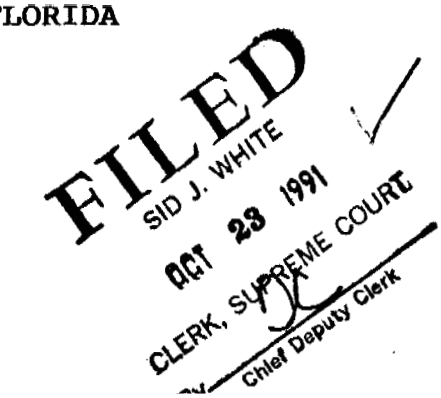
IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,493




RAYMOND PADILLA,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee.

**********

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

**********

# BRIEF OF APPELLEE

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## INTRODUCTION

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

## STATEMENT OF THE CASE AND FACTS

An indictment charging Defendant with first degree murder of Paul Gomez and attempted first degree murder of Marisella Davila was filed on March 1, 1989. (R. **1-2A).**

On March 12, **1990,** trial commenced before the Honorable Roy T. Celber. During voir dire, Defendant made motions to **strike** jurors Wallen **and** Negron for **cause;** both motions were denied. (R. 546-48). The State, on March 13, 1990, began presentation of its case. (R. 571). The follawing testimony was presented to **the** jury:

Louis Rodriguez testified that, on February 10, **1989,** he loaned Defendant money and received Defendant's .38 caliber revolver as collateral for the loan, (R. 609-10). Around dinner time that same evening, Defendant appeared at Rodriguez' house and asked for the return of the gun. Defendant was bleeding from his head and hand and explained that "the gordo and hi3 cousin" had beaten him up. (R. 610-11). Rodriguez gave the gun to

Defendant and admonished him to be careful out there. Defendant replied, "A man has got to do what a man has got to do.", and left with the revolver. (R. 612).

Approximately thirty minutes later, Defendant returned and asked Rodriguez for more ammunition. Rodriguez asked Defendant what he had done with the other bullets, and he responded that he had "wasted the bullets." (R. 613). Rodriguez found three bullets from another gun and gave them to Defendant, whereupon Defendant left. (R. 612-13).

About one half of an hour later, Defendant came back to Rodriguez' house. Defendant stated that he "had shot them and that he needed a ride to his house." (R. 614). Initially Rodriguez drove Defendant home to pick up his wife, children, and luggage, and then drove them to a friend's house in Carol City. (R. 614-15, 630-31).

Later that evening, as Rodriguez was watching the eleven o'clock news, Defendant called to inquire about the neighborhood and Rodriguez informed him that one victim had died and the second was hospitalized, Rodriguez advised Defendant to let his wife and children return home and for Defendant to flee on his own. (R. 615-16).

Wendell English testified that on February 10, 1989 he lived in the apartment complex located at 2860 N.W. 135th Street in

Opa-Locka. (R. 634-36). After eating dinner, English went outside to the second floor hallway bannister to smoke a cigarette. (R. 637). While English was standing outside, he observed a heavyset male, who had just moved into a downstairs apartment, taking boxes out to the trash dumpster. (R. 642-43). English also noticed that Defendant was standing near him on the outside second floor walkway. (R. 643-45). As the heavyset male returned from the dumpster to the apartment he was approximately thirty-five (35) feet away from Defendant who then pulled a gun from his waistband, stated, "Yeah motherfucker, I got you now", and shot the heavyset male once. (R. 648-49, 777). The heavyset male fell to the ground face down. (R. 650, 652). Prior to the shooting, the heavyset male did not say or do anything, nor did he have anything in his hands. (R. 650). A woman came out of the same downstairs apartment, as had the heavyset male, and Defendant pointed the gun at her. (R. 651). English heard one additional shot, whereupon he ran to get help. (R. 652).

Bobby Flowers was in the parking lot, repairing his car radio, at the time of the shooting. (R. 687). Flowers saw Defendant standing upstairs next to Wendell English, prior to the shooting. (R. 690). Flowers heard Defendant say, "I got you now motherfucker" as he shot the male victim. (R. 693). The male victim, who had nothing in his hands, had not said anything, and had not made any threats, fell face down to the ground upon being shot by Defendant. (R. 696). Defendant ran downstairs and shot at the female after she opened the door to the downstairs apartment. (R. 695).

Officer Ray Suarez and paramedics George Mullens and Orlando Mayor were dispatched to the scene of the shootings. (R. 715, 721, 725). The female victim, Marisella Davila, was screaming hysterically with blood coming from the injury to her head. (R. 718, 722). The dead male victim was lying face down in the parking lot with a single gunshot wound to the head. (R. 716, 725). Paramedic Mayor turned the male victim over and removed a gun which was tucked underneath the victim's clothes, inside of the waistband of his pants. (R. 725-26). Hand swabs were taken from the male victim, identified as Paul Gomez (also known as Portfirio Gomez), and analyzed for gunshot residue. (R. 759, 927, 960, 966). No gunshot residue particles were present in the hand swabs taken from Gomez. (R. 928).

Marisella Davila testified that she had known Defendant for a couple of months before the shootings. (R. 807). She had dated Defendant and he had lived with her for a short period of time in January, 1989. (R. 809). When she decided to move from 201 Sharazad Boulevard to a new apartment, at 2860 N.W. 135th Street, Defendant assisted her by interpreting the arrangements with the landlord. (R. 813). Davila moved from Sharazad Blvd. to 135th Street from 8 a.m. until 5 p.m. on February 10, 1989. (R. 814). When Davila left her old apartment at Sharazad Blvd., at 5 p.m., there were neither bullet hales in the window nor marks on the walls. (R. 818-20).

Davila's nephews, Hector and Paul Gomez, arrived at her apartment at 135th Street around 6 p.m. (R. 823). The two boys left to go to Burger King and returned fifteen or twenty minutes later. (R. 824). When they returned, Hector told Davila that he had fought with Defendant. (R. 825). Gomez left for approximately ten minutes to take Davila's son to church. (R. 825-26). Upon returning to the apartment, Gomez took boxes outside to throw them away in the trash dumpster. While Comez was outside, Davila heard a very hard boom, "like a shot". (R. 827). Davila ran to the front door and opened it, only to see Defendant standing outside pointing a gun directly at her. (R. 828). She closed the door and felt something pull her back. (R. 830). Next, Davila noticed blood on herself and realized that she had been shot and was wounded. (R. 830-31). She went outside and saw Gomez lying dead in the parking lot. (R. 831).

When the homicide detectives arrived on the scene, Davila gave them Defendant's name. She was taken to the hospital for the injury to her head and stayed overnight. (R. 832). While in the hospital, Davila identified a photograph of Defendant as the perpetrator and gave a statement of the events. (R. 781, 833).

