FILED
SID J. WHITE
FEB 23 1995
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOHN AUSTIN LANDRY,

Appellant,

v. Case No. 81,270

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/clarify the statement of the case and facts recited by appellant:

At the hearing on a motion to discharge on September 30, 1992, prosecutor Sheri Chappell represented to the judge that, "The hearing on the demand for the speedy trial was held on June 22, 1992, and basically counsel had agreed, since we weren't in Glades County, to hold it the next time we were in Glades County, that is when it was heard at that time." (R 708) This representation was not disputed by counsel for the defendant.

Subsequent to the trial, counsel for John Landry filed a motion for attorneys' fees and costs in the amount of $12,920 for attorneys' fees and $1,702.40 in costs. (R 647) An affidavit was attached to this motion which reflects Mr. Reiter's work done in preparation for this case. (R 648 - 649) Among other things the affidavit reflects that by May 22, 1992, (the date the demand for speedy trial was filed), counsel had spent approximately six hours in preparation for this case. (R 648) Counsel also filed an affidavit in support of attorneys' fees from John Hendry, a practicing attorney in the State of Florida. Mr. Hendry represented that he examined the time records and files of Michael Reiter and determined the reasonableness of the fee of $12,920 based upon, among other things, the time and labor required, the novelty and difficulties of the questions involved, and the skill requisite to perform the legal services properly. (R 698)

David Sorton and Richard Young testified that John had told them that he had worked for the victim. (T 667, 820)

SUMMARY OF THE ARGUMENT

The trial judge in the instant case had a responsibility to make sure that the demand for speedy trial was bona fide and that counsel had prepared for trial. As the trial court specifically found that this was not true, he properly denied the demand for speedy trial.

In the present case, the record demonstrates that the Appellant caused the applicable time period to be extended. The trial court properly struck the Appellant's original Demand For Speedy Trial on June 25, 1992, properly denied the Motion For Discharge on July 21 and commenced the trial within 90 days of the denial of the Motion For Discharge.

Appellant contends that the trial court erred in granting the state's motion in limine with regard to evidence he attempted to present to establish that Dawn Downs, the victim's wife, was responsible for the murder of Ed Downs. It is the state's position that no error was committed, as much of this evidence was actually presented to the jury and the remainder of the evidence was properly excluded by the trial court as irrelevant.

It is well settled that when charges are pending against a prosecution witness at the time he testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive or self-interest. However, there is no requirement that the defense be allowed to delve into matters that are purely speculative and remote to the issue at hand. Clearly, it would be impossible for Young to know exactly how much time he was

going to serve after receiving his sentence of seventeen years. The amount of gain time and good time that a prisoner receives obviously varies from case to case and from year to year. As such, this testimony would have been purely speculative.

Defense counsel's references to a plea agreement with the state during cross examination of both of the witnesses was sufficient to create an inference of improper motive to fabricate. Accordingly, because the statements in question were given prior to the plea negotiations and therefore prior to the existence of both witness' motive to fabricate they were properly admitted.

Appellant contends that Howell's testimony should not have been admitted because he had no independent recollection of the night and that his testimony was based solely on his reading of his prior deposition. It is the state's position that this claim is procedurally barred. Even if this claim was subject to review, the admission of Howell's testimony was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

Appellant contends that since the prosecutor could have had Lavoy testify on Wednesday or Thursday, of the first week, the deposition should have been excluded. As the trial court found, However, the state made a sufficient showing of unavailability and the deposition was properly admitted.

Appellant contends that the trial court erred in denying his motion for judgment of acquittal as to premeditated murder

because he contends that the state presented no evidence the murder of Ed Downs was premeditated. It is the state's position that when taken in the light most favorable to the state that the evidence clearly supports the denial of the motion for the judgment of acquittal as to premeditated murder.

The state agrees that the conviction for felony murder and first degree premeditated murder should be merged into felony murder.

Since the legitimate concerns of contemporaneous recording of facts demonstrating a reasoned judgment without the risk of post-hoc rationalization of forgotten reasoning have been satisfied sub judice the court should recede from the language in Grossman requiring a separate written order filed concurrently with the oral pronouncement of sentence.

The Court should acknowledge that the contemporary oral articulation of aggravating and mitigating findings memorialized by the court report's transcribing sufficiently satisfies the writing requirement and makes meaningful appellate review possible and that conforms to statutory and constitutional requirements.

Appellant contends that his sentence of death was not proportionate in that it was merely an impulsive killing during the course of a felony. It is the state's position that the death sentence was properly imposed in the instant case.

The record shows that the sentencing guidelines scoresheet was prepared and written reasons for departure reflected on the

scoresheet at the time of sentencing. Furthermore, the trial court orally pronounced that he was going to depart from the guidelines based upon the unscored capital crime. This is a sufficient basis for departing from the guidelines.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING LANDRY'S DEMAND FOR SPEEDY TRIAL.

Appellant was indicted on May 20, 1992, arrested on May 21, 1992, and on May 22, counsel filed the demand for speedy trial. (R 2, 12, 178) Apparently counsel agreed to hold the hearing on the demand for speedy trial on June 22, 1992, the next time they were in Glades County.[1] (R 708) At the hearing on the demand for speedy trial, counsel represented to the court that he had spent a number of hours with his client, that he had spoken to his client's family, and the other attorneys. It was his understanding that there was only one eyewitness other than the other codefendants involved and it was not a complicated case. Upon inquiry of the state and counsels for codefendants, the court learned that no discovery at all had been done, that depositions had not been taken, that the lab results were not back and that there were over 300 pages of discovery material from the state. (R 189 - 190) Based on these representations, the trial court denied the motion for speedy trial, finding that:

> "It is apparent to the court that defense counsel is not ready for trial at this time. Particularly, it was indicated that there has been no review of several hundred pages of discovery, at least one eyewitness and

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[1] The failure to schedule a calendar call within five days is not fatal to a trial court's jurisdiction. Baxter v. Downey, 581 So. 2d 596 (Fla. 2d DCA, 1991). Nor does it affect the relevant time periods.

> perhaps other witnesses in this case. No depositions have been taken or has any other information been taken from the eyewitness or other potential witnesses.
>
> To say that the defense is ready to go to trial at this time is to create with the court the following scenario: if speedy trial is granted and defendant is acquitted, of course, he is home free; However, if the defendant is not acquitted, even with the examination of the defendant and the defense counsel, it is clear that this is so ripe for an ineffective counsel petition.
>
> The penalties in this case are severe, with the possibility that the ultimate penalty be involved. The idea that something might be pulled off, and that if it isn't, that you would be bound by the consequences of such a severe penalty, it is not within the rationale thinking of this Court and, therefore, it is ordered that the motion for speedy trial is denied because it evident that the defendant cannot be ready for trial." (R 197 - 198)

As Appellant concedes that under Fla. Rule of Criminal Procedure 3.191 (g) the trial court may strike a demand for speedy trial where the trial court makes a determination that the accused does not have a bona fide desire to obtain a trial sooner than otherwise might be provided. A demand for speedy trial by an accused who has not diligently investigated his case or who has not timely prepared for trial shall be stricken as invalid. As appellant concedes, this Court in State ex rel Hanks v. Goodman, 253 So. 2d 129 (Fla. 1971), held that "it is not only appropriate, but necessary to ascertain whether the accused had a 'bona fide' desire to obtain the speedy trial and to determine whether or not the accused and his attorney 'has diligently

investigated his case and that he is prepared for trial'. If these prerequisites to the filing of the demand were not met, the demand for speedy trial should be stricken as being null and void." Id. at 130.

Nevertheless, appellant contends that he had a "bona fide desire" to obtain a speedy trial and was prepared to go to trial. Without a doubt this is what Landry represented to the trial court below. Nevertheless, a review of the inquiry made by the trial court clearly shows that Landry's counsel had not diligently investigated the case and was not prepared for trial. Rather, Landry's counsel was treating the case as more of a "crap-shoot" in the hopes that rushing the state to trial would be to his benefit. While this may be an appropriate strategy in a non-death case, as we are repeatedly told, "death is different". Farr v. State, 621 So. 2d 1368, 1370 (Fla. 1993).

There was no representation by defense counsel that he was even aware of the evidence that the state had against the defendant for the guilt phase, but, beyond that, there was no representation that he had done any type of investigation in the event that a penalty phase was necessary. When representing a defendant facing capital punishment, counsel is not only required to prepare for the guilt phase, counsel is also required to make a reasonable investigation into penalty phase issues.

Appellant contends that counsel would not have been subject to a claim of ineffective assistance because the decision to demand speedy trial was a tactical decision. However, it is

clear that even tactical decisions are subject to review when they are based on a failure to investigate. Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990) (tactical decisions cannot be made in a vacuum). See also, Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986). And in Heiney v. State, 620 So. 2d 171 (Fla. 1993), this Honorable Court rejected the state's argument that defense lawyers' decision not to present any mitigating evidence at Heiney's sentencing was strategic and therefore his actions were not subject to review under Strickland. This Court held that Heiney's lawyer did not make decisions regarding mitigation for tactical reasons where the record showed that Heiney's lawyer did not even know that mitigating evidence existed. This is so because counsel did not attempt to develop a case in mitigation. Similarly, in Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), the Eleventh Circuit found that counsel had rendered ineffective assistance where counsel did not personally seek out any witnesses specifically for sentencing prior to trial. See also Blake v. Kemp, 758 F.2d 523 (11th Cir.), cert. denied, 474 U.S. 998 (1985).

Appellant contends that even if the likelihood of him succeeding on a 3.850 motion was good, that the trial judge was not at liberty to decide if Landry needed discovery or to second-guess his tactical decisions. To the contrary, the rules specifically requires the trial court to determine if it is a bona fide request to go to trial and if counsel had diligently investigated this case and prepared for trial. Because counsel

in the instant case spent six hours in preparation before filing the demand for speedy trial, it is clear that counsel could not have possibly pursued all available resources for mitigating evidence. In fact his affidavit shows that he had not even talked to the family members when he filed the initial demand. It would not have been possible for him to have obtained prison or school records by that point, nor for him to have determined whether a mental evaluation of the defendant was necessary. The absence of penalty phase preparation, in addition to the fact that counsel had not reviewed any of the 300 pages of discovery, did not have the lab results available and had not yet taken depositions of the 31 witnesses deposed, it was reasonable to conclude that counsel could not have been prepared after six hours of preparation on the case.[2] (R 817 - 1452) Accordingly, the trial court properly found that the demand for speedy trial was not a bona fide desire to obtain speedy trial and that counsel had not diligently investigated his case and prepared for trial. See Jones v. State, 449 So. 2d 253 (Fla. 1984); State ex rel Ranalli v. Johnson, 277 So. 2d 24 (1973); State ex rel Hanks v. Goodman, 253 So. 2d 129 (Fla. 1971); State v. Kaufman, 421 So. 2d 776 (Fla. 4th DCA 1982).

