IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,843

MICHAEL ALLEN GRIFFIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellant's Statement of the Facts contains material omissions and is thus rejected by the Appellee who submits the following.

The defendant was charged with one count of first degree murder of a law enforcement officer, Joseph Martin, one count of attempted first degree murder of a law enforcement officer, Juan Crespo, one count of burglary, two counts of grand theft, one count of petit theft, and one count of unlawful possession of a firearm by a convicted felon. (R.1-5).

A. Guilt Phase

The events leading up to the murder of Officer Joseph Martin began on April 23, 1990, when a white Chrysler LeBaron automobile, which Richard Marshall rented from Avis upon arriving at the airport in Miami, was stolen from the parking lot of the Miami Beach motel at which he was staying. (R.2406-2414). Marshall had parked the car in the motel parking lot in the late night or early morning hours of April 23rd or 24th, 1990. Upon waking around 7:00 a.m. on the morning of the 24th, he found that the door to his room, which he had locked the prior night, was open. (R.2410-11). He then discovered that his Avis car keys were missing, and then, upon checking the motel parking lot, discovered that the car was gone. (R.2413-14). This car was ultimately identified as the car in which Michael Griffin was a

passenger immediately prior to the shooting of Officer Martin on April 27, 1990, and in which Griffin fled from the shooting of Officer Martin. (R.2492-93). Griffin was also charged with the theft of this car. (R.3).

The weapon which was used to kill Officer Martin was obtained in an armed home invasion robbery committed in the early morning hours of April 26, 1990, when Charles Pasco and his girlfriend exited Pasco's car and were accosted in the driveway adjacent to Pasco's house in Hollywood, Florida. (R.2420-33). As they exited the car, a man with a shotgun, which was pointed at Pasco, told Pasco to "get down," and then obtained Pasco's keys, either from Pasco's pocket or from the ground around Pasco. (R.2425-27). The man with the shotgun had a companion. (R.2425). Pasco owned a .357 Ruger, which was kept in a briefcase in his house. (R.2428). Pasco identified the records from the purchase of the gun, which records reflected the serial number. (R.2429; Exhibit 7: R.267). The gun, which was subsequently identified as the weapon used to murder Officer Martin, was identified by Pasco as Pasco's gun and was admitted into evidence as Exhibit 8. (R.2431-32). Co-defendant Nicholas Tarallo, whose testimony is detailed at pp. 3-9, infra, testified that Griffin and another Velez, co-defendant, stole the gun during the encounter with Pasco, while Tarrallo sat and waited in the white LeBaron.

Immediately prior to Pasco's testimony, defense counsel for Griffin renewed a pretrial Williams rule objection regarding

Pasco's testimony. (R.2415-18). As a result of the ensuing colloquy, the court, immediately prior to Pasco's testimony, read the following limiting instruction to the jury:

> Ladies and gentlemen of the jury, this witness is going to testify about a home invasion robbery.
>
> Now, this falls under what we call Williams rule evidence. And you must be very careful to take what I say exactly as it's said.
>
> The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendants will be considered by you for the limited purpose only of proving motive, opportunity, intent, preparation, plan, knowledge, identity, the absence of a mistake or accident on the part of the defendants and you should consider it only as it relates to those issues.
>
> However, the defendants are not on trial for the crimes that are not included in the indictment. Do you all understand what I'm saying?
>
> In other words, we're not here to try this case. It's only to be used -- the testimony you receive shall only be used for the limited purpose of the items that I just read.

(R.2418-19).

Nicholas Tarallo provided a comprehensive narrative of the events leading up to the murder of Officer Martin. Prior to the trial of Griffin, Tarallo had pled guilty to charges of second degree murder, first degree attempted murder, burglary and two counts of grand theft. He received a sentence of thirty years and agreed to testify truthfully in Griffin's trial. (R.2476).

Tarallo testified that another codefendant, Velez, had introduced him to Griffin, whom Tarallo knew by the name of Auto.

(R.2475-76). In April, 1990, Griffin had a blue Cadillac Seville. (R.2478). On April 26th, Griffin and Velez came to Tarallo's apartment, to go out, in the blue Cadillac. (R.2479). They drove the Cadillac to an apartment building near 6th Avenue, parked it there, and switched to the white LeBaron. (R.2479). Tarallo had not previously seen the LeBaron, but was aware that it had been stolen. (R.2479-80,2490). The blue Cadillac, however, was not stolen. Tarallo was told that this car belonged to the defendant's father. (R.2493).

Before getting into the LeBaron, Velez took a shotgun from the trunk of the Cadillac and put in on the back seat of the LeBaron; he then moved it to the front seat. (R.2480-81). Velez was driving the LeBaron; Griffin was in the front passenger seat and Tarallo was in the back seat. (R.2482). While driving around, they spotted a white BMW, and Griffin said, "Get that BMW." (R.2484). They followed the BWN to a house, at which time Velez and Griffin got out of the car.[1] (R.2484-85). Griffin told Velez to grab the gun and further told Tarallo to get into the front of the car and drive. (R.2485). At that time, there was one gun in the car and Velez took it. (R.2485-86). Velez and Griffin went towards the house, while Tarallo remained in the car. (R.2486). Velez and Griffin returned about ten minures later, after Tarallo heard a door slam. (R.2486). Griffin got into the front passenger seat and Velez in the back seat.

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[1] This was the confrontation in which Griffin and Velez robbed Pasco and obtained the gun.

(R.2487). Upon entering the car, Griffin and Velez had money and a .357, which they had just obtained from Pasco. (R.2487, 2420-33). Tarallo identified Exhibit 8 as the gun that Griffin came out of the house with and which he carried in his waistband when reentering the car. (R.2487).[2] Velez still had the original shotgun. (R.2488). The cash which Griffin and Velez had obtained was then divided among all three. (R.2488).

The three then left the scene to go back to the Cadillac. (R.2488). On their way back, Griffin "made a statement down the road some, that if we were to be pulled over by the police, that he would get out and shoot and for me to dip." (R.2489). Tarallo explained that "dip" meant to leave, to drive away. (R.2489). Griffin also said that he was not going to go back to jail. (R.2489).

After returning to the Cadillac, the shotgun was placed back into the trunk of the Cadillac. (R.2490-2491). Griffin kept the .357. (R.2491). After a brief stop at Tarallo's apartment, the three of them went out to eat and again returned to Tarallo's apartment, where all three of them slept until the morning of April 26th. (R.2491-92). Griffin and Velez went out during the day of the 26th and returned to Tarallo's apartment just before midnight. (R.2492).

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[2] Pasco had previously identified Exhibit 8 as his gun, which had been stolen.

At midnight, the three men went out in the blue Cadillac, which they again drove until they reached the white LeBaron. (R.2492-93). They again switched cars. However, this time Griffin parked the Cadillac behind the apartment building, a block away, because they had noticed a marked police vehicle near the apartment building.[3] (R.2494). Griffin still had the .357, and the shotgun, from the trunk of the Cadillac, was again placed in the trunk of the LeBaron. (R.2493-94). Tarallo drove the LeBaron, while Griffin sat in the front passenger seat and Velez in the back seat. (R.2495). According to Tarallo, "the plan was to go jacking," which meant to rob somebody. (R.2495). After driving around for a while, the men approached a condominium or apartment building in Broward County. (R.2496-97).

Nothing happened at that location and the three men proceeded back towards Dade County. (R.2499). While driving, Griffin said "that we should go to the Holiday Inn Newport, because he had got paid there five hundred times." (R.2499).

They proceeded to the Newport Holiday Inn in North Miami Beach and got out of the car. (R.2501). Griffin and Velez climbed up to a second floor balcony at the rear of the building. (R.2502-03). Griffin handed the .357 to Velez, and Griffin entered the motel room while Velez remained on the balcony.

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[3] A witness, Alfred Corrodi, watched the three men as they switched cars. (R.2575-82). The apartment building where the cars were parked was located on N.E. 6th Avenue and 149th Street. (R.2575-76).

(R.2404). Griffin exited the room and the two men climbed down. (R.2505). Velez now had a cellular phone and a purse with him, and the men returned to the LeBaron, with Tarallo driving, Griffin in the front passenger seat, and Velez in the back seat. (R.2505). At this time, Tarallo did not know who had the .357. (R.2506). Griffin and Velez were in the process of dividing the money and jewelry items. (R.2506). Griffin gave Velez a Rolex watch and a packet of money, while retaining another packet of money and a couple of other watches and various items of jewelry. (R.2507). Tarallo did not get any property at this time, as he was driving. (R.2508).

While driving back from the Holiday Inn, in the general direction towards where the Cadillac had been parked, they observed a police car, stopped at a red light. (R.2508). Griffin got scared, telling Tarallo to turn, to speed up, and to turn several more times. (R.2508-09). Griffin started giving Tarallo directions. (R.2509). While they were driving, Velez was talking to his girlfriend on the celluar phone. (R.2510). Tarallo now observed the .357 in Griffin's waistband. (R.2510). While driving on back streets, they observed two more police cars, the second of which approached them and went past them. (R.2511). Griffin told Tarallo to "dip," and Tarallo left. The police car turned around and started to follow them.

Tarallo then was again told by Griffin, "to turn still, go fast, to dip." (R.2512). The police car's emergency lights

were on. (R.2511-12). Tarallo turned and tried to pull over. Id. However, Griffin stated that he "was not going back to jail," and again told Tarallo to "dip." Id. Tarallo continued driving again, but then tried to pull over once again. This time, Griffin put his foot over Tarallo's foot on the gas pedal, making him drive, and telling him not to pull over. (R.2513).

Tarallo then managed to pull over a third time, and put the car in park. (R.2514). Tarallo opened his door and began to exit the vehicle, when he heard a gunshot, fired by Griffin. (R.2514-15). No other shots had been fired prior to this. (R.2514-15). Upon hearing the shot, Tarallo ducked back into the front seat. (R.2515). He saw Velez ducking in the back seat. Id. Griffin was now standing outside the car, on the right-had side. Id.

Tarallo then heard a lot of other gunshots, jumped out of the driver's side door and "spread eagle" on the ground. (R.2516-17). He eventually saw a police officer approaching with blood running from his neck and shoulder. (R.2517). Another officer was laying on his back behind the police car. Id. Throughout this time, the shotgun had remained in the trunk of the LeBaron. (R.2518-19). Griffin had fled in the white Chrysler. (R.2517). The time span between leaving the scene of the burglary until the shooting occurred was approximately ten to fifteen minutes. (R.2547).

Carlos Munoz testified that he was staying in the Holiday Inn room which Griffin burglarized on April 27, 1990. Munoz had fallen asleep around 1:00 a.m. and when he awoke around 7:30 a.m. discovered that the room had been burglarized and items had been stolen. (R.2586-96). He was missing a portable phone, several jewelry items, including a Rolex imitation watch, a gold Geneva watch, and rings, and two packets of cash, in bank wrappers and rubber bands, totalling almost $3,000. (R.2588-96). He identified photographs of the various jewelry items, as well as his license and credit cards, which had also been taken. (R.2590-94).

