IN THE SUPREME COURT OF FLORIDA

GEORGE J. TREPAL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 77,667

BRIEF OF THE APPELLEE

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FLORIDA STATUTES:

STATEMENT OF THE CASE AND FACTS

Your appellee accepts the Statement of the Case submitted by appellant at pages 1 - 6 of his brief. Appellee accepts the Statement of Facts submitted by appellant at pages 7 - 17 as a substantially accurate reflection of the proceedings below. However, to the extent that appellant editorializes or draws incorrect conclusions from the facts, your appellee disputes same and will, in the argument portion of this brief, discuss the facts as they pertain to each issue.

SUMMARY OF THE ARGUMENT

As to Issue I: The state adduced sufficient evidence to enable the jury to exclude all reasonable hypotheses of innocence. The state adduced sufficient evidence from which the jury can conclude that appellant was the only person capable of committing these murders and that he did so with premeditated intent to kill. Thus, the trial court properly denied appellant's motion for judgment of acquittal.

As to Issue II: The trial court correctly denied appellant's motion to suppress evidence in this case. The facts showed that appellant had no legitimate expectation of privacy with respect to the trash he left on legally leased premises and, therefore, appellant cannot invoke the protection of the Fourth Amendment.

As to Issue III: The trial judge correctly permitted into evidence matters which were highly relevant to material facts at issue. The evidence adduced by the state of which appellant complains was introduced not solely for the purpose of showing bad character or propensity. Rather, the evidence was admissible as relevant evidence to show that appellant committed the crimes in question.

As to Issue IV: Appellant's claim that the evidence was insufficient to show the "cause of death" of Peggy Carr was not raised below and, therefore, appellate review is precluded. Even if this claim had been preserved below, the evidence clearly showed that thallium poisoning was the cause of death and there

were no superceding or intervening causes which would relieve appellant of his criminal responsibility.

As to Issue V: The trial court did not err by not instructing the jury on the maximum and minimum penalties at the guilt phase. The failure to so instruct was done at the behest of defense counsel, and there is no principle of law which requires a personal waiver of the defendant in this instance.

As to Issue VI: The trial court did not abuse its discretion by declining to give appellant's proposed special jury instruction on circumstantial evidence. The jury was properly instructed on reasonable doubt.

As to Issue VII: The trial court validly imposed a sentence of death in the instant case. The aggravating circumstances found by the trial judge were found to exist beyond a reasonable doubt and are sustainable based on the record. The trial judge's conclusion that the aggravating circumstances clearly outweighed the mitigating circumstances is also supportable on the record. A death sentence for appellant's murder by poisoning is proportionally warranted in this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

As his first point on appeal, appellant contends that the trial court erred by denying appellant's motion for judgment of acquittal, a motion which addressed the sufficiency of the evidence and the issue of premeditation. For the reasons expressed below, the trial court correctly denied appellant's motion for judgment of acquittal.

In his brief, appellant repeatedly asserts that "a conviction based on circumstantial evidence may not be sustained if it does not exclude every reasonable hypothesis of innocence" (e.g., appellant's brief at pages 22, 40). This is an incomplete statement of the law. The question of whether the evidence presented by the state fails to exclude all reasonable hypotheses of innocence is a question for the jury to determine. The state may rely solely upon circumstantial evidence, even to obtain a conviction for "the most heinous crime." Chason v. State, 148 Fla. 450, 4 So.2d 691 (1941). The standards used by an appellate court in its review of a circumstantial evidence case were succinctly set forth in this Honorable Court's decision in Cochran v. State, 547 So.2d 928, 930 (Fla. 1989):

> [2, 3] But the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on

> appeal. (citations omitted) The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. (citation omitted)

Thus, the test to be applied on appeal of a denial of a motion for judgment of acquittal is not simply whether in the opinion of the trial judge or the appellate court the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether a jury might reasonably so conclude. See, e.g., Rodriquez v. State, 379 So.2d 657 (Fla. 3d DCA 1980); Tillman v. State, 353 So.2d 948 (Fla. 1st DCA 1978); Zuberi v. State, 343 So.2d 664 (Fla. 3d DCA 1977); Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976); Amato v. State, 296 So.2d 609 (Fla. 3d DCA 1974). All facts introduced into evidence are admitted by the defendant, and the court must draw every conclusion favorable to the state. See, e.g., Codie v. State, 313 So.2d 754 (Fla. 1975); Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Lynch v. State, 293 So.2d 44 (Fla. 1974); Victor v. State, 193 So.2d 762 (Fla. 1940). A motion for judgment of acquittal should not be granted unless there is no legally sufficient evidence on which to base a verdict of guilt. Downer v. State, 375 So.2d 840 (Fla. 1979). The facts adduced at trial concerning whether appellant was the perpetrator of the poisonings in the instant case and whether appellant acted with premeditated intent to kill supply ample justification for the trial court's denial of the motion for judgment of acquittal.

At the outset, it should be observed that your appellee takes issue with the characterization by appellant that "most of the testimony dealt with Appellant's eccentricity and the subjective observations of law enforcement officials rather than concrete matters tending to establish guilt" (appellant's brief at page 21). The instant appeal is from a five week trial where very little of the evidence was addressed to the eccentricity of the defendant. The observations of law enforcement officers were highly relevant and, as will be discussed below, helped link the defendant to much of the evidence developed in this case. The evidence introduced by the state at trial showed that appellant committed these heinous crimes and the evidence excluded others as perpetrators of these offenses.

The evidence at trial showed that appellant is an extremely intelligent man. He had a highly developed knowledge of chemistry and was an active participant in the Mensa organization, a group which includes as its members only the most intellectually gifted in our society. Appellant, along with his wife, was responsible for creating and conducting murder mystery weekends in which Mensa members participated. With this background, the evidence in this case reveals that the defendant attempted to commit the "perfect crime." Indeed, had the inhabitants or visitors to the Pye Carr residence consumed the entire eight pack of Coca Cola and returned the bottles, the perfect crime may have been committed. Had the bottles been returned, the authorities would not have been able to determine

the source of the thallium that was used to poison the Carr family. Fortunately, three unopened bottles containing lethal doses of thallium were found and the washings from the empty bottles could be compared to the washings remaining in the full bottles to ascertain the levels of the thallium. This point will be discussed more fully below with respect to the question of the sufficiency of the proof adduced to show premeditation.

With respect to the question of the sufficiency of the evidence to show that appellant committed the crimes, the state's evidence showed that virtually every possibility was examined to determine who the perpetrator was. The state showed via its evidence that there is only a certain class of persons who could have committed the poisonings and Mr. Trepal is the only member of that class. If there was a reasonable doubt as to the defendant's innocence, all the coincidences shown by the state's evidence must be ignored and every single one would have to exist by happenstance. In examining the class of persons who could have committed this crime, the predominant fact that tends to exclude most members of the population is that the murderer knew about thallium. During argument on the motion for judgment of acquittal, defense counsel conceded that the evidence when viewed in the light most favorable to the state showed that appellant:

> . . . studied chemistry in college, that he fancied himself as a chemist, that he had many chemistry books, a lot of chemistry laboratory equipment at his home in Sebring. He had a publication called Poison Detection in Human Organs, which was found in the house when it was searched. Included in this

> photocopy that they called the Green Journal -- that's what it has been referred to here -- there are references to thallium. . . .
>
> It can arguably be inferred from these materials that Mr. Trepal had a knowledge of chemistry, that he knew something about thallium, and that he had an interest in poisons or poison detection because this had to do with autopsies, basically this book. (R 4082 - 4083)

Indeed, the ledger discussed by defense counsel above was a compilation of different matters dealing with poisoning. The ledger was tied exclusively to appellant by virtue of three palm prints and thirty six finger prints (R 3942), and none of the fingerprints on that ledger belonged to appellant's wife, Dr. Diana Carr (R 3949). The first part of the journal consisted of copies from a book entitled "Poison Detection in Human Organs" (R 3848 - 3849). That document contained a subsection dealing with thallium poisoning (R 3850). Another section of appellant's journal contained copies from another book entitled "Death by Poison Synopsis" (R 3850). This portion of the ledger contained a discussion of how a criminal poisoner is cunning in that only systematic analysis can reveal such murders (R 3851 - 3852). Thus, the state's evidence showed that appellant had an extensive knowledge of chemistry and a specific knowledge of thallium and its characteristics when used as a poison.[1] Obviously, the class

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[1] The fact that appellant was a knowledgeable chemist was not disputed by the defense. Indeed, search of his home in Sebring (the residence he established after leaving the Alturas home next to the Carrs') revealed other books with ownership tabs indicating "Property of George James Trepal" which reference to

of persons who have specialized knowledge of thallium poisoning is very limited. Appellant was aware that thallium is very difficult to detect and that it may go undetected unless the examiner has some idea as to the type of poison for which he is looking (R 3852). The state's evidence showed beyond a reasonable doubt that appellant had the specific knowledge and ability required to commit the poisonings in the instant case.

