IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,499

WILLIAM LEE THOMPSON,

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

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BRIEF OF APPELLEE

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INTRODUCTION

This is an appeal, following resentencing, by the defendant, WILLIAM LEE THOMPSON, of a sentence of death imposed upon him by the Honorable S. Peter Capua, Circuit Court Judge of the Eleventh Judicial Circuit Court, In and For Dade County, Florida, following his convictions for first degree murder, kidnapping, and involuntary sexual battery.

Throughout this brief, the defendant below and appellant herein shall be termed "the defendant," while the prosecution below and appellee herein, the State of Florida, shall be termed "the State." Reference to the Record on Appeal, Transcript of Proceedings, and Supplemental Records on Appeal will be made by the use of the symbols "R," "T," "S1," "S2," and "S3" respectively with citation to the appropriate page.

The State does not dispute the defendant's Statement of the Case, but takes leave to add thereto. It does, however, dispute the Statement of the Facts as contained in the defendant's initial brief and the State therefore includes its own hereinafter.

STATEMENT OF THE CASE

Prior to trial, on October 20, 1988, the State filed a Motion To Utilize Former Sworn Testimony Pursuant To Florida Statute 90.804(2)(a) since the eyewitness to the crime, Barbara Savage Garritz did not reside in Florida and could not be located in Georgia where she purportedly lived. (R.127-132). However, Ms. Garritz had testified at the defendant's September: 1978 sentencing and the State sought to utilize that testimony at the instant proceedings. (R.127-132). A second hearing on the State's motion was conducted on May 18, 1989 to enable the trial court to ascertain whether the witness was currently unavailability to testify at trial. (T.877-953).

The defense argued in the alternative that either it should be granted a continuance so that it might make additional efforts to locate Ms. Garritz or the State should be precluded from utilizing her former testimony because an inadequate cross-examination had been conducted. (T.928). The defense presented the testimony of investigator, Jeffrey Geller, who had been unable to locate the witness either through his own efforts or those of a contact in the Atlanta area. (T.913-922). Based upon the evidence presented, as well as, argument of counsel, the trial court specifically found that the State had exercised due diligence in trying to locate the witness pursuant to the requirements of Fla.R.Crim.P. 3.640(b) and granted the State's motion to use the prior sworn testimony. (T.925, 944, 991).

Jury selection for the resentencing hearing commenced May 22, 1989. (T.987). The trial court specifically instructed the jury that it was not to concern itself with the passage of time since the defendant's initial arrest and incarceration. (T.1004). The jury was informed that its function was to render an advisory sentence of either death or life imprisonment, with no possibility of parole for twenty-five years, to the court which would be the final sentencing power. (T.1004, 1071).

During voir dire, panelist Edward Garson inquired if the defendant would be eligible for parole in twelve years in the event a life sentence were given in view of the fact he had already served thirteen years. (T.1361). The Prosecutor informed the panelist that if a life sentence was imposed, the defendant could be kept in prison until the day he died and that parole was not a possibility until he had served at least twenty-five years. **(T.1361, 1363).** The court, **sua** sponte, called for a side-bar at which both defense counsel indicated that they believed any problem with the panelist's question could be cured by an instruction from the bench. **(T.1364).** The court stated that it did not think that the prospective juror's "innocuous" question had in fact created a problem, but wanted the parties to come to an agreement about what should be said to the panel. **(T.1369, 1378).** The **court read** aloud the proposed jury instruction to which one defense counsel agreed. (T.1383). The other **defense** counsel, however, first moved to strike the panel, but then agreed to leave the matter to **the** court's consideration. **(T.1383-1384).**

The trial court instructed the jury that the question posed by Mr. Garson was irrelevant to their consideration and that they were not to be concerned w th the parole consequences, if any; instead, the panel was specifically instructed that their sole concern was the advisory sentence they would be asked to render. (T.1389). Only after Mr. Garson again raised his concern regarding the possibility that the defendant would be eligible for parole did the defense unequivocally move to strike the panel. (T.1403). The trial court denied the motion, again reinstructing the panel. (T.1405-1406). Mr. Garson was subsequently excused for **cause** as a result of his stated inability to comply with the trial court's instructions. (T.1406, 1443). Prior to swearing in **the** jury, the defendant, without reservation, personally indicated his satisfaction with the panel; defense counsel did not object to the panel. (T.1524-1525).

At trial, the State renewed its previously stated intention of introducing into evidence the defendant's prior sworn testimony during the September 1978 trial of his codefendant Rocco Surace. (T.1962). The defense objected on the grounds that introduction of the defendant's prior testimony violated his right against self-incrimination, that the testimony was not freely and voluntarily given, and that the testimony was the result of inadequate assistance of counsel. (T.1962-1963). The objection was overruled by **the** trial court and **the** testimony was read to the jury.[1] (T.1966, 1996-2045).

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[1] The jury also considered the defendant's handwritten note of

Over defense objection, the prosecution also sought to introduce into evidence numerous photographs of the victim to establish the facts of the case and to substantiate the aggravating factors it planned to argue to the jury. (T.1527-1538). After reviewing the photographs and hearing argument of defense counsel regarding their objections to them, the court determined it would allow the State to utilize only those photographs which were noncumulative and necessary to the testimony of its witnesses. (T.1545-1553, 1560-1589). During the testimony of Medical Examiner Doctor Peter Lardizabel, the defense objected **only** to the introduction of photographs depicting the victim's perforated uterus and the blood soaked tampon she was forced to **eat.** (T.2081, 2087). The trial court overruled both objections.

The trial court sentenced the defendant to death after hearing additional testimony in mitigation following the jury's recommendation. (R.758-771). After independently weighing the evidence, the trial court found the murder was: committed during the course of a sexual battery, committed for financial gain, **especially** heinous, atrocious, **or** cruel was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R.759-762). The trial court considered each conceivable mitigating factor both statutory and nonstatutory and even considered evidence not presented to the

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confession and his formal statement to the police. (T.257-265,266-276, 2777-231). The trial court, after the jury had rendered its advisory sentence, was also able to consider his in court testimony prior to the imposition of sentence. (T.3232-3296).

jury. (R.764). However, if found no statutory mitigating circumstances to exist and also found no nonstatutory mitigating circumstances. (R.764-771).

STATEMENT OF THE FACTS

The State's Case

Eyewitness Barbara Savage Garritz (hereinafter referred to as "Barbara") testified at length at the defendant's September 1978 sentencing hearing regarding the events of March 30-31, 1976. (T.1702-1820). Barbara did not testify at the instant proceeding because of both parties' inability to locate her; however, she informed Metro Dade Police Detective Greg Smith in June of 1988 that her testimony at these sentencing proceedings would be identical to her testimony at the Surace trial. (T.915, 919-920, 922, 2683). Barbara, in speaking with Detective Smith, in effect recanted the substance of her June 18, 1987 affidavit (T.2472-2481), stating that she signed the CCR prepared affidavit, even with changes, reluctantly. (T.2685). CCR representative, Nicholas Trinticosta, admitted having told her, at the time that the affidavit was presented for her signature, that the defendant was currently under a warrant and that his execution was likely to take place. (T.2368-2369). Barbara told Detective Smith that she had no personal opinion regarding the defendant's mental state at the time of the crime and that the opinions expressed in the affidavit were those of the defendant's mental health experts which she assumed were correct because the

lawyers told her they were and because they were the opinions of experts. (T.2685-2686). Barbara further stated that the characterization of the defendant as "a follower" contained in the affidavit was not hers, it was provided by the defendant's lawyers. (T.2686).

At the Surace trial, Barbara testified that in early March of 1976 she and two friends, Sally Ivester and Mary Lou Walden, had moved from Atlanta, Georgia to Miami, Florida along with Mary Lou's parents Mr. and Mrs. Surace. (T.1703-04). The three girls planned to find jobs in the area and get a permanent place to stay. (T.1708). The group first stayed at the Sunny Isles Motel. (T.1705). The day after their arrival in Miami, Barbara met Mary Lou's brother, Rocca Surace. (T.1706). Barbara and Sally moved into an apartment at the Happenings apartment complex where Surace was staying with a friend, John O'Sullivan. (T.1705).

Several days after they had moved into the Happenings, Sally met the defendant and subsequently introduced him to Surace. (T.1709-10). Barbara and Surace became involved as did Sally and the defendant who also ended up moving into O'Sullivan's apartment. (T.1706, 1710-11). None of the four were employed, although the girls brought some money with them from Atlanta. (T.1711-12, 1715, 1719-20). Since O'Sullivan was going to move at the end of the month when his rent was up, the two couples planned to get an apartment together. (T.1712-15).

During the afternoon of March 30, 1976, the four went to Surace's family's apartment where the girls were having their

mail forwarded to check and see if they had gotten anything from their parents. (T.1715-16). The girls were expecting money orders from their parents; Barbara knew Sally expected money because Surace had had her call home the week before and tell her parents to send $200-300. (T.1717). Sally complied, but told Surace that she believed she would only receive enough money for bus fare home. (T.1717-18). Barbara received a $75 money order while Sally received $25 with instructions to phone home that night at 5:30 p.m.. (T.1720-1721). Barbara did not recall the two men's reactions to the amounts received. (T.1722).

The two couples decided to go to the Sunny Isles until other living arrangements could be made. (T.1723). When they arrived at the Motel at 4:00 p.m., Surace told Barbara to register under a false name; she told him she could not because she had stayed there before and they would remember her. (T.1724). The defendant then attempted to get a room, but was refused because he had no identification, so Barbara registered, paying for the room with the money the girls received from their parents. (T.1724-25).

Once inside the room, Surace asked Barbara what was wrong; she told him she thought they'd be moving into an apartment and instead they were back at a motel. (T.1726-27). Surace told Barbara to leave the room; she went into the bedroom leaving the door open. (T.1727). Barbara heard Surace tell Sally that she'd lied to him but did not know what he meant by that. (T.1728). Sally did not respond and Surace repeated himself, this time asking her why she had lied. (T.1728, 1730). Sally

responded saying she was afraid of what he would say and do when he found out that her mother wasn't going to send the money he'd asked for. (T.1728, 1730).

Barbara heard Surace's leather and bead key chain rattle and strike a solid object while Surace asked "why did you lie". (T.1731-33). She then heard Surace order Sally twice to take her clothes off. (T.1733-34). She heard the chain which Surace wore around his waist like a belt rattle and hit a solid object. (T.1734-35). The defendant then walked into the bedroom and told her he was so mad he felt like killing Sally and that was why he had come into the bedroom because he was afraid he'd get carried away. (T.1737-38). The defendant stayed only a moment before going back into the living room; he did not tell her what was happening in the other room. (T.1738).

Barbara then heard Surace tell the defendant to bring her into the living room. (T.1738-39). Sally was standing completely nude when she entered the room. (T.1739-40). Both Surace and the defendant were angry, although Barbara did not know why. (T.1740-41). When Barbara walked past Sally, she saw Surace standing in front of her with the chain wrapped around his hand with one end swinging freely. (T.1741-42). Surace beat Sally with the chain fairly hard about the head and shoulders; Barbara could see blood on Sally's head which ran down her cheeks. (T.1742-43). Surace kept repeating that she had lied to him and Sally replied that she had been afraid of what he would say and do, (T.1744).

Surace hit Sally with the chain a number of times. (T.1746). At one point during the beating, the defendant also hit Sally with the chain approximately four times but stopped because he struck himself in the groin area with the chain. (T.1765-67). One of the two men, she did not know who, suggested they find something to put inside Sally's vagina. **(T.1745).** Barbara was ordered to find something they could use and she made a cursory search telling them there wasn't anything because she was afraid that if she did not do as she was told they would do the same to her. **(T.1745-48).** Surace had previously told her he was an honorary member of the Hell's Angels motorcycle gang and had shown her a photograph of someone who resembled him on the cover of a book about the gang. **(T.1747-48).** Surace also warned her about what happened to people who lied to gang members or who betrayed them to the police; she both believed Surace's stories and feared for her own safety. **(T.1748-49).**

Surace told the defendant that he could use a chair leg to insert into Sally's vagina. **(T.1749).** The defendant **broke** the leg off a chair, told Sally to lay on the floor, and inserted it into her vagina while twisting it. (T.1750-51). While the chair **leg** was still inside of Sally, the defendant stood and kicked it with such force that it flew over Sally's shoulder. (T.1751-53). The defendant retrieved the chair **leg** and reinserted it, this time forcing it into Sally with the palm of his hand. (T.1751-52). Sally did not scream aloud or cry out since Surace had warned her that if she made any sound he would kill her. (T.1754-55).

After the chair leg was removed, Sally tried to get up, stopping when she was on her knees. (T.1756). The defendant, without provocation, walked up ta her and punched her in the mouth with his fist with great force. (T.1756-61). There was nothing unusual about Sally's teeth prior to March 30; photographs taken after her death depict broken front teeth. (T.1760). The defendant then used the chair leg he removed from Sally's vagina to beat her, fairly hard, all over her arms, back, and sides. (T.1762, 1760). Afterwards, the defendant told Sally to go take a shower and she did so with some difficulty, remaining in the shower about fifteen minutes. (T.1765, 1768). Upon her return to the living room, Sally was told to clean up the blood off the floor. (T.1765, 1768). Sally cleaned up the blood off the floor with a towel. (T.1765, 1768). At some point during the beating, the defendant informed Sally that he was going to take her to call her mother that afternoon and have her wire down money in his name; Barbara did not know the amount Sally was to ask for. (T.1762).

During the initial phase of the beating, the tampon Sally was using because she was menstruating had been removed; Surace found it and told Sally to hold it. (T.1769-70). When Sally did not comply with his orders, Surace told her to eat it, warning her she had better not get sick while doing so. (T.1770). Sally ate the used tampon. (T.1770).

The defendant kicked Sally very hard in the area of her right rib cage causing her to hit a table in the living room and spill a beer that was on it. (T.1771-72). The defendant hit

Sally again with the chair leg for spilling the beer and made her lick the beer up off the floor. (T.1773-74).

Sally was bleeding from various parts of her body and the defendant continued to beat her for getting blood on his hand. (T.1775-76). Sally told him she was sorry and the defendant hit her for getting blood on his pants. (T.1776). Sally again said she was sorry, that she didn't know she had, and he hit her for getting blood on the floor. (T.1776-77). No request was made to Barbara at that time to clean up the blood that was on the floor and other areas of the apartment. (T.1777).

The defendant left the apartment for a minute to *go* to Barbara's car, returning with a billy club that belonged to Mary Lou's husband. (T.1777-78). The defendant hit Sally fairly hard on her back and bottom while she lay on her stomach. (T.1781-82). He told **her** to move out from underneath the table and then hit her for not moving fast enough to her back. (T.1782). When the defendant **moved** away from Sally, Surace walked **up** to her and "**stomped** her" on **the back of** her head with his booted foot. (T.1782-83). Barbara heard a crack and Sally's face hit the floor. (T.1782-83).

The defendant told her to roll over onto her **back** and to spread her legs; Sally complied. (T.1783). The defendant did not think she spread her legs wide enough so he took one leg while Surace took the other and they spread them apart. (T.1783). Sally protested that they were hurting her and the defendant took the billy club and shoved it into her vagina with a great deal of force. (T.1784). Sally **gave** a **small scream**, slapped herself in

the mouth and called herself a dummy for screaming. (T.1784). The defendant walked away and Surace dropped his lighted cigarette onto Sally's stomach. (T.1784). She started to remove it and Surace told her no, that he hadn't told her that she could. (T.1785). Surace picked up the cigarette placing it against first her left then her right nipple. (T.1785). The defendant returned, picked up a cigarette lighter, rejected it because it did not have a big enough flame, picked another more to his liking, and used it to burn Sally's vaginal area while the billy club was still inserted into her. (T.1785). Sally said "please" just once in a pleading voice; it was the only time she said anything during the beatings. (T.1785-86).

