IN THE SUPREME COURT OF FLORIDA

VIRGINIA GAIL LARZELERE,

Appellant,

v. Case No.: 81,793

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

OTHER AUTHORITIES.....PAGE(S)

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, VIRGINIA GAIL LARZELERE, the defendant in the lower court, will be referred to in this brief as Larzelere. All references to the instant record on appeal from resentencing will be noted by the symbol "R"; and all references to the transcripts will be noted by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

The state accepts Larzelere's statement of the case and facts as reasonably accurate. Due to page limitations, the state supplements Larzelere's statement with appropriate additions in the argument section of this brief.

SUMMARY OF THE ARGUMENT

As to Issue I, the trial court did not abuse its discretion in limiting defense counsel's impeachment of Heidle, because the persons who offered reputation evidence against Heidle had known him for a short period of time and did not establish a sufficiently broad based or neutral community. As to Issue II, the trial court did not abuse its discretion in denying Larzelere's motion for a mistrial, because Palmieri's comment was inadvertent, was unintentionally elicited by the state, and was cured by the trial court's subsequent actions.

As to Issue III, the trial court correctly found that the special instructions requested by Larzelere in the guilt phase were amply covered by the standard jury instructions. As to Issue IV, the trial court did not abuse its discretion in admitting selected portions of taped statements into evidence, because the portions admitted into evidence qualified under the co-conspirator exception to the hearsay rule. As to Issue V, the trial court correctly denied Larzelere's pro se motion to discharge counsel and motion for continuance, and counsel's motion to withdraw, because Larzelere intelligently waived her right to conflict-free counsel and because counsel had exhibited no ineffectiveness.

As to Issue VI, the trial court did not abuse its discretion in denying Larzelere's motion for a new trial, because it extensively investigated Juror Kelley's allegations of juror misconduct and determined that none of the conduct alleged warranted a new trial. As to Issue VII, the trial court did not abuse its discretion in admitting the bullets alleged to have been fired at the Larzelere home during a drive by shooting, as they were relevant to the state's theory of the case. As to Issue VIII, the trial court properly found that the instant murder was committed in a cold, calculated and premeditated manner and was committed for financial gain, and did not improperly double these aggravating circumstances.

As to Issue IX, the trial court properly denied Larzelere's motion to dismiss the indictment, because the state engaged in no illegal activity in securing a recording of an in-jail conversation between Larzelere and Jason Larzelere. As to Issue X, the trial court did not abuse its discretion in excluding the testimony of Means in the defense case, because the "evidence" of the taped, unintelligible conversation between Larzelere and Jason Larzelere was irrelevant and immaterial. As to Issue XI, the trial court did not abuse its discretion in denying Larzelere's motion for a change of venue because she failed to establish prejudice as a result of the pretrial publicity.

As to Issue XII, the trial court properly denied Larzelere's motion for a judgment of acquittal, because the state proved beyond a reasonable doubt that Larzelere was fully responsible for her husband's death under a principal theory. As to Issue XIII, the trial court did not abuse its discretion in admitting the statements of Jason Larzelere, because they were admissible as statements of a co-conspirator. As to Issue XIV, Larzelere failed to preserve in the trial most of her claims that Florida's death penalty is unconstitutional; those claims which were preserved are clearly without merit.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING LARZELERE'S IMPEACHMENT OF STATE WITNESS HEIDLE.

The decision to exclude evidence is committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in limiting defense counsel's impeachment of Heidle, because the persons who offered reputation evidence against Heidle had known him for a short period of time and did not establish a sufficiently broad based or neutral community.

On proffer, Karen Walker testified that she knew Heidle only through seeing him at three gay bars in Orlando from February or March through April 1991 (T 5586, 5588). The trial court did not permit Walker to testify regarding Heidle's veracity "due to the small number of people described by this witness, through whom she had contact . . . together with the relatively short period testified to that she has known the witnesses, together with the limited cross section or segment of the community to wit, three gay bars . . . ." (T 5590-91).

On proffer, Glen Pace testified that he socialized with Heidle at least three times a week in gay bars during December 1990 through April 1991 (T 5627, 5630). Pace stated that he based his opinion on Heidle's veracity on conversations he had with several people who "hung out" with Heidle in the gay bars (T 5638). The trial court prohibited Pace from testifying about Heidle's veracity, because "[t]he segment of the community or cross-section of the community testified to by this witness . . . is not sufficiently broad-based nor neutral enough or generalized enough to be classed as a community . . . ." (T 5651-52). The court also commented on "the relatively short period of time that this witness has testified to as to having known Steven Heidle, the small number of people this witness has testified to as having supplied him with the information . . . ." and found that Pace's testimony was largely "personal opinion and rumor." (T 5652).

Larzelere would have this Court believe that the trial court's alleged error on this point lies in its failure to recognize that Heidle's "community," for the purposes of testimony regarding veracity, could be comprised of bar friends. A complete review of the record on this point reveals that the trial court never said that bar friends could not a "community" make, but instead focused on the small number of people in this "community" and the short

period of time within which they knew and socialized with Heidle. Case law supports the trial court's determination.

In Wisinski v. State, 508 So. 2d 504 (Fla. 4th DCA 1987), Wisinski argued that Haspell should have been permitted to testify as to his reputation for veracity. Haspell owned a shop near Wisinski's residence and had known Wisinski for about a year prior to Wisinski's arrest, and based his opinion on three or four people who had worked with Wisinski or for Haspell. The Fourth District observed that the "community" could be a working environment, but quoted the following dispositive excerpt from **Florida Evidence:** "The reputation must be based on discussions among a broad group of people so that it accurately reflects the person's character, rather than the biased opinions or comments of two or three persons or of a narrow segment of the community . . . ." **C. W. Ehrhardt, Florida Evidence,** Methods of Proving Character -- Reputation Testimony § 405.1 at 197 (1995 ed.).

The Fourth District concluded:

> In the present case, the reputation testimony was based on three or four people who worked with [Wisinski] or for Mr. Haspell. Given the small number of people, the limited cross-section, and the relatively short period of time Haspell had known [Wisinski], we do not believe the trial judge abused his discretion in refusing to admit the testimony.

Wisinski, 508 So. 2d at 506. Compare Parker v. State, 458 So. 2d 750, 754 (Fla. 1984) ("the criminal justice system is [n]either neutral enough [n]or generalized enough to be classed as a community"); Fike v. State, 455 So. 2d 628, 629 (Fla. 5th DCA 1984) (reputation evidence must not be confined to testimony of particular employees, but must "retain the quality of being 'general'"; thus, "the legal community" of only criminal defense attorneys and not the bar as a whole did not fairly represent a "working community"). See also Rogers v. State, 511 So. 2d 526, 530 (Fla. 1987) (challenge to reputation must be based on more than personal opinion, fleeting encounter, or rumor); Todorovich v. Wolfner, 555 So. 2d 372, 373 (Fla. 3d DCA 1989) (same); Gamble v. State, 492 So. 2d 1132, 1134 (Fla. 5th DCA 1986) ("One learns of another's general reputation in a community over a period of time and through miscellaneous contacts with many people.") (emphasis supplied).

For the same reasons, the trial court in this case properly limited Walker and Pace's testimony. Both witnesses based their testimony on a very limited interaction with Heidle -- a two to four month period, which consisted strictly of socializing at gay bars. The community of persons who allegedly knew that Heidle reputation was that of a liar was very small: According to

Walker, the community consisted of three persons (T 5586); according to Pace, the community consisted of seven people, the names of whom Pace was unsure (T 5638). In a different context, the Third District cautioned against the expansive application of "community" as argued by Larzelere:

> The rule . . . is not one to be applied, relative to one's "working community," in too restrictive a manner so as to confine reputation testimony to particular co-employees. In other words, where there are close ties . . . between the reputation witnesses and the matter in controversy, testimony relied on to ascertain the nature of one's "general" reputation in his community or neighborhood would be reduced to testimony rendered not from co-employees in the more normally understood meaning of that term, but rather from very specifically placed co-employees, testifying not about someone's "general" reputation, but rather about that reputation as viewed under the predominant cloud of the specific controversy.

Florida East Coast Railway Co. v. Hunt, 322 So. 2d 68, 70 (Fla. 3d DCA 1975).

In the event this Court finds that the trial court erred on this point, any such error was harmless. Defense counsel conducted an extensive (approximately 600 pages of transcript) cross examination of Heidle, and impeached him with evidence that he had an illegal identification card for drinking alcohol (T 3280); that he had a pending DUI charge (T 3280); that he had received immunity for his testimony (T

3287-88); that he had committed perjury (T 3332-34, 3356-57); and that he had lied to police (T 3385-87, 3389, 3392-93, 3429-30, 3436-37, 3443, 3450, 3847-48). Because it is clear beyond a reasonable doubt that the restriction of Walker and Pace's testimony would not have affected the jury's verdict, any such error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING LARZELERE'S MOTION FOR A MISTRIAL, WHICH WAS BASED ON PALMIERI'S STATEMENT THAT JASON LARZELERE HAD USED COCAINE IN HER PRESENCE.

A motion for a mistrial is "directed solely to the sound discretion of the trial court and should be granted only when it is necessary to ensure that the defendant receives a fair trial." Marek v. State, 492 So. 2d 1055, 1057 (Fla. 1986). Absent a showing of abuse of discretion, the trial court's decision should not be disturbed. Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). The trial court did not abuse its discretion in denying Larzelere's motion for a mistrial, because Palmieri's comment was inadvertent, was unintentionally elicited by the state, and was cured by the trial court's subsequent actions.

The state first offered Palmieri's testimony on proffer (T 4066-119). Prior to her direct testimony, the state instructed Palmieri not to mention Jason Larzelere's alleged homosexuality and drug use/dealing (T 4070-72). On direct examination, the state asked Palmieri if Jason had taken any special actions in preparing for his stepfather's funeral. Palmieri recounted the following:

> There was some kind of acne medication, ointment that he used at night. He had taken some of it and placed it on his face and rubbed it in. And he came in the room and asked us if he looked too pale. And I said "yes" and Virginia said "no," that he looked fine; that's the way he was supposed to look.
>
> He made a distinction about switching his ring on his finger and taking the chain bracelet he had off his arm. And she told him that he was supposed to be sick and he was supposed to act like an invalid. And as I was getting dressed downstairs, Jason proceeded to come downstairs and do coke in the tanning room in front of me.

