IN THE

SUPREME COURT OF FLORIDA

MICHAEL CARUSO, JR.,	)	
Appellant,	)	
vs.	)	CASE NO. 73,507
STATE OF FLORIDA,	)	
Appellee.	)	

AMENDED REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

AUTHORITIES CITED

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITY

POINT I[1]

THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF BAD CHARACTER EVIDENCE REGARDING APPELLANT'S DRUG ACTIVITY OVER APPELLANT'S OBJECTIONS.

Appellee claims that Appellant's drug activity in December of 1987, was relevant to show the motive for the killing and burglary. However, as in Craig v. State, 16 F.L.W. S604 (Fla. Sept. 5, 1991), the evidence of drug activity was not relevant. In Craig, like in this case, there was a burglary and the victim was found dead in his home. The state introduced evidence that the defendant procured and used cocaine. This Court held that it was error to introduce such evidence.[2] The drug activity is far too tenuous to be relevant. Machara v. State, 272 So.2d 870 (Fla. 4th DCA 1973).

Appellee also argues that due to the weight of the evidence any error which occurred can only be harmless.[3] However, the evidence in this case was far from overwhelming.[4] The physical evidence against Appellant was weak. The state relied on evidence Appellant possessed Mrs. Leland's pendant. However, the person who testified to this allegation admitted that the pendant in Appellant's possession could be different from Mrs. Leland's (R1137-38). Moreover, witnesses testified that the pendant in Appellant's possession belonged to Appellant's mother (R1666,1527-28,1534,1560-

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[1] The Initial Brief is relied on for Points IV, VIII, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XXII, XXIII, XXIV, and XXV.

[2] In Craig it was proven beyond a reasonable doubt that the error was harmless. The same cannot be said in this case.

[3] Appellee makes this claim pages 30-32 of its brief, and refers to this portion of its brief in other parts of its brief.

[4] Even with the errors complained of the jury spent more than 9 hours deliberating before reaching a verdict (R2327).

69). None of the items taken from the Leland residence, including a radio and candle holders (R1129), were traced to Appellant.

Appellee also relies on Appellant's fingerprint on a panel of the front door as convincing evidence. However, Appellant was legitimately at the Leland's front door when the paramedics were inside (R1591,1623,1711).[5] Appellant's prints were not found in the bedrooms, hallway, or kitchen where the crimes occurred. Moreover, there were other identifiable prints in these areas that could not be identified to anyone known to the police to have been in the residence (R990-3).[6] The shoe impression found in the bedroom was not identified to Appellant (R795).

The state also speculated that Appellant could have only seen the bodies at the time of the killing. However, there was evidence that Appellant had gone inside the Leland residence for a couple of minutes after the paramedics went inside (R1593,1626,1657-58). In fact, one of the paramedics had noted that one of the neighbors had come inside the house (R1711). A state witness could not rule out that Appellant had been in house at this time (R1091).

It has been noted that a dog tracked a scent from the Leland house to Appellant's house. However, it is undisputed that Appellant, and his mother, had been at the door of the Leland house and then returned home. It was this scent that was later tracked.

Craig Quinn testified to a statement allegedly made by

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[5] In addition, the break in was through the rear door.

[6] These include finger and palm prints found in the interior of the bedrooms (R991-92), and on a telephone receiver (R993). Prints were found on the Saran Wrap but were not sufficient to identify to anyone (R994).

Appellant. Quinn's credibility was in question. One state witness testified that Quinn's statements could not be corroborated (R1427). In fact, Quinn testified that he heard Appellant making threats on December 7, 1987. Quinn acknowledged that police officers were present at this time (R1261). Yet, none of the officers heard the threats. Also, Quinn's testimony that Appellant gave him the knife that had broken off in the victim's head is clearly false. The knife the killer used had its tip broken off in the back door during the break in. The knife that Appellant allegedly possessed did not match this knife (R1427).

Finally, Appellee mentions the alleged cuts on Appellant's hands. However, there was no evidence that the cuts related to this incident. No blood of Appellant was found at the scene. Despite the fact that police examined Appellant's clothing and shoes for blood; no blood was found. It cannot be said that the errors in this case may not have affected the jurors.[7]

Appellee claims that "by asking Quinn about his [Quinn's] drug activities on cross-examination, defense counsel opened the door to the evidence" of Appellant's activities. However, this related to a witness' ability to perceive events and did not open the door to drug activity of other non-witnesses such as Appellant.

Appellee refers to the objection to drug activity outside of

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[7] Appellee has also argued that the error was per se harmless because the bad character evidence was not similar to the crime for which Appellant was on trial and such evidence was cumulative to other evidence of drug activity. Such an argument is specious. Murder convictions have been reversed where the prejudicial evidence of drug addiction and activity is introduced. See Greene v. State, 376 So.2d 396, 398 (Fla. 3d DCA 1979). There was no evidence cumulative to the prejudicial drug acitivity to which Appellant complains. See footnote 8, infra.

december of 1987 and claims that the present issue was not preserved. Appellee refers to the objection to drug activity outside of December of 1987. Appellant has not raised this on appeal because the only evidence of Appellant's drug activity introduced occurred in December of 1987.[8] The present issue is preseved.[9]

POINT II

THE TRIAL COURT ERRED IN ADMITTING AN AUTOPSY PHOTOGRAPH INTO EVIDENCE OVER APPELLANT'S OBJECTION.