Officer Juan Crespo, the partner of Officer Martin, described the shooting of Officer Martin and the events immediately preceding and following the shooting. On April 27, 1990, Crespo and Martin were driving in the vicinity of Washington Park, between N.E. 151st and 159th Streets, when they received a call about a possible assault suspect fleeing on foot. (R.3010-12). While driving, the white LeBaron caught their attention around 158th Street and 14th Avenue, between 3:30 and 4:00 a.m. (R.3014).

They observed three while males in the LeBaron, and the driver appeared "shocked." (R.3015-16). They started to check if the car was stolen, and continued to pursue the LeBaron, based on the look of the driver, the time of night, and the car's avoidance of main streets. (R.3017-18). Crespo also thought that

it was possible that the occupants were lost tourists. (R.3017-18). Crespo observed the LeBaron pull off the road, without stopping completely. (R.3022). Crespo unsuccessfully tried to get the tag number, but the LeBaron took off again, speeding up, while Crespo and Martin followed it. (R.3022). Crespo and Martin turned on their emergency equipment - overhead and take-down lights, high beams, flashers and hazards - and the LeBaron again pulled off the road, but quickly took off again, as the pursuit of the police continued. (R.3024-25).

The Lebaron then came to an abrupt stop, at N.E. 151st Street and N.E. 13th Avenue, and Crespo's car stopped as well. (R.3026, 3029). The driver of the LeBaron started exiting that vehicle, when Crespo heard shots fired from the passenger side of the LeBaron. (R.3032).

Crespo started returning the fire and then heard the driver of the LeBaron pleading for the police not to kill him. (R.3032-33). The driver of the LeBaron, Tarallo, opened the door, using his hands to show that he had no weapons; he got down on his knees, telling the police not to kill him. (R.3033). Crespo stopped firing and ordered him to stay down as he heard more shots from the passenger side of the LeBaron. (R.3033-34).

Crespo also saw the rear passenger of the LeBaron, Velez, exit from the driver's side. (R.3035). Velez had his hands stretched out in front, demonstrating that he had no weapons.

(R.3039). Crespo ordered him to get down, but he did not. (R.3035). The rear passenger continued walking towards Crespo. (R.3035).

Crespo then saw Officer Martin running back towards their patrol car, holding his neck. (R.3036). At this time, Crespo saw another muzzle flash, aimed at Martin, again from the passenger side of the LeBaron. (R.3037). He returned fire and the defendant then aimed at him and started shooting. (R.3038). Crespo now also saw the defendant starting to crawl through to the LeBaron and get into the driver's seat. (R.3040). Crespo could not continue firing as the rear passenger, Velez, was in his way. (R.3040).

The defendant then started driving away in the LeBaron. (R.3043). Crespo attempted to take out one of the rear tires, but missed. Id. As the defendant was driving away, another police patrol car approached. Id. Crespo waved this patrol car on to catch the LeBaron, and secured the driver and the rear passenger, who had exited. (R.3044). Crespo then observed Officer Martin in a pool of blood. (R.3048).

Much of the remaining testimony focused on the police pursuit of the LeBaron and its driver, Griffin, after the shooting of Officer Martin. Officer Velasquez was in the general vicinity of the shooting when he heard gunshots and saw the patrol car of Officers Crespo and Martin. (R.2695). He observed

Officer Martin, on the ground, crawling, while Crespo was exchanging gunfire with the subjects. (R.2696-97). Velasquez saw a person inside the white car, pointing a gun at Crespo. (R.2702). The person observed pointing the gun, drove off in the white car. (R.2703). Velasquez pursued the white car, with his lights and sirens on. (R.2704). Near the intersection of N.E. Eighth Avenue and 158th Street, the driver of the white car drove it on to the swail, left the car in drive and ran out of the vehicle, leaving it to roll and come to a complete stop on Eighth Avenue. (R.2705). The driver ran southbound, jumping over fences in the residential neighborhood. (R.2706). At that point, Velasquez lost sight of the fleeing suspect and called for backup assistance. (R.2705-06). Velasquez saw the suspect again when he was captured. (R.2712).

Officer Pete Gomez heard a dispatch about the pursuit of the LeBaron. (R.2736-37). A subsequent dispatch indicated that the LeBaron had stopped and that its occupant was on foot. (R.2738). Gomez responded to that vicinity and canvassed the yard and back areas of the residences. (R.2738). He then heard some rustling in bushes and saw and pursued Griffin. (R.2740-42). Griffin ran and Gomez chased him, until Griffin jumped over a fence. (R.2745, 2749).

Officer James Reddy, of the K-9 unit, participated in the pursuit of Griffin, arriving after a perimeter had been set up by the police in the general vicinity. (R.2766-69). In the area of

N.E. 157th Terrace and N.E. 8th Avenue, his dog alerted, and he saw a body under a car, parked in front of a house. (R.2775-78). Reddy asked this person to come out. (R.2779). Instead of coming out, the person under the car moved to the side of the car away from Reddy. (R. 2779). Reddy repeated his commands several more times, but the person kept moving back and forth. (R.2780). Reddy then released his dog, who then went under the car and grabbed and dragged the suspect. (R.2780). The person under the car proceeded to push, hit and kick the dog. (R.2781). He also started crawling away. (R.2782).

At this time, other officers, including Officer Rodriguez who had another K-9 dog, arrived. (R.2783). Rodriguez released his dog who grabbed the defendant. Reddy thus removed his canine. Id. (R.2783).

Sgt. Welden, whoas the supervisor of the K-9 unit, also responded to the area. (R.2792). He observed Reddy's dog alert, as well as the ensuing fight between the man and Reddy's dog. (R.2793-94). During the fight, a wallet fell from the suspect's pocket. (R. 2796). The wallet had a badge in it, which Welden identified.[4] (R.2796). The badge case which Welden retrieved also contained a health identification card belonging to Michael Griffin. (R.2798).

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[4] This badge was a correction officer's badge, and had been stolen from a Dade County Corrections officer's locker, in February, 1990, at a corrections facility where Griffin was incarcerated in at the time. (R.2442-47).

Sgt. Fleitas responded to the shooting and was searching for the fleeing LeBaron. (R.2801). He observed the vehicle at N.E. Eighth Avenue, between 156th and 158th Streets, still running, but with no one in it; the car was lodged in a pole and could not be moved. (R.2801-03). The windows were up. (R.2809). Fleitas retrieved from the car, a brown bag a celluar phone and a gun. (R.2806-08).

Most of the remaining testimony consisted of evidence from crime scene technicians and their search of the vehicle and suspects. Officer Nyberg removed two rings, which had been identified as belonging to Mr. Munoz (from the Newport Holiday Inn), from Griffin. (R.2817). Griffin was also found in possession of cash, wrapped in a bank wrapper. (R.2817). Griffin also had a ring which bore an inscription - "Auto." (R.2819).

Officer Barnett searched the LeBaron and impounded the firearm which had been found on the driver's seat. (R.2970-72). This firearm was identified as Exhibit 8, the same weapon which had been stolen from Mr. Pasco. (R.2973). The gun contained six fired Winchester .357 casings. (R.2973). The keys were still in the ignition and Barnett used them to open the trunk, from which he retrieved a bag with other items in it. (R.2976). Barnett also made observations about the condition of the car. There was a gunshot hole in the driver's door; a projectile in the passenger door; and a bloody palm print on the car. (R.2978, 2982, 2986-88). Barnett took the latent palm print and 23 other latent prints from the car. (R.2989-90).

The bloody palm print was determined, by technician Elzner Brown, to be Griffin's. (R.2997-3001). On the 23 other latent prints on this car, Brown found that six had comparison value, and one of those matched Griffin's prints. (R.3001-04).

Technician Taafe investigated several crime scene areas. First, he went to Jackson Memorial Hospital, to take photos of the deceased officer's body. (R.2844). He then proceeded to the area where the K-9 units caught Griffin and took photos of items found on Griffin: a gold watch, cash, etc. (R.2845-47). He then went to the scene of the shooting, where he took a hand swab from Velez. (R.2848-49). Taafe then obtained blood samples and photos from the residences through with Griffin had been chased after he left the LeBaron and started running.[5] (R.2860-62, 2869-70). Returning to the scene of the shooting, Taafe took photos showing where casings and projectiles were found. (R.2884). He also prepared a crime scene diagram. (R.2887-8; Exhibit 107). He observed that Officer Martin's firearm had six spent .38 caliber casings; a projectile was found in Officer Martin's vest. (R.2907, 2912). A projectile hole was found in Officer Martin's

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[5] There had been testimony from one of the residents of the neighborhood, Terrance Arnett, who lived at 861 N.E. 156 Terrace, that he heard knocks on his door at about 4:30 a.m. on the day in question. (R.2755-57). He heard someone asking for help, saying that he had been shot and was bleeding to death. (R.2758). Arnett stated that he would call the police, and the man told him not to do that. (R.2758-59). Arnett called 911 and when he exited his house at 6:30 that morning, noticed blood at the entrance. (R.2959).

car, in the armrest. (R.2927-28). A bullet and two projectile fragments were recovered from within Martin's car. (R.2929).

Technician Fletcher had investigated the Holiday Inn, dusting for fingerprints. (R.2611, 2639-40). Of the nineteen latent print cards which he obtained, one matched Griffins's prints. (R.2669).

Thomas Quirk, a firearms examiner, had made shoe impressions from the sneakers taken from Griffin.[6] He concluded that shoe impressions lifted from the Holiday Inn balcony were those of Griffin. (R.3118-19, 3127-28).

Quirk also determined that shots fired into Officer Martin's vest and shirt were from a .357 Magnum, Exhibt 8, the gun which Griffin had stolen from Pasco and used to shoot Martin. (R.3141). The shots had been fired from over four feet away, as there was no gunpowder residue. (R.3143). This officer also examined numerous projectiles and casings. (R.3148). Projectile A, which was removed from Officer Martin's body, had been fired from the .357 Magnum, Griffin's gun. (R.3149, 3164, 3172). Projectiles AA, which were removed from Martin's vest, also came from Griffin's gun. (R.3149, 3172). Small fragments recovered from Martin's body, designated as "B," had no comparison value. (R.3151-52, 3172). Three other projectiles recovered at the scene had also come from Griffin's .357 Magnum. (R.3164). All

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[6] The sneakers had been taken by Officer Nyberg. (R.2818).

six of the bullets had been fired from the .357 Magnum and the six casings all remained in the cylinder. (R.3154-55). Quirk also identified casings and projectiles which had been fired from Crespo's gun. (R.3159, 3167).

Dr. Welti, the medical examiner who performed the autopsy, indicated that the gunshot wound which entered Officer Martin's neck was the cause of death. (R.3225). Another bullet, the one which hit the vest of Officer Martin, caused a contusion and bleeding under the skin. (R.3218).

Additional testimony focused on the codefendant Velez. This included Detective Crawford, who, during the investigation, retrieved from Velez a Rolex, a gold chain, a bracelet and $942.70 in cash. (R.2557-58). These had been identified by victim Munoz as belonging to him. (R.2590-94). Sharon Loucks, an employee of Cellular One, confirmed that a call had been placed, for one minute, at 3:59 a.m. on April 27, 1990, on the phone taken from Munoz's hotel room. (R.2678, 2682). Christy Canton, a 15-year old girl, was a friend of Velez. She testified that she had received the 3:59 a.m. call from him. (R.22834). She also knew Griffin, and Velez and Griffin would come by her school in a blue Cadillac, which she identified by photo. (R.2832-34). She knew Griffin by the name of Auto. (R.2832-33). Lastly, Detective Romagni testified that he had impounded Velez's sneakers (R.2840), as well as Tarallo's shoes. (R.2812). Quirk, who did the comparisons, found that Velez's sneakers also matched the

shoe impressions taken from the balcony of the Holiday Inn. (R.3120).