(T 4197).

Defense counsel moved for a mistrial, arguing that Palmieri's cocaine reference had violated the trial court's order granting the defense motion in limine (T 4198). The state responded that it had advised Palmieri prior to her testimony not to refer to drug usage, that Palmieri's response had not been elicited by the state, and that the

limited reference was in no way "suggestive of Virginia's guilt" (T 4198-99). The trial court took the defense motion for a mistrial under advisement, "consider[ed] it as if there were an objection," sustained the objection, struck the reference, and instructed the jury to disregard it (T 4200-01):

> Ladies and gentlemen of the jury, the court has stricken the response of this witness just made to the extent that it refers to the use of coke in her presence or alleged use of coke in her presence by Jason. From the record it has now been stricken, and you are instructed to disregard it entirely and not consider it in any way in your consideration of any of the issues of this case.
>
> Can you follow that instruction by the court that I've now given to you to disregard it? Answer audibly.
>
> (All jurors respond affirmatively.)
>
> Is there anyone who cannot disregard it? If so, raise your hand.
>
> Let the record reflect that no hand is raised.
>
> You may proceed.

(T 4201).

Larzelere cites a number of cases which stand for the proposition that a defendant's character cannot be assailed unless she has introduced the issue of character first. This argument overlooks the fact that the cocaine reference

had nothing to do with Virginia Larzelere, but involved only her son Jason. Section 90.404, Florida Statutes (1991), specifically enunciates the manner in which the character of the accused, the victim, or a witness may be admitted. Jason Larzelere is not the defendant, the victim, or a witness in this case.

Larzelere next contends that, because the state's theory was that she so dominated her son that she manipulated him into killing his stepfather, any reference to collateral crimes committed by Jason necessarily implicated her through "guilt by association." Initial Brief at 42-43. As supportive of this contention, Larzelere cites to Fulton v. State, 335 So. 2d 280 (Fla. 1976). In Fulton, an armed Fulton approached an armed Banks, the victim; Fulton grabbed Banks; a struggle ensued; and Banks was killed. Fulton claimed self defense, and relied upon the testimony of Bartee to establish that Banks had a violent reputation in the community. On cross examination of Bartee, the state established that Bartee was charged with second degree murder, "an entirely unrelated offense." Id. at 282. This Court found error in the admission of this evidence, and rejected the state's harmless error argument, because Bartee's testimony was the heart of Fulton's self defense claim and because of

> the possibility of a "spill-over" effect. The jury's perception of the defendant might have been colored by the knowledge of a friend's involvement in a collateral matter. The danger of "guilt by association" is a real one, which ought to be mini[]mized whenever possible. The fact that the defendant and the witness were each charged with second degree murder, although the crimes were unrelated, enhances the danger of a possible "spill-over" effect.

Id. at 285 (citation omitted).

It is immediately apparent that the instant issue does not involve the Fulton scenario. First, the state did not elicit Palmieri's testimony deliberately. Second, the crimes with which Larzelere was charged and Jason's alleged cocaine use were not entirely unrelated. As a full review of Palmieri's testimony shows, her inadvertent reference to Jason's drug use was part of her much lengthier description of Larzelere's manipulation of Jason's behavior even after the victim's murder.

In any event, any error on this point was harmless. The trial court took curative steps after Palmieri's testimony on this point which were sufficient to dissipate any prejudicial effects of this testimony, and all jurors indicated that they would disregard the drug reference. Marek, 492 So. 2d at 1057; Ferguson v. State, 417 So. 2d 639, 641-42 (Fla. 1982); Salvatore v. State, 366 So. 2d 745,

751 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). Beyond a reasonable doubt, this reference did not affect the jury's verdict based on its limited nature and the trial court's curative instructions. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue III

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY IN THE GUILT PHASE OF LARZELERE'S TRIAL.

Despite her concession that the language of most of the proposed instructions are covered by the standard jury instructions, Larzelere claims error because the standard instructions did not cover the areas "as thoroughly." Initial Brief at 45. The trial court correctly found that the special instructions requested in this case were amply covered by the standard instructions.

The defense propounded the following special jury instructions:

> Interest in Income
>
> In evaluating credibility of witnesses, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his own interests. Therefore, if you find that any witness whose testimony you are considering may have

an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness' interest has affected or colored his or her testimony.

* * * *

Witnesses and Uncontradicted Testimony

The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. By the same token, you do not have to accept the testimony of any witness who has not been contradicted or impeached, if you find the witness not to be credible. You also have to decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing upon your own common sense and personal experience. (After examining all the evidence, you may decide that party calling the most witnesses has not persuaded you because you do not believe its witnesses, or because you do believe the fewer witnesses called by the other side.)

In a moment, I will discuss the criteria for evaluating credibility; for the moment, however, you should keep in mind that the burden of proof is always on the Government and the Defendant is not required to call any witnesses or offer any evidence, since [s]he is presumed to be innocent.

* * * *

Witness Credibility
Law Enforcement Witness

You have heard the testimony of a law enforcement official. The fact that a witness may be employed by the Federal Government as a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

* * * *

Unindicted Co-conspirator as Government Witness

The Government had called as witnesses people who are named by the prosecution as co-conspirators, but who were not charged as defendants.

For this reason, you should exercise caution in evaluating their testimony and scrutinize it with great care. You should consider whether they have an interest in the case and whether they have a motive to testify falsely. In other words, ask yourselves whether they have a stake in the outcome of this trial. As I have indicated, their testimony may be accepted by you if you believe it to be true and it is up to you, the jury to decide what weight, if any, to give to the testimony of these unindicted co-conspirators.

* * * *

Accomplices Called by the Government

You have heard witnesses who testified that they were actually involved in planning and carrying out the crime(s) charged in the Indictment. There has been a great deal said about these so-called accomplice witnesses in the summations of counsel and whether or not you should believe them.

The Government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others.

For those reasons, the law allows the use of accomplice testimony. Indeed, it is the law in Federal Courts that the testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony established guilt beyond a reasonable doubt.

However, it is also the case that accomplice testimony is of such [a] nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe. I have given you some general considerations on credibility and I will not repeat them all here. Nor will I repeat all of the arguments made on both sides. However, let me say a few things that you may want to consider during your deliberations on the subject of accomplices.

You should ask yourselves whether these so-called accomplices would benefit more by lying, or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying

falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth? Did this motivation color his testimony?

In s[um], you should look at all of the evidence in deciding what credence and what weight, if any, you will want to give to the accomplice witness[es].

* * * *

Circumstantial Evidence

Circumstantial evidence is legal evidence and a crime or any fact to be proved may be proved by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime or fact, as it positive evidence. Its value is dependent upon its conclusive nature and tendency.

Circumstantial evidence is governed by the following rules:

1. The circumstances themselves must be proved beyond a reasonable doubt.

2. The circumstances must be consistent with guilt and inconsistent with innocence.

3. The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of the defendant's guilt or the fact to be proved.

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence.

> Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.

(R 406-12).

The trial court denied the first proposed instruction, finding "that the standard instructions, specifically 4 and 6, in the weighing the evidence standards, 2.04, do ad[e]quately cover what is requested . . . . I also agree that the accomplice instruction arguable can also be considered as one that speaks to the same matters that would be covered in this requested instruction 1." (T 5733). Regarding the second proposed instruction, the trial court found that

> the standard adequately covers it, specifically as pointed out by the State.
>
> The fact that the standard advises the jury that [the] defendant doesn't have to prove anything, the defendant would not have to call any witnesses.
>
> Likewise, that they would have the right to disregard the testimony of any witnesses or all or any portion of the testimony of any witness, and that they should likewise apply their common sense.
>
> I think that the overall [e]ffect of the standard in those areas covers what, in fact, is the subject of the request. And to give the request would be over emphasizing an area that the Supreme Court has chosen to emphasize and weigh in the language that they have already so chosen.

(T 5734-35).

The state objected that Larzelere's third proposed instruction was inappropriate because there should be no different standard for just for a law enforcement officer: "If you were to adopt this rationale, then we could just do a special instruction for every type of witness there is . . . ." (T 5736). The trial court denied it (R 5736). Larzelere withdrew her fourth proposed instruction (R 5737).

Regarding the fifth proposed jury instruction, the trial court found that "the accomplice instruction in the standards which will be given, 2.4B, does adequately cover that." (T 5738). The trial court also declined to give Larzelere's sixth proposed instruction because the Florida "Supreme Court chose to delete it [from the standard jury instructions]. Apparently in their wisdom, they had found that it's unnecessary or perhaps even better left out. And I'm going to go by their choice in that regard, and deny the request for circumstantial evidence instruction." (T 5740).

In 1981, this Court eliminated the circumstantial evidence instruction from the standard jury instructions, finding it

> unnecessary. The special treatment afforded circumstantial evidence has previously been eliminated in our civil standard jury instructions and in the federal courts. The Criminal Law

> Section's criticism of this deletion rests upon the assumption that an instruction on reasonable doubt is inadequate and that an accompanying instruction on circumstantial evidence is necessary. The United States Supreme Court has not only rejected this view but has gone even further, stating:
>
> > [T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. . . .
>
> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case. However, the giving of the proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instruction on circumstantial evidence unnecessary.

In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 595 (Fla. 1981). Despite the elimination of the instruction, this Court affirmed the discretion of trial courts in providing the instruction. Larzelere can show no abuse of discretion by the trial court's denial of her request for this instruction, as she received the reasonable doubt and burden of proof instructions (R 423).

Further, Larzelere's requested instruction regarding the police officers is amply covered by the instructions on

weighing the evidence and expert witnesses read by the trial court (R 424-25). "After reading this record and comparing the requested instructions with those actually given," this Court should "agree with the state that the standard instructions adequately apprised the jury as to the law and the evidence and that the requested instructions would only have engendered confusion." Hansbrough v. State, 509 So. 2d 1081, 1085 (Fla. 1987).