Sally was told to *go* and take a shower. (T.1786). She started to get up but was having a lot of trouble because she kept sliding on the large amount of blood that was on the floor. (T.1786-87). Neither the defendant nor Surace attempted to help her. (T.1786-87). While Sally took her second shower and lay down in the bedroom, Surace tald Barbara to clean up the blood on the floor. (T.1787). Barbara was also instructed to go to a store and purchase peroxide for Sally and beer and cigarettes for the men. (T.1790). Barbara did not call the police while she was out running the errands because she was afraid that the men would have someone go after her for doing so even if they were in jail. (T.1791).

Sally lay on the bed begging for water and the defendant said he thought she was dehydrating. (T.1797). A pitcher of water was by the bed, but Sally was not able to help

herself and the others refused to help her. (T.1798-99). At Surace's instruction, Barbara applied the peroxide she had purchased to Sally's wounds and combed her hair while Sally was told what to tell her mother during the phone call home they previously told her she would make. (T.1791-92). Before they left the room to go to the phone booth, Surace told the defendant to hang up if Sally told her mother anything of what had happened. (T.1793-94). He also told Sally to tell her mother to send the money and warned her that if she said anything about what had happened he would kill her. (T.1794). They left for the phone with the defendant holding Sally up because she was staggering quite a bit. (T.1794). They returned after about ten minutes and Sally lay down once again on the bed. (T.1795). Surace asked the defendant what had happened during the call; the defendant said that Sally had been panting and her mother began to ask a lot of questions so he hung up. (T.1796).

Some time later, the defendant and Surace went into the bedroom to get Sally to sit up. (T.1800). Surace ordered Barbara to go and get the chain from the living room while the defendant pulled Sally up by her wrists into a sitting position with her feet on the floor. (T.1800). Sally saw Surace holding the chain and fainted, falling back onto the bed. (T.1800-01). Surace hit Sally across the stomach with the chain three times. (T.1802). Barbara neither saw Sally move nor heard her make any sound after that. (T.1802).

During the several hour long beatings, the defendant stated that he no longer wanted Sally as his "Mama" and asked

Surace where he could find a new one. (T.1796-97). Surace suggested Haulover Beach so the defendant said he would go up there and see. (T.1797). The defendant returned alone around 9:30 p.m.. (T.1802-03). The two men then discussed what they should do with Sally and contemplated either sending her home or "getting rid of her" and dumping her in a canal near the motel. (T.1803). Although they did not arrive at a definite decision, Surace said that if she didn't get better by the following morning, he would get rid of her. (T.1804).

The next morning, the men concocted an alibi story whereby Barbara would say that Sally had left the motel alone with someone she'd met while the men were away and she had not seen her since. (T.1804-05). Barbara and Surace were to leave the motel while the defendant was to remain behind and call the police to tell them that Sally had returned home in terrible shape and she needed help. (T.1805). Barbara and Surace went to O'Sullivan's apartment to pack; they told O'Sullivan that Sally was missing and asked if he'd heard from her. (T.1806). They also told O'Sullivan that the defendant was in Hollywood. (T.1806). They proceeded to the Surace apartment, but no one was there. (T.1806).

After their return to the Sunny Isles, it was decided that they would use the alibi story. (T.1806). At the motel, Barbara was ordered to, and did, give Sally a sponge bath and put peroxide on her injuries. (T.1807). Barbara also cleaned the apartment. (T.1807). Surace left the apartment with Barbara and returned to his parent's apartment complex where he had her place

the billy club and chain in a dumpster. (T.1807). They saw Surace's parents and sister and told them the alibi story. (T.1809). The defendant was to call the police later that evening. (T.1808).

When Barbara called the motel some time later, a strange man answered the phone; he told her he was a homicide detective and began to ask her questions. (T.1808). Barbara asked him what it was about and he told her that Sally had died and asked her to come to the motel. (T.1810). When she and Surace arrived at the Sunny Isles, she saw the defendant seated in a police car and walked towards him asking what had happened so people would think she didn't already know. (T.1810). Each of them was escorted away separately by a police officer and Barbara repeated the alibi story to the officer who accompanied her. (T.1810). Although she knew that the majority of the story was untrue, Barbara went along with it because she was afraid. (T.1813

When Barbara and Surace were asked to go to the police station for questioning, they agreed. (T.1814). They were separated and she had no conversations whatsoever with either Surace or the defendant. (T.1815). Barbara thereafter gave a statement to the police as to the true events of March 30-31, 1976. (T.1814-15). Although the men had been drinking beer, Surace did not force the defendant to beat, burn, or sexually abuse Sally, (T.1819).

Detective Carl Fogelgren was dispatched to the Sunny Isles Motel at approximately 9:15 p.m. as a result of the 911

call made by the defendant. (T.1825-27). In that call, the defendant identified himself by name and requested an ambulance for his "old lady" who came home badly beaten. (T.1614-15). When Detective Folgelgren arrived, he was approached by the defendant who informed him that he had been home watching t.v. when his old lady came home badly beaten. (T.1835). The defendant further informed him that following her return, she had gone into the bedroom and he was thereafter unable to awaken her. (T.1835). Detective Fogelgren described the defendant as calm; although he stood close to the defendant, he could not detect the odor of alcohol on either his clothes or his breath. (T.1833-34). The defendant did not appear to be under the influence based upon his experience. (T.1834).

The defendant, at the Detective's request, led him to the bedroom where Sally's body lay in the bed. (T.1835-36, 1838). The defendant told Detective Folgelgren that he had been an orderly in a hospital and had detected a faint pulse. (T.1839). The Detective checked for vital signs; the body was cold and the opened eyes were glazed over. (T.1839). It was evident that she was dead and had been for some time although Detective Fogelgren did not know for how long. (T.1839-40). He pulled down the sheet covering the body and saw bruising, puncture marks and possible bite marks. (T.1840). The room itself appeared unremarkable; he did not recall the presence of either beer cans or blood, (T.1841-42). He had the defendant follow him outside while he contacted homicide and rescue. (T.1841). He did not have any further conversation with the defendant because he felt the

defendant's story did not coincide with the condition of the body. (T.1842). The defendant first sat by, then in, the patrol car; he was not under arrest. **(T. 844-46).** When Surace and Barbara arrived on the scene, they had no contact whatsoever with the defendant. **(T.1845).**

Crime Scene Technician Eddie Stone was dispatched to the Sunny Isles at 10:05 p.m. where he was advised that the premises contained the body of a white female; he was taken on a tour of the rooms while he was briefed on what was known regarding the case. **(T.1860).** He noticed nothing unusual about the surroundings. (T.1860). After taking photographs, he noticed blood stained clothing consisting of blue jeans, green panties, and a sleeveless white and black print top on a chair at the foot of the bed. (T.1861, 1864). Technician Stone collected **144** latent fingerprints, as well as, the clothing, linens and other items. (T.1865-66). He also collected a chair from the room which had a loose leg which could be removed after being told to do so by Detective Ojeda. (T.1867-68). Although no prints were found on the chair leg when it was processed, powder clung to it to a point just over the lower half of the leg which indicated the presence of a dried liquid. **(T.1868-70).** He also observed the nearby phone booth which contained two chairs, both of which had blood on the seats. (T.1875).

Technician Stone personally observed the condition of the body which had numerous bruises and other injuries from the ankles to the face. (T.1871-72). The body, which was lying on its back, had three chain impressions horizontally down the

abdomen, each abaut a foot long and three inches apart. (T.1872-73). The skin of the left nipple appeared torn and the victim's front teeth were broken. (T.1872, 1876). A puncture wound was apparent in the left side of the victim's nose; Technician Stone shone a flashlight through the nostrils and saw light shining through the hole indicating that the hole went all the way through the nose. (T.1872-73). There were also several cuts on the head and the rest of the victim's nude body; the body was covered with bruises. (T.1873). The buttocks were particularly bruised and looked like a mass of purple welts and bruises. (T.1873). A welt, similar to that caused by a braided whip or cord, was also present on the victim's right side. (T.1873).

Detective Dennis Erwin of the homicide department spoke with the defendant at the police station while he was waiting to be interviewed by Detective Ojeda. (T.1882). The defendant told him that while he had been in the Miami area for approximately six years he had known Surace for about a week having met at the Happenings Apartments. (T.1882). He **stated that** he met Sally, Barbara, and Mary Lou Walden through Surace and that he paired off with Sally while Surace paired off with Barbara. (T.1882). The defendant also told him that on March 30, the two couples left John O'Sullivan's apartment to find a place to stay and had ended up in room 24 of the Sunny Isles Motel. (T.1883). The defendant claimed to have left the room at 4:00 p.m. to drink beer and pick up a girl and did not return until 4:30 a.m. the following day. (T.1883). He told the Detective that he then contacted Barbara who told him that Sally had taken off and she

did not know where Sally was. (T.1883). The defendant claimed that he and Barbara went looking for Sally until 8:00 a.m. before they returned alone. (T.1883). The defendant told him that later that day Surace and Barbara went out while he stayed behind to wait for Sally. (T.1884). He further claimed that Sally had come home at 6:00 p.m. that night badly beaten, that she fell to the floor, and that he undressed her and treated her wounds until 9:00 p.m. when he called the police. (T.1884).

Sergeant William Garrison arrived at the Sunny Isles Motel at about 10:30 p.m. on March 31 where he conducted a canvass of the north side of the motel complex. (T.1888, 1891). Witnesses were located who placed the defendant and Sally at the phone booth at around 7:00 p.m. the evening of the 30th. (T.1892-93). He was aware of the defendant's first account of what had occurred, i.e., that Sally left the motel, came back beaten, and no one knew what had happened. (T.1891, 1895). Sergeant Garrison remained at the scene assisting Technician Stone until araund 4:00 the following morning. (T.1894).

The defendant, Surace, and Barbara voluntarily went to the police station to give statements; no arrest had been made. (T.1894-95). All three gave statements using the alibi story until Barbara told the truth at around 4-5:00 a.m.. (T.1896) Once she did, the defendant was considered a suspect and was Mirandized. (T.1896). He was not under the influence of either drugs or alcohol. (T.1904). The defendant was informed that Barbara had agreed to tell the truth; he then consented to and gave a formal statement between 9:00 and 9:50 p.m.. (T.1898).

While waiting to give a written typed statement, the defendant stated that he wanted to write out a statement himself so he was provided with paper and a pencil. (T.1904-05). The handwritten statement (R.257-265) was not done in lieu of a formal typed statement. (R.266-276).

In his handwritten confession, the defendant admitted that both he and Surace hit Sally, that he beat her with a chair leg, his hand, and his right foot and that Surace beat her on the head, on her back and on her stomach with the chain. (R.257;T.1908). The defendant also stated that while he inserted the chair leg into Sally's vagina, Surace made her eat her used tampon. (R.257; T.1908-09). The defendant also admitted sexually assaulting Sally with the billy club. (R.257; T.1909). Significantly, the defendant stated that he knew he had done wrong by his actions, that he was sorry and that was why he was pleading guilty; he threw himself on the mercy of the court. (R.259; T.1912). Significantly, both Barbara's and Surace's statements were consistent with what the defendant said in his statements. (T.1919). As a result of Barbara's statement, the homicide team gathered additional physical evidence including the billy club and chain which were recovered from the dumpster Barbara led them to. (T.1849-50, 1919).

In his formal typed statement, the defendant admitted that he met Surace approximately one to one and a half weeks prior to the murder while staying at the Happenings Apartments. (R.269; T.1935). He then met Sally and Barbara; he began living with Sally and Surace lived with Barbara. (R.270; T.1936). They

moved to the Sunny Isles about two days before the murder, arriving at about 3:00 p.m. in Barbara's car. (R.270; T.1937). Barbara rented a room for four persons, number 24. (R.271; T.1938). After they got into the room, Surace took off the chain he wore around his waist and began beating Sally because she did not get the five hundred dollars she was supposed to get from her parents, she had only received a money order for $25.00. (R.271; T.1938). Surace first hit Sally with the chain on the left side of her head and then proceeded to beat her shoulders, face, and the top of her head. (R.271-2; T.1939). He hit her five or six times before he told her to strip and continued beating her back, shoulders, and buttocks. (R.272; T.1939).

The defendant stated that when Surace became tired of that he had Sally lay on her back and told him to break off a wooden chair leg. (R.272; T.1940). Surace told Sally to spread her legs and the defendant, proceeding on his own initiative, inserted it twice into her vagina four or five inches. (R.273; T.1941). Surace pressed his boot heel on Sally's throat to keep her from screaming. (R.268; T.1941). Surace also hit Sally across the chest with the chain. (R.273; T.1941). After the defendant removed the chair leg, Sally knocked over a beer while trying to stand. (R.273; T.1941). Surace became angry and made her roll over onto her stomach and lick the spilled beer off of the floor while the defendant watched. (R.273; T.1942). While she did so, Surace beat her bottom and legs with the chain; when he tired of the chain he began to use the leather key chain. (R.274; T.1942). Surace also made Sally eat her used tampon. (R.274; T.1942).

The defendant further stated that Surace had him *go* to Barbara's car and get the night stick which he then told him to insert into her vagina. (R.274; T.1943). The defendant inser ed the night stick five or six inches while Surace again placed his boot heel at her throat warning her that if she tried to scream he would do more damage to her. (R.274; T.1943). The defendant admitted that while Sally was sitting up he kicked her two or three times in the stomach with his right foot. (R.274; T.1943). He denied threatening Sally but said that Surace did, telling her that if she didn't straighten up he would kill her. (R.274-5; T.1943-44).

After they stopped beating her, Sally left the room and showered without assistance. (R.275; T.1944). She lay on the bed until he took her to make a phone call to her mother about 6:00 p.m. from the phone booth located between one and three hundred feet away from the room. (R.275; T.1946). A tall black girl who was using the phone when they got there asked him what was wrong with Sally; he told her that she was drunk. (R.275-6; T.1946). Sally made the call and asked her mother to send her more money. (R.276; T.1946). Her mother responded that she had sent all the money she was going to so they returned to the room and Sally went back to bed. (R.276; T.1946). The defendant stated it was approximately 6:30 p.m. when he left to *go* to Haulover Beach, returning about 9:00 p.m.. (R.276; T.1946-7). Sally was in the shower so he helped her out and put her to bed. (R.276; T.1947). Later, Surace told Sally to sit up; when she wouldn't, Surace hit her across the stomach lengthwise three times with the chain.

(R.277; T.276). They then pulled her back into the bed and left the room. (R.277; T.1948). That was the last time either of them struck Sally; the entire incident took place over the course of around two hours. (R.277; T.1948). The defendant admitted that during the beatings he burned Sally with a lighter around her vagina while Surace held the night stick inside her. (R.277; T.1948).

During the night, the defendant kept checking Sally's pulse and reactions; there was a pulse, but no reactions. (R.278; T.1950). They did not seek medical help or assist Sally in any other way. (R.278; T.1950). The following morning, Surace and Barbara went to his parent's apartment to pick up a paycheck that had come for Barbara. (R.278; T.1950). When they returned to the apartment, he and Surace went to the Happenings to pack their things while Barbara remained in the room. (R.278; T.1950). Barbara cleaned the room with the motel towels, rinsing off the ones with blood on them and turning them in to the maid for clean ones. (R.279; T.1951).

