IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,928

CHARLES HARRY STREET,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

****

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

The Appellee, **THE STATE OF FLORIDA**, was the prosecution in the trial court. The Appellant, **CHARLES HARRY STREET**, was the defendant. The Appellant will be referred to as "Street" and the Appellee will be referred to as it stood in the lower court. The symbol "R" will designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

On December 7, 1988 an eleven (11) count indictment was filed charging Street with the following crimes: (I) first degree murder of Officer Richard Boles; (II) first degree murder of Officer David Strzalkowski; (III) robbery of Richard Boles; (IV) armed robbery of David Strzalkowski; (V) armed robbery of Richard Boles; (VI) armed burglary; (VII) attempted armed robbery of Jeremiah Lowe; (VIII) armed robbery of Crystal Green; (IX) armed burglary; (X) possession of a firearm during the commission of a felony; and (XI) possession of a firearm by a convicted felon. (R. 1-8). A motion to sever Count XI was filed on March 22, 1990 and granted on March 28, 1990. (R. 306). The State entered a nolle prosequi on this count on October 10, 1990. (R. 15877).

Voir dire commenced on April 3, 1990, before the Honorable Alfonso C. Sepe. (R. 1658). After eight weeks of voir dire, the jury was sworn on June 11, 1990 and opening statements were made by both parties. (R. 1658-8806, 9130-9242, 10242-10357, 16029-16158).

Sergeant Timothy Wellborn testified that he was a correctional officer at Glades Correctional Institution in

September, 1987. (R. 9297-80). Wellborn described a conversation he had with Street while conducting a search after visiting hours. Street initiated the conversation and stated that he was going home soon, and Wellborn responded that Street would be back because of the type of inmate he had been. (R. 9283-87). After Wellborn predicted that Street would return to the correctional facility, Street stated, "You are wrong. I will kill the next motherfucker that tries to bring me back to prison." (R. 9295).

Florida Highway Patrol Trooper Alan Major described his encounter with Street, at approximately six p.m., on the evening before the murders. (R. 9336-39). Major was dispatched to check out a "Signal 20", a possible mentally disturbed person, standing on the northbound overpass of Interstate 95 (I-95) and 71st Street. (R. 9340-43). Upon arrival, Major notified the dispatcher that Street was not a "20". (R. 9370). Major observed Street, who was dressed in jeans, tank-top, and relatively new cheap tennis shoes, kneeling on the road with his arms wrapped around the guardrail. (R. 9346). When Major arrived, Street started running towards his car and appeared relieved to see the Trooper. (R. 9351). Major ordered Street to stop, to place his hands on the police car, and to explain where he was going. (R. 9351-52). Street cooperated, responded, "I am coming to you", and consented to a search by Major. (R. 9352-53). Major conducted a pat-down search of Street, including a search of his pockets, and found nothing. (R. 9354-57).

After Major completed his search, Trooper Aubrey Brunson arrived on the scene as a backup officer. (R. 9358, 9470-73).

Brunson also conducted a pat-down search of Street for the safety of the officers. (R. 9358, 9475). Street told the troopers that his name was Charlie Street, that he lived in Boynton Beach, and that he was trying to hitchhike home. (R. 9359, 9477). He stated that he had been trying to locate his girlfriend in Liberty City whom he had not seen in nine (9) years. (R. 9361, 9478). When Street stated that he had just gotten out of jail, Major noticed that his clothing resembled the pants and shoes given to prisoners upon release. (R. 9362).

Street told the troopers that some guys had chased him up onto I-95. (R. 9363, 9477). He said that he had been kneeling when trucks drove over the bridge because the bridge shook and it scared him. (R. 9360, 9479). Major told Street that he could not hitchhike on I-95 and that he would have to walk on 7th Avenue or 441. (R. 9363-64). Street replied that I-95 went to where he was going and the other roads did not. (R. 9363). Major offered to take Street to the Turnpike toll plaza, but told him that he would have to be handcuffed during the ride. (R. 9364-65). Street responded that there was no need to handcuff him because he was not going to do anything. (R. 9365). Before either trooper could transport Street north, a collision occurred on the overpass and they both had to attend to the accident. (R. 9367, 9481). They advised Street to walk down the ramp and proceed north on 7th Avenue. (R. 9367, 9482).

Both Major and Brunson testified that, during the several minutes they spent with him, they did not observe any signs that Street was under the influence of alcohol or drugs. (R. 9378,

9487). Street's eyes were normal, not bloodshot or glassy, and his speech was normal, not irrational, slurred, or rapid. (R. 9377, 9484-86).

Several hours later, at 12:18 a.m., Fire Rescue Lieutenant Richard Peterson was dispatched to the Mobil service station at 19255 Biscayne Boulevard. (R. 9575-76). As Peterson, and firefighters Higginbotham and Noel, drove into the station, Street waved to them with his left arm. (R. 9574, 9581). Peterson approached Street, who was standing just west of the cashier, and asked him what was wrong. (R. 9580-82). Street responded that he had diarrhea, that he had eaten some bad food or poison, and that some people in a black and white car had been harassing him. (R. 9584-85). He stated that the people had left some food which he had eaten and then they told him that it was poisoned. (R. 9585). Street later admitted that he had faked eating the food. (R. 9586).

Initially, Street wanted police protection and possibly wanted to go to a hospital. (R.9603). Street stated that he wanted out of Dade County, and that if he could get north of Fort Lauderdale he could hitchhike. (R. 9603). Peterson told Street that without money, the ambulance could not transport him to Broward County hospitals. (R.9603-4). He told Street that Jackson Memorial Hospital (JMH) would be the best place to go because the county would pay for his treatment. (R. 9603-4). Peterson prepared to take Street to JMH by completing a patient record and Street gave his name and address to Peterson. (R. 9605).

Peterson spent more than one and one-half (1 1/2) hours with Street at the service station. (R. 9591-92). During this time with him, Peterson observed that Street did not appear or smell intoxicated. (R. 9589). There was no indication of cocaine or other drugs in his system. (R. 9650). Street did not have trouble breathing, did not have rapid physical movements, and did not have any signs of distress. (R. 9587-89). Furthermore, Street did not hold his stomach or indicate that he was experiencing abdominal pain. (R. 9643-44).

After spending thirty (30) minutes with Street, Peterson informed him that the paramedic unit was leaving and that the police would come soon. (R. 9611). After Street became excited about being left alone, Peterson agreed to stay until the police arrived. (R. 9611-12). The first officer, undercover Detective Riley Smith, arrived at 1:07 a.m. (R. 9612, 9728). Street spoke to Smith and told him that something was wrong with his stomach and he wanted to go home to Boynton Beach. (R. 9737). Smith did not notice that anything was wrong with Street, e.g. erratic behavior or signs of drug/alcohol use. (R. 9738).

A few moments later, Officer Richard Boles and two other uniformed officers arrived. (R. 9614-15, 9739). Peterson spoke to Boles regarding the nature of the call, to-wit: Street's name and address and Street's desire to go home or to the hospital. (R. 9615-17). Smith observed Boles taking notes as he spoke to Street. (R. 9740). Boles' notes indicated that he wrote down Street's name, date of birth, address, phone number, height, weight, hair color, and eye color. (R. 9741-43).

After Boles spoke with Street, the paramedic crew checked Street's vital signs at 1:19 a.m. (R. 9617-19). Street had no trouble providing information to the paramedics. (R. 9621). Street's eyes, verbal responses, respiration, and motor scores were normal. (R. 9623-28). His blood pressure was on the high side, but Street explained that he had a history of high blood pressure and took Diazine for the condition. (R. 9622).

Sergeant Robert Llapur responded to the service station and observed Street leaning on the rescue truck talking to Peterson. (R. 9760). He was at the scene approximately fifteen (15) minutes and did not notice anything unusual about Street. (R. 9761-62). Street told Llapur that he wanted to go to Boynton Beach. (R. 9763). After Llapur checked and found no outstanding warrants for Street, Llapur left the scene of the service station. (R. 9765-66).

Metro Police Officer Eric Rossman testified that he was also dispatched to the Mobil Station and arrived at approximately 1:10 a.m. (R. 9900-3). Officer Boles was in front of him and Officer David Strzalkowski was behind him, as Rossman pulled into the station. (R. 9903). Rossman was driving his personal car and Boles and Strzalkowski were driving marked Metro-Dade units. (R. 9907-8). Rossman observed Street standing near the gas pumps. (R. 9907). He described Street as large, 240 pounds, large upper body, and wearing jeans and a t-shirt. (R. 9908-9). Rossman overheard firefighter Higginbotham tell Boles that Street's main complaint had been having to walk and being tired. (R.9912). Higginbotham stated that Street complained of diarrhea and

stomach cramps, but what he really wanted was a ride to Boynton Beach. (R. 9912). Rossman noted that Street complained of stomach cramps, but had no symptoms. (R. 9934). Street told the police officers that he wanted to get back to the Boynton or Deerfield area, that he was coming from Liberty City where he had been looking for an ex-girlfriend. (R. 9917). Rossman also observed Boles taking notes as he spoke to Street. (R. 9918).

A Medi-car was dispatched to transport Street to JMH. (R. 9629). While waiting for the Medi-car, Peterson noted that smoke or water was coming from the roof of the warehouses across the railroad tracks. (R. 9630). Street responded that it was somebody who was going to shoot him and Officer Rossman told Street that if someone was over there that he would shoot him for Street. (R. 9631-33, 9926). When Peterson stated that it was a white flag on the roof, Street changed his version to "a black guy fucking a white chick". (R. 9634). The officers told Street that they could not take him to Boynton, but could take him to JMH and Street replied "Fuck you, you cops do not care" and walked towards the rescue personnel. (R. 9928). Rossman definitely felt that Street was hostile to the police. (R. 9941). Peterson wrote that a stable patient was released to Medi-car at 1:45 a.m. for transport to JMH. (R. 650-51, 9629).

When the Medi-car arrived, Street walked to the rear door and sat inside on the stretcher. (R. 9636). Street complained that he had possibly eaten some poisoned food, then said he had not, but complained of diarrhea. (R. 9637). Street refused to go to JMH, he stated that he wanted to go north to Boynton Beach. (R. 9638).

Joseph St. Pharol testified that he was driving the Medi-car that responded to the Mobil station on November 28, 1988. (R. 9840-41). When St. Pharol arrived, fire rescue and police officers were present on the scene. (R. 9843-44). Lt. Peterson brought Street to the Medi-car and instructed them to take him to JMH because he had diarrhea. (R. 9847). St. Pharol had Street lie on the stretcher, with his head raised, and his feet on the floor, to keep him quiet and calm. Street never complained of being sick, and St. Pharol did not observe any signs of illness. (R. 9849, 9852). Street did not appear to be drunk or on drugs. St. Pharol observed that Street did not stumble or fall, he did not slur or mumble his speech, and he did not have red or swollen eyes. (R. 9857). When another attendant stated that they were taking him to JMH, Street yelled, "I am not going to Jackson". (R. 9850). He proceeded to talk about other places he might want to go, e.g. 8th Street in Boynton Beach or any other hospital in that direction. (R. 9851).

Peterson and an officer approached Street and stated that they had taken two hours to convince him to go to JMH, and they would give him two minutes to make up his mind if he wanted to go. The officer told him that if he did not want to go to JMH that he would take him to the county line. (R. 9853). Street lay there thinking for a minute, then slid off the stretcher and jumped out. (R. 9854). Street's fingerprints were later found on the inside door of the Medi-car. (R. 11477-79). The officer indicated that the Medi-car could leave. (R. 9855). The scene was cleared at 1:53 a.m., and as Peterson left the scene he saw

Street jogging north. (R. 9642). Later, Peterson saw Street walking north on Dixie Highway at 196th Street. (R. 9642).

Officer Rossman left the Mobil station to respond to a report of a robbery. (R. 9945). Later, when an anonymous report of a black male screaming for help in the vicinity of 203rd Street and Lone Pines Trailer Park was dispatched, Rossman advised the dispatcher that he could not respond because he had a robbery suspect in custody. (R. 9951). Officer Boles, unit #6138, advised the dispatcher that he would take the call because it was his area. (R. 623, 9754, 9951). Officer Strzalkowski, unit #6129, advised that he was close and would respond as a backup unit. (R. 623, 9754, 9952). Meanwhile, Officer Rossman transferred the prisoner to Officer Shear, and then proceeded to the scene where Boles and Strzalkowski had responded at 2:19 a.m. (R. 9953).

Florent Verner testified that he lived in the Lone Pine Mobile Village trailer park and had gone to sleep at eight p.m. on November 27, 1988. (R. 10071-75). After sleeping for a few hours, Verner woke up and was watching television when he heard a man outside screaming, "help me, help me". (10075-77). Although the man was later identified by others to be Street, Verner could not identify him. (R. 10136). Verner saw Street walking north on Dixie Highway and went outside to see if he needed help. (R. 10080). While outside, a police officer drove up and asked Verner if he had called the police. (R. 10081). Verner told him, "no", but that he had observed Street walking nearby and yelling for help. (R. 10082).

The officer pulled out of the trailer park and drove north. (R. 10083). Verner ran and followed the police car as it pursued Street. (R. 10085). Street ran from Ives Dairy Road, which was north of the trailer park, to the railroad tracks, and then to Biscayne Boulevard. (R. 10086-91). The officer activated the car's overhead emergency lights and pulled up beside Street, whereupon Street began to run south on Biscayne. (R. 10089). The officer drove south, past Street and stopped in the inside southbound lane, as a second officer made a u-turn and parked facing northbound in the outside lane. (R. 656, 10093-98). The cars were approximately eight (8) or nine (9) feet apart. (R. 10100).

The southbound officer, later identified as Officer Boles, exited his car, approached Street, and asked, "What is wrong?". (R. 10109-10). Street did not respond and the second officer, later identified as Officer Strzalkowski, exited his car and also approached Street. (R. 10109-12). The officers each attempted to grab one of Street's arms, and Street pushed them against the car facing southbound, one officer onto the trunk and the other between the rear door and trunk. (R. 10115-16). While Verner was watching a white car pull up near the southbound patrol car, he heard four (4) or five (5) shots. (R. 10118-19). When Verner looked back at the officers, he saw one falling down on the asphalt. It was Officer Strzalkowski who fell , facing east and west, on his back with his head about six (6) inches from the concrete curb. (R. 10019-20). The white car left the scene when the shots began. (R. 10121). Street chased Officer Boles around

the car and Verner could not tell whether Street caught him, but he heard one (1) or two (2) additional shots. (R. 10122-23). Verner heard Street state, "Now, I have got my lift", and drove away in the southbound car. (R. 10123-24). Street drove the car across the concrete median, and proceeded north. (R. 10127). When Street drove away, Officer Boles was still moving and Verner watched him die. (R. 10129-30). The rescue vehicle arrived soon thereafter. (R. 10132).

Metro Dade Officer Steven Anderson stated that he went towards Biscayne Boulevard when he heard the dispatch regarding the man screaming for help near the trailer park. (R. 10391-93). Anderson recalled that Officer Boles was the first to signal his arrival at the scene. (R. 10395). He heard Boles state that he had arrived and that he observed the black male subject running around in the grassy area between Biscayne Boulevard and Dixie Highway. (R. 10395-96). Boles asked the dispatcher to "hold the air" because he was going to approach the subject. (R. 10396). Thereupon, Anderson sped up because Boles' tone of voice suggested that he was alarmed. (R. 10396).

As Anderson approached the scene, he observed one patrol car facing northbound, and two officers lying on the pavement to the rear of the car. (R. 10399-400). He radioed that two officers were down and possibly shot. (R. 10400). Anderson exited his car and discovered Officer Boles lying on his back to the rear of the northbound car with an empty holster. (R. 10402, 10406). Boles was not moving and had sustained a gunshot wound to the face. (R. 10403). He had bled quite a bit and had blood running out from

underneath his upper torso. (R. 10403). Anderson tilted Boles' head to the side to drain blood from his mouth. (R. 10403). Officer Strzalkowski was lying next to the west curb of Biscayne, with a bullet wound to the base of his skull. (R. 10402-3). There was a lot of blood on Strzalkowski's shirt collar and on the ground underneath him. (R. 10404). Neither officer moved. (R. 10404). As Anderson started back to his car for a first aid kit, the fire rescue unit arrived. (R. 10404). He advised them that two officers had been shot and they began administering first aid. (R. 10404). Thereupon, Officer Anderson began to interview witnesses at the scene and learned that a black male had driven northbound in a marked patrol unit. (R. 10405).