Issue IV

WHETHER THE TRIAL COURT PROPERLY ADMITTED SELECTED PORTIONS OF TAPED STATEMENTS.

The decision to admit evidence is committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in admitting selected portions of taped statements, because the portions admitted into evidence qualified under the co-conspirator exception to the hearsay rule.

The state sought to introduce the taped statement of Jason Larzelere strictly as "an exception to [the] hearsay [rule] . . . made by the co-conspirator, Jason Larzelere,

during the course of the conspiracy . . . made in furtherance of the conspiracy" (T 4473). The state specified that it only wished to introduce certain portions of the statement because "other portions . . . [were] not relevant and other portions . . . [were] hearsay in that they [were] not necessarily stated for conspiratorial purpose[s]." (T 4474-75). Defense counsel admitted that he sought the entirety of the tapes because "it was part of their evidence." (T 4623). The trial court ruled:

> I don't believe that the state in their case should present your defense or include in a taped statement that portion that might in fact be inculpatory. If they choose to introduce a portion that they deem inculpatory, even if that means that you have to introduce in your case in chief something that you might not have had to had the state chosen or conceived it, introduce[] the whole thing, I'm ruling that they do not have to. And whether it be as to Jason's statement, first of all, there's an additional ground as to why I am not going to allow additional portions of Jason['s].
>
> The portion that I am allowing is based on the co-conspirator exception, and I'm piecing out that portion that they are tendering. And anything else that you wish to tender if you want to tender it under some exception or some argument, you can in your case in chief too.
>
> Now, as to Virginia's, and I am repeating myself that the same reason applies. If you want to introduce another portion of Virginia's that they should not choose to introduce, then you can. And I think that hopefully resolves the dilemma.

(T 4616).

Later, defense counsel again objected to the admission of statements by Jason Larzelere without the entire tape being played (T 5067). The trial court held the statements admissible in the form of excerpts:

> The Court finds there has been put into evidence the existence of a conspiracy between Jason Larzelere and Virginia Larzelere through the testimony and the statements and that there is substantial evidence of existence of conspiracy. And also that the Court finds that these statements are during the existence of and in the furtherance of conspiracy.
>
> Now, does the defense in light of that ruling request that the cautionary instruction previously read with relation to other co-conspirator statements be read at this time?

(T 5070). Defense counsel requested the cautionary instruction, which the trial court provided to the jury (T 5070-72).

Defense counsel also objected to the playing of portions of a tape involving a phone conversation with Larzelere (T 5083). The trial court overruled the objection, but did "not eliminat[e] the right of the defense to come back and introduce the remaining portion of what the state doesn't seek to introduce at this time." (T 5087).

The record makes plain that the trial court in no way precluded Larzelere from introducing in her case in chief those portions of the statements not offered by the state in its case. Instead, the court held only that the state did not have to introduce those portions of the statements which were not relevant to the stated theory of admissibility.

In any event, under the rule of completeness as codified in **Fla. Stat. §** 90.108 (1993), the portions of the tapes not played by the state were not automatically admissible when requested by defense counsel. Section 90.108

> requires the party introducing the evidence to also "introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously." Section 90.108 grants wide discretion to the trial judge in making the determination.
>
> * * * *
>
> The second limitation under the rule of completeness relates to whether the evidence admitted under this section must also be admissible under other evidentiary rules. In other words, the question is whether otherwise inadmissible hearsay is admissible under section 90.108. [While t]here is no agreement among the authorities on this question, . . . it seems undesirable to adopt a strict rule either that evidence offered under the rule of completeness must be otherwise admissible or that otherwise inadmissible evidence is automatically admissible. A trial judge should be very hesitant to admit otherwise inadmissible evidence under

> section 90.108, but should have the discretion to do so if "fairness" demands. The general unreliability of inadmissible evidence should be one of the court's consideration in determining whether fairness requires admission.

C. W. Ehrhardt, Florida Evidence Related Writings, § 108.1 at 35-37 (1995 ed.).

Larzelere can show no abuse of discretion by the trial court, as it fully complied with the evidence code and did not preclude Larzelere from introducing those portions not sought by the state in her own case in chief. See Mulford v. State, 416 So. 2d 1199, 1201 (Fla. 4th DCA 1982) (section 90.108 does not require the admission of an entire letter, as the deleted portion did not explain or rebut the part of letter offered); United States v. Marin, 669 F. 2d 73, 84 (2d Cir. 1982) (same).

If this Court finds that the trial court erred in failing to admit the tapes in their entirety, any such error was harmless. Larzelere did not state below, and does not delineate in her initial brief, what the excluded portions of the statements would have revealed. Despite the trial court's request for a defense showing of specific prejudice,[1] Larzelere was unable to show any specific

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[1] "[I]s there anything that you can specifically argue that is prejudicial of chopping out this portion that they want to play and it would not be remedied by you seeking to have the remainder introduced provided its otherwise admissible?" (T 5087).

prejudice, arguing instead that it highlighted "a very small portion of a 66 page statement." (T 5087). And, despite presenting witnesses in her case in chief, Larzelere did not pursue the admission of the remainder of the taped statements (T 5532-5705). Compare Correll v. State, 523 So. 2d 562, 566 (Fla. 1988) ("Even Correll must not have believed that the redacted portion owas of great significance because he did not seek to introduce it in his case-in-chief, even though he presented several witnesses in his defense."). Because it is clear beyond a reasonable doubt that any error in not admitting the tapes in their entirety would not have affected the jury's verdict, any error on this point was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue V

WHETHER THE TRIAL COURT CORRECTLY DENIED LARZELERE'S MOTION TO DISCHARGE COUNSEL, MOTION TO CONTINUE, MOTION FOR A NEW TRIAL, AND DEFENSE COUNSEL'S MOTION TO WITHDRAW.

Larzelere understandably does not charge that the trial court did not conduct a sufficient inquiry on this point. See Ventura v. State, 560 So. 2d 217 (Fla. 1990); Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). Instead, Larzelere claims that the trial court erred in "forcing" her to proceed with Wilkins and in not permitting her sufficient time to decide whether to represent herself or proceed *pro se*. The record belies both of these claims.

At a pretrial hearing on a purported *pro se* motion to discharge counsel, Wilkins stated that, after William Lasley's law firm had contacted him about substituting as Larzelere's counsel, Wilkins spoke with Larzelere by phone (T 475). Larzelere indicated to Wilkins only that she was thinking about switching representation (T 475). When Wilkins met with Larzelere, she indicated that she still wanted Wilkins to represent her (T 476). Larzelere later called Wilkins to confirm that she wanted Wilkins represent her (T 476).

When Howe, Jason Larzelere's defense counsel, appeared as co-counsel in Virginia Larzelere's case, the trial court inquired of Virginia Larzelere as to Howe's potential conflict and whether she was willing to waive any such claim (T 634-37, 641, 649-54). Virginia Larzelere clearly indicated that she wanted both attorneys, was fully aware of the potential for conflict, and was willing to waive any claims of conflict (T 634-37). The court also made the same inquiries of Jason Larzelere (T 637-49). The trial court held:

> It is your choice to raise the decision. It's the Court's duty to make an inquiry as to whether or not you are aware of the potential conflict or any actual conflict and, also, not only that you are aware but that you are aware of the consequences of waiving such conflict, knowing there is an intelligent, knowing, waiver of your

> rights to conflict free counsel or counsel that is free from possible or apparent conflicts.
>
> Court now finds that Jason, as well as Virginia Larzelere, that both have knowingly and intelligently waived the right to raise these potential conflicts or apparent or possible conflicts, of having conflict free counsel and effective assistance of counsel.

(T 654-55).

After the penalty phase, Larzelere filed a *pro se* motion for a new trial, alleging that: (1) the trial court erred in accepting her waiver of conflict, in that that acceptance excluded Jason Larzelere's testimony and other material favorable evidence; (2) a conflict of interest as to the private investigator Gary McDaniel existed, because he was involved in both Virginia and Jason Larzelere's cases; (3) both defense attorneys rendered ineffective assistance of counsel; (4) the state attorney's office had a conflict due to its "open charges" against its main witness; (5) the trial court erred in admitting the murder weapon into evidence and defense counsel should have objected; (6) defense counsel should have objected to the police interception of phone calls and mail at the jail and should have "entertained" motion requested by Larzelere; (7) there were violations of the court order restraining the placement of listening devices in Larzelere's presence; (8) defense attorneys were ineffective by prohibiting Larzelere from

testifying; and (9) defense attorneys were ineffective by failing to present expert testimony in the penalty phase (R 542-46, 558-64).

At the hearing on her motion to discharge counsel, Larzelere initially stated that she wanted a continuance to "bring in William Lasley, the law office of F. Lee Bailey, Terry McDaniel and Gary Sprough, and the law office of William Cummings" to support the allegations in her motion (T 6575). The trial court denied the motion for continuance, reminding Larzelere that "[t]his is your opportunity [] to state [] your grounds." (T 6576). Larzelere then stated that she would rely on her motion (T 6576). After hearing from Larzelere and attorney Wilkins on this motion, the trial court held:

> The Court finds there is no grounds for discharging counsel at this time. The Court finds that there has not been a showing of ineffective assistance of counsel that has not previously been waived. As ineffective assistance of counsel m[a]y relate to incompetent counsel or conflict-free counsel which the Court finds and previously found that the Defendant had waived the right to conflict-free counsel and had done so knowingly and intelligently. The Court finds that that waiver still stands and to the extent that there are any of these allegations that relate to actions or inactions of the counsel of record that have already been covered on the record in this waiver hearing. The Court stands on those waivers and so finds that they are not a basis to now discharge counsel from further

representing the Defendant in the remaining sentencing phase.

To the extent that there are new allegations that were not covered during the previous waiver hearings and when I use that term I'm speaking of the hearings wherein the Court made inquiry of the Defendant as well as Jason as to whether or not they would waive their right to have conflict-free counsel. I might add that that inquiry also needless to say affected or had to do with any potential allegations of incompetency that may have been brought on by both counsel continuing to represent Jason and Virginia which in fact the Court has stated on the record both in fact waived any such argument.