Appellee claims that the autopsy photograph was relevant because "stab wounds were visible only after the scalp was peeled back from the forehead" (AB at 24) and the "photograph in question showed the nature and extent of the stab wounds to the eyes" (AB at 25). Such a claim is specious. State's Exhibit #63 is an autopsy photo of the back of the head and has nothing to do with the forehead or eyes.[10] The examiner did not utilize the photo to explain the injuries to the victim's eyes.[11] The photo shows the

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[8] The prosecutor, aware of the trial court's prohibition of such evidence, was careful not to go outside of the 1st week of December of 1987. The prosecutor elicited that Craig Quinn became reinvolved with drugs in 1987 and clarified that this occurred in December of 1987 and the drug involved was cocaine (Appendix 1, R1266). Details of drug activity during that week followed.

[9] Appellant objected pretrial to evidence of Appellant's drug activity (R6-7). The trial court ruled that Appellant's drug activity occurring one week [Dec. 1 -- Dec. 7, 1987] would be admissible (R22). Appellant objected to this ruling (R22), and renewed his objection prior to Craig Quinn's testimony regarding Appellant's drug activity and requested a standing objection at this point (R1097,1100). As Appellee notes, the trial court recognized this as a standing objection to the evidence of Appellant's drug activity of the first week of December of 1987.

[10] See State's Exhibit #63 (in record sent to this Court).

[11] In fact, the medical examiner's explanation as to the wounds was totally independent of this photo. Moreover, it should be noted that there were no stab wounds to the eyes (R859). Again, exhibit #63 is irrelevant as it only shows the back of the head.

handiwork of the medical examiner, rather than that of Appellant.

Appellee also claims that the photo could not have possibly prejudiced the jury. Such a claim is without merit. One can easily look at the photo and discern the potential prejudice.[12]

POINT III

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT MR. AND MRS CARUSO HAD STATED THEY WERE AFRAID OF APPELLANT.

Both parties agree that one may not impeach on a collateral matter and this issue boils down to whether the Carusos' alleged statements to Angelo Pazienza were collateral to the instant case.[13]

Appellee claims that the out-of-court statements made to Pazienza were not collateral to the issue of Appellant's guilt. Such a claim is without merit. As explained in Gelabert v. State, 407 So.2d 1007, 1010 (Fla. 5th DCA 1981) the test of collateralness is "could the fact, as to which the error is predicated, have been shown in evidence for any purpose independently of the contradictions?" Here, the "fact" is the Carusos' out-of-court statements that they were afraid of their son. Was such a "fact" admissible (i.e. could it have been shown in evidence)? No. The statements

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[12] Where the photo is not relevant, or marginally relevant, the only remaining effect is to inflame the jury and such photos will result in a "reversal of the conviction." Jackson v. State, 359 So.2d 1190, 1192-1193 (Fla. 1978). The fact that defense counsel questioned some of the jurors about judging evidence as to its evidentiary value (i.e. relevance) rather than other considerations does not make the error harmless. At the time the jurors were asked the questions, they had not seen the photo in question and thus were not in a position to judge how they would react to it. Moreover, when dealing with inflammatory evidence it is too much to expect a juror to put such evidence out of his or her mind.

[13] To clarify one matter, Appellant acknowledges that both of the Carusos denied during their testimony that they made statements that they were afraid of their son. The crux of this issue is whether the out-of-court statements constitute a collateral matter.

were introduced through the testimony of Pazienza and thus constitute hearsay which is not admissible.[14] Because the "fact"[15] was not admissible independent of the contradiction, it was collateral. Thus, it was error to permit impeachment on the collateral matter.

The error was not harmless. Pages 1-3, supra. Two defense witnesses were improperly impeached -- the Carusos.[16] Also, despite Appellee's claims, there is a potential to misuse the statements as bad character evidence against Appellant.[17]

POINT V

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE INQUIRY WHERE THE STATE FAILED TO COMPLY WITH THE TEN DAY NOTICE REQUIREMENT OF SECTION 90.404(2)(b), FLORIDA STATUTES.

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[14] Independent of the alleged inconsistency, the statements had no value other than for the truth of their contents. As such, the statements would be hearsay. See Williams v. State, 16 F.L.W. 1684 (Fla. 4th DCA June 26, 1991) ("We reject the state's contention that otherwise inadmissible hearsay statements may be admitted to "impeach" admissible statements"). These alleged statements were only introduced through Pazienza.

[15] Appellee's confusion stems from what constitutes the "fact." The state never questioned the Carusos as to whether they were ever afraid of their son. Instead, he asked if they had made a statement that they were afraid of their son (R1627,1701). Obviously, whether they had made statements does not show bias. Instead, a potential bias is actual fear of the son at the time of trial. Again, Pazienza testified to the statements they had made, rather than testifying they were in fear of their son. It was not the existence of the statements which was important to the state, but the truth of the content of those statements.