As Officer Rossman drove towards the scene, he heard Boles and Strzalkowski discuss a black male running from the trailer park to Biscayne Boulevard. (R. 9954). Rossman heard Boles state, "We are going to approach him now." (R. 9955). This statement was the last transmission made by either Boles or Strzalkowski. (R. 9955). After the dispatcher tried unsuccessfully to get either officer to respond, Metro Dade Officer Porterfield requested permission to respond in emergency mode since neither officer was answering. (R. 9956). The sergeant authorized the emergency mode, and Officer Rossman also proceeded in emergency mode. (R. 9957). As Rossman approached the scene, he heard K-9 unit Officer Anderson advise that two officers were down, to send rescue units. (R. 9957).

Rossman arrived at the same time as Sergeant Llapur, and they saw Strzalkowski lying in the road in the far southbound lane, on his back, with his head in a northwesterly direction, with gunshot wounds. Boles was eight to ten (8-10) feet away, on his back, straddling the far right and middle lanes, with his head in a southeasterly direction, with gunshot wounds. (R. 9772-73, 9958-59). Officer Strzalkowski's badge was missing from his uniform. (R. 9771). Both officers appeared to be dead. (R. 9959). Both officers' holsters were empty. (R. 9959). Boles' service revolver, #AUA8386, was discovered on the ground near the left side of Strzalkowski's head with blood on the barrel. (R. 627-28, 9959).

Crime scene investigator George Travis was dispatched to the scene and noted the presence of the following evidence: Boles' revolver; hand-held radio; police baton; eyeglass lens; eyeglass frames; two Metro police badges; two pools of blood; two bulletproof vests; striation marks on the cement median; and vehicle drain plug. (R. 10052-53). One of the badges, #4066, was found still attached to a blood-stained section of a uniform. (R. 10643). The badge and vest were sent to serology for blood testing. (R. 10658). A tan vest was observed slightly to the east and south of the piece of blood-stained uniform. (R. 10643-44). One of the pools of blood was in the center lane, and the other was along the curb against the grassy edge of the southbound lane. (R. 10649-51). Travis collected samples of the blood from both pools and sent them to the serology unit. (R. 10653-55). He also collected paint scrapings from the striation

marks on the cement median. (R. 10668-69). Travis later matched up the drain plug he found to Boles' vehicle which was missing a drain plug. (R. 10670). Furthermore, the paint scrapings and damage to the underside of Boles' car was consistent with having been driven over the concrete median separating the southbound and northbound lanes of Biscayne Boulevard. (R. 10671-72).

As rescue units worked on the officers, Rossman interviewed witnesses at the scene. (R. 9960). Rachael Duvdivini stated that she had been riding in a car going north on Biscayne at the time of the murders. (R. 10220-25). She observed two police cars in the southbound lanes with their emergency overhead lights on. (R. 10225-27). Duvdivini saw a hand push one man who was holding onto the door of the southbound car, and then saw the car drive away. (R. 10227-28).[1] The car drove over the cement median and proceeded north, with its emergency lights on. (R. 10232).

Brad Baker, the driver of the white car, told Officer Rossman that the suspect was a large black male, heavyset, approximately 6'2". (R. 9962). Baker stated that, when he was stopped at the intersection of Ives Dairy Road and Biscayne, he saw the suspect come from the side of the railroad tracks and throw a pipe at his car. (R. 9975, 12430-31). Baker continued driving south on Biscayne and was going to call the police when he saw two patrol cars. Baker's attempts to flag the officers

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[1] Duvdivini thought she saw the car run over the man who fell, but there was no evidence that Boles was run over by the car. (R. 10227-28, 11824-25).

went unnoticed because they drove to where Street was standing. (R.9975).

Baker pulled up behind the officers and observed them get out of their cars and confront the suspect. (R. 9975, 12433). He saw one officer reach for handcuffs and the other reach for his gun while Street was in between the two of them. (R. 12439-40). When the officer, Baker believed to be Boles, reached for the handcuffs he was stripped of his gun by Street. (R. 12474). After the officer reached for his gun, Baker heard three (3) shots and then saw one officer fall backwards striking his head on the curb. (R. 12442-43). The shorter of the two officers, Strzalkowski, was shot first. (R. 12479). After hearing a few more shots, watching Street knock the second officer to the ground, and seeing him pick up a gun, Baker decided to leave. (R. 12444). As he was leaving, Baker saw the second officer get up and run around the car, whereupon he heard two more shots. (R. 12445).

When Baker gave his description of the suspect, Rossman realized that it was the same guy who had been at the Mobil station, but he could not remember his name. (R. 9976). Rossman had the dispatcher pull the transmission tapes, get Street's name and address, and then check with Medi-car to see if they had released Street. After confirming his name and that Medi-car had released him, Rossman put out a BOLO with Street's name and description. (R. 9783, 9977). Street was described as 6'2", 240 lbs., large muscular build, close cropped hair, red shirt, blue jeans, and possibly armed. (R. 9784, 9978). The BOLO was relayed to all Dade and Broward law enforcement units. (R. 9783, 9979).

At approximately 2:25 a.m., on November 28, 1988, Hallandale Police Officer Patrick Seals saw a marked Metro Dade patrol car traveling north on Federal Highway with the overhead emergency lights on. (R. 10439-40). Seals observed a black male, dressed in civilian clothes, driving the patrol car. (R. 10449). He wondered what a civilian was doing driving a marked unit, so he did a u-turn and followed the car. (R. 10449-50). Seals followed the car for several yards and then pulled off into a side parking lot, stopped, and listened to the police scanner. (R. 10450-53). He heard an officer scream that two officers were down and that a black male suspect was northbound in a marked Metro unit. (R. 10454-55).

Fellow Hallandale Officer Morantz pulled up next to Seals, and Seals told him that the man in the Metro unit had shot two officers. (R. 10455). The two pulled onto Federal Highway, activated their overhead emergency lights, and accelerated in pursuit of the Metro unit. (R. 10456). The driver of the Metro unit also appeared to accelerate. (R. 10456). Seals was driving between seventy and seventy-five (70-75) miles per hour and the driver of the Metro car was pulling away at more than seventy (70) miles per hour. (R. 10458). The Metro car continued, within its lane and not erratically, to the traffic circle known as Young Circle. (R. 10459). The Metro vehicle made a right turn around the circle, and the Hallandale officers continued their pursuit. (R. 10462). Seals lost sight of the Metro car after the turn, so he stopped on the north side of the circle. (R. 10463). When Seals stopped, Officer Morantz drove into the traffic circle

and struck Seal's car, thereby ending their pursuit. (R. 10466-67).

David Locke, a.k.a. Jeremiah Lowe, testified that he was in the area of 2300 Charleston Street in Hollywood on November 27-28, 1988. (R. 10969-72). He was in the area from seven p.m. until the early morning selling crack cocaine. (R. 10973). Crystal Green drove up in her mother's car, a small red Nova, parked and talked to Locke shortly after two a.m. on November 28, 1988. (R. 10598-602, 10974-75). As Green and Lowe were speaking, Street walked over from a police car carrying Boles' shotgun at his side. (R. 10604, 10976-77).

Meanwhile, Charlene Warner was returning to her home on Charleston Street when she observed a green and white police car, with its emergency lights flashing, parked on the street behind her house. (R. 10564-68). Warner saw Crystal Green sitting in a small red car, with Jeremiah Lowe (a.k.a. David Locke) and one other man standing outside of the car. (R. 10572-75). Warner, Green, and Locke testified that Street pointed the shotgun at Locke, cocked it, and stated, "Give me the car." (R. 10576-77, 10604, 10981). Locke replied that it was not his car, and Street turned the gun towards Crystal Green. (R. 10577, 10605, 10982). Street pointed the gun at Green, and ordered her to "get out of the car, before I kill you". (R. 10577-78, 10628, 10983). Green exited the car, Street got in, backed the car up, drove to 24th Avenue, and turned left. (R. 10579, 10627, 10984). Street did not appear to have trouble controlling the car. (R. 10579, 10984). Street did not act as if he were high or on drugs. (R.

10586, 10988). Rather, Locke described him as looking frightened or scared as if he "was running from something". (R. 10988).

Metro unit #11433 was recovered from 2310 Charleston Street with the engine, headlights, and emergency overhead lights all on. (R. 11237-40). The wiring console on the interior of the car had been pulled out. (R. 11241). The passenger side front window was broken and a portion of the window remained. (R. 10584, 11244). A criminalist examined the glass fracture and determined that the point of impact had been seven inches up from the bottom and fourteen inches from the left side of the window, but he was unable to determine whether the fracture was made from the inside or the outside. (R. 11494-98). A second criminalist later determined that the pattern of nitrites and lead present on the inside of the glass was consistent with the discharge of a firearm from inside the vehicle. (R. 11602). There was blood spatter on the car's right rear quarter panel, driver's side door, and left rear bumper. (R. 10581, 10986, 11245-47). Metro Dade crime scene technician Richard Ecott lifted fingerprints from the car and submitted the police reports from the inside of the car for fingerprint testing. (R. 11250-52). Street's right palm and right thumb print were discovered on Boles' daily activity report, which was recovered from the car. (R. 11482-83). Ecott also took swabs of the blood spatters and submitted them to serology for examination. (R. 11282-86).

City of Hollywood Police Officer Dennis Sejda recalled that he heard the radio broadcast regarding the murders in Dade County at approximately 2:20 a.m. on November 28, 1988. (R. 10698-700).

The BOLO stated that a large, stocky black male was northbound in a marked patrol unit. (R. 10700). Sejda was proceeding eastbound on Stirling Road when he saw a red car traveling slowly with its lights off. (R. 10701-6). He flashed his lights at the car and received no response. (R. 107808-9). When Sejda rolled down his window to tell the driver to turn on his lights he noticed that the driver was a large, stocky black male. (R. 10710-11). The driver looked at Sejda, turned his head, pulled into the right lane, and accelerated. (R. 10712). Sejda turned on his emergency overhead lights, made a u-turn, and followed the red car. (R. 10712-13).

After Sejda lost sight of the red car, he met Sergeant Brent Sagenkahn of the Broward Sheriff's Office (BSO), and they discussed the red car. (R. 10715-16). Sejda drove down an alley in search of the car and found it parked on the side of the road. (R. 10717-19). Sejda approached the black male, later identified as Street, standing in the median, directly north of the red car, and Street stated, "I shot two cops. Please don't kill me." (R. 10720-23, 10769-70, 11030). Street, who was dressed in a red tank top and blue jeans, fell to his knees and rolled over onto his back. (R. 10725-27, 10774, 11028-30). Sejda did not believe that Street was under the influence of alcohol or drugs; he did not detect any odors on or about Street, and Sejda was able to understand his speech. (R. 10729).

Additional Broward officers arrived and Street repeatedly said, "Don't kill me, I shot two cops." (R. 10728, 10776). Street was taken into custody and his hands were cuffed behind

his back. (R. 10730, 10781). When the officers were placing Street in the back seat of a BSO patrol car, he thrashed violently. (R. 10782, 11039-40). Additional restraints were placed on Street and he was lifted into the back seat of the car. (R. 10786, 11041-44).

Officer Strzalkowski's .38 Smith & Wesson revolver, with blood on the barrel, was recovered from the left westbound lane near the median about five to ten (5-10) feet away from where Street had been standing when arrested. (R. 625-26, 9982, 10726, 10771, 11033, 11200, 11359, 11493). Boles' police issued Remington pump shotgun, #V689397V, was recovered from bushes to the left and rear of where Street had abandoned the red car. (R. 625-26, 9982, 10733, 11200).

Stralkowski's revolver, #AUA8096, was examined and of the six bullets it held, four were live rounds and two were empty casings. (R. 11209-10). The shotgun was later examined by firearms analyst Jesse Galan. (R. 10947-56). When officers are issued the shotguns the gun carries four rounds of ammunition. (R. 10956). The shotgun contained four rounds and did not appear as if it had been recently fired. (R. 10955-59). However there was one live round in the chamber, indicating that it had been cocked after it was issued to the officer. (R. 11215).

Broward officials advised Metro Dade that they had a subject with a police revolver matching the description, but not driving a police car, at the 2200 block of Griffin Road. Rossman received permission to respond to the scene of the arrest. (R. 9981). Upon arrival, Rossman saw two armed Broward deputies and

a Hollywood deputy, and Street was in the back seat of a Broward marked unit. (R. 9982, 9984). Rossman opened the car door and identified Street as the man at the Mobil station, whereupon Street grinned at him. (R. 9984). Also crime scene technician Ecott took hand swabs from Street as Street sat in the back seat of the police car. (R. 11217-21). During the five minutes that Ecott spent with Street, he did not observe anything to suggest that Street was high or on drugs. (R. 11287).

Thereafter, Street was transported to the Broward County Jail (BCJ). (R. 11057). The officers had to physically carry Street into the jail. (R. 11060). BSO Deputy Kenneth Dugger heard Street state, "You should be glad the motherfucker is dead. You should congratulate me." (R. 11062). Detective Santos was also present when the statement was made and he instructed Dugger to write the statement down. (R. 11063, 11559).

BSO Deputy Rory Middleton was working intake at the jail when Street was brought in on November 28, 1988. (R. 10805-7). Middleton assisted in moving Street to the fingerprint and photograph area of the jail. (R. 10818). While Street was walking to the area, he chanted "Shaka Zulu". (R. 10829). The officers had no problem photographing Street, but when they removed one handcuff to fingerprint him he stated, "I could head-butt you like I head-butt those other two cops." (R. 10832). One of the deputies asked Middleton if he had Street's arm and Middleton said, "yes", whereupon Street threatened, "I could take this other arm and whoop you to death with that one." (R. 10832). Street also said, "You think you have me, like those other two

officers." (R. 10833-34). Middleton believed Street's threats, because Street appeared to be extremely strong. (R. 10834). When the officers prepared to conduct a strip search of Street, they removed the handcuffs and the cuffs made a clicking noise, prompting Street to ask, "Are you going to shoot me now?" (R. 10838).

BSO Sergeant T.C. Middleton testified that he unsuccessfully attempted to obtain a urine sample from Street between nine and ten (9-10) a.m. on November 28, 1988. (R. 11418-19). Afterwards, he accompanied Street to the courtroom for a hearing at approximately eleven a.m. (R. 11420-21). Street refused to sign a right to counsel form offered by the assistant public defender assigned to represent him. (R. 11421-23). During his first appearance hearing, Street asked to make a phone call and the judge allowed him to make it from chambers. (R. 11424). Street made a long distance phone call (R. 11424). During the phone conversation, Street expressed his concern that the police would try to kill him because he had shot two officers. (R. 12895).

After the hearing, Street was transported to Dade County. (R. 11427, 11607). As Street was being moved from the transport vehicle to the Metro homicide office, he screamed and struggled. (R. 11614-16). While the officers were carrying Street up the stairs, he physically resisted and struck his head against a doorway. (R. 11619). He was immediately examined by Fire Rescue and no treatment was necessary. (R. 11620-21, 11693-97). Thereafter, Street gave a statement to the Metro police about the murders of the two officers. (R. 11622).

Associate Medical Examiner Dr. Valerie Rao was dispatched to the scene of the murders at 4:15 a.m. on November 28, 1988. (R. 11719-23). After viewing the scene she went to JMH to examine the body of Boles. (R. 11724). She began her autopsy of Boles that morning. (R. 11727). Rao measured Boles and found him to be 5'9", 154 pounds, and forty-one (41) years old. (R. 11729). As part of the autopsy, Rao ascertained the paths of the bullets that struck Boles. (R. 11728). Boles had a non life-threatening injury to his abdomen. (R. 11733). The injury was consistent with a gunshot wound to the abdomen, with the bullet ultimately impacting into the bulletproof vest worn by Boles. (R. 11734).

The projectile which caused the wound to Boles' armpit went from front to back, left to right, and downward. (R. 11755). The presence of gray extraneous material indicated that the wound was caused by a contact gunshot. (R. 11757). The bullet did not go into the chest cavity, rather it went through the soft tissue and backwards, fracturing the third, fourth, and fifth ribs, and the scapula, on the left side. (R. 11758). In order for Boles to sustain this wound, his arm had to be extended somewhat away from the body, so that the bullet struck the ribs and scapula without entering the left chest cavity. (R. 11759). Given reasonably prompt medical attention the injury would be fully survivable and not fatal. (R. 11760).

The wound to Boles' upper left shoulder was caused when a bullet, from a different weapon than the armpit wound, entered the shoulder, grazed the humerus and fractured the clavicle and scapula. (R. 11762). This injury did not cause a lot of

bleeding, but did cause a fair amount of pain. (R. 11763). This wound, like the one to the abdomen and armpit, was not fatal. (R. 11777).

