was no evidence that the convenience store clerk new the defendant before hand or that she could have identified him later.

The facts in this case are distinguishable. Appellant killed the victim in Okeechobee in order to obtain a gun and car. He then drove to West Palm Beach in order to rob Sisco, the victim. Appellant needed the money for cocaine. As he drove to West Palm Beach, he test fired the gun in the car just to make sure it worked. When he arrived at the victim's house the victim was home. In order to rob the victim and avoid detection he had to kill the victim. Appellant was on parole already. so detection as to the robbery of a well-known attorney and court official, would have been fatal to the Appellant. The only reason he ultimately killed the victim was to avoid detection. Correll v. State, 523 So.2d 562 (1988), cert. denied 109 S.Ct. 183, 102 L.Ed.2d 152. Appellee would also state that the murder of a well-known attorney and court official is similar to that of a law enforcement official where the mere fact of the death would invoke this factor. Caruthers, supra.

POINT XII

THE TRIAL COURT DID NOT ERR IN FINDING THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITH *ANY* PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court's finding in sentencing phase of this first degree murder trial, following the jury's recommendation of death, that the killing was cold, calculated, and premeditated without pretense of moral or legal justification, was supported by the evidence. The facts indicate that the Appellant killed Clifton Ellis in Okeechobee to get a gun and car so that he could go to West Palm Beach to get money for cocaine. A spent shell was found on the floor of the car in the front (R **825, 826).** This indicates that the Appellant test fired the gun in Ellis' car while he was driving to West Palm Beach. The drive to West Palm Beach is an hour and a half to two hours. He had ample time to reflect upon his actions. When he arrived at Sisco's residence he forced his way through the door, firing one shot which glazed the head of the victim. The victim ran. Appellant fired another shot which missed the victim. The victim kept retreating. The Appellant fired the fatal shot. That shot struck the victim in the back of the head. The Appellant then walked up to the victim, took the phone out of his hand and placed the phone on the table out of reach of the victim. Thus, Appellant prevented any means of calling for help.

Appellant testified at the penalty phase that he knew Sisco and Sisco knew him (R **2022).** He testified that he had no problem

finding Sisco's house, going in and taking the watch. In his own words "nothing clouded his mind" (R 2014). At the time he was at Sisco's house, Appellant stated that he was not under the influence of any drugs (R 2013).

The facts show that the Appellant had ample time to reflect on his actions and their consequences. Jackson v. State, 522 So.2d 802 (1988). See Parker v. State, 476 So.2d 134 (Fla. 1985) (where a 13 mile death ride was sufficient). The Appellant test fired the gun to make sure that it worked. Swafford v. State, 533 So.2d 270 (Fla. 1988). The advanced precurement of the gun, the lack of provocation, the retreat of the victim, shooting the victim in the back of the head, and the appearance of the killing being carried out as a matter of course shows the cold, calculated, premeditated manner of the murder. Swafford supra. The evidence establishes the Appellant planned the robbery in advance and planned to leave no witnesses. Remeta v. State, 522 So.2d 825 (Fla. 1988). On the totality of the circumstances this case demonstrates the heightened premeditation necessary to finding the murder to have been committed in a cold, calculated, and premeditated manner.

POINT XIII

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO PROHIBIT DEATH AS POSSIBLE PUNISHMENT DUE TO DEFENDANT'S RETARDATION.

Appellant testified at the penalty phase of the trial. He testified that at sixteen he was treated as an adult in

Okeechobee and charged in court as such (R 1998). Appellant stated that he made his own decisions in his life. He can function in society and has no trouble interacting with his friends (R 2003-A, 2020). He can think for himself. However, he has control over whether or not someone else would live or die (R 2003-A). He has never been treated for any emotional problems or mental problems and he understands right from wrong. In 1987 he understood right from wrong (R 2006, 2024-A). Killing someone is wrong (R 2007). When he drove the car to West Palm Beach he had no trouble driving or making decision to go to Sisco's house. Nothing clouded his mind (R 2014). Nor was he under the influence of drugs when he went to Sisco's house to get Sisco's watch (R 2018). He understands that guns can kill people (R 2019). He is not mentally deficient and has made his own decisions since he was 14 years old (R 2022, 2025).