At approximately 9:20 p.m., Crime Scene Technician Michael Byrd was called to the scene of the shootings to gather evidence. (R. 743-44). Byrd testified that he observed a gunshot hole in the front door of apartment #95. (R. 745-46). A dowel was inserted in the hole in the front door to ascertain that the door

was closed when the bullet entered it. (R. **750).** A hole in the living room wall corresponded with the hole in the front door. (R. **751).** A projectile, with hair fragments, was recovered from a section of the west wall in the living mom. (R. 752, **777).**

Metro Dade Homicide Detective James McDermott, lead detective on the case, arrived at the scene of the shootings at **8:50** p.m. and observed the body of Gomez lying in the parking lot. (R. **850).** After investigation at the scene, Defendant became a suspect for the murder of Gomez and the attempted murder of Davila. (R. 851). Detective McDermott dispatched Detectives Romagni and Alvarez to locate Defendant. (R. **852).**

Detectives Romagni and Alvarez found Defendant the next day at the home of Marjorie Quinones. (R. 783, 789). Defendant was arrested for first degree murder and advised of his Constitutional sights. (R. **785, 854).** He signed a form acknowledging that he had been advised of his rights and understood them. (R. 104, **856-57).** Thereafter, Detective McDermott conducted a preinterview with Defendant. (R. 858). Defendant stated that on February 10, 1989 he was at work when, between six and six-thirty p.m., "Fat Boy" (Hector) and Gomez appeared and asked him to come outside. Once outside, "Fat Boy" jumped on Defendant and proceeded to beat him **up.** After being beaten **up,** Defendant went to his friend, Raymond, to obtain assistance in getting revenge. Raymond advised Defendant to forget about the incident. **(R. 859).**

Initially, Defendant did not admit shooting Gomez. (R. 860). After further discussion, Defendant stated that following the fight with "Fat Boy" he went to a friend's house, procured a gun, and went to Davila's new apartment. (R. 861). Once at the apartment complex, Defendant walked up to the balcony overlooking the parking lot. When he saw Gomez walking towards the apartment, defendant pulled out the gun, pointed it at Gomez, stated, "I've got you now motherfucker.", fired one shot, and Gomez fell to the ground. (R. 862). After shooting Gomez, Defendant went downstairs and saw the apartment door open. Thinking that "Fat Boy" would be coming out, Defendant fired two shots into the apartment and left. (R. 862-63). While fleeing to a friend's house, Defendant threw the gun into a canal at the Opa-Locka airport. Defendant accompanied the detectives to the canal to direct them to the gun. (R. 863). Police divers were unable to recover the gun. (R. 864).

Subsequent to the oral interview with Detective McDermott, Defendant gave a statement which was transcribed by a stenographer. (R. 864). The sworn statement was admitted into evidence at trial and read to the jury. (R. 865-79). In his statement, Defendant described the gun he used as a ".38 special, blue steel". Additionally, Defendant stated that he went to the apartments to shoot "Fat Boy". (R. 875). After committing the murder and attempted murder, defendant called his girlfriend and instructed her to get the children together because they had to

go somewhere. A friend took defendant and his family to Margie Quinones' house in Carol City. (R. 878).

Upon being released from the hospital, Davila went to her old apartment at 201 Sharazad Blvd. where she observed holes in the window that had not been there the day before, when she had completed moving out. (R. 833). Davila told Detective McDermott about the holes in the window and gave him a key so that he could have access to the old apartment. (R. 834).

Detective McDermott went to the apartment at 201 Sharazad Blvd. and observed the bullet holes in the window. (R. 886). The detective noticed the corresponding bullet holes in the walls and floors inside the apartment. (R. 887). At trial Detective McDermott identified for the jury, photographs of the apartment and the bullet damage. (R. 887-89). He also described a diagram of the streets where the events of February 10th occurred. The garage where Defendant worked was three-tenths (.3) of a mile from Rodriguez' house, where he obtained the gun. Defendant's house was seventy-five (75) yards from the garage where he worked, and Davila's old apartment, at Sharazad Blvd., was between one-hundred (100) and one-hundred-fifty (150) yards from Defendant's house. The distance between Rodriguez' house and the murder scene was three-tenths (.3) of a mile. (R. 894).

Crime Scene Officer Agnes Duncan testified regarding the evidence she collected from the apartment located at 201 Sharazad

Blvd. (R. 915-16). Four projectile holes were observed in the window on the west side of the front door. (R. 918). Two bullets were retrieved from the living room floor, one was recovered from the kitchen floor, and the final one was found on the bedroom floor. (R. 918-23).

Associate Medical Examiner J.S. Barnhardt, Jr., delivered expert testimony in the field of forensic pathology. (R. 960-62). Doctor Barnhardt responded to the scene of the homicide and observed the body of Gomez face up on a backboard. (R. 964). He noted a single gunshot wound through the left side of the back of Gomez' head and felt the bullet beneath the skin of Gomez' right forehead. (R. 965).

The next day, Dr. Basnhardt performed an autopsy on Gomez and determined the path of the bullet. The projectile entered on the left side of the victim's head, four (4) inches above the ear canal, proceeded into the skull, through the left side of the brain, into the right side of the brain, out of the bone on the forehead, and lodged in the soft tissue of the right forehead, where it was recovered. (R. 966-67). Gomez also had freshly sustained abrasions on the left side of his face, his left shoulder, and left arm; these abrasions were consistent with having fallen to the ground upon being shot. (R. 965, 972). Dr. Barnhardt determined that death was caused by the single gunshot which instantly incapacitated Gomez. (R. 971, 971).

Firearms examiner Thomas Quick was qualified as an expert in the area of firearms and ballistics. (R. 930-32). Quick examined the projectile retrieved, by the medical examiner, from the body of Gomez and labelled it "A". (R. 933). The projectiles recovered from Davila's prior apartment, at 201 Sharazad Boulevard, were labelled "B", "C", "D", and "E". (R. 935-36). The projectile found in the living room wall of Davila's apartment at 135th Street was labelled "F". (R. 935). Quick examined projectiles "A" and "F" and determined that they were .38 special, 357 magnum copper jacket bullets, which had both been fired from the same gun. (R. 937-39). Projectiles "B", "C", "D", and "E" were analyzed by Quick and all four had the same characteristics, to-wit: same caliber, number, land, and section of groove, and were all lead bullets. (R. 939-40). The four projectiles were consistent with being fired out of the same type of gun as projectiles "A" and "F". Due to the mutilation of the four lead bullets, Quick could not say absolutely that all six were fired out of the same gun, only that they were "very consistent". (R. 941). Quick's conclusion of "very consistent" was based on his examinations which revealed that all six were fired from a revolver, all were .38 special 357 bullets, all had land and grooves, right hand twist with a groove width of 58 thousandth of an inch. (R. 941-42).

The State rested after presenting all o the above testimony and evidence. (R. 977). Defendant moved for judgment of acquittal on the ground that no evidence of premeditation had

been presented. (R. 978-80). The motion was denied. (R. 980). Defendant presented no evidence and rested. (R. 981). Closing arguments were given. (R. 1036-88). Defendant requested a jury instruction regarding consideration of collateral crime evidence. The request was denied. (R. 1007-8). The jury was instructed and retired to deliberate. (R. 1089-1109). The jury found Defendant guilty of first degree murder of Paul Gomez and attempted first degree murder of Marisella Davila, as charged. (R. 228-29, 1111-12). Defendant was adjudicated guilty on both counts and the cause was passed for sentencing. (R. 230-31, 1116).

On April 12, 1990, the Court reconvened for the penalty phase. (R. 1126). A hearing was held on Defendant's motion to suppress his 1974 statement, given in New York, confessing to the murder of Charles Demeaz. (R. 1161-1191). The motion to suppress was denied. (R. 1191).

The jury reconvened for the sentencing phase and opening statements were not made by either party. (R. 1203). The trial court instructed the jury as to their role prior to the presentation of evidence. (R. 1203-5).

First, William Leabon testified for the State that he was the New York parole office assigned to monitor Defendant's case. Defendant had been sentenced to serve twenty (20) years for first degree manslaughter and was paroled on June 27, 1986. Defendant's parole obligation would expire on October 26, 1994,

thus he was still on parole at the time he committed the instant offenses, and thereby in violation of that parole. (R. 1206-11).

Defendant stipulated that he had previously entered a plea to manslaughter and been sentenced to twenty (20) years imprisonment. (R. 1214-15).