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[2] The record also shows that counsel objected strenuously to the taped statements of Rick Young and David Sorton being played because he had not had a chance to review them. Clearly if counsel had engaged in discovery with the state, he would have had these tapes for review. (T 1117 - 1118)

Furthermore, the record shows that indeed after the trial court denied the demand for speedy trial, that counsel did considerable more preparation for trial. He not only attended the depositions of thirty-one potential witnesses, he personally examined twenty-eight of them. (R 817, 834, 843, 852, 861, 873, 884, 906, 922, 935, 943, 979, 987, 1012, 1029, 1048, 1079, 1111, 1144, 1186, 1259, 1291, 1355, 1368, 1385, 1395, 1405, 1444, 1452) As in State v. Kaufman, 421 So. 2d 776 (Fla. 5th DCA 1982), Landry was still scheduling depositions after making the demand for speedy trial. See, also, San Martin v. Menendez, 467 So. 2d 1035 (Fla. 2d DCA 1985); State Ex Rel. Furland v. Conkling, 405 So. 2d 773 (Fla. 5th DCA 1981) Additionally, counsel was concerned about the state having made a deal with Rick Young and David Sorton and that he wanted to depose the State Attorney on the circumstances of the plea negotiation. (R 716) Thus, not only was the demand invalid at the time it was filed, but the demand was waived by counsel's scheduling of depositions and subsequent preparation. Based on the foregoing, it is clear that the demand for speedy trial was spurious and that Landry was in no way prepared to defend against the capital charges.

There are undoubtedly cases in which the defense knows what the state's witnesses will say and what evidence there is otherwise without taking discovery. And a defendant expecting a favorable verdict might logically decide to ask for immediate trial, so he can get out of jail. But, as previously noted, this

is a death case and death is different. The trial judge in the instant case had a responsibility to make sure that the demand for speedy trial was bona fide and that counsel had prepared for trial. As the trial court specifically found that this was not true, he properly denied the demand for speedy trial.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR DISCHARGE.

Appellant filed a Demand For Speedy Trial on May 22, 1992, under Fla. R. Crim. P. 3.191, which provides, in pertinent part:

> (S)ubject to the limitations imposed under subdivisions (e) and (g), every person charged with a crime by indictment or information shall have the right to demand a trial within 60 days by filing with the court having jurisdiction ... a pleading entitled "Demand For Speedy Trial".

Rule 3.191(b)(4) provides further that "if the defendant has not been brought to trial within 50 days of the filing of the demand, the defendant shall have the right to the appropriate remedy as set forth in subdivision (p)". The remedies delineated in subdivision (p) include, _inter alia_, the right to file a Motion for Discharge, after which the trial court must schedule trial within fifteen days.

On June 25, 1992, 33 days after the Demand for Speedy Trial was filed, it was properly denied by the trial court pursuant to Rule 3.191(g) which provides that such demand shall be stricken unless the accused has "diligently investigated the case". As the trial court noted, the Appellant had clearly not diligently investigated his case and thus not complied with the rule. _See_ State's brief, Issue I.

On July 17, 1992, 52 days after the trial court's denial of his Motion For Speedy Trial, Appellant filed a Motion For Discharge, which the trial court denied by written order on July

21.[3] (R 107) The motion was denied pursuant to Rule 3.191 (j)(4) which provides that "a pending motion for discharge shall be granted by the court unless it is shown that ... the demand referred to in subdivision (g) is invalid". Further, the rule provides "that trial shall be scheduled and commence within 90 days of a written or recorded order of denial". Pursuant to the rule, this 90 day period commenced on July 21, 1992.

The trial court scheduled the trial for September 30, 1992, which was well within the 90 day period provided for by the rule. However, on September 30, Landry filed a Motion For Writ of Prohibition with the Second District Court of Appeal, asking that court to prohibit the trial court from proceeding and to enter an appropriate stay. (R 167) On October 1, 1995, the appellate court issued a show cause order to the trial court, the effect of which was to grant Appellant's motion for a stay of proceedings. (R 269) See Fla. Rules App. P. 9.100(f) ("In prohibition proceedings such orders [to show cause] shall stay further proceedings in the lower tribunal) (emphasis added); Esperti v. State, 276 So.2d 58 (Fla. 2d DCA, 1973) (Where proceedings are stayed, trial court is without jurisdiction and cannot proceed); Meeks v. State, 250 So.2d 854, 855 (Fla. 1971) ("In the case of a

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[3] The current remedy under subdivision (p) after the expiration of fifty days is to file a Notice of Expiration of Speedy Trial Time. What is now subdivision (p) was formerly subdivision (i). Since the Appellant, in his brief makes reference to the current designations of the subdivision of Rule 3.191, the State will, for purposes of clarity, do likewise. The change noted above was the only substantive one affecting the instant case.

writ of prohibition, issuance of the rule to show cause operates as a supersedeas, and thereby also automatically stays the proceedings below").

During the 14 day period in which the trial court's proceedings were stayed, the clock was also tolled for purposes of the speedy trial rule. In Esperti the court held that an action by either party which causes an automatic stay of the trial court proceedings also tolls the running of the speedy rule. As Esperti was a Second District opinion, the trial court was bound by this holding.[4] Although the Esperti court relied on case law which was decided pursuant to a now inapplicable Florida Statute, those cases are "equally applicable to the running of the rule inasmuch as trial simply cannot proceed where stayed or superseded". Id. at 276 So.2d 63.

Therefore, as a result of Appellant's own actions, the trial court was prevented from proceeding from October 1 to October 15, which tolled the running of the speedy trial rule for 14 days.

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[4] On October 2, 1992, the State filed a Motion to Toll Speedy Trial during the pending writ, which the trial court granted by written order on October 14, without indicating whether the order was retroactive to October 1, the date the motion for the writ was filed. The trial court's action was superfluous, as the time period was already tolled by operation of law. See cases cited above. Appellant cites State v. Barreiro, 460 So.2d 945 (Fla. 3d DCA, 1984) for the proposition that it was necessary for the trial court to enter an order to toll the time. Appellant reads Barreiro much too broadly. That case held merely that the speedy trial period is not automatically tolled where certiorari review is sought by the state. In the instant case, a Motion for Writ of Prohibition was filed by the Appellant and the Order to Show Cause automatically stayed the proceedings. Under such a scenario, the tolling is automatic. Esperti supra.

October 1 was 72 days after the Appellant's Motion for Discharge was denied by written order, leaving 18 days for the commencement of trial under Fla. Rule Crim. Procedure 3.191(j). On October 15, 1992, the Second District Court of Appeal denied the Appellant's Motion For Writ of Prohibition. As Appellant indicates, the pertinent rule, 3.070, allows for a three day mailing period and thus, the clock began to run on October 19, 1992 (October 18th of that year being a Sunday) with 18 days remaining. Appellant's trial commenced 14 days later on November 3, 1992 when the jury was sworn for voir dire. See Moore v. State, 368 So.2d 1291 (Fla. 1979) (Trial commences when jury sworn for voir dire).

Even assuming that Appellant's Motion For Discharge filed on November 3, 1992 was meritorious however, he was not entitled to discharge at that time. Fla. Rule Crim. Procedure 3.191 (i)(now subdivision [p]) provided that the remedy for failure to try a defendant within the specified time is for the trial court to hold a hearing no later than five days from the date of the filing of a Motion For Discharge, and to order that the defendant be brought to trial within ten days. Appellant submits that he was entitled to immediate discharge, but every District Court of Appeal has that considered the issue has rejected that position. See e.g. Howard v. State, 599 So.2d 1043 (Fla. 2d DCA, 1992); State v. Ferrante, 561 So.2d 422 (Fla. 3d DCA, 1990); State v. Veliz, 524 So.2d 1157 (Fla. 3d DCA, 1988); State v. Jackson, 566 So.2d 951 (Fla. 5th DCA, 1990); State v. Eubanks, 630 So.2d 200

(Fla. 4th DCA, 1993). As the court in Veliz noted:

> Across the 3.191 board, the sole remedy available when any "prescribed time period" has run is a motion to discharge . . . . The consequences of a well-taken motion to discharge are then, in turn, clearly prescribed by the following subsection, (i)(4). That provision, including it's five and ten day grace periods, applies on it's face and without limitation to all of the speedy trial requirements set forth in the various subsections of the speedy trial rule, pointedly not excluding (d)(3).

"In the present case, the record demonstrates that [Appellant] has, by his own actions, caused the applicable time period to be extended". Baxter supra at 581 So.2d 599. Since the trial court properly struck Appellant's original Demand For Speedy Trial on June 25, 1992, properly denied the Motion For Discharge on July 21 and commenced the trial within 90 days of the denial of the Motion For Discharge (allowing for the period in which the time was tolled), Appellant's is not entitled to relief on this claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY GRANTING THE STATE'S MOTION IN LIMINE TO EXCLUDE DEFENSE EVIDENCE SUGGESTING THAT THE VICTIM'S WIFE, DAWN DOWNS, MAY HAVE BEEN INVOLVED IN THE CRIME.

Appellant contends that the trial court erred in granting the state's motion in limine with regard to evidence he alleged implicated Dawn Downs, the victim's wife, in the murder of Ed Downs. He contends that the evidence excluded was probative and supported Landry's claim of innocence. He alleges that if Dawn Downs hired Richard Young to kill her husband, and Landry was not aware of the plot until the last minute, at which time he left, he was not guilty of murder. It is the state's position that no error was committed. Most of this evidence was actually presented to the jury and the remainder of the evidence was properly excluded by the trial court as irrelevant.

In general, this Court has held that the person seeking admission of testimony must demonstrate why sought after testimony is relevant. Hitchcock v. State, 413 So. 2d 741 (Fla.), cert. denied 459 U.S. 960 (1982), citing Haager v. State, 83 Fla. 41, 90 So. 812 (1922). And, although a defendant has a right to present witnesses in his own defense, this Court held in Hitchcock, that he must comply with established rules of procedure and evidence designed to assure fairness and reliability. See also Chambers v. Mississippi, 410 U.S. 284 (1973). Where evidence tends, in any way, even indirectly to establish a reasonable doubt of defendant's guilt, it is error to

deny its admission. However, admissibility of this evidence must be gauged by the same principal of relevancy as any other evidence offered by the defendant. Rivera v. State, 561 So. 2d 536, 536 (Fla. 1990). For example, evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness. Hitchcock v. State, 413 So. 2d 741, 744. "For impeachment purposes, the only proper inquiry into a witness' character goes to reputation for truth and veracity." Id. at 744. Similarly, in Crump v. State, 622 So. 2d 963, 969 (Fla. 1993), this Court quoting State v. Savino, 560 So. 2d 892 (Fla. 1992), stated that "If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that person should be of such a nature that it would be admissible if that person were on trial for the present offense."

