IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,914

LAVARITY ROBERTSON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

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

****

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

ANITA J. GAY
Florida Bar # 0745227
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Appellee, **THE STATE OF FLORIDA,** was the prosecution in the trial court. The Appellant, **LAVARITY ROBERTSON,** was the defendant. All parties will be referred to as they stoad in the lower court. The symbol "R" will designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

An indictment charging Defendant with first degree murder of Frank Ernesto Najarro Rivas (hereinafter "Frank"); first degree murder of Isilia Leticia Paguada Martinez (hereinafter "Leticia"); robbery with a firearm of Leticia; and armed burglary of a conveyance was filed on July 19, 1989. (R. 5-7A).

On July 24, 1989, trial commenced. After an uneventful voir dire, a jury was selected and sworn to try the case. (R. 283-652). The State, on July 25, 1989, began its case. (R. 677). The following testimony was presented to the jury:

Anthony "Ty" Williams, the brother of Defendant's girlfriend, went fishing with Defendant on November 6, 1988, Defendant drove a car he borrowed from Ty's mother, Margaret Williams, and Ty rode with him. Two friends, C.J. and Gerald, accampanied them in a separate car. (R. 25, 730). Initially, the four fished on the 79th Street Causeway. (R. 692-93, 735, 752-53). After two or three hours of fishing on 79th Street, they

drove to a bait and tackle shop to buy mare bait. Then they went to a store and purchased two six-packs of beer before proceeding to the 36th Street Causeway (Julia Tuttle Causeway), to continue fishing. (R. 694, 736, **753-54).**

At the 36th Street Causeway they fished near **a** construction site. (R. 695, **737, 754).** As they fished they drank the two six-packs of beer. (R. **712,** 738, **755).** When the fish stopped biting, Gerald cleaned the fish and the other three played in the water. Defendant took a rifle out of the car and he, C.J. and Ty shot at cans in the water. (R. **696,** 737, **755-**56). **They** were at the construction site fishing and playing for two to three hours. It was dark outside when they **decided** to leave the causeway. (R. 696, 739, 757).

As the group prepared to leave, Defendant put the rifle in the front seat of the car he was driving. Another car was parked further up the dirt road, on the same side of the causeway, by the bay. (R. **697, 757).** Before everyone got into their **cars** to leave, Ty heard Defendant say, "Let's go jack.", and C.J. heard Defendant say, "Come on and go down and jack them." (R. 697, 740). To "jack" someone means to rob them. (R. 740). C.J., who had previously been convicted of a felony, stated to Defendant, "I don't do that anymore." (R. **740,** 745). **C.J.** and Gerald drove away in C.J.'s car. (R. **698, 741, 758).**

Ty and Defendant got into Ty's mother's car to leave. (R. 698). Defendant drove down the dirt road, past the other car parked further down the causeway. Defendant made a U-turn and then stopped his car near the other car. (R. 699, 978-79). Ty stayed in the car as Defendant approached the other car, pointed the rifle at the people inside and said, "Give me the money mother fucker." (R. 702, 979-80). Ty saw Defendant shoot Frank in the side. After Defendant shot Frank, Frank fell over in the seat. (R. 981). When Defendant went to the other side of the victims' car, Ty heard him say, "Give me the rings." Ty heard Leticia crying and saying, "We don't have any money." (R. 982). After Ty heard about four more gunshots, Defendant came back to the car. (R. 703, 983). Ty saw Leticia fall to the ground outside of the car. (R. 983-84).

When Defendant came back to the car, he brought the rifle and some rings. He put the rings in the ashtray. (R. 704, 984). Defendant stated, "Why you ain't try to stop me?", and Ty responded, "I ain't know you were gonna do like that." (R. 985). Defendant then said, "Well you shoulda tried to stop me." On the way home, Defendant told Ty not to tell anyone what had happened. (R. 705, 985). Ty gave a statement to Detective Roberson, on November 18, 1988, which was admitted into evidence at trial. (R. 961-91).

Later that night, Defendant saw C.J. and confessed to the killings. He told C.J. that he had killed the guy. Defendant

said he had also killed the girl; "he said he just shot her, kept shooting her." He said she just kept screaming and he told her "Bitch, shut up". Defendant also said that the girl tried to run. Ty was in the car when Defendant killed the two victims. (R. 742-43). C.J. thought Defendant was joking until he saw the murders in the news the following day. C.J. discussed the murders with Gerald on the way to work. (R. 743).

C.J. saw Defendant the day after the murders at Brownsville Park. Defendant brought up the subject of the killings and asked, "What should [I] do?". (R. 743). Defendant also saw Willie Finch at Brownsville Park and told him that he "went on a little fishing trip and him and Ty, they was out there and they seen a little car and then he approached the car, talked to the man and he shot him. Then he approached the other side of the car and he shot the girl; took the rings." (R. 765). Willie learned that the murders had in fact happened when he read about them in the newspaper the next day. (R. 767).

Defendant also confessed to the murders to his girlfriend, Sheekita Barron. Defendant gave Sheekita the rifle and some rings. (R. 717). He told her that "he had did something that he shouldn't have." (R. 718). Defendant told her that he had robbed and shot the driver of a white car parked on the causeway where they had gone fishing. (R. 723, 996). He stated that he shot the victims with the rifle he brought to her house. (R. 725, 1000). She took the rifle and put it under her mattress and

then moved it to a closet. (R. 726, **998-1000).** When Defendant gave her the four rings, Sheekita did not know where they came from. (R. 723). **She** wore them for one week and then Defendant took them back. **(R. 1002).** Sheekita gave a statement to Detective Roberson, on November 20, 1988, which was admitted into evidence at trial. (R. 992-1010).

On November **7, 1988,** Florida State Trooper John Bagnardi saw a car parked on the access road on the Julia Tuttle Causeway and stopped to investigate, at approximately seven a.m. (R. 849-51). As Bagnardi approached the victims' car, he saw blood on the seat of the car. He observed a white male slumped towards the passenger seat and blood splattered all over the front seat. When he walked around the car he saw a female face down on the ground. After checking both victims for a pulse, and finding none, he called the City of Miami Rescue and Homicide Departments. (R. 852). Bagnardi observed tire tread and acceleration marks at the scene and cordoned off the crime scene. (R. 853-56).