The last time Sally spoke was the prior evening; her body temperature went down, her eyes became hazy, her pulse was weak, and her muscles tightened up. (R.279; T.1951). The defendant realized she was dead when he called the ambulance and they told him. (R.279; T.1951). He believes that Surace threw the instruments they used on Sally and his jeans away. (R.279; T.1952).

Betty Ivester, Sally's mother, testified that her daughter moved to Miami with Barbara and Mary Lou where they

planned to get jobs and share an apartment. (T.1981-2). The girls left for Miami on Thursday March 9th. (T.1982). Sally had never mentioned that she would be asking her mother to send money after she came to Miami. (T.1983). Sally called on Saturday and told her mother she was going to need some money but did not say what it was for. (T.1984). Her mother sent a $50.00 money order. (T.1985). Sally called again several days later, said she had to have some money, and asked her mother to sell her stereo. (T.1986). Mrs. Ivester told her she would do what she cauld but that she didn't have much money. (T.1986). Sally knew things were financially strained at home and Mrs. Ivester found it unusual that Sally would even ask for money. (T.1986, 1992).

Mrs. Ivester told her she would send what she could and that Sally was to use the money to buy a bus ticket home; Sally never said she would come back. (T.1991). Mrs. Ivester sent a $25.00 money order with a note. (T.1992). She did not hear from Sally until the night of March 30th. (T.1993). Mrs. Ivester had difficulty hearing Sally during the call; her voice was low and mumbling and she would speak one ok two words before her voice would bubble and fade. (T.1993-4). When she asked Sally several times what was wrong with her, Sally told her she had been running. (T.1994). Sally asked if she had sent the money saying "I have got to have some money, Mother. Please send me the money."(T.1994). Mrs. Ivester thought the $25.00 hadn't gotten there yet and asked what was wrong. (T.1994). Sally told her that she was all right; however, her mother had never heard her sound that way before and again asked her what was wrong. (T.1995). The phone went dead. (T.1995).

The State introduced the prior testimony of the defendant given at Surace's trial.[2] (R.277-331; T.1996-2043). At that trial, the defendant testified that he had known Surace one to two months prior to March 30, 1976 and had met him at John O'Sullivan's. (T.R.282; T.1999). On that date, the two couples checked into the motel and sat in the living room drinking beer. (R.284; T.2001). Surace drank for the entire month prior to the murder; on that day, he drank a case and a half of beer by himself in addition to consuming between six and twelve sedatives. (R.283; T.2000). Surace and Barbara had words about getting an apartment and Surace left the room. (R.285; T.2001).

The defendant was talking to Sally and although he did not recall how it got started, he started to beat her. (T.R.285-6; T.2001-2). He borrowed Surace's chain to beat Sally with it. (R.286; T.2002). He kept beating Sally for some unknown reason. (R.289; T.2005). He ordered Sally to undress and inserted the chair leg into her vagina several times; he also used the billy club in a similar fashion. (R.287-8; T.2003-4). It was his decision to have Sally call home for money and they left the room so she could do so. (R.289; T.2005).

The defendant testified that Surace did not hit Sally with the chain or use his boots on her; in fact, the defendant testified that Surace had nothing to do with the entire incident and that he did everything himself. (R.298, 326; T.2014, 2040).

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[2] In the sake of brevity, the State will limit its reiview of that testimony to those areas which are inconsistent with his statements to the police, his testimony at the close of the sentencing proceedings, or the accounts provided by other witnesses.

He repeatedly asserted that Surace did nothing at all to hurt Sally. (R.308, 329; T.2025, 2043). Surace was either in the kitchen or bedroom the whole time and was past the point of intoxication. (R.298; T.2014). In fact, Surace had been in a "stupor" from drug and alcohol consumption for a month; on the day of the incident, he drank and did drugs all day. (R.307-8, 327; T.2024-5). Surace left at one point to purchase more beer; he had been driving drunk for a month. **(R.300,** 328; **T.2017, 2041).**

When the police came, the defendant testified that he told them an alibi story he had thought up. **(R.311;** T.3029). The police "hauled" him into the station where he was kept isolated from the others. (T.303-5; T.2020-2022). Fallowing his arrest, he gave a statement to the police only after being told Barbara had already done *so* because the police wanted one and he needed something for his nerves. **(R.311, 317; T.2029, 2031). He did** not know what he told them and denied recalling any additional facts about the events of March **30, 1976 . (R.317; T.2031).** Significantly, he **swore** that he was testifying truthfully and of his own volition. **(R.325; T.2039).** He claimed that he initially lied about Surace's participation in the crime because he did not want to "go down alone."(R.325, 329; T.2039, 2042). He did not try to implicate Barbara because **it** did not occur to him. (R.330; T.2043).

Dade County Medical Examiner, Dr. Peter Lardizabel responded to the Sunny Isles on March 31, **1976;** he recalled the case very well, stating that it was one he would never forget

because he could not compare it to anything else in his professional experience. (T.2055-6). When he arrived at the motel between 9:00 and 10:00 p.m., Sally's body was not in rigor mortis; she had been dead at least twelve hours.[3] (T.2059-60). Rigor mortis was present to only a minimal degree on the victim's back, consistent with her having been lying on her back at the time of death. (T.2061).

The autopsy revealed multiple blunt trauma injuries from head to toe. (T.2062). Seventy to eighty percent of the body surface was covered with bruising and other injuries. (R.248; T.2074). The victim's scalp had a total of nine lacerations: one was a one and one-half inch vertical laceration mid-back of the head around the occipital area (R.245), two other lacerations, one-third to ane-half inch in length, were nearby. (T.2063). Six additional lacerations were located on the right top of the head and right temple which were also one-third to one-half inch in length. (T.2064). The entire scalp area showed evidence of hemorrhaging. (T.2064). Additionally, the victim's face and forehead were bruised; the area underneath the forehead was also hemorrhaged. (T.2065). The bridge of the victim's nose was bruised, discolored, and swollen; a one-half inch irregular laceration was present at the left side at its midpoint, (R.464; T.2065). This laceration was consistent with a light being seen through the wound if a flashlight was shone through the nostrils.

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[3] Dr. Lardizabel testified that rigor mortis generally begins within two hours of death, becomes complete within eight to ten hours of death, and disappears completely within twenty-four hours of death. (T.2058).

(T.2066). Transverse bruises covered the ears, right cheek, and mastoids. (T.2065, 2067). The bruises located on the cheek were consistent with having been inflicted with State's exhibit 28, the leather key chain. (T.2075).

Patchy areas of bruising were present on Sally's shoulders, arms, forearms, wrists, hand and palm, all of which were defensive in nature. (R.236-7; T.2067-70). The areola of the left breast showed evidence of burn like marks on the skin consistent with having been inflicted with a cigarette or something hot. (R.236; T.2069-70). The lower extremities of the body also showed evidence of blunt trauma injury consistent with having been inflicted by the chain. (R.464; T.2071-2). Three transverse bruises, measuring thirteen inches in length from the upper hip extending to the lower portion of the abdomen caused by blunt impact trauma, were present. (T.2073, 2079). Also present were patterned chain marks on the stomach. (R.233; T.2073). Horizontal black marks on the body were consistent with having been inflicted by the chair leg. (T.2073).

Sally's buttocks were discolored throughout with hemorrhaging extending into the muscle; these injuries were inflicted with terrific force. (R.235; T.2076). The whole picture was described by Dr. Lardizabel as one of pattern bruises which conglomerated producing a block of bruising. (T.2077). A transverse blue-grey bruise on the outer front portion of the right thigh was present with some extension into the abdomen; the same bruising was apparent on the lower portion of the thigh. (R.233; T.2038-9).

Dr. Lardizabel also performed an internal examination of the body. (T.2079). The labial area was markedly red and swollen as was the outer two-thirds of the vaginal canal. (T.2080). The surrounding tissues were dark, reddish, and hemorrhagenic. (T.2080). The back portion of the vaginal canal had a laceration of over one inch in length causing an irregular perforation in the area connecting with the abdominal cavity. (R.239; T.2080). This injury was caused by the insertion of a blunt instrument with great force into the vagina; such an injury would be extraordinarily painful. (T.2082-3). Both the chair leg and billy club would be capable of causing such an injury. (T.2082). The condition of the labia was consistent with a thermal injury such as that caused by a lighter. (T.2086).

When Dr. Lardizabel opened up the victim's stomach he found something unique in his experience, a blood soaked tampon which the victim had apparently swallowed. (R.466; T.2087). The other internal organs he examined were in the early stages of autolysis or decomposition which indicated that Sally had been dead some time. (T.2088-90). He also found fatty embolisms in the brain, lungs, and kidneys which was consistent with someone having been severely beaten.[4] (T.2089-90). A chemical analysis was performed which revealed that Sally had consumed no drugs. (T.2096). The analysis revealed an alcohol content of .05 percent, however, Dr. Lardizabel attributed the majority of this

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[4] Fatty embolisms may cause all types of symptomology including dizziness, headaches, unconsciousness, coma, and even death. (T.2091).

amount to the normal production of alcohol that results from decomposition. (T.2097-8).

Dr. Lardizabel concluded that the cause of death was from multiple injuries caused by blunt trauma which resulted in fatty embolisms, shock, and hemorrhaging. He estimated her blood loss at over the one-half a pint found on the bed because that did not include the blood on the outside of the body or that on the clothing recovered from the room. (T.2094-5). Based upon the condition of the body and other pertinent facts, he believed death occurred during the early morning hours of March 31, an estimation consistent with the body having been out of full rigor mortis by 9-10:00 p.m. (T.2096). Sally was alive at the time the injuries she sustained were inflicted; Dr. Lardizabel described her death a5 a gradual and extremely painful one. (T.2095,2100).

The Defense's Case

The first defense witness was Harvey Lescalleet a former pastor from the defendant's home town community church. (T.2146-48). Mr. Lescalleet met the defendant when he was maybe fourteen to sixteen years old and knew him for maybe several years before he lost touch with him. (T.2150). They had not been close for probably sixteen years. (T.2154). When he knew him, he found the defendant to be friendly, nonaggressive, and a slow learner, but conceded that learning abilities were not a good area for him to judge. (T.2151, 2155). Mr. Lescalleet was aware of the facts underlying the case and was surprised; he could not answer whether the person he once knew would be capable of committing this crime. (T.2156-7).

Arlen Rogers also knew the defendant from the community church. (T.2159). He testified that he had never seen him either violent or aggressive. (T.2161). However, he conceded that he only knew the defendant twenty years ago and had never even visited his home. (T.2162-3). The defendant seemed to be a typical teenager; Mr. Rogers never noticed any indications of physical abuse. (T.2161, 2163-4).

Hazel Rogers, Arlen's wife, also testified to the effect that she knew the defendant from the church youth group. (T.2167). She found him to be not the brightest boy and never saw him exhibit aggressive or violent behavior. (T.2168).

Bill Weaver testified that he knew the defendant when he was a student in his eighth grade science class in 1967-8 when

he was left back. (T.2173). He found the defendant to have been a good kid when he knew him twenty years ago. (T.2194). He corresponded with the defendant only since the time he was in prison and was surprised at the quality of the letters he received. (T.2187, 2196). He did not know if the books the defendant read while in prison were consistent with his childhood IQ scores, but did not think an individual with an IQ of **74 would** be interested reading novels by Jackie Collins or Louis Lamour.

Mr. Weaver produced the defendant's school records which contained several notes on behavioral problems. (T.2184). One such incident involved a note the defendant wrote to a girl in which he said he wanted to meet her after school to have sex with her; the defendant had also sent the same girl other notes and had gone to her home uninvited. (T.2184).

Ruth Williams, the defendant's first cousin, testified that while she was growing up she and **her** family visited the Thompson family once a year for three or four days at a time. (T.2205-6, **2215).** She felt the Thompson home was messy and filthy and his parents were not loving. **(T.2207, 2208-9).** She did not, however, see any indications that the defendant was physically abused. (T.2217). Significantly, the last time she saw the defendant was when **she** was eleven to twelve years old, at least twenty years ago. (T.2216). Although Mr. and Mrs. Thompson were staying at the same hotel that she and her sister were at while waiting to testify, neither family had sought out the other. (T.2218).

Jean Marie Jackman, Williams' sister, conceded that her sworn affidavit differed from her testimony in court as to the description of the conditions of the Thompson house. (T.2226). She did not see any signs of physical abuse on the defendant when they were children. (T.2227). The last time she saw the defendant she was maybe fifteen or sixteen years old; she did not hear from him again until he was in prison. (T.2226).

Donna Adams, the defendant's former wife, testified that she has two children by him and one by another man. (T.2328-9). Although she claimed that the defendant was a nonviolent individual, she admitted that on one occasion he shoved her while she was holding their eldest child causing her to fall thereby resulting in the infant receiving between thirteen and nineteen stitches. **(T.2345).** She further admitted that that was not the first time he had behaved that way and had, in fact, shoved her many times during the course of their ten year relationship. **(T.2345).** Ms. Adams also stated that the defendant was a good father, but conceded that that was true only from the time Brian, their eldest, was between eleven and sixteen months old. (T.2348). Ms. Adams first denied that the defendant wrote her after his incarceration blaming her for his having gotten into trouble; this testimony was impeached with her prior deposition testimony in which she admitted that the defendant not only told her it was her fault but threatened her stating that if he ever got out of prison he would get even with her. (T.2351-3).

Ms. Adams testified that during their relationship, the defendant was able to accomplish many things and could do

anything he wanted to, but that it might take him a little longer than someone else. (T.2354). She further stated that she believed that he knew the difference between right and wrong. (T.2356). She did not know that the defendant had stabbed himself while in prison; he wrote her that another prisoner had attacked him. (T.2356). Both she and her children wanted to see the defendant receive a life sentence. (T.2357).

Nicholas Trinticosta, a former employee of CCR, was given the defendant's case as his first assignment out of law school, (T.2362-3). He contacted Barbara Garritz telling her that the defendant was under warrant and his execution may come to pass to get her help. (T.2363, 2365, 2368). Mr. Trinticosta presented Barbara with a prepared affidavit which she refused to sign; some corrections were made prior to her signature. (T.2364-5). He could not say who came up with the term "follower" and was also not sure whether or not he informed her of the opinions of the defendant's mental health experts, assuring her it was all right for her to sign the affidavit because the doctors said the things contained in it were true. (T.2372, 2379).

In the affidavit prepared by CCR, Barbara described Surace as an evil manipulator and the defendant as both his opposite and someone who feared and emulated Surace. (T.2473-5). She further stated that what happened at the Surace trial made sense to her because she felt that Surace would use the defendant to get off because the defendant would lie for him. (T.2475-6). In the affidavit, Barbara claimed that she had been warned by representatives of the State about what happened to witnesses who

did not testify the way that they should and that because of that she was convinced of what she had to do. (T.2476-77).

The defendant's brother, Tim Thompson, also testified on his behalf. (T.2386-92). Mr. Thompson, aged 24 years, was five and a half years old at the time his brother left home. (T.2386-7). In the years since then, he had had only one contact with him while he was in Starke prison although he did visit him in jail prior to the sentencing hearing. (T.2387-9). Mr. Thompson denied that the family home was without love and stated that his parents had shown bath he and his brother love and affection. (T.2389). He further denied that the home smelled of urine or that there was feces on the floor. (T.2390). He still resided at home. (T.2389). He believed he had seen his cousins Ruth and Jeannie once in the past twenty years. (T.2391).