After the State rested, Griffin's motion for judgment of acquittal was denied and Griffin then rested without presenting any further evidence. (R.3235-38, 3244). On February 8, 1991, the jury found the defendant guilty as charged on all counts. (R.3429-31; 515-20).

B. Suppression Hearing

As seen above, the State did not introduce the defendant's statements and did not rely on them at trial. However, pursuant to defendant's motion to suppress, the trial court held a pretrial hearing on this motion, on December 6, 1990. (R.80-81), 640, 661-736). Detective R. Nyberg, who had taken the defendant's statements, and the defendant, both testified. The trial court ruled that the statements were freely and voluntarily given and thus denied the motion to suppress. (R.736).

Detective Nyberg testified that on the day of these crimes, at approximately 5:30 a.m., pursuant to a telephone call from his supervisor, he went to the location where the defendant had been captured after fleeing the scene of the shooting. (R.662-63). Nyberg's assignment was to get hand swabs from the defendant and to attempt an interview with him. (R.663-64).

Nyberg thus came into contact with the defendant shortly before 6:00 a.m. on the day of the crimes. (R.705). The defendant was in the back seat of a marked police car; he was handcuffed. (R.664-5). The defendant had some blood and some scratches on him. (R.665). Nyberg was aware that the defendant had been captured by K-9 dogs.

The defendant was conscious, appeared alert, and "somewhat upset." Id. Nyberg testified that at the time of his arrival, he believed the defendant had already received medical attention, because his left arm was bandaged. Id. The defendant's injuries did not appear to be "that severe." (R.696). Nyberg asked that the defendant be removed from the police vehicle, and supervised the taking of the hand swabs. (R.665-66).

The defendant was then placed back in the police vehicle. Nyberg opened the door to the police car and knelt next to the door. (R.666). He was wearing a clip-on badge and also had his homicide tag on. Id. Utilizing a normal tone of voice, he introduced himself as a detective from Metro-Dade and asked the defendant his name. Id. Nyberg determined that the defendant was "mentally oriented," by asking questions about his education, knowledge and understanding of English, and knowledge of his whereabouts,[7] etc. (R.667). He also asked the defendant whether

[7] The defendant stated he was in the back of a police car in Miami, and knew he was under arrest. (R.667).

he was high on any drugs or drunk, and received a negative answer. Id. Nyberg then read the defendant his Miranda rights from a standard form. (R.668-69). He gave the form to the defendant, allowed him to read it, and then read it out loud as the defendant read along. (R.669). The defendant acknowledged understanding each right by placing his initials next to it. (R.670). He then agreed to speak to Nyberg without an attorney, and signed the Miranda form. (R.670-71). The defendant's signature was witnessed by Nyberg and another officer at the scene, Bradjic. (R.671). The defendant was not threatened, coerced or promised anything in return for his waiver of rights. (R.671-72). Bradjic then left and Nyberg began to talk to the defendant about the shooting. (R.672).

The defendant first asked Nyberg to take off his handcuffs, as his back was hurting. (R.672). Nyberg complied with the request. The defendant then asked Nyberg to be his friend. (R.674). Nyberg responded that he could not, due to what the defendant had done to Officer Martin. Id. Nyberg then spoke to the defendant for a total period of approximately five to ten minutes. (R.673). The defendant stated that he did the shooting in self-defense. Id. During this questioning, the defendant was alert and responsive to questions asked. (R.674). He did not make any complaints about being in pain, nor did he give any indication that any officer had previously threatened or physically abused him. (R.672, 675).

After the above interview, the defendant was taken to Jackson Memorial Hospital by Nyberg and another officer, Schuler. (R.675). The hospital was a twenty minute drive away, and they arrived there at 6:45 a.m. (R.676-77, 696). The defendant was not questioned during this time. (R.677).

After the defendant received treatment at the hospital, Nyberg took another statement from him, at approximately 8:50 a.m., two hours after arrival at the hospital. (R.676-77). The two hour delay was due to the defendant being treated, and because a stenographer had to arrive. (R.677). At the time of taking this second statement, the defendant was shackled to a hospital bed, in a small room. Id. This was in accordance with the hospital's strict policy of securing any arrested person, to ensure the safety of the medical personnel and the other patients. (R.680-81).

Prior to taking this statement, Nyberg specifically asked the hospital staff whether the defendant was medicated. (R.678). The staff checked and stated that the defendant had not been medicated. Id. The defendant did not appear medicated or under the influence of any drugs, either. (R.679). He was not in any way complaining about any pain or prior treatment received at the hands of any police officers. Id. He agreed to go "on the record." Id.

In the presence of the stenographer, Nyberg then again advised the defendant of his constitutional rights. (R.682). The defendant waived his rights and gave a sworn formal statement. (R.683). He was coherent and responsive during this statement, and again stated that the shooting was in self-defense. (R.683). This interview lasted for approximately fifteen minutes. (R.684). The transcript of this statement was admitted into evidence.

Nyberg then left the hospital. (R.684). At 5:30 p.m. that afternoon, he went to the Dade County Jail Clinic. Id. He met with the defendant and asked him to read and sign the now transcribed formal statement. (R.685). The defendant refused, and stated that he had been informed not to sign anything. Id. Nyberg left.

On cross-examination, the defense introduced a series of photographs depicting the defendant's appearance after his arrest, into evidence. (R.685, 689-91). Nyberg stated that he did not know whether the defendant's injuries were serious, whether they required surgery or medication, etc. (R.700-01). Nyberg stated that he wanted to obtain the statement and get him [defendant] medical treatment "as soon as possible," "[a]fter at least knowing whether he was going to talk to me or not." (R.700). Nyberg stated that he had "concerns," that once the defendant was taken to a hospital, he might be given medication which would prevent him from giving a free and voluntary statement. Id. Finally, this detective denied having ever

utilized any "good cop - bad cop" techniques on the defendant. (R.702).

The defendant testified that when he was arrested by the police, he knew he was in the State of Florida, "but I didn't know exactly." (R.708). He stated that the police had utilized dogs to assist in taking him into custody. Id. He added that he was injured by the dogs, and the arresting officers had jumped on him and beat him, for approximately ten to fifteen minutes. (R.709-11). He stated that he had also been shot in the arm before his arrest and during the shoot out. (R.710-11). The defendant stated that as a result of his injuries, he "fade[d] in and out." (R.712). He stated that he remembered speaking to Detective Nyberg, and that he was concerned for his safety at that time. (R.713).

On cross-examination, the defendant stated that he had been beated while he had wanted to "surrender" and give himself up voluntarily to the K-9 police officers. (R.720, 716). He stated that he had fled the scene of the shooting because he was being shot at (R.726) and that no police officers had followed him or asked him to stop. Id. However, the defendant then admitted leaving in the LeBaron, that he hadn't even put his car in park before "bailing out," had run into a residential neighborhood and asked people to hide him, had hid under a car, and kicked the K-9 dogs who were attempting to pull him out. (R.718, 714). The defendant also admitted that Nyberg had not

threatened him, had not gotten violent, and had not promised him anything. (R.721-22). He also stated that he had never told Nyberg about having been beaten or otherwise abused by the police previously. (R.725).

Based upon the foregoing, the defense argued that the defendant had been beaten and given the statements because of the good cop - bad cop techniques. (R.732). The defense also argued that Nyberg had deliberately prevented the defendant from receiving prompt medical treatment for injuries, at a time when he did not know the extent or severity of said injuries. (R.731). The State argued that the defendant's version was not credible. (R.729). The State also noted that Nyberg had taken both statements after the defendant had received some medical treatment. (R.734-35).

The trial court denied the motion to suppress, having found that the injuries had not affected the defendant's desire to speak to the police, that the statements were voluntarly based upon the credible statements of Nyberg, and that the defendant's account of events was not credible:

> The Court: Well, finding of fact, court finds that as a matter of law injuries do not affect the voluntariness of a confession or statement.
>
> I have heard no evidence that these injuries in any way affected his desire to speak to the detective nor give a statement.
>
> Mr. Griffin is not unfamiliar with the Miranda warnings and the ability to not testify if he so desires.

> In both of those occasions written waivers were obtained. . . .
>
> I certainly think that based upon the credibility of the police detective, and the credibility of the defendant, certainly the State has proved the freeness and voluntariness beyond the preponderance of the evidence doctrine, and therefore the motion to suppress either statement is denied.

(R.735-36).

C. Sentencing Phase

1. Hearing before the jury

The penalty phase before the jury was conducted on February 13, 1991. (R. 3629, et seq.). The State relied upon the evidence presented at the guilt phase, and introduced into evidence the previous adjudication of guilt of attempted first degree murder of Officer Crespo. (R. 3638). The State then rested. (R. 3639). The defense presented seven (7) witnesses in mitigation.

Clarence Griffin testified that he was the defendant's father. (R. 3640). He stated that he had married the defendant's mother in 1969. (R. 3642). The defendant was born in 1970. Id. At this time, the defendant's father was a co-owner of a construction company with 150 employees. (R. 3644). The job was time consuming and entailed travel out of state. (R. 3644). When the defendant was born, his mother became very depressed and was not taking care of him properly. (R. 3643). They thus hired a

full time baby sitter to take care of the defendant. Id. The defendant, for all practical purposes, lived with the baby sitters, the Monteros, from when he was less than a year old until approximately seven years of age. (R. 3645). The father felt placing the defendant with the Monteros would provide a better family atmosphere. (R. 3657). The Monteros took good care of the defendant. Id. During this time, the defendant had little contact with his mother. (R. 3646). The parents divorced in 1978, and the mother did not have any contact with the defendant thereafter. Id. When the defendant was approximately seven years old, his father's travel out of town stopped, and he went back to his father's home to live. Id. The father would still use baby-sitters. (R. 3648). When the defendant was eleven years old, his father began living with a woman, Linda Burton, with whom he had a child. (R. 3659).

Mr. Griffin testified that the defendant was an "easy going kid." Id. When he was a minor, he was frequently in trouble with the law. (R. 3663). He received some counseling through the juvenile system. (R. 3665). When he was 15, the defendant got behind in his grades and had to be put in a special class to "pick up his grades." (R. 3651). The defendant dropped out of school when he was sixteen years old. Id. He worked with his father for a while, but just didn't like the type of work. (R. 3650, 3662). Thereafter, he didn't have any jobs that lasted too long. (R. 3662). Although he would leave for a period of time, the defendant always came back to his father's home and was

living there at the time of these crimes. (R. 3662-63). Mr. Griffin stated that the defendant was not a bad, mean, or temperamental person. (R. 3655). He added that the defendant had, "felt like when this happened that either it was either him or the police officer." Id.