Next, retired New York City Homicide Detective Santos Brocato testified that he investigated the July 4, 1974 death of Charles Demeaz. On July 9, 1974, Defendant, who was a suspect in the case, gave a statement to Brocato implicating himself in the murder of Demeaz. (R. 1222-33). The statement, which outlined the circumstances of the murder, was admitted into evidence during the sentencing hearing. (R. 247-69, 1224-33). Defendant stated that he was invited to have a beer in the victim's apartment. (R. 256, 1227). When the victim took off his pants and came toward him, Defendant hit the victim in the chest and face. (R. 257, 1228-29). The victim fell unconscious into the bathtub full of water and Defendant began to look around for valuable items to take. (R. 258-59, 1229-30). After finding a ring, camera, chain, and television set, Defendant observed the victim trying to get up, so he pushed the victim's head under water. (R. 260, 1230-31). A short time later, Defendant saw the victim lying on his side and held his head under water again. (R. 1231). Defendant was charged with second degree murder and entered a plea to manslaughter. (R. 1237).

Thereafter, the State rested. (R. 1240).

Yolanda Padilla, Defendant's sister, testified on his behalf at the sentencing hearing. (R. 1241-42). Yolanda described the physical abuse regularly inflicted on Defendant, as a child, by their mother and father. (R. 1244-49). She also recounted how Defendant was taken for electric shock treatment when he was nine or ten years old. (R. 1250). At age twelve or thirteen, defendant was hospitalized in a mental facility in Ohio. (R. 1251) Yolanda recalled that Defendant received the bulk of the violence when they were growing up. (R. 1253).

Jeffro Toomer, expert psychologist, stated that he had examined Defendant and diagnosed him as having a borderline personality disorder. In Toomer's opinion, defendant was both unable to appreciate the criminality of his conduct and unable to conform his conduct to the requirements of the law. (R. 1262). Toomer drew these conclusions based on a psychosocial history provided by Defendant. (R. 1262-63). Toomer outlined the background of Defendant by describing the dysfunctional family dysfunctional behavior and the physical abuse within the family. (R. 1263-66). Defendant also told Toomer that, as a child, he had received electric shack treatment and been hospitalized in psychiatric institutions, (R. 1267-70). Toomer described the characteristics of a borderline personality disorder. (R. 1274-76). In his opinion, a person with a borderline personality disorder has very little tolerance for frustration and usually

counters it with aggression. When faced with a conflict, the person will respond with violence. (R. 1275).

In the process of obtaining Defendant's psychosocial history, Toomer discussed what led to his incarceration in New York. (R. 1287, 1295). When Defendant discussed the 1974 death of Charles Demeaz, he denied being responsible for the death. (R. 1295-96). Defendant described the 1974 murder as a physical confrontation between himself and the victim. (R. 1296). Additionally, Defendant stated that the victim was still alive in the bathtub when he left the apartment. (R. 1296-97).

With respect to the instant crimes, Defendant told Toomer that he got beaten up by a guy and went to get a gun to shoot the guy. (R. 1304). Defendant further stated that he went to one apartment to look for the guy who had beaten him up, did not find him there, and went to a second apartment looking for him. (R. 1304-5). According to Toomer, he stated that he intended to shoot the guy, but not to kill him. (R. 1305).

On the second day of the sentencing hearing, Defendant testified. (R. 1314-16). He described his educational and residential background, as well as his dishonorable discharge from the Army. (R. 1317-29). Defendant testified that he remembered all of the whippings he received as a child. He recalled that his father always took violence out on him. (R. 1333). Defendant summarized his treatment in psychiatric institutions as an adolescent. (R. 1338-42).

Defendant described the events of February 10, 1989 as follows: Hector, (a.k.a. "Fat Bay"), and Gomez came by the place where Defendant worked. Hector beat him up, so Defendant got a gun and went after Hector. **(R. 1354-55).** He now feels badly about shooting **Gornez,** because Gomez was his friend. (R. **1355).** Additionally, he testified that he never said, "I gat you now motherfucker", rather it was "I got a gun now motherfucker". (R. 1378).

Following Defendant's testimony, the defense rested. **(R. 1391).** The State did not present any evidence in rebuttal.

After both sides rested, closing arguments were given. **(R.1392-1442).** The State argued that the following aggravating factors were applicable to the murder of Paul Gomez: (1) the murder was committed by a **person** under sentence of imprisonment, (2) the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some other person; **(3)** the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. **(R. 1393-1401).**

Defendant conceded the applicability of two aggravating factors, but contested the applicability of **(3)** the murder was committed in a cold, calculated, and premeditated manner, (R. **1421).** Defendant argued in mitigation that the murder was

committed while he was under extreme emotional disturbance, the victim was a participant, he was unable to appreciate the criminality of his conduct, and he acted under extreme duress. **(R. 1429-40).**

Thereafter, the jury received the penalty phase instructions. (R. **1442-48).** The jury recommended the imposition of the death penalty by a 9-3 vote for the murder of Paul Gomez. **(R. 173, 1448-49).**

On May 25, 1990, Jeffro Toomer presented additional evidence to the trial court. (R. **1454).** He described Defendant's history of chronic alcohol and drug abuse. (R. **1455-58).** Based **on** Defendant's self-report, Toomer testified that on the day of the murder Defendant consumed one gram of cocaine, three six-packs of beer, and one-half of a bottle of Bacardi. (R. **1457).**

The trial court entered the sentencing order, (R. **235-40),** finding three aggravating factors for the murder af Paul Gomez:

> 1. The murder was committed by a person under sentence of imprisonment. (R. **236).**
>
> **2.** The defendant was previously convicted of another capital felony or of a felony involving the use of, or threat of, violence to the person. (R. 236-7).
>
> 3. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R. **237).**

The court found one mitigating factor, to-wit:

> 1. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. (R. 237-8).

The court found no "credible" evidence to support the mitigating factor that the defendant's ability to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired. (R. 238). The sentencing order concluded with the following:

> This Court is fully aware that in determining whether to impose life imprisonment or death the procedure is not a mere counting process of x number of aggravating circumstances and y number of mitigating circumstances, but instead a reasoned judgment as to what factual situation requires the imposition of death and which circumstances can be satisfied by life imprisonment in light of the totality of the circumstances.
>
> The Court finds that there are three (3) aggravating factors, and one (1) mitigating factor. The Court has received the entire record, including the testimony and evidence in the trial and sentencing proceedings to determine whether there might possibly exist anything else, whatsoever, of a non-statutory mitigating nature, that could be considered by this Court in mitigation of this sentence. The Court also heard from the defendant, who indicated he feels remorseful. Forgiveness is up to God whenever we all meet him. However, this Court must follow the law and cannot ignore, despite counsel's urging, the jury's recommendations
>
> WHEREFORE, the Court agrees with the jury's recommendation of death. (9 to 3), finds that the possible sole mitigating circumstance, his personality disorder because he is the

> victim of child abuse by his father and mother, is outweighed by the three aggravating circumstances listed. The Court further finds that such mitigating circumstances does not apply in this case to a degree which would cause it to mitigate the crime or the sentence. In conclusion, the Court having reviewed the testimony and evidence presented during the sentencing hearing, finds that there are sufficient aggravating circumstances to justify the sentence of death which outweigh any mitigating circumstance that may be present. As reported in Suarez v. State, 481 So.2d 1209, (Fla. 1985), "the sentencing process is not a mere exercise of counting up aggravating circumstances."
>
> It is therefore, the Judgment and Sentence of the Court, that Raymond Padilla, having been previously adjudicated guilty of Murder in the First Degree, be sentenced to death for the murder of Paul Gomez.
>
> (R. 238-39).

Notice of appeal was filed on August 9, 1990. (R. 281).

This appeal then followed.