In Hitchcock v. State, 413 So. 2d 741, this Court rejected Hitchcock's claim that he was precluded from presenting evidence in support of his defense. Hitchcock was charged with the murder of his brother's thirteen year old stepdaughter. At trial Hitchcock attempted to establish that his brother was actually the perpetrator of the crime. In accordance with this, defense counsel called the defendant and a series of Hitchcock's relatives -- a brother and his wife, several sisters, and Hitchcock's mother -- to the stand, asking each essentially the same questions, specifically, details of the defendant's conduct around the children, the early lives of the two brothers, and

whether Richard Hitchcock had ever exhibited violent tendencies. This Court held that the excluded testimony could have been relevant only to show Richard Hitchcock's alleged bad acts and violent propensities, and thus, was properly excluded for impeachment purposes. Furthermore, this Court held that there was no merit to the appellant's claim that the testimony concerning Richard's character would tend to prove that Richard committed the murder. This Court found that the testimony offered was too remote to be relevant and was properly excluded. Similarly, the evidence attempted to be introduced by appellant in the instant case was too remote to be possibly relevant and was merely an attempt by the defendant to paint the victim and his wife, and their relationship, in a bad light.[5]

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[5] Dawn Downs testified at the penalty phase hearing that "I'd like to -- Ed and myself, we were very, very, very close. We were joined at the hip. For the years that we were together we had never spent one night apart. We went hunting together and traveling together, golfing together. Everything we did together. We were one of the best friends. He was my only friend that I had.

I had a Cinderella life with my best friend. I was happily married. My friends were jealous of us. He would give me anything to please me on a silver platter.

And it went both ways. He put me on a pedestal and I was totally reliant on my husband because I was very insecure. He took charge of everything. He opened up my mail. If I had to go somewhere to answer questions about myself, he would answer for me.

I never wrote checks. And I tell you, I am thirty-three years old and having to start over with what I should have been doing when I was eighteen, because Ed always took care of me, Ed always took care of everything for me.

I had been so reliant on him all of my life. I loved that man

The evidence Landry attempted to introduce in the instant case included (1) the unsealed drug indictment, (2) the relationship between Dawn Downs and John Brock, (3) cultivation of marijuana on Downs' property, (4) political contributions offered to John Brock, (5) Dawn's alleged involvement in her husband's death, (6) the fact that Dawn Downs was formerly the stepdaughter of Ed Downs, and (7) how the caretakers were paid. This evidence was clearly irrelevant and it was within the trial court's discretion to deny it. Rivera v. State, 561 So. 2d 536, 540 (Fla. 1990). Furthermore, as previously noted, not only was this evidence irrelevant, but most of it was introduced to the jury in one form or another. This Court in Hitchcock v. State, 413 So. 2d 741, 744 n. 1., held that even where objections were sustained erroneously, the fact that the witness was allowed to answer cured any error. For purposes of clarity, each one of the categories referred to by appellant will be addressed individually.

(1) The unsealed drug indictment

The gist of the defense's argument below was that Dawn Downs was aware that Ed Downs had been indicted by the federal government for drug smuggling about a month before the homicide

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and I respected that man and I had admiration for him. And all of our friends had that for him too.

I wish that you could have known the man. Now that he's gone its been -- I've never been on my own, Ed has always been there with me and this change of events in my life is hard to put into words what this has done to me. (T 2113)

and that the government had initiated forfeiture proceedings against the Downs' property. They alleged that Dawn Downs had married her husband for his money and when faced with the prospect of losing it all she chose instead to hire two young men, Rick Young and David Sorton, to commit the murder. The defense inferred that she was further assisted in this matter by Detective John Brock who investigated the instant murder. A review of the evidence that was presented to the jury, as well as the evidence presented by proffer, clearly establishes that there was no basis for this claim.

First, Dawn Downs did not even know about the drug indictment until about a month after the murder. There was absolutely no evidence that Dawn Downs had any prior knowledge or anyone else, had any prior knowledge about the drug indictments. (T 578 - 79) Further, despite the fact that Ed Downs had been murdered, the federal government was, nevertheless, going forward with the forfeiture proceedings. (T 570 - 78) The fact that forfeiture proceedings were going forward clearly undermines the theory that Dawn Downs murdered her husband in order to avoid losing all her money.

(2) Relationship between Downs and Brock

Appellant also contends that he should have been allowed to present evidence that there was a relationship between Dawn Downs and John Brock. Again, defense had intimated that there was some kind of relationship between the two that would serve as a motive for Dawn Downs committing the crime. Again, no evidence was

presented that established this claim. Dawn Downs testified in the proffer that she first met John Brock when he asked to investigate a report that someone had been growing marijuana on their property and that Ed had let him go on the property to investigate. (T 570 - 76) Dawn Downs and her caretaker Charles Jacob Easterly testified that when they called 911 the operator was requesting directions to the property and that Dawn told them to get Detective Brock because he was the closest and he could get there the fastest. Dawn also said that John knew where to find the property and that he had a combination to the gate. (T 487, 533) John Brock testified that it was not unusual for him to have keys to different properties in the area. (T 1088) John Brock also testified that he had been to the Downs' home a few times. There was no evidence that there was anything about their relationship that would provide a motive.

As defense counsel has not established that Dawn Downs had anything to do with the murder, that she actually had a relationship with John Brock or that any of the other allegations were relevant to the crime as charged, the trial court properly excluded the evidence.

(3) Cultivation of marijuana on Downs' property

Defense counsel attempted to introduce evidence that John Brock had initially gone to the Downs' property in order to investigate whether there was marijuana being grown on the 200 acre estate. Defense counsel argued that the evidence was relevant because Brock knew the names "Rick" and "John" because

he had prior dealings with them. Defense counsel admitted that he did not know whether Brock had seen or investigated them before, or investigated a burglary in which they were involved. On this basis, the trial judge sustained the state's objection to any questions as to whether John Brock was investigating marijuana on the Downs' property at some time in the distant past. The court properly told the jury to disregard the question. (T 570) The trial judge did, however, allow evidence that Rick Young, David Sorton, John Landry and Franklin Delph went to the property because Ed Downs was supposed to have some marijuana plants growing out there. (T 666, 905 - 06, 1790 - 91) The sole relevancy of this testimony was to establish the original purpose for Landry to take his friends out to the property. Whether there was actually marijuana or not at any point in time was not relevant to appellant's claim that Dawn Downs committed the murder and, therefore, properly excluded.

(4) Political contributions offered to John Brock

Dawn Downs testified on a proffer that she offered John Brock a campaign contribution of $500, but he refused it. (T 581 - 582) This evidence was absolutely irrelevant to anything introduced at this trial. To suggest that his refusal of a check for a campaign contribution from the Downs constitutes evidence that John Brock was somehow involved in a plan to cover up Dawn's involvement of the murder is preposterous. Again the trial court properly denied the admission of this evidence.

(5) Dawn's alleged involvement in her husband's death

Landry claims he was not able to establish Dawn Downs' complicity in the homicide because the trial judge erred in refusing to allow him to introduce testimony that Ed Downs had been indicted by the federal government for drug related offenses and that the government had initiated forfeiture proceedings against the property. Landry claims that Richard Young was hired by Mrs. Downs to kill her husband and that the pending forfeiture was the motive for the murder. To support this claim, Landry alleged at that trial that he was at a party two weeks before the homicide and that his three accomplices were also there. (T 1788) He claims to have seen a green Jaguar, but did not see who was driving it. (T 1789) Dawn Downs drove a green Jaguar. (T 505)

Landry's testimony was totally self-serving and was not supported by any other evidence. Neither Rick Young nor David Sorton testified that they had ever met Dawn Downs either at the party or at any other time in the past. Additionally, Dawn Downs denied hiring anyone to kill her husband. (T 1892) Further, as previously noted, there was no evidence that Dawn Downs knew about the drug indictment or that Ed Downs' murder in any way profited her beyond that which was already hers. Accordingly, the trial court properly limited the admission evidence concerning the forfeiture.

(6) Dawn Downs was also Ed Downs' stepdaughter

the stepdaughter of Ed Downs has got to be the most irrelevant. Clearly, the purpose of this evidence was nothing more than to paint a bad picture of the victim's wife in the eyes of the jury.

Appellant also argues that somehow he was precluded from making a proffer on the fact that Dawn was formerly Ed's stepdaughter. The record shows, however, that when the state moved to exclude any evidence that Dawn Downs was previously the stepdaughter of Mr. Downs, the court noted:

> "The intimation of some of the questions that the state has filed a motion in limine on at this point in time when a motion in limine has been raised, I have found that there has been no relevancy and that the remoteness of some questions have no bearing at this time.
>
> But I have indicated to the defense with respect to each motion in limine brought that they are not precluded from some basis for proceeding with those questions.
>
> At this point in time, the basis of the motion in limine, again, I am going to grant the motion in limine. However, the defense is not precluded if there can arise some connection without it being so remote as opposed to simply posing a question to any witness as to the question that has no connection, and so remote that it's questionable as to relevancy.
>
> If the defense can establish at a later point in time that, then I will reconsider my ruling on any of the motions in limine. At this point in time, there is no foundation for some of the questions posed.
>
> I guess what I am trying to tell the defense is that they may, in fact, have a threshold that is met, but at this point in time, there just isn't."

(T 550 - 551)

The court further told defense counsel:

> "Well, I'll leave that to the defense as far as how you are going to develop the defense and proceed at this time. Some of the questions are simply remote and they are not having any bearing at this point.
>
> And again, I am not foreclosing you from proceeding once there is some basis for foundation. I will leave that for the defense as to how you are going to establish that.
>
> But as to questions as to how a person is paid, whether it is cash, check or money order, as I have previously ruled, that is simply not relevant. You may establish a foundation and come back and proceed with your theory.
>
> At this point in time, it is remote in the connection and it bears no relevancy." (T 552)

Thus, although appellant alleges that the court prevented him from proffering any evidence to show its relevancy, the trial court appeared to be going overboard to allow the defendant substantial leeway in presenting such evidence and defense counsel was allowed to do an extensive proffer of Dawn Downs with regard to the excluded testimony. (T 571 - 582) In the proffer, Dawn Downs testified as to her knowledge of the drug indictments. (T 572) She testified that she was fighting the forfeiture proceedings (T 573), that she had not worked for seven years and that if the government succeeded in the forfeiture proceedings, she would lose her home. (T 574) She testified in the proffer that John Brock was a friend of hers and her husband's and that he had a combination to the gate to the estate; that John Brock

had been to the property in the past for purposes of investigating whether someone had been growing marijuana or had pot plants on the property. (T 575) She then went into the specifics of how the estate was settled (T 576), what property was left in the estate (T 577), that everyone on the staff was paid in cash (T 580), and that Mr. Downs rarely carried over $1,000 on his person. (T 581) After hearing the proffer, the trial court held that the issues raised in the proffer were extremely remote and collateral to the homicide. (T 585 - 586) Again, the court reiterated that if the defense was able to connect the independent events, that he would allow the testimony. (T 586)

(7) <u>Cross examination of caretakers</u>

Appellant also complains because he was not allowed to introduce evidence that the caretakers were paid in cash. During the proffer, Dawn Downs testified that the entire staff was paid in cash. The trial court excluded this evidence as being remote and collateral. Exclusion was within the trial court's discretion and appellant has failed to show an abuse of that discretion. The fact that Mr. Downs paid his staff in cash in no way supports a claim that Dawn Downs was responsible for the murder.