Helen Thompson, the defendant's mother, testified alone since her husband's health prevented him from taking the stand. (T.2393-4). She stated that the defendant was nonaggressive and, in fact, ran from squabbles with his other siblings. (T.2395). She had not seen the defendant in thirteen years because the defendant told her to stay away, that he did not want to consider her as part of his family. (T.2396-7). She was present at the hearings because she was his mother and did not want to see him sentenced to death. (T.2395, 2397).

Donna Wells, a former neighbor, testified that the defendant was an outcast and unpopular at school where he was a disciplinary problem, (T.2400-2). Although she was aware of the facts of the case, she stated they were not things the person she knew would do. (T.2405).

Former Circuit Court Judge N. Joseph Durant, presently an assistant public defender, presided over the defendant's case in 1976. (T.2456). Judge Durant stated that he only imposed the death penalty because numerous aggravating factars were present and only two mitigating factors were apparent on the record, the defendant's age and his lack of a significant prior criminal record. (T.2458). He testified that no other evidence in mitigation was presented at that proceeding and that he would have considered such evidence had it been presented. (T.2457, **2470-1).**

Attorney Lewis Jeppeway, Jr. represented the defendant from mid-1976 to approximately September of 1977 during which time he met with him a total of three to four times. (T.2613, 2618). Mr. Jeppeway informed the court, ouf of the jury's presence, of his belief that the defendant should not receive the death penalty because of his low intelligence, the fact that he abused drugs and alcohol, the fact that Surace was the dominant party according to Barbara Garritz, and the fact she felt they did not intend to kill Sally. (T.2615).

Judge Arthur Rothenberg represented the defendant a total of two to four months during proceedings before Judge Durant. (T.2661). He stated that during that time he developed a rapport and sympathy for the defendant he still felt. (T.2664). Judge Rothenberg felt that the defendant was immature, passive, and unable to appreciate the gravity of what he had done. **(T.2662).** He also offered his opinion to the court, out of the jury's presence, that he felt that the defendant did not deserve a punishment different than that received by Surace. **(T.2657).**

The affidavit of a former neighbor, Rebecca Black, was also published to the jury. (T.2478-80). Mrs. Black found the defendant to be a nice, friendly boy who was often blamed for things his brothers did. (T.2479-80). However, much of the information contained therein was not first hand; for example, she related an incident in which one of her sons saw Mr. Thompson chase his son with a shotgun.[5] (T.2480).

The defense put on numerous mental health experts, the first of whom, Dr. Joyce Carbonel, testified by virtue of video deposition due to her unavailibility at the time of trial. (T.2131; S.1-96). Dr. Carbonel conducted a range of psychological testing on the defendant including an intelligence test which yielded a score of 85. (S.18-21), She conceded that IQ results were not always accurated because people often functioned at a higher rate than suggested by the numerical score.[6] The tests, including a finger tap test in which the defendant's left hand was faster although it was not his dominant hand, indicated diffuse brain damage. (T.26, 30-1). On at least one of the tests, the defendant cheated; on anoher occasion, he took the test for another inmate and scored out as brain damaged. (S.33-4). The results of the defendant's MMPI were "very strange" although the doctor could not explain why the results were strange. (S.36).

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[5] The defendant, in his testimony before the judge refuted the correctness of this claim. (T.3241).

[6] She did not discuss the level at which the defendant actually functioned, however.

On cross-examination, Dr. Carbonel testified that the defendant cooperated with her; the fact he refused to speak with other State experts was not, in her opinion, indicative of either an ability to reason or good judgment. (S.54). Her opinion was based upon testing and self-report, although she conceded that self-report was not always reliable. (S.54-5). She testified that she corroborated the defendant's self-report with facts supplied by other witnesses and his prison record.[7] Significantly, Dr. Carbonel could not say that the defendant was like an automaton who merely did what he was told to do. (S74). She believed that the defendant's claimed use of between ten to fifteen quaaludes per day prior to the murder would render him relatively nonfunctional. (S.93).

Dr. Carbonel disagreed with the findings of mental health experts who examined the defendant in 1976, claiming their competency evaluations were inadequate since they relied solely on self-report. (S.88-90). Their findings were, in her opinion, highly suspect because none of these experts caught the fact the defendant had a very law IQ. (S.90). She did not believe the defendant was competent to stand trial in 1976. (S.89). Finally,

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[7] In reality, much of what she relied on was inaccurate. For example, she claimed that the defendant by his history was not a mean or violent person; she did not know of his admission to another doctor that he carried out armed robberies. (S.81). The doctor also asserted that people reported him as drinking heavily an the day of the murder. (S.79). While Barbara Garritz did say they were drinking beer, her testimony is devoid of any statement the defendant drank heavily. Similarly, Surace said that the defendant drank only one or two beers.

she did not believe the defendant suffered from a personality disorder, but admitted he had symptoms of psychosis. S.86, 91).

Psychologist, Dr. Dorita Marina, conducted a number of tests[8] and determined that the defendant had a low-average I.Q. (T.2508). She noted indications of brain damage at the time she saw him, primarily in the mild to moderate range, but conceded that brain damage did not mean that the defendant did not function in everyday life. (T.2523-4, 2542). She did not read the handwritten confession made at the police station and asserted that it was reflective only of his state of mind at the time it was written, not as to his state of mind at the time of the crime. (T.2530). Dr. Marina found it probable that the defendant could have recalled the events of March 30th then but not recall them now. (T.2530). Despite the contents of that confession, she felt that the defendant did not know right from wrong at the time. (T.2547). Dr. Marina insisted that she was in a better position to evaluate the defendant's state of mind at the time of the crime by relying on test results performed thirteen years later, than experts were who examined the defendant immediately after the murder. (T.2531-3). Although she was aware of the discrepancies between the results of her tests and those performed by Dr. Carbonel, she thought the results should nonetheless be relied upon, (T.2540-1). She did not

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[8] Interestingly enough, some of the results Dr. Marina obtained were different than those obtained by Dr. Carbonel on the identical tests. (T.2513-2517.

review the reports of other experts, the defendant's statements to police, or his testimony at the Surace trial. **(T.2531-2).**

Psychiatrist, Dr. Arthur Stillman, examined the defendant in 1984 in relation to proceedings pending in federal court. (T.2557-8). His report indicated that he felt there was some possibility of minimal organic brain damage from birth. **(T.2586).** His testimony **on** the stand, however, was that the defendant definitely had brain damage based upon the test results of Dr. Marina. **(T.2586-89).** Even though he admitted he had not seen the defendant since 1984 and had not even **read** the reports of Dr. Marina or Dr. Carbonel, he changed opinion based solely upon what was told to him by defense counsel. (T.2587-8).

Dr. Stillman further testified that in his opinion the defendant, in addition to a personality disturbance, homosexuality, and a stress disorder, was under the influence of toxic psychosis at the time of the crime. (T.2579 **.** He based this opinion on the belief that the defendant had been consuming twelve to fifteen cans of beer and ten to eighteen quaaludes **per** day for four to five days prior to the crime. (T.2593). Dr. Stillman asserted that the defendant did not know the difference between right and wrong because of his toxic psychosis which would also have affected his memory; he testified that these effects would dissipate with time, however. (T.2594-5, 2603-4). He felt that some time must have passed for the defendant to have recovered enough to have come up with an elaborate alibi. (T.2603-5). Finally, Dr. Stillman disagreed with the opinions of Doctors Jaslow, Mutter, Castiello, and Corwin, stating that if

they had considered the defendant's junior high and elementary school records and IQ exams they would have reached the same conclusions that he did. **(T.2601).**

Neurologist, Dr. Robert T. Sherwood, examined the defendant in October of **1988. (T.2622).** With the exception of the presence of nystagmus and lessor coordination in the upper right extremity, the defendant's neurological exam was unremarkable. (T.2623-6). Dr. Sherwood believed the defendant suffered from some organic brain damage, but could not say that it had anything whatsoever to do with his criminal behavior. (T.2630, 2632). He could not say whether a person with organic brain damage would react differently to drug and alcohol abuse than a normal person would and could not account for the fact that the defendant's IQ had improved over the last ten years although he stated he would not expect that to occur. (T.2630-1).

The State's rebuttal

Rocco Surace testified that on March 30, **1976,** his involvement in the beatings was limited to swinging the chain and possibly making contact with Sally's head, striking her on the hip with the leather key chain, and perhaps telling Sally to strip. (T.2708-10, 2712-14, 2721). The remainder of the beatings were administered by Thompson who was not forced to do anything against his will. (T.2707-10, 2712-14, 2721). Surace stated that at the time, he was suffering from a kidney stone and was in great pain; he was also undergoing some marital problems.

(T.2702, 2715-16). He did not know if the defendant either liked or was impressed by him; he saw no reason for him to be impressed. (T.2708). Although both he and the defendant were drinking on the day of the murder, the defendant did not drink more than a beer or two; he did not know if the defendant was taking drugs although he himself did so. (T.2711, 2715-16, 2718). Surace also stated that the defendant voluntarily testified for him in 1978 and that he told the truth on the stand; he had nothing to do with the defendant testifying on is behalf. (T.2704-5, 2714-5).

Psychiatrist, Dr. Charles Mutter, evaluated the defendant in April of 1976, finding no sign of any major mental defect, (T.2745, 2758). He did not conduct psychological testing which he felt was unreliable in litigation since the subject can do things to purposely alter the results. (T.2753). He diagnosed the defendant as suffering from an antisocial personality disorder, but found that at the time of the crime he knew what he was doing and knew right from wrong as evidenced by his handwritten confession. (T.2763-6, 2772, 2788). Although the defendant had a borderline intellect, he was not substantially impaired or unable to appreciate the criminality of his conduct; he simply didn't care. (T.2763, 2791). Dr. Mutter visited the defendant twice within two weeks because he felt that the defendant was not telling him the full story. (T.2748). On the second visit he confronted him with the statements he made to the police in view of his claimed inability to remember what occurred. (T.2749). He believed the defendant did, in fact,

recall the events of March 30, 1976 and was lying when he denied it. (T.2788).

Dr. Mutter was aware of the opinions of Doctors Marina and Carbonel to the effect the defendant was brain damaged and was also aware of the results of neurological testing they performed. (T.2772). He testified that brain damage does not in and of itself mean much, that it is necessary to determine how it affects the person's ability to function. (T.2773). Here, the defendant's ability to formulate a complex alibi and other actions indicated an ability to function and reason. (T.2771-2, 2786-8). Contrary to the opinions of Dss. Marina and Stillman (T.2540, 2591) he testified that brain damage does not reverse itself over time, (T.2782). Dr. Mutter also disagreed with Dr. Marina's claim that she was better able to evaluate the defendant to determine his state of mind at the time of the crime thirteen years later an the basis of psychological testing than he was immediately thereafter. (T.2779-81). He felt it was more valuable in evaluating the defendant to rely upon evidence in close proximity to the actual crime, such as the defendant's statements. (T.2779-81 .

Psychiatrist Dr. Albert Jaslow examined the defendant in June 1976 finding no indications of serious organic brain involvement. (T.2814-5). Dr. Jaslow did not place much importance on an individual's numerical IQ, stating that how the person actually functions is more important because that is not reflected in the score. (T.2815, 2817-8). Here, he found the defendant able to fully understand and communicate. (T.2811).

The defendant told him that he felt he had a problem and should be hospitalized and that this need should take precedence over any legal proceedings. (T.2818-9). He further warned the doctor that if they did not accede to his desire for treatment they would be responsible because he could be involved in disturbed behavior. (T.2822-3). Dr. Jaslow related that the defendant had never told him that what happened was all Surace's doing and that he had been coerced into participating. (T.2824). The defendant, in addition to volunteering other information, told him that he had been involved in armed robberies, during which he was armed with a gun and that on the last occasion he had carried a knife. (T.2826). On the day of the murder, the defendant told him that he drank alcohol and took three 714 methaqualones. (T.2819, 2821). The defendant also volunteered that they did not mean to kill Sally but had wanted to teach her a lesson. (T.2823). He also stated that they did not kill Sally, that she was still alive when she was taken away by the police. (T.2823-4).

Dr. Jaslow was familiar with the defendant's written confession and found it highly significant both because it was written shortly after the murder and because it supported his opinion that the defendant was not under the influence and did, in fact, recall what occurred. (T.2828-9). Dr. Jaslow found no evidence of serious organic brain damage or major mental disorder that could be accountable for his actions. (T.2830). He also found no evidence the defendant was acting under extreme mental or emotional duress or that he was acting under the substantial domination of another; in fact, everything the defendant said

indicated that what occurred was a matter of the combined activities of the defendant and Surace. (T.2831). He also found that the defendant knew the difference between right and wrong but that he either didn't think about it or didn't consider the consequences of his acts. (T.2832).

Dr. Lloyd Miller examined the defendant in November 1988 after reviewing numerous documents including, but not limited to, police reports, the defendant's formal statement, his prior testimony at the Surace trial and the reports of other doctors. (T.2888-93). Dr. Miller found no evidence of organic brain damage; in his opinion, the defendant knew the difference between right and wrong, could appreciate the criminality of his conduct, and was not operating under the substantial dominion of another. (T.2894, 2899, *2908).* Dr. Miller found the defendant to be of average intelligence, functioning at an IQ level of eighty-five or higher. (T.2898, 2904-5). Although he looked for indications of toxic psychosis, he found none based upon the defendant's use of an alibi and his statements to police after the crime; he did not think it possible that an individual would commit a crime while under the influence of toxic psychosis, clean up, and then have a clear memory of what occurred. (T.2902-3).

The final witness in rebuttal, Dr. Leonard Haber, after being provided with numerous documents to review, examined the defendant in May of *1989.* (T.2940-42). Dr. Haber conceded that the best way to evaluate a defendant's state of mind at the time of a crime was to examine him in close proximity ta the crime.

(T.2944). Since he did not examine the defendant until much later, Dr. Haber considered the handwritten confession to be among the most important pieces of information available in evaluating the defendant a3 it was the most direct in terms of time and relevance. (T.2953). The fact that the defendant relayed information in that document he later claimed no knowledge of placed his self-repost of the events and his recollection thereof in great doubt. (T.2954-5). Dr. Haber thus found the defendant's claim of amnesia less than credible. (T.2955). Although he accepted the test results of Doctors Marina and Carbonel, he felt the manner in which an individual functioned to be of greater important than their numerical I.Q. (T.2960-2).

Dr. Haber found that the defendant exhibited a lack of candor and deviousness, particularly with regard to: the 911 call, the alibi story, the story told to the woman at the phone booth who inquired about Sally's condition, the defendant's account of his military service, the fact he stabbed himself in an attempt to escape from jail, and the fact that he was willing to do extreme things to accomplish his ends. (T.2966-70). These things were illustrative of an intelligence and deviousness; they were not the product of a simple mind. (T.2969).

Dr. Haber found no evidence of any major mental illness or any impairment of the defendant's ability to perceive the difference between right and wrong or the ability to appreciate the criminality of his conduct. (T.2980-1). He found the defendant to possess an antisocial personality; he was not

mentally ill. (T.2982-3). He was aware that there were allegations of child abuse, that his father had once chased him with a gun, but noted that there was no accepted pattern or inclination for abused children to grow up and be abusers. (T.2996-7).