Boles also had a contusion on the left side of his face which was consistent with having been struck in the face with the revolver. (R. 11778-79). An abrasion on his left wrist was made at or about the time of his death and was consistent with Boles engaging in some sort of struggle or physical force. (R. 11785-86). The abrasion on Boles' left knee was also consistent with a physical struggle. (R. 11787).

The remaining gunshot was to Boles' face. The bullet entered the right cheek bone, went into the mouth cavity, into the front portion of the skull, and lodged behind the left ear. (R. 11783, 11788). The bullet went from front to back, right to left, and slightly downward. (R. 11782). The stippling on Boles' left arm was consistent with him having held his left arm up to cover his face as he was shot in the right cheek. (R. 11782). Although this wound was not immediately fatal, the damage to the soft tissue of the face resulted in a lot of bleeding which went into Boles' lungs. (R. 11789-90).

The pattern of blood on the police car was consistent with the bleeding caused by the shot to the face. (R. 11789). It would have been possible for Boles to walk around the police car and hold onto the driver's door after sustaining this injury. (R. 11791). Boles eventually died because the blood from the face wound went into his lungs and suffocated him. (R. 11791). The testimony that Boles was lying on his back, with his mouth and

nose filled with blood, was consistent with the injury to the face. (R. 11792).

Rao conducted an autopsy of Strzalkowski on November 29, 1988. (R. 11793). He was 5'5'' and 177 pounds. (R. 11794). Rao observed injuries on the upper palm and back of his left hand which were consistent with defensive type wounds. (R. 11795-97). A bruise on his left arm was consistent with having been grabbed or held in a forceful manner. (R. 11798). The bruise to the center of Strzalkowski's back corresponded to the bullet fired into his back, which was stopped by the bulletproof vest he was wearing. (R. 11799-801). Rao observed a second contact gunshot wound to Strzalkowski's back where the bullet entered his left back, went across the left back, entered into the chest cavity, and exited into the vest. (R. 11801-6). Neither shot to the back was a life threatening injury. (R. 11803). These two wounds were consistent with the victim's left arm being held and the firearm being placed next to the chest and fired twice. (R. 11813).

Strzalkowski's third gunshot wound was caused by a bullet entering slightly behind the right ear, causing hemorrhaging in the temporalis muscle, going into and fracturing the skull, lacerating or disrupting the right temporal part of the brain, disrupting the bridge connecting both halves of the brain, disrupting the left parietal lobe of the brain, and exiting on the left side of the head. (R. 11809-812). Strzalkowski's brain swelled, and extruded through the exit wound, thus indicating that he was alive after sustaining this injury. (R. 11818). However, this wound was ultimately fatal as it tore areas of the

brain controlling location, respiratory, cardiovascular, and memory. (R. 11819). Rao could not determine what caused the laceration behind the entry wound of this shot, but stated that it could have been a blunt injury. (R. 11812). After the medical examiner had completed her autopsy reports, the physical evidence was taken to the crime laboratory bureau for further testing. (R. 11132-42, 11175-92).

Metro Dade firearms examiner Thomas Quirk examined the two officers' Smith & Wesson handguns and the physical evidence from the medical examiner. (R. 11358). He examined Boles' six shot revolver and found that all six bullets had been fired, yet none of the casings had double indentations which would have indicated that more than six attempts had been made to fire the weapon. (R. 11385-86 Quirk was unable to determine which gun fired the projectile that was recovered from Strzalkowski's head. (R. 11379-80). He was able to ascertain that the bullet recovered from the inside liner of Strzalkowski's vest was fired by Boles' gun. (R. 11380-83). He determined that the bullet hit the vest at a slight angle as the gun was fired into the back of the vest. (R. 11382). When the wound was examined in relation to the vest, it was determined that the bullet had entered Strzalkowski's back, had travelled through his skin, into his body, along the outer surface of his body, and exited into the vest where it lodged. (R. 11395). The projectile from the contact shot to Boles' abdomen, which was recovered from his vest, was fired with Boles' weapon. (R. 11366-73). Quirk determined that the weapon had been placed up against the vest and fired. (R. 11367). The

two bullets recovered from Boles' armpit and behind his left ear were also fired by his own gun. (R. 11378). Five of the projectiles were identified as having come from Boles' handgun. (R. 11392).

When Officer Strzalkowski's weapon was recovered, it had four live rounds inside the gun. (R. 11362). Two of the recovered projectiles had been fired by Strzalkowski's gun. (R. 11365). The projectile taken from Boles' left back shoulder wound was fired by Strzalkowski's gun. (R. 11375-76). This was the only bullet that Quirk could positively identify as having come from Strzalkowski's gun. (R. 11376). Quirk's findings with respect to Strzalkowski's gun were consistent with one shot having been fired into Boles and the second into the window of the patrol car. (R. 11392).

Ray Freeman, firearms examiner, assisted Quirk in examining the evidence. (R. 16180). The shot to Strzalkowski's back damaged his shirt and this damage corresponded to damage to his t-shirt and vest. (R. 16205). Freeman concluded that the wound to Boles' back was caused by a firearm being held firmly in contact with the clothing. (R. 16189). The bullet entered the lower part of his shirt, went through his t-shirt, and stopped in the vest. (R. 16187-88). The shot to Boles' left rear shoulder was fired with the muzzle of the gun held in firm contact with his shirt and pushed underneath his bulletproof vest. (R. 16196). The revolver was held parallel to the shirt, with one to one and one-half inches of the gun stuffed inside the vest. (R. 16204). The t-shirt bunched up, thereby causing two holes to be made in

it by the bullet. (R. 16221). The hole in the lower, front, center part of Boles' shirt was consistent with the muzzle of the firearm having been held very firmly against the shirt at the time the shot was fired. (R. 16214-15). The gun was held at approximately a ninety (90) degree angle when it was shot. (R. 16217). The bullet from this shot was actually stopped by the vest. (R. 16214).

Freeman determined that, based on the stippling pattern formed on Boles' face and forearm, that the shot to his face was consistent with Boles having his arm up in front of his face, approximately one foot in front of his face. (R. 16234-35). The gun was fired within a range of one to three feet from Boles' forearm. (R. 16234).

Serologist, Theresa Merrit, examined Boles' revolver and found that the blood on it was consistent with Boles' blood. (R. 11518-20). She also tested the blood found on Boles' patrol car and found that the blood from the following areas was consistent with Boles' blood: outside driver's door; inside driver's door frame; on steering wheel; outside left rear door; outside left rear corner panel; outside right side of trunk; outside right rear door; on right rear door; and fabric from inside driver's door panel. (R. 11517-27). Furthermore, the blood samples on the car were inconsistent with Strzalkowski's blood. (R. 11529). Merrit determined that the blood found on Strzalkowski's gun was consistent with type O, but she was unable to complete sufficient enzyme testing to determine if it was Boles' blood. (R. 11533).

After the State completed presentation of its case in chief, Street presented the testimony of Blanche Lee, who observed him on the I-95 overpass on the evening before the murders. (R. 11892). Although she initially thought Street was going to jump, and described him as somebody who had "nutted up", she was able to understand his speech and did not think he was on drugs. (R. 11894, 11899, 11915-24).

Eric Reznick described his observations of Street shortly after midnight on November 28, 1988. (R. 12253-58). Reznick stopped at the service station on Biscayne Boulevard and spoke to Street for approximately six minutes, prior to the arrival of Fire Rescue. (R. 12262, 12287). He described Street as "disoriented" and "not speaking logically". (R. 12264). While he described Street as needing professional help, Reznick, a mental health technician, did nothing to assist Street. (R. 12255, 12287-89).

Street introduced the audio tape of his call to "911" from the service station. (T. 12407). During the call, Street stated that he wanted to go to the hospital and that he had called his mother, however she had been dead for over one year. (R. 753-57, 12391).

The tape recording of the Metro Dade radio dispatches was also played for the jury. (R. 623-2412658-59). The tape indicated that Boles arrived at the scene at 0217, 57 seconds. (R. 12664). At 0219, 53 seconds, Boles requested an additional unit to respond, and at 0220, 35 seconds, Boles stated that he was going to approach Street. (R. 12665). The dispatcher asked

at 0222, 45 seconds if any units were on the scene and did not hear a response until Officer Anderson arrived at 0222, 54 seconds and stated that officers were down. (R. 12666-67).

Nurse Bowers testified that when she drew Street's blood at 9:10 a.m. on November 28, 1988, she did not observe any signs of cocaine withdrawal. (R. 11946, 11986). The blood was taken to the medical examiner's office and the serology laboratory for analysis. (R. 11999). Dr. William Hern, toxicologist in the medical examiner's office, conducted tests on Street's blood sample. (R. 12203). Hern explained that when cocaine is broken down by the human body, that several cocaine metabolites are produced and one of them is benzoylecognine (BE). (R. 12228). If BE is present in a blood sample, it indicates that there is a reasonable scientific probability that the person ingested cocaine at some time. (R. 12230).

BE was found in Street's blood which was drawn at 9:10 a.m., and Hern could not offer an opinion about the amount of BE or cocaine which would have been present at 2:20 a.m. (R. 12233). Nor could he tell anything about Street's state of mind at 2:20 a.m. based on the later presence of BE. (R. 12249). Based on the half life of BE, Hern estimated that Street had approximately four times as much BE in his body nine hours earlier than when his blood was drawn. (R. 12239-40). He also noted that the level of BE discovered was a low level. (R. 12240).

Psychiatric Nurse Duval saw Street at the Dade County Jail on November 28, 1988. (R. 12924). She thought Street was highly paranoid and should be placed in a strip cell away from the

general jail population. (R. 12954). This was done, however, after Street was examined the next morning by a psychiatrist, he was placed back in the general population. (R. 12977).

Dr. Jules Trop testified as an expert in addictionology. (R. 12998). Trop became involved in addictionology during his own treatment for chemical dependency on cocaine. (R. 13003). Trop described some of the effects of cocaine on a person. (R. 13208-12). Cocaine can diminish a person's need for sleep and food, and can act as a stimulant leading to paranoia and hallucinations. (R. 13212-13).

Although Trop never directly evaluated Street, he reviewed the facts of the case before forming his opinions. (R. 13013-14). In Trop's opinion, Street's behavior at 2 a.m. was consistent with someone experiencing cocaine intoxication. (R. 13323-25). Trop opined that Street was experiencing cocaine intoxication at the time of the homicides which lessened his ability to make rational choices or to direct his behavior. (R. 13326).

Given the additional facts of Street's behavior in Broward County, Trop concluded that Street's behavior continued to be consistent with cocaine intoxication. (R. 13333-35). And given the facts of Street's behavior when he was examined by the nurse at the jail, at 8:30 p.m. on the day of his arrest, it was again Trop's opinion that the behavior was consistent with cocaine intoxication. (R. 13338).

However, Trop agreed that Street's pulse, taken by Fire rescue shortly before the murders, was inconsistent with that of a person using cocaine. (R. 13365). Additionally, Street's

relatively normal respiration rate was inconsistent with that of an individual under the influence of cocaine. (R. 13366). In fact, he conceded Street's behavior on the I-95 overpass was consistent with that of a person who was afraid of heights and Street's behavior at the Mobil station was consistent with that of an individual who is tired, angry, frustrated, and wants to go home. (R. 13370, 13374).

After the defense rested, the State presented rebuttal witnesses. BCJ nurse Gail Ragland testified that she screens people with potential psychiatric or drug-related problems at the jail. (R. 13477). She checked Street for medical problems when he was brought into the BCJ on November 28, 1988 at approximately 4 a.m.. (R. 13479-82). Nurse Ragland also looked for signs of alcohol or cocaine use and observed none. (R. 13842). She did not detect an odor of alcohol on Street and his pupils appeared normal, not dilated or constricted. Further, there was nothing to suggest that Street should be hospitalized or receive psychiatric care. (R. 13488).

In addition to observing Street on the day of his arrest, Sergeant T.C. Middleton observed him during an additional fifteen or twenty days prior to trial. (R. 13539). Street's speech patterns and manner of speaking during that time were identical to those he observed at the BCJ on 6 a.m. of November 28, 1988. (R. 13540-41).

Psychiatrist Juan Valdes-Barry testified that he conducted a psychiatric screening of Street on November 29, 1988. (R. 13637-43). Dr. Valdes-Barry did not observe any signs of physical

distress or abnormal psychomotor activity. (R. 13645-46). In response to an inquiry regarding physical ailments, Street relayed that he had hypertension. (R. 13647). The Doctor noted that Street gave appropriate answers to the questions posed and spoke in an articulate and logical fashion. (R. 13648). When asked about perceptual disorders, Street stated that on several occasions he had experienced auditory hallucinations. (R. 13649). However, he never claimed to have had visual hallucinations. (R. 13652). Dr. Valdes-Barry concluded that Street was oriented to time, place, and person. (R. 13653).

Detective Richard DeCarlo of the West Palm Beach Police Department, described his encounter with Street on June 17, 1980. (R. 13783). At 6 a.m. DeCarlo and Officer Roy Blevins were dispatched to a domestic disturbance. (R. 13784). He was unable to locate the disturbance and was leaving the area when he saw Street standing twenty-five to thirty (25-30) yards away from him. (R. 13785-86). Street looked at the officers and stated that he was "tired of you guys harassing me". He then backed up, pulled down his pants and exposed his buttocks and penis while telling them to "kiss his motherfucking ass" and "suck his dick". (R. 13788).

When the officers approached Street, a struggle ensued. (R. 13789). During the struggle, Street attempted to disarm DeCarlo. (R. 13789). DeCarlo placed both hands on his weapon and held onto it to protect it. (R. 13791-92). Street and DeCarlo fell to the ground as they struggled for the weapon. (R. 13792). As the struggle continued, Street yelled to the crowd which was

gathering to get him a knife or gun, so he could "kill these motherfuckers". When Officer Blevins intervened to assist in breaking up the struggle, Street tore the badge off of his uniform. (R. 13793-95). At the time of the scuffle, Street did not seem to be under the influence of alcohol or any type of drug. (R. 13795).

Forensic psychiatrist Charles Mutter described the condition known as idiosyncratic or pathological intoxication as a condition which occurs when an individual takes a small amount of a chemical and has an adverse reaction. The major symptoms of this condition are a sudden change of personality, followed by a deep sleep, and then amnesia or a loss of memory. (R. 16314). This reaction usually occurs within minutes of consuming the drug or chemical and is a steady state. (R. 16315-16).

Cocaine intoxication is accompanied by physical and behavioral changes. (R. 16443). The physical changes include increased blood pressure, dilated pupils, and heart palpitations. (R. 16444). The subsequent withdrawal from cocaine can create delirium, confusion, and disorientation. (R. 16444). Street's vital signs taken by Fire Rescue were not consistent with cocaine intoxication. (R. 16469). Further, Street's description of the car driving by and trying to hurt him sounded more like manipulation than paranoia. (R. 16465-67). If he had been truly paranoid, he would have tried to run or hide, not casually discuss it. (R. 16465). Also Street's explanation of the "guy on the roof with a gun" becoming a "guy screwing a chick" was also significant, because if it were paranoia the image would be fixed

and he would not come up with alternative explanations. (R. 16475).

Dr. Mutter outlined the signs that he looks for to determine if a person is too intoxicated to form specific intent. He looks for signs that the person is confused, aggravated, not processing reality, disoriented, frenzied, and irrational. (R. 16488). Street's actions at the time of the murders indicated to Dr. Mutter that it was an organized manner of effecting the death of two people. (R. 16498). Street's statement that he had his ride, coupled with his actions of pulling the wires from the inside of the car in an attempt to disconnect the overhead emergency lights, supported the idea that he could form the specific intent because he was trying to avoid detection. (R. 16502). Further, Street's actions in concealing the shotgun as he approached Crystal Green to rob her was organized, directed behavior which was consistent with the ability to form specific intent. (R. 16506). Additionally, Street's acceleration when he saw Officer Sejda, and abandonment of the red car were all goal oriented behavior which were inconsistent with ingestion of cocaine to the point of intoxication. (R. 16511, 16519).

When Street was arrested he put his hands up, followed instructions, and made a correct statement of what he had done. (R. 16521). These actions indicated that his memory was intact and he was not suffering from paranoia. (R. 16522). And Street's statements later that morning, that he could "head-butt" the officers, indicated that his memory was still intact and that he was not suffering from amnesia. (R. 16528). Finally, the facts

of the altercation between Street and Officer DeCarlo does not tell whether Street was intoxicated at the time of the homicide, rather, it tells us that this was a repetition of Street's pattern of behavior. (R. 16550). After Dr. Mutter completed his testimony, the State rested. (R. 14190).