[16] Their testimony, that Appellant was inside the Leland residence and thus able to see the victims, was important. After exiting the residence, Appellant told his father some of the things he had seen inside the residence (R1593). This is contrary to the state's theory that Appellant was not in the residence.

[17] Appellee's reference to Appellant's behavior of fighting with his father and his childish temper tantrum at the carport, as necessarily cumulative to evidence of Appellant's parents' fear of him is without merit. A child's tantrums are different than the alleged fear of a parent of her child.

Appellee first claims that a Richardson inquiry is not required when the state fails to comply with the ten day notice requirement of § 90.404(2)(b). Appellee posits that the victim of the ten day notice violation merely step forward and prove how he or she is prejudiced. However, the victim of any notice or discovery violation is not able to do so until there is an adequate inquiry. See C. Ehrhardt, Florida Evidence at p.111 (2d ed. 1984); see also Distefano v. State, 526 So.2d 110 (Fla. 1st DCA 1988).

Appellee claims this issue cannot be reviewed because Appellant raised it pre-trial. However, the objection was renewed during trial prior to the testimony of Craig Quinn when the state had still not complied with the notice requirement (R1099-1100).

Appellee's main claim is that Appellant has failed to demonstrate any procedural prejudice. The burden is not on the one in the dark to show how he was prejudiced. More importantly, in this case we do not know the extent of the prejudice because there was not an adequate inquiry. Appellee contends that defense counsel conceded there was no procedural prejudice.[18] However, from the context of the discussion, defense counsel stated that the violation might not be per se prejudicial, but that he didn't know the prejudice because "This is taking be by surprise, Judge, as far as what specific acts of misconduct" the state was going to introduce

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[18] Appellee also refers to an early comment by defense counsel to Williams notice. To clarify, defense counsel made it clear to the trial court that no notice under 404(B) was received:

> MR. McDONNELL: ... It's right in 404(B). They talk about a motive. The state is required to give me ten days notice. I have received no notice. I don't think it[']s the kind of thing they can dance around. (R11).

(R21). The problem is that the prosecutor never complied with 90.404(2)(b) by informing what specific acts he was going to introduce -- even at the time of the so-called Richardson inquiry. How can an inquiry which fails to describe the key component of the violation -- the acts be described with particularity -- be deemed appropriate. Depositions are not a substitute for giving specific notice of the acts involved. Nor does a mere discussion about the ability to take depositions indicate the procedural prejudice from not knowing the specific nature of the acts.

Finally, Appellee claims that the failure to inquire into the willfulness of the violation is of no consequence. However, willfulness must be inquired into especially where, despite Appellant's complaints of prejudice in not receiving notice of the specific acts pre-trial or during trial, the prosecutor engaged in continuous non-disclosure and justified such action by stating that Appellant is on notice through the deposition he took.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY INQUIRE INTO THE DISCOVERY VIOLATION AND IN DENYING APPELLANT'S MOTION FOR A CONTINUANCE WHICH WAS MADE AFTER A DISCOVERY VIOLATION.

Appelle first claims there was no discovery violation because Appellant allegedly could have discovered such information through depositions.[19] Such a claim is without merit. First, we are

[19] Contrary to Appellee's claim, Appellant's objection was sufficiently timely for appeal. Dr. Dominguez was the last witness on Friday, September 23, 1988. Immediately after his testimony the court recessed until September 26, 1988. At the first available time for motions, prior to the next witness on September 26, 1988, Appellant made his motion as to the violation of the state's continuing duty to disclose under 3.220 (R886). The trial court recognized the objection and ruled there was no continuing duty to disclose (R890). Thus, the objection was preserved. Gordon v.

dealing with Dr. Dominguez's findings which he denied in his deposition. Thus, his findings were not available by deposition. Even if they were, this does not relieve the state from its discovery obligations. See Blatch v. State, 495 So.2d 1203 (Fla. 4th DCA 1986) (the fact that information could have been discovered by deposition not relieve obligation to disclose).[20] Clearly, it was a discovery violation for the state not to disclose the results. See Rule 3.220(b)(x), Fla.R.Crim.P.; Lee v. State, 538 So.2d 63 (Fla. 2d DCA 1989).[21]

Appellee next claims that an adequate inquiry was conducted. However, Appellee fails to point to any inquiry. Appellee points out that the trial court permitted defense counsel to search for an expert in his spare time during the trial as a quasi remedy. This illustrates the need for an inquiry rather than excusing the lack of one. The trial court could not determine what remedy to apply without knowing the extent of the procedural prejudice

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State, 449 So.2d 1302 (Fla. 4th DCA 1984) (issue preserved for appeal where shortly after complained comment court adjourned and next morning defendant moved for mistrial).

[20] Appellee also makes this claim as to Dr. Dominguez's findings as to the cuts on Appellant's hand -- "Appellant knew, based on the deposition and trial testimony ..." (AB at 45). Obviously, the nature of trial testimony does not relieve the state of its discovery obligations.