Natalie Jones, a crime scene investigator for the City of Miami Police Department, was dispatched to the **scene** of the murders at approximately 7:30 **a.m.** on November 7, 1988. She photographed the scene, taking photographs of the victims, their car and the tire tracks, which were admitted into **evidence** at trial. (R. 775-825). Jones was responsible for processing the scene for blood samples and **she** collected five blood samples from

the scene. (R. 787-88). She was also responsible for processing the scene for latent prints. She lifted prints from the car and papers inside the car and sent them to the lab for identification. (R. 837). Jones recovered spent .22 caliber casings at the scene. (R. 798). Four casings were admitted into evidence. (R. 801). Jones also recovered eight (8) projectiles from the floor of the victims' car and four (4) from the right passenger seat. (R. 810).

On April 1, 1989, Jones was dispatched to the police department auto pound to retrieve three tires from a 1988 Dodge Monaco. The car belonged ta Margaret Williams and was impounded by the police during their investigation of the murders. (R. 730-31). The tires were admitted into evidence at trial. (R. 828-32).

Ema Fernandez identified a photograph of the female victim as Leticia Paguada, her friend of six years. (R. 106, 1133-34). Juan Dellanos identified a photograph of the male victim as Frank Najarro, his friend of three years. (R. 93, 1135).

Dr. Bruce Hyma, forensic pathologist, was dispatched to the scene of the murders at 11 a.m. on November 7, 1989. (R. 1024-26). Dr. Hyma found Leticia lying dead on the ground, outside of the passenger side of the car with a pool of vomit around her face. He examined her first and found that rigor mortis was easily broken; this indicated that the time of death

was possibly longer than twelve hours. Leticia was clothed in a blouse, black skirt and red fishnet tights, all of which were intact. (R. 1027-28). She had no jewelry on her hands. (R. 1030). The doctor observed a number of gunshot wounds to her body: head, neck, back, chest, arms and hands. (R. 1029).

Frank was dead and lying on the front seat of the car. (R. 1027). He was slumped over on the passenger seat with his shoulders and head partially outside of the passenger door. Dr. Hyma observed that rigor mortis was fully developed, but opined that the difference between the two victims came from Frank's body being in the shade and Leticia's body being in the sun. (R. 1029). Frank was clothed in trousers, underwear, white shirt, shoes and socks. (R. 1030). The doctor observed gunshot wounds to Frank's left shoulder, left back and right buttocks. (R. 1030). Dr. Hyma also noted a significant amount of grey sparkling residue on Frank's shirt. Before leaving, Dr. Hyma photographed the scene of the murders. (R. 1030).

The next day, Dr. Hyma performed autopsies on both victims. He did an external examination followed by an internal examination. (R. 1031). The toxicology screens on both victims revealed no alcohol or drugs in their body fluids. (R. 1050, 1073). The cause of death for each victim was multiple gunshot wounds. (R. 1072).

Frank had four (4) gunshot wounds, which Dr. Hyma labelled as A, B, C and D. Wound A resulted from a bullet entering Frank's left shoulder, going through large blood vessels of his armpit, into his chest, left lung, through blood vessels leading to his heart, across his heart and lodging in his right lung. (R. 1033). This wound caused significant internal bleeding. (R. 1037). Wound B was a flesh wound, caused by a bullet which entered and exited Frank's left back . (R. 1039-40). Wounds C and D had similar paths, bullets entered Frank's right buttock and travelled through his pelvis and intestines before lodging in his body. Both were potentially, but not immediately, fatal wounds. (R. 1042). The projectiles from wounds A, C and D were recovered from Frank's body. (R. 1047). Photographs of the wounds and projectiles, as well as a clarification schematic drawing, were admitted into evidence. (R. 83-93).

The autopsy of Leticia revealed nine (9) wounds, which Dr. Hyma labelled as A, B, C, D, E, F, G, H and I. Wound A resulted from a bullet which entered on the right side of her neck and exited by the chin. The projectile passed through the neck and back of the throat, but did not injure any major structures, and was not immediately life-threatening. (R. 1054). Wound B was an abrasive wound, not resulting in serious injury, caused by a bullet which entered on the left cheek and exited in front of the left ear. (R. 1055). Above Leticia's left breast, Dr. Hyma observed wound C. The projectile went through soft tissue of the chest before exiting through the back shoulder, without injuring any of the major blood vessels of the armpit. (R. 1055-56).

Wounds D, E, F and H were consistent with defensive types of wounds. The bullet causing wound D entered the back of Leticia's left arm, went straight through the muscle and exited the front of her arm. (R. 1058). Wound E's bullet entered through the thumb of her left hand, exited the other side of the thumb, reentered the hand at the knuckle of the second finger and exited at the top of the second finger. (R. 1060). On Leticia's right arm, just below the wrist, a projectile entered underneath the skin, and exited the front of the arm, without damaging the bone and was marked as wound F. (R. 1062). Wound H resulted from a bullet which entered the back of her left arm and travelled up, without injuring any of the major blood vessels in the arm, before exiting at the front of the arm and shoulder. (R. 1065-66).

Wound G was potentially, but not immediately, fatal. The projectile entered Leticia's right upper back, went through the soft tissue of her back, thraugh the right lung and exited above the right chest. (R. 1064). Wound I was another potentially, but not immediately, fatal injury. It was caused by a close range shot to the left corner of Leticia's mouth. The shot went straight back from the mouth to the brain. Death would occur within minutes, but since the bullet did not reach the brain stem, it was not immediately fatal. (R. 1067-68). Inflammation was present at the sites of wounds B, C and I. Inflammation is the body's first phase of healing, thus indicating that Leticia was alive for a short period of time following the gunshot

wounds. (R. 1071-72). Projectile fragments from wounds A and I were recovered and admitted into evidence. (R. 1067-70). Photographs of the wounds and projectile fragments, as well as a clarification schematic drawing, were admitted into evidence. (R. 94-106).

Jess Galan, criminalist from the firearms identification section of the crime lab, examined the projectiles and casings recovered from the scene and the victims. He determined that the projectiles were .22 rim fire caliber projectiles, and the casings were .22 long rifle casings. (R. 1081-90). Galan concluded that the projectiles and casings were all fired from the same weapon. (R. 1092).

Detective John Spear, a homicide investigator for the City of Miami Police Department, was investigating the deaths of Frank and Leticia when he went to Defendant's home at approximately six a.m. on November 19, 1988. (R. 229,903). Witnesses had informed the investigators that Defendant was at the scene and had committed the crimes. (R. 245). Spear met Defendant inside the house and asked him to come to the police station. Defendant agreed to go to the station and rode with Spear and two other detectives. (R. 232, 904). At the station, Defendant was placed, without handcuffs, in an interview room, and the lead investigator was contacted. (R. 233, 905). Using a rights form, Spear advised Defendant of his constitutional rights. (R. 234, 905-8). Defendant initialed and signed the form. (R. 243-4, 908).