Witness Betty Dobe testified that she is an office manager for a law firm. (R. 3672). She met the defendant in the summer of 1979, when he was eight years old. (R. 3674). The defendant and his father lived in the back of a car at the time, so she took them into her house. (R. 3678). This witness had known the defendant for a total period of seven months. (R. 3684). She testified that the defendant was "very bright" and "very sullen." (R. 3679). Ms. Dobe testified that the defendant's father was a drunk at the time.[8] After the summer of 1979, she lost contact with the defendant until she saw him on the street once, when he was 15 years old. (R. 3682, 3684). She asked where he was living and the latter stated at the Blue Royal Motel. (R. 3682). Ms. Dube stated that the motel was a "sleeze joint," but that she had never been inside it. (R. 3682-83).

The third witness, Randy Gage, was a freelance writer. (R. 3691). He was previously the owner of a pizzeria in 1986 or 1987, and knew the defendant because the latter would come in the afternoons and get a slice of pizza. (R. 3692, 3702). This

[8] Mr. Griffin testified that he was not an alcoholic and had quit drinking 10 years prior to trial. (R. 3653).

witness had not had any contact with the defendant outside the pizzeria. (R. 3702). He testified that the defendant had been "very quiet and withdrawn," but that they had become friendly. (R. 3693). Mr. Gage testified that he had once received a telephone call from the defendant's father. Id. The father's gun was missing. The father believed the defendant had taken it, and was thus concerned that the defendant might get into trouble. (R. 3694-05, 3703). The defendant was in reform school at the time. (R. 3694). Mr. Gage stated that he reasoned with the defendant, who then promptly returned the gun. (R. 3695).

Gage had written an article about the defendant. Prior to this witness' questioning, the State objected to his reading of said article, on the grounds that some of it related to Governor Martinez's law and order press conferences, and impressions of the victim. (R. 3687). Additionally, the State argued that the article was a prior written statement, and the witness could testify "what he knows about the defendant, his meetings with the defendant, that sort of thing." (R. 3686-88). The defense argued that the article was relevant to demonstrate that the witness felt strongly about the defendant. (R. 3688-89). The trial court allowed the defense to elicit testimony as to the reasons why the article was written and any contents relevant to the defendant's character. (R. 3689).

Mr. Gage thus added that he had lost contact with the defendant until he saw him on television with respect to this

incident. (R. 3696). He was so "moved" that he wrote an article about the defendant which was published. Id. He stated that he had a special affinity for the defendant, because he himself had been in trouble with the law in his younger days, but had found role models to lead him out of trouble. (R. 3699-3700). He added that he felt the defendant had not had the benefit of caring people and role models (R. 3701), and that the court system had failed. (R. 3705).

The fourth witness, Al Fuentes, was a private investigator assigned to this case, and testified as to his relationship with the defendant in the previous 9½ months awaiting trial. (R. 3707, 3711-12). Prior to his testimony, the state argued that the witness should not be allowed to testify as to any self-serving statements by the defendant that he was "sorry." (R. 3707-08). The State argued that it could not cross-examine on such hearsay statements. Id. The trial court ruled that the witness could testify as to any actions of the defendant observed by him which reflected remorse, but not to a statement "saying 'I am sorry' to someone else." (R. 3708, 3710).

The witness testified that the people who knew the defendant were shocked at his involvement, very interested in helping him, and very concerned about his welfare. (R. 3714-15). They thought the defendant "would have been a better person if he would have been brought up in a different manner." Id.

This witness also testified that he had become very close to the defendant. (R. 3718). He added that from the beginning of his relationship with the defendant, the latter had demonstrated through his behavior that he was remorseful and sorry about what had happened. (R. 3717). The defendant had cried in his sorrow. (R. 3717-18).

Brenda Waters testified that she is a special education teacher. (R. 3720). The defendant was one of her students in 1985, for a period of seven months. (R. 3721, 3727). The defendant was very bright, above average in intelligence, very respectful and well behaved in her class. (R. 3722-23). He was not placed in the class due to any learning disability, but due to some emotional problem. (R. 3723). Ms. Waters had spoken to the defendant in jail and received letters from him, after his arrest in the instant case. (R. 3724-25). She testified, that "when he talked to me, you could tell that he was very depressed or very sorryful of what happened. He seemed remorseful at the time. It seemed like he was kind of choked up with tears. It wasn't something that he was proud of." (R. 3725).

Judy Baran testified that she is a librarian. (R. 3730). She met the defendant when he was ten or eleven years old, and was friends with his family. (R. 3731). She did not have contact with the defendant after he was twelve. (R. 3738). The defendant seemed wise beyond his years. (R. 3732). Once, when this witness had been battered by her husband, the defendant had been very

comforting, sympathetic to her, and supportive of her son. (R. 3733). The defendant used to complain about lack of money and that his father would buy expensive items for other members of the household. Id. This witness felt that the defendant's father's girlfriend, Linda, was a very bad role model because she used drugs and alcohol. (R. 3734). She felt that the defendant was neglected because his father worked a lot. (R. 3735). The defendant was a very reserved person. (R. 3737). He also had a lot of problems with the law, due to stealing, when he was growing up. Id. She felt the defendant was a victim of the system because he was always in jail or prison. (R. 3738).

Mario Montero testified that he is a salesman. (R. 3743). He stated that the defendant's parents had brought Griffin to Montero and his wife for baby-sitting services when the defendant was six months old. (R. 3746). The defendant eventually lived with them until he was about nine years old. (R. 3746-47). The defendant had a loving relationship with Montero and his wife. (R. 3748). The couple raised and treated him like their own child. (R. 3750-51). The defendant had been a smart, active, but insecure child. (R. 3748). He was a good student. Id. Mr. Montero had lost contact with the defendant for ten years prior to trial. (R. 3750).

The last witness, Peggy Eckman, testified that she met the defendant when she was 14 years old and became friends with him. (R. 3782). She testified that the defendant was a "very sweet,

nice person." (R. 3783). He was not violent and had not hurt or threatened anybody. (R. 3783-84). The defendant had never discussed his family or any personal problems with her. (R. 3784).

The defense rested. (R. 3790). After closing arguments by both parties, the jury was instructed, without any objections from the defense. (R. 3835). The jury recommended a sentence of death by a vote of ten (10) to two (2), on February 14, 1991. (R. 3836).

2. Sentencing hearing before the trial judge

Sentencing before the trial judge took place on March 7, 1991. (R. 3842 et seq.). The defendant requested and was allowed to make a statement to the court. (R. 3845-62). He wanted to talk about remorse. (R. 3845). The defendant stated that he never had a father or a family. (R. 3847, 3860). The defendant stated that he had made a "mistake" and regretted what happened, but that, "extreme situations really carry extreme measures sometimes." (R. 3845). He added that, "I don't believe that all the evidence that should have been brought into this courtroom was brought into this courtroom," (R. 3849), and continued, "I don't believe that I was found guilty beyond every excuseable reasonable doubt like [the prosecutor] has stated here in this courtroom." (R. 3849-50). The defendant further explained:

> . . . I don't believe it was my fault what happened, the way it happened. It's the way everything jumped off, the way the two idiots that were with me jumped out the car in an unlighted area, nobody waiting for permission to get out of the car; just stop the car and go.

(R. 3854). The defendant added that, "I was shot at. I reacted. . . when I fired that gun, I wasn't even looking. All I was trying to do was defend myself." (R. 3854). He concluded that the system was "corrupt," evil," (R. 3848), and that the prosecutors had made an "example" out of him due to personal reasons. (R. 3855-57).

The trial judge stated that the above was one of the "most moving" statements that he had heard, but that if he had known what the defendant would say, "I would have given you your full constitutional rights right from the bench here." (R. 3862).

The trial court then announced his sentence. (R. 3663-82; 497-513). He found four (4) aggravating factors: (1) that the defendant had previously been convicted of a felony involving violence, the attempted murder of Officer Crespo; (2) that the capital felony was committed while the defendant was engaged in the commission of a burglary; (3) that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the capital offense was committed in a cold, calculated, and premeditated manner. Id. In

mitigation, the trial judge found that the defendant was twenty years old at the time of the commission of these crimes; he had shown remorse; he had a traumatic childhood; and he had a learning disability. Id. The trial court then concluded that death was the proper sentence, because, "Looking at the circumstances from a qualitative viewpoint, it is easily concluded that the magnitude of the crime and the circumstances surrounding it vastly overshadows the mitigating circumstances as set forth herein." (R. 512).

This appeal has ensued.

SUMMARY OF ARGUMENT

The Appellant's arguments regarding collateral offense evidence are without merit. Most of the evidence was either evidence of offenses actually charged in the instant case or was inextricably intertwined with the current charges, so that they were inseparable offenses. The State furnished pretrial notice of all Williams rule evidence which it was required to furnish such notice for. The court also utilized appropriate instruction, limiting the jury's scope of consideration of collateral offense testimony.

The issue regarding the motion to suppress is moot and should not be reached by this Court, since the statements at issue were not introduced into evidence at trial.

The defendant was not entitled to have a newly impanelled sentencing phase jury. All collateral offense evidence was properly admitted and the guilt-phase jury was not tainted by any improper evidence.

The sentence of death herein was properly imposed. The defendant's presentation of mitigating evidence was not limited. The trial court's findings of aggravating factors were amply supported by the record herein and in accordance with precedent.

ARGUMENT

I.

THE LOWER COURT DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF COLLATERAL CRIMES.

The Appellant asserts that the lower court erred in permitting the State to introduce evidence of collateral crimes. The argument is based on alternative contentions that the evidence was not relevant, that it became the feature of the instant trial, and that, in some instances, the State had failed to give the required ten-day notice of certain collateral crimes. A careful review of the record clearly reveals that: (1) all instances of collateral crime evidence were relevant to issues before the jury in this case; (2) the evidence was not admitted solely to prove bad character or propensity to commit crimes; (3) some of the instances of which the Appelant complains are not within the scope of Williams rule evidence, as they were an inseparable part of the crimes charged and being tried in the instant case; (4) pretrial notice was given for all collateral crimes required to have such notice; and (5) collateral crime evidence did not become the "feature" of the instant trial.

The Appellant complains about the following six items, which he characterizes as Williams rule evidence:

1) The nighttime burglary of an occupied hotel room (testimony of Richard Marshall);

2) The armed home invasion robbery of two individuals and an armed burglary of a dwelling (testimony of Charles Pasco);

3) Possession of a second stolen motor vehicle (testimony of Nicholas Tarallo);

4) The attempted burglary of a dwelling (testimony of Nicholas Tarallo);

5) The attempted theft of property from that dwelling (testimony of Nicolas Tarallo); and

6) A statement by the Defendant regarding his commission of 500 other burglaries of and/or thefts from a hotel (testimony of Nicholas Tarallo).

See Brief of Appellant, p.16.

1) Testimony of Richard Marshall

The first incident of which the Appellant complains is the testimony of Richard Marshall, regarding the nighttime burglary of his hotel room. Count IV of the indictment under which the Appellant was charged and tried, was for the theft of the car which Marshall had rented from Avis, the white LeBaron. (R.3). The essence of Marshall's testimony was that he rented the car, parked it in the motel parking lot at night, went to sleep, and woke up the next morning to find that it was stolen. (R.2406-14). The Appellant does not appear to be complaining about the evidence of the theft of the car - which clearly is not subject to Williams rule analysis, since it refers to an offense which the jury was adjudicating - but the additional references to the fact that Marshall found the key to the car stolen from his room thereby suggesting that a burglary of the motel room had occurred, in addition to the theft of the car. At trial, defense counsel objected to evidence suggesting the burglary, as opposed to the theft of the car. (R.2411-13).

