IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,507

MICHAEL CARUSO, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT, BROWARD COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

SYLVIA H. ALONSO
Assistant Attorney General
Florida Bar No. 767190
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellee was the prosecution and appellant the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

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

The following symbols will be used:

"R"	Record on Appeal.
"1 S.R."	First Supplemental Record, pursuant to this Court's November 20, 1989 order.
"2d S.R."	Second Supplemental Record, pursuant to this Court's June 28, 1990 order.
"3d S.R."	Third Supplemental Record, pursuant to this Court's October 12, 1990 order.

All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts appellant's statement of the case and facts as substantially true and correct except as modified by the facts herein, and with the following additions and/or clarifications:

1. Officer Smith was the first police officer on the scene, and upon his arrival there, he was advised by paramedic Hohl that the house was secured, such that entry into the house could not be gained (R. 567-568).

Upon entering the house, Officer Smith first noticed Mrs. Leland's body laying in the kitchen area (R. 569). In order to be able to see Mr. Leland's body, Officer Smith had to be standing where Mrs. Leland's body was found (R. 570, 574). After he checked the rest of the house, Smith noticed Officer Faby standing at the front door of the residence. Smith advised Faby that a homicide was involved, at which time both Faby and Smith secured the scene (R. 571, 575-576, 598). Officer Smith did not see any unauthorized personnel inside the house (R. 575).

2. Faby stated that one had to be approximately ten feet inside the house in order to see Mr. Leland's body (R. 599).

While at the scene Faby attempted to corroborate appellant's story about having seen a black man inside the house; when Faby had another officer stand at the front window in the manner in which appellant had described seeing the black man, Faby could only discern a silhouette (R. 608). Faby also observed appellant in a fist fight with his father (R. 610).

Also at the scene, Faby was approached by Myrel Walker, who advised Faby about a person that she had seen (R. 618-621).

3. Detective Corpion noticed that appellant had fresh cuts on his hands and forearms and took a picture of same (R. 721). In the process, appellant advised Corpion that he would allow the officer to take a picture, but that if Corpion wanted appellant's fingerprints, he would have to arrest appellant first. When Corpion observed appellant on the news, appellant made statements about the crime which concerned facts that only the officers knew (R. 738-740, 746-747).

Corpion also attempted to verify what appellant stated he had seen at the front window. Corpion stated that he could see a figure, but that the race or sex of the figure could not be determined (R. 734).

4. Firefighters Matt Nikkison and Sandy Butts stated that Mrs. Leland's body was not readily visible from the back window of the residence, and that they would not have seen the body if appellant had not pointed it out to them (R. 1011, 1029). Neither Butts nor Nikkison saw anyone other than authorized personnel inside the residence, although Nikkison said it was possible that someone else was in there (R. 1016, 1031). Both firefighters did not notice a box of saran wrap (R. 1015, 1022, 1032).

5. Detective Miller stated that from the medical examiner's examination, he discovered details of the murders which were not apparent from a superficial viewing of the bodies, including the

saran wrap around Mr. Leland's head and the stab wounds to Mrs. Leland's eyes (R. 791-792).

6. The medical examiner, Doctor Dominguez, testified that the stab wounds sustained by Mrs. Leland around the eyes was only discernible during the autopsy, when the victim's scalp was pulled back (R. 827-828, 836). Moreover, Mrs. Leland was alive at the time she sustained the injuries to the head (R. 830).

As to Mr. Leland, Dr. Dominguez testified that the wounds the victim suffered on the arms and hands were defensive wounds (R. 842). Moreover, the doctor opined that the injuries sustained by Mr. Leland were inflicted by the same instruments as those used on Mrs. Leland, and that the pattern of injuries on both victims was consistent with the same person having committed both murders (R. 844, 857-858).

Finally, upon viewing a photograph of appellant's scratched arms, Dr. Dominguez opined that the scratches had been inflicted within the eight hours preceding the taking of the photo (R. 855).

7. John Bedell, a canine officer, was called to the scene to track the suspect. He testified that the canine lost track of the scent at appellant's home (R. 952-956).

8. When Quinn saw appellant on Sunday, December 6, it was approximately 3:00 p.m. (R. 1196). Appellant was high on something, but not crack (R. 1285). Indeed, after Quinn got appellant twenty dollars, Quinn and appellant went down to Miami to get drugs, which the two ingested that night (1210-1211, 1250).

Quinn testified that appellant had a bad relationship with his father; when appellant and his father had an argument in the kitchen, Quinn heard appellant say, inter alia, that appellant would cut his father's head off (R. 1206-1207).

9. During the interview with appellant, Detective Pazienza noticed the cuts on appellant's hands and that appellant's hair was wet (R. 1354). When Pazienza checked the awnings of the Leland residence, he found that they were clean (R. 1354). Moreover, Pazienza observed that the Carusos never used the front door or back door to their residence, and instead exited and entered their home through the carport door (R. 1365).

Craig Quinn allowed Detective Pazienza to tape a telephone conversation Quinn had with appellant regarding a knife (R. 1218, 1379-1384); the taped phone call was played for the jury (R. 1382-1384). As a result of this conversation, Pazienza became aware of the fact that appellant had access to knives and other tools (R. 1441).

Pazienza also observed appellant have a fight with his father to the point that the officers had to intervene (R. 1368). Thereafter, appellant returned to the carport of his house and began kicking and bending a piece of aluminum (R. 1368). Appellant's mother told appellant to calm down (R. 1369).

Finally, Pazienza did not tell anyone about the saran wrap which was found around Mr. Leland's head (R. 1360). Pazienza did not become aware that Mr. Leland's head was wrapped in saran wrap until the plastic tarp was removed from the victim's upper torso

(R. 1360, 1372). Nonetheless, appellant indicated in his interview with the media that Mr. Leland had saran wrap wrapped around his head (R. 1372).

10. James Montgomery stated that he was very close to his grandparents, and he visited them every Friday; Montgomery lived with the Lelands for approximately six months, but he had never seen appellant during that time (R. 1117, 1130, 1132). Montgomery maintained his grandparents house such that he painted and pressure cleaned the house and awnings about nine months before the murders (R. 1119-1120). The only other person who did work around the Leland residence was the lawn man (R. 1121, 1130). Montgomery also stated that his grandparents never allowed anybody into their home (R. 1129, 1132).

Montgomery testified that it was his grandmother's practice to set the table for breakfast every night before going to bed (R. 1125). Further, Mrs. Leland frequently got up during the night because she liked to snack on Twix bars (R. 1125-1126). In addition, it was his grandfather's practice to carry approximately $200 in his wallet (R. 1131).

11. In talking with Betty Quinn the day after the murders, appellant stated that if the Lelands had stayed asleep, then maybe they would not have been murdered (R. 1173). When she saw appellant interviewed on Channel 10, Ms. Quinn heard appellant talk about a black man he had seen inside the Leland home; Ms. Quinn wondered why appellant had not said anything about this when telling her about the murders (R. 1176). Finally, Ms. Quinn

confirmed that her son Craig had stayed home with her on the evening of Saturday, December 5 (R. 1169-1170).

12. Michael Holtz testified that in order to see Mr. Leland's body, one had to be in the living room (R. 1726-1727).

13. The Carusos went to the movies on Saturday, December 5; when they came home at 9:30 p.m. appellant was watching television (R. 1604, 1669). Mrs. Caruso went to bed at approximately 11:00 p.m. while Mr. Caruso last saw appellant at approximately 11:30 p.m. (R. 1604-1606). As such, the Carusos could not say whether appellant went out thereafter (R. 1608-1609). At the grand jury proceedings, Mrs. Caruso was shown a butterfly pendant, but was unable to identify the pendant as being hers (R. 1667-1668).

PENALTY PHASE:

1. Dr. Dominguez testified that Mr. Leland lived approximately fifteen minutes after the first blow to his head (R. 1987).

2. All of appellant's family members stated that appellant knew that it was wrong to kill and that appellant was not suffering from any extreme mental or emotional disturbance at the time of the crimes (R. 1998-1999, 2011, 2016, 2021, 2069, 2079).

3. Mark Luback was unaware of appellant's drug addiction and that appellant was on probation during his employ (R. 2005, 2007).

4. Elenda Adams had not seen appellant since Thanksgiving, 1987. She and Marie Bobacher were unaware of appellant's crack

addiction, that he was on probation, and that appellant had been hospitalized (R. 2011-2012, 2019-2020, 2021-2022).

5. Dr. Caddy did not interview appellant (R. 2032, 2040). He stated that in light of appellant's grand theft conviction in 1985 from Lee County, prior to June, 1986, the instant offenses could equally be related to either appellant's drug use or underlying personality problems (R. 2040-2041). Dr. Caddy could not say whether appellant could be rehabilitated (R. 2037). Appellant was not terribly motivated for treatment and had previously refused to seek drug counseling (R. 2055, 2057; 2d S.R. 2). Further, Dr. Caddy stated that appellant was unwilling to work, that he didn't give a damn about anything (R. 2034).

6. The medical records indicate that appellant slit his wrists to call attention to himself, not to commit suicide (2d S.R. 71). Appellant stated that he cut his wrist because he was frustrated with a friend's roommate with whom appellant had had an argument (2d S.R. 71).

7. At the time of the crimes, appellant was on probation for a grand theft he committed in 1985 in Lee County; appellant's probationary sentence was for five years (R. 2069, 2080).

SUMMARY OF THE ARGUMENT

GUILT PHASE:

1. The admission of evidence pertaining to appellant's drug use is barred from appellate review based on appellant's failure to properly preserve this issue. Nonetheless, appellant's drug use was relevant to establishing motive, and was therefore admissible.

2. The autopsy photograph at issue depicted several stab wounds to Mrs. Leland's eyes which were not visible unless the scalp was pulled back. This evidence was relevant to the State's theory that appellant knew details of the crime which only the perpetrator would know.

3. The prior inconsistent statement that the Carusos were afraid of their son was properly admitted for purposes of impeachment where the statement at issue related to a non-collateral issue at trial. Nonetheless, even if admission of the statement is error, it was harmless beyond a reasonable doubt.

4. Appellant opened the door to the testimony regarding appellant's possession of the chain saw and his pawning of same during the cross-examination of Craig Quinn; additionally, appellant failed to object to similar testimony by Betty Quinn and Patrick Sheehan, thus precluding appellate review of this issue. On the merits, the evidence was pertinent to prove motive, in that appellant committed the murders of the Lelands during the course of a burglary where appellant stole items to pawn for money in order to sustain his drug habit.

5. Appellant did have notice that the State might introduce evidence of appellant's drug activities around the time of the murders. Nonetheless, even of the State's notice was inadequate under §90.404(2)(b) the trial court conducted an adequate pretrial inquiry into the procedural prejudice which appellant might suffer as a result of the failure to comply with the notice requirements of the statute.

6. Appellant knew the medical examiner's estimate of the victim's time of death based on various pretrial depositions and on appellant's arrest warrant. Regardless, the trial court conducted an adequate inquiry into the alleged violation and allowed appellant an opportunity to acquire his own expert to rebut the medical examiner's testimony. As such, appellant was not prejudiced by the alleged discovery violation. The same holds true regarding the cuts on appellant's arms.

7. There was other testimony admitted at trial, without objection, that only the murderer would know about certain details of the crime. Thus, the propriety of the statement at issue was not preserved for review, and is merely cumulative of other evidence. Nonetheless, when read in context, the statement was made while the officer was explaining why he failed to tell anyone about the saran wrap around Mr. Leland's head; the statement was not a conclusion. Indeed, according to the State's theory, appellant was the perpetrator because he knew details of the crime which only the murderer would know.

8. Any distortions in the photos caused by the six week time difference between the date of the murders and the date the pictures were taken went to the weight to be given the evidence, not its admissibility. There was thus no error in admitting same.

9. The error in improperly bolstering Myrel Walker's testimony was harmless beyond a reasonable doubt, especially in light of the fact that the testimony at issue did not pertain to a material aspect of the offense and her consistently positive identification of appellant.

10. Officer Faby's and Raimondi's testimony was not hearsay as it was offered to show what the officers did pursuant to information received during the course of the investigation. Further, no details of the information given by Ms. Walker were included in the testimony. In any event, appellant was not prejudiced thereby since appellant had the opportunity to cross examine Ms. Walker, and any error was therefore harmless.

11. Officer Martin's testimony that a paramedic told him the Leland residence was secured was offered to show the police officer's steps upon arriving at the Leland home. Having not been offered for the truth of the matter asserted, the statement was not hearsay and was not erroneously admitted.

12. That the presumption of innocence was diluted by various remarks is belied by the fact that none of the statements were objected to for purposes of appellate review. When read in context, none of the statements were improper, and in any event, the trial court's instructions to the jury cured any error.

13. The trial court's instruction to the jury venire regarding the readback of testimony was not timely objected to, and is subsequently barred from review. When counsel did object at the end of trial, the judge cured the error by advising the petit jury that they could request to have testimony read back.

14. Where the trial court advised the jury that, "those folks who take notes are not to be given greater weight than those folks who have not taken notes," there was no error in allowing the jurors to take notes.

15. The trial court's tangential comment that circuit court cases are reviewed by appellate courts was given as part of an introduction explaining how the court system operates. When read in context together with the other instructions read to the jury regarding reasonable doubt, the presumption of innocence, and the burden of proof, no error was committed.

16. The testimony that appellant refused to be fingerprinted absent his arrest was not preserved for review by objection. Nonetheless, since fingerprinting is non-testimonial, appellant's fifth amendment rights were not violated.

17. The court's instruction on reasonable doubt, which tracked the language of the standard jury instructions, did not violate appellant's constitutional rights.

18. Appellant did not object to proceeding to trial on alternative theories of first degree murder, and is thus barred from raising same on appeal. In any event, there was no error.

19. As there was sufficient evidence to prove that appellant was the perpetrator of the crimes, and that the murders were premeditated, the trial court properly denied appellant's motion for judgment of acquittal.

PENALTY PHASE:

20. The trial court's finding that four aggravating factors and no mitigating factors were established is supported by the record. As such, the trial court's override of the jury's advisory sentence recommending life is not erroneous.

21. Since the trial court was well aware of the fact that victim impact evidence was irrelevant to sentencing, the trial court's admission of victim impact evidence was harmless. That the victim impact evidence did not affect appellant's sentence is evidenced by the trial court's written order and the imposition of a life sentence for Mrs. Leland's murder.

22. The trial court's finding that the murders were heinous, atrocious and cruel, and cold, calculated and premeditated, was proper. Moreover, the trial court considered the mitigating evidence, but found that none were established.

23. In accordance with prior rulings from this Court and the United States Supreme Court, Florida's death penalty statute is not unconstitutional.

24. The aggravating factors applicable sub judice are not unconstitutional.

25. The override of the jury's life recommendation was in conformance with the standards enunciated in Tedder v State, 322

So.2d 908 (Fla. 1975), and is therefore not arbitrary and capricious.

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING APPELLANT'S DRUG USE INTO EVIDENCE WHERE RELEVANT TO ESTABLISH APPELLANT'S MOTIVE IN COMMITTING THE MURDERS.

Appellant contends that the trial court erred in admitting appellant's drug activities into evidence. Appellant's objections are twofold: first, appellant challenges the trial court's pretrial ruling admitting collateral crimes evidence to prove motive; this testimony was to focus on appellant's drug activities during the week of the murders. Secondly, appellant challenges the admission of testimony which referred to appellant's drug activities outside of the one week time period previously set by the court. However, the State maintains that this Court is precluded from reviewing the issue on two grounds: there was not a proper objection below, and any error was invited by the appellant. In any event, the evidence complained of was relevant to prove appellant's motive in committing the murders. As such, the trial court did not abuse its discretion in allowing same into evidence.

Prior to trial, defense counsel moved in limine to exclude Craig Quinn's testimony regarding appellant's crack cocaine use around the time of the murders; nonetheless, even appellant admitted that if the State could establish that appellant had a drug habit, it would explain appellant's motivation in robbing and killing the victims (R. 6-7). The prosecutor indicated that the State's theory of the case was that appellant needed money to

support his drug habit, and that in the course of committing a burglary on the victims' home, appellant committed the instant murders; however, while the prosecutor indicated that the evidence of appellant's drug use two to three weeks around the time of the murders was relevant to prove motive, he advised that he was unsure whether the State would seek to elicit said testimony (R. 7-8, 19). The court finally ruled that evidence of appellant's drug usage for a one week period around the time of the murders would be admissible (R. 22).

Prior to the testimony of Dana Banker, defense counsel renewed his objection to evidence of appellant's drug use through the testimony of Craig Quinn; defense counsel requested, and the trial court granted, a continuing objection to the testimony (R. 1097-1100). James Montgomery was called subsequent to Dana Banker; thereafter, the trial court heard a proffer of Craig Quinn's testimony regarding a drug-induced delusion which occurred two days before the murders (R. 1116, 1152-1162). Betty Quinn then testified, followed by Craig Quinn (R. 1168, 1192). Appellant did not renew his objection to the collateral crimes evidence at that point.

During the direct examination of Craig Quinn, the State did not elicit any testimony regarding appellant's drug use; rather, Quinn testified that on the night of Saturday, December 6, appellant called Quinn to go out, but Quinn declined (R. 1195). On Sunday, December 7, the day that appellant allegedly discovered the victims' bodies, Quinn picked up appellant at

appellant's home at approximately 3:00 p.m. (R. 1196). Quinn and appellant eventually went to an area of Miami where black people lived because appellant knew a lot of the people there, and appellant went inside one of the black people's homes (R. 1211. Quinn stated that whenever appellant had some cash, Quinn would take appellant to that specific area of Miami (R. 1215). Thus, the prosecutor excluded any specific mention of drugs on direct examination.