Thereafter, the defense presented surrebuttal testimony to establish that the battery of a law enforcement officer charge, arising out of Street's scuffle with DeCarlo, was dropped on August 18, 1980. (R. 16374). Also a booking photograph of Street from 1980 was admitted into evidence. (R. 784, 16436).

After the State rested, closing arguments were given. (R. 14288-14541). The jury was instructed and retired to deliberate. (R. 14570-14615). The jury found Street guilty of all ten (10) counts as charged. (R. 948-57, 14761-68). Street was adjudicated guilty on all counts and the cause was passed for sentencing. (R. 958-59, 14768).

On August 6, 1990, the jury reconvened for the sentencing phase and the trial court gave them preliminary instructions. (R. 14942). Opening statements were made by both sides. (R. 14945-64, 14965-69).

A hearing was held on Street's motion to suppress his statements made in 1980 regarding the attempted murder of Samuel Nubee. (R. 14869-73, 15045-15104). The motion to suppress was denied. (R. 15106, 15118).

Street waived all statutory mitigating factors under Florida Statute section 921.141. Defense counsel had discussed the matter with Street and all agreed that they would be proceeding only on nonstatutory mitigating factors. (R. 14914-28).

Initially, the State presented the testimony of Boynton Beach Police Officer Paul Frere that he had pulled Street over for traffic infractions on August 30, 1977. (R. 14969-75). Frere described how he had radioed for backup because Street had exited his car screaming and making threats at him. (R. 14975-78). When Frere told Street that he was under arrest, Street began to push him. (R. 14980-82). As the altercation grew, backup officers arrived who assisted in taking Street into custody. (R. 14981-84). Street kicked and head-butted the officers when they tried to restrain him and place him in the back seat of the squad car, and he continued to make threatening statements to Frere as he transported him to jail. (R. 14984-90).

Next, West Palm Beach police officer Calvin Bryant testified that he was the detective assigned to investigate the shooting of Samuel Nubee on February 7, 1980. (R. 15168-69). Nubee had interceded and stopped an assault by Street and two others on Russell Harrell. (R. 15192). The next day, Street and the others confronted Nubee and beat him up. (R. 15193). When Street saw Nubee again on that same day, Street shot Nubee in the stomach. (R. 15194-95) After Street had been identified as the shooter, Officer Bryant arrested and interviewed him on February 7, 1980. (R. 15200). Street told Officer Bryant that he did not know anything about the shooting and that as far as he could see Nubee "was fighting with himself and shot himself". (R. 15208). Street was ultimately convicted of battery on a law enforcement officer, in 1977, and of attempted first degree murder, in 1980. (R. 707-14). Thereafter, the State rested. (R. 15245).

The first defense witness, Cecilia Alfonso, was a social worker who had prepared a psycho-social history of Street's early childhood. (R. 15268). Alfonso interviewed Street and his family members to prepare the report. (R. 15268). She described Street's family as extremely poor sharecroppers. (R. 15272-73). Street recalled being embarrassed over being poor and singled out at school for free lunch. (R. 15277). There was often not enough food to eat and never enough money for Christmas gifts for everyone. (R. 15273, 15278).

Street lived in Georgia until he was five or six and the family moved to Florida. (R. 15279). Soon thereafter, the family moved back to Georgia where the father worked as a driver and the family had enough food to eat. (R. 15280-81). When the father lost that job, the family moved back to Florida, eventually settling in Boynton Beach. (R. 15282).

Next, clinical psychologist Hyman Eisenstein testified as an expert in the field of neuropsychology. (R. 15358-72). Eisenstein administered standardized psychological tests to Street in order to evaluate his overall brain capacity and capacity to function on a daily basis. (R. 15405). Based on his results on the Minnesota Multiphasic Personality Inventory (MMPI), and sixteen other major tests, Eisenstein described Street as an individual who is prone to having a nervous breakdown. (R. 15411). In his opinion, Street decompensates under stress and anxiety and loses touch with reality. (R. 15410). Further, when placed under a certain amount of stress, Street loses the ability to function and can no longer operate and function coherently. (R. 15410-12).

Eisenstein also opined that cocaine would impair Street's level of thinking, concentration, and judgment. (R. 15413). After charting the various testing categories and results, Eisenstein concluded that Street has severe brain dysfunction that did not reach the level of retardation. (R. 15419). Based on this brain dysfunction, he does not have the ability to function on a day-to-day basis. (R. 15416). Street's I.Q. of seventy-seven (77) corresponds to the finding of brain dysfunction. (R. 15421). This brain dysfunction was described as a chronic and developmental condition which has been with Street throughout his entire life and will continue for the rest of his life. (R. 15449-50).

In Eisenstein's opinion, Street is mentally and emotionally disturbed. Based on this disturbance, he concluded that Street's ability to appreciate what he was doing at the time of the homicides was severely impaired. (R. 15426).

Street's father, Otis, told about Street's background and upbringing. (R. 15497). He described how Street was the sixth of eleven children that he and his late wife had. (R. 15498-99). When Street was a baby, he slept all of the time and he was taken to a doctor, but Otis could not recall what the diagnosis was. (R. 15510). However, Street did not appear to have mental or emotional problems in his childhood. (R. 15514). Otis worked as a sharecropper and the children would assist him in working in the field. (R. 15500-1). Street attended school, but his father did not know how he performed there. (R. 15503). Although the family's living conditions were poor and they often went without

food, the family was close and would attend church and have Bible studies together. (R. 15500, 15521-22).

Gwendolyn Phillips, age nine (9), testified that Street was her mother's boyfriend and a 'very kind man'. (R. 15525-26). She met Street in 1987 when he was in prison. Street would send her birthday cards and letters from jail. (R. 15528-30). Following Phillips' testimony, the defense rested. (R. 15532). The State did not present any evidence in rebuttal. (R. 15532).

After both sides rested, closing arguments were given. (R. 15671-15749). The State argued that the following aggravating factors were applicable to both the murder of Richard Boles and of David Strzalkowski: (1) victims were police officers; (2) cold, calculated, and premeditated; and (3) prior violent felony conviction. (R. 15675-15711). Additionally, the State argued that the murder of Richard Boles was heinous, atrocious, and cruel. (R. 15683-15686).

Defense counsel contested the applicability of cold, calculated, and premeditated. (R. 15741). In mitigation, he argued that the jury should consider the following: (1) evidence of Street's mental impairment; (2) Street's state of mind at the time of the murders; (3) Street's neurological condition as described by Dr. Eisenstein; (4) Street's poverty and childhood; (5) Street's mental and emotional disturbance; (6) Street's IQ of 77; (7) Street's diminished mental capacity; (8) the drugs in Street's system at the time of the homicides; and (9) the sleep disorder in Street's childhood. (R. 15733-36).

Thereafter, the jury received the penalty phase instructions. (R. 15749-60). The jury returned an advisory sentence on Count I, the murder of Officer Richard Boles, of death with a vote of 12 to 0. (R. 1661, 15764). Similarly an advisory sentence of death was rendered on Count II, the murder of Officer David Strzalkowski, with a vote of 12 to 0. (R. 1062, 15764).

On September 13, 1990, Dr. Jules Trop presented additional evidence to the trial court. (R. 15787). He described Street's state of toxic psychosis at the time of the homicides. (R. 15788). Street was intoxicated from the use of cocaine, which resulted in toxic psychosis. Although Trop was unfamiliar with the level or degree of intent required to meet the standards of first degree murder, he opined that Street was not capable of premeditation at the time of the murders. (R. 15788-89, 15794-95). Further, Trop stated that Street was unable to formulate the specific intent to commit robbery due to his use of cocaine. (R. 15790). However, Trop testified that an individual experiencing toxic psychosis can go in and out of a lucid state, thus Street could have been lucid at the time of the shootings. (R. 15800). Trop also testified that Street possibly fits into the category of antisocial personality. (R. 15800-01).

Hyman Eisenstein also presented additional testimony to the trial court. (R. 15803). In Eisenstein's opinion, at the time of the homicides, Street's ability to conform his conduct to the requirements of the law was impaired and Street was under extreme mental and emotional disturbance. (R. 15806-7).

Sentence was imposed on September 18, 1990. (R. 960-72, 15827-72). Street made a statement to the court that he was sorry for the murders and that it was not intentional, rather it was a coincidence. (R. 15825-26). On the three (3) counts of armed robbery and two (2) counts of armed burglary, Street was sentenced to life imprisonment with a three year minimum mandatory. On the robbery and possession of a firearm during the commission of a felony, he was sentenced to fifteen years state prison. On the attempted armed robbery count, Street was sentenced to thirty years state prison. (R. 15827-28). All sentences were ordered to be consecutive to each other and consecutive to the sentences imposed on Counts I and II. (R. 15828-29).

The trial court entered a written sentencing order on September 18, 1990. (R. 973-1008). The following aggravating factors were found for both the murder of Richard Boles and of David Strzalkowski:

> 1. 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. 975-76, 15832-34).
>
> 2. The capital felony was committed while the defendant was engaged in the commission of, attempt to commit, or flight after the commission of a robbery. (R. 978-79, 15834-35).
>
> 3. The murder was committed for the purpose of avoiding or preventing arrest. (R. 979-15836-39).

Additionally the court found two additional factors applicable to the murder of Richard Boles, to-wit:

4. The capital felony was especially heinous, atrocious, or cruel. (R. 983-88, 15841-47).

5. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R. 988-90, 15847-50).

The court found that although the aggravating circumstances of 1) murder committed to disrupt enforcement of laws and 2) the victim was a law enforcement officer, were supported by the evidence, they merged with the factor of "avoid arrest" and would be weighed as a single aggravating circumstance. (R. 982-83, 991, 15840-41, 15850-52). The court specifically rejected the following aggravating circumstances: 1) defendant under legal restraint; 2) pecuniary gain; and 3) victim was a public official (975, 981-82, 991-92, 15839-40, 15852).

Although Street explicitly chose to waive all statutory mitigating factors, the trial court separately reviewed and evaluated each one. (R. 932, 15853). The court found no statutory mitigating factors. (R. 992-1003, 15853-67). The court found one nonstatutory mitigating circumstance, to-wit:

1. Although defendant's use of cocaine, lack of formal education, low I.Q., and low level of brain functioning do not reach the statutory level of "extreme" mental or emotional disturbance, there is evidence of a degree of disturbance which influenced the defendant's actions. The court specifically found that there was a level to which the defendant's conduct was influenced by mental or emotional disturbances sufficient to be considered as a nonstatutory mitigating circumstance. (R. 1004, 15868-69).

The sentencing order concluded with the following additional findings of fact:

The Supreme Court of Florida has consistently held that when the aggravating circumstances outweigh the mitigating circumstances, the imposition of death is the appropriate penalty.[] Furthermore, it is clear that the jury recommendation (12-0 and 12-0 in favor of the death penalty) is entitled to great weight and serious consideration.[] As the jury represents the conscience of the community, this Court, in reviewing the propriety of the death sentence, must heavily weigh the advisory recommendation of the sentencing phase jury.[]

Moreover, this Court firmly states that it has used as a basis for consideration in imposing its sentences no information whatsoever which was not known to the defendant and/or his counsel, and which the defendant and his counsel has not had an opportunity to deny or explain.[]

This Court is fully aware that the determination of whether to impose life imprisonment or a death sentence is not merely a procedure whereby one engages in a process of counting the number of aggravating circumstances and the number of mitigating circumstances. This court, in an attempt to properly weigh these circumstances, has entered into its best reasoned judgement as to which factual situation would require the imposition of the death penalty, and which factual situation can be satisfied by a sentence of life imprisonment, given all of the evidence and in light of all of the circumstances.[]

This Court has given great weight to the defendant's history of convictions for successively more violent felonies, culminating in these two homicides (5)(b). The Court must give appropriate weight to the fact that these two homicides were committed during or in flight from an enumerated felony (5)(d). The Court gives great weight to the fact that it was the victims' occupations as law enforcement officers engaged in their official duties that led to their murders (5)(e) or (5)(g) or (5)(j).

As to the death of Richard Boles (Count I), the Court also places additional weight upon the manner of his death (5)(h) and (5)(i). However, the overwhelming portion of the weight in aggravation comes from the matters listed in the preceding paragraphs.

> The Court specifically finds a lack of the necessary proof of any statutory mitigating circumstance. In evaluating the non-statutory matters presented in mitigation, the Court does consider the existence of sufficient mental or emotional disturbance to be balanced against the matters in aggravation. In truth, the Court can only give this matter slight weight. This mitigation does not exist to the degree needed to mitigate the sentence in this cause. The aggravating circumstances powerfully and convincingly outweigh the matters in mitigation.
>
> This Court, therefore, fully agrees and concurs with the advisory sentence and recommendation found by the trial jury. It is the judgement and sentence of this Court, therefore, that as to the First Degree murder of Officer Richard Boles, you, CHARLES HARRY STREET, having been adjudicated guilty, are hereby sentenced to death. It is the judgement and sentence of this Court, that as to the First Degree Murder of officer David Strzalkowski, you, CHARLES HARRY STREET, are hereby sentenced to death.
>
> ([] indicates citations omitted).
> (R. 15869-72).

Notice of appeal was filed on October 15, 1990. (R. 1089-90). This appeal then followed.

POINTS ON APPEAL

I.

WHETHER THE TRIAL COURT PROPERLY ADMITTED REBUTTAL EVIDENCE OF STREET'S PRIOR CONDUCT?

II.

WHETHER THE TRIAL COURT CORRECTLY RESTRICTED THE DEFENSE PRESENTATION OF EVIDENCE REGARDING COCAINE PSYCHOSIS WHERE INSANITY WAS NOT AN ISSUE AT TRIAL?

III.

WHETHER THE TRIAL COURT PROPERLY FOUND THAT THERE HAD BEEN NO JUROR MISCONDUCT WHICH WOULD DEPRIVE STREET OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY?

IV.

WHETHER THE TESTIMONY OF OFFICER ANDERSON REGARDING HIS SUBSEQUENT OBSERVATION OF STREET CONSTITUTED A DISCOVERY VIOLATION?

V.

WHETHER THE TRIAL COURT CORRECTLY DENIED STREET'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR MADE NO IMPROPER COMMENTS REGARDING HIS DEMEANOR?

VI.

WHETHER THE TRIAL COURT PROPERLY DENIED STREET'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR, IN GOOD FAITH, REFERRED TO STREET'S STATEMENT IN OPENING STATEMENT, AND THE SUBSTANCE OF THE STATEMENT WAS PRESENTED TO THE JURY DURING DEFENSE CROSS-EXAMINATION?

VII.

WHETHER THE TRIAL COURT WAS CORRECT IN PROHIBITING DEFENSE COUNSEL FROM TREATING RUCCO AS AN ADVERSE WITNESS WHERE SHE ANSWERED CONSISTENTLY WITH HER PRIOR DEPOSITION?

VIII.

WHETHER THE TRIAL COURT PROPERLY DENIED STREET'S REQUEST FOR A JURY INSTRUCTION REGARDING CONSECUTIVE LIFE SENTENCES?

IX.

WHETHER STREET RECEIVED A FAIR SENTENCING TRIAL?

X.

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT EVIDENCE OF STREET'S STATEMENT FROM HIS PRIOR VIOLENT FELONY?

XI.

WHETHER STREET PROPERLY PRESERVED HIS OBJECTION TO THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT?

XII.

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT EVIDENCE OF THE CIRCUMSTANCES OF STREET'S PRIOR VIOLENT FELONIES?

XIII.

WHETHER THE TRIAL COURT PROPERLY DENIED STREET'S MOTION FOR MISTRIAL WHERE IT WAS UNTIMELY AND ANY REFERENCE TO A CADILLAC WAS RELEVANT AND PROPERLY ADMITTED?

XIV.

WHETHER THE DEATH PENALTY WAS IMPOSED IN AN UNCONSTITUTIONAL MANNER?

XV.

WHETHER THE PENALTY PHASE JURY INSTRUCTIONS UNCONSTITUTIONALLY DILUTED THE JURY'S SENSE OF RESPONSIBILITY?

XVI.

WHETHER THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT?

XVII.

WHETHER STREET PRESERVED HIS OBJECTION TO THE JURY INSTRUCTION ON HEINOUS, ATROCIOUS, AND CRUEL?