Appellant also argues that the trial court erroneously precluded him from making a proffer as to whether Charles and Seldon Easterly were paid in cash. Again, the trial court told counsel that if he could connect this later on, he would allow

counsel that if he could connect this later on, he would allow him to do so. Subsequently, when Dawn Downs was on the stand, the trial court allowed the defense counsel to present a proffer and question Dawn Downs as to how the staff was paid. Clearly this evidence was not relevant. Furthermore, as defense counsel was allowed to question Dawn Downs in a proffer as to how the Easterlys were paid, error, if any, was harmless. As in Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), where the propriety of excluding evidence can be determined from the record, the denial of a proffer does not constitute reversible error. Because the record clearly shows that the Easterlys were paid in cash and that this evidence was not relevant, the trial court's denial of the initial proffer does not constitute reversible error.

Although the state contends that all of the foregoing evidence was remote and collateral to question of Landry's guilt, error, if any, was harmless beyond a reasonable doubt in light of the overwhelming evidence of Landry's guilt.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY DISALLOWING CODEFENDANT RICK YOUNG'S TESTIMONY CONCERNING HIS UNDERSTANDING OF HIS SENTENCE UNDER THE PLEA AGREEMENT.

Appellant contends that he was erroneously precluded from making a thorough inquiry into Young's plea agreement with the state when he was precluded from asking Richard Young how much of the promised seventeen year sentence he thought he would actually serve. He contends that if Richard Young was told that he would serve less than seventeen years, which would certainly be possible with gain time, this was relevant to his understanding of the plea agreement and, therefore, to his motive to testify for the prosecution. He also contends that the prosecutor opened the door to this impeachment by asking Young about his agreement with the state. On direct examination, the prosecutor asked Young:

> BY MS. CHAPPELL:
>
> Q. Mr. Young, what were you originally charged with in this particular case?
>
> A. First degree premeditated murder, first degree felony murder, and first degree burglary.
>
> Q. And did you enter into an agreement with the State in this case?
>
> A. Yes, ma'am.
>
> Q. did you approach the State in order to enter into an agreement?
>
> A. No, ma'am.

> Q. Okay. What were the terms of the agreement that you entered into?
>
> A. The terms of the agreement are that if I testify if needed, and if I tell the truth, then I was suppose to get 17 years.
>
> Q. And what charges have you pled to?
>
> A. I pled to second degree murder and first degree burglary.
>
> Q. And what happens if you don't tell the truth, if you tell a lie in court?
>
> A. Then my plea will be altered.
>
> Q. When you say your plea will be altered, what it your understanding what will happen to you if you don't testify truthfully?
>
> A. Then I won't get 17 years, and I will be going to trial.
>
> Q. So you will be facing the charges that you were originally charged with?
>
> A. Yes, ma'am.

(T 813 - 814)

On cross defense counsel asked Young:

> Q. I understand the State went over with you about your understanding of the plea that you have entered into.
>
> For my recollection, what were you originally charged with?
>
> A. First degree premeditated murder, first degree felony murder, first degree burglary.
>
> Q. And that was charged by indictment; is that correct?
>
> A. Yes, sir.
>
> Q. And with regard to the plea that you entered into, you discussed this with you attorney?

A. Yes, sir.

Q. He explained to you everything that was within that plea agreement?

A. Yes, sir.

Q. About a seven-page plea agreement; is that right?

A. I'm not sure how many pages, but it was several pages.

Q. And he discussed with you all the possibilities and outcome of that plea agreement?

A. Yes, sir.

Q. When you entered that plea, did you do it voluntarily?

A. Yes.

Q. And you went in front of a judge and you entered your plea?

A. Yes, sir.

Q. He inquired as to you knowledge and voluntariness with regard to that plea?

A. Yes, sir.

Q. And he asked if you discussed it with your attorney?

A. Yes, sir.

Q. And what, again, is your understanding? What will you be facing based on that plea?

A. Facing 17 years in prison.

Q. And what charges did you plea to?

A. I pled to second degree murder and first degree burglary.

Q. And what are you required to do in order to maintain that agreement?

A. I am to testify if needed, and I'm going to tell the truth.

Q. And you have not been sentenced on that plea, have you?

A. No, sir.

Q. And is it you understanding that you will not be sentenced until everyone who is involved in this case, according to the State, has tried and completed that case.

A. Yes, sir.

Q. And if you change you statement, or lie, what is your understanding of what will happen to that plea agreement?

A. My understanding is that the plea will be off and I will go to trial with my original charges.

Q. And doesn't the plea agreement also state that you must give substantial assistance when you testify?

A. Can you be more specific, please?

Q. Sure. Is it you understanding that the State, in order to have a valid agreement they must believe that you have provided substantial assistance in this case in order for this plea agreement to be valid?

A. Yes, sir.

Q. And you indicated that you're going to get sentenced to 17 years?

A. If I complete the plea agreement. If I do everything I was suppose to do, yes, sir.

Q. And at the time you entered into this plea agreement, did you have pending charges against you at the time?

A. I believe I had one pending charge. I thought I had two.

Q. And would that pending charge, or two pending charges, also be taken care of in the sense that it will run concurrent with the sentence that you will receive from this particular charge?

A. I believe they got dismissed, sir.

Q. And again, you have spoken with your attorney with regard to all ramifications; is that correct?

A. Yes, sir.

Q. What is you understanding if, presuming that you behave yourself and you get gain time, how much time will you actually serve?

MS. CHAPPELL: Your Honor, I'm going to object to the form of that question, and I believe it's irrelevant.

THE COURT: Objection sustained.

BY MR. REITER: Q. Is it your understanding you will serve a total of 17 years?

MR. CHAPPELL: Your Honor, I'm going to object, again, to the form of the question.

THE COURT: Objection sustained.

BY MR. REITER:

Q. What knowledge did you have at the time you entered into this plea, with regard to gain time that you will receive for this sentence that you are going to get?

MS. CHAPPELL: Your Honor, I'm going to object to relevancy.

THE COURT: Sustained.

MR. REITER: May we approach, Judge?

(Whereupon, said bench conference was had.)

MR. REITER: The question that was asked was what his understanding to the time that he would serve, gain time or good time, whatever time, in the state prison. The state objected on relevancy.

If he's under the assumption in making this plea that he will serve a total of 4, 5, 6 less of 17, then that's relevant to entering into that plea.

MR. CHAPPELL: He can impeach him on prior plea agreements, but I don't believe it's relevant as to how much time he is going to be serving. How does he know how much time he'll be serving?

THE COURT: When the plea was proposed to him, based on the circumstances, behavior, how much time and the amount of gain time, it's a standard policy of what's going on in the system, he have the understanding or belief of it, which in his mind is important.

MR. WOLFENDALE: Based on the system, he has a substantial understanding of the gain time he would receive, based on his understanding when he entered into negotiations, whether or not he would decide to take the plea of 12 years.

MR. CHAPPELL: I believe that goes beyond the scope of proper impeachment under this particular subject.

THE COURT: How does he know how long he's going to be out?

MR. REITER: Based on prior experience. I even asked him if he believed he was going to serve 17 years.

THE COURT: If he believes he's going to serve 17 years, will he serve 17 years? Maybe he'll testify he believes he'll serve three years.

MR. WOLFENDALE: But the issue, I think, is his state of mind what he believes himself at the time he entered the plea, what his understanding was.

MR. CHAPPELL: Your Honor, I believe it's outside the scope of proper impeachment. They're going beyond the scope of that particular plea agreement and asking his opinion as to what he might serve. It's hearsay as to what his attorney told him.

MR. WOLFENDALE: His opinion as to what his understanding of the plea is also going to relate to what his attorney told him, too. I mean, based on my dealings with the system and based on my discussions with my attorney, I assumed when I entered the plea that I thought I would be out in three years, okay?.

THE COURT: I'm going to sustain the objection.

(Whereupon, said proceedings were had in open court in the presences of the jury.)

BY MR. REITER:

Q. In entering into this plea agreement, you understand you're going to get sentenced to 17 years; is that correct?

A. Yes, sir.

Q. Do you believe you're going to serve the full amount?

MR. CHAPPELL: Your Honor, I'm going to object. I believe we just discussed this.

THE COURT: Sustained.

(T 895 - 901)

It is well settled that when charges are pending against a prosecution witness at the time he testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive or self-interest. Fulton v. State, 335 So. 2d 280 (Fla. 1976); Torres-Arboledo v. State, 524 So. 2d 403 (Fla.) cert. denied 488 U.S. 901 (1988); Jackson v. State, 522 So. 2d 802

(Fla.) cert. denied 482 U.S. 920 (1988) However, there is no requirement that the defense be allowed to delve into matters that are purely speculative and remote to the issue at hand. Clearly, it would be impossible for Young to know exactly how much time he was going to serve after receiving his sentence of seventeen years. The amount of gain time and good time that a prisoner receives obviously varies from case to case and from year to year. As such, this testimony would have been purely speculative.

Additionally, Landry did not ask for a proffer of this statement.[6] As appellant did not attempt to proffer how much time Young believed he would actually serve, there is no way of knowing if it was less than seventeen years. The failure to proffer evidence precludes review of the claim. Lucas v. State 568 So. 2d 18, 22 (Fla. 1990). Further, in light of the fact that the jury was aware of the plea agreement, the fact that he would be subject to gain time and that he was to be sentenced to seventeen years clearly makes any limitation in the questioning harmless.

Appellant also contends that this error was compounded by the Court's denial of the defense motion to disqualify the Assistant State Attorney. (R 718) The defense is entitled to any information the state has with regard to the plea negotiations through the discovery process. In the instant case,

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6 Defense counsel did not ask David Sorton about how much time he would actually serve.

negotiations through the discovery process. In the instant case, however, defense counsel declined to avail himself of the discovery rules. As such, he can hardly be heard to complain because he could not put the State Attorney on the stand to question her regarding the plea negotiations. There is absolutely no support for any claim that there was anything contained in the plea negotiations other than as testified to by Richard Young and David Sorton. Accordingly, appellant has failed to show any harmful error.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE STATEMENTS OF THE TWO CODEFENDANTS TO BOLSTER THE CODEFENDANT'S TESTIMONY.

At trial, Landry's accomplices David Sorton and Richard Alan Young testified as to the events on the night of the murder. Sorton testified that on the evening of the murder John Landry, Franklin Delph and Rick Young went to the Downs' property. (T 680 - 83) Sorton testified that John and Franklin were the ones who went into the bedroom and shot Ed Downs. After the murder, Sorton said they threw the guns, the flashlight, wire cutters, and several sets of keys into the pond on the property. (T 713) He testified that when he returned to his car that he discovered that he had thrown his car keys in the pond and although they had tried to hot wire his car, they could not get it started. (T 715 - 783) At that point, they saw a car coming and they (Landry and Sorton) started running in one direction (T 716 - 17) and, Franklin and Rick went in another direction. Rick Young testified to essentially the same facts. Young testified that when they were picked up by law enforcement officers in the morning that he first told them a story that he and Franklin had concocted about being chased by a truck. He then told them the truth. John Brock took him back to the scene of the crime and Rick showed the officers where they had thrown the weapons and other items and where David's car was abandoned. (T 891 - 93)

John Brock testified that after Franklin Delph and Rick Young were picked up by the Hendry County Sheriff's Department that he and Bruce Warren of the FDLE met with the two suspects. (T 1102 - 1104) Both statements from Rick Young and David Sorton were taped and the tapes were played for the jury after the trial court determined that they were admissible to rebut the defense's claim of recent fabrication. (T 1124, 1180)

Despite the counsel's repeated references to the plea agreements and the repeated suggestions of fabrication, appellant now contends the tapes were inadmissible and that they were introduced solely to bolster the witness' credibility. This position is baseless in law and fact.