The state's evidence also showed that appellant was one of the few persons who had the opportunity to commit the crimes. Appellant's Alturas residence is situated next to the Carr residence and there are no other neighbors for at least one quarter of a mile (see State Exhibits 6, 7, 8, 9, 10, and 11, located within the unpaginated "Evidence" volume of the record). Reasonably, only members of the Carr household or appellant's household had the opportunity to commit the poisonings. Members of the Carr household were excluded as suspects for various reasons. First of all, several members of the household were poisoned and it is not reasonable to assume that the poisoner would himself knowingly ingest a lethal substance. The only logical suspect in the Carr household was Pye Carr, the husband of the murdered victim, Peggy Carr. However, Pye Carr was

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thallium (R 3788 - 3792). Significantly, the search of appellant's residence also revealed laboratory equipment and numerous toxic chemicals, including sodium cyanide, barium chloride, cobalt nitrate, potassium ferricyanide, chromium trioxide, platinum oxide, lead chloride, and uranium oxide (which is also radioactive) (R3 876 - 3888).

excluded as a suspect by law enforcement officials because he wouldn't poison his whole family (including his two year old granddaughter and his son) just to kill his wife (Pye Carr had been previously married for many years and obtained a divorce -- he did not kill his first wife). Pye Carr had no knowledge of thallium (R 2050). Pye Carr is still paying hospital bills which were not covered by insurance, and there were no insurance proceeds which may have been a motive to kill his wife (R 3008, 3054 - 3057, 3067). Appellant's wife did not have the opportunity to poison the Carr family. She had a regular job and worked regular hours and was, therefore, unable to be in the vicinity of the Carr residence to plant the thallium-laden Cokes. In addition, appellant's wife did not have thallium (R 3578), and it was never demonstrated that she had the particularized knowledged as to the poisonous characteristics of thallium. Appellant's speculation in his brief that Dr. Carr had access to thallium merely because she is a physician is particularly unavailing. Radioactive thallium is used in diagnostic testing and tracing of heart problems. Dr. Carr is an orthopedic surgeon and would have no need to use thallium in her practice.[2]

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[2] Indeed, the physicians who originally treated Peggy Carr did not know what was wrong with her. She was hospitalized in Bartow several days after she consumed the poison and no one considered thallium poisoning. One week later Peggy Carr was hospitalized in Winter Haven and was treated by Dr. Hostler. Dr. Hostler did not, upon his initial examination, know what was causing Peggy Carr's problems (R 1823). Dr. Hostler, a neurologist, knew about thallium only through the course of his training in neurology. He knew that a special request was necessary to screen for thallium, and he ordered that special screen to attempt to

Although appellant attempted to show that he spent a lot of time in his office the week when the poisoning occurred through the testimony of Gordon Rowan, a person who maintained an office next to appellant's office, Mr. Rowan could not say that appellant was in his office all week (R 3288). Also, the testimony indicated that the water supplies of the Carr and Trepal households were interconnected. Thus, appellant would have had reason to be on the Carr property in order to check on the water connection and his presence would not have been unusual. Even appellant acknowledged that there was at least a thirty minute interval on two separate days in which appellant could have placed the thallium laced Cokes (or added a thallium solution to Cokes already present) in the Carr household (appellant's brief at page 31). Thus, the location of the houses and the facts concerning who was in the two households at any given time during the day pointed only to the defendant as having the opportunity to "plant" the thallium laced Cokes. Appellant was the only person in a physical position to be able to observe the comings and goings of the Carr household to determine when the window of opportunity arose to induce the poisoned Cokes into the Carr household.

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exclude thallium poisoning (R 1826 - 1827). Thus, not all physicians will ordinarily have knowledge about thallium and there was no evidence that Dr. Carr, who is not a neurologist, possessed the knowledge concerning lethal doses of thallium.

The state also introduced evidence which permitted the jury to conclude that appellant had a motive for committing the poisonings. Indeed, this point was conceded by the defense during the argument on the motion for judgment of acquittal:

> There is evidence that over a six-year period starting in 1982 and ending in 1988 there were several incidents between members of the Pye Carr family and George Trepal. I think when the evidence all shakes out there were maybe a couple of instances of where the dogs were chasing the cats and he complained. There were a couple of occasions when the children were riding the three-wheelers, this was back prior to 1983, and he complained. And there were several occasions where the Pye Carr family children or adults were playing radios or listening to party tapes too loud and he came over and complained.
>
> I'll concede for the purpose of this argument only, that for the purposes of this case, that viewed in the light most favorable to the State, these acts could be construed as a motive for Mr. Trepal to want the Pye Carr family to move out. (R 4082).

In his brief, appellant now asserts that these long-standing problems were "[in]sufficient to demonstrate animosity strong enough to take a life" (appellant's brief at page 26). It is not possible to speculate as to the degree of animosity required of a particular person to take another's life. The cases that appear before this Court demonstrate that it is often not possible to know why people kill, either for a purpose or without any reason at all. What is clear as demonstrated by the evidence adduced sub judice is that appellant perceived the problems between himself and the Carr family as big problems and he repeatedly went and complained. In the light most favorable to the state,

the jury was presented with evidence from which they could reasonably conclude that appellant had a motive to act against the Carr family. Appellant had a vendetta against the entire Carr household, and the members of the entire household were potential victims of the poisonings.

As aforementioned, appellant attempted to commit the perfect crime. Fingerprints on the full Coke bottles were wiped clean (R 3933). No fingerprints were found, even from the bottler or others who would have ordinarily touched them. The typewriter used to create the threatening letter which was mailed to "Pie"[3] Carr family in June, 1988, was never found. The screwdriver used to pry the caps off the Coke bottles was never recovered. In other words, appellant attempted to think of everything to conceal the crimes. This was not unlike the Mensa murder weekends wherein scenarios were developed by Diana Carr, based upon research supplied by appellant, where it is most difficult to solve the mystery. However, fortunately for the citizenry of Polk County, a thorough and intensive police investigation was able to link appellant to the poisonings.

As aforementioned, a threatening letter was sent to Pye Carr which was postmarked June 14, 1988 (R 1718). The contents of that letter were as follows:

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[3] The threatening letter was addressed to Pie Carr, and not Pye Carr, and only those who had only heard the name but had not seen it would have spelled it Pie. Appellant is in the class of people who may never have seen the spelling of Mr. Carr's nickname. A family member is certainly not in that class.

> You and all you so-called family have two weeks to move out of Florida for ever or else you will all die. This is no joke. (R 1595)

Although there was no physical evidence available to tie the note to appellant, evidence was adduced by the state which linked the note to appellant. Mr. Trepal was not originally a suspect in this case. Rather, the law enforcement officials, upon learning that members of the Carr family had been poisoned by thallium, concentrated their investigation upon Pye Carr and members of his family. However, on December 22, 1988 (approximately two months after the consumption of the poisoned Cokes) Detective Mincey and F.B.I. Special Agent Brekke were driving past the Trepal and Carr residences when they saw appellant outside of his home. The law enforcement officers turned their car around and asked appellant whether they could talk with him. Appellant replied in the affirmative and invited the officers into the kitchen area of his home. When asked why someone would want to poison the family next door, appellant replied that it was in order to get them to move out. Appellant continued by nodding over to the Carr residence and stating, "Like they did" (R 2077, 3176). Both Agent Brekke and Detective Mincey testified that this response was unusual. Almost all other interviewees were asked that question and none had come up with a motive or a reason for the poisonings up to the time of appellant's interview or thereafter. In addition, appellant's answer matched the threatening note that was received by the Carrs and which very few people knew about (R

2078, 3177). Appellant's description to Agent Brekke and Detective Mincey of the problems with the Carr family was punctuated by a display of animosity and showed appellant's knowledge that a lot of people in the Carr family were coming and going (R 3178). It was at the time of this interview that appellant first became a suspect in the case based upon his unusual responses (R 3011, 3179).

In this same vein, the threatening note sent to the Carr family was also linked to appellant by virtue of his work on one of the Mensa murder mystery weekends. Detective Susan Goreck acted in an undercover capacity and befriended appellant at the Mensa meetings. Appellant advised her that he had researched and written a pamphlet for one of the Mensa mysteries dealing with voodoo (R 3225). Significantly, a portion of that pamphlet read as follows:

> Few voodooists believe they can be killed by psychic means, but no one doubts that he can be poisoned. When a death threat appears on the doorstep, prudent people throw out all their food and watch what they eat.
>
> Hardly anyone dies from magic. Most items on the doorstep are just a neighbors way of saying, "I don't like you. Move or else!" (R 3226; page 3 of State Exhibit 181 located in the unpaginated "Evidence" volume of the record)

Detective Goreck testified that this pamphlet had significance because she had previously read the threatening note sent to the Carr family prior to the poisoning (R 3226). Indeed, the voodoo pamphlet is an eerie reflection of what appellant did. Your

appellee submits that it would be most unusual for a person who receives a death threat to immediately think of his foodstuffs being poisoned. Rather, the recipient of a death threat might look over his shoulder and observe any strange person or might be leery of persons who may be perceived to be carrying a weapon, but they ordinarily would not suspect that they were to be poisoned by some outside source. The "move or else" statement in the voodoo pamphlet strikingly parallels the note sent to the Pye Carr family advising them to move out of Florida forever or else they will all die. From the evidence presented at trial, the jury could reasonably conclude that appellant sent the threatening note to the Carr family and then acted in accordance with that note's provisions.