## POINTS ON APPEAL

**I.**

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE CHALLENGES FOR CAUSE MADE DURING VOIR DIRE AGAINST PROSPECTIVE JURORS WALLEN AND NEGRON?

**II.**

WHETHER THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR MISTRIAL MADE IN RESPONSE TO THE STATE'S INTRODUCTION OF RES GESTAE EVIDENCE?

**111.**

WHETHER THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S REQUEST FOR A SPECIAL INSTRUCTION ON HOW TO CONSIDER COLLATERAL CRIME EVIDENCE?

**IV.**

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**VI**

WHETHER THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED?

**VII**

WHETHER THE TRIAL COURT PROPERLY CONSIDERED EACH MITIGATING FACTOR PROPOSED BY DEFENDANT?

## VIII

**WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES WHEN IMPOSING SENTENCE FOR THE NON-CAPITAL FELONY?**

## SUMMARY OF ARGUMENT

Defendant did not identify Juror Wallen or Negron as an objectionable juror when requesting additional peremptory strikes and did not preserve the issue for appellate review. Additionally, the trial court did not abuse its discretion in denying challenges for cause against Jurors Wallen and Negron where both jurors stated, unequivocally, that they would fallow the instructions given by the court.

The evidence linking Defendant to the shooting at 201 Sharazad Blvd. was inseparable from the evidence linking him to the shootings at 135th Street and was properly admitted. Evidence of the earlier shooting comprised a part of the so-called *"res gestae"* and was properly admitted to adequately describe the deed. In order to establish the Defendant's state of mind at the time and place in question, the State produced evidence of the shooting at Davila's former apartment.

Because evidence of the prior shooting was introduced to present a complete account of the criminal episode under Section 90.402, not as collateral crime evidence under Section 90.404(2), the trial court was not required to give an instruction limiting its use pursuant to the standard instruction for section 90.404(2).

The trial court properly allowed the State to introduce evidence regarding the events which resulted in Defendant's prior violent felony conviction for manslaughter. It is proper to introduce during the penalty phase of a capital trial evidence of the circumstances surrounding any prior felony conviction involving the use or threat of violence as it assists the jury in assessing the character of the defendant, thereby enabling them to make an informed recommendation.

The determination of the trial court that Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired is supported by substantial, competent evidence and should be final. The testimony of Toomer was refuted by the evidence presented during the guilt phase which described the actions of Defendant on the night of the murder and indicated his ability to appreciate the criminality of the shootings.

The trial court correctly found that the murder of Paul Gomez was committed in a cold, calculated, and premeditated manner where the evidence proved a heightened premeditation to kill. Further, Defendant's position that the murder was committed due to a pretense of moral or legal justification is irreconcilable with the facts of the murder.

The jury was instructed on all mitigating circumstances to be considered and it can be presumed that the trial judge followed his own instructions on the consideration of nonstatutory mitigating evidence. Moreover, it is unnecessary to reach the question whether the order expressly evaluates each proposed mitigating factors, because *Campbell* is not a fundamental change of law requiring retroactive application.

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

## ARGUMENT

### I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENSE CHALLENGES FOR CAUSE MADE DURING VOIR DIRE AGAINST PROSPECTIVE JURORS WALLEN AND NEGRON.

Initially, Defendant maintains the trial court erred in denying his challenges for cause of two prospective jurors, Wallen and Negron, who stated their concerns about Defendant not testifying. This position is without merit.

The following statements were made during voir dire questioning of Juror Wallen:

> [DEFENSE COUNSEL]: Mr. Wallen, is these any reason that you can think of that you would not make a fair juror in this case?
>
> MR. Wallen: The only thing I can think of is that I was hoping I would get a chance to hear the Defendant speak and you just said that he might not speak in this case.
>
> [DEFENSE COUNSEL]: He might not speak.
>
> MR. WALLEN: I was given the impression that you were trying to set us up that he is not going to say anything.
>
> [DEFENSE COUNSEL]: And would that bother you at all?
>
> MR. WALLEN: Yes.
>
> [DEFENSE COUNSEL]: Why?
>
> MR. WALLEN: Well, even though he may not have done it, I don't know why that would bother him now.
>
> [DEFENSE COUNSEL]: He's having a difficult time accepting why--

MR. WALLEN: He has a hard time pronouncing words--I think he can be articulate and speak English. If he can't speak English, that is moot. I don't know why he can't be asked questions. I'm starting to get the idea that's the way it's going to go.

[DEFENSE COUNSEL]: What if you heard--

MR. WALLEN: I don't see the reason for, during the course of this trial, not hearing his side of the story. We are trying to decide this case. I would think he was trying to trick us here.

[DEFENSE COUNSEL]: If we have given that impression, we don't mean to do that.

MR. WALLEN: But I feel very strongly that that's what he's trying to do.

[DEFENSE COUNSEL]: Well, let me explain this to *you.* I've been doing this now for a number of years and I've always found that the jury has a problem with a person not testifying, that's why I want to find out if the problems you people have is consistent with other jurors having the same personal problem.

The problem is that our law says you have a right to remain silent. That's the law. He has to take that law--he has a right to be silent and not say a word. As a matter of fact, he does not have to get up here and he does not have to say anything.

I do not have to get up here and ask you any questions. We could have a jury only through what the prosecution has asked you. We do not have to say anything. We can remain silent. That is the rules of the law.

MR. WALLEN: If you had a feeling that you were innocent, wouldn't *you* want to tell everybody?

THE COURT: Speaking only for myself--

MR. WALLEN: From the way I've been hearing it now, it seems that, if I have been paying attention, he may not speak. In other words, that is kind of in the back of [my] mind. It

> is kind of anticipating that he is not going to say anything. That kind of bothers me as a prospective juror, the fact that they got me thinking like this; but I never thought that it would occur until you brought it up.
>
> **(R. 524-27).**

After defense counsel questioned the prospective jurors, the trial court inquired of Juror Wallen with the following:

> THE COURT: I have a couple more questions for Mr. Wallen.
>
> I have got to get this straight here so I have it straight in my mind. If I give you an instruction and tell you the State has the burden of proof and the Defendant has to say nothing whatsoever, you will not hold it against him even if you would like to, you can't, or even if I told you you could not discuss it, not even in the jury room, would you be able to follow my instructions?
>
> **MR. WALLEN: Yes.**
>
> THE COURT: Okay. That is good enough for me.
>
> (R. 537).

Defendant moved to strike Wallen for cause, and the trial court denied the motion. (R. **547-48).** When Defendant moved to strike Wallen for cause, he had two (2) remaining peremptory challenges, yet instead of exercising one to remove Wallen, defense counsel stated, "We accept Wallen". (R. 548).

During defense questioning of Juror Negron the following questions and answers were presented:

**[DEFENSE COUNSEL]:** Would you have a problem returning a verdict of not guilty if the State has not proven their case?

**********

MS. NEGRON: Well, I believe that I could be fair. I just think that we should listen to all the facts.

**[DEFENSE COUNSEL]:** Well, suppose you do not hear from him; suppose he doesn't take the stand?

**MS. NEGRON:** Well, **I** don't just want to hear the State's opinion. I would like to know also what he feels happened.

**[DEFENSE COUNSEL]:** But--excuse me--that's what I am getting at--but if they failed to prove their case, can you vote not guilty not hearing from him?

MS. NEGRON: Well, yes.

**[DEFENSE COUNSEL]:** The **proof** has to come from there, would you agree with that?

**MS. NEGRON:** Yes.

**[DEFENSE COUNSEL]:** Well, they have to prove that he's guilty. If they can't prove that, then I believe that he's innocent. Would you have anything against voting that way?