Detective Bruce Robersan, the lead investigator on the case, met Defendant at the station after seven a.m. on November 19, 1988. (R. **249-50, 919).** After reviewing the rights form with Defendant, Roberson had a conversation with him. (R. 252, 920). Defendant said he had no involvement in the killings and recounted his activities on the day of the homicides. He stated that he went fishing with friends: Ty, C.J. **and** Gerald, in the morning on the 79th Street Causeway. (R. 253, 921). They fished on 79th Street, left, bought beer and bait and then went to the 36th Street Causeway (Julia Tuttle Causeway) to continue fishing. While fishing, Defendant and his friends drank the beer. Defendant took a **.22** caliber rifle from the trunk of the car he was driving, and the four took turns shooting at beer cans or plastic containers in the water. **As** they were leaving, Defendant saw a car parked on the same side of the causeway **as** they were and he suggested robbing the people in the car. At first the others agreed, but then Gerald and C.J. decided not to have any involvement and drove away. (R. **254-55, 922-23).** Defendant and Ty drove past the car, saw a male and female inside, turned araund, came back, looked inside, decided not to rob them and drove away. **(R.** 255, **923-24).**

After the first interview of approximately one hour, Roberson left Defendant at the station and attempted to verify the story given by Defendant. Roberson was unable to find Ty, C.J. or Gerald, so he returned to the station and asked Defendant to give a taped statement concerning his activities on the day of

the homicides. (R. 256, 925-27). Defendant agreed to give a taped statement which was admitted into evidence at trial. (R. 928).

On November 19, 1988, after Defendant was arrested for the murders, the police went to the home of Margaret Williams, mother of Sheekita and Ty. Margaret Williams gave the officers permission to retrieve a rifle. (R. 729). They found the rifle in the closet where Sheekita had placed it. (R. 726).

The firearms criminalist, Jess Galan, examined the rifle recovered from Williams' house. (R. 1092). The rifle holds seventeen (17) long rifle cartridges in the magazine and one in the chamber. (R. 1093). Based on his study of the class and individual characteristics, Galan concluded that the rifle recovered was the particular weapon used to fire the projectiles and casings recovered from the murder scene. (R. 1094). Furthermore, he studied the powder pattern on Frank's shirt and was able to duplicate the pattern with the rifle. (R. 1096-98).

Galan also studied the three tires impounded by crime investigator Natalie Jones on April 1, 1989. He made standards of the three tires submitted for analysis. Galan determined that the tire tracks depicted in the photographs of the scene were consistent with the tread pattern size and wear of the tires analyzed. (R. 1098-1108). Robert Hart, criminalist in the area of firearm and tool mark identification, assisted Galan in

examining the tires. Hart compared the tires impounded with photos of tire impressions from the scene and concluded that the photos of the scene were consistent with the patterns of the tires submitted. (R. 1109-17).

Teresa Merritt, serologist at the crime lab, tested the victims' blood and determined that Frank was type O and Leticia was type A. (R. 1119-23). She tested the fishnet stockings and black skirt worn by Leticia and found Frank's blood type, type O, on them. Merritt also examined the white shirt worn by Frank and found that the pattern of blood on the shirt was consistent with the pattern on Leticia's stockings. (R. 1124-29).

On November 15, 1989, Daniel Mets was working as a clerk at the Cash-In Pawn Shop when Defendant pawned seven (7) rings for fifty dollars ($50). Mets wrote Defendant's name, date of birth, race, sex, address, phone number, hair color, ***eye*** color, driver's license number and social security number on the pawn slip when Defendant pawned the rings. Defendant's right thumb print was also placed on the pawn slip at the time of the transaction. (R. 869-79).

Arthur Fogel, salesman at the Cash-In Pawn Shop, heard Defendant's name mentioned on a television report of the murders and reviewed the records of the pawn shop. (R. 881-82). After finding the pawn slip and rings with Defendant's name on them, Fogel contacted Detective Rouse. Rouse, in turn, contacted

Detective Roberson who retrieved the rings from Fogel. (R. 883-84). The rings were introduced into evidence at trial during Roberson's testimony. (R. 941).

Blanca Paguada, Leticia's sister, testified that she had last seen Leticia between 5:30 and 6 p.m. on the day of the murders. She identified four of the rings recovered from the pawn shop as Leticia's rings. (R. 1013-14). Additionally, she identified a photograph as one of her sister wearing some of the rings in question. (R. 82, 1016).

Tracy Lowe, fingerprint examiner with the Metro Dade Police Department, met with Defendant to take standard prints from him. She compared the standards to the pawn slip and determined that the print on the slip was that of Defendant. (R. 888-92). Harry Coleman, question document examiner, analyzed the handwriting on Defendant's driver's license, the rights form signed by Defendant on November 19, 1988 and the pawn slip and concluded that all three documents were signed by the same person. (R. 901-2).

The State rested after presenting all of the above testimony and evidence. (R. 1158-59). Defendant moved for judgment of acquittal on the ground that the "State has failed to prove each and every count of the Indictment." The motion was denied. (R. 1159). Defendant presented no evidence, rested and renewed his motion for judgment of acquittal. The motion was

again denied. (R. **1159).** Closing arguments were given, (R. **1176-**1252), and the jury was instructed. (R. **1252-89).** Defendant requested **and** received a special jury instruction on voluntary intoxication. (R. **152, 1279).** The jury retired to deliberate. The jury found Defendant guilty of first degree murder of Frank, first degree murder of Leticia, robbery with a firearm of Leticia and armed burglary with an assault upon Frank and/or Leticia. (R. 153-56, 1298-1301). Defendant was adjudicated guilty, a presentence investigation was ordered and the cause was passed for sentencing. **(R. 157-59).**

On August **18, 1989,** the Court reconvened for the penalty phase. (R. **1319).** Opening statements were not made by either party. The trial court instructed the jury as to their role prior to the presentation of evidence. (R. **1335-37).**

First, Willie Finch testified for the State that when he talked to Defendant at Brownsville Park about the murders, Defendant stated he had touched Leticia in her private area and that she got mad. (R. 1337-8).

The State then presented the certified copies of the judgment of conviction for two counts of first degree murder, and one count each of robbery with a firearm and armed burglary of an occupied conveyance. (R. **167-9, 1340).** The State then rested. (R. **1340).**

Johnny Robertson, Defendant's father, testified on behalf of his son. (R. 1341). Defendant had a normal childhood, was not an abused child and was a great help around the home. (R. 1342-43, 1353). While Defendant did not have any problems at home, he did have disciplinary problems in school. (R. 1344). Mr. Robertson knew that his son was arrested for an incident involving a stolen car, but was told that someone else had stalen the car and Defendant was riding in it. (R. 1344-45).