The Appellant's attempt to categorize the implied entry into the room and the taking of the key as Williams rule evidence is erroneous. The manner in which the car keys were taken was part and parcel of the car theft, and the car theft was one of the charges which the jury had to determine. The manner in which the keys were taken explains the taking of the car and is thus inseparably linked to the theft of the car.

"Under the principle announced in Williams v. State, 110 So. 2d 654 (Fla. 1959), evidence of collateral crimes committed by the defendant is admissible if relevant for any purpose except to show the bad character or criminal propensity of the accused." Smith v. State, 365 So. 2d 704, 706 (Fla. 1978). "So long as evidence of other crimes is relevant for any purpose the fact that it is prejudicial does not make it inadmissible. All evidence that points to a defendant's commissions of crime is prejudicial. The true test is relevancy" Ashley v. State, 265 So. 2d 685, 694 (Fla. 1972).

"Among the other purposes for which a collateral crime may be admitted under Williams is establishment of the entire context out of which the criminal conduct arose." Smith, supra, at 707. See also, Jackson v. State, 522 So. 2d 802, 805-06 (Fla. 1988); Bryan v. State, 533 So. 2d 744 (Fla. 1988); Heiney v. State, 447 So. 2d 210, 213-14 (Fla. 1984). The "entire context" language which this Court has repeatedly utilized, has similarly

been referred to in the District Courts of Appeal as "inseparable crimes." See, Erickson v. State, 565 So. 2d 328, 332-33 (Fla. 4th DCA 1990), rev. denied, 576 So. 2d 286 (Fla. 1991); Kelly v. State, 522 So. 2d 1140, 1141 (Fla. 5th DCA 1989) (evidence of aggravated assault preceding charged offenses was "inseparably linked in time and circumstances to the evidence relating to the charged offenses. . . ."); Austin v. State, 500 So. 2d 262, 265 (Fla. 1st DCA 1987), rev. denied, 508 So. 2d 13 (Fla. 1987) ("[w]ithout deciding the question of whether 'inseparable crime evidence' is admissible under Section 90.402. . . we hold the collateral crime evidence at issue herein was so inextricably interwined with the crimes charged that an intelligent account of the criminal episode could not have been given [without the collateral crime evidence]."); Platt v. State, 551 So. 2d 1277 (Fla. 4th DCA 1989); Tumulty v. State, 489 So. 2d 150 (Fla. 4th DCA 1986).

In view of the foregoing principles, it clearly must be concluded that the references to possible entry into the motel room and the taking of the rental car keys were inextricably intertwined with the car theft charge, which was before the jury, and that such testimony was necessary to present the full context in which the car was stolen. The evidence was relevant to charges which the jury was considering and was therefore properly admitted.

The Appellant also asserts that he was not furnished pretrial notice, under section 90.404(2)(b), Florida Statutes, that the State intended to introduce any evidence regarding the theft of the LeBaron and the burglary of the motel room (when the car keys were obtained). The Appellant's only trial objection to the use of this testimony was on the grounds that the reference to the burglary was an offense which was not currently charged; the trial objection made no reference to a claim that adequate pretrial notice under section 90.404(2)(b) was not given. As such an objection was never made, it cannot be asserted for the first time on appeal, and that claim is not properly preserved for appellate review. See, Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985).

Furthermore, when evidence comes in as inseparable crime evidence, because it is inextricably linked to that which is properly before the court, it is not subject to the ten-day notice provision or section 90.404(2)(b), Florida Statutes. Platt, supra, 551 So. 2d at 1277. As stated by Professor Erhardt, in Florida Evidence (1993 ed.):

> The question may arise as to whether inseparable crime evidence is admissible under section 90.402, which generally provides that relevant evidence is admissible, or under section 90.404(2), which specifically provides for the admissibility of similar fact evidence to prove a material fact. If the prosecution is offering the evidence under section 90.404(2), there must be compliance with the ten-day notice provision in section 90.404(2)(b). Although there is some older authority to the contrary, Florida has adopted the view of Professor Wigmore who suggested that this evidence is not admitted because it shows the commission of other crimes or

> because it bears on character, but rather because it is relevant and inseparable part of the act which is in issue. This evidence is admitted for the same reason as other evidence which is a part of the so-called "res gestae;" it is necessary to admit the evidence to adequately describe the deed.
>
> In addition to Wigmore's logical argument, it seems that both the language of section 90.404(2)(a) and of Williams indicates that the rule applies to evidence of discrete acts other than the actions of the defendant committing the instant crime charged. Under this view, inseparable crime evidence is admissible under section 90.402 because it is relevant rather than being admitted under 90.404(2)(a). Therefore, there is no need to comply with the ten-day notice provision. Similarly, the Wigmore view has been adopted by the United States Court of Appeals for the Fifth and Eleventh Circuits.

See also, Erickson, supra, 565 So. 2d at 331 (inseparable crime evidence need not comply with the ten-day notice provision); Gorham v. State, 454 So. 2d 556, 558 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985). The theft of the LeBaron was a charged offense, properly before the jury and falling outside the scope of Williams rule constraints. The additional reference to a burglary within the motel room was inextricably linked to the theft of the LeBaron and was thus beyond the scope of the ten-day notice provision.

With respect to the testimony from Mr. Marshall, it should further be noted that about one or two hours after the completion of his testimony, the judge gave the following instruction to the jury:

> In relation to the testimony of a Richard Marshall, you remember Mr. Marshall? He's the

> fellow from New York who came down here and he had his white LeBaron convertible stolen?
>
> I want to instruct you that notwithstanding all that you heard, there was more in there than you should have heard. The only things that you should consider regarding Mr. Marshalls testimony is that he had lawful possession of that motor vehicle and that he did not give the defendants; either individually or collectively, permission to use that vehicle, okay?

(R.2472-73). Additionally, in their final instructions, the jury was again cautioned as to Williams rule evidence. (R.3604). Thus, even if it is concluded that Marshall's testimony went too far, the jury was given curative instructions. These instructions effectively advised the jury to disregard everything except the fact that Marshall had lawful possession of the vehicle and did not give the defendants permission to use it. If any reference to the taking of the keys from the motel room was in error, these instructions certainly cured that error. See, Harmon v. State, 527 So. 2d 182 (Fla. 1988) (any prejudice from testimony that witness met defendant while in jail alleviated by curative instruction); Marek v. State, 492 So. 2d 1055 (Fla. 1986).

2). Testimony of Charles Pasco

The Appellant next complains that the evidence that Griffin robbed and burglarized Mr. Pasco and his girlfriend was improperly admitted, since the possession and use of the firearm were the only relevant issues. Prior to trial, the State had filed a Notice of Intent to Rely on Evidence of Other Crimes,

Wrongs, or Acts, pursuant to section 90.404(2)(b)(1), Florida Statutes.[9] This Notice referred to the following offenses:

> That Nicholas J. Tarallo, Samuel G. Velez and Michael A. Griffin on April 26, 1990 did unlawfully by force, violence, assault or putting in fear, take certain property to wit: A handgun and/or cash, the property of Charles Pasco at 820 Johnson Street, City of Hollywood, Broward County, Florida as owner or custodian, from the person or custody of Charles Pasco and/or Marcia Kystoff said property being the subject of larceny and of the value of: Less than three hundred dollars ($300.00), with the intent to permanently deprive Charles Pasco and/or Marcia Krystoff of the said property, and in the course of committing said Robbery, carried a: Firearm to wit: A shotgun in violation of 812.13 Florida Statutes.

Immediately prior to Pasco's testimony, defense counsel for Griffin renewed a pretrial Williams rule objection regarding Pasco's testimony. (R.2415-18). As a result of the ensuing colloquy, the court, immediately prior to Pasco's testimony, read the following limiting instruction to the jury:

> Ladies and gentlemen of the jury, this witness is going to testify about a home invasion robbery.
>
> Now, this falls under what we call Williams rule evidence. And you must be very careful to take what I say exactly as it's said.
>
> The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendants will be considered by you for the limited purpose only of proving motive, opportunity, intent, preparation, plan, knowledge, identity, the absence of a mistake or accident on the part of the defendants and you

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[9] This Notice was omitted from the record on appeal. Simultaneously with the filing of this Brief of Appellee, the State has filed a Motion to Supplement the Record on Appeal, to include this Notice.

should consider it only as it relates to those issues.

However, the defendants are not on trial for the crimes that are not included in the indictment. Do you all understand what I'm saying?

In other words, we're not here to try this case. It's only to be used -- the testimony you receive shall only be used for the limited purpose of the items that I just read.

(R.2418-19). Not only did the jury receive this instruction immediately prior to the testimony from Mr. Pasco, but, the final instructions to the jury, immediately before their deliberations, included the following:

Williams Rule. The evidence which has been admitted to show similar crimes, wrongs or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of motive, opportunity, intent, preparation, plan, knowledge, identify, the absence of mistake or accident on the part of the defendant and you should consider it only as it relates to those issues.

However, the defendant is not on trial for a crime which is not included in the Indictment or the Information.

(R.3604).

This Court has consistently held that evidence of another crime committed by defendant is admissible where there is evidence that the same weapon was used in the other crime and the one for which the defendant is on trial. In Bryan v. State, 533 So. 2d 744, 745-6 (Fla. 1988), this Court held that evidence that the defendant robbed a bank three months before the murder was admissible as relevant to the issue of ownership and possession

of the murder weapon by the defendant. In Amoros v. State, 531 So. 2d 1256, 1259-60 (Fla. 1988), the Court held that the State was properly allowed to introduce as evidence that the same gun had been used to kill a person on an earlier occasion. In Remata v. State, 522 So. 2d 825, 827 (Fla. 1988), this Court approved the admission of evidence about offenses committed by the defendant in Texas and Kansas as it was relevant to demonstrate the defendant's possession of the murder weapon.

Thus, the offense by which Griffin obtained the murder weapon was clearly relevant to the issue of identity of the murderer of Officer Martin. The robbery of Pasco was further relevant to the issues of intent and motive with respect to the killing of Officer Martin. After fleeing from the Pasco residence, Griffin made statements to the effect that he was not going to go back to jail, and that he would shoot if stopped by the police. (R.2489). When this is considered in conjunction with his probationary status, the motive and intent to shoot any police officers following the chase after the Holiday Inn burglary is similarly established. See Jackson v. State, 498 So. 2d 406, 410 (Fla. 1987) (defendant's statement that "she wasn't going back to jail" was relevant to prove her motive for killing police officer); State v. Escobar, 570 So. 2d 1343 (Fla. 3d DCA 1990), cause dismissed, 581 So. 2d 1307 (Fla. 1991) (codefendant's statement that "if the police stopped him he was going to shoot it out with him because there was no way he was going to go back to jail and rot there" was relevant and

admissible to establish the defendant's motive for the murder of Officer Estefan); Grossman v. State, 525 So. 2d 833, 837 (Fla. 1988) (fact that defendant was on probation and that gun theft violated probation was relevant to her motive in killing officer when apprehended).