[21] Appellee's confusion stems from the belief that no discovery violation occurs as long as there is no deliberate misinformation to the defense. Of course, even if no misinformation occurs, a discovery violation occurs, where the state fails to provide information as required. In this case, Dr. Dominguez's informing defense counsel that he could not recall the time of death and there was nothing that would refresh his recollections (R880-81,2 SR 135) was not the violation itself, but did exacerbate the violation. The violation occurred where the state failed to disclose the results of the physical examination or comparison.

resulting from the nondisclosure.[22]

Finally, Appellee's references, to the attempts of impeachment[23] and the paramedic's findings, does not relate to the procedural prejudice that an inquiry was designed to ferret out.

POINT VII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO OFFICER WALSH'S TESTIMONY THAT HE FELT ONLY THE KILLER WOULD KNOW THAT SARAN WRAP WAS AROUND THE VICTIM'S HEAD.

Appellee claims the error was harmless, and not preserved, because it was merely cumulative to the testimony of Officers Belusko and Miller. Such claims are without merit. Belusko's testimony that the killer knew "certain things" does not convey that Appellant was the killer. Miller's testimony that Appellant made a statement regarding things that people at the crime scene knew does not infer by opinion that Appellant was the killer. There was evidence that Appellant was at the crime scene with paramedics and officers (R1591). None of this testimony has the same effect as Walsh's testimony that the Saran Wrap "was one of the elements I felt only the killer would know" (R1081). A police officer's feelings that Appellant was the killer is not permissible opinion and is not harmless for the reasons stated in page 43 of the Initial Brief and pages 1-3 of this brief.

POINT IX

THE TRIAL COURT ERRED IN PERMITTING THE BOLSTERING OF STATE WITNESS MYREL WALKER'S TESTIMONY BY PRIOR CONSIS-

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[22] Obviously, there is some procedural prejudice inherent in not being aware of findings until the witness testifies at trial. Perhaps if defense counsel had ben timely notified he could have been able to obtain an expert to dispute the state's expert.

[23] While Dominguez's findings may be in question, we do not know what affect the last minute attempts of impeachment had on the jury. Maybe none, maybe not enough.

TENT STATEMENTS.

Appellee concedes that it was error to improperly bolster Myrel Walker's testimony, but claims that such error was harmless. However, the state perceived Walker as a key witness as shown by Appellee's claim that "appellant was placed at the scene of the murders by Myrel Walker" (AB at 30).[24] The improper bolstering of such a witness cannot be deemed harmless.

Appellee also claims that after Walker was impeached

> ... 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 (R1515-1517).

(AB at 53). This rehabilitation was by use of Walker's prior consistent statements to the police and in her deposition. This is the very improper bolstering which Appellee concedes is error.

Finally, Appellee claims that the error would be harmless because of the strength of her testimony. However, one cannot discern from a cold record how credible a witness appears to a jury. Walker was impeached to some degree regarding her testimony as to what occurred on the night in question. Her view of the person was not under ideal circumstances. She was nervous. It was dark. It was around midnight. The jury could legitimately find that Walker might be somewhat fatigued after working and returning home late. When Walker first saw Appellant she could only say "it looked like the guy but I'm not sure" (R1509). Only after showups was Walker becoming sure of her identification. The jury may have had legitimate concerns about the credibility of Walker's testimony. The

[24] Although Walker was an important witness, it is an exaggeration to say that she placed Appellant at the scene of the murders.

improper bolstering of that testimony may have been the catalyst to eliminate or ease the jury's doubts about Walker's testimony.

POINT X

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE HEARSAY TESTIMONY OF OFFICERS RAIMONDI AND FABY.

Appellee claims that the out-of-court statements were not hearsay because they show what the officers did pursuant to the statements. However, it is well-settled that out-of-court hearsay statements are not admissible merely to show the sequence of investigation or to justify police officers' actions. State v. Baird, 572 So.2d 904, 907-908 (Fla. 1990); Harris v. State, 544 So.2d 322, 324 (Fla. 4th DCA 1989). What the officers did pursuant to information was not in issue. Even if it was, the information itself was hearsay and should not have been admitted. State v. Baird, supra (officer should state that he acted on "information received" rather than stating what that information was).

Appellee next claims Appellant was not prejudiced because the declarant, Myrel Walker, also testified during trial. However, Walker's testimony causes the hearsay to be prejudicial. While the hearsay was not in great detail, Raimondi's testimony that Walker observed a person at her door at approximately midnight on December 5 (R1481-82) and Faby's testimony that Walker gave a description and that description matched Appellant (R621)[25] were consistent with

[25] Appellee claims Faby's answer as to who matched the description was not complete. However, the answer was complete to inform the jury that Appellant matched the description (R621). The only incompleteness was Faby's offering of additional hearsay.

and bolstered Walker's in-court testimony.[26] The use of prior consistent statements through a police officer to put a "cloak of credibility" on a witness' testimony is not harmless. Perez v. State, 371 So.2d 714 (Fla. 2d DCA 1979).