On cross-examination, Mr. Robertson testified that his son was a responsible twenty year old. (R. 1348-49). He recalled that his son once hit a girl in school. (R. 1349-50). He also recalled that Defendant was transferred from Miami Springs Senior High School to an alternative school due to attendance problems. (R. 1350).

Defendant took the stand at the sentencing hearing. (R. 1354). He explained his arrest for grand theft; he was driving a car stalen by a friend when he was stopped by police and arrested. (R. 1355-57). Defendant also discussed his disciplinary problems in school. (R. 1358-59).

Defendant testified about the day of the murders. C.J. and Gerald suggested going fishing, so Defendant borrowed a car from his girlfriend's mother. (R. 1360). He and his friends went to the 79th Street Causeway, around 5 p.m. and fished for about an hour. They left, bought hooks, lead, and malt liquor, before

going to the Julia Tuttle Causeway to continue fishing. (R. 1361-62). Defendant drank three or four of the cans of malt liquor while at the second fishing spot. (R. 1363). He took a gun out of the car and everyone shot the gun into the water. (R. 1364).

As everyone prepared to leave, Defendant suggested that they *go* over and rob the people parked in a car close to the water. (R. 1364). At first C.J. agreed to rob them, but then changed his mind and left with Gerald. (R. 1365). Defendant drove past the entrance to the causeway, turned around and saw the white car with the two victims in it. He left Ty in the car and "just jumped out with the gun". (R. 1365-66).

Defendant wanted to rob the people in the car, so he pointed the gun at Frank and said, "Give me the money." Frank looked at him and Defendant repeated, "Give me the money." Frank just looked at him and defendant shot the gun. When he shot the gun Leticia was screaming. Defendant told her to "shut up and be quiet". Leticia got out of the car and Defendant ran around the car toward her. He told her to shut up and give him the rings off her finger[s]. He does not remember getting the rings off or her giving them to him, but when he got back to the car, he noticed that he had the rings. Defendant stated that he did not remember if he touched her and then stated that he never touched her. (R. 1366).

After admitting that he shot Frank and Leticia, Defendant was asked why he did it. He responded that his "hand was on the gun, on the trigger. [He] wanted her to shut up, she wouldn't shut up and the gun just went off. [He] just kept pulling the trigger like [he] couldn't stop, like [he] had no control, no control in what [he] was doing." (R. 1366-67).

When he returned to the car, Ty looked at him as if he was wondering why Defendant had killed the people. Defendant looked at Ty and said, "Why didn't you stop me, why didn't you stop me from what I did?". Ty responded that he didn't know Defendant was going to kill them. Defendant told Ty not to say anything, because Defendant did not know what to do. (R. 1367).

Defendant left the gun and rings at Sheekita's house and caught a cab home. (R. 1367). Later that night, Defendant told Sheekita what he had done. He told her he was sorry for what he had done and did not know what to do. About a week later he took the rings to the pawn shop and sold them. (R. 1368). He wanted to get rid of them because they made him think back to where they came from. (R. 1369).

When he went to the park that night, Defendant talked to his friends: Darryn, Willie and Trap, about what happened. He was asking for their advice, but they would not take him seriously. (R. 1368).

Defendant was glad when the police came to his house because he wanted to talk to them about the murders. (R. 13690). Once he was at the station, however, he did not know what to do and was confused. He kept thinking that he wanted to get a lawyer before he gave a statement. (R. 1370).

On cross-examination, Defendant admitted that he shot and killed both Frank and Leticia. Further, he stated that he wanted to rob them to get something of value. (R. 1372).

After Defendant shot Frank, Leticia began screaming and jumped out of the car. (R. 1373-74). Defendant went to the back of the car and told her to give him the rings. He told her to stop screaming. As he did this, she was able to see Defendant and what he looked like. Defendant said she knew what he looked like, "She had to, she was looking right at me." (R. 1374-75).

Defendant was asked whether he decided to kill Leticia because she kept screaming and he replied, "No, it was just something that, you know, just as I had the gun pointed towards her, she was screaming, you know, it was like--". (R. 1375).

Contrary to the physical evidence presented by the medical examiner, Defendant testified that he never got closer than four feet to Leticia. (R. 1377). He also stated that when he left the scene of the murders that Leticia was sitting on the car, that she was not dead. (R. 1385).

The State introduced, without objection, a certified copy of the sunrise/sunset table for Eastern Standard Time. (R. 1385). Sunset on the day of the murders was at 5:36 p.m. (R. 170).

Following Defendant's testimony, the defense rested. (R. 1388). The State did not present any evidence in rebuttal.

After both sides rested, closing arguments were given. (R. 1400-1427). The State argued that the following aggravating factors were applicable to the murder of Frank: (1) the defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some other person; (2) the murder was committed while defendant was engaged in the commission of other felonies; and (3) the murder was committed for financial gain. (R. 1411-12). With regard to the murder of Leticia, the State argued the three above-listed aggravating factors and one additional: the murder was especially wicked, evil, atrocious or cruel. (R. 1413-15).

Thereafter, the jury received the penalty phase instructions. (R. 1429-34). The jury recommended the imposition of the death penalty by an 8-4 vote for the murder of Frank and by a 12-0 vote for the murder of Leticia. (R. 1435-36).

Pursuant to a court order of May 24, 1989, Defendant was examined by disinterested qualified experts to determine his mental competency. (R. 24). The defense presented copies of the

doctors' reports to the trial court to consider prior to imposing sentence. (R. **1438-41**). The presentence investigation report, however, was not presented to the trial court for its consideration prior to sentencing. (R. **1470**).

The State presented the testimony of Dr. Yates and Dr. Herrera to the trial court. (R. **1442-70**). Dr. Yates, a neurological surgeon, administered an electroencephalogram and a neurological examination to Defendant on August 15, **1989**. (R. **1443**). The tests were bath normal and did not indicate any organic brain damage. (R. **1444**). The following day, Dr. Yates administered a twenty-four hour electroencephalogram, CAT scan and MRI scan to Defendant. All three tests yielded normal results. (R. 1444-46). Based on the examinations, it was Dr. Yates' expert opinion that Defendant did not have organic brain damage. (R. **1447**).

Dr. Herrera, a licensed psychiatrist specializing in the field of neuro-psychology, met with Defendant and administered neuro-psychological tests. Such tests are used to establish if there is any impairment of the higher cerebral functions that may be indicative of brain dysfunction or damage. (R. **1449-50**). Dr. Herrera noted that Defendant had a significant problem in the area of auditory memory, along with other minor signs of brain dysfunction, but after neurological testing, concluded that Defendant did not suffer from organic brain damage. (R. **1451-53**).