**MS. NEGRON: No. I** won't have a problem voting that way.

**[DEFENSE COUNSEL]:** But, if they do show that he is guilty and they have the evidence that says he is guilty, then they would have proved him guilty, would **you** agree with that?

**MS. NEGRON:** Yes.

**[DEFENSE COUNSEL]:** Well, what if they brought forth evidence that--which is believed to show that he is guilty of what they charged him with--

**MS. NEGRON:** And he chose not to say anything?

**[DEFENSE COUNSEL]:** And he chose not to speak?

MS. NEGRON: Yes.

[DEFENSE COUNSEL]: Now, would you have to say that he is guilty?

MS. NEGRON: Yes.

[DEFENSE COUNSEL]: Well, do you understand that maybe he is guilty, but it is not proved beyond a reasonable doubt and to the exclusion of every reasonable doubt?

MS. NEGRON: Yes.

[DEFENSE COUNSEL]: Do you understand that that may be a problem? That they may not be able to prove beyond and to the exclusion of every reasonable doubt, in which case, my client will be found not guilty in your eyes; is that correct?

MS. NEGRON: That's correct, but then he doesn't have a reason he should remain silent.

[DEFENSE COUNSEL]: Well, that is the law that is given to him. That is his right to do so.

MS. NEGRON: In other words, it is his right to choose what to say and what not to say?

[DEFENSE COUNSEL]: Sort of like that. See, some people are inarticulate and have trouble or a tendency to choke up in public speaking and that is the reason why he is not testifying. But we all have to believe at one point or another that probably he will overcome that fear and speak effectively.
See, he has a speech defect. He has asked the attorneys to speak for him.
Well, that's why we are talking for him, plus it is his Constitutional right to have an attorney present.

MS. NEGRON: Right, but you spoke on his behalf.

[DEFENSE COUNSEL]: Well, some people get frustrated speaking in front of other people if they are not going to believe what they are saying. He has decided not to testify.

MS. NEGRON: Well, I guess that is his right.

**[DEFENSE COUNSEL]:** Would you make your decision based an his conviction not to testify or on what the State can prove?

**MS. NEGRON:** On what they can prove.

**[DEFENSE COUNSEL]: Well,** if they can't prove it, it doesn't matter what he does, then you would agree with that?

**MS. NEGRON:** Well, if they can't prove it **exactly.**

**[DEFENSE COUNSEL]:** If they can't prove it, then my client is not guilty, correct?

**MS. NEGRON:** If they cannot prove it, yes.

**[DEFENSE COUNSEL]:** You said maybe you would have a problem in deciding this case?

**MS. NEGRON:** Yes, but if they can prove that he is guilty and he chooses not to **speak,** then that would make it worse.

**[DEFENSE COUNSEL]:** Well, they have to prove it first. He chose not to speak and that is his right.

**MS. NEGRON:** Well, I **guess** that will be, it will be. It is very hard.

**[DEFENSE COUNSEL]:** What would your verdict be?

**MS. NEGRON:** If he chose not to speak and they proved it?

**[DEFENSE COUNSEL]:** If they didn't prove it, if they just proved it maybe?

**MS. NEGRON:** Maybe is not beyond a reasonable doubt, it would raise some suspicion in my mind that there's a possibility that he may be guilty.

**[DEFENSE COUNSEL]: Well,** what would your verdict be?

**MS. NEGRON: I would** say--1 couldn't provide you with that information. I would have to see what **the** evidence is. I want to see what the State can prove.

[DEFENSE COUNSEL]: If they prove it maybe or they prove it probably that he did it--

MS. NEGRON: Maybe he did it is not good enough.

[DEFENSE COUNSEL]: Maybe--probably is good enough?

MS. NEGRON: Probably is the same thing as maybe.

[DEFENSE COUNSEL]: Would you say that is good enough?

MS. NEGRON: Yes.

[DEFENSE COUNSEL]: Are you sure?

MS. NEGRON: Yes.

[DEFENSE COUNSEL]: I'm not trying to put words in your mouth.

MS. NEGRON: Yes.

[DEFENSE COUNSEL]: Would you agree with t at?

MS. NEGRON: Yes.

[DEFENSE COUNSEL]: That maybe is not good enough?

MS. NEGRON: That maybe is not good enough.

[DEFENSE COUNSEL]: What I said before is a mistake, probably is not good enough either. Maybe is not good enough and probably is not good enough. Do you understand that?

MS. NEGRON: Probably is not good enough either?

[DEFENSE COUNSEL]: They have to prove it beyond and to the exclusion of a reasonable doubt. Probably is not good enough.

MS. NEGRON: Yes.

[DEFENSE COUNSEL]: Well, I would say that as a lawyer, he has a right not to speak.

MS. NEGRON: In a case like this and he chose not to speak, yes, I would have a problem with that.

**[DEFENSE COUNSEL]:** But, if they only prave it probably--

**MS. NEGRON:** If they proved it probably, then in my mind he probably did do it, and I would have to answer to myself whether or not he did it or did not do it. In order to form that opinion, I would want to hear his side.

**[DEFENSE COUNSEL]:** What would your verdict be?

**MS. NEGRON:** From what we have talked about, probably.

**[DEFENSE COUNSEL]:** The law is beyond and to the exclusion of a reasonable doubt.

**MS. NEGRON:** Well--

**[DEFENSE COUNSEL]:** So, in a civil case, we talk about 51 percent versus 49 percent, just tipping the scales in the other parties' favor. In a criminal case, the burden is beyond and to the exclusion of a reasonable doubt.
Do you understand what I am saying?

**MS. NEGRON:** Well, there is a possibility--there is a problem in my mind that he may still have done it.

**[DEFENSE COUNSEL]:** There's also a part that says that he may not have done it.

**MS. NEGRON:** Well--

**[DEFENSE COUNSEL]:** Which one would you go with?

**MS. NEGRON:** It would depend on the evidence that I heard, but I would point--1 would formulate my opinion on the evidence and what I heard.
If I personally feel that he is innacent, and I understand that you have professional expertise here, but you know, unless it is proven to me that he is mute or cannot talk or doesn't speak English or he's illiterate, then I don't understand why he won't take the stand in his own defense. He should try to defend himself.

[DEFENSE COUNSEL]: Now, doesn't that seem to you that you're going against the law and beyond and to the exclusion of reasonable doubt?

MS. NEGRON: I see what you are saying. Yes, it does sound like I am going against the law and not following the law. I can't formulate that kind of an opinion without having heard the facts and having the facts in front of me.

[DEFENSE COUNSEL]: When you talk about legal theories, and it seems pretty clear to me that beyond and to the exclusion of reasonable doubt means something more than probably.

MS. NEGRON: Right.

[DEFENSE COUNSEL]: That it means something more than maybe?

MS. NEGRON: Right.

[DEFENSE COUNSEL]: And you're saying that given that scenario that you might still convict him even though it's not beyond and to the exclusion of every reasonable doubt?

MS. NEGRON: I'm saying that I need to hear his side. If I had enough proof that the State proved its **case** by the evidence they presented, I would have a problem if he did not talk to us.

[DEFENSE COUNSEL]: Well--

MS. NEGRON: 1 understand that I may **be--it** may sound like I'm going against the law, but I really can't make that kind of decision until I hear **the** facts and the situation.

[DEFENSE COUNSEL]: We **are** not talking about any guilt or situation. We are talking about--

MS. NEGRON: What theoretical situation are you going to?

[DEFENSE COUNSEL]: This is very ambiguous. What you are telling me is--

MS. NEGRON: What I am trying to say is I would like to hear his side.

[DEFENSE COUNSEL]: My understanding of the burden in a criminal case is that it is high, and that if we are put on a scale, the State has to prove all of what they are charging my client with beyond and to the exclusion of every reasonable doubt.