SUMMARY OF ARGUMENT

Rebuttal evidence of Street's prior conduct was properly admitted where it was relevant to establish that his actions at the time of the murders was consistent with his prior actions while not intoxicated.

The trial court did not abuse its discretion in restricting presentation of toxic psychosis where insanity was not at issue and where Street was properly allowed to present all available evidence regarding voluntary intoxication.

Street has failed to establish that he was prejudiced by a juror closing his eyes during the direct examination of a State rebuttal witness. Secondly, the single improper comment by a civilian to the jurors was followed by an investigation, individual and collective questioning of the jurors, and a defense written curative instruction; it did not vitiate the entire proceeding.

Officer Anderson's testimony regarding his subsequent observation of Street was not a discovery violation. Rather, it was a testimonial discrepancy which was properly presented to the jury for their consideration.

The prosecutor properly commented on the evidence of Street's demeanor after the murders, and the record does not support Appellant's claim that the prosecutor improperly commented on Street's demeanor during trial.

During opening statement the prosecutor's reference to an admissible statement made by Street to Detective Smith was a good faith comment on the evidence he expected would be presented.

However, after the substance of the statement was elicited through defense questioning of a State witness, the prosecutor decided not to present the testimony of Detective Smith and Street's claim of error is without merit.

The trial court properly denied the defense request to treat a witness as hostile where she made no adverse inconsistent statements.

Street has not shown that the trial court abused its discretion in refusing to instruct the jury that life sentences could be imposed consecutively where the jury was properly instructed on the possible sentences and defense counsel argued that they could be imposed consecutively.

The prosecutor was properly allowed to cross examine the defense expert witnesses about the bases for their opinions and this questioning did not deprive Street of a fair sentencing trial.

It was proper for the State to introduce the 1980 statement made by Street regarding the attempted murder of Samuel Nubee. Not only did Street waive his right to contest the admissibility of the statement by pleading to the charge in 1980, but the statement was also admissible as evidence of the circumstances surrounding his prior violent felony conviction.

Street failed to preserve his objection to the prosecutor's biblical references during closing argument. Moreover, he has not established that the trial court abused its discretion in allowing the argument.

The trial court properly allowed the State to introduce evidence regarding the events which resulted in Street's prior violent felony convictions for resisting arrest with violence and attempted murder. During the penalty phase of a capital trial, it is proper to introduce 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.

Defense counsel did not contemporaneously object to the evidence that Street was driving Cadillacs at the time of his prior arrests. Additionally, the evidence was relevant to rebut Street's assertion of an impoverished background and its admission did not vitiate the entire proceeding.

Not only did Street fail to raise the constitutionality of the death penalty below, but constitutionality has been upheld in numerous cases by this Court and the United States Supreme Court.

The trial court and the prosecutor correctly stated the role of the jury at sentencing and did not diminish its role.

The death penalty is not cruel and unusual punishment and the trial court properly evaluated the mitigating evidence presented by Street.

Street did not properly preserve his objection to the heinous, atrocious, and cruel jury instruction at trial. The trial court did not err in rejecting the constitutionally infirm instruction requested by defense counsel. The trial court properly applied the law in finding the aggravating circumstance

of HAC for the murder of the second officer and any error with respect to this finding is harmless where the aggravating factor was given minimal weight.

ARGUMENT

I.

THE TRIAL COURT PROPERLY ADMITTED REBUTTAL EVIDENCE OF STREET'S PRIOR CONDUCT.

Initially, Street contends that he was deprived of a fair trial due to the introduction of evidence of his prior conduct. He lists several instances, most of which were not appropriately preserved for appellate review, and focuses his argument on the introduction of rebuttal testimony regarding his prior altercation with police officers. However, the trial court did not abuse its discretion in admitting relevant evidence to rebut Street's claim that he lacked intent when he murdered the two victims.

His first example of improperly admitted evidence is the statement he made to a corrections officer in 1987 that he would be released soon and would not be incarcerated again because, he would "kill the next motherfucker that tries to bring [him] back to prison." Prior to trial the defense filed a motion to suppress this statement, a hearing was held, and the motion was denied. (R. 1252-1324). This statement was properly admitted as it was relevant to show Street's premeditated intent to use deadly force in the future. See Kelvin v. State, 18 Fla. L. Weekly D190 (1st DCA December 30, 1992)(Defendant's statement

during previous drug arrest that the "next time he wouldn't go as peacefully" was properly admitted in his trial for murder of a police officer during a drug raid.").

Street's claim that it was error to introduce his statement to the trooper on the I-95 overpass that he had just gotten out of prison, was specifically waived by defense counsel after the State proffered the testimony. Defense counsel stated, "I do not object to the testimony that he told them he had just gotten out of prison. I do not want the nine years to come in." (R. 9333). Similarly, any potential error from the trooper's description of Street's clothing as "the type that they give you in prison", R. 9362), and another witness' statement that he worked in the "Career Criminal Section", (R. 9727-29), were waived by the failure to object at trial. State v. Cumbie, 380 So. 2d 1031 (Fla. 1980). Additionally, appellant failed to preserve a claim of potential error due to Officer Rossman's comment that "there was no way this guy has never been arrested before". (R. 9943). Id.

Although defense counsel did object to the paramedic's comment that he was afraid the incident at the service station "was a bad drug deal", when the objection was sustained there was no request for a curative instruction. (R. 9596-99). As stated by this Court with the following:

> The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks.
>
> Duest v. State, 462 So. 2d 446 (Fla. 1985).

Furthermore, the isolated comment of the witness, which was not in response to a question, and was never a focus of the State's case, did not vitiate the entire trial.

Rebuttal evidence of Street's prior conduct was properly admitted where it was relevant to establish that his actions at the time of the murders were consistent with his prior actions while not intoxicated. After Street presented his defense that he was voluntarily intoxicated when he committed the murders of Boles and Strzalkowski, the State proffered the testimony of Officer DeCarlo regarding his arrest of Street in 1980. After much discussion, the trial court properly ruled that the evidence was admissible:

> The first one, the test of remoteness. The Court finds that there is no remoteness.
>
> **********
>
> The class of the victims are the same. It is unique when people seize the guns or a gun from a police officer and resist to that extent.**********
>
> Among the suggestive features to this is when the defendant, according to the evidence in this case, robbed Jeremiah Lowe, and I think her name was Greene, I do not recall her name, Jeremiah, he robbed them at gunpoint to take their cars, but, never hurt them.
>
> So, he distinguished, at least in the evidence in this case, violence against civilians or a non-police officer.
>
> And his history with regard to the past episode, was consistent with the conduct of the defendant and, and the episode here that occurred in Dade County some 10 years later or eight years later, in 1988, the November 28, 1988 incident.
>
> **********
>
> The issue of similarity and on intent is required. The Court find that the main issue

> here was an effort to hurt the officers, kill them if necessary. We are talking about the Palm Beach officers now.
>
> **********
>
> There can be nothing more material than the issue of whether or not the defendant cannot form specific intent**********
>
> So the issue is material to that issue. The defense has legitimately raised the defense of cocaine intoxication to the extent that they have offered, through cross-examination, and their own witnesses, proof to satisfy the Court of an inability to perform a specific intent.**********
>
> The Court, therefore, denies the motion of the defense and overrules the objection, and will admit that evidence, under a special instruction to the jury to that effect to be given now as well as at the conclusion of the trial. (R. 13748-53).

A trial court's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984).

Florida Statute Section 90.404(2)(a) provides that evidence of other crimes, wrongs and acts is admissible if it is probative of a material issue other than the bad character or propensity of an individual. In Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), this Court stated there is a general rule of admissibility of relevant similar fact evidence even though the evidence points to the commission of a crime. In the instant case the evidence that Street tore the officer's badge and attempted to disarm was relevant to show intent, which was an ultimate issue in this case. See Rossi v. State, 416 So. 2d 1166 (Fla. 4th DCA 1982)(When sole defense was insanity, evidence of a similar act

committed by the defendant ten years previously was relevant to a determination of mental state and intent.); Goldstein v. State, 447 So. 2d 903 (Fla. 4th DCA 1984)(Evidence that defendant had threatened the murder victim on a prior occasion was relevant to the issue of intent.).

Furthermore, the evidence that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. Bryan v. State, 533 So. 2d 744 (Fla. 1988). The trial court correctly found that the encounter between Street the officers in 1980 and the officers in 1988 were factually similar, and thereby relevant to the issue of intent. Additionally, the State presented the evidence to rebut Street's claim of voluntary intoxication, not as a feature of the trial.

Finally, Street alleges that the trial court erred in failing to give him a continuance to present the testimony of Terry Hickson who witnessed DeCarlo's altercation with Street. The trial court did not abuse its discretion in denying this request where DeCarlo's name was provided to the defense on April 2, 1990 as a potential rebuttal witness to their defense of voluntary intoxication. (R. 13764-65). Defense counsel deposed DeCarlo on May 23rd, 1990, yet on July 16, 1990, they requested a continuance to "investigate this matter". (R. 13763). The request was denied and defense counsel renewed the request on July 20, 1990 to obtain the testimony of Terry Hickson. (R. 16615). The denial of a request for a continuance does not constitute a palpable abuse of discretion where the witness was not under subpoena and defense counsel had been given three

months to "investigate this matter". Jent v. State, 408 So. 2d 1024 (Fla. 1982).

The State would also add that the presentation of Hickson's testimony would not have affected the verdict. Her testimony would have been that Street was beaten by DeCarlo and antagonized by racial slurs. (R. 878-79, 16615). However, the rebuttal testimony of DeCarlo was introduced to establish that when he tore the badge from the officer's uniform and attempted to disarm the officer in 1980 that he was not intoxicated by drugs or alcohol. The proffer of Hickson's testimony did not include any evidence to rebut DeCarlo's testimony that Street was not intoxicated. Accordingly, there is no reasonable possibility that the presentation of her testimony would have affected the verdict.

II.

THE TRIAL COURT CORRECTLY RESTRICTED THE DEFENSE PRESENTATION OF EVIDENCE REGARDING COCAINE PSYCHOSIS WHERE INSANITY WAS NOT AN ISSUE AT TRIAL.

Next, Street argues that he was prejudiced by the trial court's restriction of evidence regarding cocaine psychosis. However, Street has not shown that the trial court abused its discretion where insanity was not at issue, and Street was given great latitude with respect to presentation of evidence regarding voluntary intoxication.[2]

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[2] Trop did not interview Street, yet he was permitted to fully discuss the effects of cocaine on Street and how his actions on November 27-28, 1988 were consistent with cocaine intoxication even though no evidence was presented that cocaine or alcohol was consumed by Street prior to the murders. The only evidence of consumption came from the presence of a low level of BE in

On January 5, 1989 the trial court entered an Order On Notice of Intent to Rely on Insanity, ordering Street to file a written notice of intent to rely upon insanity on or before February 2, 1989. (R. 326). Based upon this order, and Street's subsequent announcement that he would not be relying on insanity, the trial court granted the State's motions in limine to prohibit defense expert witnesses from testifying about the defense of psychosis, toxic psychosis, or any abnormal mental condition not constituting legal insanity. (R. 324-26, 338-40).[3]

At trial the State objected to testimony from Dr. Trop about cocaine psychosis or toxic psychosis and the trial court entertained argument on the matter. (R. 13223-74). Trop defined cocaine psychosis as a "break with reality under the influence of the drug". (R. 13227). He explained the distinction between cocaine intoxication and cocaine psychosis, (R. 13228), and was permitted to testify extensively about cocaine intoxication, (R. 13275-89, 13320-28, 13333-41); the jury was ultimately instructed on voluntary intoxication and specific intent. (R. 14611-16) The State argued that, in the absence of legal insanity, testimony about Street's state of mind at the time of the murders was

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Street's blood, which indicated that at some time prior to 9:10 a.m. on November 28, 1988 he ingested cocaine. Trop's report was substantially predicated upon the self-serving history of drug and alcohol use Street provided to another doctor. Trop's opinion was based upon inadmissible hearsay, yet the trial court allowed the defense to thoroughly explore voluntary intoxication. cf. Cirack v. State, 201 So. 2d 706 (Fla. 1969).

[3] cf. Gurganus v. State, 451 So. 2d 817 (Fla. 1984)(Error to exclude testimony of clinical psychologists where defendant relied upon insanity as a defense.

inadmissible under Chestnut v. State, 538 So. 2d 820 (1989). (R. 13225). During argument the following discussion occurred:

> **THE COURT:** Now, the only issue in front of me to decide whether this objection shall be sustained or not is whether or not the doctor is in effect saying in a state of psychosis, in the context of the questions asked of you by [defense counsel] and cross-examined by [the prosecutor], that the independent or that particular state of psychosis is a state where you are not able to differentiate between right and wrong and the consequences of your actions. You have lost touch with reality.....Are you also including in psychosis the inability to tell right from wrong?
>
> **[Dr. Trop]:** Not necessarily, Your Honor,
>
> **THE COURT:** You are not including that?
>
> **[Dr. Trop]:** Not necessarily. That can be part of it, but not necessarily.
>
> **[Prosecutor]:** I want to go through this series of questions that I asked the doctor.
> Do you remember my taking your deposition the 27th or 28th day of March of this year?
>
> **[Dr. Trop]:** Yes,
>
> **[Prosecutor]:** We talked about your belief concerning toxic psychosis in some length?
>
> **[Dr. Trop]:** Yes.
>
> **[Prosecutor]:** Do you remember these questions and these answers, as they went to that issue? Page 8/9: Let me try and summarize some areas I have covered.
>
> > Q: Would it be fair to state you do not believe the defendant had the capacity to know the nature and consequences of his actions at 2:30 in the morning on November 28th, 1988?
> >
> > A: That is correct."
> >
> > Q: Would it be simply fair to state it is your belief for all of these, instead of reasonable medical certainty, that it

is your belief that, in fact, the defendant did not have the ability to establish right from wrong at the time the crimes were committed?

A: That is correct.

Q: It is your belief that an attempt to commit a crime as a result of toxicity, which you believe he had, he is unable to commit the act you believe he is charged with?

A: That is correct.

It is my understanding that basically, if you believe that person has reached the level where they are toxically psychotic, that in effect the person is really unable to comply with the legal system?

[Dr. Trop]: The answer to that is in the majority of cases, yes. I have seen people who are quote, "toxically psychotic" that could distinguish between right and wrong.

In other words, somebody hallucinating, who might say, who killed somebody, no because it is wrong.

The answer that I gave him, the answer I gave here [is] essentially wrong.

[Prosecutor]: Obviously, in a vast majority of people experiencing toxic psychosis, would it be your opinion they would not know the difference between right and wrong?

[Dr. Trop]: That is correct.

[Prosecutor]: In this particular case, you do not conduct an examination of the defendant, and you would have no way of knowing which of the ninety-five percent, or five percent, he fell into?

[Dr. Trop]: That is correct.

THE COURT: I am going to sustain the State's objection on that question only.

(R. 13243-46).

Appellant has failed to establish that the trial court abused its discretion in prohibiting testimony regarding Street's toxic psychosis,[4] break from reality, and ability to know right from wrong, where insanity was not a defense at trial. A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981).

As in Wickham v. State, 593 So. 2d 191 (Fla. 1991), the defense expert was allowed to testify fully about matters relevant to intent. As stated by this Court:

> The only real limitation was that the expert was not permitted to draw purely legal conclusions from her observations of Wickham. It is axiomatic that the resolution of legal issues is properly left to the jury to resolve, using the legal instructions provided by the trial court. Accordingly, we find no error here.
>
> Id. at 193.

Similarly, in the instant case, the trial court's exclusion of purely legal conclusions, including Street's inability to formulate the specific intent to rob or murder, (R. 13428), was not error. Also see Stephens v. State, 513 So. 2d 1275 (Fla. 3d DCA 1987), review denied 549 So. 2d 187 (Fla. 1988)(In the absence of an insanity defense, the trial court was correct to exclude testimony that defendant was suicidal at the time of the shooting and did not have the specific intent necessary for

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[4] Additionally, defense counsel acknowledged that some of the elements of cocaine psychosis were the same as the elements of insanity (R. 13260, 13263).

murder.). Accordingly, there is no reasonable possibility that the exclusion of Dr. Trop's proffered testimony, (R. 13428), affected the verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

III.

THE TRIAL COURT PROPERLY FOUND THAT THERE HAD BEEN NO JUROR MISCONDUCT WHICH DEPRIVED STREET OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

In his third argument, Street alleges juror misconduct which deprived him of a fair trial. Specifically, he raises two instances: A. that a juror slept during the trial; and B. that the jury was contaminated by improper comments from an outside influence. These two instances have not been properly preserved for appellate review and are both without merit.