However on cross-examination, Quinn testified that he had a drug problem (R. 1224-1225). Quinn denied that appellant had called him on Saturday for the purpose of discussing the work on Sunday (R. 1230-1231). Appellant further elicited the fact that on that Sunday evening, Quinn had ingested cocaine which he had purchased from the black people in Miami; Quinn specified that he purchased the drug through a line of credit which he had established with them (R. 1250-1251). Quinn also testified that appellant had stated that appellant had been arrested in Davie on a reverse sting (R. 1255).

Thus, based on the testimony elicited by appellant during cross-examination, the prosecutor asked Quinn on redirect about his drug activities in December, 1987 (R. 1266). Quinn stated that he became involved with crack through the appellant, and that it was appellant who would take Quinn down to Miami to purchase the drugs which he and the appellant would subsequently ingest together (R. 1267-1269). Quinn then described in detail his and the appellant's drug activities during the time period

commencing December 1, 1987 up through and including Sunday, December 7, 1987. Quinn stated that on Saturday, the appellant had called him because appellant wanted to party, i.e. smoke cocaine (R. 1271). On Sunday, as on previous occasions, appellant was to work with Quinn, but appellant liked to be paid for his work in cash so that he could use the cash to purchase drugs. (R. 1260-1274).

On recross, Quinn testified that the appellant smoked more crack cocaine than he did. Defense counsel further questioned Quinn about Quinn's statement regarding appellant's arrest in a reverse sting (R. 1289, 1290).

Following Quinn's testimony, the court adjourned for the day. At the commencement of trial the following day, defense counsel objected to the testimony which referred to appellant's drug use beyond the time parameters previously set by the Court, i.e. one week during the time of the murders (R. 1297-1298). The court responded, stating:

> It was my understanding you wanted to make a standing objection with respect to my ruling with respect as to the day -- I'm sorry, with the one week period. That testimony would be admissible.

(R. 1300). The trial court consequently found that defense counsel had opened the door to the complained of testimony, and that defense counsel's objections were untimely. As such, the trial court denied appellant's motion for mistrial (R. 1300-1301). Appellant did not request a curative instruction.

Based on the foregoing, appellant has failed to preserve the admission of the collateral crimes evidence for purposes of appellate review. First, appellant did not renew his objection to the collateral crimes evidence prior to the admission of Craig Quinn's testimony, Phillips v State, 476 So.2d 194, 196 (Fla. 1985); Crespo v State, 379 So.2d 191 (Fla. 4th DCA) cert. denied. 388 So.2d 111 (Fla. 1980). Secondly, by asking Quinn about his drug activities on cross-examination, defense counsel opened the door to the evidence elicited by the prosecutor on redirect examination, Capehart v State, 16 F.L.W. S447 (Fla. June 13, 1991); See Holton v State, 573 So.2d 284 (Fla. 1990); indeed, even in closing defense counsel argued that the State wanted the jury to believe that appellant was so high on cocaine that appellant would have done anything (R. 1849). Dobson v State, 566 So.2d 560 (Fla. 5th DCA 1990). Insofar as there was other evidence regarding appellant's drug use, without objection, appellant cannot now complain that the admission of same into evidence was error (R. 1181, 1183, 1375, 1436). Easter v State, 398 So.2d 838 (Fla. 5th DCA 1981).

Thirdly, as to the testimony which referred to appellant's drug use outside of the one week period previously set by the court, any objection was untimely since the objection was not raised until long after the conclusion of Quinn's testimony, Castor v State, 365 So.2d 701 (Fla. 1978). Further, as is evidenced by the exchange between counsel and the court, the trial judge was unaware of the particular grounds of

appellant's objections; thus, insofar as the trial court was not advised of appellant's particular objections to the evidence i.e. that it referred to appellant's drug activities prior to the time of the murders, appellant's previous objections lacked the specificity required to alert the trial court of the alleged erroneous testimony, and the alleged error is therefore not preserved. Rivers v State, 425 So.2d 101 (Fla. 1st DCA) review denied, 436 So.2d 100 (Fla. 1983); Johnston v State, 497 So.2d 863, 868-869 (Fla. 1986). Appellant has additionally waived the error by his failure to request a curative instruction. Id.

On the merits, it is well settled in Florida that collateral crimes evidence is admissible where relevant to show motive for the subsequent crimes and to provide the entire context of the crimes charged. Grossman v State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989); Tumulty v State, 489 So.2d 150 (Fla. 4th DCA), review denied, 496 So.2d 144 (Fla. 1986); Heiney v State, 447 So.2d 210 (Fla. 1984); §90.404(2)(a), Fla. Stat. (1987). The proper test for admissibility is relevance. Id. Reversal is warranted only where the appellant can demonstrate an abuse of discretion in allowing same into evidence. Warren v State, 443 So.2d 381 (Fla. 1st DCA 1983).

Thus, in Jackson v State, 522 So.2d 802 (Fla.) cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988), the defendant shot and killed two victims as a result of arguments the defendant had had with the victims about drugs. Specific

testimony revealed that, prior to killing the first victim, the defendant had threatened to kill, and had shot at, an unnamed person in a bar; there was also testimony concerning a prior assault by the defendant on one of the victims approximately two weeks before the murders. Finding that the evidence supported the State's theory that the defendant had committed the murders because he believed the victims were stealing his drugs, this Court ruled that the collateral crimes evidence was properly admitted.

Similarly sub judice, the evidence regarding appellant's drug use was relevant to establish appellant's motive in killing the Lelands and to provide the jury with the entire factual context in which the crimes arose. According to the State's theory of the case, appellant was addicted to crack cocaine and needed money to support his habit. As a result, appellant attempted to commit a burglary on his next door neighbors' home; however, having been discovered by the Lelands in the course of committing the burglary, appellant murdered the victims, who would otherwise be able to identify appellant, to avoid his subsequent arrest. Hence, evidence of appellant's drug activities around the time of the murders, and prior thereto, was relevant to establish that appellant was a crack addict. Consequently, the jury could understand appellant's motive in committing a burglary and his subsequent violent reaction in brutally killing the Lelands.

Nonetheless, assuming arguendo that the evidence was improperly admitted, appellant was not prejudiced thereby. As noted by this Court in Craig v State, 510 So.2d 857 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988):

> Evidence that the defendant has committed *a similar crime, or one equally heinous,* will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.

(Emphasis in original), 510 So.2d at 864 citing Nickels v State, 90 Fla. 659, 685, 106 So. 479, 488 (1925). In the instant case, appellant's drug use was not more heinous than the crimes for which appellant was being tried. By the same token, to the extent that evidence of appellant's drug use beyond the one week period of the murders was admitted, said evidence was merely cumulative of testimony regarding appellant's drug activities around the time of the murders. Johnston v State, 497 So.2d 863. Finally, in light of the all the evidence indicating appellant's guilt, i.e. appellant's fingerprint on the front door of the victims' home, Myrel Walker's testimony placing appellant at the scene of the crime, appellant's knowledge of the saran wrap on Mr. Leland's head and of the stab wounds to Mrs. Leland's eyes, as well as the other inconsistencies in appellant's statements, the alleged impermissible evidence did not affect the jury's verdict of guilty (See pages 30-32 infra). As such, any error

was harmless beyond a reasonable doubt. Jackson v State, 522 So.2d 802. Appellant's convictions must therefore be affirmed.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING AN AUTOPSY PHOTOGRAPH INTO EVIDENCE WHERE RELEVANT TO SHOW THE NATURE OF THE INJURIES SUSTAINED BY THE VICTIM.

The test for admissibility of photographs is relevance, and the trial court's ruling admitting them into evidence will not be disturbed on appeal absent an abuse of discretion. Wilson v State, 436 So.2d 908 (Fla. 1983). The test of relevancy takes into consideration such issues as the cumulative nature of the photograph, and/or whether the photograph was taken away from the scene of the crime. Adams v State, 412 So.2d 850, 853 (Fla.) cert. denied, 475 U.S. 1103, 106 S.Ct. 1505, 74 L.Ed.2d 148 (1982) citing State v Wright, 265 So.2d 361, 362 (Fla. 1972). As such, the mere fact that a photograph was taken during the autopsy of the victim does not per se render the photograph inadmissible, so long as the photograph is relevant to any issue to be proven in the case. Id., Wilson, supra, Burns v State, 16 F.L.W. S389 (Fla. May 16, 1991); Randolph v State, 16 F.L.W. S271 (Fla. May 3, 1991); Nixon v State, 572 So.2d 1337, 1342 (Fla. 1990); Grossman v State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989).

In the instant case, the challenged photograph was relevant to the State's theory of the case. According to the prosecutor, appellant was the perpetrator of the victims' deaths because

appellant knew details of the crime which only the murderer would know, contrary to appellant's claims that he knew said details from having followed paramedics and police into the crime scene (R. 942, 1109, 1111). In support of the State's theory, various witnesses who viewed the bodies at the crime scene, testified that only dried blood and/or lacerations were visible in the eye area of Mrs. Leland; based solely on their view of the female at the crime scene, none of them could tell that Mrs. Leland had been stabbed in the eyes (686-688, 752-753, 775, 791-792, 825, 827, 1019-1020, 1325, 1403). The medical examiner and two officers who participated in the autopsy, testified that they became aware of the stab wounds around Mrs. Leland's eyes during the autopsy; the extent of the stab wounds were visible only after the scalp was peeled back from the forehead (R. 685-686, 791-792, 827-828, 835-836).

Thus, the photograph at issue was relevant, and therefore admissible, to support the State's theory of the case and to show the nature and extent of the injuries suffered by Mrs. Leland. Prior to the photograph's admission into evidence, the following exchange transpired between the court and counsel:

> MR. MCDONNEL: [defense attorney]: Judge, in looking at "OOOO" for identification, it's obviously gruesome in nature. It appears the epidermis has been peeled back by the Medical Examiner.
>
> It shows some obvious internal injuries to the female victim. I believe there are a number of other photographs that the State has in their possession which clearly show those

exact same injuries without the epidermis being peeled off the head.

And because of that, I think it's unnecessarily gruesome to show this particular photographs to the jury.

MR. HANCOCK [Prosecutor]: The State's position now is if Mr. McDonnel thinks this is gruesome, I'll be happy to cut this off, if he's concerned about this portion showing.

THE COURT: I didn't notice that. The other scene shows the cuts but it doesn't show how deep the hole is. I'll allow it in.

MR. MCDONNEL: I think we should take a look at those photographs and if you don't --

THE COURT: What other photos, the ones that have been marked?

MR. MCDONNEL: Not in evidence but for identification.

MR. HANCOCK: Here, Judge, you can look and see if there are any that show that. Now, you tell me where it is. Marty, you can't tell.

THE COURT: This is the one you're trying to describe?

MR. HANCOCK: Yes and the--Judge, this was not taken for any prejudicial purposes, just to show the actual --

THE COURT: I'll allow it in. Over objection.

(R. 743-744). As is evidenced from the foregoing, the photograph in question showed the nature and extent of the stab wounds to the eyes unlike any other photograph. This was clearly one of the factors considered by the trial court in ruling that the challenged photograph was relevant and admissible. Consequently,

just as the color photographs in Engles v State, 438 So.2d 803, 809 (Fla. 1983), 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984) were relevant because the drag marks on the victim's body were not visible on the black and white photo, the photograph sub judice was relevant because it was the only photograph showing the nature and extent of the stab wounds.

Further, during voir dire, defense counsel asked prospective jurors whether the gruesome nature of the photographs would interfere with the jurors' fact-finding function; indeed, all the prospective jurors indicated that they would not be swayed towards guilt or innocence based on the gruesome nature of the photos (R. 323-324, 422, 428, 486).

> It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused.

Henderson v State, 463 So.2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1986). It can therefore be presumed that the jury at bar was not unduly inflamed by the photograph to the extent that they would find appellant guilty solely on the photograph.

Nonetheless, in determining that the photographs were relevant and admissible, the trial court considered the fact that the photograph supported the State's theory of the case and that no other photograph in the State's possession demonstrated the nature and extent of the wounds suffered by the victim. The fact

that the photo was taken during the autopsy was only one of the factors to be considered by the trial court in determining its admissibility. Having found that the foregoing factors rendered the photo relevant, and that its relevance outweighed any undue prejudice, the trial court did not abuse its discretion in admitting the photograph into evidence.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING A PRIOR INCONSISTENT STATEMENT INTO EVIDENCE.

Appellant contends that the trial court erred in allowing Detective Pazienza testify on behalf of the State as a rebuttal witness. Pazienza testified that while questioning Mr. and Mrs. Caruso on the date of the murders, both had stated that they were afraid of appellant (R. 1745, 1760). The State had previously laid a proper predicate for the testimony by asking both Mr. and Mrs. Caruso whether they had told Detective Pazienza that they were afraid of appellant (R. 1627, 1701). Following defense counsel's objection to the testimony, the trial court instructed the jury that they were to consider the testimony on rebuttal solely for purposes of impeachment, not as substantive evidence (R. 1757-1760). Contrary to appellant's assertions, the evidence was not hearsay and was properly introduced as an inconsistent statement.

Extrinsic evidence of a prior inconsistent statement is admissible into evidence where the witness first denies having made the statement, and the statement relates to a non-collateral

issue at trial. §90.614(2) Fla. Stat. (1987). In Gelabert v State, 407 So.2d 1007, at 1010 (Fla. 5th DCA 1981), the court described non-collateral evidence as follows:

> 1. [F]acts relevant to a particular issue (which would therefore be admissible irregardless of their impeachment value); and
>
> 2. [F]acts which discredit a witness by pointing out the witness' bias, corruption, or lack of competency (i.e., personal knowledge of the facts, ability to understand an oath, and ability to relate the facts at trial).

Under these circumstances, a witness' testimony about another witness' prior inconsistent statement is not hearsay since it is being offered solely for purposes of impeachment. See Williams v State, 443 So.2d 1053 (Fla. 1st DCA 1984); Lambrix v State, 494 So.2d 1143, 1147 (Fla. 1986).

> When a witness has testified to facts material in the case, it is provable by way of impeachment that he has previously made statements relating to these same facts which are inconsistent with his present testimony. The making of these previous statements may be drawn out in cross-examination of the witness himself, or if on such cross-examination the witness has denied making the statement, or has failed to remember it, the making of the statement may be proved by another witness.
>
> The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold and raises doubt as to the truthfulness of both statements.

Wingate v New Deal Cab Company, 217 So.2d 612, 614 (Fla. 1st DCA 1969), citing McCormick on Evidence.

Thus sub judice, the testimony by Detective Pazienza, that Mr. and Mrs. Caruso had stated on the night the victims were discovered, that they were afraid of their son, was not hearsay. The statement was not offered for its truth, but as impeachment to demonstrate Mr. and Mrs. Caruso's bias. Indeed, the trial court's instruction to the jury advised that the statement was only to be considered for impeachment purposes, and not as substantive evidence.

By the same token, the testimony at issue was properly admissible insofar as it related to a non-collateral issue at trial. The Carusos' statement to police that they were afraid of their son, the appellant, where in court they had denied making said statement, demonstrated the witnesses' bias towards the appellant; said statement shed light on the relationship between the appellant and his parents. As such, the testimony in question was admissible for impeachment. Federal Deposit Insurance Corp. v Carre, 436 So.2d 227 (Fla. 2d DCA 1983); Sias v State, 416 So.2d 1213 (Fla. 3d DCA 1982).

Finally, assuming arguendo that the statements were improperly admitted, any error was harmless beyond a reasonable doubt. State v DiGuilio, 491 So.2d 1129 (Fla. 1986). First, the trial court gave an instruction to the jury that they were not to consider the statement as substantive evidence, but only as impeachment. Secondly, the testimony did not have the effect of

impugning appellant's character when considered in light of the other testimony at trial; during the State's case in chief, several witnesses testified that appellant and his father, Mr. Caruso, had had a physical confrontation shortly after the victims had been discovered, to the point that police had to intervene; Pazienza testified that after the fight, the appellant went to the carport of his home and began kicking and bending a piece of aluminum, such that appellant's mother would not even exit the house (R. 610-612, 936, 1083, 1096, 1367-1369). Thus, to the extent that the rebuttal testimony was cumulative of the testimony regarding appellant's actions at the scene, appellant was not prejudiced by Pazienza's testimony on rebuttal.

Finally, given the State's evidence, it is unlikely that the testimony at issue had any impact on the jury's verdict. The permissible evidence which the jury could have relied on in finding appellant guilty included, but was not limited to, the following: appellant was placed at the scene of the murders by Myrel Walker, who testified that she had seen the appellant knocking on the door of her house on the evening of December 5, 1987, just before midnight; it was later discovered that there were pry marks on Myrel Walker's front door (R. 1487-1490, 1494-1500). Appellant's fingerprints were found on the front door of the victims' home, as were pry marks (R. 666, 758-761, 775, 972). A K-9 officer who was called to the murder scene to track the suspect, testified that the canine lost track of the scent at appellant's home (R. 952-956). Appellant had fresh cuts on his

arms the day the bodies were discovered (R. 721-722, 729, 855-856, 935-936, 1083, 1354), and appellant made several incriminating statements to Craig Quinn, which statements implied that appellant had committed the murders (R. 1214, 1217, 1257, 1287).