On cross examination of David Sorton, defense counsel inquired as to the nature of the plea agreement with the state. (T 730 - 736) Counsel specifically asked him, "And if you change your story here today again, this agreement could be null and void; isn't that correct?" Subsequently, defense counsel asked David Sorton:

> "Q. So you lied to the police when you made this report and described the situation how the car was stolen?
>
> A. Yes.
>
> Q. And you lied to Sergeant Brock when he asked about your involvement in the case?
>
> A. Well, I didn't actually lie about that. I denied because he thought at the time I was the one that did the shooting; and I denied that I didn't do the shooting.
>
> Q. Okay.

A. So that, you could say, I didn't lie on that.

Q. Your statement was different from the first one you gave him as they were driving you to the county line, and the later one that they taped, right?

A. Correct. Well, the only part is that I denied the involvement.

Q. You denied your involvement?

A. Right.

Q. But you were involved?

A. Right.

Q. So that was a lie?

A. No. Well, not necessarily, because that's when I said I didn't. Because I told the truth on my statement, then it would be not true.

Q. Okay. And when you went to your aunt, you lied to your aunt, didn't you?

A. Yes.

Q. And you made up a story and you told her what had happened to your car; isn't that correct?

A. The same story, yes. At first, I told the same story to my brother, but then I went ahead and told him.

Q. Was it more believable the second time you told the story to your aunt? You had practiced it a little bit?

MS. CHAPPELL: Your Honor, is there a question being posed? I'm going to object.

THE COURT: Objection sustained as to both questions.

BY MR. WOLFENDALE:

> And when you went to that fellow's window at two in the morning, you lied to him about what had happened to the car?
>
> A. Correct.
>
> Q. You made up a story?
>
> A. Correct.

(T 792 - 794)

Similarly, defense counsel on cross examination of Richard Alan Young asked him about the plea agreement. (T 895 - 901) Subsequently, he inquired of Young:

> Q. Before we get started, let me ask you, how many times have you given a statement?
>
> A. I gave a statement to the officers on may 3rd, I gave a second statement to the state attorney's office ---
>
> Q. I'm not asking you specifically what --
>
> A. I'm not sure what you call that.
>
> Q. I just want to know the number of times.
>
> MS. CHAPPELL: Your Honor, I'm going to object if he's not going to allow the witness to answer a question.
>
> MR. REITER: I'm asking him to respond, Judge.
>
> THE COURT: Objection sustained, motion is granted. Move on, please.
>
> BY MR. REITER:
>
> Q. How many times?
>
> A. I'm asking you, is that in a deposition or statement what I took last week?
>
> Q. How many times have you told your story to somebody else?

A. Four times.

(T 903)

And then Young was asked:

> Q. Have you had a conversation with the state attorney's office before coming in here to testify?
>
> A. I had a conversation with Ms. Chappell.
>
> Q. Did you go over your testimony with Ms. Chappell?
>
> A. I went through part of it.
>
> Q. So before you came in here today, you pretty well had a good idea of the questions that were going to be asked of you by the state attorney; did you not?
>
> A. I can't say pretty good; I can say a few questions.

(T 905)

Counsel also attempted to impeach Young with the deposition given in the instant case. (T 907, 914, 960, 962, 987 - 991) In light of the foregoing questioning, the trial court properly allowed the state to play the taped statements for the jury.

It is well established that prior consistent statements are generally inadmissible to corroborate or bolster a witness' trial testimony. Rodriguez v. State, 609 So. 2d 493 (Fla. 1992); Moreover because prior consistent statements are usually hearsay; they are inadmissible as substantive evidence unless they qualify under an exception to the rule excluding hearsay. Id. at 150 citing Charles W. Ehrhardt, Florida Evidence, §801.8 (1992). The

prior statements Young and Sorton were properly admitted under §90.801(2)(b), Florida Statutes (1991), which excludes from the definition of hearsay the prior consistent statement of a witness who testifies at trial and is subject to cross examination concerning that statement when the statement is offered to rebut an express or implied charge of improper influence, motive, or recent fabrication. Both Young and Sorton testified at trial and both Young and Sorton faced challenges by defense counsel as to their plea agreements and their incentive to lie. As this Court found in Rodriguez, defense counsel's references to a plea agreement with the state during cross examination of both of the witnesses was sufficient to create an inference of improper motive to fabricate. Id. at 500. Accordingly, because the statements in question were given prior to the plea negotiations and therefore prior to the existence of both witness' motive to fabricate they were properly admitted. Rodriguez v. State, 609 So. 2d 493 (Fla. 1992); Jackson v. State, 599 So. 2d 103, 107 (1992); Alvin v. State, 548 So. 2d 1112, 1114 (Fla. 1989) Dufour v. State, 495 So. 2d 154, 160 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987).

Nevertheless, appellant contends that although the statements were made within the hours of the murder, it is possible, if one was to believe John Landry's version of the story, that they were able to fabricate John Landry's involvement at the time of the commission of the crime. This argument is sheer sophistry. First, the evidence shows that David Sorton

and Richard Young both left the scene of the crime separately. (T 716-17, 891-93) And, even Landry's own testimony alleged that David Sorton caught up with him in the woods within twenty minutes of Landry's alleged "abandonment". (T 1868) Thus, even accepting Landry's version, from the time Landry allegedly left, it would have given Sorton only twenty minutes to enter the home, commit the murder, ransack the house, have a few drinks, fabricate a story and then catch John Landry in the woods. This claim is ludicrous as it would not have given the accomplices an opportunity to fabricate the story. Furthermore, the inference at trial was that the motive to lie concerning Landry's involvement was developed at the time of the plea agreement. As such, it was within the trial court's discretion to admit the statements and appellant has failed to show an abuse of that discretion.

Appellant also contends that it was error to play the tape because inadmissible hearsay was presented to the jury. A review of the record shows that any questionable statements on the tape were redacted during the trial. More importantly, while defense counsel made many objections during the playing of these tapes, there were no hearsay objections to the now challenged statements. Therefore, any hearsay challenge is now barred. Furthermore, Detective Brock, David Sorton, and Rick Young were all available for cross examination. Accordingly, any statements made by them were subject to cross examination and, therefore, did not constitute hearsay. Rodriquez, supra. Furthermore,

assuming, it was error to play the tapes, error, if any, was harmless beyond a reasonable doubt. Jackson v. State, 599 So. 2d 107; Alvin v. State, 548 So. 2d 1114.

Appellant also complains that error occurred during the playing of Rick Young's taped statement when Detective Brock stated that they had already spoken to Franklin for an hour and a half. Landry contends that since Delph did not testify and the jury heard he made a long taped statement that this constitutes error because he was unable to cross-examine Delph or anyone concerning the taking of Delph's statement. (T 1164 - 67) This claim is barred and without merit.

At the beginning of the taped statement of Richard Young, the following exchange occurred:

> MR. BROCK: All right, now remember you're under oath. Okay? And we've already, I've already talked with, ah, Franklin. All right. In fact, we spoke with him for about an hour. About an hour?
>
> BRUCE WARREN: An hour.
>
> MR. BROCK: All right. He had problems with some questions that we asked him. Okay? And he's already told us that you were in the house. I can tell you that straight up front.
>
> MR. YOUNG: Well, then, that's --
>
> MR. BROCK: Listen to what I'm going to say now. He's already said that you were in the house, --
>
> MR. YOUNG: (Unintelligible)
>
> MR. BROCK: -- but you weren't in the bedroom at the time of the shooting. All right. I want to know what you know about it.

> MR. YOUNG: Well, I don't, I don't understand how I can be two places at once.
>
> MR. BROCK: I don't think you were in two places at once. I think you were there.
>
> MR. YOUNG: How can I be with somebody (unintelligible) trying to say I killed somebody.
>
> MR. BROCK: No, I'm not trying to say anything. Oh, I do know that you were there, though. Your name came up from the victim.

(T 1127 - 1128)

No objection was made by defense counsel at that time. Subsequently, defense counsel objected to the admission of statements saying that, "I think at this point, because they know that there is an hour and a half statement from a codefendant who is not in this case, they are going to draw an improper inference from the fact that a statement is not produced and put forth in the courtroom. And it is also in violation of our client's Sixth Amendment Constitutional Rights." (T 1165) The trial court denied the motion for a mistrial and implicitly found that an objection should have been made when the statement was played to the jury. (T 1165 - 1167)

The failure to make a contemporaneous objection bars this claim for review. Furthermore, even if it was error to admit it, the error was clearly harmless. The reference did not show that Delph in any way implicated John Landry in the commission of the crime or otherwise provided any prejudicial information. And, contrary to appellant's assertion, Brock was available for examination on the taking of Delph's statement.

Appellant also objects that there was no proffer of the tapes by the state before it was played for the jury. As the trial court stated upon admission of the statements, if defense counsel had made a discovery request, he would have been given these taped statements. Defense counsel's decision to forego discovery prior to trial, does not give him the right to preclude the admission of evidence. (T 1223, 1224) Furthermore, defense counsel apparently had a transcript of the tapes and was given the opportunity to object throughout the playing of the tapes. (T 1119 - 20, 1123, 1162) As such, no error was committed.

Appellant also complains that the trial court erroneously denied the defense's requested jury instruction that the tapes were for impeachment only. The tapes were not introduced for impeachment purposes. The tapes were offered to rebut the inference of recent fabrication suggested by defense counsel on his cross examination. Furthermore, each of the cases relied upon by appellant to support this proposition all refer to the admission of prior inconsistent statements used for impeachment purposes. These cases are clearly inapplicable to the instant case, since these were not inconsistent statements, but to the contrary were consistent statements and not used for impeachment. The admission of these tapes was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Furthermore, any error that occurred as a result of the admission of the tapes was harmless in light of the fact that John Brock, Richard Young and David Sorton all testified to essentially the same facts at trial.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY ALLOWING CHRIS HOWELL'S HEARSAY TESTIMONY.