To the extent that there are new allegations on the record now of incompetency of counsel or ineffective assistance of counsel that were not previously on the record the Court having considered the allegations of the Defendant, the responses of counsel of record, and let me make sure that you have no desire to have the Court make any further inquiry of Mr. Howe[] above and beyond what has already been put on the record.

Do you, ma'am?

[Larzelere]: Not at this time.

[Court]: The Court finds that there has been no showing of ineffective or incompetent counsel that would warrant the Court discharging counsel at this time.

(T 6609-11). When Larzelere asked for "time to think about" whether to proceed with Wilkins and Howe or to represent herself, the trial court stated that it needed to know "at this time" (T 6614). Larzelere then stated: "In that case I guess I'm stuck with them." (T 6614).

In its two written orders, the trial court stated:

> The Court has considered all of the allegations and ground raised by said counsel of record as a basis for withdrawal, and the responses of said counsel to the defendant's pro se motion to discharge said counsel. The Court has considered the previous hearings before this Court wherein the defendant announced her desire to be represented by both defense counsels while said counsels would also jointly represent he co-defendant, at which hearing the Court fully inquired of and advised the defendant as to the potential and actual conflicts of interest that such joint representation may create, and fully inquired of the defendant as to whether her announced desire to waive all such conflicts of interest and ramifications therefrom, both then present and future, was being done knowingly and intelligently. In view of the above, and based on the additional reasons cited on the record this day, the Court finds no reasonable basis to conclude that said current counsel has not rendered and would not during the future sentencing hearing be able to continue to render effective assistance of counsel. Furthermore, the Court has concluded that there is not conflict of interest existing or which will continue to exist should said counsel continue to represent the defendant, that has not previously been knowingly and intelligently waived by the defendant. Furthermore, the Court finds no reasonable basis for finding that there is any deterioration of the attorney-client relationship or loss of confidence or trust in said counsel that would support withdrawal of counsel, that would interfere with the fair and effective representation by said counsel of the defendant during the remaining sentencing hearing.
>
> * * * *

> The defendant's request to discharge her current attorneys is untimely. As previously stated, the trial and sentencing phases before the jury have been completed; the only remaining proceeding is the further sentencing hearing requested by the defense and the hearing for pronouncement of sentence thereafter by the Court. In the event the defendant's current counsel were discharged and a new attorney appointed (which appointment would presumably be at County expense since the defendant has been adjudged currently insolvent) any new counsel in order to effectively argue the applicability and non-applicability of statutory and non-statutory mitigating and aggravating circumstances, would understandably (in order to himself effectively represent the defendant hereafter) have to review and become familiar with the transcript of the four week trial, and the sentencing hearing before the jury. No such transcripts are available since they have not yet been ordered for transcription since no pronouncement of sentence and notice of appeal has yet been filed. Under these circumstances substantial expense and delay (in completion of the sentencing proceedings) would be occasioned by the appointment of or substitution of new counsel; such factor is a further consideration which this Court has a duty to weigh in determining the propriety in granting defendant's current request to discharge counsel.

(R 598-99, 639-45; T 6613).

Prior to the sentencing hearing for presentation of mitigation, Wilkins again moved to withdraw, alleging that Bonnie Gilbert, a state witness in Jason Larzelere's case, had stated that Wilkins had asked her to assault jurors in

the parking lot of the courthouse (R 663). Wilkins stated that this had caused him to be listed as a defense witness in that case (R 663). Further, Wilkins alleged that Jason Larzelere's biological father, Harry Mathis, had stated referred to an "inappropriate relationship" between Wilkins and Virginia Larzelere in 1975 when Wilkins represented her on other, unrelated charges (R 663-64). Finally, Wilkins alleged that defense counsel in Jason Larzelere's case had moved for a mistrial based on "some impropriety in the taking or pre-trial depositions in the Virginia Larzelere case due to the relationship of the undersigned Counsel with a court reporter who took and transcribed those depositions." (R 664). The trial court found the allegations insufficient as a matter of law and denied the motion (T 6674).

A defendant's right to choose his own attorney is not absolute and cannot be invoked in bad faith, for the sake of arbitrary delay, or to otherwise subvert judicial proceedings. Cartwright v. State, 565 So. 2d 784, 785 (Fla. 5th DCA 1990). Both the state and the defendant are entitled to orderly and timely proceedings. Jones v. State, 449 So. 2d 253 (Fla.), cert. denied, 469 U.S. 893 (1984). For these reasons, trial courts possess wide discretion in ruling on requests for continuances. Morris v. Slappy, 461 U.S. 1 (1983). Here, Larzelere can show no abuse of

discretion by the trial court. Larzelere moved to replace Wilkins with Lasley in January 1992. When Howe became co-counsel, the trial court conducted a lengthy examination of Larzelere to determine that she made this choice voluntarily and intelligently. In May 1992, after the jury had recommended death, Larzelere again moved to have Wilkins discharged. Based on these prior, extensive proceedings, the trial court correctly found that such a request was unwarranted and untimely when Larzelere asked for a continuance to ponder whether to represent herself or proceed with Wilkins.

In any event, joint representation does not *per se* violate the constitution. Holloway v. Arkansas, 435 U.S. 475 (1978). Where actual conflict of interest is shown, however, the court's allowing joint representation to continue is reversible error. Foster v. State, 387 So. 2d 344 (Fla. 1980). Actual conflict occurs "'whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.'" Barclay v. Wainwright, 444 So. 2d 956, 958 (Fla. 1984) (quotation omitted). See also McCrae v. State, 510 So. 2d 874, 877 n.1 (Fla. 1987) ("an 'actual' conflict of interest exists if counsel's course of action is affected by the conflicting representation, i.e., where there is

divided loyalty with the result that a course of action beneficial to one client would be damaging to the interests of the other client. An actual conflict forces counsel to choose between alternative courses of action."). Larzelere has made no showing that an actual conflict of interest existed with Howe and Wilkins representing both her and Jason Larzelere.

Even if actual conflict exists, a defendant may waive her right to conflict-free counsel by choosing to proceed to trial with an attorney who has an adverse conflict of interest. United States v. Rodriguez, 982 F. 2d 474, 477 (11th Cir. 1993). The defendant's waiver must be clear, unequivocal, and unambiguous, and the record should show that defendant was aware of the conflict, realized the conflict could affect the defense, and knew of the right to obtain other counsel. United States v. Petz, 764 F.2d 1390, 1393-94 (11th Cir. 1985). There is no legitimate claim that Larzelere's waiver of conflict-free counsel was not unequivocal, and the colloquy on this question more than adequately demonstrates that she was aware of the potential conflict and knew that she could obtain other counsel if she wished.

In Roberts v. State, 573 So. 2d 964 (Fla. 2d DCA 1991), counsel represented Roberts and his wife, both of whom had been implicated in the same drug trafficking matter. They

both signed pretrial waivers of conflict, and the trial court conducted extensive questioning of both, determined their waivers to be voluntary, and conducted separate trials. On appeal from the denial of a postconviction motion, Roberts claimed ineffective assistance of counsel based on the attorney's dual representation. The Second District denied relief, holding that Roberts's claim amounted to "little more than second-guessing his own prior choice to share a single attorney with his codefendant -- a choice made in the face of warnings from the state and the trial court." Id. at 965. See also Morgan v. State, 550 So. 2d 151, 153 (Fla. 3d DCA 1989) (because the two Morgans "chose dual representation [by private counsel, they] may not now complain."); Belsky v. State, 231 So. 2d 256 (Fla. 3d DCA 1970) (possible conflict fully explained by counsel to Belsky prior to his engaging private counsel). For the same reasons, this Court should refuse to hear Larzelere's claim which is based on nothing more than second guessing.

Issue VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING LARZELERE'S MOTION FOR A NEW TRIAL BASED ON THE LACK OF EVIDENCE THAT THE JURY HAD BEEN CONTAMINATED BY EXTRAJUDICIAL INFORMATION.

The decision to grant a motion for a new trial on the grounds of juror misconduct, see **Fla. R. Crim. P.** 3.600, is

committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Shere v. State, 579 So. 2d 86, 95 (Fla. 1991); Roland v. State, 584 So. 2d 68, 70 (Fla. 1st DCA 1991). The instant trial court did not abuse its discretion in the instant case. Instead, it properly granted the defense motion to interview Juror Kelley, extensively interviewed Kelley and other jurors, and heard argument before denying Larzelere's motion for a new trial in a lengthy order, which included a chronology of events and exhaustive factual findings.

After the jury rendered its guilty verdict and jurors proceeded to their vehicles in the parking lot, Bonnie Gilbert, a state witness in Jason Larzelere's case (R 663), accosted jurors Bufis, Day, and Eubanks; Gilbert yelled at these jurors that she would blow up Bufis's vehicle (T 6008). Gilbert was later arrested for the second degree felony of threatening to throw a bomb (T 5973).

Day testified that Bufis reported the incident to a deputy, and that Eubanks told him and Bufis that the incident was upsetting to her (T 6010). Day, however, "just wrote it off as emotions running high" (T 6010). Day did not feel any danger at the time of the incident or after (T 6011). Day also stated that the incident would not enter into his deliberations during the penalty phase (T 6013,

6021). Day stated that he, Eubanks and Bufis had discussed the matter at "Marker 32," among themselves, and then with Juror French after he arrived at "Marker 32" (T 6016).

Eubanks testified that she heard a person screaming something about blowing up a car, and that this upset her (T 6024-25). Eubanks stated that she talked only with Day, Bufis, French, and her boyfriend about the incident (T 6027, 6030). Eubanks stated that she felt a "present danger" at the time of the incident, but no longer (T 6028). Eubanks testified that she would not permit the incident to enter into her penalty phase deliberations (T 6030).

Bufis testified that, after the verdict, several jurors left the courtroom to "have a drink, relieve a little tension" (T 6034-35). As Bufis, Eubanks and Day walked to Bufis's vehicle, a male and female said to them that Bufis's truck would blow up and that they were "going to blow holes through that truck." (T 6035). The incident "pissed off" Bufis and upset Eubanks; on Day's suggestion, they reported the incident to a deputy in the parking lot (T 6035). Bufis also recalled discussing the incident with French at the bar (T 6037). Bufis stated that he felt no danger at the time of the incident or after (T 6040). Bufis finally testified that he could be fair and impartial in the penalty phase (T 6043, 6050).