Even appellant's allegedly exculpatory statement was not corroborated by the evidence (R. 1335-1351). The officers, paramedics and firefighters who were the first to arrive on the scene, testified that they did not see appellant in the house when the scene was secured (R. 565-568, 571, 575, 579, 583-584, 593, 597-598, 614, 625, 1013, 1016, 1026, 1022, 1031-1034). Furthermore, given the position of the victims' bodies within their house, appellant could not have seen the bodies and the trauma suffered by the victims unless he had been farther into the house than the front door (R. 570, 572-574, 599-600, 752, 775-776, 779-780, 810, 820-821, 1015, 1021). Yet, appellant was able to describe the position of the victims' bodies within the home (R. 1040) as well as the nature of the injuries suffered by the victims, i.e. the stab wounds to Mrs. Lelands eyes and the saran wrap around Mr. Leland's head; these details of the crime were not released to the general public and were not known to many of the law enforcement personnel who viewed the scene since the saran wrap around Mr. Leland's head was not visible until the heavy plastic covering was removed from his upper torso, and the stab wounds to Mrs. Leland's eyes were not seen until the autopsy was performed (R. 570, 575, 613, 626, 653, 685-688, 775, 791-792,

825, 827-828, 835-836, 1019-1020, 1084-1085, 1325, 1360, 1372, 1403). The officers also tried to verify whether they could see a black man from the front window of the victims' house; they stated that only a silhouette could be seen from the front window, and that no physical characteristics of the individual could be discerned (R. 607-608, 628-629, 734, 765, 1071, 1387, 1392-1393). By the same token, there was testimony that one had to strain to be able to view Mrs. Leland's body from the back window of the Leland home (R. 609, 1011, 1015, 1029-1030, 1355-1356). Officers Corpion and Pazienza testified that the awnings on the victims home were clean; the victims' grandson, James Montgomery, testified that he maintained the Leland house and had just cleaned and painted their house, including the awnings, nine months before (R. 735, 1119, 1121, 1130, 1354).

Thus, based on the entire record, the alleged impermissible evidence could not have affected the jury's guilty verdict. As such, the alleged error in admitting the rebuttal testimony of Detective Pazienza was harmless beyond a reasonable doubt.

POINT IV

THE TRIAL COURT'S ADMISSION OF EVIDENCE REGARDING THE CHAIN SAW WAS NOT PRESERVED FOR APPELLATE REVIEW AND WAS NONETHELESS RELEVANT TO PROVE MOTIVE.

Appellant claims that the prosecutor introduced bad character evidence showing that appellant stole a chain saw from his father and subsequently pawned same. However, appellant's

rendition of the procedural aspects of this testimony is erroneous, and therefore the instant issue has not been preserved for appellate review.

It was the appellant who initially opened the door to the testimony that appellant had gotten a chain saw from his father and had subsequently pawned same. During the cross-examination of Craig Quinn, defense counsel questioned Quinn about the chain saw, asking him whose chain saw it was and when was it pawned (R. 1258-1259). The prosecutor then followed up on this testimony on redirect examination (R. 1274-1280). As such, any error which may have resulted from the admission of this testimony was invited by the appellant, and he is therefore estopped from complaining about the admission of same on appeal. Guess v State, 16 F.L.W. D1361 (Fla. 1st DCA May 13, 1991); Edwards v State, 530 So.2d 936 (Fla. 4th DCA 1988); Jones v State, 632 So.2d 1337 (Fla. 3d DCA 1988).

By the same token, the State called Betty Quinn, Craig Quinn's mother, and Patrick Sheehan, an employee of the Uptown Pawn Shop, who testified about the chain saw, without objection by the appellant (R. 1311-1313, 1471-1479). As a result, appellant has failed to preserve the instant issue for appellate review. Sochor v State, 16 F.L.W. S297 (Fla. May 2, 1991); Castor v State, 365 So.2d 701 (Fla. 1978).

Furthermore, none of the witnesses in question, i.e. Craig Quinn, Betty Quinn, or Patrick Sheehan, specifically said that appellant had "stolen" the chain saw from his father; rather, the

testimony was that appellant had "gotten" the chain saw from his father (R. 1259, 1277). Thus, there was no evidence that appellant had "stolen" the chain saw from his father, and any implication to that effect was clearly vague.

In any event, the testimony regarding appellant's attempts to pawn the chain saw was relevant to prove appellant's motive in committing the murders. The State's theory of the case was that appellant had committed the murders in the course of perpetrating a burglary of the victims' home; appellant's purpose in committing the burglary was to steal items and/or cash in order to support his drug habit. Indeed, there was evidence that appellant had stolen a gold butterfly pendant and necklace from the victims and that appellant intended to pawn same for money to buy drugs (R. 1214, 1257, 1281). Furthermore, the focus of the testimony regarding the pawning of the chain saw was the fact that appellant pawned it and the date on which it was pawned, not whether appellant had stolen it from his father (R. 1275-1276, 1278-1279, 11311-1313, 1471-1479). As such, the evidence was relevant, and therefore admissible to prove motive. Craig v State, 510 So.2d 857 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Heiney v State, 447 So.2d 210 (Fla. 1984).

Further, appellant was not prejudiced by the testimony. First, appellant elicited the fact that at the time of the murders, appellant was on probation for having committed a grand theft (R. 1255). Secondly, with regards to the butterfly pendant which appellant was alleged to have stolen from the victims,

appellant attempted to establish that the pendant in fact belonged to appellant's mother (R. 1528, 1532, 1536, 1663-1666). Thus, if in fact the jury believed that the butterfly pendant did belong to appellant's mother, in light of the testimony regarding appellant's intention to pawn same, the implication would be the same as that of the chain saw: that appellant had stolen the item to pawn same. As such, the testimony that appellant "stole" the chain saw from his father was merely cumulative of other testimony in the case.

In sum, appellant has failed to demonstrate fundamental reversible error.

POINT V

THE TRIAL COURT DID NOT ERR IN FAILING TO CONDUCT AN ADEQUATE INQUIRY INTO THE STATE'S ALLEGED FAILURE TO COMPLY WITH THE TEN DAY NOTICE REQUIREMENT OF §90.404(2)(b) FLA. STAT. WHERE THE ISSUE AROSE PRETRIAL AS A RESULT OF APPELLANT'S MOTION IN LIMINE TO EXCLUDE COLLATERAL CRIMES EVIDENCE.

Appellant contends that the trial court erred in failing to conduct an adequate Richardson[1] hearing prior to trial regarding the collateral crimes evidence which the State intended to introduce at trial, namely appellant's drug use around the time of the murders. However, as evidenced by the hearing held by the trial court, appellant had notice of the nature of the evidence

[1] Richardson v State, 246 So.2d 771 (Fla. 1971).

the State sought to introduce and he was not prejudiced by the lack of notice.

The hearing in question arose as the result of appellant's motion in limine to exclude the collateral crimes evidence regarding appellant's drug use. The hearing commenced with the following from defense counsel:

> MR. MCDONNEL: There is one more matter, Judge, having to do with evidence, and I request a ruling from the Court. If the Court could give me one now because I think it may have a bearing on voir dire examination. Mr. Craig Quinn was listed as a witness.
>
> THE COURT: Craig who?
>
> MR. MCDONNEL: Quinn, Q-U-I-N-N. He was, around the time of these homicides, an acquaintance of Michael Caruso. During the deposition, as well as some pre-trial discovery, it came to my attention that Mr. Quinn's testimony is going to be that he was smoking crack cocaine around the time of these homicides, and Mike Caruso was smoking crack cocaine around the time of these homicides.
>
> I respectfully feel, Judge, that that is irrelevant to any issue before this jury. And if it is relevant whatsoever, it would fall under the purview of the William's Rule 90.404(b).
>
> The only way I can conceive of the State saying that's relevant is to say because Michael had a drug habit. If they can establish he had a drug habit, that was a motive to go kill these people or rob these people, whatever the case may be.
>
> Nonetheless, Judge, I received William's Rule notice and I think the Court's well aware that any character evidence relating to Mr. Caruso is inadequate unless Mr. Caruso makes his

> character admissible. So based on a motion in limine to keep out any reference by the prosecution about basically from this Quinn as to Mike Caruso's alleged cocaine habit.

(R. 6-7). (Emphasis added). As the discussion between the Court and the parties progressed, appellant claimed that he had no written notice of the State's intention to introduce the collateral crimes evidence (R. 9). The prosecutor responded that appellant did have notice based on the pretrial depositions of the State's witnesses and the prosecutor's discussions with defense counsel; the mere fact that appellant had notice is evidenced by appellant's motion in limine (R. 9-15)

The trial court then inquired into the possible procedural prejudice suffered by appellant as a result of the State's failure to file written notice under 90.404(2)(b) (R. 16-22). Defense counsel conceded that he could hardly claim prejudice based on Quinn's testimony since he had taken Quinn's deposition (R. 21). Thus, finding that appellant was not prejudiced by the prosecutor's failure to file a notice, the trial court ruled that evidence of appellant's drug use one week around the time of the murders would be admissible (R. 22). Defense counsel objected to the trial court's ruling, but nonetheless requested leave of court before Quinn would take the stand, "in case I can establish more problems;" the trial court advised defense counsel that he would have that time (R. 22). Based on defense counsel's lack of a request for leave of court prior to Quinn's testimony, it is apparent that appellant was unable to "establish more problems."

Insofar as the instant hearing occurred pretrial and was not the result of a discovery violation, the State maintains that the extent of the inquiry required by Richardson does not apply to the scenario sub judice. Brazell v State, 570 So.2d 919 (Fla. 1990); Downing v State, 536 So.2d 189 (Fla. 1988). In such cases, the focus is on whether the defendant has suffered any procedural prejudice as a result of the State's failure to comply with the provisions of §90.404(2)(b) Fla. Stat. Garcia v State, 521 So.2d 191 (Fla. 1st DCA 1988); See State v Lewis, 543 So.2d 760, 765 (Fla. 2d DCA) rev. denied 549 So.2d 1014 (Fla. 1989).

As is evidenced by the colloquy between the parties and the trial court, appellant had notice of the testimony which the State was going to seek to elicit from Craig Quinn. Defense counsel had deposed the witness and had discussed with the prosecutor that he intended to file a motion in limine seeking to exclude Quinn's testimony. Indeed, the hearing at issue arose as a direct result of appellant's motion in limine to exclude the collateral crimes evidence of appellant's drug use through Craig Quinn. Furthermore, the trial court advised defense counsel that appellant would be afforded any extra time he needed to prepare for Quinn's testimony if appellant discovered any other problems. As such, appellant can hardly complain that he as procedurally prejudiced in preparing his defense as a consequence of the State's failure to file a written notice. Garcia, supra; Davis v State, 537 So.2d 1061 (Fla. 1st DCA 1989); See Freeman v State, 545 So.2d 915 (Fla. 2d DCA), rev. denied 548 So.2d 662 (Fla.

1989): trial court did not err in admitting hearsay evidence under 90.803(23) despite state's failure to provide sufficient notice as required by §90.803(23)(b) Fla. Stat. where state attached to its notice copies of depositions and police reports containing the statements; DiStefano v State, 526 So.2d 110 (Fla. 1st DCA 1988): though state did not meet notice requirements of §90.803(23) Fla. Stat. defendant not procedurally prejudiced thereby where defendant had opportunity to view videotape and interview victim's mother regarding the testimony in question.

Appellant has even failed to demonstrate on appeal how the state's failure to provide written notice procedurally prejudiced him in preparing for trial. Thus, regardless of whether the trial court ascertained whether the prosecutor's failure to file written notice was willful or inadvertent, the outcome at bar would remain unchanged. Assuming, for the sake of argument only , that the prosecutor's failure to file notice was willful, the trial court would still not have been forced to resort to excluding the evidence. Johnson v State, 461 So.2d 1385 (Fla. 1st 1984). Exclusion of evidence is discretionary, and it is a sanction to be invoked only under compelling circumstances when no other remedy suffices. Wilkerson v State, 461 So.2d 1376 (Fla. 1st 1985); Keen v State, 456 So.2d 571 (Fla. 2d DCA 1984).

Thus, the fact that the trial court did not specifically ask the prosecutor whether his failure to file a written notice as required by 90.404(2)(b) was willful or

inadvertent does not necessitate reversal of the instant cause. The rule established by Richardson, "...was never intended to furnish a defendant with a procedural device to escape justice," Richardson v State, 246 So. 2d 771 at 774 (Fla. 1971), is equally applicable to the scenario sub judice. The trial court instead emphasized, as it should, whether appellant was prejudiced thereby; he determined that appellant had suffered no prejudice. Appellant's conviction must therefore be affirmed.

POINT VI

WHERE APPELLANT KNEW THAT THE MEDICAL EXAMINER HAD PREVIOUSLY GIVEN A TIME OF DEATH FOR THE VICTIMS, THERE WAS NO DISCOVERY VIOLATION BY THE STATE WHICH NECESSITATED AN INQUIRY BY THE TRIAL COURT, AND IN ANY EVENT, AFTER INQUIRING INTO THE CIRCUMSTANCES SURROUNDING THE ALLEGED VIOLATION, THE TRIAL COURT AFFORDED APPELLANT THE OPPORTUNITY TO FIND HIS OWN EXPERT.

Appellant's allegation that he was not informed of the medical examiner's findings on the time of the victim's death is refuted by the record. As such, there was no discovery violation by the State which necessitated a hearing by the trial court. Nonetheless, the trial court did conduct an inquiry into the alleged discovery violation, after which he afforded defense counsel the opportunity to find his own medical expert to refute the medical examiner's testimony. Thus, appellant's claim is without merit.

During direct examination of the medical examiner, Dr. Dominguez testified that, by the time he arrived at the scene of

the crime at 10:00 a.m., the victims had been dead for approximately eight to ten hours; as a result, the medical examiner placed the victims' time of death between 12:00 a.m. and 2:00 a.m. on the morning of December 6, 1987 (R. 854-855). On cross-examination, defense counsel impeached Dr. Dominguez regarding his direct examination testimony on the estimated time of death of the victims:

> Q: Do you recall me asking you back on May 31, under oath, whether you can approximate the time of death?
>
> A: At the time I said I didn't remember.
>
> Q: And I asked is there anything which would refresh your recollection?
>
> A: Yes. I said not really. but, in fact, after going through the past three or four days trying to go through in my mind everything that went on that day and being able to go back through my pictures, I was wrong then.
>
> I think I could come up with-- There's some evidence that would tend to indicate that I can arrive at the time of death.
>
> Q: You had your pictures with you during the deposition, didn't you?
>
> A: Yes, sir, I did.
>
> Q: Did you prepare for the deposition?
>
> A: Not as well as I should have. I've been going over this case for the last three days. For your deposition, I didn't have that much time.
>
> Q: But you had your notes in front of you?
>
> A: I had my notes.

Q: And photographs?

A: Yes.

(R. 862-863).[2]

At the conclusion of the medical examiner's testimony, proceedings were concluded for the day (Friday, September 23, 1988), until Monday, September 26. At the commencement of trial on Monday, defense counsel moved for a mistrial claiming that Dr. Dominguez' trial testimony regarding the victim's time of death was contrary to the testimony regarding same at deposition; defense counsel stated that he was traveling under the theory that the State would not be prepared to present an expert who would be able to estimate the time of death (R. 880-882). Defense counsel further stated that because he did not know of the medical examiner's change in testimony, appellant was unable to hire his own expert to refute Dr. Dominguez' estimation; he also challenged the medical examiner's opinion regarding the cuts on appellant's hands on the same grounds, i.e. having a defense expert to refute same (R. 883).

In response, the prosecutor agreed with appellant that at deposition, the medical examiner had stated that he could not remember the victims' estimated time of death; however, the prosecutor did point out that, based on the depositions of the

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[2] In closing, appellant argued that the inconsistencies in the medical examiner's testimony at deposition and at trial rendered Dr. Dominguez' testimony suspect, such that the jury could not rely on same in reaching its verdict (R. 1832, 1850).

police officers and the arrest warrant, appellant knew that medical examiner had previously placed the Lelands' time of death at eight to twelve hours prior to his arrival (R. 888-890). As to the cuts on appellant's arms, the prosecutor stated that appellant was aware of same since he had the photographs depicting the cuts, as well as deposition testimony from several police officers who estimated the age of the cuts (R. 889-890).

At the conclusion of the inquiry, the trial court found that there was no discovery violation as to either the time of death or the scratches on appellant's arms (R. 890-891). The trial court refused to delay the trial at that point, but allowed appellant the opportunity to find his own expert to contradict the testimony of the medical examiner; the trial court stated:

> I'm not delaying the trial. If you can come up with somebody you have to bring that up. I'm not ruling either way. I'm saying I'm not going to delay the trial. And if you can come up with somebody we'll address it at that point.

(R. 892-893).

Based on the foregoing, the State first maintains that there was no discovery violation which necessitated that a hearing be held. While at deposition the medical examiner stated that he did not remember the time of death he had previously estimated, appellant did know from the depositions of the police officers and from the arrest reports, that the medical examiner had estimated the time of death at 8 to 10 hours prior to the medical examiner's arrival at the scene (R. 2235). Thus, since

he already knew that the medical examiner had previously stated the victims' time of death, appellant was not surprised by the testimony itself; rather he was surprised that the medical examiner was able to remember same. Appellant's lack of surprise to the content of the testimony is further bolstered by the fact that appellant did not timely and contemporaneously object to the medical examiner's testimony; instead, he waited until two days later after proceedings commenced to raise the issue.[3]

At deposition, the victim in White v State, 403 So.2d 331 (Fla. 1981), stated that he might possibly identify the defendant if he saw him in the flesh, rather than in pictures; indeed, the victim had previously been unable to identify the defendant in pretrial photographic lineups. However, at trial, the victim surprisingly identified the defendant. Finding that the State had not misinformed the defendant about the victim's ability to make an in-court identification of the defendant, this Court found that no discovery violation had occurred.