Chris Howell was a guest at David Sorton's house at the time of the homicides. (T 1030 - 34) Howell testified that on the night of the murders that Landry and Sorton came home at 3:30 a.m.. They told Howell and Sorton's brother Billy, about the robbery-murder. Howell admitted that he was afraid to testify and was having trouble remembering because he did not want to testify against his friends. (T 1047 - 48, 66)

Appellant contends that Howell's testimony should not have been admitted because he had no independent recollection of the night and that his testimony was based solely on his reading of his prior deposition. This claim is procedurally barred. Even if this claim was subject to review, the admission of Howell's testimony was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

Prior to the admission of Howell's testimony, Landry moved to exclude any testimony that regarding statements that David Sorton made regarding the crime. Counsel conceded that any statements that Landry made would be admissible as an admission against interest. (T 982-83) The state argued that the statements of David Sorton were admissible against Landry because they were made during course of the conspiracy. (T 983-84) The court denied Landry's motion. (T 984) The state then presented the testimony of Richard Young. (T 985) Subsequently, when

Howell was put on the stand, Landry did not renew his objection nor did he object to the testimony based on the use of the deposition. As this Court has repeatedly held even where a prior motion in limine is denied, the failure to object at the time the challenged evidence is introduced waives the issue for appellate review. Lindsey v. State, 636 So. 2d 1327 (Fla.), cert. denied 115 S. Ct. 444 (1994), Lawrence v. State, 614 So. 2d 1092 (Fla.), cert. denied 114 S. Ct. 107 (1993). Because Landry failed to object to this testimony when given, and on the ground now argued, he failed to preserve this issue for review.

Even if this claim was properly before this Court, it is without merit. A review of Howell's testimony clearly shows that Howell was reluctant to testify and that he was attempting to avoid answering the questions. Nevertheless, Howell did specifically remember the evening and could attribute certain portions of the conversation to John Landry. Howell testified that it was about 3:00 or 3:30 when David Sorton and John Landry got to David's house. They told him that their car was stolen and they had gotten a ride from Danny Rennolds. (T 1038, 1043) He testified that they looked liked they had walked through a pasture and that their shoes were wet. (T 1039 - 1040) He specifically remembers that John Landry told him that they had broken into a house that night. (T 1044) He couldn't remember if Landry had actually said it, but he was told that somebody had been shot. (T 1044) He recalled that John told him the crime occurred somewhere in Muse. Howell testified that he was afraid

to testify. (T 1047) He testified that he was having a hard time recalling because he didn't want to be there. (T 1048) John told him that he had mechanical problems with the gun and that it had jammed. (T 1050) He also recalled that John had mentioned that the gun had jammed up after the shooting. (T 1050) Howell testified that David had some money in a plastic bag. They split it up at that time and David put the money somewhere outside. (T 1051) They were counting the money in David's room that night. He testified that Landry left the house after about thirty minutes. (T 1052) Based on his conversations with John and David he formed an opinion that John was in charge during the murder. (T 1054) Howell said that they called the police to report Sorton's car being stolen. (T 1055) On cross examination, Howell testified that John did most of the talking and David made a few comments. (T 1061) Howell testified that during his discussions he had with John and David that he did not gather that John was not there during the commission of the crime. (T 1066) It is the state's position that this evidence was admissible for several reasons.

First, contrary to appellant's assertion, a review of Chris Howell's testimony clearly shows that he could attribute many statements to John Landry and that he had a clear memory of the events.

Furthermore, as Howell testified, David and John were splitting up the receipts from the robbery and discussing how to cover-up the crime, any statements made during the course of that

conversation are part of the conspiracy and, therefore, admissible against the defendant. In Echols v. State, 484 So. 2d 568 (Fla. 1985) cert. denied, 479 U.S. 871 (1986), this Court reviewed a similar argument and stated:

> "Appellant next argues that it was error to admit the videotape of Dragovich's meetings with Adams and an undercover policeman wherein Dragovich confirmed that he and appellant had planned the murder in order to obtain control of the victim's estate. Appellant's point is that the murder had already been accomplished and that the statements were not in furtherance in the conspiracy to murder Vaskovich. We disagree. The videotape was relevant to the premeditated conspiracy to murder Vaskovich and corroborated other evidence showing premeditation between Dragovich and appellant to commit the murder. In Florida all relevant evidence is admissible except as provided by law. Section 90.402 Fla. Stat. (1981). Although conspiracy itself was not charged, the proof of premeditation consisted largely of proof of a conspiracy to commit murder in order to obtain control of the victim's estate. The videotape was thus admissible under Section 90.803(18)(e) Fla. Stat. (1981)."

Echols v. State, 44 So. 2d at 573.

Additionally, these statements were admissible under Section 90.801(2)(b) which provides that a statement is not hearsay if a declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, the statement is consistent with his testimony and is offered to rebut an expressed or implied charge against him of improper influence, motive, or recent fabrication. See, also Rodriguez v. State, 609 So. 2d 493, 500 (Fla. 1992). David Sorton testified at trial,

was subject to cross examination, the testimony of Chris Howell was consistent with David Sorton's, and rebutted the defense implication of recent fabrication.

And, finally, the statement was admissible based on the rule that a person's silence can constitute an admission where the circumstances and nature of the statement are such that it would be expected that the person would protest the statement even if untrue. Tresvant v. State, 396 So. 2d 793, 738 (Fla. 1981); Privett v. State, 417 So. 2d 805 (Fla. 5th DCA 1982). In Privett, supra at 806, the Court set out several factors that should be present to show that acquiescence did in fact occur. These factors include the following:

> "1. The statement must have been heard by the party claimed to have acquiesced; (2) the statement must have been understood by him; (3) the subject matter of the statement is within the knowledge of the person; (4) there were no physical of emotional impediments to the person responding; (5) the personal makeup of the speaker or his relationship to the party or even are not such as to make it unreasonable to expect a denial; (6) the statement itself must be such as would, if untrue, call for a denial under the circumstances."

Id. at 806

After considering the foregoing, the court in Privett, held that:

> "In this case the testimony was clear that the defendant Privett was present and heard extensive discussions of bank robberies and his participation in them. No claim of physical impediment is raised, and the statements implicating Privett in bank robberies certainly seem to be ones, if

> untrue, would call for a denial. Clearly, an admission by acquiescence can be seen by these repeated statements made in Privett's presence. Without any objection by him, and, indeed, the statements of his own tending to show the truth of the conversations. Here, the statements were admissible against Privett via §90.803(18)(b), and were properly allowed in by the trial court." Privett v. State, at 807.

As the statements by David Sorton were made in John Landry's presence and John Landry not only acquiesced to the statements, but generally affirmed and led the conversation, the statements clearly do not constitute hearsay and were admissible against the defendant.

Assuming arguendo, it was error for the trial court to admit Chris Howell's statement, error if any was harmless in the instant case where David Sorton testified and confirmed all the statements made by Chris Howell.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE PERPETUATED DEPOSITION TESTIMONY OF BALLISTICS EXPERT TERRANCE LAVOY INSTEAD OF REQUIRING LIVE TESTIMONY.

Appellant complains that the trial court erred in allowing the state to introduce the perpetuated deposition testimony of ballistic expert Terrance Lavoy instead of requiring live testimony. On Friday, October 22, 1992, the state filed a motion to perpetuate the testimony of Terrance Lavoy, the FDLE firearms examiner (R 372). The motion alleged that Terrance Lavoy would not be able to attend the trial due to his plans to be out of the country. A hearing on the motion was held on Monday, October 26, 1992 (R 373, T 732) At the hearing, the state represented that Terrance Lavoy conducted the firearms examinations in this case and that he had non-refundable tickets to Mexico during the next trial cycle, which was November 2nd. The state alleged that Mr. Lavoy was a necessary witness in the state's case and asked that they be able to perpetuate his testimony prior to him leaving the country. (T 733, 736) The state asked that the deposition be scheduled for next Monday afternoon because Mr. Lavoy was apparently in Massachusetts on business the week of the hearing.

Defense counsel moved to strike the motion because he had just received the motion to perpetuate on the preceding Friday. He objected because the rules provide for a reasonable time. (T 734) Defense counsel objected to the deposition stating that a hardship had not been shown by the state. Defense counsel

further argued that Mr. Lavoy's affidavit noted that he would be unavailable on the dates on November 7 - 14th. He noted the trial was set in this case for 1:30 p.m. on the 2nd. Therefore there was a five day lapse period during which he could testify. (T 736) The state responded that she had told Mr. Lavoy at the time that, if they could get to the point where had even a partial case put on he could testify. The prosecutor told the court that her only problem was that if he was not able to get on because jury selection took too long, or they didn't have any kind of a case put on yet, she would need to have his testimony perpetuated. The court granted the motion to perpetuate, but instructed counsel that if she could take his testimony before the 7th then she could proceed with the live testimony. (T 737) Defense counsel then moved for clarification as to what county the deposition should be taken in. (T 737) The state responded that Mr. Lavoy has no problems accommodating the defense either by coming to Hendry County, Glades County, or where ever the defense wanted to set it. (T 738)

At trial, when the state sought to introduce the tape of Terrance Lavoy, Landry objected. He contended that since the state's witness was available at the beginning of the trial and the state instead decided not to call this witness until he left town, that it was now improper to seek the admission of the deposition testimony. (T 1438) The state responded as follows:

> MS. CHAPPELL: The State conducted a hearing on the motion to perpetuate testimony before this Court and we put on evidence at that

time by the prosecutor, myself, in regard to Mr. LaVoy's unavailability as well as Mr. LaVoy himself doing a sworn affidavit in regard to his unavailability.

Last week, Monday, November 2nd, Terrence LaVoy's testimony was perpetuated in the courtroom in this particular courtroom with Mr. Landry present, as well as Counsel Reiter being present. He had an opportunity to cross-examine, to observe, to object, and to make any kind of objections that he had at that time, as well as the Defendant in this case. Mr. Landry was present.

The court order was that the State should make every attempt to get Mr. LaVoy to testimony live. We heard last week from the witnesses who were Dawn Downs herself and some of the Easterlys, as far as what they recall happening on that day. On Thursday, we brought our lab analyst here in order to get them to identify the items of evidence that were picked up at the scene.

I made many attempts to contact Mr. LaVoy on Thursday and I spoke with him personally. I rearranged the evidence on Friday morning to put Mr. LaVoy on Friday. He informed me that he was testifying in front of Judge Springstead in Hernando County on a first degree murder case and that he was unavailable Friday to testify before this Court.

He was doing, I believe even at that occasion, a motion to perpetuate testimony for Judge Springstead prior to the time that he was going to leave town.

I made every effort to have Mr. LaVoy come down on Friday, which he was unavailable to do. The Defendant in this case had an opportunity to face Mr. LaVoy and he has had the opportunity as has counsel was present to object to anything on the tape that he did feel was appropriate.

And the State would ask that we be able to play that taped testimony in regard to Mr. LaVoy's motion to perpetuate testimony.

(R 1439 - 1440)

Defense counsel objected, stating that other than Friday, they were in trial on Wednesday and Thursday and that she could have brought him in on any of those days. Since it was her decision to wait, the deposition testimony should not be admitted. (T 1441) Upon questioning by the trial court, the prosecutor represented that she had spoken with Mr. Lavoy on the 5th of November after she had started putting on her lab analyst. He contacted Lavoy to see if he could appear before the court on Friday to testify live, which would have been on the 6th. At that time, Lavoy notified her of a commitment to another first degree murder case in Brooksville, in front of Judge Springstead in Hernando County. She reiterated that she didn't believe that the state could have brought him in to testify prior to the 6th because none of the exhibits have been picked up by the lab analyst. None of the other witnesses knew about the exhibits. Since it wasn't until Thursday that the exhibits had been picked up in order to show them to the jury and make any since with regard to the exhibits in the case, that she could not present Lavoy's testimony. (T 1442) The trial court found that the state had taken reasonable steps to have the witness available and that since the witness was out of the country the objection was overruled (T 1445).