The Appellant apparently acknowledges that the possession of the weapon stolen from Pasco is relevant, but contends that the manner in which it was stolen is not relevant. That is repudiated by the foregoing cases, which establish that the prior offense involving the weapon is pertinent to the issue of identity. Tarallo established that the person who stole Pasco's firearm was Griffin, thereby corroborating other evidence that the person who fired at Officers Martin and Crespo was the same person who stole Pasco's gun - i.e., Griffin.

Alternatively, it is also submitted that the offense during which Griffin obtained the firearm from Pasco was part of an "inseparable crime" along with the murder of Officer Martin; the two incidents are inextricably linked together. See Smith, supra, 365 So. 2d at 707; Bryan, supra, Kelly, supra; Austin, supra.

3). Testimony as to possession of a second stolen vehicle

The Appellant next claims that there was improper collateral offense evidence when Tarallo referred to the blue

Cadillac as a stolen car. Brief of Appellant, p. 18. This is a misreading of the evidence, as Tarallo never testified that the blue Cadillac was stolen. The only testimony from Tarallo regarding ownership of the Cadillac was the following:

> Q. Who was driving the blue Cadillac?
>
> A. Auto was.
>
> Q. Now, you told me a minute ago that you knew the white Chrysler LeBaron was stolen?
>
> A. Yes, I did.
>
> Q. What about the blue Cadillac?
>
> A. I didn't know it was stolen, no.
>
> Q. What did you think or what were you told?
>
> A. I was told that it was Auto's father's car.

(R.2493). Thus, Tarallo had no knowledge that the Cadillac was stolen and believed it was owned by Griffin's father. That is the only fair reading of that testimony, and no one ever testified to the contrary. Thus, there is no Williams rule testimony regarding any theft of the Cadillac.

Even if, by some remote possibility, Tarallo's testimony could be read as stating that the Cadillac had been stolen, there was no objection to any such testimony, on Williams rule grounds or on any other grounds. Thus, any argument regarding testimony about the Cadillac as having been a stolen car is not preserved for appellate review.[10]

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[10] There is no conceivable reason for the State to introduce any testimony that the Cadillac was a stolen vehicle. The State's entire theory of the case was that the LeBaron was the stolen

4 & 5). Testimony as to attempted burglary and theft

The Appellant's fourth and fifth alleged instances of violations of the Williams rule are characterized as an attempted burglary of a dwelling and an attempted theft of property from that dwelling, as set forth in Tarallo's testimony. See Brief of Appellant, p. 16. When the three men went out around midnight, a few hours before the shooting of Officer Martin, the plan was to go "jacking," to rob somebody. (R.2495). After they switched cars and got into the LeBaron, they drove up to Broward County. Tarallo then testified as follows:

> Q. And what happens as you're driving northbound?
>
> A. We see an apartment complex of condominium or something to that effect. We pull off to park the car on a beach meter like.
>
> Q. Why did you pull of there?
>
> A. Because Auto said that it looked easy to get into that apartment or condo whatever it is.
>
> Q. Did you pull off?
>
> A. Yes, we did. Pulled into the parking lot and proceeded to the back of the apartment or condominum or whatever it was.

(R.2496-97). Defense counsel then objected on the grounds that this was collateral crimes evidence, for which no prior notice under section 90.404, Florida Statutes, had bene given. (R.2497-98). Defense counsel's objection and motion for mistrial were

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car, which was used during criminal episodes, and the codefendants, after the criminal spree, quickly tried to return to the Cadillac, the "safe" car, to minimize detection during and after the offense.

overruled. (R.2498-99). Tarallo's testimony continued, with an explanation that after the three men exited the car, they got back in a few minutes later. (R.2499). Nothing happened when they had stopped at that apartment complex. (R.2499).

This evidence did not present any Williams rule situation. Tarallo's testimony was that no criminal acts occurred at this time; thus, there was no evidence of any collateral offenses. However, even if Griffin's statement, that the complex looked easy to get into, could be viewed as evidence of a prior "bad" act, it is subject to the "inseparable crime" analysis which has previously been set forth in this argument. The three men set out to commit a robbery that night. They were driving around until they found a suitable place, and they did not find it until they got to the Newport Holiday Inn. The intent and motive which brought them to the complex in Broward County were the same intent and motive which ultimately led them to the Holiday Inn, a few hours later. The earlier detour puts the events of the night in context, and those events cannot reasonably be related without the reference to the Broward County detour along the way. Smith, supra; Bryan, supra; Erickson, supra; Tumulty, supra; Austin, supra.

6). Tarallo's testimony as to other burglaries

The last alleged violation of the Williams rule is, according to Appellant, "a statement by the Defendant regarding

his commission of 500 other burglaries of and/or thefts from a hotel." See Brief of Appellant, p. 16. The Appellant has taken liberties in paraphrasing the testimony of Tarallo. Tarallo stated that as the three men were driving back to Dade County from Broward County, Griffin stated "that he should go to the Holiday Inn Newport, because he had got paid there five hundered times." (R.2499). Tarallo does not make reference to 500 burglaries or thefts. The statement, at best, is ambiguous. However, even if it does refer to prior offenses committed at the Holiday Inn, it was clearly admissible. The burglary of the Holiday Inn was one of the charged offenses. The statement in question indicates the reason that Griffin wanted to go there that evening. As such, it was indicative of his motive, intent and plan to commit a theft oriented offense at the Holiday Inn that evening. The statement is therefore directly relevant to the proof of one of te charged offenses and is an inseparable component of the proof of that offense.

Accordingly, there were not violations of the Williams rule. All of the evidence of the alleged instances was relevant to the charged offense, by proving identify, intent or motive. Most of the instances were inextricably intertwined with the charged offenses. The only prior offense which might have warranted prior notice under section 90.404(b)(2) was the Pasco incident, and that was the one matter which was so noticed prior to trial. Even that notice may have been unnecessary, as that too appears to be inseparable from the charged offense which

occurred less than 24 hours later, during the early morning of the 27th. Furthermore, not only did the jury receive a Williams rule instruction prior to the Pasco evidence, but another one was given during the final instructions prior to deliberations. This instruction reminded the jury that any collateral, uncharged offenses were not relevant because they were offenses, but only insofar as they related to issues such as intent, motive, plan, identity, opportunity, etc., with respect to the charged offenses which the jury was going to deliberate on.

The last aspect of the Appellant's argument is that the collateral offenses improperly became the feature of the instant trial. This argument, which the Appellant bases primarily on Snowden v. State, 537 So. 2d 1383 (Fla. 3d DCA 1989), rev. denied, 547 So. 2d 1210 (1989), has no merit. The concern that collateral offenses, even when relevant to the instant offense, not become a feature of the current trial, is one which this Court has long recognized. Williams v. State, 117 So. 2d 473, 475-76 (Fla. 1960). The facts of the instant case do not support the contention that any collateral offenses became a feature of the current trial.

Richard Marshall's testimony regarding the theft of the LeBaron, while not Williams rule testimony, since it was a charged offense herein, consisted of no more than eight pages. (R.2406-14). Mr. Pasco's testimony consisted of no more than 13 pages. (R.2419-32). Tarallo's references to the Pasco offenses

were a brief four pages. (R.2484-88). His references to the Broward County stop at the apartment complex which Griffin might have contemplated burglarizing, were even briefer, comprising no more than one full page of testimony. (R.2496-97, 2499). His references to Griffin's statement about getting paid at the Newport Holiday Inn five hundred times consisted of a few lines of testimony. (R.2499). In the context of twenty-six witnesses presented by the prosecution, over the course of a guilt phase evidentiary presentation which lasted from February 1 through February 6, the limited testimony at issue here can hardly be deemed a "feature." This is all the more true in the context of the state's case-in chief consisting of approximately 900 pages of evidence. Similarly, all of these collateral incidents were a relatively small part of the prosecutor's closing argument. That closing argument lasted for approximately fifty pages in the trial transcripts. (R.3496-3546). Of those 50 pages, approximately 25 lines worth of argumentation can be found which in any way touches on the collateral incidents. (R.3501 - 2 lines; R.3502 - 3 lines; R.3503 - 4 lines; R.3504 - 6 lines; R.3505 - 2 lines; R.3509-10 - 5 lines; R.3518- 1 line; R.3526 - 2 lines). This represents about 2% of the prosecutor's closing argument - hardly an indicia of making collateral incidents a feature of the case.

The bulk of the prosecution's case consisted of the extensive evidence of Griffin's participation in the shooting of Officer Martin, the burglary of the Holiday Inn, the lengthy

flight from the shooting of Officer Martin, and presentations from crime scene technicians, the firearms examiner and the medical examiner.

Not only do the facts of this case not suffice to make collateral offenses the feature, but the applicable case law does not support the Appellant's argument either. See, Stano v. State, 473 So. 2d 1282 (Fla. 1985) (evidence of eight other murder convictions in sentencing proceedings); Wilson v. State, 330 So. 2d 457 (Fla. 1976) (extremely extensive similar fact evidence that spanned over 600 pages approached, but did not reach, outer boundary where prejudice begins to outweigh probative value); Headrick v. State 240 So. 2d 203 (Fla. 2d DCA 1970) (nine witnesses called to establish six other burglaries did not become feature of the case); Rogers v. State, 511 So. 2d 526 (Fla. 1987) (evidence of two other robberies did not become feature of case); Burr v. State, 466 So. 2d 1051 (Fla. 1985) (evidence of three other incidents did not become feature); Talley v. State, 160 Fla. 593, 36 So. 2d 201 (Fla. 1948) (evidence from eight other victims to prove one rape did not become feature); Epsey v. State, 407 So. 2d 300 (Fla. 4th DCA 1981) (score of sexual batteries on five other victims to prove one charged crime did not become feature).

The few appellate court reversals due to collateral offenses becoming features, relied upon by the Appellant, have rather sparse facts, making it virtually impossible to determine

how extensive and significant the collateral offense testimony was. See, Smith v. State, 344 So. 2d 915 (Fla. 1st DCA 1977); Matthews v. State, 366 So. 2d 170 (Fla. 3d DCA 1979); Macklin v. State, 395 So. 2d 1219 (Fla. 3d DCA 1981). At least one of these cases suggests that the evidence was not even properly admissible, as its only apparent purpose was to show criminal propensity. Matthews, supra. Smith emphasized that the evidence adduced was of minimal relevance, minimal necessity, and overly extensive. By contrast, evidence adduced in the instant case was of extreme importance - identity derived from possession of a stolen firearm - and it was kept to a reasonable minimum, without undue emphasis.

Accordingly, it must be concluded that any collateral offense testimony did not rise to the level of becoming the feature of the instant trial.

II.

THE LOWER COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.

The Appellant, in arguing that the lower court erred in denying the motion to suppress the defendant's pretrial statements, has raised an issue which is moot and need not be decided by this Court. Even though suppression was denied, the State did not introduce the statements into evidence at either the guilt-phase or sentencing-phase of the trial.

As a general rule, this Court does not determine issues which have become moot. See, e.g., State v. Kinner, 398 So.2d 1360 (Fla. 1981); Pace v. King, 38 So.2d 823 (Fla. 1949). A principal exception exists where the issue is one which is capable of repetition, while evading review. Kight v. Dugger, 574 So.2d 1066 (Fla. 1991). Examples of such situations would include issues involving the right to an abortion. In re T.W., 551 So.2d 1186 (Fla. 1989).