French testified that he learned of the incident from Day, Eubanks, and Bufis at the bar (T 6053). French stated that he had not discussed the incident with any other jurors (T 6055). French stated that he felt no danger as a result of the incident, and that it would not enter into his penalty phase deliberations (T 6059-60).

The trial court then brought in the other jurors individually, the court's judicial assistant, and another bailiff to question them about the incident (T 6067-126), after which the defense moved for a mistrial (T 6128-36, 6139-40, 6142-46). The trial court then requested that Day, Eubanks and Bufis return so that the court could ask each of them whether they would hold the incident against Larzelere and whether the incident would affect their ability to render a fair advisory verdict; each said no to both questions (T 6148-50). The court then ruled:

> Based on the arguments that have been presented and based on the testimony that has been elicited in this inquiry that has now been completed by the Court, the Court finds that there was an improper contact by a third person or persons with one or more of the jurors, as has been testified to.
>
> The Court finds, based on the inquiry and responses of the jurors to the questions that were asked, that the contact with the jurors is not prejudicial, that if it were prejudicial at the first instance, that any prejudice has now been clearly established to have been removed and the

> fact is that the Court finds that the necessary burden of proof has been met, in that it has been established that this jury is now untainted by the statements that were made to them or in their presence. And, therefore, the Court denies the motion for mistrial.

(T 6151).

After the jury rendered its sentencing recommendation, Dorrie Jean Mueller interviewed Juror Kelley (T 6314). In this interview, Kelley claimed that jurors discussed matters concerning the trial even though they were not supposed to do so (T 6335); that some jurors had formed opinions regarding Larzelere's guilt or innocence (T 6339); that she had "[a] feeling of I wished I could have been [Larzelere's] friend" (T 6357); that the jurors listened to tapes in the jury room which were not admitted into evidence (T 6360); that a juror stated during deliberations he/she had read that Jason Larzelere pled for a sentence of 10 years (T 6372); that "the Professor"[2] wrote down notes at every break and at night, which he reviewed before, but did not bring in to, deliberations (T 6376); that she felt pressured into voting for guilt (T 6383); and that "the Professor" told them about the threat to Bufis, Day, and Eubanks, so that all the other jurors lied to the trial court when they said they had not heard about what had happened (T 6395).

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[2] Juror French apparently was "the Professor" (T 6967).

Juror Kelley also spoke with Gary McDaniel by telephone and related that she suspected that jurors had read newspapers based on comments (T 6420); that "eight jurors [had lied] to the judge on the day that we were talked to in reference [to whether] we kn[e]w anything about what had happened in the parking lot [on] the night of our verdict" (T 6426); and that on juror had taken notes (T 6429-30).

Subsequently, defense counsel filed a motion to interview Juror Kelley (R 589-97; T 6694). At a hearing on this motion, the trial court found such an interview necessary (T 6694-97), and also found

> that further inquiry in the area of the statements or of the subject matter of the alleged threats or described threats or approaching by individuals in the parking lot of three jurors, that inquiry has already been made by the Court on as to all jurors, the Court is inclined to believe that under the current status of the law, that the scope of the inquiry of Kelley should not include any further questions in that area.
>
> The Court is also inclined to believe that the scope of the interview should not include any inquiry regarding the taking of notes, as argued by the state. I say that because of a very close reading of the transcript taken together with a reading of the inquiry by the Court of all jurors after the guilty verdict and before the penalty phase began, reveals that an adequate record of what, in fact, each juror overheard when they were sequestered during the one on one inquiry and clearly refutes any allegation by Kelley in her

> interview that those jurors had lied about their knowledge of the incident in the parking lot. And, in fact, refutes Kelley's own statement that she says she also lied in not telling about the incident, because she acknowledged that she knew about or heard the discussions about the incident that were generally being made by French in the juryroom during the sequestration during the one on one inquiry.

(T 6698-99).

On October 6, 1992, the court conducted an inquiry of Kelley. Kelley could not remember any specific comments made by jurors that were in violation of the court's admonitions not to discuss the case (T 6739-41). Kelley also admitted that she had no first hand knowledge that jurors were reading newspaper (T 6743-44), but based on comments jurors made, she was "led [] to believe" they were (T 6743). Kelley's only specific recollection appeared to be that Day and French had stated during penalty phase deliberations that they had read something (T 6747-52, 6785). Kelley "was really absolutely not sure," but seemed to recall a juror[3] saying before the guilty verdict was returned that, although he recognized Kelley in a newspaper photograph taken when the jury visited the scene of the murder, "it was hard to tell who was looking out of the office window" (T 6753).

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[3] Apparently, this juror was Bufis (T 6948).

Kelley recalled the jurors' being called back before sentencing for questioning about the threat in the parking lot. She stated that one juror asked eight jurors, including her, whether they had heard about the threat before the court questioned each juror individually (T 6760). Kelley explained that, when she said the jurors lied to the court about this, she meant that, if the court had asked whether they knew anything about the threat, all the jurors had said no, when a juror in fact had mentioned it to them (T 6762). Kelley recounted, however, that no one "discussed anything in detail until . . . "[a]fter the sentencing" (T 6768), and that no one discussed the threat incident during sentencing deliberations (T 6769).

Regarding notetaking by French, Kelley admitted that he said nothing that led her to believe that his notes were based on anything other than evidence presented at trial (T 6786). After sentencing, Kelley recalled one juror stating that she thought her phone was bugged (T 6787, 6800). Kelley stated that, before she spoke with McDaniel, she spoke with Mueller and a newspaper reporter (T 6788). Kelley recounted her involvement with Mueller: A Charles Chip salesperson at Kelley's work knew that Mueller was working on a book about the Larzelere case and knew that Kelley had been on the Larzelere jury; the Charles Chip person asked if she could have Mueller call Kelley, and

Kelley agreed (T 6791). Kelley recalled two or three taped interview sessions with Mueller (T 6793).

On November 17, 1992, the trial court conducted another interview of Kelley.[4] Kelley still believed that Day had referred to Jason's plea bargaining during the guilt phase deliberations (T 6931-32). Kelley recalled discussing Jason's plea bargain with other jurors after sentencing (T 6940-41). Kelley changed her mind about Bufis reading the newspaper (T 6942), but then changed it again (T 6949). Although Kelley thought French had read the newspaper, she changed her mind (T 6942-43, 6946, 6949). Regarding Day's statement about Jason's purported plea bargain, Kelley admitted that she did not know he had read something: It could have been Day's or her own speculation (T 6945). Further, Kelley did not know if anyone other than her had heard Day's comment (T 6949).

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[4] Larzelere cites to pages 6927-28 and 6952-60 of the transcript as supportive of her contention that "[d]efense counsel specifically requested that the trial court not make [] an inquiry" of the other jurors "as to how the extra-judicial matters may have played a part in their deliberations." Initial Brief at 63. This is a misrepresentation of the record. At transcript page 6927, defense counsel objected to two questions the state wanted the court to ask Kelley, not the other jurors. At transcript page 6952, the state rebutted defense counsel's previous argument about proper questions to pose to Kelley. At transcript page 6955, the trial court then asked the parties their positions about interviewing other jurors. Defense counsel then stated that that was not "necessarily something that needs to be done." (T 6955).

Kelley also recounted the French incident regarding the post-verdict threat to Bufis, Day and Eubanks:

> We all came into the room, we were escorted into the room, into a juryroom when we first walked in the courthouse. And the jurors that were in that room -- and I can't even remember now how many of us there were. There were nine and Mr. French was in there and we all were wondering what we were doing there and where the other jurors were. I think [Eubanks], Mr. Day and [Bufis]. And [French] said, I don't know, but maybe it has something to do with the night of [the] verdict and the incident, the threatening or the incident in the parking lot.
>
> And then he was called in to talk to you and the attorneys and he came back into the room and wrote on a piece of paper, it's about the night of [the] verdict, don't say anything about it, meaning, we assumed, that he had already said something to us about it. . . .

(T 6968-69).

On December 11, 1992, the court conducted interviews of the other jurors. Bufis testified that, other than one incident that he had previously reported to the court, he had not read, heard or seen any news or media coverage about the Larzelere trial (T 7058). Bufis specifically refuted Kelley's statement that he had said anything about Jason Larzelere and plea bargaining (T 7067). Bufis also refuted Kelley's statement that he had made an observation about "a picture of a juror in the newspaper peering out of a window

during the jury's viewing of the scene" (T 7069). Bufis stated that, while waiting to be questioned about the threat incident after sentencing, no one had ever shown him a piece of paper related to the incident (T 7073).

Eubanks testified that she never read, saw or heard any news or media coverage about the Larzelere trial (T 7084). Although Eubanks recalled "somebody [telling] somebody that Joyce's picture was on the front page of the News Journal," she said that that was all that was said (T 7085, 7088). Eubanks stated that, during her entire time as a juror, she never heard anything about Jason Larzelere and plea bargaining (T 7089-90). Eubanks stated that French never showed her a piece of paper while she was waiting to be questioned about the threat incident (T 7092). Eubanks stated that she heard nothing during her tenure as a juror that led her to believe that any juror relied on anything not presented in the trial (T 7095).

Suchan testified that he did not read, see, or hear any news or media coverage during the trial (T 7106), that he heard nothing about a plea bargain for Jason Larzelere during the trial (T 7107-08), that he heard nothing about a picture of a juror peering out of a window at the scene being in a newspaper (T 7108-09), that French did not show him any piece of paper while he waited to be questioned about the threat incident (T 7111), and that he saw nothing

that caused him to believe that any juror relied on anything other than trial evidence (T 7112). Badger testified similarly (T 7118-25). Clay testified similarly (T 7132-39). Although Clay did not recall French showing a note, he did remember that "there was a conversation somewhere early in the day that there was a problem in the parking lot and everything and that was the reason for splitting up. But it was not even broadened on beyond that, so far as what took place, other than that was probably the reason we were separated." (T 7137).