Appellant now contends that since the prosecutor could have had Lavoy testify on Wednesday or Thursday, of the first week, the deposition should have been excluded. As the trial court

found, However, the state made a sufficient showing of unavailability and the deposition was properly admitted.

Rule 3.190(j)(1) provides that:

> "After an indictment or information on which a defendant is to be tried is filed, the defendant or the state may apply for an order to perpetuate the testimony. The application shall be verified or supported by the affidavit through credible persons that a perspective person resides beyond the territorial jurisdiction of the court or may by unable to attend or be prevented from attending a trial or hearing, that the witness' testimony is material, and that it is necessary to take the deposition to prevent a failure of justice. The Court shall order commission to be issued to take the deposition of the witnesses to be used in the trial and that any designated books, papers, documents, or tangible objects not privileged be produced at the same time and place. If the application is made within ten days before the trial date, the court may deny the application.

The state filed the initial motion to perpetuate testimony on Thursday, October 22, 1992. The hearing was held on Monday, October 26, 1992. The deposition was taken on Monday, November 2, 1992, and trial began the next day. The state clearly showed that the witness would be unavailable as he had non-refundable tickets to Mexico. Furthermore, as the state represented, the witness was available to testify at trial on the original trial date, that it was only the rescheduling due to the writ of prohibition that produced the conflict.

Appellant further complains, that he was prejudiced by the introduction of the deposition, because Lavoy's testimony was not cumulative. No other ballistics expert testified; there was no

evidence to corroborate his testimony, and, although defense counsel cross-examined Lavoy at the deposition, he was unable to cross-examine him at trial based on the evidence after hearing the evidence introduced by the state. Landry claims, that presumably, the prosecutor knew what her witnesses would say prior to Lavoy's taped deposition, while defense counsel did not have the benefit of that information.

The state agrees that Lavoy's testimony was not cumulative and no other ballistic's expert testified. That was the reason the state represented to the court that it was necessary to tape the deposition to prevent a failure of justice. Furthermore, as appellant concedes, defense counsel was able to cross-examine Lavoy at the deposition. Landry's claim that he was prejudiced because, unlike the prosecutor, he was not privy to what the state's witnesses would say prior to Lavoy's taped deposition is also without merit. Any absence of knowledge as to what the witnesses would say was a result of Landry's decision to not engage in discovery. Furthermore, the record clearly shows that defense counsel did participate in the discovery depositions of the state's witnesses. Defense counsel Reiter participated in the deposition of state witnesses Ed Campbell, Eliberto Carmona, William McQueen, Paul Roman, David Doer, Diane Alderman, James Brownly, Amanda Foster, Daniel Reynnolds, Larry Rennolds, Michael Hensley, Sherry Passmore, Steven Grib, Mary Elizabeth Hunter, Sandra Luckey, Kennington, Evelyn Sue Bengston, Olive Easterly, Charles Jacob Easterly, Dawn Downs, Richard Alan Young, John

Brock, David Sorton, Nadine Easterly, Seldon Easterly, Belinda Hart, Max Castor, Robert J. Bronson, Beamon Rich, David Hutchinson, and Anthony John Raso. (T 817 - 1472) Thus, contrary to his assertion counsel 'presumably knew what the state's would say' prior to Lavoy's deposition

This is supported by appellant's failure to allege any information that was obtained during direct examination that he was unable to use during the cross examination of Terrance Lavoy.

The granting of the motion to perpetuate testimony and the admission of the testimony was within the trial court's discretion and appellant has failed to show an abuse of that discretion.

Assuming, arguendo, that it was error for the trial court to admit the deposition into evidence, error, if any, was harmless beyond a reasonable doubt. Both David Sorton and Richard Young testified that the defendant went into the bedroom armed with a rifle and that he participated in the shooting of the victim. Whether John Landry's bullet is actually the one that killed the victim is not relevant to the felony murder conviction. Furthermore, the testimony showed that John Landry stated that the victim grabbed for his gun, that he shot the gun and that it jammed during the shooting. (T 866, 1050) Accordingly, error, if any, was harmless beyond a reasonable doubt.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL AS TO PREMEDITATED MURDER.

Appellant contends that the trial court erred in denying his motion for judgment of acquittal as to premeditated murder because he contends that the state presented no evidence the murder of Ed Downs was premeditated. It is the state's position that when taken in the light most favorable to the state that the evidence clearly supports the denial of the motion for the judgment of acquittal as to premeditated murder.

As this Court recently held in Spencer v. State, 19 Fla. Law Weekly S 460, 461 (Fla. Sept. 21, 1994):

> "Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and may only exist for such time as will allow the accused to conscious of the act about to be committed and the probable result of that act.
>
> Asay v. State, 580 So. 2d 610, 612 (Fla.), cert. denied, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991); Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986). Whether a premeditated design to kill was formed prior to a killing is a question of fact for the jury that may be established by circumstantial evidence. 580 So. 2d at 612, 493 So. 2d at 1021. Where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. Cochran v. State, 547 So. 2d 928, 930 (1982). Moreover, the circumstantial evidence rule does not require the jury to believe the defendant's version of the facts when the state has produced conflicting evidence. Id.

Premeditation may be established by circumstantial evidence, including the nature of the weapon used, the presence or absence

of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Holton v. State, 573 So. 2d 284, 289 (Fla. 1990), cert. denied, 500 U.S. 960, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991). See also, Sochor v. State, 619 So. 2d 285 (Fla. 1993); Bedford v. State, 589 So. 2d 245 (Fla. 1991).

In a similar case, Young v. State, 579 So. 2d 721 (Fla. 1991), this Honorable Court stated:

> Young also challenges the sufficiency of the evidence to convict him of premeditated first degree murder. Young deliberately armed himself, expressed his willingness to use the shotgun, and took the shotgun with him when he exited the car at the victim's direction. Although conflicting, the jury could, and obviously did, believe the testimony that the first and last shots came from the shotgun, thereby negating the claim of self-defense. Moreover, one of Young's accomplices testified that he manually reloaded the shotgun after firing it. A firearms expert's testimony corroborated this. That expert testified that, even though it was a semiautomatic shotgun, the automatic ejector did not work and had to be manually unloaded and reloaded after each shot before it could be fired again. We find evidence of premeditation is sufficient." 579 So. 2d at 723.

The evidence in the instant case showed that John Landry armed himself with a rifle prior to entering a home and that John and Franklin, who were both armed, went into the Downs' bedroom. (T 680 - 83) David Sorton testified that he heard about four gunshots. (T 774) Sorton testified that John had a .22 pump action gun. (T 676) Young testified that John and Franklin went

into the bedroom carrying weapons and that when they came out John was carrying the .22 pump rifle. (T 863 - 865) Franklin said that John had fired first and then John's gun jammed. John said the man had jumped up and grabbed his gun. (T 866) Dr. Michael Frank Arnall, the Glades County Medical Examiner, testified that there were three gunshot wounds and one laceration found on the body of Ed Downs. (T 1595) Terrance Lavoy, FDLE ballistics expert testified that one of the bullets taken from the body was consistent with having come from a .22 caliber slide action rifle commonly referred to as a pump. (T 1508 - 12) He positively identified two other .22 long rifle caliber bullets taken from the body as fired from the Marlin semiautomatic. (T 1512 - 20) Thus, the evidence shows that atleast one of the bullets found in the victim's body came from John Landry's gun. This combined with the testimony that Franklin said that John shot first and John said that he shot his gun and then it jammed combined with the number of shots that Dawn Downs, David Sorton, and Richard Young heard, the evidence is clearly sufficient to support the jury's finding.

Additionally, it should be noted that appellant's theory of defense was that he was not present for the murder; that he had abandoned the burglary prior to the entry of the home. As this Court stated in Huff v. State, 495 So. 2d 145 (Fla. 1986); "No evidence whatsoever was introduced to support appellant's story; in fact, all the evidence adduced at trial, with the exception of appellant's testimony, pointed to his guilt. The reasonableness

of the hypothesis of innocence is a question for the jury. Williams v. State, 437 So. 2d 133 (Fla. 1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984); Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983). The jury here could probably conclude that appellant's story was untruthful and unreasonable." Id. at 150. Landry's jury obviously rejected his abandonment theory.

Furthermore, even if the trial court erred in denying the motion for judgment of acquittal, error in the instant case is harmless in light of the fact that the defendant was also found guilty of felony murder. (See Issue IX)

ISSUE IX

WHETHER APPELLANT'S SENTENCE FOR PREMEDITATED MURDER MUST BE VACATED BECAUSE THAT CONVICTION WAS MERGED INTO THE FELONY MURDER CONVICTION.

The state agrees that the conviction for felony murder and first degree premeditated murder should be merged into felony murder. Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991).

ISSUE X

WHETHER LANDRY'S SENTENCE MUST BE REDUCED TO LIFE BECAUSE THE TRIAL COURT DID NOT FILE A WRITTEN SENTENCING ORDER.

On December 15, 1992, the Honorable Jay Rosman, Circuit Judge in the Twentieth Judicial Circuit orally articulated and the court reporter transcribed the following findings:

> THE COURT: I'm prepared to pronounce sentence at this time.
>
> We all sat through quite a bit of testimony concerning the facts of this case and the death, the murder, of Ed Downs was a particularly heinous crime. The testimony, the evidence that we heard, was of a number of individuals prepared to burglarize, armed with weapons, dressed with ski masks, prepared to burglarize and, evidently, prepared for a loss of life.
>
> I'm not sure if there is any crime that would cause any homeowner to be more concerned for their safety than a burglary followed by a shooting in one's own bedroom. We think of a home from many different perspectives. When we think of a home, we think of our families, we think of our marriages, we think of our children. We think of the safety and security that comes with one's home.
>
> We often hear that one's home is one's castle, to be protected from the weather, from others. We think of a home in terms of families, and families that would start, begin there, families that share the home that come together often.
>
> And on that night, John Landry, you destroyed a home and you destroyed a family. The Downs were sleeping that night in their bedroom, and if we think of a home as a place for security and safety, no other room in the house has the sanctity and protection of one's bedroom, the privacy of one's bedroom. The Downs' were simply sleeping that night.

From the beginning of this trial until the very end, the one thing I've not seen from you is any remorse, no feeling at all. You had an opportunity and you presented your version to the jury, that is, you did not partake of the incident, the actual shooting. And the jury rejected that version, a version that came in contradiction to the testimony of a correctional officer who had overheard you and presented an admission concerning the crime; in the testimony of Dawn Downs who heard your name and discussions in the bedroom at the time; and contradiction to the testimony of others who testified as to your taking part in the actual murder and the actual shooting of Edward Downs.

During the second phase, we heard testimony concerning Ed Downs and the type of person that he was, and no one in this Court, nor anyone present before me, knew Ed Downs, but apparently he was a person who gave a lot of himself to others.

It's apparent that you took away more than a person's life. Also, this individual was a husband; and Dawn Downs has lost a husband. She has testified as to her loss as well as to Tim Downs' loss of a father and friend and also the loss of a grandfather.