Detective Goreck was also instrumental in obtaining other evidence against appellant. Through her undercover character, she was able to ascertain that Coke was appellant's beverage of choice, whereas Peggy Carr preferred Pepsi. Family members testified that Peggy Carr preferred Pepsi and that is what she usually drank herself (R 3651, 3658 - 3659). Most significantly, Peggy Carr usually bought Pepsi, a store brand or whatever was on sale, but <u>always</u> bought two-liter nonreturnable bottles (R 3651, 3657, 3668 - 3669). Detective Goreck was told by appellant in January of 1990 that if he was being sought by the police, it had to do with the poisonings of his next door neighbors. The poisonings had occurred more than a year prior to this conversation. Appellant also told Detective Goreck that the

poisonings were "just a personal vendetta" and that, "I must be a suspect. I must be the prime suspect," and if so, "that could get messy" (R 3739, 3747, 3749). Appellant advised Detective Goreck that it would be easy for him just to call the police and see what they wanted (R 3750), but he never did. These conversations were different than others Detective Goreck had had with the appellant; usually appellant was very talkative and the conversation flowed from one subject to another -- but on this occasion there were long lapses where appellant had nothing to say (R 3760). Taken in the light most favorable to the state, the evidence shows the "guilty mind" of appellant.

As aforementioned, appellant attempted to commit the perfect crime. The typewriter used to prepare the threatening note received by the Carr family was never found. No fingerprints were found on the full Coke bottles, even the fingerprints of those who would ordinarily have handled the bottles in the stream of commerce. When appellant moved into the Alturas residence located next to the Carr home, appellant was in possession of a bottle capping device (R 3631), but the bottle capper was not found in appellant's Sebring home when it was searched by law enforcement officers (R 3777 - 3778). Testimony at trial indicated that a flat-bladed screw driver of either 3/64" or 5/64" was consistent with the marks found on the caps of the tampered Coke bottles (R 3974). A set of small screwdrivers was found during the search of appellant's residence, but a 5/64" flat-bladed screwdriver which ordinarily would be in the set was

missing (R 3974 - 3975). However, the state introduced evidence that .64 gram of thallium one nitrate was found in a work bench located in the garage of appellant's former Alturas residence. In his brief, appellant contends that the state's evidence showed that the thallium one nitrate belonged to appellant and that that particular thallium was used to poison the Coke bottles (appellant's brief at pages 24, 27 - 29). The state never contended that Q-206 (the bottle which contained the .64 gram of thallium nitrate was the source of the thallium used by appellant to poison the Cokes. Rather, it was introduced as a possible source but, considering the fact that appellant disposed of all physical evidence which would link the poisonings to him, the state could not demonstrate that the actual thallium used in the poisonings came from Q-206. The prosecutor's argument in opposition to the motion for judgment of acquittal demonstrates the relevance of Q-206 in this case:

> One of the very important things in this case that has been brought by several different witnesses from several different areas is the rarity of thallium. There is no thallium poisoning to speak of in this country. There is one case that anybody can find that someone died in Indiana.
>
> This is a substance which is not distributed widely, which has been banned as a pesticide since the Sixties. When it was a pesticide it was not in the form of thallium nitrate, and certainly not pure thallium nitrate as this was.

* * *

> The argument that this bottle has to be the source of the thallium begs the question. This bottle does not have to be the source of what was put into the Coca-Cola bottles.
>
> The jury would be free to conclude from Mr. Trepal's knowledge and his possession of multitudes of chemicals that he had other thallium, that he had thallium and other heavy metals which he had discarded. So he does have this thallium bottle and it may be the source of what's in these Coca-Colas but may not.
>
> So whether or not that bottle is the source I think is not important in the analysis of whether the state can prove that there is competent substantial evidence that Mr. Trepal committed the crime. (R 4111 - 4113)

Indeed, it is not unreasonable to imagine that the actual thallium used to poison the Carr family was not the thallium found in Q-206. Appellant took great pains to dispose of the physical evidence in this case, but the competent circumstantial evidence adduced by the state proved that appellant committed these crimes beyond a reasonable doubt.

In a similar vein, appellant makes much in his brief of the purported "unsubstantiated assumption" that appellant left the poison Cokes on the doorstep of the Carr residence (appellant's brief at page 31). The state conceded in argument that it could never be established how the poisoned Cokes were introduced to the Carr household by appellant. Rather, the state argued that they could have been left on the doorstep or appellant could have entered the Carr residence and added the thallium solution to

Cokes already in the house.[4] The state's theory that the Coke bottles were placed on the doorstep of the Carr home is not unsubstantiated, but rather it is strikingly consistent with the voodoo pamphlet written by appellant which describes leaving the poisoned foodstuffs on the door of an intended victim. In an effort to counter this possibility, appellant attempted to show via cross examination that Travis Carr could have purchased the Cokes which were found tainted with thallium. He contends in his brief at page 31 that law enforcement molded the evidence to support the notion that Travis purchased the Cokes. However, Travis stated at times to Detective Mincey that he bought the Cokes and he also stated to Detective Mincey that he didn't buy the Cokes. Detective Mincey testified that there was simply no consistency in Travis' responses (R 2079, 3030 - 3031). When information was obtained that Travis may have purchased the Cokes in a particular store, Detective Mincey attempted to verify the fact by showing photographs of Travis to salespersons. Travis was not identified by the photographs (R 3032 - 3033). In addition, the evidence at trial showed that Travis' memory was affected by his ingestion of the toxic thallium. The jury was free to conclude that Travis did not purchase the Cokes.

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[4] The "secret" family hiding place for the Cokes as described at page 32 of appellant's brief was not really so secret. Indeed, the Coke carton was found in plain view in the Carr's kitchen. See State Exhibit 16 and State Exhibit 20 located in the unpaginated "Evidence" volume of the record.

In addition to adducing sufficient evidence from which the jury could conclude that Pye Carr or Dr. Diana Carr did not commit these crimes, the state also adduced evidence from which the jury could conclude that the Cokes were not tampered in the stream of commerce. In particular, the evidence excluded beyond a reasonable doubt the possibility that only eight bottles of Coke contained within the same carton were tampered within the bottling plant; it was mathematically impossible (R 3040 - 3041). In addition, the F.B.I. investigation determined that the Coke was not tampered with in the stream of commerce (R 3183). No other tainted bottles of Coca Cola ever appeared. There was no extortion note ever sent to Coca Cola. In other words, there were no indices of any random poisoning. The jury was certainly free to so conclude.

As demonstrated by the evidence discussed above, appellant's contention that there was an impermissible pyramiding of inferences is totally without merit. Rather, the state introduced totally independent pieces of circumstantial evidence which were not necessarily dependent on the existence of another piece of evidence.

In conclusion with respect to the question of whether the trial judge erred by denying the motion of judgment of acquittal as it pertained to appellant being the perpetrator of the crimes, the evidence is wholly sufficient to permit the jury to conclude that all reasonable hypotheses of innocence were excluded. By examining all of the classes of persons who could have

conceivably committed these crimes, the inescapable conclusion is that appellant remains in a class of one. He is a person who knows poisons and who has a sophisticated knowledge of chemistry. He is someone who has something against the Pye Carr family. Appellant is also in the class of people who have something against the victims but who can be in a position to watch the comings and goings of everyone in that house. The journal found in appellant's Sebring home indicated that a criminal poisoner is cunning and that poisoning is a cold, calculated crime and only systematic analysis can reveal such murders. Sections of the journal detail other poisons and discuss detection thereof. Appellant is aware through his written materials that thallium can be found only if you set up a special piece of equipment to look for thallium (R outine heavy metal screens don't reveal thallium). A section of the journal discussing thallium contains information containing lethal doses, how symptoms are delayed for several days after ingestion, and that death occurs much later. The "Death by Poisoning" section of appellant's ledger described how difficult it is to detect certain types of poisoning and that a particular poison may go undetected unless the examiner has some idea as to the type of poison for which he is looking. The defendant is in a class of person who spelled Pye Carr's nickname as "Pie", rather than those who know it is spelled Pye (those who have only heard the name but have not seen it). Appellant is in the limited class of people who know that to get a letter to Alturas you use a Bartow mailing address. Defendant is in the

limited class of people who use rolls of stamps (rather than sheets or books), and the stamp on the threatening note came from a roll. Appellant had an interest in intellectually solving difficult murders (i.e., his Mensa murder mystery involvement), yet the most complex murder case in appellant's geographical region occurs right next door and appellant never talks about it. Appellant's friend and confidant, Pat Boatwright (R 3699), testified that not only would appellant not discuss the case, but appellant averted Boatwright's eyes as soon as a question concerning the poisoning was asked and appellant did not look Boatwright in the eye again for months (R 3700 - 3701). The evidence as discussed in this portion of the argument reveals that the state adduced sufficient evidence from which the jury could reasonably exclude all reasonable hypotheses of innocence.

Petitioner also contends that the trial judge erroneously denied the motion for judgment of acquittal with respect to the issue of premeditation. Appellant contends that the evidence was insufficient to establish that appellant committed the poisonings with the "clear and conscious intent to effect the death of any individual" (appellant's brief at page 37). The evidence adduced by the state at trial totally belies this contention. In Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), this Honorable Court discussed the concept of premeditation:

> [1-6] Premeditation can be shown by circumstantial evidence. (citation omitted) Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of

> time to permit a reflection, and in pursuance of which an act of killing ensues. (citation omitted) Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. (citation omitted) Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wound inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned. (citation omitted)

Moreover, the question of "whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury." Larry v. State, 104 So.2d 352, 354 (Fla. 1958); Preston v. State, 444 So.2d 939, 944 (Fla. 1984). The jury is not required to believe the defense version of the facts which the state has produced conflicting evidence. Cochran v. State, supra. Based on these standards, the state adduced sufficient evidence from which the jury can conclude that appellant acted with premeditated intent to kill members of the Pye Carr family.