The State also presented the testimony of Dr. Haber, a licensed psychologist. **(R. 1458).** Dr. Haber saw Defendant on July 19, 20, **1989,** and conducted **a** psychological interview. (R. 1459). Dr. Haber's expert forensic psychologist opinion, after examining Defendant, was the following:

> With a positive neurological and/or neuro-physical findings relative to organic brain damage, there is little to offer regarding mitigation from the information this examiner has available other than of the impact of the beer consumption at the time. (R. 1462).

After hearing the testimony of the physicians regarding the neurological tests of Defendant, Dr. Haber concluded that there **was** no positive sign of the presence of organic brain syndrome or organic brain dysfunction. (R. 1462-63).

The matter was passed until August 21, **1989** for sentencing. (R. **1471).** At that time Johnny Robertson, Defendant's father, again testified on behalf of his son. (R. **1474-86). Mr.** Robertson testified that he and his wife tried to bring up their three children in the best environment they could provide. They were strict with their children. **(R. 1475-76).** He always told Defendant to do good deeds for people and Defendant used to do errands and work for friends and relatives. (R. 1476). Defendant also volunteered time at a neighborhood park. (R. **1476-77). Mr.** Robertson stated that Defendant should have to pay for what he did, but should pay with life in prison. (R. 1486).

On August 21, 1990, the trial court entered the sentencing order. (R. 197-205, 1488-1503). The court found three aggravating factors for the murder of Frank:

> 1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to some other person. (R. 199, 1491).
>
> 2. The murder was committed during the commission of other felonies: armed burglary and armed robbery. (R. 199, 1492).
>
> 3. The murder was committed for pecuniary gain. (R. 200, 1493-94).

The court found the above-listed aggravating circumstances plus two more for the murder of Leticia:

> 1. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (R. 199-200, 1493).
>
> 2. The murder was especially wicked, evil, atrocious or cruel. (R. 201-2, 1495-97).

The court found three mitigating factors, one statutory and two non-statutory, applicable to both murders:

> 1. The defendant had no significant history of prior criminal activity. (R. 202, 1497-98).
>
> 2. The defendant had a reasonably good upbringing. (R. 204, 1501).
>
> 3. The defendant was remorseful. (R. 204, 1501).

The sentencing order concluded with the following:

> In conclusion, the Court finds that the aggravating circumstances as set forth in this order far outweigh the mitigating circumstances as to each of the murders committed. The Court finds that no mitigating circumstance singularly or collectively outweighs the serious aggravating circumstances of this case. After fully evaluating and weighing all of the evidence, the Court is compelled to follow the recommendation of the jury as to each murder count. The Court further notes that independent of the jury finding the Court in its own analysis concurs with the jury's recommendation as to both murders. (R. 204-205, 1501-2).

Defendant was sentenced to death for both of the murders, life imprisonment, with a minimum mandatory three years, for the armed robbery and life imprisonment, with a minimum mandatory three years, for the armed burglary. All sentences were ordered to be consecutive to each other. (R. 205, 1502-3).

Notice of appeal was filed on October 4, 1989 (R. 209). This appeal then followed.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING FACTOR OF AVOIDING ARREST FOR THE MURDER OF LETICIA PAGUADA?

II.

WHETHER THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING FACTOR OF PECUNIARY GAIN FOR EACH MURDER?

III.

WHETHER THE TRIAL COURT PROPERLY CONSIDERED CIRCUMSTANCES (d) AND (f) AS SEPARATE AGGRAVATING FACTORS FOR EACH MURDER?

IV.

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES WHEN IMPOSING SENTENCES FOR THE NON-CAPITAL FELONIES?

V.

WHETHER THE TRIAL COURT WAS CORRECT IN IMPOSING THE DEATH PENALTY WHEN IT FOUND, FOR EACH MURDER, THAT THE AGGRAVATING FACTORS FAR OUTWEIGHED THE MITIGATING FACTORS?

SUMMARY OF ARGUMENT

Ample evidence supports the finding or the trial court that Leticia was murdered to eliminate an eyewitness and thereby avoid arrest. She knew what Defendant looked like and had witnessed both the antecedent crimes of burglary and robbery, as well as the murder of Frank. The dominant or only motive for killing her was to eliminate a witness.

Defendant stated that he approached the victims to rob them and whether the robbery of Frank was successful is irrelevant to finding the aggravating factor of pecuniary gain for each murder.

The trial court properly considered the aggravating factors of pecuniary gain and during the commission of a felony as separate aggravating factors for each murder. Both burglary and robbery were charged and proved and since these two crimes had different facts supporting them the two factors were separate aggravating circumstances properly considered by the trial court. Furthermore, the trial court made a reasoned judgment of all applicable aggravating factors and the double recitation of proven factors does not call the propriety of the sentence into question as it did not interfere with the mandated process of weighing the circumstances. However, if this Court should find that the factors were improperly doubled, then ample aggravating factors remain, which, outweigh the valid mitigating factors.

A conviction of first-degree murder, a capital felony not scored on the guideline scoresheet, is a valid **reason** for departure from the permitted range. Although the trial court failed to enter written reasons for departure the requirement for contemporaneous written reasons is prospective only.

If an aggravating factor is eliminated by this Court, then the trial court's alleged sentencing errors should be analyzed for harmless error. Only evidence of the statutory aggravating circumstances was presented at the sentencing hearing, thus neither reversal nor remand is compelled by Elledge. Moreover, the weakness of the mitigating factors confirms that the trial court would have concluded the aggravating circumstances were outweighed by the mitigating ones. The aggravating factors found by the trial court are supported by the record and far outweigh the mitigating circumstances as to each of the murders committed.

ARGUMENT

I.

THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING FACTOR OF AVOIDING ARREST FOR THE MURDER OF LETICIA PAGUADA.

The trial court found that the murder of Leticia was for the purpose of avoiding or preventing a lawful arrest, that the murder was committed to eliminate an eyewitness to the prior murder of Frank. (R. **199-200).** In the sentencing order, the court noted that "because of the close proximity of the Defendant to her, Leticia Paguada had a goad look at Defendant's face." (R. 200). Defendant stated during the sentencing phase that Leticia was able to see him and what he looked like. Leticia knew what Defendant looked like, "She had to, she was looking right at [him]." (R. **1374-75).** Furthermore, the physical evidence demonstrated the close proximity of Leticia to Defendant when he eliminated her. Stippling and gunpowder were present at Wound I, caused by the potentially fatal blast to her mouth, thus indicating the shot was delivered at close range. (R. 1067).