Hoff testified similarly to Suchan (T 7146-64). Hoff, however, remembered a note written shown by French: "[T]he only thing on the note was, when he came back from talking to you -- and it said he was not allowed to discuss anything." (T 7156, 7157). Hoff remembered French putting the note on the table, and that she and Kelley saw it, but she did not know if other jurors saw it (T 7156). Hux testified similarly to Suchan (T 7186-99). Hux, however, recalled that Kelley had mentioned that "somebody had told her that her picture was in the paper and she was going to get a copy of it" (T 7190). Hux's "interpretation of what [Kelley] was saying was somebody from her area of employment had seen it and she had talked to this person and the person had happened to mention that they had seen her in the paper." (T 7196). White (T 7205-14) and Krol (T 7221-30) testified similarly to Suchan.

After these interviews, the defense moved for a mistrial based on Kelley's statements (R 948-50; T 7246-50). The trial court denied this motion, making extensive findings of fact, providing a full chronology of events, and attaching a lengthy appendix (R 1070-1247). Specifically, the trial court held:

> In weighing the reliability and credibility of the statements of juror Kelley, the Court concludes that the testimony of the other jurors decisively conflicts with that of juror Kelley, that juror Kelley in her statements and testimony has contradicted herself, made statements based on speculation, displayed equivocation, expressed confusion, displayed a faulty memory, exhibited bias and partiality.
>
> David Day when interviewed unequivocally and without hesitation denied making any such statements as are alleged to juror Joyce Kelley or any other juror. David Day unequivocally denied ever having received or having ever heard or read any such information from any source whatsoever at any time, whether during his service as a juror until discharged or afterward or otherwise.
>
> Every other juror when interviewed unequivocally and without hesitation denied having heard David Day or any other juror make such statements as are alleged, in their presence or hearing at any time during their jury service until discharged as jurors on March 4, 1992.
>
> Every other juror denied having heard such a statement from any source during the time period of their jury service until the date of their final release on March 4, 1992.

> As is recited above, there are irreconcilable differences on material matters. This Court has observed each juror, including Joyce Kelley, as they testified and has considered the total of all testimony and evidence recited above. In applying the principles for determining the credibility of witnesses and evidence the Court finds the testimony of Joyce Kelley unreliable and not credible on those matters alleged by the Defendant as a basis for a new trial. Further, the Court finds the testimony of the other jurors reliable and credible.

(R 1098).

Rule 3.600(b)(4), Florida Rules of Criminal Procedure, "specifically provides that juror misconduct is a basis for a new trial, if the substantial rights of the defendant were prejudiced thereby." Sconyers v. State, 513 So. 2d 1113, 1115 (Fla. 2d DCA 1987). See also Russ v. State, 95 So. 2d 594 (Fla. 1957) ("Where a juror on deliberation relates to the other jurors material facts claimed to be within his personal knowledge, but which are not adduced in evidence, and which statements are received by the other members of the jury and considered in reaching their verdict it is misconduct which may vitiate the verdict, if resulting prejudice is shown.").

Larzelere can make only vague allegations that the trial court erred in its decision to question Kelley and other jurors about Kelley's claims. Keen v. State, 639 So.

2d 597 (Fla. 1994), is inapplicable here, because the instant trial court exhibited its complete understanding that matters inhering in the verdict are inviolate and unassailable and limited itself to an inquiry of whether jurors were aware and, if so, whether the extraneous matters entered into their decision making. At no point in time did the trial court inquire into the jurors' thought processes. Contrast Johnson v. State, 593 So. 2d 206, 210 (Fla. 1992); Mitchell v. State, 527 So. 2d 179, 181 (Fla. 1988); Songer v. State, 463 So. 2d 229, 231 (Fla. 1985).

Furthermore, a review of the record shows that the trial court more than fully complied with the procedure suggested in United States v. Herring, 568 F. 2d 1099, 1104-05 (5th Cir. 1978): If extrajudicial

> material does in fact raise serious questions of possible prejudice, the ABA recommends that the court shall question the jurors 'on motion of either party.' This questioning should be as neutral as possible and should be confined at first to the issue whether any jurors have actually been exposed to the damaging material. If any have, they should be further questioned to determine the extent of that exposure and its effects on their ability to render an impartial verdict. Such an examination of the jurors would provide guidance in the record -- for both the trial and the appellate courts' purposes -- on how to proceed from that point.

Id. at 1105 (footnote omitted). See also Tanner v. United States, 483 U.S. 107, 117 (1987) (juror testimony permitted on external matters which do not inhere in verdict). The record also shows that Larzelere was, and remains, unable to establish prejudice because of Juror Kelley's inconsistent and contradictory testimony, bias, and faulty memory. See Russ, 95 So. 2d at 601 ("not all statements by a juror concerning evidence not properly before the jury will vitiate a verdict, even though such conduct may be improper.").

Issue VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE BULLETS GIVEN TO POLICE BY LARZELERE, WHICH SHE ALLEGED WERE FIRED AT HER HOUSE SUBSEQUENT TO THE INSTANT MURDER.

The decision to admit evidence is committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in admitting the bullets alleged to have been fired at the Larzelere home during a drive by shooting, as they were relevant to the state's theory of the case -- that Larzelere had devised quite an elaborate scheme of events to murder her husband and direct suspicion away from herself and Jason Larzelere.

Charles Sylvester, a private investigator, testified that he worked for Larzelere -- to protect her and her family members (T 4527). Regarding the "drive by shooting," Sylvester testified as follows:

> When I was leaving the residence, the Larzelere residence, Mrs. Larzelere and Jason Larzelere were following me. As soon as I stepped from the garage, it's a three car garage and the doors were open, there was three or four shots that were fired or noises.
>
> [Prosecutor]: What else did you observe?
>
> [Sylvester]: At that point in time, I shoved both Larzeleres back on the garage floor. I looked to see where the shots had come from. I observed three men running across the -- it's a park area now, an old schoolhouse grounds. And I immediately attempted to pursue them in my automobile.
>
> By the time I got the automobile started and out the chain link gate, they were on the far side of the parking lot in a small purplish color car, possibly an AMC Pacer or Gremlin or possibly even a Pinto.
>
> [Prosecutor]: Could you distinguish these noises that you have described as sounding like shots? Can you distinguish them from the sounds of fire crackers or any other sound?
>
> [Sylvester]: No, ma'am, I could not. If it was fire[d] from a weapon, it would have been a small caliber .22 or .25 or possibly three or four fire crackers. They were not loud, they were distinct bangs. But I did not hear any impact or bullets behind me or hear a bullet pass in front of me.

[Prosecutor]: Okay. Did you see anyone with a weapon?

[Sylvester]: No, ma'am, I did not.

[Prosecutor]: Did you participate in any complaint made to the police concerning that?

[Sylvester]: I advised Mrs. Larzelere to dial 911, and within probably a minute or two, there w[ere] law enforcement officers from [] Deland on the scene. And I had discussed what would have happened with them and they stated that they were putting all points out, and they also had stated that there were numerous other incidents like this.

[Prosecutor]: Where did this take place at?

[Sylvester]: At the Larzelere home in Deland.

[Prosecutor]: Were you present when Virginia Larzelere turned over any bullets to law enforcement in reference to that incident?

[Sylvester]: No, ma'am. I received a page from Mrs. Larzelere and returned her phone call the next morning.

[Prosecutor]: Were you present?

[Sylvester]: No, ma'am.

[Prosecutor]: Did you participate in inspecting the area to determine whether or not there were any bullets in the area?

[Sylvester]: No, ma'am.

(T 4535-36). Larzelere gave "[t]wo pieces of metal in a plastic container" to police, claiming that she had dug them out of the white fence at her Deland home shortly after the

drive by shooting (T 5095, 5097, 5236). Firearms expert Rathman testified that, in his opinion, these bullets had not been fired (T 5282). Further, Rathman opined that, even though there were markings on the bullets, these markings were made by a tool and not rifling that would be "consistent with having been fired from a rifled firearm" (T 5282).

This Court has held that, when a suspected person exhibits "indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance." Straight v. State, 397 So. 2d 903, 908 (Fla. 1981); Daniels v. State, 108 So. 2d 755, 760 (Fla. 1959); Smith v. State, 561 So. 2d 1281, 1282 (Fla. 2d DCA 1990). See also State v. Escobar, 570 So. 2d 1343, 1345 (Fla. 3d DCA 1990) (evidence of defendants' fleeing and shoot-out with California police a month after killing a Florida police officer was "probative of defendants' mental state and is, therefore admissible").

The state made its theory of the case evident from the beginning: Larzelere's version of events was never static (T 1990); Larzelere presented a number of different "charades" to the police (T 1991-92); and Larzelere was "trying not to get arrested," trying "to make sure that the police didn't obtain any other information" (T 1996). The

state continued this theory throughout closing arguments: Larzelere's misrepresentations (T 5779, 5784, 5787-90); Larzelere's version of the UPS delivery was "just another situation of her endless exaggeration and false statements where she's setting something up" (T 5801); Larzelere's constantly changing version of events (T 5809-10); Larzelere

> was later to again throw the police off, claim a drive-by shooting, and to turn over bullets which she claimed to have been pulled out of the fence, to law enforcement, bullets which were again analyzed, that were again examined by tool mark and firearm expert, Gary Rathman, where he can tell you absolutely these bullets were never fired from a gun, these bullets were never part of any drive-by shooting.
>
> As her paid investigator was to say, oh, they could have been firecrackers. Very interesting that her investigator that she paid didn't go searching for bullets, that he wasn't the one to find the bullets, that it was Virginia Larzelere personally to find the bullets and turn them over to law enforcement.

(T 5809).