Appellant's basic premise is that appellant acted out of hatred or ill will in an imminently dangerous manner, evincing a depraved mind regardless of human life. Your appellee strenuously disagrees and submits that the evidence adduced at trial shows, beyond a reasonable doubt, that appellant intended to kill.

The use of thallium one nitrate shows that appellant intended to kill. Testing revealed that Coca Cola with a solution of thallium one nitrate added does not appear different than plain Coke. However, Coke with a solution of thallium three nitrate becomes extremely discolored (R 3406). If appellant had used thallium three nitrate no one would have consumed the Coke, but they would have been aware, after testing, that someone was trying to poison them. If the intent was to scare the Carr family from their residence a detectable poison would have been used.

Perhaps the most telling evidence supporting the jury's reasonable conclusion that appellant acted with premeditated intent is the results of the testing done on both the empty and full Coke bottles retrieved from the Carr residence. To contest the fact that a lethal dose of thallium was included within the Coke bottles is patently ridiculous -- Peggy Carr died as a result of the ingestion of the thallium-laced Coke. The testimony revealed that the level of thallium found in Peggy Carr's system caused her death, the level in Travis Carr's system produced a life-threatening condition, and the level found in Duane Dubberly's system resulted in a mild illness (R 1835). Of course, the varying levels of thallium were a result of different levels of consumption. The washings of the empty Coke bottles revealed varying levels of thallium in the residue: 4.32 milligrams, 3.65 milligrams, 2.08 milligrams, and 0.62 milligrams (R 4060 - 4061). These figures must be contrasted with the

washings from the full bottles of Coke after the Coke was removed. Those three bottles contained the following levels of thallium in the residue: .66 milligrams, 1.3 milligrams and 1.83 milligrams (R 4057 - 4059). The correlative amounts of thallium in the full bottles were as follows: 403.6 milligrams, 915.3 milligrams and 767.5 milligrams. A lethal dosage, according to the testimony at trial, varied from six to forty milligrams of thallium per kilogram of body weight (R 3080, 3915). The average lethal dose is approximately 14 milligrams per kilogram of body weight (or from one half gram to one gram in an average person of 150 pounds [approximately 75 kilograms]). The doses in the full bottles of Coke revealed anywhere from slightly less than one half gram of thallium to slightly less than one gram of thallium. The state was entitled to have the evidence viewed in the most favorable light and the evidence supported the possibility that six milligrams per kilogram of weight is a lethal dose, therefore, only 270 milligrams could kill a 100 pound woman. Doctor Melamud testified that Peggy Carr weighed approximately 100 pounds, or 45 kilograms. The level of thallium in each of the full Coke bottles exceeds the amount necessary to induce death. Since it was established that each of the full bottles contained a lethal dose, the washings of those full bottles could be compared to the washings from the empty bottles which were actually consumed. The washings from the empty bottles contained substantially more thallium than the washings of the full bottles after they were emptied. The only conclusion

that could be reasonably deduced is that there was as much or more thallium in the empty bottles than in the full bottles. This is a conclusion which the jury could reasonably make.

Appellant also makes the unsupported assertion that appellant would not have known that anyone other than Peggy and Pye Carr resided in the main house. The evidence showed, however, that appellant was able to observe the comings and goings of all seven members of the family and their guests. As aforementioned, appellant's intended victims were the entire household because those are the persons with whom he had the problems. The evidence adduced by the state at trial permits the conclusion reached by the jury, that appellant acted with premeditated intent when he poisoned the Carr family.

Inasmuch as the state presented evidence which permitted the jury to exclude all reasonable hypotheses of innocence, the trial court correctly denied appellant's motion for judgment of acquittal. Appellant's first point must fail.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

As his second point on appeal, appellant contends that the trial court erroneously denied a motion to suppress physical evidence, namely the opaque brown bottle which contained .64 gram of thallium one nitrate which was referred to as Q-206. It is axiomatic that a trial court's order denying a defendant's motion to suppress comes to the appellate clothed with the presumption of correctness, e.g., McNamara v. State, 357 So.2d 410 (Fla. 1978), and a reviewing court must interpret the evidence in the light most favorable to sustaining the trial court's ruling. State v. Riehl, 504 So.2d 798 (Fla. 2nd DCA), review denied, 513 So.2d 1063 (1987). As will be discussed below, the trial court correctly denied appellant's motion to suppress.

In order to provide this Honorable Court with an objective view of the operative facts surrounding the motion to suppress, your appellee will rely upon the trial judge's order setting forth those facts. The trial judge determined those facts from the testimony adduced at the motion to suppress hearing held on August 27, 1990 (R 4777 - 4835), and from the uncontroverted statement of the facts contained in appellant's memorandum in support of the motion to suppress (R 4719 - 4728). The facts found by the trial judge are as follows:

> Peggy Carr and members of her family first showed signs of having ingested thallium on or about October 23, 1988. Investigators were advised in early November 1988, that the

poisoning agent was thallium. On December 2, 1988, they concluded that there were traces of thallium on Coca Cola bottles the family drank. Peggy Carr died allegedly as a result of thallium poisoning on March 3, 1989.

During a routine part of the investigation of the incident, investigators queried defendant George Trepal a next-door neighbor of the Carr family, concerning his work habits. He told them he routinely went daily to the Bartow office of his wife, Dr. Diana Carr. Investigators learned that in fact defendant went daily to a small office he rented in Winter Haven. He was placed under surveillance from January 6, 1989 through January 29, 1989. Sometime near the end of December 1988, Polk County Sheriff Office Special Agent Susan Goreck was assigned to the case as an undercover agent. Her primary assignment was to investigate Trepal. In furtherance of this objective, Goreck assumed the fictitious identity of "Sherry Guin."

Trepal and his wife are members of the Mensa organization and are regular participants in what is described as "murder weekends". As a result of her attendance at one of the "murder weekends," Goreck developed a friendship with Trepal and his wife. During the months following the "murder weekend" Goreck had considerable contact with the couple.

In early April, 1989, Goreck learned that the couple were talking about moving from Alturas to Sebring. During the month they discussed the sale of the Alturas property to Goreck. Some months later Dr. Carr accepted a position at a hospital in Sebring and she and Trepal moved to Sebring sometime prior to November 7, 1989. The hospital paid professional movers to move the couple's possessions and Trepal personally supervised the movers instructing them as to what to take and what not to take to the Sebring residence.[5]

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[5] Specifically, the trial judge heard evidence that when appellant moved from the Alturas residence, he specifically

On November 8, 1989, Trepal and Goreck discussed the rental of the Alturas property to Goreck. Trepal told her that he and his wife had already discussed it and that it would be fine. During a telephone conversation on December 5, 1989, Trepal and Goreck entered into an oral rental agreement. December 7, 1989, Goreck mailed money orders totalling $350.00 to Trepal as payment for the first month's rent. On December 12, 19889, Goreck telephoned Trepal to see if he had received the money orders and if the property was ready for her occupancy. Trepal replied that he had cashed the money orders and that Goreck could move in immediately. He did inform her that the upstairs portion of the residence needed some repair and painting and that the garage still needed some "cleaning out." He indicated an intention to return to the property to take car of these matters but assured her that he would not walk in on her without knocking or calling first. The rental agreement contained no reservations regarding Goreck's occupancy. She had rented the Alturas property.

On December 12, 1989, Goreck, other law enforcement officers, and crime scene technicians went to the Alturas property for the purpose of processing the area for possible evidence of a homicide. As part of the search they entered the unlocked garage. Shortly thereafter an officer opened a drawer of a workbench and found, along with other trash, a small opaque brown bottle. The investigators did not recognize the contents of the bottle but it, along with other items removed from the property, were sent to the F.B.I. for analysis. The tests, completed in

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pointed out what items were to be moved on the moving truck and advised that the other items that remained were to be left there as trash (R 4833 - 4834). Q-206 was located within the work bench in the garage and was among those items which were to be left, according to appellant's instructions, as trash.

> March, 1990, revealed the presence of thallium residue in the bottle. It is this bottle that is the subject of this motion to suppress.
>
> Several additional facts need to be mentioned. Trepal, like Goreck, enjoyed woodworking. The garage was used as a woodworking shop and during the Spring, 1989, in discussions about the sale of the property, Goreck and Trepal discussed the use of the garage for that purpose. Goreck was shown the interior of the garage. Regarding Trepal's comments about returning to the property to do repairs and cleaning, it si worth mentioning that between the date of that conversation, December 12, 1989, and the date of his arrest, April 7, 1990, there is no evidence that Trepal ever returned to the property. Two separate sets of photographs of the interior of the garage taken on the date of the search and the date of arrest, indicate that nothing was moved during the interim. (R 5087 - 5989)

In his brief before this Court, appellant presents the same arguments as presented to the trial judge below, namely that Q-206 was seized without a warrant and that the seizure did not fall within one of the recognized exceptions to the warrant requirement (appellant's brief at page 41). However, your appellee submits that the focus of appellant's argument in his brief, as it was below, is misplaced in that the facts of this case demonstrate that appellant had no reasonable expectation of privacy so as to invoke Fourth Amendment concerns.