Defense Testimony Following Jury Recommendation

The defendant's former counsel from 1982 to 1988, Michael Von Zamft, testified following the jury's recommended sentence that he believed the defendant did not understand the substance of their conversations and that he was under the influence of Surace at the time of the crime. (T.3220-3). He did not believe the defendant should receive a death sentence since he believed that only indiscriminate killers with na justification or knowledge of their victims deserved to receive the death penalty. (T.3224).

The defendant also testified an his own behalf before the judge, claiming that all of his siblings were beaten as children, but none received as much punishment as he did. (T.3261). He did not have any contact with his family by mutual choice; he wrote to his parents in prison but the last time he wrote to his mother was in 1978-1979 before they broke off all contact. (T.3262). The witness who testified his father chased him with a shotgun was mistaken; it was his mother. (T.3264).

Thompson stated that he did not like doctors because they all lied. (T.3293). Dr. Jaslow lied on the stand when he testified that he told him that he had been involved in armed

robberies. (T.3266). His own expert, Dr. Carbonel lied when she said he had told her he took ten to fifteen quaaludes on the day of Sally's murder. (T.3273). He claimed that in reality he consumed half a case of beer and took two or three quaaludes. (T.3273). The defendant stated he lied when he pled guilty and also lied during his testimony at Surace's trial, but justified his actions by stating that he had to. (T.3256, 3266). He further asserted that the police told him what to say during his statements. (T.3255).

The defendant also testified that he had never shoved his former wife, Donna, except for the one time she fell and their child was injured. (T.3274). He denied ever having a zip gun in his prison cell, that the parts found there belonged to another prisoner who occupied the cell before him. (T.3284-5). Although he admitted that he might have been motivated by the desire for money and the need to teach Sally a lesson on the day of the murder, he claimed he did not mean to kill her. (T.3251, 3276, 3279). Significantly, the defendant admitted that he wished the whole thing had never happened because he did not want to die in the electric chair. (T.3277).

ISSUES PRESENTED ON APPEAL

I.

DID THE TRIAL COURT ERR IN ALLOWING THE FORMER TESTIMONY OF WITNESS BARBARA SAVAGE GARRITZ WHEN IT WAS ESTABLISHED THAT THE WITNESS WAS UNAVAILABLE PURSUANT TO FLA.R.CRIM.P. 3.640, THE DEFENDANT WAS GIVEN AMPLE NOTICE OF THE STATE'S INTENTION TO USE THE TESTIMONY, AND THE DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT OF CROSS-EXAMINATION AT THE FORMER PROCEEDING?

II.

DID THE TRIAL COURT ERR IN FAILING TO EITHER STRIKE THE JURY PANEL OR CONDUCT INDIVIDUAL VOIR DIRE WHEN ONE JUROR, WHO DID NOT SERVE ON THE PANEL, STATED THAT HE COULD NOT FOLLOW THE LAW UNLESS HE WAS ASSURED THE DEFENDANT WOULD NOT BE RELEASED AFTER TWELVE YEARS HAVING SERVED THIRTEEN IF GIVEN A LIFE SENTENCE?

III.

DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO INTRODUCE THE DEFENDANT'S PRIOR TESTIMONY AT THE SURACE TRIAL?

IV.

DID THE TRIAL COURT ERR IN ALLOWING INTO EVIDENCE AUTOPSY PHOTOGRAPHS OF THE DECEASED WHICH WERE RELEVANT AND NECESSARY TO MATTERS IN ISSUE?

V.

DID THE TRIAL COURT ERR IN LIMITING THE TESTIMONY OF CERTAIN DEFENSE WITNESSES AS TO THEIR OPINION ON WHETHER OR NOT THE DEATH PENALTY WAS AN APPROPRIATE SENTENCE WHEN THEIR OPINIONS WERE NOT RELEVANT?

VI.

DID THE TRIAL COURT ERR IN SENTENCING THE DEFENDANT TO DEATH?

A.

Did The Trial Court Err In Failing To Find The Defendant's Age Or Lack Of A Significant History Of Criminal Activity As Mitigating Factors When The Record

Did Not Support Such Findings And It Was Not Bound By The Findings Of A Prior Trial Court Whose Sentence Was Reversed On Appeal?

B.

Did The Trial Court Err In Finding That The Murder Was Commited For Financial Gain And Was Committed In A Cold, Calculated, And Premeditated Manner Without Any Legal Or Moral Justification?

C.

Did The Trial Court Err In Failing To Find The Existence Of Numerous Statutory And Nonstatutory Mitigating Circumstances Argued By The Defense When They Were Refuted By Other Substantial Competent Evidence?

SUMMARY OF THE ARGUMENT

The trial court correctly allowed the State to utilize the former testimony of witness Barbara Savage Garritz from the defendant's 1978 sentencing proceeding. The defense was given ample notice of the State's intention to rely upon this former testimony, and the State, immediately prior to trial, again established that Ms. Garritz could not be located. The witness was thus correctly found to be unavailable pursuant to Fla.R.Crim.P. 3.640.

The trial court correctly denied the defense's motion to strike the panel after Juror Carson asked whether the defendant would be released after serving an additonal twelve years if given a life sentence. The defense volunteered the fact it believed any harm could be cured by proper instruction by the trial court and the trial court correctly instructed the jury that that was not a matter for its consideration.

The trial court properly allowed the State to introduce the defendant's prior inconsistent testimony at the Surace trial. The defendant failed to object below on the grounds raised herein; the matter is thus not preserved for the appellate review of this Court. Additionally, the testimony was admissible to establish the State's case with regard to the existence of aggravating factors and was also admissible to both impeach the defendant and to rebut his theory of the defense.

The trial caurt did not err in allowing the State to introduce relevant noncumulative autopsy photographs of the victim which were necessary to establish the aggravating factors

the State argued and which were also necessary to the medical examiner's testimony.

The trial court properly limited the testimony of certain defense witnesses regarding their opinions of the appropriateness of the death penalty for the defendant when their opinions were irrelevant given the limited nature of their relationships with the defendant and the large number of years prior to the crime during which they had no contact whatsoever with him. The propriety of the court's ruling is further supported by the fact that individuals with significant relationships were allowed to testify before the jury regarding their opinion as to the penalty the defendant should receive and other individuals were permitted to proffer their opinions to the court.

The trial court correctly imposed the death penalty in this case. The trial court was not bound, on resentencing, to utilize the same aggravating and mitigating factors found in the defendant's first sentencing hearing. It properly rejected statutory and nonstatutory mitigating factors which were refuted on the record by substantial competent evidence. Death was the appropriate penalty since the aggravating factors outweighed mitigating factors.

ARGUMENT

I.

THE TRIAL COURT PROPERLY ALLOWED THE FORMER TESTIMONY OF WITNESS BARBARA SAVAGE GARRITZ WHEN IT WAS ESTABLISHED THAT THE WITNESS WAS UNAVAILABLE PURSUANT TO Fla.R.CRIM.P. 3.640, THE DEFENDANT WAS GIVEN AMPLE NOTICE OF THE STATE'S INTENTION TO USE THE TESTIMONY, AND THE DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT OF CROSS-EXAMINATION AT THE FORMER PROCEEDING

On appeal, the defendant contends that the trial court improperly allowed the State to introduce, over defense objection, the former testimony of witness Barbara Savage Garritz at the defendant's 1978 sentencing hearing. However, when the matter is viewed within the context in which it occurred below, it is clear that the trial court correctly allowed the jury to consider this testimony since the defense was given ample notice of the State's intention to rely upon it, the witness was unavailable pursuant to Fla.R.Crim.P. 3.640, and the defendant was not deprived of his right of cross-examination at the former proceeding.

Prior to trial, the State, filed an "Affidavit In Support of Certificate To Secure Out-Of-State Witnesses'' wherein it stated that Ms. Garritz was a material witness in the case and an eyewitness to the events leading to the death of Sally Ivester. (S.3). The affidavit further stated that Ms. Garritz was believed to be currently residing in Georgia and that as both Florida and Georgia had adopted the "Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings'' it was seeking her attendance at the

defendant's trial in compliance with the terms and provisions thereof, (S.3-5). See: O.C.G.A. Sections 24-10-90 to 24-10-97; F.S.A. Sections 942.01-.06. The trial court, on October 11, 1988, entered a "Certificate To Secure The Attendance Of Out Of State Witness" pursuant to Florida Statute Chapter 942.

Unable to secure the attendance of Ms. Garritz, the State, on October 19, 1988, filed its "Motion To Utilize Former Sworn Testimony Pursuant To Florida Statute 90.804(2)(a)" with regard to the September 1978 testimony of Ms. Garritz. (R.127). The motion stated that Ms. Garritz had been located in June of 1988 in Georgia and, although she had been subpoenaed on September 27, 1988 to appear as a witness at trial, the subpoena had been returned. (R.127;S.1-2). Ms. Garritz had also been subpoenaed as an out of state witness to no avail. (R.127;S.1-2). The motion further related that Detective Greg Smith of the Metro Dade Police Department could testify both as to the efforts that were being made to locate the witness and her current unavailability; his prior deposition was clearly before the court.' (R.127). In support of its Motion, the State also filed a letter from Senior Assistant District Attorney for the State of Georgia, Daniel J. Porter, with a returned subpoena, to

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[9] Detective Smith stated in his deposition that Ms. Garritz told them that her testimony in 1978 was accurate without doubt. (S2.19). She reluctantly signed the CCR prepared affidavit which was not totally accurate since it was written a first hand tense and she did not write it and because it contained information provided by another. (S2.19, 21). She had no belief in 1976 that the defendant was a wimp and a follower; these terms were told to her by CCR attorneys and she accepted them as true. (S2.21, 54). Rather than stating she felt both Surace and the defendant should receive life sentences, Ms. Garritz stated that she felt they should both die in the electric chair. (S2.54).

the effect that diligent search had been made for Ms. Garritz but that she could not be found within the jurisdiction of that court having moved or been evicted from her former residence. (S.9). Ms. Garritz left no forwarding address. (S.9). The trial court therefore found the witness to be unavailable pursuant to the requirements of Fla.R.Crim.P. 3.640. (T.905).

In May of 1989, the State renewed its efforts to secure the attendance of Ms. Garritz at trial by filing a second affidavit in support of issuance of a certificate to secure her presence as an out of state witness and the trial court again issued a certificate. (S.10-11, 12-13). A hearing on the State's renewed motion to utilize Ms. Garritz's former testimony was conducted on May 18, 1989. (5.16; T.877). The State submitted to the court the affidavit of Georgia criminal investigator Ezra M. Jackson who stated that on May 9, 1989, he had attempted to locate Ms. Garritz. (S.15; T.906). Mr. Jackson stated that the United States Postal Office in Norcross, Georgia informed him that their records showed Ms. Garritz no longer lived at the Ashley Run address and the mail had not been picked up since October of the prior year. (S.15). The affidavit further stated that Ms. Garritz's phone had been disconnected. (S.15). Mr. Jackson also went to the witness' former apartment where he spoke with the manages of the complex who confirmed that Ms. Garritz no longer lived there. (S.15). No forwarding address was available at the complex. (S.15). The trial court found the affidavit to be legally sufficient. (T.908-09).

To challenge the adequacy of the State's efforts to locate Ms. Garritz, the defense put its investigator, Jeffrey Geller, on the stand. (T.913-922). Mr. Geller testified that an associate in Georgia, J.R. Noland, had located Ms. Garritz's mother in Doraville, Georgia. (T.913). Mr. Geller did not speak with the mother himself, all the information he possessed which was allegedly from her was relayed through his associate who neither appeared at the hearing nor submitted an affidavit. (T.913-14). Mr. Noland told Mr. Geller that the mother had informed him that Barbara and her children still resided in the Atlanta area and that although they were not on great terms she had seen Barbara for Mother's Day and at an uncle's funeral, (T.913-14). Nevertheless, Mr. Geller was unable to provide an address for the witness where she could be served and did not know the names or ages of her children although he alleged they attended public school. (T.915). Mr. Geller personally did some investigation while he was in Georgia on other business and went to two of her former places of residence; he was not able to find any information relating to her current address despite contacting local police and business owners. (T.918-20). Mr. Geller had no information as to whether or not Ms. Garritz had been in Florida at any time during the previous year. (T.922).

Based upon the evidence presented, which the court stated coroberated rather than disputed the State's claims as to their efforts to locate the witness, the trial court found that the State had exercised due diligence in attempting to locate Ms. Garritz who was declared unavailable for purposes of trial. (T.925, 934, 944).

F.S. 90.804(2)(a) provides that the former testimony of a witness, taken at a legal proceeding in compliance with the law, is not excludable as hearsay where the declarant is unavailable if the party against whom the testimony is sought to be introduced had an opportunity and similar motive to develop the witness' testimony. Similarly, Fla.R.Crim.P. 3.640 provides that the testimony of a witness given at a former trial may be read into evidence where the witness is absent from the State and the party seeking to introduce it makes a showing of due diligence in its efforts to secure her presence. It is clear that in this case, the State exercised due diligence in attempting to procure Ms. Garritz's presence, thereby satisfying the aforestated provisions,

The former testimony rule contained in the rules of criminal procedure codifies the common law rule of evidence, Florida has historically permitted the use of former testimony where: 1) the former testimony was taken in the course of a judicial proceeding in a competent tribunal, 2) the party against whom the evidence is offered, or his privy, was a party to the former trial, 3) the issues are substantially the same, and 4) a substantial reason is shown why the original witness is not available.[10] Johns-Mansville Sales Corp. v. Janssen, 463 So.2d 242 (Fla. 1st DCA 1984). Here, the former testimony sought to be introduced was that of Ms. Garritz at the

[10] Provision number five, i.e., that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness, was satisfied as the former testimony was read into evidence in open court.

defendant's September 1978 sentencing hearing in which the issues were the same. The trial court granted the State's motion since the first three requirements of the rule were satisfied. Additionally, the trial court below found that the testimony was admissible because the witness could not be located and the State had exercised due diligence in attempting to do so.

The record reflects that the State established to the court, both in October of 1988 and May of 1989, that it had attempted to first locate this out-of-state witness and then serve her with a subpoena to ensure her appearance at trial. It did so through the affidavits of the prosecutors and a Georgia investigator, as well as, the deposition of a Metro Dade Detective. This case is thus similar to Layton v. State, 348 So.2d 1242 (Fla. 1st DCA 1977) in which that court found that the State had met its burden of establishing a witness' unavailability through the affidavit of a state investigator who had attempted to contact the witness at her former places of residence and employment in Florida and New Jersey. Similarly, in this Court's recent decision in Hitchcock v. State, 16 FLW S23 (Fla. January 4, 1991), no error was found where the witness whose testimony the State sought to introduce no longer worked for the State and the prosecutor merely advised the trial court that a diligent search had not revealed her whereabouts. Here, the State went much further in its efforts to establish the unavailability of the witness. It is thus apparent that this case is totally distinguishable from those relied upon by the defendant. Outlaw v. State, 269 So.2d 403 (Fla. 1972) (no proof

of service was available to establish if the witness had ever been served), Palmieri v. State, 411 So.2d 985 (Fla. 3d DCA 1982)(prosecutor merely gave a witness his business card requesting him to call should he return to town and witness was served by mail thereby preventing the court from ascertaining whether the subpoena had in fact been received), McClain v. State, 411 So.2d 316 (Fla. 1982) (witness who was merely reluctant to leave wife's hospital bedside to testify was not unavailable within meaning of the rules). In contrast, here, ample evidence was provided, by both parties, to the effect that the witness was unlocateable. Furthermore, the defendant's argument ignores the fact that here, as in all cases dealing with witnesses in other state, Florida had no extraterritorial jurisdiction and is dependant upon the actions of officials in that other state in utilizing public records to locate an individual. The trial court thus did not abuse its discretion in finding that the State had met its burden of establishing the witness' unavailability. Stano v. State, 473 So.2d 1282,1286 (Fla. 1985). See also: Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

The defendant also contends that the former testimony was improperly allowed in view of what he terms the improper restriction on cross-examination by the 1978 trial court which violated his right of confrontation, particularly in view of the fact that that proceeding was reversed because of a Hitchcock violation. In reality, however, no such violation occurred.