The requirement that "[p]roof of the requisite intent to avoid arrest and detection must be very strong," Riley v. State, **366** So.2d **19, 22** (Fla. 1979), cert. denied, 459 U.S. **981, 103 S.Ct. 317, 71** L.Ed.2d **291 (1982);** rehearing denied, **459** U.S. **1138, 103** S.Ct. 773, 71 L.Ed.2d 985 (1983) has been met in this case. In Riley, the owners and managers of a business were

threatened, bound, gagged and shot, after a robbery. Avoidance of arrest by eliminating witnesses was deemed a proper factor in Riley. The facts of the present case are even stronger, where the victim witnessed her boyfriend's murder and Defendant acknowledged she could identify him. The only possible motive for the killing was to eliminate an identification eyewitness.

Applicability of this aggravating factor was outlined by this Court with the following:

> This aggravating circumstance most clearly applies when the offender's primary purpose is some antecedent crime such as burglary, theft, robbery, sexual battery, etc., for which the criminal then kills in order to avoid arrest and prosecution. If a defendant is shown to have killed a victim out of personal animosity and then decides as an afterthought to take the victim's wallet, then the killing was done primarily to see the victim dead and not to avoid being arrested for robbery.

Troedel v. State, 462 So.2d 392 (Fla. 1984), later proceeding 479 So.2d 736 (Fla. 1985).

Unlike the situation in Troedel, Defendant approached the victims with the specific intent to rob them. The robbery was not an afterthought or a subsidiary motive, it was the initial crime contemplated by Defendant. Leticia was murdered after witnessing the robbery and the fatal shooting of Frank.

Although Defendant did not expressly state that he killed Leticia to eliminate an eyewitness to the murder, the facts as found by the trial court support this finding. First, Leticia saw him kill Frank and could later identify him. Additionally, the robbery was complete, Defendant had her rings, and he had no logical reason for killing her other than to prevent detection. As in Routly v. State, 440 So.2d 1257, 1264 (Fla. 1983), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984) "[i]n fact, defendant has not been able to assert any other explanation for this behavior...". Also see Correll v. State, 523 So.2d 562, 568 (Fla. 1988), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988);(Four victims murdered by the defendant. Aggravating factor of avoiding arrest applied to two victims where one was his daughter, and it was difficult to see why she was killed except to eliminate her as a witness, and other one was the last person killed and she could have easily identified the defendant.)

Ample evidence was presented in Griffin v. State, 414 So.2d 1025, 1029 (Fla. 1982), to support the aggravating factor of avoiding arrest. Griffin killed two young men during the course of a convenience store robbery. One was discovered dying at the scene of the robbery and the other was discovered by the side of the road a few miles from the store. There was testimony to establish that the second victim was in the store at the time of the robbery. This Court held that the murder of the second

victim was adequately shown to have been committed for the purpose of avoiding arrest. He was a potential witness who could have identified Griffin and testified about the robbery and murder of the first victim. Similarly, Leticia was eliminated as a potential witness who could have testified about the burglary, robbery and murder she had witnessed.

In Burr v. State, 466 So.2d 1051 (Fla. 1985), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985), where the defendant shot the victim in the back of the head during a convenience store robbery, this Court held the evidence sufficient to establish that the murder was committed to avoid arrest. As in Burr, the shooting of Leticia, after the commission of the armed burglary, armed robbery and murder, exhibited an intent to eliminate witnesses.

Recognition of the murderer has long been deemed an adequate factual basis. Lightbourne v. State, 438 So.2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); Meeks v. State, 339 So.2d 186 (Fla. 1976), cert. denied, 439 U.S. 991, 99 S.Ct. 592, 58 L.Ed.2d 666 (1978). Furthermore, it is not necessary that an arrest be imminent at the time of the murder in order to find this aggravating factor. Swafford v. State, 533 So.2d 270, 276 (Fla. 1988); cert. denied, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).

In Menendez v. State, 368 So.2d 1278 (Fla. 1979), in which a killing followed a robbery, there was no indication that the victim had an opportunity to recognize or view the murderer's face, and the events preceding the actual killing were unknown. However, the events preceding the killing of Leticia were known. The armed burglary, armed robbery and murder had all been completed. The dominant or only motive for the killing of Leticia was the elimination of witnesses.

In Armstrong v. State, 399 So.2d 953 (Fla. 1981) cert. denied, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983), the pathologist could not unequivocally testify as to the direction of fire and the positions of the victims when shot, thus rendering indeterminate the likelihood that the victims could identify the accused. However, in this case Defendant stated that Leticia could identify him as she was looking right at him. (R. 1374-75). Further, the medical evidence established that the shot causing Wound I was delivered at close range to Leticia's head and went from her mouth to the back of her head. It is without question that Leticia could identify Defendant as the killer of Frank.

The instant case can be distinguished from Cook v. State, 542 So.2d 964 (Fla. 1989), where the defendant stated he shot the victim "to keep her quiet because she was yelling and screaming". Defendant was asked on cross-examination at the sentencing

hearing case whether he had killed Leticia because she kept screaming, and he responded "No, it was just something that, you know, just as I had the gun pointed towards her, she was screaming, you know, it was like--". (R. 1375). Defendant did not kill Leticia to stop her from yelling and Screaming, thus this factor was properly relied on by the court. Furthermore, any error in the trial court's consideration of this factor was harmless as further discussed in Argument V.

II.

THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING FACTOR OF PECUNIARY GAIN FOR EACH MURDER.

Proof beyond a reasonable doubt was presented, through the testimony of Defendant and other witnesses, that the killings were for pecuniary gain. Defendant stated that he approached the victims because he had robbing them on his mind. (R. **1366).** The evidence that he attempted to take money from Frank and took rings from Leticia is unrefuted. The record supports the trial judge's finding beyond a reasonable doubt that the murders were committed for financial gain. That the robbery of Frank was incomplete or unsuccessful is irrelevant so long as there was an attempt. Fitzpatrick **v.** State, 437 So.2d 1072, **1078** (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. **1328,** 79 L.Ed.2d **723** (1984).

III.

THE TRIAL COURT PROPERLY CONSIDERED CIRCUMSTANCES (d) AND (f) AS SEPARATE AGGRAVATING FACTORS FOR EACH MURDER.