The issue raised by the Appellant herein, does not fall into any such applicable exception. First, if the Court finds, as the State has argued herein, that there are no guilt-phase reversible errors, the suppression issue is purely academic and of no consequence, since it would not constitute reversible error in the instant case. The Appellant's sole argument is predicated on the notion that if this case is remanded for retrial for any reason, the Court should address the suppression

issue to prevent error from occurring at the retrial. The Appellant bases this contention on the proposition that the trial court's ruling on the suppression motion would become the law of the case after this Court disposed of the case, even if by reversing for new trial. The Appellant's argument misconstrues the nature of the "law of the case" doctrine. "By 'law of the case' is meant the principle that the questions of law decided on appeal to a court of ultimate resort must govern the case in the same court and the trial court, through all subsequent stages of the proceedings. . . ." McGregor v. Provident Trust Co. of Philadephia, 119 Fla. 718, 162 So. 323, 327 (1935); Strazzulla v. Hendrick, 177 So.2d 1, 3 (Fla. 1965). Thus, the doctrine is applicable only as to issues decided by the appellate court. The suppression issue, if not decided by this Court in this appeal, would not be subject to the law of the case doctrine. The lower court, in any retrial, if there were a reversal herein, would have the inherent power to reconsider any of its own rulings which had not been determined by this Court in this appeal. See also, Greene v. Massey, 384 So. 2d 24 (Fla. 1980); Preston v. State, 444 So.2d 939 (Fla. 1984). Since the law of the case doctrine would be inapplicable to an issue not decided on the appeal, in the event of a retrial, a second conviction and a second direct appeal, the suppression issue would then be subject to review, assuming that the statements had been introduced into evidence. Thus, this is an issue which, in the event of a new trial, would be subject to both reconsideration by the trial court and direct appellate

review by this Court. Accordingly, there is no reason for presently determining a moot issue at this time.

It should further be noted that the defendant's argument as to coercion and non-voluntariness comes down to a credibility determination between two witnesses: Detective Nyberg and the defendant. The lower court made the credibility determinations and found that the detective was credible and that the defendant's testimony was not. (R. 735-36). Not only did the court find that the defendant was lacking in credibility, but it was also noted that there was no evidence that the defendant's alleged injuries had any effect on his ability to freely and voluntarily give a statement. (R. 735-36). There was no medical evidence documenting what effect, if any, the defendant's condition had on his ability to give a voluntary statement. Under such circumstances, with credibility determinations being beyond the scope of this Court's review, any ruling by the lower court, if reviewed, would have to be deemed within the lower court's discretion. See, e.g., Young v. State, 140 So. 2d 97 (Fla. 1962) (trial judge resolves conflicts in evidence in determining whether confession was freely and voluntarily made); Collier v. State, 353 So. 2d 1219 (Fla. 3d DCA 1978) (same); Donovan v. State, 417 So. 2d 674 (Fla. 1982) (voluntariness of confession is determined from totality of circumstances).

III.

THE LOWER COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO IMPANEL A NEW JURY FOR SENTENCING.

The Appellant maintains that a new sentencing jury should have been impaneled, because the guilt-phase jury was tainted by evidence of collateral offenses. The principal flaw in the Appellant's argument regarding the desire to impanel a new sentencing jury, is that the guilt phase jury was not improperly tainted through the presentation of guilt-phase evidence. All of said evidence, as argued in point I, supra, was properly admitted into evidence and was relevant to the charges which the guilt-phase jury was considering. It is inevitable that a guilt-phase jury will hear evidence which is prejudicial to a defendant. All evidence demonstrating guilt is "prejudicial." However, in the absence of any improprieties in the guilt-phase, there is no basis for obtaining a new sentencing-phase jury.

The Appellant's reliance on Robinson v. State, 487 So. 2d 1040, 1042 (Fla. 1986), is misplaced. There, this Court found that the State improperly introduced evidence of collateral crimes into the sentencing phase. Not only was the evidence inadmissible and improperly admitted, but it also affected the jury's ability to consider the aggravating factor of prior convictions for violent felonies. Robinson does not stand for the proposition that properly admitted, relevant evidence can in any way taint a sentencing jury. Likewise, Garron v. State, 528 So. 2d 353 (Fla. 1988), is not applicable herein. Once again,

that case involved a situation where collateral offense evidence was inadmissible and improperly admitted into the sentencing phase proceedings. 528 So.2d at 358. That problem was further compounded by the use of improper collateral offense evidence, solely to probe bad character and propensity to commit crimes, during the guilt phase.

Indeed, even in cases which appear before resentencing juries which hear only the sentencing phase evidence, such juries have a right to hear a reasonably complete presentation of guilt phase evidence. See, e.g., Valle v. State, 581 So. 2d 40, 45 (Fla. 1991); Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986). Thus, even a newly impaneled sentencing jury would have had the right to hear collateral offense testimony if it was relevant to the facts and circumstances of the capital offense for which the defendant was convicted.

Accordingly, the lower court did not err in denying the motion to impanel a new sentencing-phase jury.

IV.

THE TRIAL COURT DID NOT IMPROPERLY RESTRICT THE DEFENDANT'S INTRODUCTION OF MITIGATING EVIDENCE, AND DID NOT DENY HIM HIS DUE PROCESS RIGHTS AS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTION.

The Appellant contends that he was denied due process of the law, because his efforts to introduce mitigating evidence were limited. This argument is refuted by the record and without merit.

The Appellant first argues that he was precluded from presenting the defendant's statements indicating his remorse. As noted by the Appellant, the State may not bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial. Moreover, remorse is a nonstatutory mitigating circumstance. However, in the instant case, the Appellant was not precluded from presenting evidence of remorse.

As reflected in the statement of the facts herein, pp. 30-32, the fourth witness in mitigation, Al Fuentes, was a private investigator who assisted the defendant in preparation for his trial. Prior to this witness' testimony, the State argued, "We're not saying that he [defense counsel] can't show remorse. We're just saying he's got to follow the rules of evidence to do it." (R.3710). The State conceded that the witness could testify to any personal observation, "which to him showed remorse," but objected to testimony from this witness as to, "the defendant said I am sorry," (R.378). The State added

that it would be deprived of an opportunity to cross-examine. Id. The defense argued that the defendant's statement, "I am sorry", was admissible because, it was a "statement tending to expose the declarant to criminal liability," and, "technically Michael Griffin is unavailable as a witness because he has a 5th Amendment priviledge not to testify." (R.3708, 3709).[11] The trial court ruled that the "mere fact of saying 'I am sorry' to someone else is not admissible." (R.3710). The witness' personal observations and the defendant's actions reflecting remorse were ruled admissible. (R.3708, 3710).

The trial court's ruling was correct. Although the rules of evidence have been somewhat relaxed for penalty proceedings, the introduction of hearsay statements which the State has no opportunity to cross examine or rebut is still prohibited. See Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), vacated on other grounds, 18 Fla. Law Weekly S87 (Fla. Feb. 3, 1993), where this court held:

> Regarding item c, Hitchcock argues that, although the state's introducing hearsay in a penalty proceeding is limited to that hearsay which a defendant is given the opportunity to rebut, a defendant's ability to introduce hearsay is unlimited. While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded. We find no merit to

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[11] See Fla. Stat. 90.804(2)(c). On appeal, however, the Appellant has argued that the statement is admissible under Fla. Stat. 90.801(3) as evidence of his then state of mind or emotion. This argument is not preserved as it was not relied upon or presented in the trial court. Tillman v. State, 471 So. 2d 32 (Fla. 1985).

> Hitchcock's claim that the state must abide by the rules but that defendants need not do so.

See also, Johnson v. State, 608 So.2d 4, 10 (Fla. 1992 (no error in refusal to let the jury hear-self serving statement of remorse).

Moreover, even if the defendant's statement that "I am sorry," was admissible, it was cumulative to testimony about his remorse. Witness Fuentes testified that from the beginning of his relationship with the defendant, the latter had demonstrated through his behavior that he was remorseful and sorry about what had happened. (R.3717). The defendant had cried in sorrow Id. Thereafter, without any objections from the State, witness Waters testified that she had contacted the defendant in jail and, "When he [defendant] talked to me, you could tell that he was very depressed or very sorryful of what happened. He seemed remorseful at the time. It seemed like he was kind of choked up with tears. It wasn't something that he was proud of." (R.3725). Thus, Fuentes' testimony that the defendant said "I am sorry," would not have added to the "amount and depth of remorse felt by the defendant," as argued by the Appellant herein. See Initial Brief of Appellant at p. 29.

The State would also note that after the presentation of testimony from Ms. Waters and Mr. Montero to which the State had not objected, the defendant additionally proffered these witnesses' depositions as to the defendant's statements. (R. 377). The defendant proffered that Ms. Waters would testify that

she "received letters from Michael from which he said 'I am sorry.'"[12] Id. The proffered deposition of Mr. Montero reflects the following when he visited the defendant in jail:

> Q. Did he [defendant] talk to you at all about the circumstances that lead him to be in jail?
>
> A. Very little. I didn't allow him to do it. I became very emotional at that time.
>
> Q. Did he talk to you about how he felt about his position where he was?
>
> A. Oh yes.
>
> Q. What did he have to say about that?
>
> A. He was very sorry.

(R. 606). The State first respectfully submits that the defendant's above expression of sorrow at being in jail awaiting trial for a death penalty charge, without any reflection on his deeds or the crimes, does not establish remorse for his actions so as to constitute a nonstatutory mitigating circumstance.

Moreover, the statements, even if admissible, again do not add to the above noted testimony which was presented and considered at the penalty phase. Finally, the State would note that the trial judge found that remorse had been established as a

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[12] The defense did not proffer the letters themselves. (R. 3771). The proffered deposition reflects that the defendant's letters never discussed his actions or the crimes herein. (R. 585). Specifically, the letters reflected, "Something like 'I'm feeling a lot of feelings at this time. I'm feeling remorse, sorry.' Three or four words just come out and tell me he's feeling so confused. Those are the things that I'm feeling. That's basically what he said. Basically if he had a different life or upbringing maybe he would have had a different -- maybe it never would have happened, something like that, to that effect." Id.

nonstatutory mitigating circumstance. (R. 511). Thus, in light of the statements being cumulative to the witnesses' testimony, and the trial judge's finding of remorse, any error in not admitting said statements was harmless beyond a reasonable doubt. Hitchcock, supra, at 690.

The Appellant also argues that the trial judge abused his discretion in not allowing an article written by Mr. Gage to be read into evidence. As noted in the statement of the facts herein, this witness was available and testified. There was no error in rejecting the prior written statement of this witness. Hitchcock, supra, at 690 ("The court also correctly rejected the trial transcripts of the police officers' testimony (item 3) [as to defendant's cooperation]. As stated previously, the rules of evidence apply to defendants as well as the state in penalty proceedings. For the transcripts to have been admissible, Hitchcock would have had to demonstrate the officers' unavailability.").

Moreover, witness Gage stated he had written the article, explained why he wrote it, and testified to his knowledge of the defendant's background, character and culpability as contained in said article. Indeed, he was also allowed to testify as to his opinion on alleged shortcomings in the "system," as reflected in the article. The State fails to see any prejudice to the defendant in not additionally reading the article. Thus, even if error, the failure to read the article into evidence was harmless beyond a reasonable doubt. Hitchcock, supra, at 690.