Appellant's argument that Detective Goreck in her undercover capacity as Sherry Guin, obtained possession to the Alturas residence as part of a ruse to collect evidence has no legal significance. "A government agent, in the same manner as a

private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." Lewis v. United States, 385 U.S. 206, 211, 87 S.Ct. 425, 17 L.Ed.2d 312, 316 (1966). In the instant case, Detective Goreck, acting as a private citizen, legally leased the premises and had all of the rights of any lessee in that premises. Thus, appellant's reliance upon Gouled v. United States, 55 U.S. 298, 41 S.Ct. 261, 65 L.Ed.2d 647 (1921), is completely misplaced. If Gouled were applied to the instant case, it would be as if Detective Goreck gained access to appellant's Sebring home, where he lived, and then, while his back was turned, rifled through appellant's private papers. The only significance of examining the ruse employed in the instant case is to examine if appellant had any reasonable expectation of privacy. He had rented the house to a third party who presumably could have anyone she wanted in the house, including the next door neighbor who is a police officer. So long as what Detective Goreck did would have been reasonable when judged by an objective standard of what the public thinks is reasonable behavior by a tenant, then the evidence obtained was not suppressible. In other words, if Detective Goreck pulled walls down or pulled the floor up to engage in a search, then it might be said that the public would not see this as reasonable behavior. However, when the detective merely swabbed the floors and picked up the discarded trash, one can hardly say the public would view her actions as unreasonable.

Appellant places great reliance upon State v. Suco, 521 So.2d 1100 (Fla. 1988), affirming State v. Suco, 502 So.2d 446 (Fla. 3d DCA 1986). The factual scenario in Suco is inapposite to the circumstances presented in the instant case. This Court, relying upon the decision in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), held:

> . . . As noted in *Rakas*, although the use of property concepts in determining the presence or absence of a reasonable expectation of privacy has not been altogether abandoned, 439 U.S. at 143 n. 12, 99 S.Ct. at 430, n. 12, "arcane distinctions developed in property and tort law between guests, licensees, invitees and the like, ought not to control." 439 U.S. at 143, 99 S.Ct. at 430. It is, rather, the totality of the circumstances in any given case which must be looked to in determining whether a defendant had a reasonable expectation of privacy in the premises search. (citations omitted)

State v. Suco, 521 So.2d at 1102. The totality of the circumstances in the instant case show that appellant did not have a reasonable expectation of privacy in the premises searched. In Suco, the landlord had retained and exercised a possessory interest in the premises and was also an invitee on the property at the time the search was conducted. This Court held that the totality of the circumstances supported Suco's reasonable expectation of privacy in the home search. In the instant case, however, appellant never reserved any right to possession. He said he might come back to paint a particular part of the ceiling where there had been a leak and to clean the garage but he never did either. He did not retain or exercise

possessory rights in the house at all, and certainly not in his trash. The defendant in Suco regarded the house as a place of some privacy for himself, whereas appellant did not regard the Alturas home in the same way.

The decision of the United States Supreme Court in California v. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), is instructive with regard to the circumstances of the instant case. In Greenwood, the Court held that one does not have an expectation of privacy in trash. Inasmuch as appellant specifically conveyed the idea that all items which remained in the garage after the move from Alturas to Sebring were to be regarded as trash, appellant had no legitimate or reasonable expectation of privacy in those items, one of which was Q-206. Appellant supervised the movers as to their activities in the garage. He told them what to take and what not to take. Everything was taken at once and the movers were told that anything that was left was trash. This is not a situation where appellant was moving bit by bit but, rather, everything appellant wished to have moved was moved and he specifically told the movers what he did not want moved. All of the appellant's equipment and valued material was moved out of the garage. The only thing left in the garage was trash, which he had not yet cleaned out. When Detective Goreck rented the house she had every right to clean out the trash and either throw it away, keep it, or turn it over to the police if she wished. That everything remaining in the garage was considered as trash is illustrated by

the fact that appellant never went back and got any of the items of trash that were left in the garage. The evidence adduced below showed that when appellant was arrested, the police found the garage to be in exactly the same condition as it had been four months earlier when the bottle of thallium was found. Appellant had no expectation of privacy with respect to his trash. As the Court held in Greenwood, supra, "An expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." Greenwood, 486 U.S. at 39 - 40, 100 L.Ed.2d at 36. Fourth Amendment protection is not afforded to appellant under the facts of the case.

Inasmuch as appellant had no legitimate expectation of privacy with respect to the trash he left on the legally leased premises, the trial court correctly denied appellant's motion to suppress. Appellant's second point must fail.

ISSUE III

DID THE TRIAL COURT ERR IN PERMITTING THE INTRODUCTION OF NUMEROUS ITEMS OF TESTIMONY PURSUANT TO SECTION 90.404(2), FLORIDA STATUTES? (AS STATED BY APPELLANT)

Appellant next contends that the trial court erred by permitting into evidence certain matters which appellant characterizes as "Williams Rule" evidence. However, some of the matters of which appellant complained are not really "similar fact evidence" governed by the classic Williams Rule type analysis. Some of the matters which appellant contends are "similar fact" pieces of evidence were, in actuality, relevant evidence which showed that appellant committed a crime. For the reasons discussed below, appellant's point is without merit.

At the outset it should be observed that appellant's contention at page 67 of his brief that "[a]ll of the evidence was admitted by the trial judge" is absolutely incorrect. Multiple motions in limine were filed by the defense (R 4905 - 4916, 4917 - 4918, R 4940 - 4942) essentially in response to three Notices of Intent to Prove Evidence of Other Crimes, Wrongs, and Acts filed by the state (R 4675, 4762, R 4925). The state sought to show, among other things, that when the defendant lived next door to the Carr family, two dogs owned by the Carr family died unexpectedly and showed symptoms similar to that which humans suffer after being poisoned by thallium (R apid weight loss and loss of hair), that appellant injected food substances with illegal drugs, that appellant was convicted and

sentenced for the crime of conspiracy to manufacture amphetamine, that while in college appellant placed a drug on his door knob or refrigerator so that anyone entering his room would be affected by the drug, and that in order to encourage a neighbor to move, appellant concocted a gas by boiling acetone through chlorine bleach and thereafter surreptitiously produced the gas into the neighbor's residence (R 4675, R 4762, R 4925). After a pretrial hearing, the trial judge excluded all of these matters sought to be introduced by the state, as well as other items of evidence which the state sought to elicit (R 5414). Thus, contrary to appellant's brief, all of the evidence was not admitted by the trial judge.

Florida Statute 90.404(2)(a) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Admissibility of this type of evidence was further explained by this Court in Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989):

> . . . Evidence of "other crimes" is not limited to other crimes with similar facts. So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contains similar facts to the charged crime

> is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant. . . . The only limitations to the rule of relevancy are that the state should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence *solely* for the purpose of showing bad character or propensity, in which event it would not be relevant, and such evidence, even if relevant, should not be admitted if its probative value is substantially outweighed by undue prejudice. Our later case law reiterates the controlling importance of relevancy. . . . .

This Court in Swafford v. State, 533 So.2d 270, 275 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989), observed that "[s]ince Williams we have acknowledged many times its basic teaching that evidence showing collateral crimes or wrongful acts is admissible if it is relevant for any purpose other than to show the bad character or criminal propensity of the accused" (citations omitted). An examination of the evidence now complained-of by appellant reveals that such evidence was relevant for purposes other than to show bad character or criminal propensity.

Prior to discussing those items of evidence of which appellant complains, it is necessary to observe that appellant is mistaken with respect to the applicability of the "fingerprint" rule. In his brief, appellant alleges that evidence should not be admitted of collateral acts unless the prior act is so unique so as to tie the defendant to that act. In the instant case, however, application of State v. Savino, 567 So.2d 892 (Fla.

1990), is totally misplaced. Similarities between the acts must be so unique or unusual when similar fact evidence is introduced to prove identity, plan or pattern. *Read's Florida Evidence Volume I, p. 268d.* As will be discussed below, the state was not attempting to prove identity, plan, or pattern. Rather, the evidence complained-of by appellant was highly relevant with respect to proving appellant's knowledge of chemistry and poisons. Thus, the state was not introducing evidence of prior crimes wherein uniqueness may have been an issue, but rather the state was introducing direct evidence showing that appellant possessed the requisite knowledge necessary to commit these crimes.

Two matters of evidence contested by appellant on appeal were clearly relevant to a material fact in issue, and, as asserted above, the key to admission of this type of evidence is relevancy. The fact that appellant understood the poisonous characteristics of certain red berries demonstrates that he has knowledge of poisonous substances beyond that of the ordinary person. The fact that testimony was adduced showing that appellant was the chemist in a group which manufactured methamphetamines was also highly relevant to demonstrate appellant's superior knowledge in a complex, not easily understandable area. The trial judge recognized that the testimony concerning the manufacture of methamphetamines was relevant to the issues presented in the case:

> "What he is going to be permitted to prove is that Mr. Trepal has knowledge of chemical reactions necessary to produce methamphetamine" (R 5388).

To that extent, the trial court permitted the testimony of Agent Broughton concerning the steps employed in the manufacture

of both methamphetamine and amphetamine. This evidence was not introduced solely for the purpose of showing appellant was "a criminal and [ ] a man of bad character" (appellant's brief at page 70). Rather, it was offered to demonstrate that appellant had the knowledge necessary to commit the instant crimes. The state was careful to avoid characterizing appellant as one who had been previously convicted of illicit activities (R 5374 - 5375). Notwithstanding the contention in appellant's brief, Agent Broughton was qualified to testify as to the manufacture of methamphetamines. He had previously been qualified as an expert in the State of Florida regarding investigation and operation of clandestine drug labs (R 3469). As such, in much the same manner as a doctor or a lawyer would refer to books and documents, Agent Broughton was competent to testify concerning the matters with which he deals on a daily basis. Inasmuch as knowledge of poisons and complex chemistry was an issue to be determined by the jury in this case, the trial judge correctly permitted the above-described evidence.