A. The allegedly sleeping juror:

With respect to the juror who was allegedly sleeping, defense counsel failed to make this a basis for a mistrial or to demonstrate prejudice warranting relief. During direct examination of a State rebuttal witness, defense counsel sought a mistrial due to improper testimony and the cumulative effect of prosecutorial misconduct. (R. 16550-54). After the court denied the motion for mistrial, defense counsel asked the court to "inquire of each of the jurors whether their capability of continuing--their attention has dozed off a couple of times." (R. 16554). The trial judge stated that he would allow the jury to take a recess before cross examination, but would not conduct a voir dire. (R. 16554-55). Soon thereafter, a recess was taken. During the recess, the trial judge noted that he had observed

Juror Ballance's eyes closed. (R. 16560). Defense counsel did not seek a mistrial, rather he asked the court to "make an inquiry of the jury as to how they feel, what their stamina level is in terms of proceeding." (R. 16561). The court denied the request and the issue was not discussed again. Defense counsel did not request further recess or state that the recess taken had been inadequate. Cross examination continued briefly, (R. 16562-85), and the trial adjourned for the day. (R. 16610). The record does not disclose, nor has Appellant demonstrated that this single incident was in any way prejudicial to his substantial rights. Mirabel v. State, 182 So. 2d 289 (Fla. 2d DCA 1966).

B. Comment by civilian to jurors:

Secondly, Appellant argues that the comments made by outsiders to two of the jurors constitutes fundamental error which deprived him of a fair trial. Not only does the record belie a finding of any error, the claim fails to rise to the level of fundamental error. Although, Appellant mistakenly refers to the outsiders as "apparent law enforcement officers", there was no indication that the two men were police officers. (R. 13959). Furthermore, Appellant can produce no record support for his supposition that the men were in any way connected to law enforcement and his conclusion that the statements to the jurors constituted "deliberate, intentional, and criminal molestation of the jury by law enforcement officers" is improper and should be disregarded by this Court. (See Brief of Appellant at p. 68).

After a lunch break during the State's rebuttal case, a bailiff advised the court that one of the alternate jurors had

become upset when someone made a comment to her in the hallway. (R. 13955-56). Thereupon, the juror, Juror Brown, was questioned individually by the court and counsel. (R. 13957). Juror Brown stated that two men, in civilian clothing, had walked past, during the lunch break, and stated "guilty, guilty". (R. 13958-59). Brown stated that her reaction, as a juror, was to think that the men were "a bunch of creeps". (R. 13964).

The three additional jurors identified by Juror Brown as being present were also individually questioned. Juror Perez was questioned regarding his exposure to the outside commentators. (R. 13967). Perez heard a man state "guilty" as he walked past the jury on the third floor. (R. 13968). He stated that he did not report the incident because he "didn't give it so much importance". (R. 13973). Next, Juror Weaver was questioned about his observations during the lunch recess. (R. 13977). He did not hear what was said, but Juror Perez told him that a man stated "guilty, or something". (R. 13978-79). Juror Harrison did not hear the comment either, but was told that someone said "guilty". (R. 13982-84).

Thereafter, the trial court inquired of the remaining jurors, collectively, whether they knew of the incident that occurred on the third floor during lunch. (R. 13988-89). Defense counsel asked the court to be more specific in its inquiry, and the court asked if anyone heard any remarks while waiting outside the rest rooms on the third floor during the recess. (R. 13889-90). None of the jurors indicated knowledge of the incident. (R. 13990). Defense counsel asked the court to make the inquiry even

more specific. (R. 13994-96). The court agreed to ask the question proposed by defense counsel. (R. 14003). After further discussion, (R. 14005-10), the trial court presented the following question and instruction:

> ...But only for the limited purpose to remove from your minds any possible ambiguities that exist so that any questions regarding what you might have heard cannot be misunderstood by you, have any of you, therefore, heard any words that touch upon any possible verdict of guilty or not guilty, other than those four jurors that we spoke to?
>
> Has anybody here heard anything like that?
>
> **********
>
> Let me give you an instruction, and the record will reflect that no one of the jurors has raised their hand in answer to the court's question.
>
> The instruction is as follows, and this is a strong instruction.
>
> There may have [been] an improper attempt by a person, at the present time unknown to the Court, to make a comment to the jury about a possible verdict in this case.
>
> I will repeat that paragraph again without any commentary, as I have explained, so that the continuity of the instruction of that paragraph, that the instruction is not lost to you.
>
> There may have been an improper attempt by a person to make a comment to the jury about a possible verdict in this case.
>
> If any of you have been exposed directly or indirectly to such a comment, you are instructed that it is an improper comment and unethical and illegal, and you are instructed to totally and completely disregard that comment.[5]

(R. 14012-14).

After the above instruction, was given to the jury, the court offered to investigate further. The four jurors who heard the comment, trial counsel, and the trial judge walked to the area

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[5] The underlined portion of the instruction was written by defense counsel. (R. 977).

where the incident had occurred. (R. 14017). The specific locations were identified and the incident was discussed further. (R. 14017-29). The court requested an independent investigation of the incident. (R. 14029, 1013-15).

Subsequent to the investigation of the circumstances at the scene, the four jurors who were involved were questioned individually as to the effect of the comments on their ability to continue as jurors. (R. 14038-42). The jurors stated that the incident had not affected their ability to be fair and impartial. (R. 14040-41). Upon completion of the individual questioning, defense counsel made a motion for mistrial. (R. 14043). The motion, which did not state a basis, was denied. (R. 14043).

Street argues that the jury was fundamentally corrupted by the improper comment of "guilty, guilty". Unlike the cases relied upon by Appellant[6] the instant case does not involve the issue of the jury being exposed to improper evidence, rather the jury was exposed to an improper outburst of an outsider. Determinations of whether outbursts of witnesses or trial spectators warrant a mistrial rest within the discretion of the trial court and are evaluated in terms of whether there is prejudice to the defendant. See Cheney v. State, 267 So. 2d 65, 69 (Fla. 1972) (no abuse of discretion in denying mistrial where

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[6] Ferrante v. State, 524 So. 2d 742 (Fla. 4th DCA 1988); Kruse v. State, 483 So. 2d 1383 (Fla. 4th DCA 1986); Mattox v. United States, 146 U.S. 140 (1892); Briggs v. United States, 221 F.2d 636 (6th Cir. 1955); United States v. Marx, 485 So. 2d 1179 (10th Cir. 1973); United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974); Russ v. State, 95 So. 2d 594 (Fla. 1957); Johnson v. State, 27 Fla. 245, 9 So. 208 (Fla. 1891); Paz v. United States, 462 F.2d 740 (5th Cir. 1972); and Owens v. State, 68 Fla. 154, 67 So. 39 (Fla. 1914).

prosecutrix in rape case became hysterical in presence of jury, exclaiming that she could not look at defendant again, and victim's aunt then approached defense counsel and criticized him for defending the defendant; Messer v. State, 330 So. 2d 137, 141 (Fla. 1976).

Moreover, after objectionable comments have been made, curative instructions admonishing the jurors to disregard such comments are routinely deemed sufficient to cure any error arising out of such comments. See Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Greer v. Miller. 483 U.S. 756, n. 8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987). Finally, given the isolated nature of the incident, the corrective action taken by the trial court, and the statements of the jurors that they were not influenced, there is no reasonable possibility that the single utterance of "guilty" affected the verdict.

IV.

THE TESTIMONY OF OFFICER ANDERSON REGARDING HIS SUBSEQUENT OBSERVATION OF STREET WAS NOT A DISCOVERY VIOLATION.

In his next point, Street argues that the trial court should have conducted an inquiry, pursuant to Richardson v. State, 246 So. 2d 771 (Fla. 1971), or granted a mistrial due to Metro Officer Anderson's testimony which contradicted his earlier deposition. This argument is without merit.

In his deposition, Anderson stated that he was the first officer at the scene, found the victims, and secured the crime scene. When defense counsel asked him if he did anything else in the case, he stated "no". (R. 10471). However, at trial he

stated that he had to pick up some items at the Broward County Jail during the morning hours of November 28, 1988. (R. 10475). Anderson testified that he walked past Street, who was standing in the holding cell, and he observed Street extend his arm behind his back, and smirk or glare at Anderson. (R. 10489). Officer Anderson explained that he did not discuss his observations of Street at the Broward jail because defense counsel did not ask him whether he had done anything after he left the scene of the crime. (R. 10495). Thus any alleged inconsistency in his deposition and trial testimony arose from defense counsel's questions and was neither a discovery violation nor a legal basis for a mistrial.

This Court has consistently held that a witness' testimonial discrepancy is not a discovery violation and does not support a motion for a Richardson inquiry. Rather, such discrepancy is a matter of credibility to be determined by the jury:

> When testimonial discrepancies appear, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider. This would serve to discredit the witness and should be favorable to the defense. Therefore, unlike failure to name a witness, changed testimony does not rise to the level of a discovery violation and will not support a motion for a Richardson inquiry.
>
> Bush v. State, 461 So. 2d 936, 938 (Fla. 1984), cert. denied 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345, habeas denied 579 So. 2d 725,

In the instant case, the alleged contradictory testimony of Officer Anderson was neither a discovery violation nor the basis for a Richardson inquiry. The testimonial discrepancy, if any, was presented to the jury for their consideration. There was

thus no ground for a motion for mistrial, and no error in denying same.

The State would additionally note that, Officer Anderson's observations were not written or recorded "statements" within the purview of Fla. R. Crim. P. 3.220(b), and accordingly no discovery violation occurred and no Richardson inquiry was necessary. See Johnson v. State, 545 So. 2d 411 (Fla. 3d DCA 1989)(Disclosure of an oral, unrecorded statement of a state witness to the prosecuting attorney was not required under Fla. R. Crim. P. 3.220(a)(1)(ii) and was not a discovery violation); State v. Lewis, 543 So. 2d 760, 767 (Fla. 2d DCA 1989)(Personal observation of lighting conditions by investigating officer did not constitute a scientific test within the meaning of Rule 3.220(a)(1)(x) and was not a discovery violation).

Moreover, the trial court properly denied Street's request for a mistrial as the admission of testimony that he smirked at a police officer did not vitiate the entire proceeding. Duest v. State, supra. Nor is there is any reasonable possibility that any error created by the admission of Officer Anderson's observations contributed to the verdict. State v. DiGuilio, supra.

V.

THE TRIAL COURT CORRECTLY DENIED STREET'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR MADE NO IMPROPER COMMENTS REGARDING HIS DEMEANOR.

Next, Street alleges that the prosecutor commented on his demeanor during closing argument, thereby depriving him of a fair trial. Not only does this argument fail for lack of

contemporaneous objection, but it is also directly refuted by the record.

During closing arguments of the guilt phase, the prosecutor made the following statements:

> *'You should be glad that the motherfucker is dead. You should congratulate me.'*
> And there are no errors in here, because I took it directly from Santo's report. That is what he says at 4:30 in the morning.
> The minute he walks into that jail, he is still proud of what he did. He is still gloating over what he did.
> It may not be something that you feel comfortable about in terms of dealing with the idea that somebody would be proud of doing this, but you know how we know that this man is proud at the time?
> Because of that grin.
> We have heard about that grin two or three times. I don't know if you remember.
> Rossman said that he came to the back of the police car to see if he could identify Street as the same man he had seen in the Mobil station.
> And he said at that point, all he saw was head goes up, big grin, puts his head back down.
> Santos, after listening to the statement, he sees that grin again.
> Officer Anderson for the third time when he comes into the jail about 7:00 in the morning to pick up the defendant's clothing and brings him back to the Dade County jail, he is wearing a Metro Dade uniform, when he sees those Metro Dade uniforms, he has got that big grin on.
> You should congratulate me.
> He has that grin on his face.
> You want to know why?
> Because at that time he was proud of what he had done. He knew what he had done. He intended to do what he had done.
>
> (R. 14387-89).

There was no contemporaneous objection to the comments on the evidence that Street grinned at the police officers. Furthermore, after the prosecutor completed his closing argument

and defense counsel made a motion for mistrial he did not list the "grin" evidence as a basis for his motion. Rather, he stated the motion was made due to the following four comments: 1. a statement regarding defense of legal intoxication; 2. a comment on Street's killing spree; 3. a comment that jury had not heard evidence from defense counsel to rebut statement that Street was proud of the murders; and 4. a statement regarding the absence of evidence that DeCarlo called Street a "nigger". (R. 14400-4). It was not until the next day that defense counsel claimed the prosecutor improperly commented on Street's grin, (R. 14562-63), thus any error was waived for failure to make a timely objection. State v. Cumbie, 380 So. 2d 1031 (Fla. 1980); Nixon v. State, 572 So. 2d 1336 (Fla. 1990), cert. denied 112 S.Ct. 164, 116 L.Ed.2d 128.

Moreover, it is undisputed that it is proper to comment on the evidence during closing argument. White v. State, 377 So. 2d 1149 (Fla. 1979), cert. denied, 449 U.S. 845, 101 S.Ct. 129, 66 L.Ed.2d 54 (1980). The record directly refutes Appellant's contention that the prosecutor commented on Street's grin *at trial*, the comments referred only to his grinning prior to trial. The prosecutor's references to Street's grin were based entirely on the evidence presented at trial, (R. 9985, 10490, 11559), and did not trespass upon his right to a fair trial.

Finally, the jury was instructed that what the attorneys said in closing arguments was not evidence, and that the only thing to be considered by them was the evidence introduced at trial. (R. 14286, 14610). Accordingly, if the statements

regarding Street's demeanor outside of the court were improper, there is no reasonable possibility that they contributed to the verdict. State v. DiGuilio, supra.

VI.

THE TRIAL COURT PROPERLY DENIED STREET'S MOTION FOR MISTRIAL WHERE THE PROSECUTOR, IN GOOD FAITH, REFERRED TO STREET'S STATEMENT IN OPENING STATEMENT, AND THE SUBSTANCE OF THE STATEMENT WAS PRESENTED TO THE JURY DURING DEFENSE CROSS-EXAMINATION.

As his next issue, Street contends that he was denied a fair trial when the prosecutor referred in opening statement to his confession that he committed the murders in self defense, yet did not introduce the statement to the jury. However, the opening statement was made in good faith, and any error caused by the reference to the confession was dissipated by the defense presentation of the substance of the confession.

Prior to trial, hearings were held on Street's motions to suppress his statements to correctional officers regarding not returning to prison, to Broward officials regarding representation by the public defender, and to Broward officers regarding his fear of being shot by them during arrest. (R. 1232-1522). There was no motion to suppress Street's exculpatory statement to Metro Dade Detective Greg Smith that he had shot the officers in self defense. (R. 1524). Therefore, when the prosecutor made the following statement in opening remarks on June 11, 1990, he knew that Street's comments to Smith were admissible, and he intended to introduce them during trial:

> The defendant himself at some point tells the police that he took the gun from one officer,

> knowing that the other one was still armed and knew that that was the one that he was going to have to shoot first.
> (R. 9166-67).

However, when the State rested its case on July 19, 1990, the prosecutor made a decision, that due to evidence which had been admitted, he was not going to present Street's statement to Smith. (R. 14259-61).

Opening remarks are not evidence, and the purpose of opening statement is to outline what an attorney expects to be established by the evidence. Whitted v. State, 362 So. 2d 668 (Fla. 1978). The record in the instant case discloses no more than a good faith attempt to list what the prosecutor expected the evidence to establish. See Rutledge v. State, 374 So. 2d 975 (Fla. 1979), cert. denied 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980)(Prosecutor's opening statement reference to tape recording, identifying the defendant as the attacker, which was subsequently ruled inadmissible was not reversible error.); Ricardo v. State, 481 So. 2d 1296 (Fla. 3d DCA 1986), review denied 494 So. 2d 1152 (Fla. 1986)(Motion for mistrial properly denied where prosecutor's opening statement reference to inadmissible police report was a good faith outline of what he expected the evidence to be).

Additionally, the State submits that the opening reference to Street's self defense statement did not vitiate the entire proceeding where the defense counsel elicited the substance of the statement during cross examination of State witness Dr. Mutter with the following:

Q: ...we are up to the point where the Fire Rescue leaves and Charlie Street is telling Greg Smith that he is there alone with the two police officers. Charlie Street tells Greg Smith that the two police officers surrounded him and told him that they were going to kill him. Did Mr. Laeser tell you that?

A: I don't recall.

Q: Is it in your three-page report that contains all the relevant information?

A: It is not in the report itself, no.

Q: Did you think that to be insignificant in assessing Charlie Street's mental state on November 28th?