The trial court found that the murders occurred during the commission of a felony, circumstance (d), and that the murders were committed for pecuniary gain, circumstance (f). (R. 199-200). Defendant contends that these findings constitute an improper doubling of aggravating circumstances. This position also lacks merit since burglary and robbery were charged as two separate offenses and the facts supporting the two crimes were different. Defendant unlawfully entered the car occupied by Frank and/or Leticia to commit an offense therein, to wit: theft and/or robbery and/or murder. (R. 7). While burglarizing the car and unsuccessfully attempting to obtain money from Frank, Defendant murdered him. Leticia witnessed the burglary and murder and then exited the car screaming.(R. 1366). Defendant ran around the car, after having completed the burglary and murder, and committed the armed robbery of Leticia. (R. 1366). Since the burglary and robbery were separately committed they constitute different features of the criminal episode which can be used to support both aggravating circumstances under challenge. The aggravating circumstance of during the commission of a felony was based on the burglary which was completed prior to the robbery, on which the aggravating circumstance of pecuniary gain was based.

In the sentencing order the trial court stated that "Pursuant to Florida Statute **921.141,** this Court is required to and has considered each of the aggravating and mitigating circumstances involved therein and makes the following findings of fact." (R. 198). The trial court then addressed each of the nine ***(9)*** statutory aggravating circumstances, (R. 198-202), the seven (7) statutory mitigating circumstances, (R. 202-204), and the non-statutory mitigating circumstances, (R. **204).** There is **no** indication in the record that the trial court did anything other than weigh the applicable aggravating circumstances to determine that they far outweighed the mitigating circumstances, The trial court did not engage in a mere tabulation of circumstances, to arrive at the sentences of death, rather by addressing the factual support for each statutory aggravating circumstance, the trial court conducted a reasoned judgment as required by law.

As stated by this Court, in Hargrave v. State, *366* So.2d 1 (Fla. 1979); cert. denied, **444** U.S. **919, 100** S.Ct. **239, 62** L.Ed.2d **176** (1979), rehearing denied, **444** U.S. 985, **100** S.Ct. **493, 62** L.Ed.2d **414 (1979):**

> Although *Provence v. State,* 337 So.2d **783 (Fla.** 1976), condemns the doubling up of the aggravating Circumstances of pecuniary gain each time a crime such as robbery is concerned, the mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgment....the

> statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. it requires a weighing of those circumstances. Id. at 5.

The trial court exercised its reasoned judgment and evaluated each of the statutory aggravating circumstances in its sentencing order. A finding that both aggravating factors, during the commission of a felony and pecuniary gain, were supported by the record does not undermine this reasoned judgment. The mere recitation by the trial court of the applicable aggravating circumstances does not indicate either a simple tabulation or an improper doubling of the factors.

However, if this Court should find that the trial court did improperly double aggravating factors (d) and (f), then the sentence should still be affirmed. A comparable situation alleging improper doubling was addressed by this Court in Jacobs v. State, 396 So.2d 1113 (Fla. 1981), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981), with the following:

> It is necessary that the trial judge exercise a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances. The trial judge reasoned that a murder committed for pecuniary gain during the course of a robbery coupled with the heinous manner in which

> death was inflicted, as well as the circumstance that death was inflicted for the purpose of avoiding detection, required the imposition of a death sentence. The fact that these factual situations were considered as four aggravating circumstances instead of three does not indicate that the technical error committed by the judge in any way affected his reasoned judgment. Id. at 1119.

In the present case, as in Hargrave and Jacobs, absent either factor **(d)** or (f), ample aggravating factors remain, which, when balanced against the valid mitigating factors weigh in favor of the death penalty. Also see Jackson v. **State**, 498 So.2d 406, **411** (Fla. 1986), cert. denied, **483** U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987), rehearing denied, **483** U.S. 1041, 108 S.Ct. 11, 97 L.Ed.2d 801 (1987); (Consolidation of two aggravating factors did not render the sentence invalid, because the Florida sentencing statute requires a weighing rather than a mere tabulation of factors in aggravation and mitigation.).

IV.

THE TRIAL COURT DID NOT ERR IN IMPOSING DEPARTURE SENTENCES FOR THE NON-CAPITAL FELONIES.

The trial court did not utilize a sentencing guidelines scoresheet for the primary offenses, two counts of first-degree murder, as they were exempt from guidelines calculation. Fla.R.Crim.P. 3.701(c). However, the trial court did state in its written sentencing order that consecutive life sentences were imposed for the non-capital felonies. (R. 205).[1] The sentence imposed is valid because a conviction of first-degree murder, a capital felony which cannot be scored as an additional offense at conviction, may serve as a reason for departure. Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).

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[1] If this Court should find the written sentencing order insufficient to satisfy the requirement of written departure reasons, the trial court should be given an opportunity to express its reasons for departure in writing where the requirement for contemporaneous written reasons is prospective, only. Ree v. State, 565 So.2d 1329 (Fla. 1990).

V.

THE TRIAL COURT WAS CORRECT IN IMPOSING THE DEATH PENALTY WHEN IT FOUND, FOR EACH MURDER, THAT THE AGGRAVATING FACTORS FAR OUTWEIGHED THE MITIGATING FACTORS.

The State has presented argument as to the validity of each contested aggravating circumstance. If, however, this Court should find any of the aggravating circumstances to be invalid, then the sentence should be affirmed as the trial court made a reasoned judgment that the aggravating factors far outweighed the mitigating factors. Neither reversal of the sentences imposed nor remand for another sentencing hearing is warranted in this case. A death sentence may be affirmed when an aggravating Circumstance is eliminated if this Court is convinced that such elimination would not have resulted in a life sentence. Hamblen v. Duqqer, 546 So.2d 1039, 1041 (Fla. 1989).

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[2] Defendant has challenged the applicability of three aggravating factors found by the trial court. He has not attacked the two remaining factors: (1) Defendant has been previously convicted of another capital felony. See Lucas v. State, 376 So.2d 1149 (Fla. 1979), (When a defendant commits two separate murders as part of one incident the murder of each victim is to the other a previous conviction), and (2) the murder of Leticia was especially wicked, evil, atrocious or cruel. See Swafford v. State, 533 So.2d 270, 277 (Fla. 1988), cert. denied, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989) ("...the killing itself occurred in such a way as to show a wanton atrocity. Swafford fired nine bullets into the victim's body, most of them directed at the torso and extremities.").

Moreover, Elledge v. State, 346 So.2d 998 (Fla. 1977), cert. denied, 459 U.S. 981,103 S.Ct. 316, 74 L.Ed.2d 293 (1982), is inapplicable to the instant case. In Elledge the error was in allowing nonstatutory aggravating evidence to be introduced, while in this case only statutory aggravating evidence was introduced.