Appellant also contends that the trial judge erroneously permitted testimony that appellant expressed verbal threats concerning the Carr family children. Alan Adams had done lawn work for appellant approximately once every week for a period of a year and a half to two years (R 3638). He testified that appellant always got highly upset and yelled obscenities at the Carr children. Mr. Adams also observed appellant threaten the children on several occasions. On one occasion appellant stated

he "would get them" and another occasion appellant was highly upset when the children rode motorcycles through appellant's yard and appellant stated, "I'm going to kill you" (R 3639). Once again, evidence of this nature was highly relevant with respect to the issues in the case. The state's theory, and conceded by defense counsel in the argument on the motion for judgment of acquittal, was that appellant was highly upset for many years over the activities of the Carr family. Testimony of the nature just described is relevant towards showing appellant's motive for eventually poisoning the family.

With respect to appellant's contention that the trial judge erroneously permitted testimony that appellant deliberately was placed in "hostile" confrontation situations in order to observe his reactions, your appellee submits that no proper objection was made to this testimony. During trial, after the prosecutor asked Detective Goreck how appellant reacted to a hostile-type person coming to his home, defense counsel merely objected without stating any grounds or reason for his objection (R 3239). During the other portion of the testimony complained-of by appellant in this regard (R 3246), no objection of any kind was made by appellant. Generally, in order for an issue to be preserved for further review by an appellate court, that issue must first be presented to the trial court and the specific legal argument or ground to be argued on appeal must be part of that presentation. Tillman v. State, 471 So.2d 32 (Fla. 1985), citing Steinhorst v. State, 412 So.2d 332 (Fla. 1982), and Black

v. State, 367 So.2d 656 (Fla. 3d DCA 1979). The failure to present the specific objection to the trial court as now presented on appeal precludes appellate review.

The fact that testimony was elicited concerning Coke being the beverage of choice of appellant has been discussed previously under Issue I, supra. This information was highly relevant in that the testimony revealed that Peggy Carr, in her purchases for the Carr family, usually bought Pepsi, a store brand, or whatever was on sale, and it was known that Pepsi was Peggy Carr's preferred beverage. Also, Peggy Carr only purchased two liter plastic bottles, not sixteen ounce refundable glass bottles such as those which contained the thallium-laced Coke. Thus, this testimony concerning appellant's preference for Coke was relevant as direct evidence to show that it was more probable that appellant supplied the Cokes to the Carr household.

Appellant also contends that the trial court improperly admitted testimony concerning the threatening note sent to the Carr family in June, 1988, and that the scenarios in the Mensa mystery weekends included threatening notes and homicides by poisoning. This matter has also been discussed in Issue I, supra, and appellant is incorrect when he asserts that there was no evidence to link the threatening note to appellant (brief of appellant at page 78). The record in this case is clear that appellant, and not his wife (Dr. Diana Carr), wrote the "voodoo pamphlet" which contained language strikingly similar to that

contained in the threatening note sent to the Carr family. This testimony was competent circumstantial evidence to link appellant to the threatening note. Additionally, although Diana Carr might have written some of the scenarios for the Mensa murder mystery weekends, she did so based only upon research submitted by appellant. However, these scenarios written by Dr. Carr do not include the "voodoo pamphlet" which clearly was written by appellant. This evidence was highly relevant to the issues presented at trial.

Your appellee submits that the trial court did not err in admitting the items of evidence discussed under this claim. However, should this Honorable Court determine that there was error in the admission of one or more of the items discussed herein, any such error is harmless beyond a reasonable doubt. State v. DiGuillio, 491 So.2d 1121 (Fla. 1986).

ISSUE IV

WHETHER APPELLANT MAY RAISE ON APPEAL AN ISSUE CONCERNING THE SUFFICIENCY OF THE EVIDENCE WITH RESPECT TO "CAUSE OF DEATH" WHERE THAT ISSUE WAS NOT RAISED BEFORE THE TRIAL COURT.

Appellant raises as his fourth point a claim which was not presented to the trial judge. Appellant contends on appeal that the record does not reveal that the evidence established beyond a reasonable doubt that appellant caused the death of Peggy Carr. The failure to raise this claim below precludes appellate relief. See Tillman, supra; Steinhorst, supra; and Black, supra.

Even had this claim been preserved below, via a defense request for an instruction as to cause of death or otherwise, appellant's point would have no merit. In order for appellant to escape criminal liability, a completely superceding cause of death would have had to exist. The evidence in this case does not support the existence of a superceding cause. For some reason, appellant contends that the decision in Griffith v. State, 548 So.2d 244 (Fla. 3d DCA 1989), would render Dr. Hostler criminally liable for the death of Peggy Carr if the statutory provisions regarding recognition of brain death (*Florida Statute §382.009* or its predecessor *§382.085 (1985)*) were not followed. No interpretation of Griffith would support that conclusion. There, the court was concerned with a defendant who attempted a mercy killing of a person he thought dead. The victim was not "brain dead" inasmuch as her respiratory and circulatory functions were not maintained by artificial means of support and because there

was no termination of the functioning of the entire brain. The court held that the terms of *Florida Statute 382.085 (1985)* do not permit a third party from taking the law into his own hands by taking a life. In the instant case, however, Dr. Hostler testified that Peggy Carr was in a chronic vegetative state unable to maintain life on her own and, in all probability, was brain dead (R 1837 - 1840). Dr. Hostler also testified that he consulted with several physicians and legal counsel prior to disconnecting Peggy Carr from the ventilator (R 1838). There is no evidence that the statutory provisions of §*382.09* were not complied with.

In any event, the record is clear that the "cause of death" of Peggy Carr was the result of thallotoxicosis or thallium poisoning (R 1841). This conclusion was not challenged by defense counsel in cross examination or otherwise. Indeed, at the pretrial conference, the court asked defense counsel if cause of death was an issue and defense counsel replied that he didn't know and that's why witnesses weren't listed (R 4893). No witnesses, such as a pathologist, were listed nor did defense counsel in any way challenge Peggy Carr's cause of death. It simply was not an issue in this case.

Even had Dr. Hostler acted in a negligent manner, appellant would not be relieved of criminal responsibility. In Hallman v. State, 371 So.2d 482 (Fla. 1979), this Honorable Court held that even if medical malpractice could have been known at the time of Hallman's trial, a writ of error coram nobis would not have lied

because the fact of the hospital's negligence would not have precluded a conviction. In so holding, this Court relied upon Johnson v. State, 64 Fla. 321, 323, 59 So. 894, 895 (1912):

> A defendant cannot escape the penalties for an act which in point of fact produces death, which death might possibly have been averted by some possible mode of treatment. The true doctrine is that, where the wound is in itself dangerous to life, mere erroneous treatment of it or of the wounded man suffering from it will afford the defendant no protection against the charge of unlawful homicide.

See also Hampton v. State, 496 So.2d 195 (Fla. 4th DCA 1986). Thus, based on long standing Florida precedent, appellant could not avoid criminal responsibility even if Dr. Hostler had negligently attended to Peggy Carr, (and your appellee firmly denies that Dr. Hostler acted in a negligent fashion). Appellant's fourth point must fail.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY ON THE MAXIMUM AND MINIMUM PENALTIES FOR THE OFFENSE OF FIRST DEGREE MURDER DURING THE GUILT PHASE OF THE TRIAL.

At the charge conference for the guilt phase of this capital murder case, the following discussion occurred concerning the giving of an instruction on the maximum and minimum penalties. As will be noted, the prosecutor argued the instruction should be given, and it was the defense attorney who did not want the instruction.

> THE COURT: Maximum and minimum penalties. This is 2.06.
>
> MR. AGUERO: Again, that's a standard instruction and it only applies to Count I. That's all that instruction is allowable for anymore.
>
> MR. J. STIDHAM: It has been deleted, Your Honor.
>
> THE COURT: Sir?
>
> MR. J. STIDHAM: In the standard instructions 2.06 has been deleted. In my understanding, 2.05, item 5[6] is supposed to take care of that.
>
> MR. AGUERO: No. 2.06 has not been deleted as to capital cases.
>
> MR. J. STIDHAM: This is a brand new book. I'll show you.

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[6] Rule Instruction 2.05, Item 5 provides: Your duty is to determine if the defendant is guilty or not guilty, in accord with the law. It is the judge's job to determine what is a proper sentence would be if the defendant is guilty.

THE COURT: I think it's one of these things that you can waive. It is surely to your benefit. I mean, I think they intended it to be to your benefit. But if you don't want to hear it, I don't know of any reason that I should --

MR. J. STIDHAM: I realize that's what it's intended to be.

MR. AGUERO: It is the State's position that that is not -- I mean, of course, they can waive any instruction. But it is the State's position this is a standard instruction. And the trial of a capital case doesn't make any sense unless you give this instruction. That is, if you don't tell the jury about the penalty on a capital charge then they don't -- what you read them before was that. You already gave that to them at the beginning of the trial.

THE COURT: I know.

MR. AGUERO: So if you don't give it again you're leaving out something that I think they need in order for them to go back in the jury room and remember that there's 14 other counts they have to do is one thing. This count means that they are going to come back on first degree murder. So, I think this needs to be in there in order to remind the jury of their job.