Similarly at bar, since Dr. Dominguez testified at deposition that he could not remember what he had estimated the victims' time of death to be, the State did not misinform appellant about same. Indeed, based on the police reports and depositions, appellant knew that the medical examiner had previously estimated the time of death. As such, Dr. Dominguez'

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[3] Insofar as appellant failed to timely and contemporaneously object, the State submits that the instant issue has not been preserved for appellate review. Castor v State, 365 So.2d 701 (Fla. 1978).

ability to refresh his recollection for trial did not amount to a discovery violation by the State. Downing v State, 536 So.2d 189 (Fla. 1988); State v Lewis, 543 So.2d 760 (Fla. 2d DCA) review denied, 549 So.2d 1014 (Fla. 1989); Whitfield v State, 479 So.2d 208 (Fla. 4th DCA 1985).

The same holds true of the medical examiner's testimony regarding the cuts on appellant's arms. Appellant knew, based on the deposition and trial testimony of the officers and the photographs, that the cuts on appellant's hands were fresh (R. 721-722, 729). That the medical examiner confirmed their testimony is not a discovery violation, especially where the testimony was within the doctor's expertise. See Burns v State, 16 F.L.W. S389 (Fla. May 16, 1991).

In any event, assuming that the medical examiner's testimony did constitute a discovery violation, there was no error where the trial court conducted an adequate inquiry thereon. Despite the fact that the trial court found no discovery violation, the trial court nonetheless allowed appellant the opportunity to find his own expert to rebut the medical examiner's testimony regarding the victims' time of death. The medical examiner testified on Friday, September 23, 1988, appellant objected to the testimony on Monday, September 26, 1988, and the defense's case did not close until September 29, 1988 (R. 801, 871, 1601). Hence, appellant had at least a week in which to find his own expert to contradict the medical examiner's findings (R. 1780). Further, appellant was able to

substantially impeach the medical examiner's change in testimony. Hence, appellant did not suffer procedural prejudice as a result of the alleged discovery violation. Cohen v State, 16 F.L.W. D1547 (Fla. 3d DCA June 11, 1991). Thus, in light of the trial court's consideration of the alleged discovery violation, there was no reversible error. State v Hall, 509 So.2d 1093 (Fla. 1987).

Finally, the State would note that even the evidence presented by the defense witnesses supported the fact that the victims had expired between 12:00 a.m. and 2:00 a.m. on December 6. The medical examiner testified that rigormortis begins to set eight to ten hours after death (R. 854). Michael Holtz, who testified for the defense, stated that when he entered the victims' home at approximately 8:00 a.m. and checked Mrs. Leland for vital signs, rigormortis had already set in (R. 1713, 1716-1717). Thus, aside from the medical examiner's testimony, there was other evidence indicating the victims' time of death, thereby negating any prejudice which appellant claims he suffered as a result of the testimony in question.

POINT VII

IN LIGHT OF THE OTHER EVIDENCE AT TRIAL, THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO OFFICER WALSH'S TESTIMONY THAT HE DID NOT TELL ANYONE ABOUT THE SARAN WRAP AROUND THE VICTIM'S HEAD BECAUSE IT WAS AN ELEMENT OF THE CRIME THAT ONLY THE KILLER WOULD KNOW.

Appellant contends that the trial court erred in overruling appellant's objection to the following testimony by Officer Walsh:

> Q: What did you observed Dr. Dominguez do?
>
> A: He examined the bodies and went to the male victim. And my attention was drawn to the bedroom area. And he removed the plastic that was covering the male victim and relayed that he's wrapped in saran wrap. And at that point I looked and turned toward the body. And I could see that the male victim's head was tightly wrapped in saran wrap.
>
> Q: Did you know that before?
>
> A: No, I did not.
>
> Q: Did you tell anyone anything in reference to that anything about the saran wrap?
>
> A: No, I did not.
>
> Q: Why not?
>
> A: Because it was elements of the crime I felt only the killer would know.

(R. 1080-1081) (Emphasis added). Appellant alleges that the trial court's reason for admitting the subject testimony into evidence, i.e. that such evidence had already been admitted into evidence without objection, is not supported by the record. As such, appellant claims, the admission of the testimony was erroneous because it was a conclusion to be drawn by the jury.

The State's theory of the case was that appellant was the perpetrator of the crimes charged because appellant knew details

of the murder which only the killer would know. The prosecutor argued as such in closing arguments, without objection, as did defense counsel (R. 1804, 1840). Moreover, prior to the admission of the challenged remark, Detective George Miller testified to the following:

> Q: Now, did there ever come a time when you had occasion to see Mr. Caruso again?
>
> A: Yes, sir.
>
> Q: And when was that?
>
> A: It was the following morning. I was watching the early morning news on television, and I observed Mr. Caruso being interviewed.
>
> Q: Do you recall what station that was?
>
> A: I believe it was Channel 10?
>
> Q: And what happened on that?
>
> A: He made a statement that only we at the crime scene knew.
>
> Q: What did you observe him say?
>
> A: He stated that he had seen the body of a white female laying in the living room and later had seen the body of a white male laying in the hallway with his head wrapped in Saran Wrap.

(R. 738-739). In addition, Officer Belusko testified that there are certain details of a crime which only the perpetrator would know, and that consequently these details are not released to the media (R. 939). During the cross-examination of Officer Walsh, appellant first questioned him about the complained of remark (R. 1088-1089).

Thus, although witnesses prior to Officer Walsh did not use the same words to describe the fact that only the murderer would know about the saran wrap around the victim's head, the essence of Miller's and Belusko's testimony was the same as that of Officer Walsh's remark. Hence, insofar as appellant failed to object to Miller's and Belusko's testimony, and based on his cross-examination of Officer Walsh, the present challenge to Walsh's statement has not been preserved for appellate review, Easter v State, 398 So.2d 838 (Fla. 5th DCA 1981). By the same token, appellant was not prejudiced thereby to the extent that Walsh's testimony was cumulative of the other evidence. Johnston v State, 497 So.2d 863 (Fla. 1986).

On the merits, appellant's characterization of Officer Walsh's statement as opinion testimony which drew a conclusion, is erroneous. As evidenced by the excerpt of the testimony above, the remark was Officer Walsh's explanation for failing to tell anyone about the saran wrap around the victim's head. It was not a statement concerning Officer Walsh's opinion about the perpetrator of the crimes. Indeed, the statement did not even involve an ultimate issue in dispute, i.e. that appellant was the perpetrator because he knew details of the crime that only the killer would know. Hence, in light of the nature of the testimony, the trial court did not err in overruling appellant's objection to same. See Holton v State, 573 So.2d 284, 288 (Fla. 1990). In any event, the trial court sustained appellant's subsequent objections to similar statements (R. 1360-1362).

Finally, assuming for the sake of argument that the statement was an improper conclusion and was inadmissible, any error was harmless beyond a reasonable doubt, (See Point III supra, pages 30-32).

POINT VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING A PHOTOGRAPH WHERE ANY DIFFERENCE IN THE LIGHTING CONDITIONS BORE ON THE WEIGHT TO BE GIVEN THE PHOTOGRAPH, NOT ITS ADMISSIBILITY.

Appellant was allegedly the first person to become aware of the Lelands' demise. In appellant's statement to police, appellant claimed that upon returning home from an early morning walk, he cut across the Lelands' front lawn and saw a black man standing at the front window of the Leland home; appellant described the black male as having a medium afro, with a medium body build, standing approximately 5'10" tall, about 35 years old (R. 1336-1341). Upon seeing the man, appellant claimed that he became suspicious, whereupon appellant subsequently discovered the body of Mrs. Leland.

In an attempt to verify appellant's version, law enforcement at the scene reenacted the appellant's statement of events. As a result, on the day the bodies were discovered, Officer Fahy traced the area across the Leland yard appellant stated he had walked to try to get an idea of what appellant had seen. Another officer stood inside the Leland home at the front window where appellant stated he had seen the black man standing,

but Officer Fahy testified that all he could see was a silhouette (R. 607-608). Detective Corpion and Pazienza likewise reenacted appellant's version of events on the day the bodies were discovered, and they too testified that they could not tell the race or sex of the person standing at the window (R. 734, 1356). On cross-examination of both Fahy and Corpion, appellee would note that appellant attempted to impeach the officers' testimony by showing that no photographs were taken to verify what the officers had seen in recreating the view from the window.

Detective Pazienza, on the other hand, did take a photograph of what could be seen from the Leland's front window. The photograph was taken on January 13, 1988 at approximately the same time of day that appellant had stated he had seen the black man (R. 1387, 1390). Despite the six week difference between the date of the murders and the date that the picture was taken, the trial court was inclined to admit the photograph into evidence since any difference in the lighting conditions went to the weight to be given the photograph, not its admissibility (R. 1388-1391). Finding that Pazienza attempted to recreate the same conditions which existed on December 6, 1987, the trial court admitted the photograph in question into evidence (R. 1393-1395).

Having considered that the passage of time affected the photograph's weight rather than its admissibility, the trial court's ruling admitting same into evidence was not in error.

> The perspective from which the photographs is taken, the type of camera and film used, the quality and focal

> length of the lenses used, the lighting, the use of filters, and the development of the final print or transparence can result in distortion and misrepresentation. (Citations omitted). The effect os such distortion or misrepresentation on the physical characteristics is usually minimal but the effect on the abstract of quality of time can be misleading. Admissibility, however, is a question for the trial judge. Once authenticated and admitted, questions of possible distortion go to the weight which the photograph is given. (Citations omitted).

(Emphasis added). Hannewacker v City of Jacksonville Beach, 419 So.2d 308, 311 (Fla. 1981).

Thus, any changes in the lighting conditions which resulted from the passage of time did not render the photographs inadmissible. Any differences which may have occurred as consequence of the six week difference between the time the photograph was taken and the date the bodies were found could have been utilized by appellant to attack the weight to be given the photograph (R. 1395-1396). As such, the trial court did not abuse its discretion in admitting the photograph into evidence despite the change in lighting conditions. See Johnson v State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); First Federal Savings & Loan Association v Wylie, 46 So.2d 396 (Fla. 1950).

POINT IX

> THE TRIAL COURT'S ERRONEOUS ADMISSION OF MYREL WALKER'S PRIOR CONSISTENT STATEMENT WAS HARMLESS BEYOND A REASONABLE DOUBT.

While appellee agrees with the appellant, that Myrel Walker's prior consistent statement was improperly admitted in the absence of a claim of recent fabrication, appellee disagrees that the impropriety of admitting said testimony amounts to reversible error. To the contrary, the error in admitting the statement was harmless beyond a reasonable doubt.

Although Mrs. Walker admitted that she may have made a mistake in describing which direction appellant walked after asking Mrs. Walker to use her telephone, she never vacillated in her identification of appellant as the man who appeared at her door on the night of December 5, 1987; to the contrary, Mrs. Walker got a good look at the individual, was able to accurately describe him, and she subsequently had no doubt that appellant was the same person (R. 1497, 1498, 1500, 1501, 1509, 1518). This was the thrust of Mrs. Walker's testimony. As such, the impeachment value of Mrs. Walker's inconsistent statement was minimal at best, where the impeachment effected a collateral matter, not her identification of appellant itself.

Furthermore, during direct examination, from an aerial map of the neighborhood, Mrs. Walker unequivocally described the direction in which appellant walked after encountering Mrs. Walker on December 5 (R. 1504-1506). Additionally, the prosecutor rehabilitated the witness on redirect wherein she explained that when appellant walked down the street and into one of her neighbor's yards, the direction into the yard was north (R. 1515-1517).

In any event, given the permissible evidence on which the jury could have relied in reaching its verdict (See Point III, pages 30-32) the impermissible prior consistent statement did not taint the jury's verdict of guilty. As such, any error was harmless beyond a reasonable doubt.

POINT X

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO THE TESTIMONY OF OFFICERS FABY AND RAIMONDI WHERE THEIR STATEMENTS WERE NOT BEING OFFERED FOR THEIR TRUTH, BUT TO SHOW WHAT THE OFFICERS DID IN THE COURSE OF INVESTIGATING THE MURDERS.

Appellant alleges that the trial court reversibly erred in admitting certain hearsay statements by Officers Raimondi and Faby. However, the challenged statements were not admitted for their truth, but to show the course of the instant homicide investigation .

For example, in explaining why Officer Raimondi went to interview Myrel Walker, Raimondi testified that, "We went to interview her in reference to a white male which she had seen." (R. 1481). By the same token, the full context of Officer Faby's testimony with regards to his conversation with Myrel Walker was the following:

> Q: And as a result of asking these questions, did she respond to these and give you a certain description?
>
> A: Yes, she did.
>
> Q: As a result of getting a description of this person, what did you do with that?

A: I advised the detective of what I had been advised of and also wrote another report, a supplemental report.

Q: Was there anyone that you observed without telling us what her description was, was there any person that you observed that fit that description?

A: Yes, there was.

Q: Who was that?

MR. MCDONNEL: Objection, calls for a conclusion?

THE WITNESS: The Defendant before this--

(R. 621). After the court overruled appellant's objection, Officer Faby never completed the answer to the prosecutor's question (R. 622).

The Officers' contextual testimony was not hearsay as it was offered to show what the officers did pursuant to information received as a result of their investigation of the murders. See Johnson v State, 456 So.2d 529 (Fla. 4th DCA 1983) review denied 464 So.2d 555 (Fla. 1985). Moreover, the officers did not testify as to the details of the information given by Myrel Walker. Cooper v State, 573 So.2d 74 (Fla. 4th DCA 1990). Indeed, Raimondi's statement was about a "white male which [Myrel Walker] had seen," while Faby's testimony was presumably that appellant fit Ms. Walker's description of the man she had seen at her house; as is evidenced by the excerpt of Faby's testimony above, it is hard to determine exactly what Faby's testimony was because Faby never completed the statement in question.

In any event, assuming that the testimony was erroneously admitted, appellant was not prejudiced thereby. The dangers inherent in hearsay testimony is that the defendant is deprived of cross-examining the declarant. State v Baird, 572 So.2d 904 (Fla. 1990). However, because Myrel Walker testified in the instant case, appellant was not deprived of cross-examining the content of Myrel Walker's statements to the officers. To the contrary, appellant fully cross-examined Myrel Walker about her description of appellant and her ability to view him (R. 1506-1512).

In sum, the testimony at issue did not deny appellant of a fair trial because it was either properly admitted, or because any error in its admission was harmless.

POINT XI

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTION TO OFFICER MARTIN'S TESTIMONY THAT A PARAMEDIC HAD TOLD HIM THE LELAND RESIDENCE WAS SECURED WHERE THE STATEMENT WAS NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED.

Hearsay is defined as an out-of-court statement, other than the one made by the declarant at trial or hearing, offered to prove the truth of the matter asserted. §90.801 Fla. Stat. (1987). The statement at issue sub judice is not hearsay because it was not being offered for its truth, but to show the steps the officer and paramedics took upon arriving at the Leland residence. The full context of the statement reveals that once the officer and paramedics discovered that the Leland home was

secured, i.e. all the doors and windows were locked, paramedic Hohl gained entry into the residence by removing six panels out of the carport door (R. 567-568).

Thus, the challenged testimony was not hearsay. In fact, the statement in no way was an "accusatory remark" which described the appellant or his actions. Cooper v State, 573 So.2d 74 (Fla. 4th DCA 1990). Indeed, the statement did not even relate to a contested issue at trial! It was merely a statement showing the sequence of events upon the officer's arrival at the crime scene. As such, the statement was not offered to prove the truth of the matter asserted, and was subsequently not inadmissible hearsay. Hence, appellant has failed to demonstrate any error, let alone reversible error, thereby requiring that appellant's conviction be affirmed.

POINT XII

THE ALLEGED DILUTION OF THE PRESUMPTION OF INNOCENCE DID NOT AMOUNT TO FUNDAMENTAL REVERSIBLE ERROR.

Appellant contends that several remarks by the prosecutor throughout the trial had the effect of diluting the appellant's presumption of innocence. However, when read in the full context of the trial, the statements complained of did not have the effect of diminishing the burden of proof. See Miller v State, 435 So.2d 258 (Fla. 3d DCA 1983). Indeed, the veracity of appellant's argument is belied by the fact that none of the statements were objected to at trial, thus precluding appellate review of this claim absent a finding of fundamental error.

Harris v State, 570 So.2d 441 (Fla. 3d DCA 1990) (Shwartz, J. specially concurring); see Pope v Wainwright, 496 So.2d 798 (Fla. 1986) cert. denied 480 U.S. 951, 107 S.Ct. 617, 94 L.Ed.2d 801 (1987).

The statements made by the prosecutor at voir dire, taken in their full context, did not denigrate the concept of reasonable doubt:

> MR. HANCOCK: Now, say the State didn't call an eyewitness to this crime, Mr. Armstrong, but you were still convinced beyond a reasonable doubt that Mr. Caruso was guilty of it, would you have any problem coming back with a guilty verdict?
>
> MR. ARMSTRONG: I don't think so.
>
> MR. HANCOCK: The reason I asked is that some people have a problem unless there's somebody that actually saw the crime, do you understand?
>
> Do you understand in a homicide, you don't have eyewitnesses. They're dead. So, if the State met its burden and proved him guilty beyond and to the exclusion of all reasonable doubt, what would your verdict be?
>
> MR. ARMSTRONG: Guilty, but you wouldn't be up here if they had a good case, would you?
>
> MR. HANCOCK: We have an opportunity to present the facts to you, and then you make that determination. The Broward County Grand Jury has indicted Mr. Caruso and determined there's probable cause on that.
>
> Do you understand you make the final decision from the facts that are introduced into evidence? And likewise say we did not meet the burden, you wouldn't have any problem coming back with a not guilty, would you?

MR. ARMSTRONG: If you met the burden?

MR.HANCOCK: Say we didn't?

MR. ARMSTRONG: Oh, yes, definitely.

MR. HANCOCK: You say, definitely. Would you be fair either way?

MR. ARMSTRONG: I would have no problem being fair.