POINT XI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE HEARSAY TESTIMONY OF OFFICER MARTIN THAT HE WAS TOLD BY A PARAMEDIC THAT THE LELAND RESIDENCE WAS SECURE.

Appellee claims that Officer Martin's statement, that a paramedic advised him that the house was secured, was not offered for the truth. However, Appellee then states that the statement was offered to show that the house was secured -- the very truth of the matter asserted.[27] The fact that the statements were not directly accusatory does not render them non-hearsay.

POINT XX

THE TRIAL COURT ERRED BY OVERRIDING THE JURY'S RECOMMENDATION FOR LIFE IMPRISONMENT.

Appellee analyzes the present case as a death recommendation case and reviews evidence in a light most favorable to sustain a death recommendation.[28] Thus, where there are circumstances or facts which reasonable people could differ to as being mitigating,

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[26] The fact that Walker later testified and was cross-examined does not render the out-of-court statements non-hearsay. Wells v. State, 477 So.2d 26 (Fla. 3d DCA 1985); United States v. Freeman, 519 F.2d 67, 69 (9th Cir. 1975).

[27] As Appellee notes, this was followed by testimony that a paramedic broke in the house.

[28] Throughout its argument on this point Appellee uses death recommendation cases to posit since there is some evidence which could support the trial court not finding a circumstance, the mitigating circumstance can be ignored. However, the opposite is true. If a mitigating circumstance is supported by evidence, even though there might be conflicting evidence, in a life recommendation case the circumstance must be evaluated in a light most favorable to the jury's recommendation.

Appellee's analysis improperly results in the rejection of them as being mitigating.[29] In other words, if reasonable people could differ, an override of the life recommendation should be upheld. Of course, as this Court noted in Ferry v. State, 507 So.2d 1373, 1376-77 (Fla. 1987), where reasonable people could differ -- the override of the life recommendation is improper:

> Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people *could* differ on what penalty should be imposed in this case renders the override improper.

Below are the non-statutory mitigating factors which, contrary to Appellee's claim, are supported by evidence and could form a reasonable basis for the jury's 11 to 1 life recommendation.

1. Appellant had a history of cocaine and alcohol abuse.

Appellee argues that one is "entitled to disregard" evidence of cocaine and alcohol abuse because part of it was based on Appellant's statements.[30] In other words, Appellee is making its own determination as to the weight to give the evidence of cocaine and alcohol abuse. The weight to give such evidence is for the jury to decide. Because there is evidence to support a history of

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[29] See Carter v. State, 560 So.2d 1166, 1169 (Fla. 1990) (testimony mitigating "Although some reasonable persons might disbelieve portions of this testimony" because other reasonable persons might believe it).

[30] The statements were made long before any possible motive to fabricate about drug addiction. Appellee cites Hardwick v. State, 521 So.2d 1071 (Fla. 1988) for the proposition that the trial court does not abuse its discretion in not finding existence of a history of drug abuse. Hardwick was a case where the jury recommended death and the issue was whether the trial court's finding was reasonable -- not whether reasonable people could differ.

cocaine and alcohol abuse,[31] this circumstance constitutes a valid mitigating circumstance. E.g. Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978); Amazon v. State, 487 So.2d 8, 13 (Fla. 1986).

It should also be noted that the trial court recognized Appellant's "craze for this devastating drug [crack cocaine]" related to his behavior and conduct.[32] Moreover, in the lower court the state argued that Appellant's cocaine abuse was relevant and resulted in the death of the Lelands. Certainly, the history of Appellant's cocaine and alcohol abuse is related to his character and background and could be legitimately accepted as mitigating.[33]

2. Appellant's judgment was impaired.

Appellee does not dispute that the evidence discussed in pages 75-76 of the Initial Brief supports a reasonable basis for this circumstance. However, Appellee argues that there is evidence to negate such a conclusion. Possible conflicts should not be

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[31] See pages 19-22 of the statement of the facts in Appellant's Initial Brief. There was evidence that Appellant had to be hospitalized three (3) times due to cocaine overdoses (R1998). Appellant had been abusing alcohol since the age of 16 (2d SR 97). The drug abuse was considered to be "life threatening" (2d SR 104).

[32] The trial court indicated that this craze could not be used to justify the death of the Lelands (R2362). The trial court's evaluation of this mitigating evidence is misplaced. Obviously, the cocaine addition was not introduced to justify the killings. One does not need to justify the killings for there to be mitigating circumstances. Rather, the mitigating circumstances may properly arise from the aspects of a defendant's character, especially from the diverse frailties of humankind. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (Mandatory death sentencing scheme improper because it excludes, among other things, "possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind").

[33] Any aspects of a defendant's character may be relevant to whether a death penalty is warranted. See Lockett v. Ohio, 438 U.S. 586 (1978).

resolved against the jury's recommendation. Rather, the evidence should be analyzed to determine if there could be a reasonable basis for the jury's recommendation. Here, as explained at pages 75-76 of the Initial Brief, there was a basis from which the jury could legitimately find this mitigating evidence.