The defendant claims that Ms. Garritz's testimony was improperly restricted as it did not delve into areas of mitigation and that as a result he is entitled to a new sentencing proceeding. He does not, however, set forth exactly what areas were not discussed with the exception of whether the defendant and Surace were under the influence of alcohol and drugs at the time of the crime. This assertion of error is unfounded for several reasons. First among them is the fact that the unredacted version of the original trial testimony contained in the record is devoid of any objections that were improperly sustained by the court or any ruling by the court restricting areas that the defense could persue on cross-examination.[11] Secondly, Ms. Garritz did in fact testify as to the fact that both the defendant and Surace were drinking at the time of the incident and also went into their alcohol and drug consumption in her affidavit which was read to the jury. Furthermore, both the defendant's and Surace's testimony discussed at length the alcohol and drugs they consumed at the time of the offense. Thus, even if the defendant were correct in his claim that the court at the original sentencing proceeding improperly restricted testimony as to the defendant's consumption of pills, any error is harmless.

The defendant's argument also ignores the fact that while the law contemplates the opportunity to conduct cross-examination, the right is not unlimited. In Ohio v. Roberts,

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[11] The defendant relies upon argument of defense counsel at the hearing on the State's motion to utilize the former testimony in citing to transcript page 929.

the United States Supreme Court held that "...the opportunity to cross-examine...even absent actual cross-examination---satisfies the Confrontation Clause."[Emphasis added]. Id., at 448 U.S. 70, 100 S.Ct. 2540, 65 L.Ed.2d 610. See also: United States v. Monaco, 702 F.2d 860 (11th Cir. 1983); United States v. King, 713 F.2d 627 (11th Cir. 1983). Additionally, the record reflects that defense counsel not only did conduct cross-examination, he also interjected himself at various times into the prosecutor's direct examination of Ms. Garritz to have matters under discussion clarified. (R.405, 452). This alleged restriction thus did not affect the adequacy of the remaining cross-examination, which, while of short duration, was not otherwise impaired. Foster v. State, 436 So.2d 56, 57 (Fla. 1983). It is therefore clear that the defendant may not prevail on this issue.

Finally, the defendant complains the trial court failed to either grant it additional continuances or provide further funds for its investigators to locate Ms. Garritz. The record reflects, however, that a number of continuances were granted to the defense to aid in the preparation of its case through, among other avenues, investigation. (R.179-181, 219-224). Sums were also requested and provided for investigative purposes. (R.219-224; T.792-801, 884, 913). Given the fact the defense and State were both unable to locate this out of state witness in their numerous attempts in the months before trial, it is clear the trial court acted within its discretion in denying the motions

on the eve of trial. Lusk v. State, 446 So.2d 1038 (Fla. 1984), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984).

11.

THE TRIAL COURT DID NOT ERR IN FAILING TO EITHER STRIKE THE JURY PANEL OR IN FAILING TO CONDUCT INDIVIDUAL VOIR DIRE WHEN ONE JUROR, WHO DID NOT SERVE ON THE PANEL, STATED THAT HE COULD NOT FOLLOW THE LAW IF HE WAS NOT ASSURED THE DEFENDANT WOULD NOT BE RELEASED AFTER TWELVE YEARS HAVING SERVED THIRTEEN YEARS IF GIVEN A LIFE SENTENCE.

The defendant asserts that he was denied a fair sentencing proceeding when the trial court failed to either strike the panel or to conduct individual voir dire of its members after Juror Garson inquired whether the defendant would be free after serving an additional twelve years if given a life sentence in view of the thirteen years he had already spent in prison. As the following analysis reveals, however, no error occurred below.

The record reflects that the sole juror who inquired as to the probable length of time the defendant would actually serve on a life sentence given his prior incarceration was Juror Garson. (T.1361). Defense counsel did not immediately object; the court sua sponte called a side-bar after the State indicated that under a life sentence, a defendant could be kept imprisoned for his natural life but is technically eligible for parole after serving twenty-five years. (T.1361). After taking a brief recess in the hopes that the parties could agree on an instruction for the jury, the defense having conceded the problem could be cured, Mr. Badini indicated they had been unable to come to an agreement and was looking "to the guidance of the Court to make a statement at least not to put the juror

down, but at least put that to rest now." (T.1368). The trial court indicated that it did not think that any harm had been done, but that a statement should be made to the jury telling them to concern themselves only with the issue before them. (T.1369). Only at that moment did the defense raise the question of whether or not the panel should be voir dired; no motion to do so was in fact made. (T.1369). The defense then stated it would challenge Mr. Garson for cause and was going to ask that ~~he be~~ sequestered. (T.1375). The trial court then read the suggested jury instruction to which Mr. Badini agreed. (T.1383). Only thereafter did Ms. Carr move to strike the panel, adding "and we'll leave that [i.e. the instruction] to Your Honor's consideration." (T.1384). The trial court instructed the jury that Mr. Garson's question was irrelevant to their consideration, that they were only to concern themselves with recommending either a life sentence or the death penalty and that the parole considerations were not a matter for their concern. (T.1389).[12] When Mr. Garson raised the issue again, Mr. Badini incorrectly stated that the trial court had denied

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12 The Court instructed the jury:

> "...Mr. Garson and all of the potential jurors, with regard to your question, it is irrelevant to your consideration. You are only to concern yourself with what punishment should be recommended to be imposed upon the Defendant. That is of a life sentence without the possibility of parole for twenty-five years or death.
>
> The parole consequences, if any, are not for your consideration. ..." **(T.1389).**

his motion for voir dire and accused the prosecutor of contaminating the jury; he then moved to strike the panel. (T.1399-1403). The trial court denied the motion and again seinstructed the jury. **(T.1405)**. When Mr. Garson indicated he would be unable to comply with the trial court's instructions, he was excused for cause. (T.1443).

As the foregoing establishes, the defense first acquiesced with the instructions, then moved to strike the panel, then left the matter to **the** judge's discretion **thereby** waiving any motion to strike. Only after the matter was raised again did the defense **make** an unwithdrawn motion to **strike** the panel as it felt that the prosecutor's comments contaminated the jury; however, it at no time moved to have the entire panel individually voir dired. The State respectfully contends that the issues raised herein were not properly preserved below for the review of this Court. See e.g.; Steinhorst v. State, 412 So.2d **332** (Fla. 1982); Teffeteller v. State, **495** So.2d **744 (Fla. 1986)**. Additionally, the **trial** court's instruction was **proper** and any doubt was cured by **it**, particularly since the panelists, with the sole exception of Mr. Garson, all asserted **they** would follow the court's instructions. The record is devoid of any restriction placed upon the defense by the court in asking other members **of the** panel their feelings about this matter. In fact, Mr. Badini made such an inquiry of Juror De La Salano during a challenge for cause. It is thus clear that the defense could have made similar inquiry of other panelists but chose not to do so. It is thus improper for the defense to now speculate as to

whether or not they would have received a favorable response had they done so, particularly since the defense accepted the panel without reservation.

The State would also assert that if on resentencing it is not reversible error for a jury to be advised of a prior sentence imposing the death penalty, where no curative instruction is read, error cannot have occurred here. ***See:*** Teffeteller **v.** State, supra. The case at bar is comparable to this Court's recent decision in Downs v. State, 16 FLW 555 (Fla. January 11, 1991) in which this Court held that a trial court did not abuse its discretion when, during a resentencing proceeding, it instructed a jury, after it asked what the parole consequences would be, that the defendant would receive credit for time served. Id, at S57.

The defendant's argument implicitly asserts that on resentencing no defendant would be able to receive a fair and impartial recommendation since the jury would always be concerned with the impact of time already served; such an assertion is unfounded and would lead to an absurd result if followed as it would ultimately preclude resentencing. Finally, as in the case of all challenges to a jury panel, the trial court is granted broad discretion in assessing the need for individual voir dire or the need to **strike** an entire panel and start anew. Davis v. State, 461 So.2d 67 (Fla. 1984). This is so because of the trial court's unique position in evaluating both the events occurring in the court room and the demeanor of the jurors themselves. It is apparent in this **case** that not only

did the trial court not find Mr. Garson's question to have any impact upon the jury's ability to render an impartial recommendation based upon its instruction, it is also clear that it acted well within the wide latitude granted to it in dealing with the manner in the fashion it did. As the foregoing analysis shows, no error resulted.

III.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO INTRODUCE THE DEFENDANT'S PRIOR INCONSISTENT TESTIMONY AT THE SURACE TRIAL.

The defendant asserts that the trial court improperly allowed the State to utilize an "insidious" trial tactic by introducing the defendant's prior inconsistent testimony at the Surace trial. He asserts this was improper both because it was intended solely to inflame the jury so as to deprive him of a fair trial and because the jury improperly considered the fact he helped an equally culpable codefendant receive a lessor sentence as an aggravating factor. While the defendant's claim is dramatic in its language, it is lacking in any merit whatsoever,

At trial, the State announced its intention to introduce the defendant's prior testimony at the Surace trial. (T.1962). The defense at no time objected on the grounds raised in this appeal. Rather, counsel objected on the grounds that use of the testimony violated the defendant's right of self-incrimination, that the testimony had not been freely and voluntarily given, and that the testimony was given as the result of inadequate representation. (T.1963). Since the matter was not raised by proper objection on the grounds raised herein, it is not preserved for the appellate review of this court. United States v. Madruga, 810 F.2d 1010 (11th Cir. 1987); Ferguson v. State, 417 So.2d 639 (Fla. 1982), appeal after rem., 474 So.2d 208 (Fla. 1985).

F.S.90.801(2)(a) specifically provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement and the statement is inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial. In this case, the defendant's testimony was made under oath in a trial; the procedural requirement of the statute, i.e. that the testimony be taken at a formal proceeding to ensure its reliability has thus been met. See e.g.: Dunn v. United States, 422 U.S. 100, 107, 99 S.Ct. 2190,2195, 60 L.Ed.2d 743, 751 (1979); Delgado-Santos v. State, 471 So.2d 74, 77 (Fla. 3d DCA 1985). Obviously, his testimony at the Surace trial not only went to the establishment of the State's aggravating factors in this proceeding, but also contradicted his theory of the defense.[13] The testimony was thus properly admitted both to support the State's case and was also proper to rebut the defense. Johnson v. State, 465 So.2d 506 (Fla. 1985), cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985). Furthermore, the testimony was admissible as a confession on the part of the defendant, the credibility of which was decided upon by the jury. See: Smith v. State, 424 So.2d 726 (Fla. 1983); Moore v.

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13 The State argued, and proved, four aggravating factors: that the murder was committed during the commission of a sexual battery, that the murder was committed for pecuniary gain, that the murder was heinous, atrocious, and cruel, and that the murder was cold, calculated, and premeditated and that it was committed without any moral or legal justification. The defense argued in mitigation that the defendant was under extreme mental or emotional duress at the time of the crime, was under the substantial domination of Surace, and was unable to appreciate the criminality of his conduct and was additionally unable to conform his conduct to the requirements of the law.(R.758-771).

State, 530 So.2d 61 (Fla. 1st DCA 1988). The cases relied upon by the defendant are therefore inapplicable to this case.[14]

The defendant also contends that the jury, in hearing this assertedly false testimony, improperly considered the defendant's testimony, which helped his codefendant receive a lessor sentence, as a nonstatutory aggravating circumstance. Not only is this argument totally unsupported by the record, it ignores the fact that the trial court is the final arbiter of sentence and it explicitly stated that it did not consider any evidence in aggravation or any aggravating factors other than those set forth in 921.141(d),(f), (h), and (i). (R.763). See Spaziano v. Florida, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). This case is thus distinguishable from Elledge v. State, 346 So.2d 998 (Fla. 1977), relied upon by the defendant, which held that the trial court's consideration of a confession to an unconvicted crime as a nonstatutory aggravating factor required reversal. The defendant has therefore failed to demonstrate that the trial court abused its discretion and may not prevail on appeal.

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[14] These cases relate to situations in which the State either purposely elicited knowingly false testimony from witnesses on the stand Napue v. Illinois, 360 U.S. 246, 79 S.Ct. 1173, 3 L.Ed. 1221 (1959), or where it allowed knowingly false evidence go uncorrected Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 104 (1959). They also included a strained comparison to cases in which the 'State-introduced a defendant's exercise of his right to remain silent as evidence of guilt. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 70 L.Ed.2d 791 (1935); Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1976); State v. Burwick, 442 So.2d 944 (Fla. 1983)'.

IV.

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE AUTOPSY PHOTOGRAPHS OF THE DECEASED WHICH WERE RELEVANT AND NECESSARY TO MATTERS IN ISSUE

The defendant argues that the trial court erred in admitting into evidence photographs taken during the deceased's autopsy which he claims were "unnecessary and gratuitous" and introduced "solely to inflame the jury." (Defendant's brief page 57). In essence, he asserts that the photos were not material to any fact in issue since the defense had already acknowledged the victim's violent death. The defendant's claim is clearly without merit since not only were the photographs not exceptionally gory, they were both highly relevant and necessary to the State's case.

The defendant's argument totally ignores the fact that the photos were introduced during the penalty phase of the case and the State must prove the aggravating circumstances it argues beyond a reasonable doubt. Eutzy v. State, 458 So.2d 755 (1984), cert. denied 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). The mere fact the defendant does not challenge that the victim's death was a violent one does not, as he would have this Court believe, relieve the State of this burden. Engle v. State, 438 So.2d 803 (1983), cert. denied 104 S. Ct. 1430; Thompson v. State, 389 So.2d 197 (Fla. 1980). The photos were also necessary becasue this was a penalty proceeding in which the jury did not have the benefit of facts and evidence presented during the guilt phase with which to understand the events underlying the crime, Nor were the photographs

exceptionally gory or superfluous to the State's case. This case is thus not comparable to Dyken v. State, 89 So.2d 866 (Fla. 1956) wherein this Court held the introduction of especially gruesome photos during the guilt phase of a trial reversible error where the photos showed a victim's head covered in gunshot wounds, the manner of death has been conceded, and the sole issue before the court is whether the defendant was the perpetrator of the crime.

This Court has recognized that the basic test for determining whether photographs of a murder victim should be admitted is relevancy although necessity may be a consideration where large numbers of cumulative photographs of a gruesome nature, taken away from the crime scene, are offered into evidence. Henninger v. State, 251 So.2d 862 (Fla. 1971). Where such photographs are relevant and they are not so exceptionally gruesome as to out weigh their relevancy, they are admissible. Even in those instances where "...photographs are offensive to our senses and might tend to inflame the jury, [it] is insufficient by itself to constitute reversible error, but the admission of such photographs...must have some relevancy, either independently or as coroberative of other evidence." Id. at 865.