V.

APPLICATION OF THE AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED DURING COMMISSION OF A BURGLARY, WAS PROPER.

The Appellant argues that the trial judge erroneously found the aggravating factor that the murder was committed during the commission of the burglary of the Holiday Inn, because the burglary had been completed. The trial judge's order, based on the physical evidence, and expert and eyewitness testimony, made detailed findings of fact. (R. 498-501). The trial court then concluded:

> The State proved beyond a reasonable doubt that the burglary of the Holiday Inn, although technically complete, was not legally complete, in that the Defendant had not reached a place of temporary safety, that is, the "safe car", at the time of the homicide. See Hornback v. State, 77 So.2d 876 (Fla. 1955); Parker v. State, 15 FLW D2874 (Fla. 1st DCA Nov. 27, 1990). As such, the Court finds that the murder of Officer Martin was committed while the defendant was engaged in the commission of a burglary.

(R. 504). The trial court's findings are well supported by the record, and establish the presence of this aggravating circumstance.

For the purposes of the aggravating factor at issue, "it is sufficient that the capital murder occur during the same criminal episode as the enumerated felony." Way v. State, 496 So.2d 126, 128 (Fla. 1986); see also, Johnson v. State, 438 So.2d

774, 775-77 (Fla. 1983), reversed on other grounds, 498 So.2d 938 (Fla. 1986) (felony murder aggravator applicable where the defendant killed a deputy one half hour after, and only a mile and half from the site of a robbery).

The evidence in the instant case established that the defendant utilized his father's Cadillac when conducting legitimate activities (R. 2478-79) and the stolen vehicle, the LeBaron, to commit criminal activities. The night before the commission of the instant burglary, the Cadillac was parked in a parking lot at Northeast 6th Avenue and 149th Street, and the defendant switched to the stolen vehicle. The defendant committed a robbery in the latter vehicle and immediately returned to the safe car, the Cadillac. (R. 2488). The proceeds of the robbery were distributed between all three coperpetrators, including the driver, Tarallo.

The night of the instant crimes, the defendant announced his intention to commit another robbery and again took the Cadillac to the same parking lot at N.E. 6th Avenue and 149th Street. This time, he had to park a block away due to the presence of a police car. He again switched to the stolen vehicle. The trio then travelled east on 163rd Street (R. 2501) to the Holiday Inn, and committed a burglary. As they returned, travelling west on 163rd Street, in the direction of the Cadillac, before the driver, Tarallo, had received any proceeds, they observed a police car. (R. 2508, 2531). The defendant gave

directions through the back streets towards the safe Cadillac. (R. 2510). The trio were spotted by the victim officers on N.E. 158th Street and 14th Avenue. (R. 3014). They fled to 151st Street and N.E. 13th Avenue, where Tarallo stopped. (R. 3026, 3067). The defendant started shooting. He then fled again in the direction of the Cadillac, to N.E. 8th Avenue and 158th Street. (R. 2705). There he abandoned the stolen vehicle, and again headed south towards the location of the Cadillac (R. 2755, 2758), but was captured first.

The entire sequence of events, from burglarizing the room at the Holiday Inn to the shoot out, took place in approximately 10 to 15 minutes. The homicide herein thus clearly occurred during the same criminal episode as the burglary and before the defendant had reached a place of temporary safety, that is the Cadillac. Way, supra; Johnson, supra; see also, Parker v. State, 570 So.2d 1048, 1051-52 (Fla. 1st DCA 1990), where the Court held:

> '[I]n the absence of some definitive break in the chain of circumstances beginning with the felony and ending with killing, the felony, although technically complete, is said to continue to the time of the killing.' Mills v. State, 407 So.2d 218, 221 (Fla. 3d DCA 1981).
>
> Factors to be considered in determining whether there has been a break in the chain of circumstances include the relationship between the underlying felony and the homicide in point of time, place and causal relationship. One commentator suggests that in the case of flight, a most important consideration is whether the fleeing felon has reached a 'place of temporary safety.' LeFave, Substantive Criminal Law, §7.5 (1986).

> In the instant case, the application of these factors demonstrates that the robbery was not completed at the time of the death of Deputy Sheriff Cook. The time from the robbery to the killing was no longer than an hour, the killing occurred no more than several miles from the robbery, and the only stops that the robbers made were to get gas and ask directions - all to accomplish their goal of fleeing from the scene of the crime to a place of safety, their motel room.

Accordingly, there was no error in the consideration of this aggravating factor.

Assuming, arguendo, that there was any error in considering this circumstance, such was harmless beyond a reasonable doubt. See, Rogers v. State, 511 So.2d 526, 535 (Fla. 1987) (no reasonable likelihood that the trial court would have concluded that the aggravating circumstances were outweighed by mitigation that the defendant was a good father, husband and provider, where three of five aggravating factors found by the trial court were not supported by the record). The trial court herein found three other aggravating factors, (1) that the defendant had previously been convicted of a felony involving violence; (2) that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest; and (3) that the homicide was committed in a cold, calculated and premeditated manner. The trial court also concluded that, "from a qualitative viewpoint, it is easily concluded that the magnitude of the crime and the circumstances surrounding it vastly overshadows the mitigating circumstances." (R. 512).

The State would note that the mitigation in the instant case was not, in large part, of great significance. First, the trial court merely stated that the defendant's age of twenty at the time of the murder was mitigating. (R. 511). "The fact that a murderer is twenty years of age, without more, is not significant." Garcia v. State, 492 So.2d 360, 367 (Fla. 1986). When age is accorded significant weight, it must be linked to some other characteristic of the defendant, such as immaturity. Echols v. State, 489 So.2d 568, 575 (Fla. 1985). In the instant case, the trial court did not find any evidence of immaturity. On the contrary, the evidence in the penalty phase reflected that the defendant was a mature, very bright and streetwise person.[13] Likewise, although the defendant was placed in a special education class, in order to pick up his grades, his teacher testified that he did not have a learning disability. (R. 511, 3651, 3723). Similarly, the factor of remorse herein was not significant, as evidenced by the vacillation in the defendant's statements.[14] While the defendant stated that he made a mistake and regretted what had happened, he also stated that he was not at fault. He blamed his companions, the victim, and the prosecutors. Finally, although the defendant was abandoned by his natural mother at birth, he received the loving care of foster parents. When he was returned to his father he was cared for and not abused. In light of the significant remaining

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[13] See Statement of the Facts herein at pp. 26-33.

[14] See Statement of the Facts herein at pp. 34-35.

aggravating factors, which the trial court appropriately deemed to have "vastly overshadowed" the mitigation, there is no reasonable likelihood that the trial court would have imposed a different sentence. Rogers, supra.

VI.

APPLICATION OF THE AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WAS PROPER.

The trial court's findings with respect to the aggravator at issue are as follows:

> The evidence shows beyond a reasonable doubt that the murder of Officer Martin was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. On April 26, 1990, the defendant, after committing an armed burglary and robbery, stated to both Mr. Tarallo and Mr. Velez that if they were pulled over by the police, he would get out and shoot because he was not going back to jail. Twenty-six hours later, on April 27, 1990, the defendant committed another armed burglary. As the defendant, Mr. Tarallo and Mr. Velez were driving away from the scene of that burglary, Officers Martin and Crespo attempted to pull the defendant's vehicle over. The defendant again told Mr. Tarallo and Mr. Velez that he was not going back to jail. After Mr. Tarallo pulled the car over, the defendant got out of the car and began shooting at the police officers, resulting in Officer Martin's death. The Court finds that this evidence demonstrates a substantial period of reflection and thought by the defendant. See Harvey v. State, 529 So.2d 1083 (Fla. 1988); Remata v. State, 522 So.2d 825 (Fla. 1988); Johnson v. State, 438 So.2d 777 (Fla. 1984). The defendant had considered and planned the fact that if he was stopped after committing a burglary, he would shoot the police officers in order to prevent his going back to jail. The Court therefore finds that the murder of Officer Martin was committed in a cold, calculated manner, without any pretense of moral or legal justification.

(R. 508).

The Appellant argues that the above findings do not support this aggravator, because the defendant's actions in ordering Tarallo to drive away from the police reflect that, (1) he was avoiding confrontation, and (2) that he made the decision to shoot within a matter of seconds. As noted by the trial jduge, however, the record reflects that at least twenty six hours prior to the homicide, the defendant articulated a plan to kill in order to avoid going to jail. His actions at the time of the homicide were in full conformity with the prearranged plan.

Tarallo testified that after commission of a burglary on April 26th, the defendant stated that he was not going back to jail, and, "that if we were to be pulled over by the police, that he would get out and shoot and for me to dip." (R. 2489). "Dip" meant to leave, to drive away. Id. On April 27th, after the commission of the burglary at issue, when the defendant saw the police, he instructed Tarallo to "dip," in accordance with his plan. He again announced he was not going back to jail. When the "dipping" failed, he got out of the car and started shooting; again in accordance with his previously announced plan.

The state respectfully submits that the defendant's announcements twenty-six hours prior to the homicide were ample evidence of reflection. His actions in conformity with those plans were overwhelming "evidence of a careful plan or prearranged design to kill," as required under Rogers, supra, at 533. See, Rutherford v. State, 545 So.2d 853, 856 (Fla. 1989)

(aggravator valid when defendant followed a prior plan to kill. "[T]he finding of cold, calculated and premeditated is not limited to execution-style murders. It is appropriate, as we indicated in Rogers, when there is evidence of calculation, which we defined as consisting of a 'careful plan or prearranged design.'"); see also, Johnson, supra, at 779 (murder of a deputy within a half hour of a robbery properly found to constitute CCP, where the defendant had previously announced that he "would not mind shooting people" and the deputy was shot three times); Brown v. State, 565 So.2d 304, 308 (Fla. 1990) (prior statement of intent to shoot is evidence of preplanning for the purpose of this aggravator); Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988) (prior discussion of whether to kill victims is sufficient evidence of the reflection and calculation contemplated by this aggravating factor); Remeta v. State, 522 So.2d 828, 829 (Fla. 1988) (aggravator supported due to planning a robbery in advance with intent to leave no witnesses); Jackson v. State, 498 So.2d 406, 412 (Fla. 1987) (aggravator found applicable where the defendant had stated, "she wasn't going back to jail." "This record does not show a woman panicking in a frightening situation, but rather a woman determined not to be imprisoned who fashioned her opportunity to escape and then acted accordingly."); Cruse v. State, 588 So.2d 983, 992 (Fla. 1991) (advance procurement of a weapon, expression of intent, lack of provocation and the appearance of a killing carried out as a matter of course, are all indications of the existence of this aggravating factor).

Assuming, arguendo, that this aggravator is inapplicable, the State respectfully submits that any error was harmless beyond a reasonable doubt, as discussed in Argument V herein, at pp. 68-70, supra.

CONCLUSION

Based upon the foregoing, the appellee respectfully submits that the conviction and sentences herein should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **ANDREW M. KASSIER, Esquire,** 1411 N. W. North River Drive, Miami, Florida 33125 on this 7 day of June, 1993.

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