3. Appellant tried to overcome his drug addiction.

Appellee claims that there is evidence which conflicts with the evidence supporting this circumstance. Again, the jury was responsible for resolving the conflicts, thus the evidence should be analyzed consistent with their life recommendation. Here, the doctor's report on May 11, 1987, showed that Appellant was motivated and trying to overcome his addition despite an initial reluctance to share his feelings and notes the insurance situation (Appendix 2, 2d SR 72,109). Because insurance expired, Appellant was discharged before his addiction was addressed (R2064).

Appellee also quotes the trial court's unfounded speculation that Appellant had rejected his parents. The record shows that the opposite is true. Appellant's sister testified that Appellant tried to commit suicide because he thought he was failing his parents by using drugs (R2000).

4. Appellant attempted suicide.

There was evidence of suicidal feelings and an attempt.[34] Appellee argues that Appellant attempted suicide to call attention to himself. Assuming this is true, it would nevertheless con-

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[34] See Appellant's Initial Brief at 77.

stitute a mitigating factor as to his character.[35] Appellee also claims that a suicide attempt is a single act of no mitigating significance. This is not true. See Campbell v. Kincheloe, 829 F.2d 1453, 1463 (9th Cir. 1987) ("suicide attempt on one occasion"). A suicide attempt reflects different aspects which may in themselves be mitigating. It reflects possible mental instability, depression, a call for help and other possible mitigatings.[36]

5. Appellant was a good worker.

Appellee does not dispute that Appellant's employer testified that Appellant was a good worker who he could trust (R2003-04, 2007). Instead, Appellee argues that the employer did not know of Appellant's drug addiction outside of work. These were matters for the jury to consider. The employer was only testifying to Appellant's character traits that he was aware of -- Appellant was a good worker. The jury could legitimately find this mitigating circumstance. Smalley v. State, 546 So.2d 720 (Fla. 1989).

6. Appellant is a non-violent, respectful person.

Appellee argues that this fact is not true because it's refuted by the hospital records which "indicate that appellant was

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[35] Generally, suicide attempts are a form of calling attention to one's self and constitute a call for help.

[36] This particular act can relate to different categories of conduct. When this Court noted in Campbell v. State, 571 So.2d 415 (Fla. 1990) that circumstances should be dealt with as categories of related conduct rather than individual acts it was not intended that an individual act could not be mitigating. Otherwise the "disparate treatment of an equally culpable codefendant" would not be mitigating. Rather, it was intended that every individual act not necessarily be examined. For example, four (4) attempted suicides would not be considered four mitigating circumstances. There would be one mitigating circumstance of attempted suicide which consists of four individual acts of related conduct.

so violent that he had to be restrained" (AB at 90). Appellee has missed the point. Appellant was violent at these times, but he was under the influence of crack cocaine.[37] The undisputed consensus of testimony was that when he was not under the influence of crack cocaine, Appellant was non-violent and respectful (R2004,2009,2013-14). The jury could legitimately consider this circumstance.

7. Appellant was a good brother and son.

Appellee has not disputed the evidence referred to at pages 78-79 of Appellant's Initial Brief. Instead, Appellee refers to possible conflicting evidence to essentially conclude that reasonable people could differ on this circumstance. Appellee then cites a death recommendation case to conclude that it was not an abuse of discretion not to consider this evidence. Again, Appellee uses the wrong standard. This was a life recommendation. The issue is whether, after conflicts are resolved consistent with the jury's recommendation, the mitigating circumstances could be found by the jury -- even though reasonable people might differ. Here, the jury could legitimately consider this mitigating evidence.

8. Appellant had a history of depression.

Appellee does not dispute the evidence that was noted in Appellant's Initial Brief. The jury could reasonably rely on this.

9. Appellant's inability to handle pressure.

Appellee argues that Appellant had no financial responsi-

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[37] Appellee has referenced two incidents. The hospital notes on May 30, 1987 indicates that Appellant had to be restrained after being "drunk and high on crack" (2d SR 75, 80-82). The hospital notes on November 2 and November 3, 1986 indicate that his admission was the result of crack cocaine and Appellant was stating he "wants to die" and "crack has a hold on him" (2d SR 87, 88).

bilities to feel pressured about thus this factor does not apply. Appellee fails to understand that this factor does not have to relate to financial pressures. There are other pressures in life. For example, having an addiction during adolescence can create all kinds of pressures. Also, Appellee's claim that Dr. Caddy testified Appellant didn't give a damn about anything and was unwilling to work is wrong. Instead, when properly read in context, Caddy's testimony was that Appellant's family thought he was very sensitive unlike a kid who didn't give a damn (Appendix 3, R2034-2035).

10. Appellant did not have a history of prior violent crime.

Appellee does not dispute this, but instead says this does not "negate" the fact that Appellant had been found guilty. Appellant never claimed that it negated guilt so that he would avoid punishment. Instead, this factor indicates that the murders were an isolated out-of-character act of physical violence and Appellant has the potential for peacefully living in prison.[38] The jury could legitimately find this mitigating circumstance.