(R. 199-204). Thus, appellant's contention that by the foregoing exchange Mr. Armstrong indicated that he was going to deny appellant his presumption of innocence, is preposterous. The fact that appellant chose Mr. Armstrong as a juror in the instant cause undermines this claim. By the same token, by emphasizing that the jury was the final arbiter and that they would have to find appellant not guilty if the State failed to meet its burden, the prosecutor did not reinforce the notion that there was strong evidence of appellant's guilt.

When read in full, the prosecutor's fleeting reference to the grand jury and the indictment in opening statements also did not serve to denigrate the presumption of innocence; the reference to the grand jury and the indictment was made only in reference to the sequence of events which transpired in the instant case. Indeed, even defense counsel agreed in opening that evidence would show that Detective Pazienza had secured an arrest warrant for appellant, and that appellant was subsequently indicted for two counts of first degree murder (R. 555).

The arrest warrant secured by Detective Pazienza and the grand jury indictment were utilized by appellant in an attempt to demonstrate the weakness of the State's case (R. 554-555). Appellant theorized that the State's case was no better given the passage of time than it was on the date the Lelands were discovered; by the time the arrest warrant and indictment issued, the only new evidence discovered by law enforcement related to a knife and the butterfly pendant allegedly obtained from appellant by Craig Quinn. However, since the knife tip found at the crime scene did not match appellant's knife, and since the butterfly pendant allegedly belonged to appellant's mother, appellant claimed that the State's case was no better by the time the warrant and indictment issued than it was on the day of the murders. As a matter of fact, appellant theorized that because Craig Quinn was the source of the "extra" evidence which the State utilized to buttress its case, then Craig Quinn must be the murderer.

Hence, in closing, appellant argued:

> And that gold butterfly is significant for another reason. On December 6, 1987, they had Michael's statement, and they had the Medical Examiner there, and they had Myrel Walker's testimony, and they had Dana Banker from the Hollywood Sun Tattler, and they had the Channel 10 videotape. And they had all that. And they had all this. And on December - maybe December 7th, 6th or the 7th, they were in possession of every single bit of this. But did they arrest Michael Caruso for murder? No.

> Correct me if I am wrong, December 18th Craig Quinn gives a knife to Detective Pazienza with a broken tip and says Caruso gave it to him. December 18th Craig Quinn gets a gold butterfly charm from Detective Pazienza and says Caruso gave it to me. December 21 James Montgomery comes down to the police station. That's my grandmother's butterfly. December 23rd, two days later, he's arrested for Murder One.
>
> Do you think the police had enough to put together a case of first degree murder prior to December 21 and chose not to do it? That's okay. Do you think they had enough December 7th? And do you think they had enough with this, or did they need the knife and did they need the gold? Ask yourselves.

(R. 1829-1830). Thus, the prosecutor's reference to appellant's arrest in closing was made in fair reply to appellant's closing statements.

The remaining statements and/or questions which appellant contends diluted the presumption of innocence is negated when placed in their full context. For example, the reference to Mrs. Quinn's testimony to the grand jury on redirect was not intended to bolster her credibility. Rather, the questions were posed in response to cross-examination, where appellant implied that Mrs. Quinn evaded police questioning after the murders to protect her son from prosecution for same; interestingly enough, through Mrs. Quinn appellant brought out the fact that Craig Quinn had a history of drug abuse and had a prior robbery conviction (R. 1179-1185). This was part of

appellant's theory of defense, that Craig Quinn was the actual murderer, not appellant (R. 1835-1836).[4]

Officer Pazienza, the lead detective in the case, testified as to why the investigation eventually focused on appellant, thereby explaining why the police were "concerned" about appellant's statements (R. 1357-1358). The testimony regarding the grand jury and arrest warrant put in reference the sequence of events which transpired in the instant case (R. 1384-1386); as argued above, the arrest and grand jury indictment was a large part of appellant's defense in attacking the strength/weakness of the State's case. The remaining comments as to the grand jury indictment were elicited during the admission into evidence of a photograph reenacting appellant's version of events (See Point VIII supra). Since the photographs in question were taken for presentment to the grand jury, the prosecutor referred to the date on the indictment to refresh Pazienza's memory as to the date the photographs were taken (R. 1388-1392).

Finally, any reference to Mr. and Mrs. Caruso's grand jury testimony was elicited by the prosecutor for purposes of impeachment. For example, Mrs. Caruso had told the grand jury that she could not be sure the butterfly pendant in question was hers, while at trial she attested that the butterfly was indeed hers (R. 1666-1668). Similarly, Mr. Caruso had told the grand

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[4] Appellee finds this aspect of appellant's defense interesting in light of appellant's claim in Point I, supra, i.e. that evidence of appellant's drug use was irrelevant and inadmissible collateral crimes evidence.

jury that when appellant came out from the Leland home after following the paramedics inside, appellant had stated that Mr. Leland had saran wrap on his face; on the other hand, at trial, Mr. Caruso stated that he could not recall what his son, the appellant, had stated (R. 1623-1626).

In sum, when read in their full context, or in the context of the trial, all of the statements which appellant complains of were misconstrued and did not have the effect of denigrating the presumption of innocence. Assuming arguendo that any one or all of the statements did have the effect of diluting appellant's presumption, any error was cured by the trial court's instructions to the jury. For example, the trial judge began by telling the prospective jurors that the indictment is not evidence (R. 49-52), he advised them on the presumption of innocence (R. 52-53), and he emphasized that the jurors who would be chosen were the judges of the facts (R. 63). Furthermore, the trial court repeatedly instructed the jury on reasonable doubt and reiterated its instructions on the presumption of innocence (R. 53-55, 1902-1904). As such, any error was cured. Giamo v Purdy, 346 F.Supp. 1 (S.D. Fla.) affirmed, 465 F.2d 994 (5th Cir. 1972). See, United States v Bascaro, 742 So.2d 1335 (11th Cir. 1984); United States v Davis, 679 F.2d 845 (11th Cir. 1982) cert denied in Armstrong v United States, 459 U.S. 1207 (1983); United States v Strauss, 678 F.2d 886 (11th Cir.) cert. denied, 459 U.S. 911, 103 S.Ct. 218, 74 L.Ed.2d 173 (1982); See also Ham v State, 16 F.L.W. 1449 (Fla. 3d DCA May 28, 1991).

POINT XIII

THE TRIAL COURT DID NOT FUNDAMENTALLY ERR IN INSTRUCTING THE JURY VENIRE ABOUT THE READBACK OF TESTIMONY, AND ANY ERROR WAS CURED BY THE TRIAL COURT'S INSTRUCTION TO THE PETIT JURY PRIOR TO DELIBERATIONS.

The instruction at issue was given by the trial court to the jury venire prior to the commencement of jury selection (R. 47). At the time that it was given, appellant did not object to the instruction. Appellant did not object to the instruction until the close of all the evidence, during the charge conference (R. 1783-1784). Once appellant pointed out his objection to the instruction, the trial court advised the jury, during the jury charge, that they could ask to have testimony read back to them (R. 1887-1888).

Given appellant's failure to timely and contemporaneously object to the instruction when given, the instant issue has not been preserved for appellate review. Farrow v State, 573 So.2d 161 (Fla. 4th DCA 1990); Diaz v State, 567 So.2d 18 (Fla. 3d DCA 1990).

Nonetheless, assuming that the instruction in question was in error, any error was cured by the trial court's final instruction to the petit jury that they could request that testimony be read back to them (R. 1887). Thus, appellant's argument that the instruction prohibited the jury from asking for a read back of testimony is without merit, and is unsupported by the record. Indeed, the fact that the jury did ask a question

during their deliberations negates appellant's argument that the instruction stifled the jury from asking questions (R. 1924). As such, in light of the trial court's subsequent instruction prior to deliberations advising the petit jury that they could ask to have testimony read back to them, any error in the initial instruction to the jury venire was cured. Appellant has therefore failed to demonstrate reversible, fundamental error.

POINT XIV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURORS TO TAKE NOTES DURING THE TRIAL.

Appellant alleges that the trial court erred in instructing the jurors that they had the option of taking notes throughout the trial. Appellant does not appear to challenge the instruction per se; rather, appellant's contention is that in the instant case the instruction allowing the jurors to take notes is erroneous in light of the trial court's instruction that the jury could not have any testimony read back. However as pointed out in Point XIII, supra, prior to deliberations the trial court advised the petit jury that they could request that testimony be reread to them (R. 1887). Consequently, appellant's argument is without merit.

When the trial court did advise the jury about the option of notetaking, he told them the following:

> Okay, now I see several of you have your note pads ready and you are ready to write away. I want to indicate to you, if you want to take notes, that's fine. If you don't want to take notes,

> that's fine too. But I must tell you when you take notes, your notes must be left here in the courtroom during all recesses, whether it be breaks during the day or overnight recesses. Your notes will be left here.
>
> And another thing you must bear in mind, is when you go back into the juryroom, those folks who have taken notes, are not to be given any greater weight or authority than those folks who have not taken notes.
>
> And the people who have taken notice [sic], those are the only people who can rely on those notes that were taken. In other words, those folks who don't take notes are to rely on their independent recollection of what the testimony was okay.

(R. 535-536). After the trial court advised the jury that they could have testimony read back to them if they requested it, an instruction similar to the one outlined above was repeated by the trial court during the jury charge (R. 1889).

Where the trial court allows the jury the option of taking notes during trial, and advises them that a juror's note taking does not give a juror authority over the others on the panel, a trial court does not abuse its discretion in allowing the jurors to take notes. Kelley v State, 486 So.2d 578, 583 (Fla.) cert. denied, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). Sub judice, the trial court did advise the jury that, "those folks who have taken notes, are not to be given any greater weight or authority than those folks who have not taken notes." When viewed in light of the remaining instructions given by the trial court regarding note taking, and the instruction advising the

jury that they could have testimony read back, there was no abuse of discretion in allowing the jury to take notes. Appellant's conviction must therefore be affirmed.

POINT XV

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THE COURTS OF APPEALS ENTERTAIN APPEALS AND DECISIONS OF CIRCUIT COURT JUDGES.

Appellant claims reversible error resulted from the following instruction:

> The third level of our court structure is the District Court of Appeals. We have five District Court of Appeals within the State of Florida. We so happen to fall within the geographical domain of the Fourth District Court of Appeals which is headquartered in West Palm Beach. And they entertain appeals and decisions of circuit court judges sitting in Broward County, Palm Beach County, Saint Lucy County, Indian River County, Okachobee [sic] County.
>
> The highest court we have in the State of Florida is the Florida Supreme Court which is one and that's situated in Tallahassee.

(R. 33).

Contrary to appellant's assertions otherwise, the instruction at issue did not suggest that final responsibility as to the case rests with the appellate court. The instruction was given to the jury venire as part of the trial court's introduction, which included an explanation of how the court system operates (R. 28-75). Also included in the introductory instructions was an instruction on reasonable doubt, the burden

of proof and the presumption of innocence (R. 52-58). When the instruction is read in its entirety, in the context of the trial, it becomes evident that appellant's argument is without merit.

"...[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368, 373 (1973). In Stano v State, 473 So.2d 1282, 1288 (Fla. 1985) cert. denied, 474 U.S. 1093, 106 S.Ct. 879, 88 L.Ed.2d 907 (1986) no constitutional rights were found to have been violated when the prosecutor cross-examined the defendant about whether he planned to attack his former attorney's performance in a collateral proceeding, and urged the jury to return an appeal-proof sentence. Similarly sub judice, appellants rights were not violated by the trial court's passive explanation of the legal process. Appellee submits that the instruction at issue is even less offensive than the argument upheld in Stano since the mention of the appellate process here was only tangential, especially when viewed in light of the entire context of the trial. Hence, no reversible error has been demonstrated.

POINT XVI

THE TRIAL COURT DID NOT FUNDAMENTALLY ERR IN ALLOWING EVIDENCE AND ARGUMENT ABOUT APPELLANT'S REFUSAL TO GIVE POLICE HIS FINGERPRINTS.

Appellant alleges that error occurred when two of the State's witnesses testified that appellant refused to have police

take his fingerprints, absent his arrest (R. 721, 728, 1083). Based on this testimony, the prosecutor made several remarks in closing arguments (R. 1794, 1871-1872). Appellant now alleges that the comments were improper because it was an attempt to penalize appellant for exercising a valid constitutional right. Appellant's argument is infirm, however, on several grounds.

First, none of the testimony or argument which appellant now claims were improper were objected to at trial. As such, review by this Court of the instant claim is procedurally barred. Occhione v State, 570 So.2d 902 (Fla. 1990); Harris v State, 564 So.2d 1211 (Fla. 3d DCA 1990); Joseph v State, 316 So.2d 585 (Fla. 4th DCA 1975). Consequently, the prosecutor's closing arguments was nothing more than a fair comment on the evidence and the inferences which could be drawn therefrom.

Secondly, appellant's argument improperly combines the Fourth Amendment right against unreasonable searches and seizures with the Fifth Amendment right against self incrimination. While an individual cannot be unlawfully detained for the purpose of obtaining his fingerprints, absent at least a reasonable suspicion of criminal activity, Hayes v State, 488 So.2d 77 (Fla. 2d DCA) 479 U.S. 831, 107 S. Ct. 119, 93 L.Ed.2d 65 (1986) interpreting Hayes v Florida, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985), it does not follow that a comment on appellant's statement, if you want my fingerprints you have to arrest me, is error. Indeed, appellee questions whether appellant had a lawful right to refuse giving his fingerprints

since "...the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." Hayes v State, 488 So.2d at 79 citing Hayes v Florida, 84 L.Ed.2d at 711. Sub judice, at the time appellant made the statement, police already suspected appellant.

As a result, since the giving of fingerprints is non-testimonial in nature, and is therefore not protected by the Fifth Amendment, Wyche v State, 536 So.2d 272 (Fla. 3d DCA 1988) review denied 544 So.2d 201 (Fla. 1989), there is no right to refuse to submit to same; thus, the act of refusal is not a compelled communication, and there is no error in commenting on said refusal. See Pardo v State, 429 So.2d 1313 (Fla. 5th DCA 1983): evidence of refusal to submit to blood alcohol test not violative of fifth amendment; Lowery v State, 402 So.2d 1287 (Fla. 5th DCA 1981): no error in admitting testimony that defendant appeared for taking of his handwriting samples; Clark v State, 379 So.2d 97 (Fla. 1979) cert. denied, 450 U.S. 936, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981): since fifth amendment offers no protection against compulsion to submit to voice exemplar and since it does not privilege refusal to submit, the admission of same into evidence not error.

In O'Brien v Wainwright, 738 F.2d 1139 (11th Cir. 1984) cert. denied 469 U.S. 1162, 105 S.Ct. 918, 83 L.Ed.2d 931 (1985) the State was allowed to elicit testimony that the defendant had refused to appear in a lineup at a time when O'Brien had not been compelled, by court order, to appear in same. In fact, after the defendant refused to appear in the lineup, the state sought a court order requiring O'Brien to appear in one, which order was ultimately denied. Regardless of the fact that O'Brien had refused to appear in the lineup at a time when he was not compelled to do so, the district court found that the testimony concerning the defendant's refusal to participate in the lineup was admissible because it was highly probative of guilt. As a result, the court held that no constitutional error or fundamental unfairness had resulted as a consequence of the admission of the testimony into evidence.

Similarly at bar, the fact that appellant was not legally compelled to submit to fingerprints at the time he made the statement does not detract from the propriety of arguing that appellant's refusal to submit to fingerprints was circumstantial evidence of guilt. Whether compelled or not, the impact of the appellant's statement remains unchanged. In that sense, the testimony and argument challenged sub judice is analogous to evidence of flight which is admissible as circumstantial evidence of consciousness of guilt. Cf. Bundy v State, 471 So.2d 9 (Fla. 1985) cert. denied 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). The unobjected to testimony was therefore admissible,

and the prosecutors argument thereon in closing was nothing more than a comment on the evidence and the inferences which could be drawn therefrom.

In essence, appellant has again failed to demonstrate fundamental constitutional error, O'Brien v Wainwright, 738 F.2d 1139, such that appellant's conviction must be affirmed.

POINT XVII

THE TRIAL COURT DID NOT FUNDAMENTALLY ERR IN INSTRUCTING THE JURY ON REASONABLE DOUBT IN ACCORDANCE WITH THE STANDARD INSTRUCTION ON REASONABLE DOUBT.

Appellant challenges the trial court's instruction on reasonable doubt which was as follows:

> A reasonable doubt is not a possible doubt, a speculative doubt, imaginary or forced doubt.

(R. 1903).

The fact that defense counsel failed to object to the challenged instruction so as to preserve the instant issue for appellate review, Fla. R. Crim. P. 3.390, is just one factor which evidences the frivolousness of the instant claim. The second factor which negates the validity of this claim is that the trial court's instruction was taken, verbatim, from the Florida Std. Jury Instr. (Crim.) 2.03, and is therefore presumed correct. See In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla.) as modified on other grounds, 431 So.2d 599 (Fla. 1981). This Court recently rejected a claim similar to the one made by

appellant herein in Brown v State, 565 So.2d 304 (Fla.) cert. denied, ___ U.S. ___, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990). In the absence of a suggestion on how better to improve the standard instruction, which is given in all Florida criminal cases, there is no reversible error.

POINT XVIII

THE TRIAL COURT DID NOT FUNDAMENTALLY ERR IN PRESENTING THE JURY WITH ALTERNATIVE THEORIES OF FIRST DEGREE MURDER.

Appellant claims that his conviction is infirm because the trial proceeded on alternative theories of first degree murder, namely, premeditated murder and felony murder. Appellant alleges that proceeding on alternative theories of first degree murder was reversible error for three reasons: he was deprived of a unanimous verdict; that because there was insufficient evidence of felony murder, the verdict is invalid because it cannot be determined on which theory the jury relied in finding appellant guilty of first degree murder; that the indictment, which charged only first degree premeditated murder, was insufficient to put appellant on notice of the charges against him, i.e. felony murder. Appellee will briefly and summarily address each claim individually.