Clearly, evidence concerning the alleged drive-by shooting was "most relevant in the context of a person with a consciousness of guilt," Drake v. State, 476 So. 2d 210, 215 (Fla. 2d DCA 1985): Larzelere obviously hoped to divert attention from herself and Jason Larzelere, by turning bullets, which had not been fired, over to police in support of an alleged drive-by shooting committed by whoever might

have killed Dr. Larzelere. See Zeigler v. State, 402 So. 2d 365, 375 (Fla. 1981) (Zeigler "murdered Mays in furtherance of a crafty design to focus attention on others as the murderers." However, when Zeigler was not successful in killing those who would be blamed, he became "very desperate" because there was no evidence of "a surprise robbery and massive shootout. He would not appear to be involved if he happened to be one of the victims. Accordingly, he shot himself and called the police for help."). See also Buenoano v. State, 478 So. 2d 387, 390 (Fla. 1st DCA 1985) ("[b]ased, in part, upon the conflicting statements given by the appellant and the contradictions between the physical evidence . . . and the appellant's statements . . ., the jury was entitled to reject the appellant's hypothesis . . . .").

In the event this Court finds that the trial court erred on this point, any such error was harmless. The drive-by shooting evidence was limited in nature, and the state adduced far more incriminating evidence against Larzelere through Heidle and Palmieri's testimony. Because it is clear beyond a reasonable doubt that the admission into evidence of this alleged drive-by shooting would not have affected the jury's verdict, any such error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue VIII

WHETHER THE TRIAL COURT PROPERLY FOUND THAT THE INSTANT MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER AND WAS COMMITTED FOR FINANCIAL GAIN.

Larzelere claims that the trial court improperly doubled the cold, calculated, and premeditated (CCP) and financial gain aggravating circumstances. Even though Larzelere acknowledges that this Court has rejected such a claim in Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), and Echols v. State, 484 So. 2d 568 (Fla. 1985), Larzelere argues that "the Echols/Fotopoulos distinction is one without a difference." Initial Brief at 67. Specifically, Larzelere argues that there is no difference between the merger of the financial gain and committed during the course of a robbery aggravating factors and the merger of CCP and financial gain.

As this Court has noted,

> [t]here is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement.

Echols, 484 So. 2d at 575. Here, there is no valid argument that CCP and pecuniary gain were "based on the same essential feature of the crime". Id. at 574. The finding of financial gain was based on extensive evidence that Larzelere killed her husband to collect on several million dollars worth of insurance. The finding of CCP was based on evidence that Larzelere meticulously staged her husband's murder to look as though it were committed by an unknown assailant for robbery. Compare Fotopolous, 608 So. 2d at 793. For these reasons, no improper doubling occurred.

Issue IX

WHETHER THE TRIAL COURT PROPERLY DENIED LARZELERE'S MOTION TO DISMISS THE INDICTMENT BASED ON HER CLAIM THAT THE STATE ILLEGALLY INTERCEPTED HER CONVERSATION WITH JASON LARZELERE.

Larzelere moved orally to dismiss the indictment based on the state's alleged misconduct in illegally intercepting a conversation between her and Jason Larzelere while she was incarcerated and represented by counsel (T 1616-17). The trial court properly denied this motion, because the state engaged in no illegal activity in securing the recording.

Deputy Sheriff Prochilo testified that a monitoring device was placed in Larzelere's cell (T 1625). Prochilo stated that he was instructed by his supervisor to keep others from going back by the cells so that any conversation

Larzelere had with Jason would not be interrupted (T 1630). Detective Rose testified that Randy Means asked if Rose could place a listening device in a Volusia County jail cell to record Larzelere's conversations with Jason (T 1636-38). Rose testified that he received permission from his supervisors to install the device (T 1638). Rose did not know why Means had asked for his help specifically, but assumed it was expertise (T 1648). Means emphasized to Rose that he did not want the device to record conversations between Larzelere and her attorneys (T 1660-61).

Randy Means, an investigator for the State Attorney's Office for the Ninth Judicial Circuit, testified that he and others in the State Attorney's Office chose October 4th as the date for recording because they knew that both Larzelere and Jason would be in the courthouse (T 1677). Means recounted that the listening device was placed in the cell to record conversations "the two may have which might incriminate them in this case" (T 1678). Means stated that Rose had been recommended for the job because "Rose had the technology" (T 1679). Defense counsel and the state stipulated that the procedures used by the state through a third assistant state attorney insured that Larzelere's attorney/client privilege was not abridged (T 1701-08).

Larzelere acknowledges the general proposition that recorded conversations of a defendant in jail do not violate

his or her statutory or constitutional rights because there is no expectation of privacy in prison. However, Larzelere submits that the invocation of a defendant's rights to silence and to an attorney somehow change the public character of a jail cell. There is no basis for such a claim, and Larzelere's reliance on State v. Calhoun, 479 So. 2d 241 (Fla. 4th DCA 1985), is misplaced. As noted in State v. McAdams, 559 So. 2d 601 (Fla. 5th DCA 1990),

> Calhoun is distinguishable on its facts. In Calhoun, the defendant asked to speak to his brother in privacy after having been given his Miranda warnings. He and his brother were taken into an interview room and left unattended. There was a video camera hidden in the ceiling. In holding that the officers had fostered a reasonable expectation of privacy, the court suppressed the video tape.

Id. at 602 (emphasis supplied). In the instant matter, as in McAdams, "the officers did nothing to foster an expectation of privacy and Calhoun is inapplicable." Id.

As the state argued persuasively below, Larzelere failed to show that any of her rights had been violated:

> What they have shown is aggressive investigation of a first degree murder case.
>
> They've conceded the cases which say that there's no expectation of privacy in a jail.
>
> They've ascertained the cases that we cited to the Court, for instance the

case of the [S]tate versus Calhoun, but they conveniently ignore the case of the [S]tate versus McAdams, which distinguishes Calhoun in the same manner as our facts are distinguished from Calhoun.

McAdams makes it clear that law enforcement is doing its job when it investigates and records non-privileged conversations in a public place, including a jail, when there are no acts on the part of law enforcement which deliberately foster an expectation of privacy.

That's the issue here.

Most of the cases they cite, including M[a]ssiah, involved interrogation by a State agent.

There is no interrogation here.

Those cases are inapplicable to the situation.

We have nothing done by law enforcement to foster an expectation of privacy.

We have a recording device placed in a public place.

As a matter of fact, the guards walked back and forth through here. The last sentence of testimony was there was nothing done out of routine in this case.

When co-defendants have joint hearings before the Court they put them in the holding cell together.

* * * *

Everything done in this situation was done in a routine manner . . . .

The cases hold objectively that there is no expectation of privacy in a jail cell.

There was no violation of the Fifth Amendment right to remain silent.

There was no violation of the attorney/ client relationship.

Prosecution took special steps to insure that none of that happened.

If you're going to take the defense argument to the logical extreme . . . once the defendant, in any case, retains an attorney, and says, I've got an attorney, I assert my right to remain silent, every word that comes out of their mouth after that point in time is immunized. They can speak in front of the TV.

There's no expectation of privacy in front of the TV cameras.

How do they distinguish this?

What right has been violated?

Nothing.

What's been done here is investigation on a first degree murder case that they don't like.

But there's been no rights violated.

The state put plenty of safeguards in place. And, lastly, in spite of the fact we assert that what we did was just and right and a part of aggressive law enforcement.

Lastly, there is no prejudice.

Again, the M[a]ssiah case, the remedy is suppression.

There's nothing to be suppressed here.

There's no prejudice to the defendant.

> In summary, Your Honor, that is simply the recording, an attempt to record two people voluntarily talking to each other in a public place.
>
> No one interrogated them.
>
> The cases they cite about shocking the conscience of the Court, pumping the stomach cases, invasion of the body, fabrication of evidence by law enforcement, or interrogation by law enforcement agents. All law enforcement did was take an opportunity to record something in a public place.

(T 1738-40).

Finally, were Larzelere able to show a violation of her rights, she fails to cite to one case supportive of her contention that dismissal of the indictment is the correct remedy. As the court noted in McAdams, the correct remedy for state misconduct in obtaining statements is suppression of those statements. In light of the fact that the state did not use this evidence at trial, Larzelere's ability to show prejudice, and an entitlement to any remedy, under this issue is fatally impaired.

Issue X

> WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THE TESTIMONY OF RANDY MEANS INADMISSIBLE IN THE DEFENSE CASE IN CHIEF.

The decision to exclude evidence is committed to the sound discretion of the trial court, and such a decision

should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in excluding the testimony of Randy Means in the defense case, because the "evidence" of the taped, unintelligible conversation between Larzelere and Jason Larzelere was irrelevant and immaterial.

Defense counsel argued for the testimony of Randy Means to question him about the "bugging" of Larzelere's cell and the alleged violation of her rights (T 5668-69). The trial court noted that, if Means's testimony touched on an alleged violation of Larzelere's rights, that action would be a violation of the court's previous order on the motion to dismiss (T 5669). The trial court held that, if defense counsel only wished to show that the bugging was done and nothing was obtained, that direction would be admissible (T 5671). However, after the trial court learned that the bugging did record a conversation, only a few words of which were intelligible, the trial court reversed its prior ruling:

> I find that the fact that there was an effort made [to record] is not relevant to any issue in this case. And if it's relevant, if what you're seeking to show is an overzealousness on the part of law enforcement at all costs, or tying every possible means for grabbing at straws to

> elicit incriminating statements from them, I find the fact that, I found that the action was lawful of doing so, that the prejudicial effect that might be left in the jury's mind suggesting that it was improper outweighs any argument that the defendant might make that this shows a focus on Virginia and Jason, and not being open to focusing on other possible suspects.

(T 5675).

Larzelere can show no abuse of discretion by the trial court's action. See Herrera v. State, 532 So. 2d 54, 55 (Fla. 3d DCA 1988). Recordings which are only partially intelligible are admissible unless the "unintelligible portions are so substantial as to render the recording as a whole untrustworthy." United States v. Wilson, 578 F.2d 67, 69 (5th Cir. 1978). Defense counsel, as noted by the trial court, conceded that, but for a couple of words, the tape was unintelligible.

In any event, any error committed on this point was harmless. The tape in no way exculpated Larzelere, and the trial court's ruling in no way prevented Larzelere from presenting a viable defense case. Because it is clear beyond a reasonable doubt that the trial court's refusal to admit this evidence would not have affected the jury's verdict, any such error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING LARZELERE'S MOTION FOR A CHANGE OF VENUE, WHICH WAS BASED ON A CLAIM THAT PRETRIAL PUBLICITY PRECLUDED SELECTION OF A FAIR JURY.