Any, or a combination, of these non-statutory mitigating circumstances would serve as a basis for a reasonable person to differ on the propriety of a death sentence. Appellee also claims that none of the statutory mitigating factors apply.

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[38] Contrary to Appellee's assertion, this is not merely the absence of the aggravating factor involving a conviction for a prior violent felony. See Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987) ("not only is there no aggravating factor of prior convictions, but the trial judge expressly found that Proffitt's lack of any significant history of prior criminal activity or violent behavior were mitigating circumstances"). This aggravating factor will be absent where there are no convictions for such felonies even though the defendant has a prior history of violence. Appellant has no such history of violence.

1. Age.

Appellee claims that this circumstance does not apply because the trial court found Appellant to be mature and streetwise. However, as noted on pages 79-80 of Appellant's Initial Brief there was evidence to the contrary on which the jury could rely.

2. Substantial impairment of Appellant's capacity to appreciate the criminality of his conduct.

The trial court ruled that this factor had not been "conclusively established". As explained in Appellant's Initial Brief, the trial court used the wrong standard. Appellee claims that since there was some evidence to support the trial court's finding it was not error to overrule the jury's life recommendation.[39] Appellee uses the wrong standard. If there are reasonable inferences to support a circumstance, the evidence should be resolved in favor of the jury's recommendation. Based on the evidence recited in pages 80-81 of Appellant's Initial Brief, the jury could reasonably rely on this mitigating circumstance.

3. Appellant was suffering from an extreme mental or emotional disturbance.

Appellee states that there was no evidence to support this circumstance. However, even the trial court found that Appellant

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[39] Appellee refers to the evidence that Appellant had showered and that his clothes were washed on the day of the murders. However, assuming arguendo these events took place, they occurred long after the murders and thus were not indicative of his mental state at the relevant time. Moreover, Appellant's mother washed Appellant's clothes and there was absolutely no evidence or indication that any of his clothes had blood on them. The police took the clothing Appellant had worn on the days of the murders, but there was no evidence they had been washed. In addition, taking showers certainly is not probative of mental state.

was suffering from some form of emotional disturbance.[40] Lay opinion of family members who were not with Appellant at the time of the crimes does not mean the fact that the jury could legitimately find this factor.

4. No significant history of prior criminal activity.

Despite the stipulation by the parties in the best position to know, the prosecutor and defense counsel, that one grand theft constitutes Appellant's prior criminal history, Appellee now alleges that prior arrests constitute a significant history of criminal activity. As noted in the Initial Brief, arrests, without any evidence, or allegation, as to the underlying facts, does not show criminal activity. See Brothers v. Dowdle, 817 F.2d 1388, 1390 (9th Cir. 1980); Hines v. State, 358 So.2d 183 (Fla. 1978).

Appellee next claims that because there was some evidence to support the aggravating factors, it was not error to find them. However, the pertinent question as to a life override issue is not whether it would be error to apply the alleged factor. Rather, the issue is whether it could be reasonable for a jury to reject, or give reduced weight to, the alleged aggravating factor. Hallman

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[40] The trial court mistakenly believed that the disturbance had to be extreme. Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990) (any emotional or mental disturbance is mitigating). Based on the facts that Appellant indicated that he wanted to smoke crack cocaine on the day of the murder (R1271-72), the description of Appellant's violent and uncontrollable behavior after this time (R1435,1358), which contrasts with the undisputed testimony that when not under the influence of drugs Appellant is peaceful and respectful (R2013-14,2009), combined with Dr. Caddy's testimony as to the affects of crack cocaine causing one to be so emotionally disturbed that his or her conduct is likely to be very different than normal circumstances (R2030), including the dramatic reduction of one's ability to reason (R2031), the jury could legitimately conclude that Appellant had taken cocaine and was suffering a mental or emotional disturbance.

v. State, 560 So.2d 223, 227 (Fla. 1990).

Appellee argues that the trial court was correct in ruling that the killings were cold, calculated, and premeditated based on the fact that Appellant knew the victims and there was trauma around the victim's eyes. From this, it is speculated that there was a "subconscious reflection" to eliminate the Lelands as witnesses. CCP is not a "subconscious" reflection. Moreover, the witness elimination theory for CCP must be based on more than the mere fact that the witnesses could have identified their assailant. Perry v. State, 522 So.2d 817, 820 (Fla. 1988). The evidence is consistent with a burglary panicking and killing when discovered committing the burglary. Under the standard set in Perry, supra, at 820, the jury could reasonably reject this factor.

Appellee also argues that there was evidence to support a conclusion that the murder of Mr. Leland was heinous, atrocious, and cruel (HAC) because of the numerous wounds. Again, the issue is whether the jury could reasonably reject, or give reduced weight to, HAC. The numerous wounds and the description of the scene is consistent with a frenzied attack during a rage which does not constitute HAC. See Halliwell v. State, 323 So.2d 557 (Fla. 1975). For the reasons further explained in the Initial Brief, the jury could reasonably reject, or give little weight to, this factor.