If this Court should find error in the weighing of aggravating and mitigating factors, then it must be determined whether this error was harmless. The record reflects three uncontested aggravating factors for the murder of Leticia, to-wit: 1. previous capital conviction; 2. during commission of felony/pecuniary gain; and 3. heinous, atrocious or cruel, and two uncontested aggravating factors for the murder of Frank, to-wit: 1. previous capital conviction; and 2. during commission of felony/pecuniary gain. These undisputed aggravating circumstances far outweigh the insignificant mitigating circumstances. Here, as in Rogers. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), where improper aggravating circumstances were considered by the trial court, reversal of the sentence "is permitted only if this Court can say that the errors in weighing aggravating and mitigating factors, if corrected, reasonably could have resulted in a lesser sentence." Id. at 535. The trial court found that the aggravating circumstances far outweighed the mitigating circumstances, therefore this Court cannot reasonably say that

any error in considering an improper aggravating factor, if corrected, could have resulted in a lesser sentence.

If this Court should determine that the aggravating factor of avoiding arrest was improperly considered, then the error must be deemed harmless. There is no reasonable possibility that deletion of this factor would have altered the sentence imposed by the trial court. State v. Diguilio, 491 So.2d 1129 (Fla. 1986). The record shows that the aggravating factor of avoiding arrest was not presented to the jury, yet the jury recommended death by votes of 12-0 and 8-4 based on evidence of four and three aggravating circumstances for the murders of Leticia and Frank, respectively.[3] In Grossman v. State, 525 So.2d 833, 846 (Fla. 1988), cert. denied, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989), improper aggravating evidence of victim impact was considered by the trial court, but not received by the jury which unanimously recommended death. Consideration of victim impact evidence by trial court was held to be harmless error when all twelve members of the jury, who did not consider the victim impact evidence, were persuaded that death was the appropriate sentence for each murder. For purposes of harmless error analysis, the jury recommendations of death in the present case, which were not based on the aggravating factor of avoiding

[3] The trial court did not err in finding that the murder was committed to avoid arrest even though jury itself was not instructed an this particular aggravating factor. *See* Hoffman v. State, 474 So.2d 1178, 1182 (Fla. 1985).

arrest, show that the jury was convinced death was the appropriate penalty based on the permissible evidence. This recommendation of death is entitled to great weight. Moreover, it indicates that eliminating the trial court's consideration of avoiding arrest would not have resulted in a life sentence.

Although the trial court found a single statutory mitigating factor, ta-wit: no significant history of prior criminal activity, extensive evidence diminishing the importance of this factor was presented at the sentencing hearing. Defendant and his father both testified that he had previously been arrested and placed in a pretrial intervention program (PTI) for grand theft. (R. 1344-45, 1355-57). Additionally he had previously battered both an ex-girlfriend and a teacher, and had caused other disciplinary problems in school. (R. 1349-50, 1358-59, 1480). While Defendant had no prior felony convictions he did, nonetheless, have prior instances of criminal activity which were noted by the trial court in the sentencing order. (R. 202).

Two non-statutory mitigating factors, to-wit: reasonably good upbringing and remorse, were also found by the trial court, yet were not of sufficient weight to counterbalance the aggravating factors. The finding of "reasonably good upbringing" was based on the testimony of Defendant's father about his son's good character, however this testimony was riddled with inconsistencies. His father testified that Defendant had been

brought up to know the difference between right and wrong, yet Defendant was arrested for stealing a car. (R. 1344-46, 1481). While Mr. Robertson stressed how Defendant was never a problem and helped at home and in the community, he acknowledged that Defendant was repeatedly a disciplinary problem in school. (R. 1343-44, 1479-82). The record demonstrates the weakness of Defendant's reasonably good upbringing as a mitigating circumstance to afford some basis for reducing a sentence of death.[4]

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[4] The State would note that a deprived and abusive childhood was recognized as a mitigating circumstance by this Court in Campbell v. State, 15 F.L.W. 342 (Fla. June 15, 1990). While a deprived an abusive upbringing is based on facts "of a kind capable of mitigating the defendant's punishment, i.e., factors, that in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed", (See Rogers 511 So.2d at 534), it would be incongruous to accept categorically a reasonably good upbringing as a mitigating circumstance. Also see Walton v. Arizona, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), Scalia, J., concurring in part and concurring in the judgment. ("Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision any aspect of a defendant's character or record, or any circumstance surrounding the crime: that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised hi3 mother.....we require that States "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,'" *Godfrey v. Georgia*, 446 U.S., at 428. In the next breath, however, we say that "the State cannot channel the sentencer's discretion...to consider any relevant [mitigating] information offered by the defendant," *McClesky v. Kemp*, *supra*, at *306*, that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not "deserve to be sentenced to death," *Perry v. Lynaugh*, *supra*, at . The latter requirement

The record is similarly weak for the finding of remorse as a non-statutory mitigating circumstance. The only evidence of remorse was Defendant's self-serving statements during the sentencing phase that he was "sorry that it happened, you know....you know, sorry for what I did, you know". (R. **1370-71).** When Defendant talked with Ty immediately after the murders, he was not remorseful, he was defensive and cautioned Ty with "Don't say anything. I don't know what to do." (R.705, 1367). When Defendant gave the gun and rings to Sheekita on the night of the murders and she asked what happened, he responded, not with remorse, but with "Nothing, don't worry about it, just be quiet." (R. 1367). When Detective Robertson met with Defendant on November 19, 1988, Defendant did not express remorse over the double homicide, instead he fabricated a story about driving by the victims and then leaving. (R. 927-28). While Defendant's father testified that his son was remorseful, Mr. Robertson stated that he had never talked about the murders with his son (R. **1483).** Although the trial court found that Defendant displayed remorse, the cumulative effect of this mitigating factor and the other two, when balanced against the strong aggravating factors, is insignificant. Given the contradictions in the evidence supporting the mitigating circumstances, there is no reasonable likelihood that the trial court would have

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quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve." 111 L.Ed.2d at 535-36.

concluded the aggravating circumstances were outweighed by the mitigating ones.

CONCLUSION

Based upon the foregoing points and authorities the State respectfully urges this Court to affirm Defendant's convictions and sentences of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

Anita J. Gay

ANITA J. GAY
Florida Bar No. **0745227**
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **ROBIN H. GREENE**, Attorney for Appellant, 100 North Biscayne Boulevard, Suite 1100, Miami, Florida 33132, on this 10th day of December, 1990.

Anita J. Gay

ANITA J. GAY
Assistant Attorney General

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