Katherine Hendrickson testified that she was the Appellant's psychologist when he was in school. She has not seen him since he left school (R 2063). He was placed in a classroom of mildly retarded (R 2067). Appellant had an unusual concern for his sisters and brothers. One time he came to her and expressed his concern about his younger brothers. He said they were developing slowly and he asked if they could be put in the school's preschool, which is designed to assist handicapped children in getting a good start in school. Appellant was instrumental in the school picking those children for the program. Appellant was particularly worried about his brothers because they were not

toilet trained and were not talking. This incident occurred when the Appellant was a young teenager (R **2072, 2074).**

One of the reports on the Appellant stated that he was a very good reader with fair comprehension and that he was an excellent speller: "Really too high for my level of instructions". She testified that the last time he was evaluated was in January, **1979.** At that time the Appellant had a mental behavior of fifteen and a social age of about **12.6.** Hendrickson testified that many mildly retarded people know that if you shot someone you can seriously injure them. At the age of twenty-three years old even a person with a lower IQ will, and many do, conform their conducts to the rules we all live by in society (R **2074-2078, 2085).**

The Appellant did not present any testimony that he was currently mentally retarded. In fact, his own testimony states that he knows right from wrong and was not under the influence of anything when he went to Tom Sisco's house that night. There simply is not one thread of evidence that the Appellant is mentally retarded. He even refused to answer questions at points when he knew the answers would incriminate him.

CONCLUSION

In order to prove premeditation the State had to show when the Appellant picked up the car and weapon and the circumstances under which it was done. The death of Ellis in Okeechobee and Sisco's death in West Palm Beach are inextricably interwoven. It is not Williams rule evidence but rather relevant evidence under **90.402.**

The Appellant waived any objection he may have had to the jury pool being drawn from a county-wide district. Furthermore, he struck a black juror thereby exacerbating any problem. Had he moved early enough the State could have cured the problem. Instead he strategically waited until two days before trial to make his motion. Once denied he never renewed the motion even in his motion for new trial.

Appellant's statements to the police were voluntary and given after his Miranda rights were read and waived. His statements made to the officers transporting him to Lake Butler were also voluntary and spontaneous. He was not being questioned. No questions were asked regarding Sisco's murder here in West Palm Beach.

The shoes of the Appellant were given to the police by his mother. The police recognized the pattern on the sole of the shoe as the same found in Ellis' residence. This was a seizure of evidence incident a lawful arrest.

The denial of the bill of particulars is within the discretionary powers of the trial court. In the present case the information adequately informed the Appellant of the charges he had to defend against. Appellant offered no alibi defense at trial.

The Appellant's own ballistics expert examined all the evidence including the photographs he now complains he did not receive. The existence of these photographs were revealed during cross examination by the Appellant. Had he not asked the

question he would not have gotten the answer. There was no discovery violation and the pictures only corroborated the testimony of the State's witness and of the Appellant's expert testimony.

The Appellant never asked that the instructions on other crimes be read to the jury. All he asked for was a mistrial. Nevertheless, the murder of Ellis was not another crime within the meaning of the statute but was so intertwined with the murder of Sisco as to make this one criminal episode.

The testimony of Officer Perez as to the telephone number on a pay phone located near the apartment where Laura Mayo, Nathaniel Brice, and Cheri Mayo resided is not hearsay. Perez testified to what he knew and was available for cross examination.

The trial court's findings in the sentencing phase of this trial, following the jury's recommendation of death, of four aggravating circumstances and no mitigating circumstance is well supported by the evidence. There is no evidence that the Appellant is mentally retarded and did not know right from wrong. He testified that he did know right from wrong.

For the foregoing reasons Appellant's sentence and conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by United States mail to: MICHAEL L. **SULLIVAN, ESQUIRE,** Attorney for Appellant, **309** N.W. Fourth Street, Okeechobee, Florida **34972,** this 3rd day of May, **1990.**

Of Counsel

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