THE COURT: The problem with it, not to argue but the problem is that what you're saying this instruction tells them. It doesn't tell them. It doesn't tell them if you find him guilty of first degree murder you're going to come back. It tells them the maximum penalty is death or life. And then it tells them to disregard what I just told them. The maximum penalty is death or life. So it's stupid, idiotic.

MR. AGUERO: I understand.

MR. J. STIDHAM: I agree. I believe, you know, this instruction to me cuts both ways. It helps, it hurts, who knows what it's going to do. So it bugs me.

THE COURT: In the sense that it contributes to the confusion of the jury it helps.

MR. J. STIDHAM: I mean, they know what the penalty for this is at this point.

THE COURT: I know.

MR. AGUERO: Denied?

THE COURT: No, no. Whatever you want to do. If you want it you get it. I just can't imagine why the Supreme Court tells me to tell them something and then tell them to disregard that I just told them that.

MR. J. STIDHAM: I totally agree with that.

MR. AGUERO: Well, it used to be that way as to all crimes. It didn't make sense then either. Okay. That's out.

THE COURT: It's out of there. Cautionary instruction.
(R 4025-4027)

Not only did defense counsel waive the giving of an instruction on the maximum and minimum penalties at the guilt phase, but it was also not necessary to give the instruction at that point in the trial.

Appellee submits the trial court was not required to instruct on the penalties applicable to first degree murder during the guilt phase. This issue was presented to the Fifth Circuit in Wright v. State, 585 So.2d 321 (Fla. 1991).[7] That

[7] The court certified the following question to the Florida Supreme Court: Whether Florida Rule of Criminal Procedure 3.390(a) requires that a trial judge instruct the jury on the possible penalties that attend a conviction for first-degree murder at the conclusion of the guilt phase of the trial upon a timely request? This question is still pending before this Court.

court indicated such an instruction was not needed in the guilt phase. The court went on to opine that Rule 3.390(a), Florida Rules of Criminal Procedure, should be read to require the giving of maximum and minimum penalties only in capital cases and only in the penalty phase of a capital case. The court reasoned that the second phase was the time when the jury must concern itself with recommending a penalty, thus the minimum and maximum penalties become relevant. During the guilt phase, the court stated, the jury can be assumed to know the minimum and maximum penalties. *Id.* at 322.

The reasoning of the district court is sound in this instance. The penalties involved for a particular crime are no more relevant in a capital case at the guilt phase than they are at the guilt or innocence determination of any other criminal trial. Furthermore, we don't have to assume, we know that the jury during the guilty phase is aware of the possible penalties. And the jury *sub judice* was clearly aware of the maximum and minimum for first degree murder because they were specially given this information during the *voir dire* proceedings. The trial judge said:

> At the conclusion of the evidence and the argument, [during the penalty phase], and after hearing fairly detailed instructions on the law, the jury will be asked to retire and to return a recommendation to the Court as to what sentence should be imposed. There are only two possible punishments for the crime of first degree murder in Florida. And they are: Death in the electric chair or life imprisonment with a mandatory minimum of 25 years before eligibility for parole. (R 24)

The jury was aware of the maximum and minimum sentences for first degree murder.

Thus, even if the jury should have been given a penalties instruction at the conclusion of the guilt phase, Appellee submits the failure to do so was harmless error since they were so instructed during the *voir dire* proceedings.

Additionally, Appellee submits defense counsel waived the giving of such an instruction. It is abundantly clear from the charge conference that the prosecutor wanted the court to give a maximum and minimum penalty instruction. It was defense attorney who stressed that it should not be given. And there is no reason why counsel could not waive this particular instruction on behalf of the defendant.

Appellant's reliance on Harris v. State, 438 So.2d 787 (Fla. 1983), is not well-founded. The court in Harris was concerned with counsel's waiver of lesser included offenses to first degree murder and grounded its opinion on Beck v. Alabama, 447 U.S. 625 (1980). However, even that decision has been called into question. Justice Grimes in his concurring opinion in Mack v. State, 537 So.2d 109 (Fla. 1989), questioned the soundness of Harris. He opined that in the course of a criminal trial the defense attorney must make a number of tactical decisions impacting on the trial. He further stated it is impractical and unnecessary to require on the record waivers from the defendant except for those rights which go to the heart of the adjudicatory process, *i.e.*, right to counsel; right to jury trial; right to be present at critical stages.

There is no decisional law in this state which would require the defendant to personally waive a penalty instruction. This appellant has not advance any reason to have such a requirement.

The trial court did not err in not instructing on the maximum and minimum penalties at the guilt phase. The failure to so instruct was done at the behest of the defense counsel; he waiver of the instruction is sufficient without a waiver by the defendant. Additionally, appellee submits the trial court need not give such an instruction at the guilt phase. The instruction is only relevant at the penalty phase of a capital trial.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GIVING APPELLANT'S PROPOSED SPECIAL JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE WHERE THE JURY WAS PROPERLY INSTRUCTED ON REASONABLE DOUBT.

During the charge conference, the parties discussed a jury instruction on circumstantial evidence. The prosecutor indicated that it was unnecessary to give such an instruction because the subject is adequately covered by other instruction (R 4017). The defense attorney argued it was within the trial court's discretion, and he offered a proposed circumstantial evidence instruction (R 4017-4018). He further indicated that should the court deny that instruction, he would propose another one. (R 4018-4019) The court denied the requested special instruction, finding that the subject was adequately covered under the reasonable doubt instruction (R 4019). No new circumstantial evidence instruction was proposed, and the defense did not request the former standard instruction on circumstantial evidence.

Your appellee submits that the trial court properly denied the request for a special instruction on circumstantial evidence. As was noted by appellant, this Court in revising the standard jury instructions for criminal cases in 1981 indicated that an instruction on circumstantial evidence was rendered unnecessary if the jury is instructed on reasonable doubt and burden of proof. *See,* In Matter of Use by Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981).

The trial court denied the special instruction finding that the reasonable doubt instruction covered the topic (R 4019). The trial judge had indicated during the conference that instructions would be given on presumption of innocence, reasonable doubt and burden of proof (R 4016). And when the jury instructions were given to the jury, the court said:

> Mr. Trepal has entered a plea of not guilty to these charges. And that means that you must presume or believe him to be innocent. The presumption stays with the defendant as to each material allegation of the charges contained in the indictment through each stage of the trial until the presumption is overcome by the evidence.
>
> To overcome a presumption of innocence the State has the burden of proving to you two things:
>
> That the crimes with which the man is charged were in fact committed, and that he is the person that committed the crimes.
>
> Mr. Trepal is not required to prove anything.
>
> Regarding the concept of reasonable doubt, it is defined more in the negative than any other way. In other words, we're telling you that a reasonable doubt is not.
>
> A reasonable doubt is not a possible doubt, it is not a speculative doubt, it is not an imaginary doubt, it's not a forced doubt. And that sort of a doubt should not influence you to return a verdict of not guilty if in your own mind you having an abiding conviction that Mr. Trepal is guilty. But, if, after carefully comparing, considering, and weighing this evidence, you do not have in your mind an abiding conviction that Mr. Trepal is guilty, or, if having a conviction at all, it is one which wavers and vacillates, is not stable, then this case has not been proven to you beyond a reasonable doubt, and you should return a verdict of not guilty.

> It is to the evidence introduced in this trial, and to it alone, that you are to look for proof.
>
> A reasonable doubt as to Mr. Trepal's guilt may arise from the evidence, it may arise from conflicts in the evidence, or it may arise from lack of evidence.
>
> If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.
> (R 4285-4286)

These instructions adequately covered the subject of how the jury was to treat the evidence presented before it.

Appellant argues that a different result should obtain because the trial court used the term "should" in the reasonable doubt instruction and not "must". This argument was presented to the district court and rejected in Thomas v. State, 525 So.2d 945 (Fla. 4th DCA 1988). Although the judge in his concurring opinion recognized that the use of the word "must" might be more appropriate, it was nonetheless held that the instruction was not error. *Accord,* Torrence v. State, 574 So.2d 1188 (Fla. 3d DCA 1991).

Appellant has failed to demonstrate an abuse of discretion in the trial court's denial of a special jury instruction on circumstantial evidence.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY IMPOSING A SENTENCE OF DEATH UPON APPELLANT.

As his final point on appeal, appellant contends that the trial court improperly imposed a sentence of death in this case. Your appellee contends to the contrary and, as will be discussed below, the imposition of a sentence of death on appellant was proper in this case.

A. Prior Violent Felony Aggravating Factor:

Appellant first contends that the trial judge invalidly found this aggravating circumstance because it "was based upon the same incident as resulted in Peggy Carr's death rather than any previous criminal activity" (appellant's brief at pages 97 - 98). In other words, appellant contends that because the prior violent felonies were the contemporaneous convictions for the six counts of attempted first degree murder with respect to other members of the Carr family, the aggravating factor should not have been found. This is incorrect. In Pardo v. State, 563 So.2d 77 (Fla. 1990), this Honorable Court relied upon its previous decision in Wasko v. State, 505 So.2d 1314 (Fla. 1987), and determined that:

> . . . We have consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance so long as the two crimes involved multiple victims or separate episodes.

The attempted murder convictions were properly considered in aggravation by the trial judge where multiple victims were involved.