We do not have to do anything. That is the duty of the State and the evidence that they have to prove in order to put my client in jail. If you have a reasonable doubt, you must find him not guilty.

MS. NEGRON: But, what is the definition of "pretty sure"?

[DEFENSE **COUNSEL]:** Beyond and to the exclusion of every reasonable doubt is my definition of what the law says the State has to prove his guilt by.

MS. NEGRON: Well, all I am saying is that if they present a case before me and 1 have--and I feel they have proven their **case** and I am leaning towards a guilty verdict from everything that they gave me, that is my assessment of the case and that is what I am leaning towards.

[DEFENSE COUNSEL]: Well, if there is still a possibility of doubt, what would your verdict be?

MS. **NEGRON:** If he spoke or whether he didn't speak?

[DEFENSE COUNSEL]: If the situation was that he didn't speak?

MS. NEGRON: If he didn't want to speak, I probably would think that he was guilty.

[DEFENSE COUNSEL]: **And** if he [did] speak?

MS. NEGRON: It depends on what he says.

[DEFENSE COUNSEL]: And if he doesn't speak, you are going to find him guilty even though the law says that he can remain silent.

MS. NEGRON: I understand his right to remain silent, but if someone is not guilty, then they shouldn't have anything to hide.

[DEFENSE COUNSEL]: Could you follow the law?

MS. NEGRON: According to you, I'm not following you[r] definition of the law.

[DEFENSE COUNSEL]: Could you follow the definition of the law as explained to you by the Judge?

MS. NEGRON: I will follow the law, yes.

THE COURT: [Ms. Negron], I think it is important that I ask a question here.

I understand what you just said. However, if I instruct you that the State has the burden of proof and the Defendant need not say anything, would you hold it against him? Could you disregard those feelings that you have and could find him not guilty?

MS. NEGRON: If the State doesn't meet its burden, even if he chose not to defend himself--if they could not satisfy me of his guilt, is that what you are saying?

THE COURT: Well, not satisfy your standards. If I instruct you--if I give you an instruction that you cannot find him guilty, that the State has not proven their case, would you still find him guilty?

MS. NEGRON: No.

THE COURT: Even though you will not hear from the Defendant, could you still follow my instructions and follow the guidelines, even though you do not know what the guidelines are right now, could you still follow them?

MS. NEGRON: Are you asking me on a hypothetical basis?

THE COURT: Well, not hypothetical. You will be given a definition on reasonable doubt and on burden of proof, and if the State hasn't convinced you beyond a reasonable doubt that the Defendant did commit this crime, then you must find him not guilty. Could you *go* along with that?

MS. NEGRON: I would find him not guilty.

THE COURT: She's all yours.

**(R. 507-20).**

Thereafter, Defendant's motion to strike Juror Negron for cause was denied, so a peremptory challenge was used to remove Negron. (R. 546).

Defendant never identified Wallen or Negron as objectionable jurors when requesting additional peremptory strikes, thereby failing to preserve the issue for appellate review according to the following dictates of this Court:

> Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." Pentecost v. State, 545 So.2d 861, 863 n. 1 (Fla. 1989). By this we mean the following. Where a defendant seeks reversal based an a claim that he was wrongfully forced ta exhaust his peremptory challenges, he initially must identify **a** specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to **after** his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is **seated** and then, if the verdict is adverse, obtain a new trial. (emphasis added).
>
> Trotter **v.** State, 576 So.2d 691, **693** (Fla. **1990).**

After raising his initial challenges for cause against Wallen and Negron, Defendant accepted Wallen and struck Negron. Defendant

never identified Wallen, or another juror, as an objectionable juror after his peremptory challenges had been exhausted.

Defendant relies on Hamilton v. State, 547 So.2d 630 (Fla. 1989), as an example of reversible error in failing to strike a juror for cause. But, in Hamilton, at the conclusion of voir dire the defendant had exhausted his peremptory challenges and requested an additional challenge so he could backstrike a particular juror who had not been excused for cause. In the instant case, Defendant merely requested additional peremptory strikes, (R. 542, 543, 550, 551), but never identified an objectionable juror he wished to have removed.

Notwithstanding the Defendant's failure to properly preserve the issue for review, the trial court correctly concluded that Jurors Wallen and Negron should not be dismissed for cause. This Court has set forth the following parameters for evaluating challenges for cause:

> 'The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.' *Lusk v. State*, 446 So.2d 1038, 1041 (Fla.), *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). Determining a prospective juror's competency to serve is within a trial court's discretion. *Davis v. State*, 461 So.2d 67 (Fla. 1984), *cert. denied*, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985).
>
> Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989).

Wallen stated unequivocally that he would be able to follow the instructions of the trial court. (R. 537). Evaluating the entire voir dire of Wallen, the trial court determined that Wallen was competent to serve as a juror.

Similarly, the trial court did not abuse its discretion in denying Defendant's challenge for cause against Juror Negron. Negron also stated, unequivocally, that even if the defendant did not testify that she would follow the instructions as given by the trial court. (R. 519-20). In Moore v. State, *525* So.2d 870 (Fla. 1988), a juror who stated that his belief about the insanity defense would "probably" affect his ability to follow instructions should have been removed for cause. Id. at 872. Conversely, Negron stated decisively that, if the State did not prove their case she would follow the instructions and "find him not guilty." (R. 520).

This Court has repeatedly held that the question of whether a juror should be excused for cause is soundly within the discretion of the trial court.

> There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors. In fact, it has been said:
>
> > There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empanelling of a jury.

(citations omitted).

Cook v. State, 542 So.2d 964, 969 (Fla. 1989), appeal after remand, 581 So.2d 141 (Fla. 1991); cert. denied, ____ S.Ct. ____, 1991 WL 154548 (U.S. October 7, 1991).

Defendant has failed to meet his heavy burden of showing an abuse of judicial discretion.

**II.**

THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR MISTRIAL MADE IN RESPONSE TO THE STATE'S INTRODUCTION OF RES GESTAE EVIDENCE.

Secondly, Defendant contends that admission of evidence regarding shots fired by Defendant into Davila's previous apartment was reversible error. Defendant's position that evidence of the shooting was not relevant to the instant crimes is not persuasive. The relevance was demonstrated by the following: Rodriguez' testimony that Defendant stated that he had "wasted" the bullets, (R. 613); Davila's testimony that at 5 p.m. on the day of the murder there were no bullet holes in the apartment at 201 Sharazad Blvd., (R. 833), and the firearms examiner's testimony that the projectiles from 201 Sharazad Blvd. were "very consistent" with the projectiles from the murder scene, (R. 941). The evidence linking Defendant to the shooting at 201 Sharazad Blvd. was inseparable from the evidence linking him to the shootings at 135th Street. Professor Erhardt examined

"inseparable crime" evidence and distinguished it from "Williams Rule" evidence in the chapter on "Relevancy" in his work on Florida Evidence (2d Ed. 1984):

> However, the Florida opinions have not contained a close analysis of the reasons that inseparable crime evidence is admissible. Professor Wigmore suggests that this evidence is not admitted either because it shows the commission of other crimes or because it bears on character, but rather because it is a relevant and inseparable part of the act which is in issue. This evidence is admitted for the same reason as other evidence which is a part of the so-called "*res gestae*"; it is necessary to admit the evidence to adequately describe the deed. In addition to Wigmore's logical argument, it seems that both the language of Section 90.404(2)(a) and of *Williams* indicates that the rule applies to evidence of discrete acts other than the actions of the defendant committing the instant crime charged. Under this view, inseparable crime evidence is admissible under Section 90.402 because it is relevant rather than being admitted under 90.404(2)(a). Therefore, there is no need to comply with the ten-day notice provision. The Wigmore view has been adopted by the United States Court of appeals for the Fifth and Eleventh Circuits. (footnotes omitted).