A: I think all of this is significant interest.

Q: And Charlie Street, after they surrounded him and told him that they were going to kill him, he became afraid and believed that they were going to kill him and throw him into a fire that was burning [a] short distance away. Did Mr. Laeser tell you that?

A: No, I don't recall him saying that, and I may have read part of it.

Q: Is that contained in the three-page document that contains all the relevant information that you have used?

A: No, sir.

Q: Did you have any information to corroborate the fact that at that point in time, the police officers Boles and Strzalkowski, in fact, surrounded Charlie Street and told Charlie Street that the[y] were going to kill him?

A: No, sir.

Q: In your investigation that you did in this case, did you have any information to corroborate the fact that there was a fire nearby and that Boles and Strzalkowski were trying to throw Charlie Street's body into the fire after they killed him?

A: No, sir.

Q: Do you think that might be significant in assessing Charlie Street's state of mind?

A: Yes.

Q: You, however, rejected that?

A: No, sir. That is not part of my opinion.

Q: Charlie Street states that one of the officers pulls his gun and again stated that the other officer was going to kill Charlie Street, and at that point, Charlie Street grabbed the gun, wrestled it from the hands of the police officer and shot him, and then realizing that the other officer was going to shoot him, Charlie Street then turned and shot the other police officer.

Do you have any information to corroborate Charlie Street's perception that one of the officers pulled his gun out and said to Charlie Street that he was going to kill Charlie Street?

A: No, sir.

(R. 14153-55).

The prosecutor specifically referred to the testimony of Dr. Mutter as one of his reasons for deciding not to present the contents of the statement made by Street to Detective Smith. (R. 14260). It is apparent from the extensive information brought out by defense counsel, that any error caused by the prosecutor's brief opening reference to Street's self defense claim was harmless.

VII.

THE TRIAL COURT CORRECTLY PROHIBITED DEFENSE COUNSEL FROM TREATING RUCCO AS AN ADVERSE WITNESS WHERE SHE ANSWERED CONSISTENTLY WITH HER PRIOR DEPOSITION.

Street argues that he should be given a new trial because the trial court refused to permit impeachment of his own witness, Ann Marie Rucco. However, Street failed to establish that Rucco made an inconsistent statement at another time, thus the trial court properly denied the defense request to impeach her pursuant to §90.608, Fla. Stat. (1989).

In her prior sworn statement, Rucco gave the following answers:

> A: A black male was running along the railroad tracks.
>
> Q: And what else was the black male doing on the railroad tracks?
>
> A: He was staggering around as if he was drunk and he was waving his arms around.
>
> Q: You previously told me that he was stumbling and staggering on the railroad tracks because this was possibly due to the railroad keys, that he couldn't run because of them. Could that be possible also?
>
> A: Yes.
>
> (R. 835-36).

When defense counsel deposed Rucco, she specifically adopted her prior sworn statement as true and accurate. (R. 857). At trial, Rucco gave the following answers in response to the defense attorney's questions on direct examination:

> Q: And did you see something at the time?

A: I saw a man running along the tracks going north.

(R. 12591).

Q: Now, as the person was running along the railroad tracks, how was his sense of balance?

A: I would say it was unstable, because he was on the tracks.

Q: Did you ever see him appear to stumble.

A: He stumbled, but he never fell completely.

(R. 12593).

Q: Based on your observations of the person, from what you saw of him as he is running, stopping, pausing, whatever condition you saw with respect to his balance, can you say if he looked to you like he might have been drunk or not?

A: No.

Q: You can't say?

A: (Witness shakes head).

(R. 12600).

Thereafter, the trial court properly denied Street's request to cross examine Rucco as an adverse witness. (R. 12615-641).

Defense counsel did not establish that Rucco was adverse, pursuant to §90.608(2), Fla. Stat. (1989). In her sworn statement and deposition Rucco was not asked whether she could "say if [Street] looked to [her] like he might have been drunk or not?". (R. 12600). Thus, Rucco's response at trial that she could not say whether or not Street looked to her like he might have been drunk, was not an adverse statement. Until trial, Rucco was not asked whether she thought Street was or was not drunk. Her response that she "could not say", while not the

answer that the defense desired, was not a prior inconsistent statement. Brumbley v. State, 453 So. 2d 381 (Fla. 1984). Moreover, Street has failed to establish that the trial court abused its discretion in denying his request to cross examine Rucco. McCloud v. State, 335 So. 2d 257 (Fla. 1976).

VIII.

THE TRIAL COURT PROPERLY DENIED STREET'S REQUEST FOR A JURY INSTRUCTION REGARDING CONSECUTIVE LIFE SENTENCES.

Street claims that the trial court erred in refusing to give his requested jury instruction that he could be sentenced to consecutive minimum mandatory twenty-five (25) year sentences for a minimum total of fifty (50) years in prison. This argument is not supported by the law.

The defense filed a written request, (R. 1060), and repeatedly made oral requests, (R. 5536, 14929, 15661, 15722), for the special instruction that life sentences could be imposed consecutively. These requests were denied by the trial court. However, defense counsel was permitted to make the following argument to the sentencing jury:

> The punishment of life imprisonment, locked away in a small cell, deprived of all the experiences that make us human, all the experiences that make life worthwhile, no one to love him and care about him, no hope for his future. Is that severe punishment?
>
> Charlie Street is 36 years old.
>
> The Judge has the authority under the law to sentence him to a consecutive life sentence. That means the Judge can sentence him to 25 years minimum mandatory life sentence in Count I and an additional 25 years minimum mandatory in count II; a total of 50 years, 50 years in prison before he could even be considered for parole. He would be 86 years old. You may consider that Judge Sepe has the same concerns

> as you do about protecting our community. You may consider that Charlie Street will never, never be released from prison.
>
> (R. 15742-43).

The trial court did not abuse its discretion in denying Street's request for a special jury instruction. The jury was informed through the standard instruction, on the possible sentences for first-degree murder, of the minimum mandatory portion of a life sentence. (R. 15752, 15755, 15756).

In King v. Dugger, 555 So.2d 355 (Fla. 1990), King argued that it was error to prohibit him from presenting testimony from a parole commission witness that a life sentence for first-degree murder includes a twenty-five (25) year minimum mandatory. This Court held that:

> Testimony that King would have to serve at least twenty-five years of a life sentence is irrelevant to his character, prior record, or the circumstances of the crime. *See Franklin*, 108 S.Ct. at 2327 (plurality), 108 S.Ct. at 2333 (O'Connor, J. concurring in the judgment). Excluding that testimony was within the trial court's discretion. The Standard instruction on the possible sentences for first-degree murder adequately inform the jury of the minimum mandatory portion of a life sentence.
>
> King, id. at 359.

Furthermore, the trial court allowed counsel to argue that Street could be sentenced to two consecutive minimum twenty-five year prison terms on the murder charges should they recommend life sentences. Accordingly, defense counsel argued that if the jury recommended a life sentence Street would not be paroled until he is eighty-six (86) years old. The jury was apprised of the substance of the special instruction and there is no

reasonable possibility that its absence contributed to their verdict. State v. DiGuilio, supra.

IX.

STREET RECEIVED A FAIR SENTENCING TRIAL.

As his next claim of error, Street submits that he was denied a fair sentencing trial due to the cross examination of his expert witnesses regarding his future behavior. Street has failed to show that the trial court abused its discretion in permitting cross examination of the defense witnesses regarding the bases for their opinions.

Neuropsychologist Hyman Eisenstein testified that he evaluated Street, and among his conclusions were the following: Street loses touch with reality and the ability to coherently function under stress and anxiety, but regroups very shortly thereafter (R. 15411); Street is unable to exercise control over his emotions, when placed under stress (R. 15412); Street has difficulty in his thinking and conversation if he takes cocaine, alcohol, or any type of drugs (R. 15413); Street is mentally disturbed, and was throughout his school years (R. 15423); Street is emotionally disturbed, and has been for the past several years (R. 15425); and Street has suffered from brain dysfunction his entire life. (R. 154449). On cross examination, the prosecutor elicited that Street will continue for the rest of his life "not to learn how not to make bad choices". (R. 15472).

As stated by this Court in Hildwin v. State, 531 So. 2d 124, 127 (Fla. 1988), aff'd, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), "there is a different standard for judging the

admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's character." The trial court properly allowed cross examination of Eisenstein as to whether his evaluation of Street would change over time. The state was not trying to establish the future dangerousness of Street, but was questioning the permanence of Street's neuropsychological condition. See Valle v. State, 581 So. 2d 40 (Fla. 1991), cert. denied 112 S.Ct. 597, 116 L.Ed.2d 621, (State entitled to cross examine defense witness as to whether his opinion that "lifers" make good prisoners would change given the possibility that Valle could be eligible for parole in fifteen years.).

Given Eisenstein's inconsistent conclusions, to-wit: that he had always had brain dysfunction and been emotionally disturbed, yet could "regroup" shortly after a stressful situation, it was entirely proper for the prosecutor to utilize cross examination as a means of undermining the credibility of the diagnosis. Extensive testimony was presented by the defense that Street's actions at the time of the murders were consistent with one who was experiencing cocaine intoxication. (R. 12998-13419). One reasonable inference to be drawn from this testimony was that Street was only a dangerous person if he ingested cocaine. However, Eisenstein opined that Street had always had the neuropsychological conditions he described, yet he also referred to the temporary conditions brought on by the use of drugs. Accordingly, the trial court properly allowed the State to explore the permanence of Street's conditions.

The trial court also correctly allowed the prosecutor to question defense witness, Cecilia Alfonso, a social worker, about the basis of her testimony. Alfonso testified that part of her information came from Street himself. (R. 15296). When the prosecutor asked Alfonso if she knew "whether or not the defendant has ever been convicted of a crime?", the defense objected, and the answer was proffered outside the presence of the jury. (R. 15296, 15329-34). The trial court ruled that the State could elicit, pursuant to §90.806, Fla.Stat. (1989), any convictions specifically told to Alfonso by Street. (R. 15334-37). Thereafter, the prosecutor asked Alfonso if she conducted a personal interview with Street as part of formulating her report on his criminal history. Alfonso responded that she had, and that she discovered Street had been convicted of a felony in 1973. (R. 15339).

After having admitted the hearsay statements Street made to Alfonso, the trial court properly allowed the State to attack the credibility of the declarant (Street) under §90.806, Fla. Stat. (1989). Notwithstanding the statutory provision, the credibility of Street's statements to Alfonso became relevant when Alfonso stated that she had considered his statements in formulating her report. See Parker v. State, 476 So. 2d 134 (Fla. 1985)(State entitled to cross examine psychologist about criminal offenses related to him by defendant, and used by him in compiling case history); Muehleman v. State, 503 So. 2d 310 (Fla. 1987), cert. denied 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170, ("[P]roper for State to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis.").

X.

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT EVIDENCE OF STREET'S STATEMENT FROM HIS PRIOR VIOLENT FELONY.

As put forth in argument XII, it is axiomatic that it is not only proper to introduce during the penalty phase of a capital trial evidence of the prior conviction, but also evidence of the circumstances surrounding any prior conviction involving the use or threat of violence. Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla. 1992). Notwithstanding this well settled proposition of law, Street claims that the trial court erred in preventing him from presenting evidence that he refused to sign a rights waiver form when he was arrested for attempted murder in 1980. However, this argument was not preserved for appellate review and should not be considered by this Court.

A hearing on Street's motion to suppress his 1980 statements to Detective Bryant was held on August 6, 1990. (R. 14897-14914, 15064-15111).[7] Detective Bryant testified that after arresting Street for the attempted murder of Samuel Nubee and advising him of his constitutional rights, that Street made the following spontaneous statements: he did not know anything about the shooting; the witnesses were "lying on him"; and he did not know what was going on with the victim. (R. 15071, 15205). After the

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[7] The State continues to maintain, as it did at trial, that it was improper for the trial court to entertain a motion to suppress where Street had entered a knowing and voluntary pleas to the charge of attempted murder in 1980 and had thereby waived his right to raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea. Robinson v. State, 373 So. 2d 898 (Fla. 1979); Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973).

spontaneous statements, Bryant asked Street three questions, and received answers as follows:

> Q: When you were there, exactly what did you see?
>
> A: As far as he could see, the guy [the victim] was fighting with himself and shot himself?
>
> Q: You mean, the guy was fighting all by himself and just shot himself?
>
> A: Well, he was over there clowning around with the gun, you know how people clown around, and he probably shot himself. That is all that I know about it.
>
> Q: Were you involved in the beating of Russell Harrell?[8]
>
> A: You mean the police shooter? That is what we call him. No. You should be happy about what happened to Russell Harrell, since he is a police shooter.
>
> (R. 15072-73, 15207-9).

The trial court ruled that Street's statements, other than his spontaneous ones, would be excluded. (R. 15106-7). However, after reconsideration, the judge reversed his ruling on the motion to suppress and permitted the State to elicit the statements made by Street in response to Detective Bryant's questions. (R. 15118). Thereafter the prosecutor asked for clarification on Street's refusal to sign the rights form. The trial court instructed the prosecutor that "there is to be no testimony whatsoever that he refused to sign the card; just that he made the statement." (R. 15118-19). On cross examination of

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[8] Nubee, the victim of the attempted murder, had intervened in a fight between Street and Harrell, thus prompting the attack on Nubee by Street.

Detective Bryant, defense counsel did not ask or proffer questions regarding Street's refusal to sign the rights form. (R. 15211-20). It was necessary for the defense to proffer what Detective Bryant would have said in order to preserve this claim for appellate review. Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990).

XI.

STREET DID NOT PROPERLY PRESERVE HIS OBJECTION TO THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT.

Street next argues that the three (3) instances wherein the prosecutor referred to the Bible denied him a fair trial. All but one of these instances are procedurally barred by the failure to object at trial. Freeman v. State, 563 So. 2d 73 (Fla. 1990), cert. denied 111 S.Ct. 2910, 115 L.Ed.2d 1073. Furthermore, the argument fails on the merits.

The prosecutor referred to the Sixth Commandment of "thou must not murder" and to the statement, "Be not deceived, for God is not. Whatsoever a man sows, so that much shall he also reap." (R. 15671-73, 15710). However, there was no objection to either comment, and their potential for prejudice falls far short of fundamental error. Defense counsel did object when the prosecutor stated, "Should we excuse the sinner? Should we thank the sinner? Is that our job; is that our obligation under the law?", and the objection was overruled. (R. 15705). However, this comment was invited by, and constituted a fair rebuttal to defense counsel's statement that at sentencing the jury would "have a unique opportunity in this case, "you will have a unique

opportunity to condemn what has happened, to condemn the sin but not condemn the sinner." (R. 14968). Street has not shown that the trial court abused its discretion in permitting the prosecutor to make biblical references. As held by this Court, "[t]he reading of passages from the Bible is not ground for reversal." Paramore v. State, 229 So. 2d 855 (Fla. 1969).

Furthermore, it is hypocritical for Street to assert that the prosecutor's references to the Bible made the sentencing process fundamentally unfair, when defense counsel made the Bible and its teachings a central theme with the following:

> We are about to enter into the valley of the shadow of death. I would ask that you reach out for the hand of the Lord as we take this journey. (R. 15729).
>
> This case is going to test your conscience, your conscience hold you before the Creator ... (R. 15731).
>
> Our Christian heritage teaches us that we all have a responsibility to do what we can in our own small way to make this a better world. (R. 15743).
>
> Does the Lord think that we are somehow better than Charlie Street because of our good fortune? (R. 15744).
>
> Let your Judeo-Christian heritage speak to you in the Old testament, on the book of genesis where there is a scripture of how Cain killed his brother, Abel. When it happened, what did the Lord do? What was the Lord trying to teach us in the Book of Genesis, Chapter 4? In the New Testament, the Gospel according to John, Chapter 8, the pharisees brought a woman to see us and they said to the Lord, lord this woman has been caught in adultery and the law of Moses orders that such a woman should be put to death by stoning....What does the Lord teach us about the sanctity of life? The Bible teaches us in Matthew, Chapter 7, the lord will judge us as we judge others. Your verdict on others will be the verdict passed

> on you. The Gospel according to Matthew, chapter 25, the Lord said, whatsoever you do to the least of my people you do unto me. (R. 15746-47).
>
> I want to read to you for a moment from my church, a quote paraphrasing the Bible and just leave you with those thoughts. When I was hungry, you gave me to eat. When I was thirsty, you gave me to drink. Now, enter the home of my father....(R. 15748-49).
>
> The Lord tells us that every tear will be wiped away and every wound will be healed. We will want to enter God's house on that day. (R. 15749).