Various roles of an individual are often not considered, but Edward Downs was more than just -- more than just a person. He had various roles that had been taken from him and the impact has been seen by his family and also by friends.

Dawn Downs has presented a scenario to us, and we are fortunate that she was not also killed, and perhaps in a matter of a few seconds, a matter of reconsideration, and she would also have been shot and killed.

The security of Dawn Downs has also been impacted. We hear of how Ed Downs was everything to her, and yet she has not lost only a husband, but she has also lost any type of security and the feelings of being safe in her own bedroom. She has testified

that she no longer sleeps with a husband; she sleeps with a gun now because of her loss of safety and security.

Based upon the presentence investigation report and hearing, you testified at trial, it was apparent, and it is apparent to this Court, that you were the ringleader. You were the mastermind of this burglary, and you, in fact, shot Ed Downs and you did kill him, fatal wounds through the heart.

I've considered the aggravating circumstances and the mitigating circumstances that were presented to the jury, and considered those separately and apart from the jury's decision. There has not been a day since the jury's recommendation that this Court has not reflected at sometime during the day as to the ultimate decision to be made. It is not without that certain introspection that this Court proceeds as it does.

In consideration, this Court has considered the jury's verdict and their recommendation. The aggravating circumstances, either one or independently, or together, have been considered; that is, a felony was committed during this perpetration, and also that the felony was committed for pecuniary gain.

With respect to any mitigating circumstances, the lack of significant criminal history was presented to the jury along with the age of the defendant. The jury as a whole rejected the mitigating circumstances and considered the aggravating circumstances to outweigh the mitigating circumstances.

With respect to the no significant criminal history, this was rebutted by the State.

The presentence investigation shows that there have been eight prior felony convictions, four of which have been burglaries of homes. As a juvenile, you had one previous felony also.

With respect to your age, you are 21 years old. You are not a minor, and while the Court has considered this as a mitigating

> circumstance, the Court finds that the aggravating circumstances of this case outweigh the mitigating circumstances. I've considered the aggravating circumstances, and find there are insufficient mitigating circumstances to outweigh the aggravating circumstances in this case.
>
> There being no legal cause shown why the judgment and sentence of law should not be pronounced, the Court adjudges you guilty of the crime of first-degree murder. It is the sentence of this Court that you be taken into the custody of the Department of Corrections, and there at an appointed place and time, be put to death. May God have mercy on your soul.
>
> You have an automatic appeal to the Supreme Court of the State of Florida, and the judgment of guilt, and the sentence of this Court has been imposed.

(R 799 - 804)

Appellant contends that the line of cases beginning with Van Royal v. State, 497 So.2d 625 (Fla. 1986) and Grossman v. State, 525 So. 2d 833 (Fla. 1988) requires that the lower court's failure to file a separate written sentencing order requires reduction of the sentence from death to life imprisonment. See also Stewart v. State, 549 So. 2d 171 (Fla. 1989); Christopher v. State, 583 So. 2d 642 (Fla. 1991) Bouie v. State, 559 So. 2d 1113 (Fla. 1990); Hernandez v. State, 621 So. 2d 1353 (Fla. 1993).

Appellee submits, respectfully that the Van Royal progeny are erroneous and the Court should now recede from them.

Initially, the state would note that in fact there has been a writing. Circuit Judge Rosman orally articulated his findings pertaining to aggravating and mitigating circumstances which have

pertaining to aggravating and mitigating circumstances which have been transcribed by the court reporter and are in writing subject to appellate review at R 799 - 804, as contemplated by the statute. The Florida Statute defines writing as follows:

> "1.01. Definitions -- In construing these statutes and each and every word, phrase or part hereof, where the context will permit:
>
> * * *
>
> (4) The word 'writing' includes handwriting, printing, <u>typewriting and all other methods and means of forming letters and characters upon paper, stone, wood, or other materials</u>."

(emphasis supplied)

If the legislature deems the formulation of letters upon stone or word or other materials sufficient to satisfy a writing, it is incomprehensible that this Court would conclude that a transcript reciting factual findings made a part of the official appellate record is inadequate. See <u>United States v. Copley</u>, 978 F.2d 829, 831 (4th Cir. 1993) (a transcribed oral finding can serve as a "written statement" for due process purposes when the transcript and record complied before the trial judge enable the reviewing court to determine the basis of the trial court's decision); <u>United States v. Barth</u>, 899 F.2d 199, 201 (2nd Cir. 1990) (we can see no reason why transcribed oral findings cannot satisfy the written statement requirement of Morrissey, at least where as here, we possess a record that is sufficiently complete to allow the parties and us to determine the evidence relied on and the reasons for revoking probation).

We are told with increasing frequency that the jury is a co-sentencer and that their recommendation must be accorded great weight. See Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Indeed, this Court has ruled that the state constitutional double jeopardy clause precludes resentencing a defendant to death if the jury recommends life imprisonment and this Court finds that the jury recommendation was reasonable and other error requires retrial. Wright v. State, 586 So. 2d 1024 (Fla. 1991). And yet the Van Royal -- Grossman line of cases would render a nullity the considered judgment of both jury and judge which as here have concluded that death is the appropriate sanction, solely because the judge has not performed the repetitive gesture of filing another paper which identically recites that faithfully recorded by the court reporter. Such a result constitutes an arbitrary irrational, and capricious elevation of form over substance and is in the words of Barth, supra, at 202, "unduly formalistic".

Appellee is cognizant that many of the concerns mentioned in this Court's decisions on this point are legitimate and real. In Bouie v. State, supra, for example, the Court correctly reduced the sentence from death to life imprisonment where the sentencing order said virtually nothing about what specific aggravating or mitigating factors had been found by the trial judge:

> "There is no indication of which aggravating circumstances and which mitigating circumstances, if any, were deemed applicable."

(559 So. 2d at 1116)

In Hernandez v. State, 621 So. 2d 1353 (Fla. 1993), the trial court failed to provide either oral or written reasons in support of death sentence until twelve days after oral pronouncement of sentence. This Court reiterated its previously stated concerns:

> "The purpose of this requirement is to ensure that each death sentence handed down in Florida results from a thoughtful, deliberate, and knowledgeable weighing by the trial judge of all aggravating and mitigating circumstances surrounding both the criminal and the crime, as dictated by the United States Supreme Court and our own state constitution."

(621 So. 2d at 1357)

The concerns expressed in Hernandez and in Christopher, supra, have been satisfied in the instant case; the trial court contemporaneously articulated his findings of aggravation and mitigation without resorting to belated rationalization "after the fact" which runs the risk that the "sentence was not the result of a weighing process or the 'reasoned judgment' of the sentencing process that the statute and due process mandate". Christopher, quoting Van Royal v. State, 497 So. 2d 625, at 630 (Fla. 1986) (Ehrlich, J., concurring).[7]

Since the legitimate concerns of contemporaneous recording of facts demonstrating a reasoned judgment without the risk of

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[7] The instant case is unlike Van Royal where the trial court overrode a jury life recommendation and made no findings in the record at all -- oral or written.

post-hoc rationalization of forgotten reasoning have been satisfied sub judice the court should recede from the language in Grossman requiring a separate written order filed concurrently with the oral pronouncement of sentence.

The Court should acknowledge that the contemporary oral articulation of aggravating and mitigating findings memorialized by the court report's transcribing sufficiently satisfies the writing requirement and makes meaningful appellate review possible and that conforms to statutory and constitutional requirements. See also Cave v. State, 445 So. 2d 341 (Fla. 1984).

ISSUE XI

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATE.

Appellant contends that his sentence of death was not proportionate in that it was merely an impulsive killing during the course of a felony. It is the state's position that the death sentence was properly imposed in the instant case.

Proportionality is not a recounting of aggravating versus mitigating but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). A review of similar cases shows that the sentence in the instant case was proportionate. Davis v. State, 19 Fla. Law Weekly S 55 (Fla. Feb. 2, 1995) (death sentence proportionate for murder of 73 year old woman during burglary where the trial court found two aggravating factors and little mitigation); Melton v. State, 638 So. 2d 927 (Fla. 1994) (a sentence found proportionate where defendant convicted of a fatal shooting during a robbery where there were two aggravating factors and little mitigation); Jent v. State, 579 So. 2d 721 (Fla. 1991) (sentence proportionate for murder committed during the course of burglary where court affirmed two aggravating factors balanced against little mitigation); Brown v. State, 565 So. 2d 304 (Fla. 1990) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators). Accordingly, the trial court properly imposed the sentence in the instant case.

Appellant also contends that disparity in sentencing further renders this sentence disproportionate. Each of Landry's codefendants all received a lesser sentence because they entered into plea agreements. Furthermore, the evidence shows that Landry was not only the shooter, but, also, was the moving force behind the crime. This Court has repeatedly held that a death sentence is not disproportionate where a less culpable codefendant receives a life sentence. Hannon v. State, 638 So. 2d 1283 (Fla. 1992); Coleman v. State, 610 So. 2d 1283 (Fla. 1992).

Similarly, appellant's argument that the trial court erred in considering during the course of a burglary and for pecuniary gain as separate aggravating factors is without merit. Brown v. State, 473 So. 2d 1260, 1267 (Fla.) cert. denied, 474 U.S. 1038 (1985).

Appellant also contends that should this Honorable Court reverse on any of the guilt phase issues that this Court should direct that a life sentence be imposed. Although the state disagrees that any of the foregoing issues warrant reversal, it is the state's position that the death sentence was properly imposed in the instant case and should be a proper consideration in the event of a new trial.

ISSUE XII

WHETHER APPELLANT MUST BE RESENTENCED FOR BURGLARY WITHIN THE SENTENCING GUIDELINES.

Appellant contends that the sentence for burglary should be reduced to the permitted range of twelve to seventeen years because the trial court did not file written reasons for the departure. Landry concedes that the scoresheet was prepared and that written reasons were provided on the scoresheet. He contends, however, that it is insufficient and untimely.

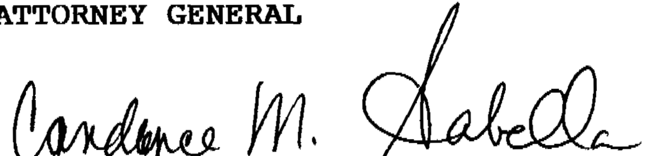
The record shows that the sentencing guidelines scoresheet was prepared and written reasons for departure were reflected on the scoresheet at the time of sentencing. Furthermore, the trial court orally pronounced that he was going to depart from the guidelines based upon the unscored capital crime. This is a sufficient basis for departing from the guidelines. See, e.g., Torres-Arboledo v. State, 524 So. 2d 403, 414 (Fla. 1988) (" . . . we find the fact that a defendant has been convicted of first-degree murder, a capital felony which cannot be scored as an additional offense at conviction may serve as a clear and convincing reason for departure"); Bedford v. State, 589 So. 2d 245, 252 (Fla. 1991). Accordingly, the sentence should be affirmed.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the decision of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 21 day of February, 1995.

OF COUNSEL FOR APPELLEE.