The "Wigmore" view has also been adopted by Florida courts. In Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986), the defendant was being tried for murder and the prosecution introduced evidence of drug smuggling operations in which the defendant was involved. The Fourth District found the evidence admissible as relevant evidence under section 90.402. Id. at 153.

The evidence of Defendant shooting into Davila's former apartment was similarly relevant, because it also was "inextricably intertwined" in the facts of the subsequent murder and attempted murder. It was inseparable crime evidence that explained or threw light on the crimes being prosecuted. In order to establish the Defendant's state of mind at the time and place in question, the State produced evidence that Defendant had obtained the gun from Rodriquez, left for thirty minutes, returned stating he had "wasted" the ammunition, obtained additional ammunition, and then proceeded to track down the victim and murder him. The evidence was relevant to establish premeditation, as well as to refute any claims of self defense. See Jackson v. State, 522 So.2d 802, 806 (Fla. 1988) (Testimony regarding an assault by the defendant on an unnamed person on the day of the murders was properly admissible as one incident in a chain of chronological events which occurred that day.); Gorham v. State, 454 So.2d 556, 558 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 941, 83 L.Ed.2d 953, (Evidence of the defendant's use of victim's credit cards was not *Williams* rule evidence.).

## III.

THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S REQUEST FOR A SPECIAL INSTRUCTION ON HOW TO CONSIDER COLLATERAL CRIME EVIDENCE?

Defendant also argues that, once the trial court admitted the evidence of the earlier shooting, it was reversible error to refuse his request for an instruction, pursuant to

§90.404(2)(b)2, Florida Statutes (1988), about the limited purpose for which the evidence was being admitted. As submitted in the previous argument and as shown by the following discussion, the characterization of the evidence as *Williams* rule evidence is inappropriate:

> [DEFENSE COUNSEL]: The State is asking, William's Rule Evidence, the State attempted to introduce by the shooting in the other room was declared not William's Rule Evidence.
>
> THE COURT: I did not declare William's Rule. I found it irrelevant for the case.
>
> [PROSECUTOR]: It is the State's position that it is relevant to show premeditation.
>
> THE COURT: And I disagree.
>
> [DEFENSE COUNSEL]: We would request the William's Rule instruction to be given. The evidence which has been applied to show similar crimes and will be considered by you only as that evidence related to prove of whatever the State allege.
>
> THE COURT: No, I don't think so. I am going to deny that. I think it came in as relevant evidence in the case in chief, I think William's Rule instruction will confuse them.
>
> [DEFENSE COUNSEL]: So it is not a William's Rule?
>
> [PROSECUTOR]: No.
>
> THE COURT: That evidence was not William Rule Evidence,
>
> (R. 1007-8).

Because the evidence of the prior shooting was introduced to present an intelligent account of the criminal episode under Section 90.402, not as collateral crime evidence under Section

90.404(2), the trial court was not required to give an instruction limiting its use pursuant to the standard instruction for section 90.404(2). See United States v. Martin, 794 F.2d 1531, 1533 (11th Cir. 1986) (Trial court did not err in refusing to give *a* limiting instruction where evidence admitted was not extrinsic evidence but rather, direct evidence of the crimes charged.).

**IV.**

**THE** TRIAL COURT PROPERLY ALLOWED **THE** STATE TO PRESENT EVIDENCE OF THE CIRCUMSTANCES OF DEFENDANT'S PRIOR VIOLENT FELONY.

Defendant contends that the trial court erred in allowing the State to introduce the testimony of homicide detective Santos Brocato regarding the events which resulted in Defendant's prior violent felony conviction for manslaughter. Defendant argues that admission of the testimony constituted impermissible aggravating evidence prohibited by this Court in Elledge v. State, 346 So.2d 998 (Fla. 1977). Elledge is inapplicable to the instant case as the error was in allowing nonstatutory aggravating evidence to be introduced, while in this case only statutory aggravating evidence was introduced.

Moreover, Defendant's argument fails because it is **proper** during the penalty phase of a capital trial to introduce, not only evidence of the prior conviction, but evidence af the circumstances surrounding any prior felony conviction involving

the use or threat of violence. As held by this Court with the following:

> Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.
>
> Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989).

The testimony of Detective Brocato was relevant to fully apprise the jury of the background of Defendant's previous conviction and the trial court did not abuse its discretion in admitting the evidence.

Although Defendant stipulated that the aggravating factor of a prior violent felony conviction was applicable, (R. 142), Defendant repeatedly stressed his lack of violent intent in the prior felony conviction in an attempt to minimize the aggravating factor of previous convictions of threat or violence to a person. As shown below, during closing argument of the penalty phase, defense counsel argued that Defendant never intended to kill the victim of the 1974 murder:

> **[DEFENSE COUNSEL]:** ...You remember that manslaughter was culpable negligence, gross conduct--
>
> [PROSECUTOR]: I'm going to object to instructions to the elements of that crime. It's totally irrelevant to the aggravating factors.
>
> **THE COURT:** Overruled

[DEFENSE COUNSEL]: But manslaughter is a crime with no intent to kill.

[PROSECUTOR]: Again, Judge, I'm going to object because it's not the law as stated in New York.

[DEFENSE COUNSEL]: Judge, we can go sidebar.

THE COURT: No need to go sidebar. Overrule the objection.

[DEFENSE COUNSEL]: And it is not a crime of intent to kill.

Now, what bothers me about the prosecution--I admire them, and I respect them--is that you kept hearing that he drowned the man, pushed him down, things of that nature.

The only trouble is that we believe he hasn't been **convicted** of that.

[PROSECUTOR]: Objection, judge.

THE COURT: I will sustain the objection and tell the jury that what the lawyers say is not evidence. You heard the testimony. You rely on your own memory, and if your individual or collective memories differ with the attorneys, then disregard what the attorney's memory is and rely on what your memory is. You may continue.

[DEFENSE COUNSEL]: Recall and use your own memories.
Detective Brocato testified that the defendant held the person's head down, about two or three times, and the prosecution made a feature out of that.

I also remember the defendant getting on the witness stand, at the very last part of the trial, he told the State Attorney's Office and the prosecution something else. And I also remember what he was arrested for was not what he was convicted of.

[PROSECUTOR]: I'm going to object because that has nothing to do with the facts that he was arrested for.

[DEFENSE COUNSEL]: That's exactly what it has to do with.

THE COURT: I will overrule the objection.

[DEFENSE COUNSEL]: The facts of what he pled to--what he pled guilty to, not what he was convicted of. What he was charged with. it's a minor point....

(R. 1422-24).

Evidence of the circumstances leading to Defendant's prior conviction was necessary to provide the jury with a complete picture of Defendant's prior history and was correctly admitted.

Finally, the trial court sustained Defendant's objection to the question regarding whether Defendant had ever beaten his wife, and the witness did not answer the question, thus no prejudicial evidence was admitted. Furthermore, Defendant failed to request a curative instruction from the court, so his objection and subsequent motion for mistrial were inadequate. Duest v. State, 462 So.2d 446 (Fla. 1985).

**V.**

THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT'S ABILITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS NOT SUBSTANTIALLY IMPAIRED.