Perhaps the best analysis currently available of the propriety of the introduction of photographs of murder victims is that set forth in this Court's recent decision of Czubak v. State, 15 FLW S586 (November 8, 1990) wherein the Court recognized that it

> has long followed the rule that photographs are admissible if they are

relevant and not so shocking in nature as to defeat the value of their relevance. See Bush v. State, 461 So.2d 936, 939-40 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986); Williams v. State, 228 So.2d 377, 378 (Fla. 1969). Where photographs are relevant, "then the trial judge in the first [instance] and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence.''Leach v. State, 132 So.2d 329, 331-32 (Fla. 1961), cert. denied, 368 U.S. 1005 (1962). We have consistently upheld the admission af allegedly gruesome photographs where they were independently relevant or corroborative of other evidence. See, e.g., Jackson v. State, 545 So.2d 260 (Fla. 1989) (photographs of victim's charred remains admissible where relevant to prove identity and circumstances surrounding murder and to corroborate medical examiner's testimony); Bush v. State, 461 So.2d at 936 (photographs of blowup of bloody gunshot wound to victim's face admissible where relevant to assist the medical examiner in explaining his examination); Wilson v. State, 436 So.2d 908 (Fla. 1983) (autopsy photographs admissible where relevant to prove identity, nature and extent of victims' injuries, manner of death, nature and force of the violence, and to show premeditation); Straight v. State, 397 So.2d at 903 (photograph of victim's decomposed body admissible where relevant to coroberate testimony as to how death was inflicted); Foster v. State, 369 So.2d 928 (Fla.) (gruesome photographs admissible in guilt phase to establish identity and cause of death), cert. denied, 444 U.S. 885 (1979).

Here, the defendant complains of two photographs[15] one of which illustrates the hole torn in the rear wall of the victim's vagina as a result of her rape by the defendant with the chair leg and billy club, the other depicting the tampon found in her stomach. Both of these photographs were highly relevant to the State's case which sought to prove aggravating factors of HAC, CCP, and the fact that the murder was committed during a sexual battery. The photographs were coroberative of the testimony of Barbara Garritz (T.1750-3, **1769-70, 1783-4)** as well **as** the handwritten and formal statements made by the defendant **(T.1908-9, 1941, 1943).** Thompson v. State, 565 So.2d 1311 (Fla. 1990). Furthermore, the photos were also used by the medical examiner in describing his findings during the autopsy (T.2080-3, 2087) and also related to his opinion as to the cause and manner of death **(T.2094-5).** Nixon v. State, 15 FLW S630 (Fla. December 7, 1990). Additionally, the trial court was **careful** to allow only noncumulative photographs into evidence as shown during the hearing conducted so that it could consider the admissibility of each individual photograph.

The defendant attempts to use this **Court's** prior opinion appearing at 389 So.2d 197 (Fla. 1980), to stand for the proposition that the trial court on resentencing was precluded from using any other photographs other than the four introduced in the 1978 proceeding based upon his assertion that this Court

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15 The defendant also makes note of other morgue photographs with which he seemingly does not take issue. These photographs were also necessary to prove the State's case in aggravation and to explain **the** Medical Examiner's testimony. They depicted bruising, chain marks, burns, and head injuries.

found all other photographs inadmissible. The defendant's reading of the prior opinion is both strained and without legal basis. First, it is clear: that this Court, in the earlier Thompson opinion, was ruling only as to the appropriateness of the admission of the four photographs and did not address, in any respect, the remaining photographs. Id. at 200. Secondly, his argument ignores the fact that the proceedings currently before this Court are a completely new sentencing proceeding before a new advisory jury; as such, the trial court was not bound by what evidence had been deemed admissible by a prior sentencing court. To hold otherwise would lead to ridiculous results. This case is on all fours with this Court's recent decision in Randolph v. State, 562 So.2d 331 (1990), in which this Court found the admission of autopsy photographs proper during that defendant's penalty phase proceedings. The Randolph Court found that "the photographs were relevant to prove the violent and extensive nature of the injuries inflicted, and tended to support the state's claim that the murder was heinous, atrocious, or cruel. We find no abuse of discretion by the trial court in admitting these photographs." Id. at 338. The defendant in this case has therefore failed to establish that the trial court abused its discretion in admitting the photographs and that discretion may therefore not be disturbed on appeal. Wilson v. State, 436 So.2d 908, 910 (Fla. 1983).

V.

THE TRIAL COURT DID NOT ERR IN LIMITING THE TESTIMONY OF CERTAIN DEFENSE WITNESSES AS TO THEIR OPINIONS ON WHETHER OR NOT THE DEATH PENALTY WAS AN APPROPRIATE SENTENCE WHEN THEIR OPINIONS WERE NOT RELEVANT

In this appeal, the defendant alleges that the trial court erred in sustaining the State's objection as to the personal opinions of the following individuals as to the appropriateness of the death penalty for the defendant: Harvey Lescalleet, Arlen and Hazel Rogers, Bill Weaver, Ruth Williams, Jean Marie Jackman, N. Joseph Durant, Lewis Jeppeway, and Arthur Rothenberg. He asserts that as a result, the jury was prevented from considering valid relevant mitigating evidence. The record reveals, however, that the trial court did not err in its decision. The first six witnesses could not make a relevant determination given the limited nature of the contact they originally had with the defendant, as well as, the number of years which had passed since they had any contact with him. The last three witnesses did present to the court, the final arbiter of the appropriate penalty, their personal opinions as to whether or not he should be sentenced to death.

The defendant correctly asserts in his brief that he is entitled to present any relevant evidence in mitigation; however, what he purposely ignores is the fact that the key word "relevant" does not apply to the testimony of the individuals he now complains of. Harvey Lescaleet, for example, testified that he knew the defendant for perhaps several years around the time he was fourteen to sixteen before he lost touch with him,

(T.2150). The only contact they had during that time was through the community church. (T.2150). Significantly, Mr. Lescaleet had not had any contact whatsoever with the defendant for sixteen years. (T.2154). He therefore could have no knowledge of the defendant beyond the few years he knew him in a severely limited environment. Similarly, Arlen and Helen Rogers also knew the defendant only through their mutual place of worship and they too had not seen him for twenty years prior to the crime. (T.2159, 2162, 2167). Bill Weaver, the defendant's eighth grade science teacher, did not have any real contact with the defendant with the exception of that year and his role as vice-principal. He had no contact whatsoever after the defendant dropped out of school and they only resumed contact after twenty years when they began corresponding after the defendant was incarcerated for the instant crime. (T.2173-4, 2187). Ruth Williams and Jean Marie Jackman, the defendant's cousins, testified that the saw the defendant three or four days a year when they visited his family and had no contact with him for twenty years. (T.2205-6, 2215-16, 2226). Of the two, only Ms. Jackman had resumed contact with him, but only after his incarceration. (T.2226).

N. Joseph Durant, a former Circuit court judge who presided over the defendant's first murder trial, testified before the jury that he would have considered mitigating evidence had it been presented, but that in that case, none was, so that he considered only age and lack of a prior record in reaching the sentence he imposed. (T.2456-7, 2470).

Significantly, Mr. Durant told the court, out of the jury's presence, his opinion that he would not have imposed the death penalty in that case had any mitigation been presented and additionally testified that he was very much opposed to the death penalty and that this was the only case in which he had ever imposed it. (T.2436). Lewis Jeppeway Jr. the defendant's counsel for a one year period from mid 1976 to approximately September 1977, met with the defendant on only three to four occasions during the course of his representation. (T.2613, 2618). Mr. Jeppeway also told the court separately his belief that the death penalty should not be imposed given evidence of the defendant's low intelligence, substance abuse, family background, his belief Surace was the dominant party, and the lack of intent to murder. (T.2615). Judge Arthur Rothenberg represented the defendant for a brief two to four month period during his first trial during which time he built up feelings of rapport and sympathy for him which he still possessed. (T.2664). Judge Rothenberg testified to the court as to his opinion that the defendant and Surace should get the same sentence. (T.2658).

It is readily apparent that all of the defendant's relatives and friends were present in court to testify on his behalf because they did not want him to receive the death penalty. As in People v. Heishman, 753 P.2d 629 (Cal. 1988), relied upon by the defendant, their testimony was clearly elicited because they wanted him to receive a life sentence. Furthermore, his mother and former wife, individuals who had

meaningful, relevant contact with him at the time of the crime, both testified that they did not want the jury to sentence him to death. (T.2344, 2395). Thus, even under the analysis urged by the defendant set forth in Heishman,[16] no error resulted.

The remaining friends and family members who testified on the defendant's behalf had not seen him for an average of twenty years and their opinions thus were not relevant since they could not be based on a valid assessment of the defendant's character and behavior. The opinion of lay witnesses on the propriety of a sentence under these circumstances is simply not appropriate, when the witness has had no meaningful opportunity for observation. See, e.g, Wells v. State, 98 So.2d 795 (Fla. 1957). Whether non-expert opinion testimony meets the criteria of F.S. 90.701 and is admissible largely within the discretion of trial judge. South Venice Corp. v. Caspersen, 229 So.2d 652, 656 (Fla. 2d DCA 1975).

The opinions of judges and lawyers is similarly improper and potentially more dangerous given the added weight a jury would logically accord the opinion of such individuals. Additionally their opinions would not be relevant since the judges and lawyers who testified for him also knew the defendant for a limited period of time and only under extremely restricted and artificial circumstances. Although these individuals had a greater knowledge of the capital sentencing process than lay witnesses, their opinions were properly excluded from the jury's

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[16] In Heishman, the court found it error to disallow the testimony of the defendant's wife because the significant nature of their relationship would have yielded relevant evidence.

consideration given the prejudicial effect they would naturally have. Significantly, their opinions were presented to the trial court, the ultimate sentencer, for its consideratian; the trial court's sentencing order clearly establishes that it considered these proffered opinions since it stated that it "considered each and every statutory mitigating factor, as well as any other conceivable mitigating evidence which was presented or argued by the defense,'' including "evidence presented separately before the Court." (R.704). (Emphasis added.).

A number of cases have considered the question of a witness' opinion as to the propriety of a particular sentence. In Jackson v. State, 498 So.2d 406 (Fla. 1986), the defense sought to have the victim's brother, a reverend, testify that the family did not wish to have the defendant sentenced to death. This testimony, which the trial court felt was unique to the witness rather than attributable to the victim's entire family, was proffered to the court. This Court, in considering this assignment of error, specifically held that "...this evidence [i.e. the brother's opinion on the appropriate sentence] sheds no light on appellant's character or record, or on the offense itself." Id. at 413. Similarly, in Patterson v. State, 513 So.2d 1257 (Fla. 1987), the court found that the consideration of a victim's relative's opinion that death was the appropriate penalty was error as it constituted improper aggravatian, In this Court's mast recent case touching on this issue, Floyd v. State, 15 FLW S465 (Fla. September 13, 1990), this Court rejected Floyd's claim that the trial court erred in

preventing the victim's daughter from expressing her opinion that he should not receive the death penalty although it did allow her to testify regarding her knowledge of his character based upon her correspondence and visits with him in prison. This Court held "the court's decision to prevent her from further testifying about her opinion as to whether Floyd should be executed was not an abuse of discretion." Id. at S467. The trial court's decision below to prevent the witnesses from testifying as to their opinion on a sentence was thus not an abuse of discretion. The precepts of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) were therefore not violated since Lockett requires a sentencer to consider evidence relevant to the defendant's character, record, or to the circumstances surrounding the crime. A witness' opinion as to the propriety of a particular sentence does not fall within any of these categories.

VI.

THE TRIAL COURT DID NOT ERR IN SENTENCING THE DEFENDANT TO DEATH

A.
The Trial Court Did Not Err in Failing To Find the Defendant's Age Or Lack Of A Significant History Of Criminal Activity As Mitigating Factors When The Record Did Not Support Such Findings And It Was Not Bound By The Findings Of A Prior Trial Court Whose Sentence Was Reversed On Appeal.

The defendant contends that despite the fact that the sentences imposed by prior courts were overturned on appeal he is nonetheless entitled to the benefit of the mitigating factors found to exist by those courts by virtue of the principle of the law of the case. It is abundantly clear, however, that he may not reap the benefits of sentences he sought to and succeeded in having reversed.

The issue raised herein has already been decided against the defendant as recognized by this Court's recent decision in King v. State, 15 FLW S11 (Fla. January 12, 1990). In King, as in this case, the original sentencing judge found King's age (twenty-three years) to be a mitigating factor. On resentencing, the trial court did not find his age in mitigation and King claimed, via a petition far habeas corpus relief, that appellate counsel was ineffective for failing to raise this issue. This Court held:

> To foreclose any possible concern about appellate counsel's failing to raise the issue, however, we find that relief would not have been given on appeal. Deciding whether mitigating circumstances have been established is

> within a trial court's discretion. Stano v. State, 473 So.2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986). An age of twenty-something is "iffy" as a mitigating circumstance. Scull v. State, 533 So.2d 1137 (Fla. 1988), cert. denied, 109 S.Ct. 1937 (1989). That his first judge found King's age in mitigation did not create any vested entitlement or right requiring the second judge to accede to the first's findings. King's resentencing was a completely new proceeding, separate and distinct, from his first sentencing. A trial court is not obligated to find mitigating circumstances. Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986), and, contrary to King's claim, a mitigating circumstance in one proceeding is not an "ultimate fact" that collateral estoppel or the law of the case would preclude being rejected on resentencing. No abuse of discretion that would have given relief on appeal is apparent in the resentencing...Id. at 511-12.

As this Court's analysis in King establishes, the trial court below is not obligated to make the same findings as its predecessor. The record below supports the trial court's finding that these mitigating circumstances did not, in fact, exist. The defendant, at the time of the crime, was twenty-four years of age, an "iffy" mitigating circumstance which was rendered moot by the lack of other evidence necessary to show it was a valid factor. (R.708). Garcia v. State, 492 So.2d 360, (Fla. 1986), cert. denied, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986).

The defendant also contends that the trial court failed to find his lack of a significant prior criminal history in mitigation. However, psychiatric expert Dr. Albert Jaslow

testified that the defendant admitted committing two armed robberies, one with a gun and one with a knife. (T.2826). The trial court correctly noted that prior criminal history is not limited to convictions and that it could properly consider this fact in determining that the mitigating factor did not exist in this case since it found Dr. Jaslow's testimony to be more credible that that of the defendant on this point. (R.705-6). Quince v. State, 414 So.2d 185 (Fla. 1982). The trial court thus correctly determined not to find these two mitigating circumstance since competent substantial evidence to support their rejection exists in the record. Campbell. State, 16 FLW S1 (Fla. January 4, 1991).

B.

The Trial Court Did Not Err in Finding That The Murder Was Committed For Financial Gain and Was Committed In A Cold, Calculated, And Premeditated Manner Without Any Legal Or Moral Justification.

The defendant asserts that the trial court below incorrectly found that the murder was committed far financial gain and was committed in a cold, calculated, and premeditated manner without any legal or moral justification ("CCP)" since these circumstance were not found by the initial sentencer. He bases this claim on the principle of the law of the case argued in sub-issue A; the State therefore readopts its prior argument as to this point. As stated above, the trial court, in a distinct new sentencing hearing, is not precluded from making its own findings as to the existence or nonexistence of aggravating and mitigating factors so long as they are supported

by the record as they are in this case. See e.g.: King v. State, supra.