Although outside this one incident Appellant has no prior violent criminal behavior, Appellee claims that the prior violent felony aggravator carries much weight. Even though it must be acknowledged that based on existing caselaw contemporaneous

killings seem to qualify under this aggravating factor,[41] the jury could have reasonably given this little weight because it could find that the single episode was an isolated out-of-character act.

Appellee also argues that the aggravating factor, that the murder occurred during the commission of a felony, applies. Appellant does not dispute that this factor could be found, however, for the reasons explained in Appellant's Initial Brief at 85, the jury could give this factor little weight.

Finally, Appellee tries to explain the 11 to 1 life recommendation by claiming that the jury was swayed by emotional arguments by defense counsel. However, the defense asked the jury to recommend life based on the facts and law, but not on emotion (Appendix, R2106). Appellee specifically claims that the jury may have been swayed because of Appellants family's tears from the following portion of the record:

> MR. McDONNELL: ... I put family witnesses up there so you can watch him cry. I put them up there so you can watch him and see that there's nothing in this guy's history to show that he's a killer.

(R2122-23) (emphasis added). Clearly, the him referred to is Appellant; not his family. The defense attorney was conveying that Appellant was remorseful for the pain and suffering he had caused to his family because of his drug addiction.

Appellee argues that more important was the improper con-

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[41] Appellant disagrees with the logic of these cases. The importance to the prior violent felony aggravator is that the prior violent felony demonstrates that the murder for which the defendant is being sentenced is not an out-of-character incident of violence. Thus, it constitutes an aggravating circumstance. Where the prior violent felony stems from an act contemporaneous with the murder incident, the rationale behind the aggravator does not apply and the aggravator should not be found.

sideration of the following:

> "More importantly, defense counsel characterized the instant offenses as out-of-character occurrences, which were the direct result of crack cocaine addiction (R2109-2113). Consequently, defense counsel argues that, though Appellant was a drug addict, he could be rehabilitated."

(AB at 100). Certainly, the jury may consider if there was an out-of-character occurrence and if Appellant could be rehabilitated.

In closing, Appellee notes that "there is no basis on which to justify the instant offense" (AB at 101). The purpose of Phase II, and reviewing the propriety of the jury override, is not to justify a murder. Rather, the issue is whether the facts are so clear and convincing that virtually no reasonable person could differ as to the appropriateness of the death sentence. The override is not to be judged on the basis of the weight of the evidence assigned by the trial judge. Ferry v. State, 507 So.2d 1373 (Fla. 1987). Instead, the evidence must be analyzed consistently with the jury's recommendation. If such evidence then provides a reasonable basis for a life recommendation, an override of the 11 to 1 life recommendation was improper. In the instant case, there was a reasonable basis for the jury's recommendation.

POINT XXI

THE TRIAL COURT ERRED IN ENTERTAINING VICTIM IMPACT INFORMATION PRIOR TO SENTENCING APPELLANT.

Appellee relies on Payne v. Tennessee, 5 F.L.W. Fed S708 (1991) to claim that the victim impact information was not improper. In Payne, the court noted that the admission of victim impact evidence would not violate the Eighth Amendment. However, this does not answer whether victim impact evidence would be permissible under the Florida Constitution or Laws.

The Florida Legislature has made clear in Section 921.141(5), Florida Statutes (1987), that aggravating circumstances are limited to those provided by statute; no others can be considered to support a sentence of death. Purdy v. State, 343 So.2d 4 (Fla.) cert. den., 434 U.S. 847 (1977); Grossman v. State, 525 So.2d 833, 842 (Fla. 1988). No other statutes can abrogate this requirement. Floyd v. Bentley, 496 So.2d 862 (Fla. 2d DCA 1986) (specific statute takes precedent over general statute). Thus, victim impact information must be excluded from capital sentence proceedings.

Florida law has independently prohibited victim impact information.[42] See Welty v. State, 402 So.2d 1159 (Fla. 1981); Jones v. State, 569 So.2d 1234 (Fla. 1990). The logic in preventing passioned, arbitrary decision making still applies in Florida.

Also, the type of victim impact information admitted in this case has not been permitted by the court in Payne. Explanations as to details of how Appellant's exercise of his constitutional right to a trial impacted the victim's family is not the type of victim impact information held not to violate the Constitution. Nor does Payne deal with permitting expressions of opinions as to the propriety of the death penalty as was done in this case.

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[42] In this case many of the letters, and the "petition" expressing opinions that death should be imposed, were not even from the victims' family. Appellant knows of no jurisdiction that permits this type of information even in a non-capital case. These letters which are unsworn to also present a number of other problems such as the rights under the confrontation clause. The right to confront adverse witnesses applies to the final sentencing proceeding before the judge in a capital proceeding. Engle v. State, 438 So.2d 803 (Fla. 1983). The right to secure confrontation and cross-examination applies to sentencing. Eutsey v. State, 383 So.2d 219 (Fla. 1980).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier on this 6th day of January, 1992.

Jeffrey L. Anderson
Of Counsel.