1. Non-unanimous verdict:

At trial, appellant did not request a special verdict form, nor did he object to instructing the jury on alternative theories of first degree murder, either during the charge

conference or after the jury charge. As such, absent fundamental error, appellate review of the issue is procedurally barred. Fla. R. Crim. P. 3.390(d); Ray v State, 403 So.2d 956 (Fla. 1981).

Nonetheless, on the merits, this Court has consistently rejected the same claim made by appellant herein, and has held that a special verdict is not required to identify whether the jury found premeditated murder or felony murder when it found the defendant guilty of first degree murder. Haliburton v State, 561 So.2d 248 (Fla. 1990); Buford v State, 492 So.2d 355 (Fla. 1986); Brown v State, 473 So.2d 1260, 1265 (Fla.) cert. denied 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). Recently, the United States Supreme Court explicitly affirmed this holding, Schad v Arizona, 5 F.L.W. Fed. S622 (June 21, 1991). Appellant's claim is therefore without merit.

2. General Verdict based on Felony Murder:

As argued above, appellant failed to preserve this issue by requesting a special verdict or by objecting to the jury instructions. Additionally, appellee contests appellant's assertion that the evidence was insufficient to prove felony murder (See Point XIX, infra).

Furthermore, since no portion of the first degree murder statute has been found to be unconstitutional, appellant's reliance on Stromberg v California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.2d (1931) and its predecessors is misplaced; the convictions therein were found to be invalid where a portion of

the statute on which the conviction was based was found to be unconstitutional, and it could not be determined whether the jury verdict was predicated on that portion of the statute which was found unconstitutional.

3. Notice of Felony Murder:

As with the above claims, appellant did not move to dismiss the indictment at any time prior to trial; indeed, appellant has never claimed that the charges were so vague, indistinct, or indefinite as to mislead or embarrass him in the preparation of his defense, or to expose him to new prosecution for the same offense. As a result, appellate review of this claim is procedurally foreclosed. Tucker v State, 459 So.2d 306 (Fla. 1984).

On the merits, this Court has already previously held that the State may prosecute first degree murder under a theory of felony murder when the indictment charges only premeditated murder. Young v State, 579 So.2d 721 (Fla. 1991); Knight v State, 338 So.2d 201 (Fla. 1976). See Schad v Arizona, supra. Consequently, appellant's claim is without merit.

POINT XIX

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THERE WAS SUFFICIENT EVIDENCE TO PROVE PREMEDITATION AND FELONY MURDER, AND THAT APPELLANT WAS THE PERPETRATOR.

Contrary to appellant's assertions, there was substantial competent evidence to prove premeditated murder and felony

murder, as well as appellant's identity as the perpetrator of same. As such, the trial court properly denied appellant's motions for judgment of acquittal.

When proving premeditation by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference which can be drawn from the evidence. Holton v State, 573 So.2d 284, 289 (Fla. 1990). However, whether the evidence fails to exclude all reasonable hypotheses is a question of fact for the jury, and where there is substantial, competent evidence on which to sustain the jury verdict, the verdict will not be reversed on appeal. Demurjian v State, 557 So.2d 642, 643 (Fla. 4th DCA 1990) citing Cochran v State, 547 So.2d 928 (Fla. 1989). Premeditation can be established by the circumstances surrounding the crime:

> Evidence from which premeditation may be inferred includes the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicides as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned. No definite length of time for it to exist has been set and indeed could not be.

Sochor v State, 16 F.L.W. S297 (Fla. May 2, 1991); See Buford v State, 403 So.2d 943 (Fla. 1981).

The State's theory was that appellant burglarized the victims' home and was discovered first by Mrs. Leland, who was known to get up during the night to snack (R. 1125-1126). Mr. Leland, having heard his wife's distress at being attacked, attempted to come to his wife's rescue, but was killed as he exited his own bedroom.

The State's theory was supported by the evidence adduced at trial. Mrs. Leland's body was discovered just outside of the kitchen area, in between the kitchen and living room; her legs were in the kitchen, while the torso was in the living room (R. 569, 644-645, 775). Mr. Leland's body was found in the hallway, with the legs in the northeast bedroom and the torso lying in the hallway (R. 570, 648-649, 776). Mr. Leland's head was wrapped in saran wrap, while the upper torso was covered with a heavy translucent plastic (R. 646, 775, 798, 822). The medical examiner testified that Mr. Leland had some lacerations on his hands and fingers, as well as other defensive wounds on the back of the head and elbow (R. 841-843).

Both victims died as the result of blunt head trauma and multiple stab wounds (R. 837, 853); each victim had at least one stab wound which was caused by an instrument whose blade fully penetrated the victims (R. 834-835, 842-843). Mrs. Leland was stabbed a total of six times, in the back and in the head area (R. 827-829). In addition, Mrs. Leland was brutally beaten about the face, as evidenced by several lacerations to the forehead area and a crushing of the right eye ball and bone area (R. 825-

827); the caved-in area on the right side of the face was consistent with having been struck with a champagne bottle, which had been found shattered around Mr. Leland (R. 830-831, 836). None of the injuries alone caused Mrs. Leland's death: she was alive at the time she suffered the injuries to the head, with death occurring from two to up to ten minutes between the time the injuries were sustained (R. 830, 832).

Mr. Leland was stabbed a total of nine times, in the right upper back, on the right upper chest and in the head (R. 838, 841, 852). Mr. Leland also suffered from several lacerations to the head, which were consistent with having been struck with the champagne bottle to the head; the glass remnants of the bottle were found lying around Mr. Leland's head (R. 822, 839-841). The stab wound which penetrated to Mr. Leland's brain was inflicted during a time when Mr. Leland was still alive (R. 850).

The medical examiner opined that the injuries sustained by both victims were consistent with having been inflicted by the same instrument (R. 844). By the same token, Dr. Dominguez' professional opinion was that, more than likely, the same person killed both victims (R. 857-858). Based on the blood splatter to the walls and the formation of the glass fragments around Mr. Leland's head, the victims were already on the floor when they were beaten with the champagne bottle (R. 840, 905-908, 913, 915). It was estimated that the victims expired between 12:00 a.m. and 2:00 a.m. December 6, 1988 (R. 853-855).

Moreover, there was evidence that the perpetrator had taken the precaution of wiping away his fingerprints from the scene. There was a wall phone in the kitchen with blood on it that had been transferred onto the phone with a cloth or towel (R. 645). The same type of transfer was found on the mattress in the northeast bedroom where Mr. Leland was found (R. 649-650). The wet towel was subsequently found in the bathroom (R. 650).

Thus, the nature of the injuries and the manner in which the injuries were inflicted, i.e. number of stab wounds, deep penetration of instrument, injuries caused by multiple instruments, leads to the inference that the murder was premeditated. When considered in conjunction with the remedial measures to destroy the fingerprints, and the fact that multiple victims were involved who did not provoke the appellant, there was sufficient evidence on which to sustain the jury's finding of premeditated murder.

By the same token, there was sufficient evidence that the murders occurred during the commission of a burglary. Pry marks were found on the front door of the victims' home (R. 643, 776). The victims' bedrooms were ransacked: in the southeast bedroom referred to as Mrs. Leland's room, the drawers were pulled out and the purses therein had been laid on the dresser; Mrs. Leland's pocketbook was found devoid of any money (R. 647-648). In Mr. Leland's bedroom, his wallet was found on the floor, empty of any currency; a safety deposit key was found on the bed, and jewelry boxes were strewn on the floor (R.650-651). Moreover,

there was testimony that the Lelands never allowed people into their house (R. 1129).

Finally, the jury was entitled to reject the reasonableness and truthfulness of appellant's hypothesis of innocence, as there was sufficient evidence on which the jury could conclude that appellant was the perpetrator of the murders. Cochran v State, 547 So.2d 928 (Fla. 1989); State v Lewis, 543 So.2d 760 (Fla. 2d DCA) review denied 549 So.2d 1014 (Fla. 1989); Huff v State, 495 So.2d 145 (Fla. 1986); Buenoano v State, 478 So.2d 387 (Fla. 1st DCA 1985) petition for review dismissed, 504 So.2d 762 (Fla. 1987).

Myrel Walker placed appellant at the scene of the murders, since she saw appellant knocking on the door of her home on the evening of December 5, 1987, just before midnight; contrary to appellant's assertions, Myrel Walker's identification of appellant was unequivocal (R. 1494-1501, 1509, 1518). Additionally, there were pry marks on the front door of Myrel Walker's home (R. 11487-1490). Appellant's fingerprints were found on the front door of the victims' home, as were pry marks (R. 643, 666, 758-761, 776, 972). A K-9 officer who was called to the murder scene to track the suspect, testified that the canine lost track of the scent at appellant's home (R. 952-956). On the day the bodies were found, appellant had fresh cuts on his arms (R. 721-722, 729, 855-856, 935-936, 1083, 1354).

Appellant was found in possession of a butterfly pendant, which was identified by James Montgomery as belonging to his

grandmother, Mrs. Leland (R. 1086, 1093, 1134-1138, 1139, 1214, 1280-1282, 1427-1428). Appellant told Craig Quinn that he got the pendant from the victim next door (R. 1257, 1427). Subsequent to the time of the murders, appellant also made various statements indicating that he had a lot of gold jewelry (R. 1214, 1257, 1287-1288). The tip of a knife was found on the outside at the front door of the victims' house (R. 644, 776). Although the knife tip did not match a broken knife belonging to appellant, appellant told Craig Quinn that he had broken off the tip of a knife on the old lady next door (R. 1217, 1287).

There was also evidence negating appellant's exculpatory statement detailing how he had found the victims and how he knew certain details of the crime (R. 1335-1351). None of the officers or paramedics at the scene saw appellant in the house when the house was secured (R. 565-568, 571, 575, 579, 583-584, 593, 597-598, 614, 625, 1013, 1016, 1022, 1026, 1031-1034). Given the position of the victims' bodies within the house, appellant could not have seen the bodies and the trauma suffered by the victims unless he had been farther into the house than the front door (R. 570, 572-574, 599-600, 752, 775-776, 779-780, 810, 820-821, 1015, 1021). Yet, appellant was able to describe the position of the victims' bodies within the home (R. 1040), as well as the nature of the injuries suffered by the victims, i.e. the stab wounds to Mrs. Leland's eyes and the saran wrap around Mr. Leland's head; these details of the crime were not released to the general public and were not known to many of the law

enforcement personnel who viewed the scene; the saran wrap around Mr. Leland's head was not visible until the translucent plastic covering was removed from his upper torso, and the stab wounds to Mrs. Leland's eyes were not seen until the autopsy was performed (R. 570, 575, 613, 626, 653, 685-688, 775, 791-792, 825, 827-828, 835-836, 1019-1020, 1084-1085, 1325, 1360, 1372, 1403).

The officers also tried to verify whether they could see a black man from the front window of the victims' house; they stated that only a silhouette could be seen from the front window and that no physical characteristics of the individual could be discerned (R. 607-608, 628-629, 734, 765, 1071, 1387, 1392-1393). Appellant's statement about having seen a black man in the Leland home at about 7:30 a.m. on December 6, was also unreasonable in light of the victims' time of death, which was between midnight and 2:00 a.m. (R. 854-855, 1336).

Similarly, there was testimony that one had to strain to be able to view Mrs. Leland's body from the back window of the Leland home (R. 609, 1011, 1015, 1029-1030, 1355-1356). Appellant claimed that he was supposed to clean the awnings on the victims' home on that Sunday, yet the awnings on the house were clean since they had just been painted nine months before (R. 735, 1119, 1121, 1130, 1354). Furthermore, appellant himself indicated that he was not on the best of terms with the victims, and yet in appellant's statement appellant knew which bedroom

pertained to Mrs. Leland thereby indicating that he had been in the victims' home (R. 1339, 1342).[5]

In sum, the State presented evidence which was in direct conflict with appellant's version of events. As such, the jury was free to reject appellant's hypothesis of innocence, and conclude as a result thereof, that appellant committed the murders of Mr. and Mrs. Leland. Consequently, the trial court did not err in denying appellant's motions for judgment of acquittal. Appellant's convictions must therefore be affirmed.

POINT XX

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

In arguing that the trial court erred in overriding the jury's recommendation of life, appellant points to several statutory and nonstatutory mitigating factors which the jury may have relied on in support of its recommendation of a life sentence. Appellant also argues that the jury may not have found that all of the aggravating circumstances were proven beyond a reasonable doubt.

At trial, appellant told the jury that in recommending a life sentence, they could rely on the fact that appellant had no prior criminal history, that appellant acted under duress and was out of control at the time of the murders, that appellant was

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[5] By comparison, Mrs. Caruso, appellant's mother, who was on friendly terms with the victims, had only been in the Leland home twice (R. 1650-1651, 1686).

under the influence of cocaine at the time of the crimes, and that appellant was of a young age (R. 2118-2120). Appellant did not specify for the jury, or the trial judge, any nonstatutory mitigating circumstances which could support a life sentence; rather, appellant argued that, "[a]n additional mitigating circumstance is any other aspect of the defendant's character or his background or record, and any other circumstance of the offense," (R. 2121).

However, regardless of what defense counsel argued in mitigation to the jury, the question of whether a mitigating circumstance has been established is a question of fact to be determined by the trial court. Stano v State, 460 So.2d 890 (Fla. 1984) cert denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985). Thus, there is no requirement that a trial court find anything in mitigation, and "'mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence.'" Porter v State, 429 So.2d 293, 296 (Fla. 1983) citing Quince v State, 414 So.2d 185, 187 (Fla. 1982).

Hence, despite the fact that the appellant sub judice can discern some evidence which conceivably establishes mitigation, the trial court's override of the jury's recommendation of life is not sua sponte erroneous. Ziegler v State, 16 F.L.W. S257 (Fla. April 11, 1991). Rather, the appropriate focus is whether there are valid mitigating circumstances discernible from the record which reasonable people could conclude outweigh the

aggravating factors. Torres-Arboledo v State, 524 So.2d 403 (Fla.) cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988). If the facts suggesting a sentence of death are so clear and convincing that no reasonable person could differ, then a sentence of death following a jury recommendation of life will be upheld on appeal. Tedder v State, 322 So.2d 908 (Fla. 1975).

Based on the foregoing, appellant's assertions that the jury could have relied on various nonstatutory and statutory mitigating factors is mere speculation and conjecture. What is clear from the record is that the trial court, the only fact finder, found that no mitigating circumstances were established (R. 2361-2362). The trial court's finding that there were no mitigating factors to outweigh the aggravating factors is supported by the record:

1. The trial court properly and specifically rejected appellant's drug use as a nonstatutory mitigating factor. The trial court instead found that appellant had rejected his parents efforts to help him overcome his drug problem, "to seek out and feed and foster his penchant for drugs," (R. 2361-2362).

Further, the trial court was entitled to discard the record evidence which appellant contends establishes his history of having abused alcohol since the age of 16. The hospital admission notes which appellant relies on are based on appellant's own uncorroborated statements to his physicians (2d S.R. 97). Even Dr. Caddy refused to rely on the hospital records (R. 2042). And as to appellant's cocaine use, said use was said

to have commenced in June, 1986 (R. 2041). Thus, having considered appellant's history of drug use, the trial court did not abuse its discretion in finding that it did not diminish appellant's culpability for the murder. See Hardwick v State, 521 So.2d 1071, 1076 (Fla.) cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). Indeed, appellant's history of drug use instead supports the trial court's rejection of the mitigating circumstance that appellant had no significant history of criminal activity (R. 2358). §921.141(6)(a) Fla. Stat. (1987).

2. What appellant characterizes as a nonstatutory mitigating circumstance, i.e. that appellant's judgment was impaired at the time of the offense, is merely a variation of the statutory mitigating circumstance that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, §921.141(6)(b) Fla. Stat. (1987). Nonetheless, there was ample evidence in the record negating that appellant's judgment was impaired at the time of the offense. Appellant's parents stated that when they had returned home from the movies at 9:30 p.m. the evening of December 5, 1987, appellant was watching television (R. 1604, 1669, 2068). Appellant did not appear to be under the influence of cocaine at that time, and he stayed with his parents watching television until about 11:30 p.m. (R. 1604-1605, 1670, 2068).

Moreover, at the time he encountered Myrel Walker that same evening at midnight, appellant's judgment was obviously not

impaired such that he was able to concoct a story that his car had broken down, thereby requesting use of Myrel Walker's telephone. Appellant's alleged lack of judgment at the time of the offense is also negated by appellant's actions in wiping away his fingerprints from the crime scene and his exculpatory statements regarding the black man he saw standing inside the Leland home upon returning home from a morning walk (R. 645, 650, 762-763, 800, 1335-1351).

Dr. Caddy's testimony as to the effects of crack cocaine were merely generalizations since Dr. Caddy did not personally interview appellant (R. 2039). Consequently, there was no evidence on which to support a finding that appellant had ingested cocaine on the night of the murders or that appellant's judgment was impaired at the time he committed the crimes. The trial court considered appellant's drug use, but found that, "there was no evidence before this Court suggesting that [appellant] was high or used any drugs prior to or at the time of the murders..." (R. 2359). Therefore, having considered this nonstatutory mitigator, there was no error in failing to find mitigation on this basis. Bruno v State, 16 F.L.W. S65 (Fla. January 3, 1991); Koon v State, 513 So.2d 1253, 1257 (Fla. 1987) cert. denied, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988).