Defendant submits that, due to the unrebutted testimony presented by Jeffro Toomer, the trial court erred in rejecting as mitigation that Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of

the law was substantially impaired. Contrary to Defendant's assertions, the testimony of Toomer was contradicted by evidence presented during the guilt phase of the trial. Toomer presented evidence, based on Defendant's self-report that he had consumed large amounts of cocaine and alcohol on the day of the murder. (R. 1456). However, Defendant's friend Louis Rodriguez, described defendant as "nervous" and "upset" when he came to get a gun, not as impaired. Rodriguez also noted that Defendant was able to walk, talk, and do other things. (R. 612). And when Defendant returned for more ammunition, after having "wasted" the first bullets, he was described as "more calm". (R. 613). The testimony of Rodriguez was in conflict with the testimony of Toomer and it was the duty of the trial court to resolve the conflict. The determination of the trial court is supported by substantial, competent evidence and should be final. See Sireci v. State, 16 F.L.W. S263, S264 (Fla. September 19, 1991) (The trial judge decides whether a particular mitigating circumstance is established and reversal is not warranted simply because an appellant draws a different conclusion.).

Additionally, the actions of Defendant immediately after the murder belie a finding the he was unable to appreciate the criminality of his actions. After murdering Gomez and attempting to murder Davila, Defendant fled the scene and disposed of the murder weapon. (R. 863, 879). Thereafter, he called his girlfriend and told her to get the children together that they had to leave. (R. 878). After taking his girlfriend and children

to a friend's house, defendant demonstrated his awareness of the criminal nature of his acts by checking with Rodriguez regarding the status of the neighborhood. (R. 616). Finally, when interviewed by the police, Defendant initially denied the shootings, (R. 860), and at trial suggested that the shooting occurred in self defense, (R. 1097-98), thereby evincing his appreciation of the criminality of his actions.

Notwithstanding the competent substantial evidence contradicting Toomer's testimony about Defendant's mental condition at the time of the murder, the trial court may accept or reject the testimony of an expert witness just as it may accept or reject the testimony of any other witness. Roberts v. State, 510 So.2d 885, 894 (Fla. 1987). The only evidence of drug or alcohol abuse on the day of the murder was Defendant's self-serving statements. There was no other evidence presented to support Toomer's opinion that Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired due to substance abuse. Furthermore, the actions of Defendant on the night of the murder constitute competent substantial evidence to support the trial court's rejection of this mitigating circumstance. See Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990) (Trial court may reject argument that mitigating factor applies if the record contains substantial competent evidence to support rejection).

## VI.

## THE TRIAL COURT PROPERLY FOUND THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED.

The trial court properly found that the murder of Paul Gomez was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification where the evidence proved the "heightened premeditation" contemplated by this Court with the following:

> The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See, e.g., Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988); *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began. (citations omitted).
>
> Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990).

The following actions of Defendant, prior to the homicide, established that it was preplanned, rather than impulsive: procuring a gun from Rodriguez, (R. 611); stating, "A man has got to do what a man has got to do.", (R. 612); returning for additional ammunition after "wasting" the first bullets, (R. 613); going to 2860 N.W. 135th St. to shoot Fat Boy, (R. 875). In addition to the evidence which proved Defendant had considered shooting someone before going to the apartments, his actions at the time of the murder demonstrates the heightened premeditation

necessary to find this aggravating factor. Defendant went upstairs to the second floor, concealed the gun under a rag, watched the victim in the parking lot, pointed the gun at the victim, stated, "I've got you now motherfucker", and killed the victim. (R. 646-50, 690-94, 876-77). The uncontradicted evidence established beyond a reasonable doubt that Defendant acted in a calculated manner and with the heightened premeditation described in the statute. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

Moreover, Defendant's assertion that this factor usually applies to execution or contract style murders, (See Brief of Appellant p. 47), has been expressly rejected by this Court's statement that , "the finding of cold, calculated, and premeditated is not limited to execution-style murders." See Rutherford v. State, 545 So.2d 853, 856 (Fla. 1989).

Likewise, Defendant's contention that the murder was committed with a pretense of moral or legal justification must be rejected. The suggestion that Defendant shot the victim in self-defense, or only after the victim went for his gun, was conclusively refuted by the eyewitness testimony. Neither English nor Flowers heard the victim say anything, do anything, or have anything in his hands immediately before being murdered. (R. 650, 696). Furthermore, Defendant's own statement, that he felt "bad about [the murder of Paul Gomez] because he was my

friend", (R. 1355), refutes a claim that Defendant believed the victim to be a dangerous person. Unlike the record in Christian v. State, 550 So.2d 450 (Fla. 1989), the instant record is devoid of "unrebutted evidence of the victim's threats of violence to [the defendant] and his apparent inclination to fulfill them." Id. at 452. The facts presented did not establish a "pretense" of moral or legal justification, thus the trial court properly found that the murder was cold, calculated, and premeditated.

## VII.

WHETHER THE TRIAL COURT PROPERLY CONSIDERED EACH MITIGATING FACTOR PROPOSED BY DEFENDANT?

As his next point, Defendant argues that the sentencing order is deficient because the trial court failed to expressly address each proposed mitigating circumstance. This argument is also flawed. Defendant requested, and the trial court gave, jury instructions on the following four (4) mitigating factors: (1) the crime was committed under extreme mental or emotional disturbance; (2) the victim was a participant; (3) the defendant acted under the substantial domination of another; and (4) the capacity of defendant to appreciate the criminality of his conduct was substantially impaired. (R. 1444-45). The judge instructed the jury on all mitigating circumstance to be considered, thus we can presume that he followed his own instructions n the consideration of nonstatutory mitigating evidence. Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988).

After specifically addressing the two proposed statutory mitigating factors, the trial court noted the following:

> The Court finds that there are three (3) aggravating factors, and one (1) mitigating factor. The Court has received the entire record, including the testimony and evidence in the trial and sentencing proceedings to determine whether there might possibly exist anything else, whatsoever, of a non-statutory mitigating nature, that could be considered by this Court in mitigation of this sentence.
>
> (R.238-39).

In view of the statements specifically addressing the two statutoy mitigating factors and the above summary regarding whether any non-statutory mitigating factors "might possibly exist", as well as the jury instructions given by the court, it can be concluded that the trial court expressly evaluated each mitigating circumstance proposed by Defendant.

Furthermore, as noted by this Court with the following, in Gilliam v. State, 582 So.2d 610 (Fla. 1991), the decision in Campbell v. State, 571 So.2d 415 (Fla. 1990) does not compel a different result:

> *Campbell* directs that 'the sentencing court must expressly evaluate in its written order each mitigating circumstant proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.' *Id.* at 419 (footnote omitted). It is unnecessary for us to reach the

> question whether this order complies, because *Campbell* is not a fundamental change of law requiring retroactive application.
>
> Id. at 612.

As in Gilliam, the sentencing order in the instant case was entered prior to this Court's decision in Campbell, thus retroactive application of the "express evaluation" requirement is not warranted.

## VIII

### WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE SENTENCING GUIDELINES WHEN IMPOSING SENTENCE FOR THE NON-CAPITAL FELONY?

The trial court did not utilize a sentencing guidelines scoresheet for the primary offense, one count of first degree murder, as it was exempt from guidelines calculation. Fla.R.Crim.P. 3.701(c). However, the sentence of twenty-seven (27) years imposed for the non-capital felony, attempted first degree murder conviction, is valid because a conviction of first degree murder, a capital felony which cannot be scored as an additional offense at conviction, may serve as a reason for departure. Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988).

[If this Court should find the written sentencing order insufficient to satisfy the requirement of written departure

reasons, the trial court should be given an opportunity to express its reasons for departure in writing where the requirement for contemporaneous written reasons is prospective only. Ree v. State, 565 So.2d 1329 (Fla. 1990).]

## CONCLUSION

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

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 **SCOTT W. SAKIN, ESQ.,** 1411 N.W. North River Drive, Miami, Florida 33125, on this 22nd day of October, 1991.

**ANITA J. GAY**
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