Although the defendant asserts the trial court improperly found the murder was committed for financial gain, except for his argument on law of the case, he does not contend the record fails to support this finding. The record indisputably shows that Sally was told to call home and ask for two to three hundred dollars; she received only twenty-five dollars. (T.1717, **1720-1)**. The defendant admitted beating Sally to "teach her a lesson'' for failing to get the money. (R.271, 189; T.1938, **2005**, 3250). In fact, during the beatings Sally was told she would *go* to the phone booth and call home again to **ask** for more money. (R.275-6; T.1762, 1946). Ms. Garritz was told to tend to Sally's wounds and fix her up only so that she could be taken to the phone, not because of some humanitarian feelings on the part of the defendant. **(T.1762,** 1791-2). Contrary to the defendant's assertion that he did not intend for Sally to die because he sought medical help, the record shows the defendant admitted he did not **seek** any medical help for Sally and in reality only called 911 after she was already dead in furtherance of the alibi plan. (R.278-9; T.1839, 195-51). The defendant even refused to give Sally water she could not get for herself despite his belief she was dehydrating. **(T.1797-99)**.[17] The record supports the trial court's finding the murder was committed for pecuniary gain. See e.g.: Jones v. State, 15 FLW

17 The above facts also support the trial court's finding of CCP since the defendant argues that he did not intend to commit the murder because he tried to help Sally.

5605 (Fla. November 23, 1990); Michael v. State, 437 So.2d 138 (Fla. 1983), cert. denied, 465 U.S. 1013, 79 L.Ed.2d.

The defendant also claims the trial court erred in finding CCP as he asserts that "nothing in the record supports a determination...that either the defendant or Surace intended the victim to die." (Defendant's brief p.70). The record clearly refutes this assertion, however. The undisputed testimony of Barbara Garritz established that even before the defendant became involved in the beatings he went into the bedroom and told Ms. Garsitz that he was so furious with Sally he wanted to kill her. (T.1737-8). During the initial phase of the beatings, Sally was told they would kill her if she cried out, if she didn't straighten out, or if she said anything to her mother during the phone call. (T.1754-55, 1794, 1943-44). Additionally, the testimony showed that the defendant and Surace had planned to "get rid of" Sally and had discussed dumping her in a canal near the motel. (T.1803-4). The fact they ultimately killed her by beating her to death over a prolonged period of time also supports the finding of CCP. It is impossible to believe that anyone who participated in beatings of the length and severity involved in this case did not know that the ultimate result would be the death of the victim.

Findings of CCP are not limited to witness elimination or contract murders. Ruthsrford v. State, 545 So.2d 853 (Fla. 1989), cert. denied, 110 S.Ct. 353 (1989). The evidence shows that the defendant had ample opportunity during the crime to reflect upon his actions and their consequences, particularly as

the beatings ceased during significant periods as, for example, while the phone call was made. See: Turner v. State, 530 So.2d 45 (Fla. 1987), cert. denied, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1988); Jackson v. State, 522 So.2d 802 (Fla. 1988), cert. denied, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988). The fact that at trial the defendant claimed he did not initially intend to kill Sally does not preclude a finding of CCP given the facts of this case. Scott v. State, 484 So.2d 1134 (Fla. 1986). Additionally, contrary to the defendant's assertion on appeal, the facts of this case also support a conviction based on a theory of premeditated murder and they, without doubt, support the prerequisite finding of heightened premeditation necessary to this aggravating factor.

C.

The Trial Court Did Not Err In Failing To Find The Existence Of Numerous Statutory And Nonstatutory Mitigating Circumstances Argued By The Defense When They Were Refuted By Other Substantial Competent Evidence.

The defendant claims that in addition to the other errors set forth in his brief the trial court also erred in failing to find numerous statutory and nonstatutory mitigating circumstances, This argument totally ignores the fact that the finding, or not finding, of mitigating factors is within the trial court's discretion which will not be disturbed an appeal unless a clear abuse is shown. Stano v. State, supra. Additionally, as this Court stated in Campbell v. State, supra, "the court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence.''

This Court went on to clarify that "this is a question of fact and one court's finding will be presumed correct and upheld on review if supported by 'sufficient'competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). When these principles are applied to the evidence produced at trial, which is discussed below, it is clear that the trial court was eminently correct in rejecting these statutory and nonstatutory circumstances urged by the defendant.

1). The defendant was not operating under extreme mental or emotional duress.

The defendant argues at length, utilizing the testimony of his experts to support his claims, that th trial court incorrectly rejected evidence that at the time of the crime he was operating under extreme mental or emotional duress. This claim totally ignores the fact that the State's expert witnesses expressly refuted his experts' findings.

Unlike any of the defense experts, two of the State's experts examined the defendant in close proximity to the crime. (T.2725, 2779-81, 2814-5). Dr. Mutter found no evidence of any major mental defect and further found that the defendant had the ability to function and reason. (T.2758, 2786-8). He further testified that the defendant did, in fact, recall the events of March 30, 1976 and lied when he denied it. (T.2788). Similarly, Dr. Jaslow found no evidence of serious organic brain damage that could be attributable to the crime and found him fully able

to communicate. **(T.2814-15,** 2811, 2830). Significantly, he found no evidence that the defendant was acting under extreme mental ok emotional duress. **(T.2831).** Dr. Miller, who examined the defendant in **1988,** found no evidence of organic brain damage and found the defendant to be of average intelligence. **(T.2894, 2898, 1904-5).** Dr. Haber found no evidence of mental illness or impairment. **(T.2980-1).** All of the State's experts, (as well as, the defendant's **expert,** Dr. Carbonel) testified that what was more important than merely considering an I.Q. score was the actual level an individual functioned at; all felt the defendant functioned above his I.Q. score. (T.2773, **2815, 2817-8, 2830, 2898, 2904-5, 1960-2).**

The defendant also argues that the defendant's disturbance is illustrated by his "suicide" attempt while in prison, However, the record reflects and the defendant concedes, that he stabbed himself in the furtherance of an escape attempt. **(T.2966-70). The** defendant **at** no time relayed a history of headaches or blackouts during any examination by a State's expert.[18] **The** trial court thus acted within its discretion by rejecting the existence of this mitigating circumstance. See: Stano v. State, supra.

2). The defendant acted under the substantial dominion of another.

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[18] The remaining matters urged in support of this mitigating factor will be addressed below in the appropriate separate categories argued by the defendant.

The defendant urges that the trial court erred in failing to find that he acted under the dominion of Surace during the commission of the crime. He first claims that every one of the defense witnesses described him as a follower. Interestingly enough, none of the witnesses who testified on his behalf had seen him for twenty-odd years at the time they testified and none had any contact with him at the time of the crime. Barbara Garritz, the only eyewitness to the crime, painted a picture in which the defendant was portrayed as an active co-participant in the proceedings. In speaking with Detective Smith, she recanted her affidavit, relied upon by the defendant, and specifically stated that the term "follower" was not her own but was supplied to her by the defense. (T.2683, **2685-6).** Furthermore, the defendant's own confessions, not to mention his testimony at the Surace trial, totally belies the claim that he acted under the dominion of Surace. Contrary to the defendant's assertion, all of the State experts, including Ds. Miller (who stated it seemed likely he was not acting under the dominion of another See;T.2908) stated the defendant was not acting under the influence of Surace. (T.2823, 2791, 2984). Hill v. State, **515** So.2d **176** (Fla. 1987), cert. denied 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

3). The defendant was unable to appreciate the criminality of his conduct.

The defendant asserts that the trial court erred in failing to find that he was unable to appreciate the criminality

of his conduct. This assertion is controverted on the record, not only by his own canfession in which he states he knew what he was doing was wrong, but also by the testimony of all of the State experts. All of these doctors testified that he was able to appreciate the criminality of his conduct and that he knew the difference between right and wrong, but that he simply didn't care. (T.2763,2791,2828-9,2830,2832,2894,2899,2908,2980-2) Even his ex-wife believed he knew the difference between right and wrong. (T.2356). Cook v. State, 542 So.2d 964 (Fla. 1989).

4). Other aspects of the defendant's character.

a). History of emotional and physical abuse.

The defendant claims the trial court erred in failing to consider the emotional and physical abuse dealt him by his family as a mitigating factor. All of the evidence he relies upon, however, was refuted. The trial court could therefore reject it as a mitigating circumstance.

The defendant first points to his claim that he lived in a filthy home where no love was displayed. These assertions were clearly refuted by his own brother who testified on his behalf!(T.2389-90). The defendant asserts that because Tim Thompson was the only witness to testify as to these facts his testimony is outweighed by that of other individuals who testified to the contrary. However, the mere number of people involved is not significant. See: State v. Sebastian, 171 So.2d 803 (Fla. 1965). The defendant's cousins, for example, admitted

that they spent three or four days a a year visiting the defendant's family; neighbors admitted they had never even been inside the defendant's home. No witness was able to testify first hand as to signs of physical abuse on the defendant; the only so-called witness to the gun incident, Mrs. Black, did not appear at trial. Additionally, Ms. Black did not see the incident herself and her account, through her son, was refuted by the defendant himself who identified a different parent. (T.2480,3241). The affidavit of Ms. Black is also suspect as she did not appear on his behalf at trial and was thus not available for cross-examination. Additionally, this affidavit was prepared on the defendant's behalf by CCR and must be examined with the same scepticism as that of Barbara Garritz since the testimony of Detective Smith clearly established that Ms. Garritz later recanted her affidavit as not being her own. It is thus clear that the trial court viewed Tim Thompson's testimony as more credible then that of other witnesses, particularly since his testimony was that of a first party observer and was offered by the defense. It did not abuse its discretion in rejecting this mitigating circumstance. See: Kight v. State, 512 So.2d 922 (Fla. 1987), cert. denied, 108 S.Ct. 1100, 99 L.Ed. 262 (1988); Johnston v. State, 497 So.2d 863 (Fla. 1986).

b). The defendant's alcohol and substance abuse.

The defendant claims the trial court erred in rejecting his history of alcohol and substance abuse as a mitigating

factar. The record is replete with inconsist information, provided by the defendant, as to exactly what substances he abused at t e time of the crime. The only eyewitness, Ms. Garritz testified that there was beer present, but did not delineate how much was consumed by anyone. Surace testified that the defendant consumed one to two beers during the entire day. (T.2711). The defendant's 911 tape recording and the testimony of police officers on the scene belie his claim he was under the influence as does his own behavior in carrying out the alibi and his confessions. (R.257-265, 269-279; T.1833-4, 1841-2). The defendant's testimony at the Surace trial also establishes that he was not under the influence at the time of the crime, that Surace was the one who had been in a substance induced stupor for the prior month. (R.283, 307-8, 327; T.2000, 2024-5). See: Hardwick v. State, 521 So.2d 1071 (Fla. 1988), cert. denied, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988).

The defendant's claim of intoxication is rendered less than credible by his own experts, who relied upon nothing more substantial than the defendant's own self-report, and the defendant's own testimony. Dr. Stillman testified that the defendant told him that for four to five days prior to the murder he consumed twelve to fifteen cans of beer and ten to eighteen quaaludes. (T.2593). Dr. Carbonel testified that the defendant told her he consumed ten to fifteen quaaludes on the day of the murder which she added would have rendered him nonfunctional. The defendant testified that Dr. Carbonel lied if she testified as to the aforementioned quantities. (T.3274).

He told the State's expert, Ds. Jaslow that he consumed three 714 methaqualones. (T.2819, 2821). Dr. Jaslow found the defendant's handwritten confession of great significance since it was made shortly after the crime itself and refuted both the defendant's claim that he did not recall the events of that day and his claim he was under the influence of drugs and alcohol at the time. (T.2828-9). Rocco Surace also testified that the defendant only drank one or two beers on the day of the crime. (T.2711, 2715).

Finally, the record cantains the testimony of only one witness other than the defendant himself regarding his claimed history of substance abuse, that of his ex-wife. Her testimony is less than credible, however, since she was obviously biased and her testimony was impeached.

c). The defendant's history of nonviolent behavior.

The defendant claims the trial court incorrectly ignored his history of nonviolent behavior as a valid mitigating factor. The record below clearly establishes that the court properly failed to find this circumstance.

The defendant incorrectly asserts that his former wife, Donna Adams, testified that he pushed on her only once during their relationship and that their child was injured as a result. The record establishes that Ms. Adams, in actuality, stated that the defendant had "shoved" her many times during the course of their relationship and that as a result of this particular incident their infant son sustained an injury requiring nineteen

stitches. (T.2345). The defendant also threatened to get even with Ms. Adams who he blamed for his having murdered Sally. Additionally, the defendant admitted to Dr. Jaslow that he had committed two armed robberies, one with a knife and one with a gun. (T.2826). While in prison, the defendant stabbed himself in furtherance of an escape attempt and was also found in the possession of a "zip" gun. (R.753). The defendant was obviously not a nonviolent individual.

c). The defendant's capacity for love.

The defendant alleges the trial court erred in failing to find his capacity for love in mitigation and points to his loving relationship with his former wife and children. The record below once again supports the trial court's finding that this mitigating circumstance did not exist. The defendant's former wife testified that the defendant shoved her around many times during their relationship, a pattern of behavior which, as stated above, resulted in a serious injury to their child. (T.2345). The defendant was so loving he blamed Ms. Adams for his having committed the murder and threatened to get her if he was ever released. (T.2351-3). Furthermore, his assertedly loving relationship with his children was also refuted by Ms. Adams who testified he was a father to their eldest son for five months. (T.2348). It is clear that he never even saw his daughter, with whom Ms. Adams was pregnant at the time of the murder, and had no compunction at cheating on his wife while still married. The defendant loved the victim, with whom he was

having an affair, so much that he beat her to death. He was also so loving he had had no contact with his immediate family for years and informed his mother he did not want to consider her as part of his family any longer.

d). The disparate sentence received by Surace.

Finally, the defendant claims that the trial court should have found the fact that Surace received a lessor sentence a mitigating circumstance. However, this argument is ludicrous in view of the fact that the only reason Surace did, in fact, receive a lessor sentence was solely due to the fact the defendant took the stand at Surace's trial **and** confessed to having committed the murder single-handedly. As the court below stated, "if the defendant's testimony at Surace's trial was false then his acts and **false** testimony are responsible for the disparate convictions. If the defendant's testimony was true, as Rocco Surace testified to at this sentencing hearing, then the defendant and Surace were not equally culpable and the defendant should be treated differently..."(R.770). The trial court's rationale shows it was eminently correct in rejecting this factor.

The foregoing analysis, when viewed in light of applicable case law, supports the trial court's rejection of these statutory and nonstatutory mitigating circumstances since competent, substantial evidence that refuted their existence was presented during the sentencing hearing. The trial court thus acted within its discretion and this Court must affirm those findings.

CONCLUSION

The argument above therefore shows the defendant is not entitled to the relief requested. Nevertheless, as his "last-ditch" effort to prove his **case**, he asserts that the **entire** sentencing proceeding was flawed because the jury was unable to impartially participate in the proceedings due to the nature of **the** crime itself. This argument is without merit, since it, should this Court accept it as true, would make a trial or sentencing of any defendant guilty of a comparable crime impossible. It also makes **a** mockery of the basic principles underlying our criminal system and denigrates the function of the jury within that system.

Based upon the foregoing arguments, **the** Appellee, THE STATE OF FLORIDA, respectfully requests that this Court affirm **the** sentence imposed **below.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to GEOFFREY C. FLECK, Esquire, Counsel for Defendant/Appellant, 5975 Sunset Drive, Suite 106, South Miami, Florida 33143 on this 10th day of February, 1991.

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