3. Appellant's attempt to overcome his drug addiction was not erroneously excluded by the trial court. Appellant was admittedly hospitalized on three occasions in order to recover

from his drug problems, to no avail. Dr. Caddy specifically rejected the notion that appellant had tried to do anything to help himself, since appellant had been in denial (R. 2055). Dr. Caddy further confirmed that appellant was not terribly motivated for treatment (R. 2057).[6] Finally, as he had not interviewed appellant, Dr. Caddy could not testify whether appellant could overcome his drug addiction (R. 2037-2038).

The trial court's finding that appellant "...rejected his [parents] advances of love and concern and continued despite their repeated efforts to aid him in conquering his drug problem, to seek out and feed and foster his penchant for drugs," (R. 2362), was therefore supported by the record and properly rejected as a mitigator.

4. Appellant's attempted suicide was properly rejected as a mitigating factor where this mitigating factor pertains to an individual act, rather than as a category of related conduct. Campbell v State, 571 So.2d 415, 419 n. 3 (Fla. 1990). Indeed, the fact that defendant Campbell attempted suicide was part of the mitigating evidence relating to Campbell's impaired capacity; thus, the attempted suicide was not, by itself, a mitigating circumstance.

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[6] When appellant was advised that he should seek drug/alcohol counseling, appellant refused; he did agree to attend AA meetings (2d S.R. 2). Thus, even if appellant's family had the resources to provide drug treatment, it is questionable whether said treatment would have been successful in light of appellant's refusals and denial.

Nonetheless, despite the fact that appellant slit his wrists, there was evidence that appellant did not do so with the intent to kill himself; rather, it appears that appellant had slit his wrists to call attention to himself (2d S.R. 71). That appellant was not attempting suicide is further bolstered by the fact that the cuts on appellant's wrists were not too deep (R. 2000). Moreover, the assertion that appellant was attempting suicide because he thought he was failing his parents is negated by the hospital notes, which indicate that appellant's attempt was provoked by frustration with a friend's roommate with whom appellant had had an argument (2d S.R. 71). Thus, the trial court did not abuse its discretion in finding that there was nothing in appellant's background which pointed toward mitigation (R. 2362).

5. The trial judge did not err in failing to find that appellant was a good worker in recommending death. The evidence revealed that appellant intermittently worked for Mark Luback from May, 1986 to June 1986, and from November, 1986 to October, 1987 (R. 2003). Despite Mr. Luback's high opinion of appellant and his feeling that he could trust appellant, Mr. Luback was not aware of the fact that appellant was on probation for grand theft during his employ with Mr. Luback, nor was he aware of appellant's cocaine addiction (R. 2005, 2007). Further, appellant's only motivation for working was to acquire money to purchase drugs (2d S.R. 97). Finally, aside from having dropped out of highschool in 1981, appellant was not gainfully employed at the time of the murders (R. 2051).

6. That appellant was not a nonviolent, respectful person was properly considered by the trial court and was subsequently rejected. To reiterate, the trial court found that appellant's drug abuse could not be utilized as a "sword and a shield," and that, "[t]he Defendant's volatile aggressive behavior does not scream out favorably on his behalf." (R. 2362). This finding was supported by the manner in which the murders were executed, by the altercation between appellant and his father on the morning following the murders, and by the hospital records which indicated that appellant was so violent that he had to be restrained (R. 2044; 2d S.R. 74, 81-82, 84, 87-88). Moreover, Dr. Caddy testified that appellant was disrespectful towards his parents, although appellant's father stated that appellant's "smart mouth" was more in the nature of teasing rather than disrespect for his parents (R. 2054, 2079).

7. As pointed out by the appellant, the trial court considered, and rejected, as a mitigator that appellant was a good brother and son. Inter alia, the trial court stated that appellant "stayed out all night away from his parents home, frequented known drug areas, and left his concerned parents in the dark about his behavior and conduct," (R. 2362). There was evidence in the record to support this (R. 1178, 1209, 2066, 2081). As stated previously, appellant's assertion that he cut his wrist because he thought he was failing his parents, is negated by the record (2d S.R. 71). Thus, the trial court's rejection of appellant being a good son and brother in mitigation

was not an abuse of discretion. Sochor v State, 16 F.L.W. S297, 299 (Fla. May 2, 1991).

8. The trial court properly considered and rejected the evidence regarding appellant's "depression" in mitigation: "There are not circumstances surrounding the instant slaughter and massacre nor the defendant's character or background that points toward mitigation," (R. 2362). The trial court read all of the appellant's medical records (R. 2360), but found that nothing therein rose to the level of establishing mitigation.

9. Appellant's alleged inability to handle pressure is hardly a plausible mitigator in light of the fact that appellant had nothing to feel pressured about. Appellant was unemployed at the time of the crime, and there is no evidence that he was making any efforts to remedy his unemployed status; indeed, Dr. Caddy testified that appellant had an unwillingness to work, and that appellant just didn't give a damn about anything (R. 2034). Appellant was single, he lived with his parents, and he had no dependents, and therefore appellant did not have any financial responsibilities to deal with.

As pointed out above, the trial court considered all aspects of the appellant's character and background, but found that there was nothing which pointed towards mitigation. Thus, his rejection of appellant's inability to handle pressure in mitigation was not an abuse of discretion.

10. Whether or not appellant did not have a history of prior violent crimes does not negate the fact that appellant had

just been found guilty of two of the most violent crimes in existence: appellant brutally beat and repeatedly stabbed two old and defenseless people in the privacy of their own home in the still of night. It is obvious, both directly and indirectly, from the trial court's order, that this nonstatutory factor carried little or no weight. See Ziegler v State, 16 F.L.W. S257, S258 (Fla. April 11, 1991). Indeed, what the defendant characterizes as a nonstatutory mitigating circumstance is really just the absence of an aggravating factor, §921.141(5)(b) Fla. Stat. (1987), which the trial court found did apply in this case.

As with the nonstatutory mitigating factors, the trial court did not abuse its discretion in finding that none of the statutory mitigating circumstances were established. Thus, appellant's assertions that the jury may have found one of the statutory mitigating circumstances in recommending life is unsupported by the record. All that is known is that the jury recommended life. Anything more is purely speculative. On the other hand, what is clear is that the trial court rejected all of the statutory mitigating circumstances, and his basis for rejecting same.

APPELLANT'S AGE AT THE TIME OF THE CRIME, §921.141(6)(g) Fla. Stat. (1987):

Age may be accorded weight as a mitigating factor when it is relevant to the defendant's mental or emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them. Eutzy v State,

458 So.2d 755, 759 (Fla. 1984). In this context, the trial court properly rejected this mitigating factor.

The trial court found that appellant was street wise, and that there was the absence of any evidence establishing that appellant lacked ordinary intelligence or marked emotional immaturity. All of appellant's family members and his prior employer testified that appellant was not suffering from any mental or emotional disturbance at the time of the crime (R. 1999, 2011, 2016, 2021, 2069, 2079); further evidence established that appellant knew that it was wrong to kill (R. 1998, 2006, 2016). Thus, the trial court did not err in failing to give little or no weight to this mitigating factor. Cooper v State, 492 So.2d 1059 (Fla. 1986) cert. denied, 479 U.S. 1101, 107 S.Ct. 1330, 94 L.Ed.2d 181 (1987); Kokal v State, 492 So.2d 1317 (Fla. 1986); Mills v State, 476 So.2d 172 (Fla. 1985) cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed.2d 349 (1986).

THE CAPACITY OF THE DEFENDANT TO ESTABLISH THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED, §921.141(6)(f) Fla. Stat. (1987):

The trial court rejected this mitigating factor, finding that there was no evidence to establish same. The court relied inter alia on the fact that, on the day of the murders, appellant had taken several showers and had washed his clothes to extinguish any evidence of the victims' blood, and appellant's ability to concoct a story explaining how he had discovered the crimes (R. 2360-2361). The trial court's findings were supported by the record (R. 1998, 1999, 2006, 2011, 2016, 2021, 2069,

2079); (See pages 86-87 above, relating to appellant's impaired judgment at the time of the crime). Thus, the trial court did not abuse its discretion in failing to find this mitigating factor inapplicable. Thompson v State, 553 So.2d 153, 157 (Fla. 1989) cert. denied, 110 S.Ct. 2194 (1990); Roberts v State, 510 So.2d 885, 894 (Fla. 1987) cert. denied, 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988). Provenzano v State, 497 So.2d 1177, 1184 (Fla. 1986) cert. denied, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987); Johnston v State, 497 So.2d 863 (Fla. 1986).

THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, §921.151(6)(b) Fla. Stat. (1987):

Appellant claims that this mitigating factor was established by the testimony of Dr. Caddy, the medical records and other evidence at trial; however, appellant fails to specify what evidence established this factor. Appellee maintains that appellant's failure to direct this Court to said evidence is based on the fact that the record is devoid of any evidence to support this claim.

Dr. Caddy could not state whether the Lelands' murders was a result of drugs. Dr. Caddy testified that if drugs was emerging with other patterns of illegal action, then the illegal actions were more likely the result of drug effects; if on the other hand, appellant had been involved in other illegal acts prior to the drug usage, then the criminal actions were more likely the result of some underlying personality disorder (R. 2040-2041). Be that as it may, Dr. Caddy could not state under

which category appellant pertained, as he had not interviewed appellant (R. 2039-2040). More importantly, Dr. Caddy did not testify as to appellant's mental state at the time of the crimes.

By the same token, all of appellant's family members testified that appellant was not suffering from extreme mental or emotional disturbance at the time of the crimes (R. 1999, 2011, 2016, 2021, 2069, 2079). The medical records which appellant relies on as evidence of his extreme mental and emotional disturbance is misplaced as well, since those records pertain to appellant's mental state as of June, 1987, and this crime was committed about six months later. Thus, as in Roberts v State, 510 So.2d at 895, there is nothing "which would support or corroborate the bald assertions of the existence of extreme emotional or mental disturbance."

The trial court's finding that appellant was not under extreme mental or emotional disturbance at the time of the crimes and that this statutory mitigating factor was inapplicable should therefore be upheld by this Court. Bruno v State, 16 F.L.W. S65, S68 (Fla. January 3, 1991).

THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY, §921.141(6)(a) Fla. Stat. (1987):

The State would first point out that the jury did not have access to the information in appellant's presentence investigation report and therefore had no knowledge that appellant had various prior arrests for: four felonies, of which three were grand thefts and one was throwing a deadly missile;

and five misdemeanors. The jury was also unaware of the fact that appellant had a grand theft charge pending at the time he was convicted. The trial court relied in part on this information in finding that this mitigator was inapplicable.

The only conviction of which the jury had knowledge was a grand theft conviction in 1985 which arose in Lee County for which appellant was placed on five years probation. Thus, having considered all of appellant's prior arrests and convictions, together with the evidence relating to appellant's drug activities, it was within the trial court's discretion to find that this mitigating factor did not apply. Pardo v State, 563 So.2d 77, 81 (Fla. 1990); Mills v State, 476 So.2d 172, 179; Funchess v Wainwright, 772 F.2d 683, 694 (11th Cir. 1985).

As with the mitigating circumstances, the finding that an aggravating circumstance applies is within the trial court's discretion. Ziegler v State, 16 F.L.W. S257 (Fla. April 11, 1991). Thus, appellant's assertions that the jury may have found that the aggravating factors were not established beyond a reasonable doubt is without merit, since all that is known is that the jury recommended life; anything more is speculation. Accordingly, the trial court found the following aggravating factors sub judice pursuant to §921.141(5):

> 1. That appellant was previously convicted of another capital felony or felony involving the use of force or threat of violence to another person (R. 2354).

> 2. That the crime for which appellant is to be sentenced was committed while he was engaged in the commission of or an attempt to commit or fleeing after committing or attempting to commit the crime of burglary (R. 2355).
>
> 3. That the crime for which the appellant is to be sentenced was especially wicked, evil, atrocious and cruel (R. 2356).
>
> 4. That the crime for which the appellant is to be sentenced was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification (R. 2357).

The trial court found substantial support for each of the foregoing four reasons. Appellant's allegations in negation are without merit.

Despite the fact that the killings were contemporaneous, separate victims were involved, thus warranting application of this aggravating factor. Ziegler v State, id; Lucas v State, 376 So.2d 1149 (Fla. 1979); See, Wasko v State, 505 So.2d 1314 (Fla. 1987); Patterson v State, 513 So.2d 1257 (Fla. 1987). Appellant's speculative assertions to the contrary are therefore without merit.

The same holds true of appellant's assertion that the trial court improperly found in aggravation that the murder was committed during the commission of a burglary. As noted by the trial court, there was ample evidence that the murders occurred during the commission of a burglary.[7] As such, the trial court's

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[7] The following facts adduced at trial were relied on by the

finding that this aggravating factor applied was not erroneous. Occhione v State, 570 So.2d 902 (Fla. 1990); Johnston v State, 497 So.2d 863 (Fla. 1986); Mills v State, 476 So.2d 172 (Fla. 1985); Porter v State, 429 So.2d 293 (Fla. 1983).

The judge's finding that the murder was heinous, atrocious and cruel is also supported by the record. Mr. Leland was stabbed a total of nine times, and he suffered several lacerations to the head as a result of having been struck with a champagne bottle; Mr. Leland was struck with such force that the champagne bottle shattered on the floor around Mr. Leland's head (R. 830, 838, 839). Additionally, the stab wound to Mr. Leland's chest was inflicted with such force that the instrument causing the wound penetrated completely (R. 843-844). There were several lacerations on Mr. Leland's arms which the medical examiner characterized as defensive wounds, thus indicating that Mr. Leland unsuccessfully attempted to ward off his attacker from striking him in the head (R. 841-843). Moreover, the evidence indicated that the victims were already on the floor when the injuries were inflicted. (R. 823, 913). Aside from the fact that Mr. Leland was alive at the time he sustained his injuries, Mr.

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trial court: the medical examiner testified that the murders occurred at night; appellant's fingerprints on the front door of the victims' home, together with pry marks found on the door, indicate that appellant forced his way into the Leland home; appellant told Craig Quinn that he had gotten a gold butterfly pendant from the lady next door; the victims' residence was ransacked.

Leland lived up to fifteen minutes between the infliction of the injuries and death (R. 1986, 1987, 1990).

Thus, based on this evidence, the crimes were clearly committed in a heinous, atrocious and cruel manner, thereby justifying application of this aggravating circumstance. Haliburton v State, 561 So.2d 248, 252 (Fla. 1990); Hardwick v State, 521 So.2d 1071, 1076 (Fla.) cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988); Roberts v State 510 So.2d 885, 894 (Fla. 1987) cert. denied, 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988).

As his final attack to the aggravating factors, appellant alleges that the jury could have reasonably rejected the cold, calculated and premeditated aggravating circumstance. There was evidence from the record that the instant offense was calculated and from a prearranged design. Appellant went to the Leland home armed with a knife: Myrel Walker testified that when she saw appellant, he had a shiny object in his pants pocket (R. 1497), and the tip of a knife was found outside the front door of the Leland residence (R. 644). Moreover, having chosen his next door neighbors as victims, appellant knew that once he was discovered by the Lelands, he would be prosecuted for burglary, especially in light of the fact that appellant was on probation at the time of the murders. In this regard, the trial court found it significant that appellant stabbed the victims repeatedly in the eyes. In addition, appellant first killed Mrs. Leland, thus providing ample time for appellant to reflect on his actions

towards Mr. Leland. Thus, having established that the murder was committed in a prearranged manner and to avoid apprehension and prosecution for burglary, the trial court did not abuse its discretion in finding that this mitigating factor was established. Valle v State, 16 F.L.W. S303 (Fla. May 2, 1991); Haliburton v State, 561 So.2d 248, 252 (Fla. 1990); Eutzy v State, 458 So.2d 755 (Fla. 1984).

In sum, the jury had no reasonable basis upon which to base the life sentence, and therefore the trial court's override of the jury's recommendation should be upheld by this Court. The jury may have been swayed against death by the emotional impact of defense counsel's argument at the end of the penalty phase and by appellant's family's tears (R. 2122). Defense counsel argued that the United States is the only civilized society which recognized capital punishment, and that appellant's fortuitous exposure to the death penalty was the result of where he lived (R. 2106). More importantly, defense counsel characterized the instant offenses as out-of-character occurrences, which were the direct result of appellant's crack cocaine addiction (R. 2109-2113). Consequently, defense counsel argued that, though appellant was a drug addict, he could be rehabilitated (R. 2122), despite Dr. Caddy's testimony that he could not give a prognosis as to appellant's ability to be rehabilitated (R. 2037-2038). Thus, defense counsel pleaded with the jury to not commit a

"wrong" by imposing death; that there was "no justification for the 'wicked lady'[8] getting [appellant]" (R. 2121, 2123).

However, as pointed out previously, defense counsel's characterization of appellant as a "victim" of crack, whose actions were a direct result of the drug is not supported by the evidence. Nor is there evidence that appellant's addiction was the consequence of appellant's friendship with Craig Quinn, Appellant's cocaine use did not commence until June, 1986. However, in 1985 in Lee County, prior to his cocaine use, appellant had committed a grand theft and had been arrested for other crimes, of which the jury had no knowledge. Indeed, there is no basis on which to justify the instant offense. Appellant came from a loving family who supported him in all his endeavors; nor did appellant suffer from a traumatic or troubled childhood. What the evidence did establish was that appellant had the opportunity to be a productive outstanding member of society, who disposed of these opportunities for no apparent reason.

Thus, since the jury's advisory life sentence was inappropriate under the law, the trial court had no choice but to overrule the jury's recommendation. Brookings v State, 495 So.2d 135, 145 (Fla. 1986). Clearly, in the case at bar, the trial court properly considered all the evidence in mitigation of appellant's sentence but properly found the weight of evidence to support death. The trial court's decision is supported by

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[8] Defense counsel characterized crack as the "wicked lady," (R. 2111).

competent substantial evidence. No reasonable person could differ as to the necessity of the death sentence based upon the weight assigned by the court. Appellant is really asking this Court to re-weigh the evidence which cannot be done. Porter v State, 429 So.2d at 296.