Given the statements of defense counsel, it is not only outrageous to suggest that the statements of the prosecutor were improper, but it is equally outrageous to suggest any reasonable possibility that these statements affected the sentencing verdict. State v. DiGuilio, supra.

XII.

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT EVIDENCE OF THE CIRCUMSTANCES OF STREET'S PRIOR VIOLENT FELONIES.

Appellant contends that the trial court erred in allowing the State to introduce the testimony of Officer Frere and Detective Bryant regarding the events which resulted in Street's prior violent felony convictions for battery on a law enforcement officer and attempted first degree murder. Street's argument that admission of the testimony constituted a misuse of the aggravating circumstance of a prior violent felony is without merit.

Appellant's argument fails because it is proper to introduce during the penalty phase of a capital trial, not only evidence of the prior conviction, but also evidence of the circumstances surrounding any prior conviction involving the use or threat of violence. As held by this Court:

> 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 Officer Frere and Detective Bryant was relevant to fully apprise the jury of the background of Street's previous convictions, and the trial court did not abuse its discretion in admitting the evidence.

XIII.

THE TRIAL COURT PROPERLY DENIED STREET'S MOTION FOR MISTRIAL WHERE IT WAS UNTIMELY AND ANY REFERENCE TO A CADILLAC WAS RELEVANT AND PROPERLY ADMITTED.

Appellant alleges that "time and time again" the prosecutor referred to the fact that Street was driving Cadillacs at the time of his 1977 and 1980 arrests. This "time and time again" consisted of three references, only one of which was preserved by a contemporaneous objection. Furthermore, the references to Cadillacs was relevant and did not vitiate the entire sentencing proceeding.

When Officer Frere testified about Street's 1977 arrest for battery on a law enforcement officer, he stated that Street was driving a Cadillac. There was no objection to this evidence on direct examination, (R. 14971-74), but on redirect, (15039-40), the defense objection was sustained. However, defense counsel did not request a curative instruction to give the trial court the opportunity to cure any error caused by the statement, and the defense motion for mistrial was properly denied. Duest v. State, supra.

A similar procedural default occurred when the defense presented the testimony of a social worker regarding Street's impoverished background, and the State asked whether she was aware that Street had been stopped twice in Cadillacs. (R. 15294). Defense counsel did not object to the question. The social worker continued to testify, (R. 15294-96), until the prosecutor inquired about her knowledge of Street's criminal

history. An extensive discussion regarding the defense objection and motion for mistrial followed, yet the reference to a Cadillac was not raised as a basis for objection or mistrial. (R. 15296-15337). It was not until the next witness was testifying that defense counsel objected to the social worker's testimony regarding the Cadillacs. (R. 15375). The State properly countered that the objection was waived as it was not contemporaneous. Castor v. State, 365 So. 2d 701 (Fla. 1978). The trial court did not abuse its discretion in denying the untimely defense motion for mistrial. (R. 15351-52). Furthermore, any right to raise this allegation of error was again waived where the trial court offered to either give a curative instruction to the jury or to strike the testimony and defense counsel did not accept either option. (R. 15493-96). Duest v. State, supra.

Finally, as argued in issue IX, the State was entitled to cross examine the social worker about the basis for her opinions. Street maintained that his impoverished background was a mitigating factor and evidence that he was driving expensive cars was properly elicited on cross examination to test the basis for and to evaluate the credibility of the social worker's opinion.

XIV.

THE DEATH PENALTY WAS NOT IMPOSED IN AN UNCONSTITUTIONAL MANNER.

Next, Street alleges that the imposition of the death penalty is unconstitutional where insufficient guidance is given to the jury. However, he neglected to raise this argument at trial and is thereby foreclosed from raising it on appeal. Castor v. State, supra.

Furthermore, the constitutionality of the death penalty has been upheld on multiple occasions by both this Court and the United State Supreme Court. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Ferguson v. State, 417 So. 2d 631 (Fla. 1982); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

XV.

THE PENALTY PHASE JURY INSTRUCTIONS DID NOT UNCONSTITUTIONALLY DILUTE THE JURY'S SENSE OF RESPONSIBILITY.

Next, Appellant alleges numerous instances where both the prosecutor and judge unconstitutionally diminished the jury's role in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). (R. 2890-2895, 2904-5, 2950-51, 3065-67, 3142-47, 3309-13, 3371-73, 3379-91, 15651-53). This Court has ruled that Caldwell claims based on these types of comments offer no relief inasmuch as both the prosecutor and judge were correctly stating the law. Grossman v. State, 525 So. 2d 833, cert. denied 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822; Combs v. State, 525 So. 2d 853 (1988); Hill v. State, 549 So.2d 179 (Fla. 1989).

XVI.

THE DEATH PENALTY IS NOT CRUEL AND UNUSUAL PUNISHMENT.

Street's sixteenth claim regarding the constitutionality of the death penalty is without merit and has been repeatedly rejected by this Court. Patten v. State, 598 So. 2d 60 (Fla. 1992); Diaz v. State, 513 So. 2d 1045 (Fla. 1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1022 (1988); Thomas v. State, 456 So. 2d 454 (Fla. 1984).

Even if this claim is considered in its best light, as an argument advocating the strength of the nonstatutory mitigation, it still fails. The most cogent argument to defeat this claim can be found in the thorough sentencing order which expressly evaluated the nonstatutory mitigation as follows:

> There has also been presented in evidence two matters which require discussion, since they were both presented in mitigation. The easier of these to discuss is the testimony of Gwen Phillip, age nine (9). She testified briefly that the defendant, while he was in prison prior to his November, 1988 release from incarceration, met her when her mother visited the defendant. These meetings were momentary. He then spent two evenings at her home after his release from prison. He has also sent her several cards, letters and gifts on her birthday. Although this was presented by the defense in mitigation, the Court fails to see what value, if any, it was intended to achieve. The testimony of a nine-year old child who barely met the defendant could not tell this Court anything about the defendant's character. It has virtually no value, and this Court does not consider it as a matter in mitigation.
>
> The second matter is somewhat inter-related to the issue of the lack of formal education and training that the Court evaluated under 921.141 (6) (b), i.e., the evidence of poverty during the defendant's childhood. This evidence was presented through Ms. Cessie Alfonso, a social worker, and through the testimony of the defendant's father, Mr. Otis Street.
>
> The issue of economic poverty during the defendant's developmental years must be considered, but also must be placed in perspective. The question of an economically deprived childhood must be examined in concert with questions of abuse and/or moral deprivation, as well. It is undisputed that the financial status of the Street family was poor during the defendant's childhood years. The defendant was one of twelve children, and each of the children, as soon as they were able, assisted the family by working in the fields. The family was a subsistence unit which sharecropped land. There was often not

enough food for everyone, and seldom any funds for new clothing, or even birthday or Christmas gifts. However, this was a very close family in which the parents attempted to give the children whatever they could afford. The family atmosphere was never strict or abusive, but rather, kind and loving. The parents were God-fearing and the family regularly attended church services as a unit, and also participated in religious study in the home. There was no evidence presented of any type of misconduct or illegality by the defendant while he was a juvenile, and his first contact with police came after his 19th birthday. Even then the father and mother counselled the defendant, arranged for employment, and attempted to lead him back to a moral path.

This Court cannot dispute the defendant's poverty while he grew up. However, the Court must independently decide if this "fact" is truly of a mitigating nature. Campbell v. State, 15 FLW S342 (Fla. June 14, 1990). While the defendant's childhood was economically deprived, this Court cannot come to the conclusion that, as a whole, he had a deprived childhood. Although it is proposed as mitigation, the Court cannot agree to give it the status of a mitigating circumstance. Economic fortunes which do not reach the depths of deprivation or which are not accompanied by a cruel and abused life cannot be sufficient to reasonably convince this Court of the existence of such a mitigating circumstance. Therefore, this non-statutory mitigating circumstance is found not to exist in this case.

The Court must now address the value to be given to the matters which it had previously addressed and rejected as to 921.141 (6) (b) due to its finding that there did not exist any extreme mental or emotional disturbance while the defendant was committing the capital felonies.

While the statutory mitigating circumstance (6) (b) was found not to have been proven, the Court could not disregard the defendant's mental and emotional state during the commission of these crimes. It is unnecessary to repeat the findings under (6) (b), but the use of cocaine, although there was no proof of the amount, if any, in the defendant's body or blood, nor the specific effect of cocaine on his mental abilities, his lack of formal

> education and training, low I.Q. and low level of brain functioning are valid "facts" in mitigation. Although they do not reach the statutory level of "extreme", there is evidence of a degree of disturbance which influenced the defendant's actions. Dr. Eisenstein's analysis and testimony on September 13, 1990 that there was an "extreme" mental or emotional disturbance is questionable due to evidence of the defendant's conduct, and this does qualify for consideration.
>
> This must be considered by this Court as being proven to the degree that this Court is reasonably convinced of its existence and reasonably convinced of its value in mitigation.
>
> Therefore, this Court specifically finds that there is a level to which the defendant's conduct was influenced by mental or emotional disturbances sufficient to be considered as a non-statutory mitigating circumstance.
>
> (R. 1001-1004).

It is evident from the well-reasoned sentencing order that Street was appropriately sentenced to death.

XVII

STREET FAILED TO PRESERVE HIS OBJECTION TO THE JURY INSTRUCTION ON HEINOUS, ATROCIOUS, AND CRUEL.

Appellant's final claim is that the jury instruction for the aggravating circumstance of heinous, atrocious, and cruel (HAC) was improper under Espinosa v. Florida, 505 U.S. ____, 112 S.Ct. ____, 120 L.Ed.2d 854 (1992). However, this claim has been waived because Street failed to preserve his objection to the instruction in the trial court. Sochor v. Florida, 504 U.S. ____, 112 S.Ct. ____, 119 L.Ed.2d 326 (1992).

Defense counsel did not file a written request for a special instruction on HAC, pursuant to Fla. R. Crim. P. 3.390(c), and

did not object to the HAC instruction given after the jury was instructed and prior to their deliberations, pursuant to Fla. R. Crim. P. 3.390(d). See Walker v. State, 473 So. 2d 694 (Fla. 1st DCA 1985)(Issue not properly preserved where defendant failed to object to failure to give instructions prior to the time the jury retired to consider its verdict); Harris v. State, 438 So. 2d 787 (Fla. 1983)(Because no objection was made in accordance with Rule 3.390(d), appellant waived his right to challenge the instruction on appeal.).

Further, the trial court did not err in rejecting the constitutionally infirm instruction requested by defense counsel. Defense counsel asked the trial court to define heinous as "extremely wicked or extremely evil or shockingly evil." (R. 15657). See Shell v. Mississippi, 498 U.S. ____, 111 S.Ct. ____, 112 L.Ed.2d 1 (1990)(Trial court's limiting instruction of "heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain..." held not constitutionally sufficient.).

Moreover, the facts show the murder of Boles to have been heinous, atrocious, or cruel. His murder was more than a simple shooting and was accompanied by additional facts that set it "apart from the norm of capital felonies". Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). This factor is supported by the record as demonstrated by the sentencing order of the trial judge:

[Boles] was subjected to both physical pain and mental anguish before he expired.

The Court has found much guidance in evaluating this circumstance by examining the facts of Bole's death in light of Swafford v. State, 533 So. 2d 270 (Fla. 1988), and Francois v. State, 407 So. 2d 885 (Fla. 1981). A portion of the Court's analysis must include reasonable common-sense inferences from the situation in which Officer Boles found himself. The first physical act of importance is that Boles was disarmed of his handgun and thereby became unarmed. He then saw his partner grasped in a bear hug and shot in the center of the back, then shot in his upper back under the vest, and finally saw the defendant step back and shoot Officer Strzalkowski in the head with a third and obviously fatal shot. During all of this, Boles was attempting to regain physical control of his weapon. Whatever period of time that those three shots took, a logical inference would have been that Boles must have known that he was "next", since he was unarmed. The level of fear, and emotional or psychological strain of expecting the inevitable nature of his impending death is a matter which this Court must consider in determining the heinous or cruel nature of this capital felony. This Court is aware that a finding of this factor "can be sustained on the basis of the mental anguish inflicted on the victim as (he) waited for (his) execution to be carried out." See Francois, supra.

Subsequent to completing the homicide of Officer Strzalkowski, the defendant turned his attention toward Boles. The defendant still had three shots remaining in Boles' handgun. The defendant then fired a fourth shot directly into the stomach area of Richard Boles. Although this projectile struck a body armor vest, its point-blank range created a substantial impact upon the stomach of this officer. A fifth shot was then fired at point-blank range. It struck Officer Boles in the area of the armpit under his left arm, avoiding the vest's protection. The testimony of Dr. Rao was that this projectile tore into the chest cavity. Because the angle of travel and the path, Dr. Rao concluded that the left arm of the victim was elevated and to the side of the body, consistent with a struggle. It must also be noted that this victim had defensive wounds on both hands as if struck

while protecting himself. He also had a linear abrasion to his left forehead area, consistent with having been struck on the head with the firearm. The Court notes these facts because they tend to show the length of the struggle before the final shots.

At that point the two separated. A sixth shot was fired. Like the previous shots, it was scientifically proven that this sixth shot was also fired from Bole's own handgun. The two men were at a distance of one to three feet when the sixth shot was fired. There was scientific evidence of powder stippling or burning on Boles' left forearm and also on his face. Based upon this evidence, it is clear to this Court that the officer, in spite of having been shot twice, lifted his left arm to cover his face when the defendant fired a sixth shot. This shot entered the victim's right cheekbone. Because his head was turned to the left and slightly to the rear, the path of the sixth projectile was through the base of the officer's tongue, and it lodged in his left neck below the left ear. Scientific evidence would eventually establish that this was the fatal shot. However, it was not immediately fatal. The immediate effect was to cause a flow of blood from the tongue to enter into the lungs as the victim breathed. Any efforts to spit or [sic.] cough the blood out would only delay the inevitable.

The defendant turned and walked to where he disposed of the now-emptied handgun. He then picked up the handgun of his first victim, Officer Strzalkowski, knowing that it was fully loaded. In effect, the defendant re-loaded while Officer Boles staggered to the far side of his police vehicle. Upon seeing that Boles was still moving, the defendant leveled and aimed the second gun at Boles. Officer Boles was still able to slowly move to the open door of his police vehicle, perhaps in an effort to summon aid or re-arm himself. Clearly, however, he was fully conscious and capable of voluntary movement toward a place of comparative safety. In response, the defendant chased after Boles and caught him as Boles stood and clung to the door frame at the driver's side. Substantial evidence of Bole's dripped blood follows this path from shot six to the open door, where the defendant fired the seventh shot. This shot was fired at point-blank range into Boles' left shoulder area, in a path directly into his chest. This shot was matched to Strzalkowski's handgun.

> The evidence is clear that the defendant had disarmed Boles, killed Strzalkowski, and had access to two police cars. Therefore, there was no necessity to fire even one shot at Boles in order to escape. The homicide itself was done in a cruel way. The degree to which Boles suffered physical pain by a shot to his stomach, shot into his chest, shot into his face, and final shot into his chest, again, can accurately be surmised. But the emotional pain caused by waiting from the first through the seventh shots while fighting for his life, only to see the defendant return and fire the final shot must have been overwhelming. Even then, death was not instantaneous. As he fell after the seventh shot, Boles was unable to prevent the blood from running into his lungs. His mouth filled with its own blood, which was later emptied by the first officer to arrive. Finally, the blood filled his lungs so that he could no longer breath. Boles suffocated in his own blood.
> (R.984-88).

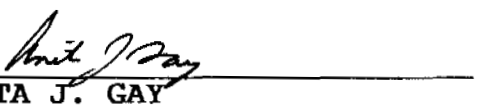
Finally, any error with respect to the finding of the aggravating circumstance of HAC is harmless where the trial court specifically stated, that although he gave additional weight to this factor when imposing sentence for the murder of Boles, "the overwhelming portion of the weight in aggravation" was attributed to uncontested aggravating factors, to-wit: avoidance of arrest; prior violent felony; and commission during a felony. (R. 1007). There is no reasonable possibility that the omission of HAC would affect the sentence.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by mail to **LEE WEISSENBORN, ESQ.**, Oldhouse, 235 N.E. 26th Street, Miami, Florida 33137 and **GEOFFREY C. FLECK, ESQ.**, Sunset Station Plaza, 5975 Sunset Drive, Penthouse 802, South Miami, Florida 33143 on this 20th day of January, 1993.

ANITA J. GAY
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