Appellant further contends that a prior violent felony may be considered in aggravation only when there is personal interaction of a violent nature between the defendant and the person that is the victim of the prior felony (appellant's brief at page 98). This contention is meritless, especially in light of the fact that *Florida Statute* §782.04(1)(a)2j provides that first degree murder is committed if one throws, places, or discharges a destructive device or bomb and a death ensues. Certainly appellant is not claiming that this is not a crime of violence. If this Court were faced with a case in which a person placed a bomb in an airline and all passengers died, certainly this Court would find that this was a crime of violence. If this Court were faced with a letter bomb scenario such as the one which took the life of Judge Robert Vance of the Eleventh Circuit Court of Appeals, this Court would most certainly find that the perpetrator had committed a crime of violence. In each of these situations, there was no direct contact between the defendant and the human victim and, yet, it is unmistakably clear that a crime of violence has been committed. As the trial judge observed, attempted murder is a crime of violence per se. Johnson v. State, 438 So.2d 774 (Fla. 1983) (R 5549). This aggravating circumstance was proven beyond a reasonable doubt.

B. Great Risk of Death to Many Persons Aggravating Factor:

The trial judge correctly found that appellant knowingly created a great risk of death to many persons. In so doing, the trial judge relied upon the proper standard as set forth in this Honorable Court's opinion in Kampff v. State, 371 So.2d 1007

(Fla. 1979) (R 5550). Appellant's actions resulted in a likelihood or, at the very least, a high probability that death would ensue to many persons. The instant case must be contrasted with the decisions in King v. State, 514 So.2d 354 (Fla. 1987), cert. denied, 47 U.S. 1241 (1988), and White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983), cases relied upon by appellant. In King and White, there existed only a possibility that others might have been killed based upon the actions of the defendant. This is not a case where the appellant is to be condemned for what might have occurred. There is no speculation involved in the instant case. Rather, appellant's intentional poisoning of Coke was done so with the intent to kill persons against whom he had a vendetta. By introducing the thallium-laced Cokes into the Carr household, appellant did something which was likely to cause death to many persons.

Appellant's contention that the trial court engaged in speculation is totally belied by the record. Appellant contends that the trial judge's order which stated that "several persons regularly visited the household as guests" must be read in conjunction with the fact that seven persons resided in the Carr residence. It is immaterial that three of those persons slept in the garage apartment. The evidence showed that all seven persons were members of the household and that they frequently co-mingled at various times. The record also revealed that there were regular visitors to the Carr residence such as Pye Carr's sister and her daughter, and friends of the children which included Ronnie Chester, the ex-husband of one of the children who lived

on the Carr homestead when appellant was a neighbor. Indeed, the evidence showed that appellant knew that a lot of people in the Carr family were coming and going at various times (R 3178).

Appellant is also incorrect when he contends that "there was no evidence adduced at trial by which the volume of content of thallium in the empty bottles could be extrapolated through the use of the washing measurements" (appellant's brief at page 102). Your appellee has already set forth in great detail the evidence of the washings which revealed, beyond a reasonable doubt, that the empty bottles had contained lethal doses of thallium. Issue I, supra, at pages 25 - 26. There is no question that the introduction of thallium-laced Coke into the Carr household created a great risk of death to many persons.

Appellant's contention that the "many" aspect of this aggravating factor was not established is without merit. The trial court correctly relied upon Raulerson v. State, 420 So.2d 567 (Fla. 1982) (R 5550) to support the satisfaction of the "many" element (in Raulerson, four persons were held to be "many" persons for the purposes of the statute). As aforementioned the evidence clearly showed that appellant knew that there were at least seven persons in the Carr family who resided at the homestead at all times, and that he knew of many other people who frequently visited the home. Considering that one of the Coke bottles was broken, there were still seven bottles which each contained a potentially lethal dose of thallium. "Many" persons could have died as a result of appellant's actions. One person died and one other person was in a life-threatening situation

because of the thallium poisoning. This aggravating circumstance was proved beyond a reasonable doubt.

Appellant's contention that this aggravating factor was improperly doubled with the prior violent felonies aggravating factors is without merit. Each of these factors deals with a different aspect of the crime. The result in the instant case should be no different than that in Toole v. State, 479 So.2d 731 (Fla. 1985), wherein this Court held that creating a great risk of death to many persons and committing the capital felony while engaged in the commission of an arson were not improperly doubled. See also Bundy v. State, 471 So.2d 9, 22 (Fla. 1985). The cases relied upon by appellant, White v. State, supra, and Lucas v. State, 490 So.2d 943 (Fla. 1986), are inapposite. In White, this Court rejected the use of the great risk aggravating factor based on what might have occurred during the criminal episode. This Court also rejected the trial court's suggestion that the aggravator was valid because six people were killed. In each of those murders, the gun was discharged at a close range and involved relatively little risk of injury to other persons in the room. This must be contrasted with the fact that appellant introduced poison into the Carr residence which may have affected many persons. In Lucas, this Court rejected the great risk aggravator because the defendant's conduct never endangered others than those who were murdered. This Court found that the three persons who were murdered do not constitute "many" persons within the meaning of our statute. In the instant case, however, more people than those who fell ill were directly involved as

possible victims of the poisoning. Lucas and White do not indicate that there is an improper doubling in the instant case.

C. Cold, Calculated, and Premeditated Manner Without Any Pretense of Moral or Legal Justification Aggravating Factor:

Appellant's challenge to the trial court's finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification is particularly unavailing. Your appellee submits that intentional poisoning is uniquely cold and calculated. See Buenoano v. State, 527 So.2d 194 (Fla. 1988), wherein the defendant did not dispute that a poisoning murder was committed in a cold, calculated and premeditated manner. Indeed, the instant murder satisfies the requirements for the establishment of this aggravating factor:

> . . . The cold, calculated, and premeditated murder, committed without pretense of legal or moral justification, can [ ] be indicated by circumstances showing such facts as advanced procurement of a weapon, lack of resistence or provocation, and the appearance of a killing carried out as a matter of course. (citations omitted)

Swafford v. State, 533 So.2d 270, 277 (Fla. 1988). All of the factors discussed in Swafford, i.e., advanced procurement of a weapon (here, the thallium-laced Cokes), lack of resistence or provocation and the appearance of a killing carried out as a matter of course, are all present in the instant case as demonstrated by the facts adduced at trial. There is no reasonable doubt that appellant committed the homicides in a cold, calculated, and premeditated manner. This conclusion is buttressed by the decision in Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986), wherein this Court opined:

> . . . Heightened premeditation necessary for the circumstance does not have to be directed toward the specific victim. Rather, as the statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable. (emphasis in original)

Your appellee futher submmits that the second part of the test, to-wit, that the murder was committed without any pretense of moral or legal justification, has also been shown beyond a reasonable doubt. Appellant's assertion that he only intended to scare the Carr family is belied by the quantity of the thallium used in the Cokes, but even if appellant was upset with his neighbors and wished them to move, there is no justification, either moral or legal, for lashing out and committing murder. Society does not grant the right to poison your neighbors merely because you are upset with their actions. This is not a case where appellant retaliated due to threats or other provocation of his neighbors. There simply was no justification for his actions.

D. Proportionality:

Your appellee submits that the sentence of death was properly imposed in the instant case where the aggravating factors established below set appellant and this killing apart from the average capital defendant. The imposition of the death sentence was proportionate to other capital cases where the sentence has been upheld. See Buenoano v. State, supra.

The jury recommended in the instant case that appellant receive a death sentence by a vote of nine to three. The trial court found the existence of three valid aggravating

circumstances: (1) previous conviction of another capital felony (2) appellant knowingly created a great risk of death to many persons, and (3) the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R 5549 - 5551). In mitigation, the court found that appellant has no significant history of prior criminal activity (R 5551 - 5552). The trial judge also discussed the nonstatutory mitigating circumstances (R 5552 - 5553). Indeed, it appears that the trial judge complied with the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990), by setting forth in his written order each mitigating circumstance proposed by the defendant. It also appears that the trial court even discussed matters which are not mitigating in an attempt to give every benefit to appellant. The fact that appellant was raised in a normal middle-class environment by parents who remained together, a "very happy" childhood is simply not mitigating. The fact that appellant had no psychological or discipline problems is certainly not mitigating. The fact that appellant is intelligent and a published author does not mitigate the commission of these crimes. Indeed, this Court is usually confronted with situations where a capital defendant has had a deprived childhood and has psychological or emotional problems. A contrary situation is simply not mitigating. According to this Court's Campbell opinion, that appellant had a good prison record and that he had a stable family life were validly considered as nonstatutory mitigation. Campbell, Id. at 419 n. 4, 2), 3). When considered in the context of the facts of this case, the aggravating

circumstances clearly outweigh the existing mitigating circumstances. The trial court's well-reasoned order (R 5549 - 5556) amply justifies the imposition of the death penalty in the instant case. The murder in the instant case was not the result of sudden reflection, but rather the result of a cold, calculated plan formulated over a period of time sufficient to accord reflection and contemplation of appellant's actions. The death sentence imposed is proportionally warranted.

E. Conclusion

The trial court's imposition of a sentence of death in this case after receiving a 9 - 3 recommendation of that sentence by the jury was proper. The aggravating circumstances found by the trial judge were proven beyond a reasonable doubt and they clearly outweighed the mitigating factors considered by the judge. The death sentence imposed for the thallium poisoning of Peggy Carr is proportionally warranted.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Ronald N. Toward, Esq., P. O. Box 226, Bartow, Florida 33830, this 3rd day of April, 1992.

Robert J. Krauss

OF COUNSEL FOR APPELLEE.