The case at bar presents extreme aggravating factors and, at best, speculative and/or unsubstantiated mitigating factors. Thus, even if the trial court erred in finding one of the aggravating factors to be applicable, the aggravating factors still clearly and convincingly outweigh the mitigating factors so that no reasonable person could differ as to the penalty of death. Echols v State, 484 So.2d 568, 577 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986); Torres-Arboledo v State, 524 So.2d 403. To hold otherwise would fail to give full force and effect to Florida's capital sentencing scheme, where the trial judge is the final sentencer.

POINT XXI

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY AND LETTERS FROM THE VICTIMS' FAMILY AND FRIENDS PRIOR TO IMPOSING SENTENCE.

The victim impact evidence which appellant asserts was erroneously "entertained" by the trial court was heard by the trial court after the jury had recommended that appellant be sentenced to life; the letters in question were also not heard by the jury. Moreover, the trial court did not "entertain" said evidence, since the trial court was aware that such victim impact

evidence was irrelevant to the issue of sentencing; nonetheless, the trial court was under the impression that such evidence was admissible under Florida law, see §921.143 Fla. Stat. (1987), (R. 2187-2188, 2189).

At the time of appellant's sentencing, the trial court did not have the benefit of Grossman v State, 525 So.2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), which held that §921.143 Fla. Stat. (1987) did not apply in capital cases in light of Booth v Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). However, in the interim, Payne v Tennessee, 5 F.L.W. Fed. S708 (1991) has overruled Booth, holding that victim impact evidence is admissible under the Eighth Amendment of the United States Constitution. Thus, based on Payne, appellee submits that the trial court did not err in admitting the victim impact evidence appellant complains of.

Assuming arguendo that the admission of the testimony and letters from the victims' family and friends was error, the error was harmless beyond a reasonable doubt. Grossman, supra. As pointed out above, the trial court was aware of the fact that Booth precluded victim impact evidence from being considered in imposing sentence: the trial court agreed with defense counsel that under Booth victim impact evidence was not something which should be considered in a death penalty case (R. 2186-2187). In fact, the trial court corrected the prosecutor about the relevance of such evidence:

> MR. HANCOCK: The Court can take it into consideration if the Court is going to sentence him as to one count and a different sentence as to another count. The Court can, if it's going to run it concurrent or consecutive as to the other count, you can always consider that.
>
> THE COURT: I take issue with you. It can't be used as a basis for aggravating or mitigating a sentence, but every victim of a crime has a right to say their peace to the Court.
>
> MR. MCDONNEL: My position, Judge, is you're not to use what they have to say in your sentence.
>
> THE COURT: That's what I said. I can't use it as a basis of aggravating or mitigating, but I have a right to hear what they have to say. I believe it was a constitutional amendment wasn't it, about victim's rights. If it's not a constitutional amendment, it's a statute.
>
> I'm not aware of any exception being covered that automatically prohibits victims of homicides, relatives of victims of homicides from addressing the Court. Okay.

(R. 2188-2189). Based on the trial court's statements, it is clear that said evidence was not a factor when sentence was imposed. LeCroy v State, 533 So.2d 750, 755 (Fla. 1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3262, 106 L.Ed.2d 607 (1989).

The trial court's order makes no mention of the victim impact evidence, and there is no evidence that the trial court considered same in imposing sentence (R. 2354-2363). Rather, the trial court's only reason for allowing said evidence was because he felt constrained to do so under Florida law. Given the

absence of any reference to the letters or testimony in the trial court's sentencing order, the trial court's reliance on same in imposing sentence will not be presumed. Mills v Dugger, 574 So.2d 63, 66 n. 3 (Fla. 1991).

The fact that the jury recommended a life sentence and that the trial court overrode their recommendation thus does not require a contrary result. In Hamblen v Dugger, 719 F. Supp (M.D. Fla. 1989) the defendant waived his right to a jury for purposes of sentencing, and the trial court imposed a sentence of death. Despite the fact that letters from several of the victim's relatives were received by the trial court, the trial court's sentence of death was upheld. Since the record was devoid of any evidence indicating that the victim impact evidence influenced the judge's imposition of sentence, the sentence of death was upheld. See also Mills, supra.

Similarly sub judice, the trial court was clearly aware of the fact that the letters and testimony was not a factor to be considered in imposing sentence. Moreover, the trial court's written order fails to indicate that said evidence was utilized by the Court in imposing a sentence of death. As a result, appellant's assertions to the contrary are without merit, and appellant's sentence on this point should be affirmed.

That the victim impact evidence did not influence the sentencing judge is further bolstered by the fact that the trial court imposed a life sentence for the murder of Genevieve Leland, versus the imposition of death for the murder of Gordon Leland.

All of the testimony and letters at issue referred to the death of both victims, and the effect thereof on the victims' family (R. 2154-2156; 1 S.R. 191-197). Had the evidence had any impact, consciously or subconsciously, on the trial court as appellant claims (Appellant's brief p. 88), the trial court would have imposed a death sentence as to both victims. Thus, the fact that the trial court sentenced appellant to death solely for the murder of Mr. Leland indicates that only the aggravating and mitigating circumstances were considered in imposing sentence. As such, appellant's claim that the trial court improperly "entertained" the victim impact evidence is unavailing. None of the appellant's Eighth Amendment rights under the United States Constitution were therefore violated.

POINT XXII

THE TRIAL COURT DID NOT COMMIT SUBSTANTIAL ERRORS IN THE SENTENCING ORDER REGARDING THE AGGRAVATING FACTORS OF COLD, CALCULATED AND PREMEDITATED, AND HEINOUS, ATROCIOUS AND CRUEL.

As argued in Point XX above, the trial court properly found that the aggravating factors of heinous atrocious and cruel were established; the same holds true of the aggravating factor that the killing was cold, calculated and premeditated, (See pp. 98-99 infra). The trial court also considered the nonstatutory and statutory mitigating evidence, but found that either none were established, or that the mitigating factors did not outweigh the aggravating factors. (See Point XX, pp. 83-91).

No reversible error requiring resentencing has been established by appellant.

POINT XXIII

FLORIDA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL.

1. The Jury:

a. Standard jury instructions:

i. Heinous, atrocious or cruel:

Appellant's constitutional attack on this instruction has consistently been considered, and rejected by this Court. Smalley v State, 546 So.2d 720, 722 (Fla. 1989); See McKinney v State, 16 F.L.W. S300 (Fla. May 2, 1991). As such, the instruction is constitutional. Proffitt v Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

ii. Cold, calculated and premeditated:

Appellant objected that the jury be instructed on this aggravating circumstance, but did not object to the instruction based on constitutional grounds (R. 1958); later counsel stated that he was objecting to "reading number 8 and 9 pursuant to the United States Supreme Court case," (R. 1965), but appellee maintains that this objection was too vague to apprise the trial court of the specific error claimed. See Occhicone v State, 570 So.2d 902, 905 (Fla. 1990). By virtue of his failure to preserve this issue, appellant review is barred. Vaught v State, 410 So.2d 147, 150 (Fla. 1982).

In any event, as obliquely conceded by appellant, this Court has already considered, and rejected this same claim in Brown v State, 565 So.2d 304, 307 (Fla.) cert. denied, ___ U.S. ___, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990); Occhicone v State, 570 So.2d at 906.

iii. Felony Murder:

As with the instruction on cold, calculated and premeditated, appellant objected to the giving of this instruction arguing that it was inapplicable to the facts of the instant case (R. 1950). Appellant did not object to the instruction per se, on constitutional grounds. As such, appellant has failed to preserve this issue for appellate review. Vaught v State, 410 So.2d at 152.

On the merits, appellant's claim that this instruction is unconstitutional has likewise been previously rejected by this Court. Menendez v State, 419 So.2d 312, 314 (Fla. 1982).

b. Majority Verdicts:

That jury unanimity in recommending death is not required by due process was already decided by this Court in Alvord v State, 322 So.2d 533 (Fla. 1975) cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976) and more recently in James v State, 453 So.2d 786 (Fla.) cert. denied, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984). Besides, appellant can hardly allege error on this issue in light of the jury's eleven to one recommendation for life, where the sentence of death resulted when the judge overrode the jury's recommendation.

c. Advisory role:

Appellant's claim that the jury instructions do not advise the jury of their role in the sentencing scheme in violation of Caldwell v Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) was not preserved for review where appellant did not object to the standard instruction as given. Vaught v State, 410 So.2d at 152. Regardless, this Court has consistently held that this claim is inapplicable in Florida. Combs v State, 533 So.2d 287 (Fla. 1988); Grossman v State, 525 So.2d 833, 839 (Fla. 1988).

2. Counsel:

Appellant's complaint against trial counsel in capital cases in general is irrelevant to the case sub judice. Any claim of ineffective assistance of counsel in this case must follow he standard set in Strickland v Washington, 466 U.S. 668 (1984) and should not be raised on direct appeal. See State v Menses, 392 So.2d 905 (Fla. 1981).

3. The Trial Judges:

Likewise, appellant's complaint against trial judges generally is irrelevant to the instant case. Appellant's complaint against the Florida judicial system as resulting in racial discriminatory application of the law is further unavailing in light of the fact that appellant is white.

4. Appellate Review:

a. Proffitt and appellate reweighing:

Florida's death penalty statute is constitutional. Thomas v State, 456 So.2d 454 (1984); Méndez v State, 419 So.2d 312 (Fla. 1980). This Court appreciates it's role in ensuring nonarbitrary and noncapricious results. Smalley v State, 546 So.2d at 722.

b. Aggravating circumstances:

The aggravating factors that the killing was cold, calculated and premeditated, and heinous, atrocious and cruel are not constitutionally infirm. See subsection 1(a) above relating to jury verdicts.

Appellant's attack on the constitutionality of the aggravating factors of great risk of death to many persons, hinder government function or enforcement, and under sentence of imprisonment must also fail where said circumstances were inapplicable to the instant case. Neither the judge nor the jury considered these factors in aggravation (R. 1948, 1949, 1953, 1965).

Appellant's challenge to the constitutionality of the aggravating factor relating to prior violent felony was not preserved for review by an objection. Vaught v State, supra. Nonetheless, appellant's argument that this aggravator is constitutionally infirm as against the rule of lenity necessarily assumes that the statute is vague. Inasmuch as the rule of lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one," Callanan v United States, 364 U.S. 587, 596 (1981), appellant's argument must fail. This Court has

previously determined that the legislature clearly intended that this aggravating factor apply in a situation such as the one at bar involving contemporaneous convictions for two murders. King v State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981). Indeed, this aggravating circumstance is relevant to determining whether the defendant exhibits a propensity to commit violent crimes. Hardwick v State, 461 So.2d 79, 81 (Fla. 1984) cert. denied, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed.2d 267 (1985).

d. Procedural technicalities:

By the same token, Florida's contemporaneous objection rule and its application in death cases is both valid and legitimate. Dugger v Adams, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

e. Tedder:

Appellant's constitutional attack of the Tedder standard is belied by the United States Supreme Court's decision in Spaziano v Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), which upheld the trial court's imposition of a death sentence despite the jury's recommendation for life pursuant to Tedder.

5. Other problems with the statute:

a. Lack of special verdicts:

Appellant's claims regarding the jury's failure to specify which aggravating and/or mitigating factors it relied on in reaching its advisory verdict has already been decided adversely to the appellant in Hildwin v Florida, 490 U.S. 638, 109 S.Ct.

2055, 104 L.Ed.2d 728 (1989). So, too has the appellant's claim regarding special verdicts on first degree murder. Schad v Arizona, 5 F.L.W. Fed. S622 (June 21, 1991); (See Point XVIII supra).

b. No power to mitigate:

Florida's sentencing scheme provides substantial safeguards to ensure that a death sentence is imposed in only these cases which warrant it. Proffit v Florida, 428 U.S. 242 (1976).

c. Presumption of death:

As conceded by appellant, the United States Supreme Court has found that the Eighth Amendment is not violated when death is imposed when at least one aggravating circumstance is found and no mitigating factors are found. Blystone v Pennsylvania, 494 U.S. __, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990); Boyde v California, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 316 (1990). In any event, the presumption of death is inapplicable to appellant where four aggravating factors were established.

POINT XXIV

THE AGGRAVATING CIRCUMSTANCES UTILIZED SUB JUDICE, I.E. THE MURDERS WERE COMMITTED DURING THE COURSE OF A BURGLARY, THE KILLINGS WERE HEINOUS ATROCIOUS AND CRUEL AND WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, AND PRIOR VIOLENT FELONY, ARE CONSTITUTIONAL.

The constitutionality of the aggravating circumstances which the trial court found were established by the evidence,

i.e. the murders were committed during the course of a burglary, the killings were heinous, atrocious and cruel, and were committed in a cold, calculated and premeditated manner, and prior violent felony, has been addressed elsewhere in the instant brief and will not be reiterated here (See Point XXIII, infra).

POINT XXV

THE JUDGE'S OVERRIDE OF THE JURY'S RECOMMENDATION OF LIFE WAS NOT UNCONSTITUTIONALLY ARBITRARY AND IRRATIONAL.

Based on the United States Supreme Court decision of Parker v Dugger, 4 F.L.W. Fed. S1031 (January 22, 1991), appellant contends that the trial court's imposition of a death sentence for the murder of Mr. Leland is arbitrary and capricious. Appellant reasons that because the trial court imposed a sentence of life for the murder of Mrs. Leland, he must have necessarily found that mitigating circumstances were established. However, this assertion is directly contradicted by the trial court's order; nor does this conclusion necessarily result from the court's holding in Parker.

First, the United States Supreme Court in Parker did not hold that the trial court's imposition of death for the murder of Sheppard was arbitrary and capricious in light of the imposition of a life sentence for the Padgett murder. What the Parker court held was that this Court had ignored the mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances. As a result, the Parker court did not

reverse the imposition of death for the Sheppard murder; instead, they remanded the case to this Court so that this Court could reconsider the death sentence in light of the entire record.

As such, Parker supports the instant trial court's imposition of death for the murder of Mr. Leland. Since the trial court's written order clearly and expressly states that no statutory or nonstatutory mitigating circumstances were established (R. 2358-2363), this Court is not placed in the untenable position of having to second guess the trial court's findings. By the same token, the trial court clearly and expressly considered all of the evidence presented in mitigation, including the appellant's medical records, the testimony presented by appellant's family and friends, and the testimony of the psychologist, Dr. Caddy.

Secondly, the trial court's imposition of a sentence of death as to Mr. Leland versus a sentence of life as to Mrs. Leland is not inconsistent. The standard is not whether the jury found evidence in mitigation on which to support its advisory sentence of life, but whether the facts suggesting death are so clear and convincing that virtually no reasonable person could differ. Tedder v State, 322 So.2d 908 (Fla. 1975). Appellee submits that, in conformity with the trial court's conclusion, the facts suggesting death with regards to the murder of Mr. Leland are so clear and convincing, that virtually no reasonable person could differ.

Contrarily, perhaps the trial court found that, as to the murder of Mrs. Leland, the facts suggesting death were not so clear and convincing.[9] However, because the trial court is not required to state his reasons for imposing a life sentence, see §921.141(3) Fla. Stat. (1987), the facts underlying the imposition of a life sentence for the murder of Mrs. Leland is unknown.

Thus, appellant's assertion that the trial court must have necessarily found that some mitigating circumstances were established in light of the life sentence imposed for Mrs. Leland's murder is mere conjecture and speculation. Indeed, the State submits that this assertion is appellant's effort to cloud the issues relevant to the imposition of death. The essential 104inquiry is not why the trial court imposed a life sentence for the murder of Mrs. Leland; but rather, why the trial court imposed a sentence of death for the murder of Mr. Leland, and whether that sentence is supported by the record. The State maintains that it is supported by the record, and that said sentence is in conformity with similar cases in which death has been imposed. Mills v State, 476 So.2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986); Porter v State, 429 So.2d 293 (Fla.) cert. denied, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); White v State, 403 So.2d 331 Fla. 1981); See Occhicone v

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[9] The trial court may not have imposed death because he did not find that some of the four aggravating factors applicable to the murder of Mr. Leland were applicable to the murder of Mrs. Leland. See Parker v Dugger, 4 F.L.W. Fed. S1031.

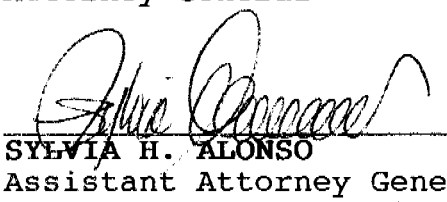
State, 570 So.2d 902 (Fla. 1990); Johnston v State, 497 So.2d 863 (Fla. 1986). As such, the trial court's imposition of death was not arbitrary and capricious, thereby requiring that this Court affirm same.

CONCLUSION

Based on the arguments and authorities cited herein, the State respectfully requests that the appellant's conviction and sentence be AFFIRMED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

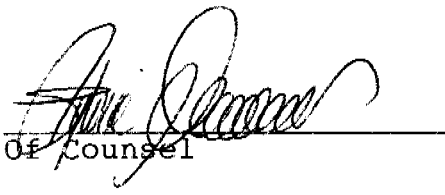


SYLVIA H. ALONSO
Assistant Attorney General
Florida Bar No. 767190
111 Georgia Avenue, Suite 204
West Palm Beach, FL 33140
(407) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been forwarded by courier to Jeff Anderson, Assistant Public Defender, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 1st day of October, 1991.



Of Counsel

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