An application for a change of venue is addressed to a trial court's sound discretion, and a trial court's ruling will not be reversed absent a palpable abuse of discretion. Davis v. State, 461 So. 2d 67 (Fla. 1984); Straight v. State, 397 So. 2d 903 (Fla.), cert. denied, 454 U.S. 1022 (1981). Here, the trial court did not abuse its discretion in denying Larzelere's motion, because she failed to establish prejudice.

In her motion for a change of venue, Larzelere alleged that the victim was extremely well known in Volusia County; that the local and national print and broadcast media had covered the murder extensively; and that the "pervasive nature of this extensive pretrial publicity" had so infected the residents of Volusia County that jurors would not be able to decide the case based on courtroom evidence alone (R 200-05).[5] The state argued in response that

> the most appropriate thing in Manning v. State is the fact that it leaves to the

[5] The court conducted a hearing on this motion, at which defense counsel called reporter Pat LaMee to testify (T 205-40).

Court the option of . . . waiting to make a determination of the prejudice that exists in the community until you bring forth the jury and conduct some voir dire of them to see what they say.

I don't think that the testimony elicited by the defense today is persuasive as to the inability to have an impartial jury here.

Furthermore, I don't think their attachments are persuasive. I note that all the attachments I saw are form affidavits which mean they are not originally drafted by these writers. That they're endorsing form language. Furthermore, all of them identified themselves as attorneys, which I don't think is persuasive as being a representation of a cross-section of the community. I don't think you can presuppose from their affidavits that this reflects the feelings or the knowledge of a cross-section of the community. Two of them in fact have the same last name, Quarles. I believe they are related to each other.

Chris Quarles I believe to be -- to work in the criminal law field. In fact, he works -- if he still is in the same job -- in capital defense litigation, which means he would be specifically attuned to pay attention, to pay a lot of attention to a first-degree murder story, because it might come his way at some point.

Therefore, I would argue to the Court that the Court should take the avenue that is discussed, that the Court has the option and the discretion of voir diring a jury here to make a determination of what they say concerning their knowledge or prejudice.

The law is very clear in every case that knowledge or having formed opinions is not decisive. Even if jurors come in here and say they have read stories,

> that does not make them an impartial jury that -- that the Court would need to question them as to whether or not they could put any information aside and base their verdict upon the evidence and the law.

(T 238-40). The trial court deferred ruling on the motion until jury selection (R 321).

During jury selection, the trial court and attorneys for both sides extensively questioned jurors' about their exposure to the case, how it affected them, and their ability to put this information aside if chosen to serve on the jury (T 679-1604). After jury selection, the trial court denied this motion (T 1604).

In considering a motion for a change of venue, "a determination must be made as to whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom." Manning v. State, 378 So. 2d 274, 276 (Fla. 1979). "The critical question to be resolved . . . is not whether the prospective jurors possessed any knowledge of the case, but, rather, whether the knowledge they possessed created prejudice against" Larzelere. Davis, 461 So. 2d at 67. See also Copeland v. State, 457 So. 2d 1012, 1017 (Fla. 1984) ("Public knowledge

alone . . . is not the focus of the inquiry . . . ."); United States v. Padilla-Martinez, 762 F. 2d 942, 951 (11th Cir.), cert. denied, 474 U.S. 952 (1985) (a defendant is not constitutionally entitled to a trial by jurors ignorant of relevant issues and events). During voir dire, and in her initial brief, Larzelere has failed to show a community "so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." Manning, 378 So. 2d at 276. See also Dobbert v. State, 328 So. 2d 433, 440 (Fla. 1976). In addition, Larzelere's failure to use all of her allotted peremptory challenges indicates the absence of juror prejudice.[6] United States v. Alvarez, 755 F. 2d 830, 859 (11th Cir. 1985).

Larzelere claims that the jurors' answers to the voir dire questions are not dispositive of the issue. "Although such assurances are not dispositive, they support the presumption of a juror's impartiality. It is the defendant's burden 'to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality."'" Copeland, 457 So. 2d at 1017 (quoting Murphy v. Florida, 421 U.S. 794 (1975), and Irvin v. Dowd, 366 U.S. 717 (1961)). Because Larzelere has failed

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[6] Larzelere used only nine peremptory challenges before accepting the jury panel (T 1580-83).

to meet her burden of proof regarding this issue, this Court should affirm the trial court's decision.

Issue XII

WHETHER THE TRIAL COURT PROPERLY DENIED LARZELERE'S MOTION FOR A JUDGMENT OF ACQUITTAL.

At the close the state's case in chief, Larzelere moved for a judgment of acquittal on the grounds that

> the State has failed to prove a prima facie case of guilt against the defendant as to the crime of first degree murder.
>
> Furthermore, Your Honor, at this time the defendant moves for a Judgment of Acquittal also, and striking of the testimony with respect to the charge that Virginia Larzelere conspired with Jason Larzelere to commit the murder of Norman Larzelere to collect the insurance proceeds and to cover up the murder.

(T 5531). The state responded that, in addition to the statements of Larzelere, the state had adduced evidence regarding the insurance proceeds and estate (T 5531). At the close of all evidence, Larzelere moved for an acquittal, arguing again that the state had not proved a prima facie case against her and adopted her previous arguments (T 5705).

On appeal, Larzelere now claims that the state's evidence, "almost entirely circumstantial," was legally

insufficient to support a guilty verdict, and the proof failed to exclude the reasonable possibility that Larzelere was not involved in her husband's murder. Initial Brief at 76. In so arguing, Larzelere does not acknowledge that her classic "shotgun" motion below failed to specify for the trial court the extent to which the state's evidence was insufficient. Cornwell v. State, 425 So. 2d 1189, 1190 (Fla. 1st DCA 1983). Accordingly, Larzelere failed to preserve this argument for appellate review, and it should not be considered by this Court. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

In the event this Court reaches the merits of this claim, it is well aware that, in moving for an acquittal, Larzelere admitted the facts adduced in evidence and every conclusion favorable to the state. Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). Thus, the issue before this Court is whether the state presented sufficient evidence which established that Larzelere murdered her husband. State v. Law, 559 So. 2d 187, 188 (Fla. 1989).[7] This determination is for the jury, and where there is competent substantial evidence to support

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[7] Because Larzelere concedes that the state's case was not based solely on circumstantial evidence, Initial Brief at 76, the special Law standard does not apply, i.e., where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

the jury's verdict, that determination should not be disturbed on appeal. Toole v. State, 472 So. 2d 1174 (Fla. 1985). The trial court correctly denied Larzelere's motion for a judgment of acquittal, because the state proved each element of the crime of first degree murder with competent substantial evidence.

Specifically, the state proved Larzelere's "active participation in the murder, not as the shooter, but as a principal under Florida Law, which makes her equally as guilty as the shooter" (T 5777). The state's theory was that Jason Larzelere was the actual shooter, based on descriptions of the assailant (T 3997), the victim's crying out of Jason's name immediately before his death (T 2145, 2612), and Jason's statements to, and complicity with, Larzelere, Heidle and Palmieri.

Insurance policies on the victim's life had accumulated over the years, largely through Larzelere's efforts.[8] First were two Kentucky Central Life policies on which Larzelere would have received half -- one worth $75,000 to Larzelere, the other $50,000. These were secured prior to Larzelere's marriage to the victim, and the other half went to the victim's parents (T 2752-53). Next was a $25,000 Allstate policy, 100% payable to Larzelere upon the victim's death (T

[8] A chart of the policies is found at (R 382).

2763). The first major policy was a 1987 $300,000 State Farm policy, 100% payable to Larzelere upon the victim's death and secured by Larzelere herself, for the stated purpose of replacing the Kentucky Central Life policies (T 2772-74, 2777). About one year later, Larzelere secured an additional policy through State Farm in the amount of $250,000, 100% payable to Larzelere upon the victim's death (T 2778-79). At the end of 1988, Larzelere requested quotes from State Farm for $2.5 million worth of insurance for the victim (T 2781).

In 1990, Larzelere secured another life insurance policy in the amount of $750,000 with Allstate for the victim; this policy contained an accident death benefit rider of $350,000, so that, if the victim were murdered, the total payout would be $1.1 million (R 386-87; T 2806). Larzelere told the insurance agent that the only other insurance policy in existence at the time of her application was the $250,000 State Farm policy, which the Allstate policy would replace (T 2824-25). As the testimony of the witnesses showed, however, Larzelere cancelled none of these policies.[9]

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[9] Heidle recalled seeing these policies, and the victim's will, after Jason retrieved them from a storage warehouse at Lazelere's direction (T 3047-69).

In 1989, the victim initiated divorce proceedings against Larzelere (T 3891-92). Also in 1989, Larzelere informed her lover Karn that she needed to have her husband killed. Karn then arranged for Larzelere to speak with Hayden, and Larzelere specified to Hayden how she wanted the victim killed (T 2040-44, 2072-76). In 1990, Larzelere told a different lover, Langston, that she needed to have her husband killed (T 2096-98).

In December 1990, Larzelere told Lombardo, who worked in the victim's dental office, about the copies of her and the victim's wills kept in the office (T 3906-11).[10] Also about this same time, Larzelere refinanced the marital home at a 16.85% interest rate (T 2900); the amount financed was $203,001.36, $121,436 of which was used to pay off the first mortgage, and $78,942.22 of which was paid out in cash to the Larzeleres, for the stated purpose of purchasing some property in Manatee County (T 2898-99). Soon thereafter, Larzelere began negotiations to purchase an $80,000 Porsche (T 5370-71). Larzelere also secured a $203,000 mortgage insurance policy which would pay cash to her, not the bank, upon the victim's death (T 2869).

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[10] Lombardo testified that, when Larzelere originally gave her the wills, the victim's will was not signed. The three purported witnesses to the victim's will testified that they had not witnessed the signing and had not signed as witnesses, despite the wording in the will to the contrary (T 3950-75).

Witnesses at the dental office, the scene of the murder, recounted Larzelere's nervous, abrupt behavior on the day of the murder (T 2391). Phone records showed Larzelere's status calls to Jason Larzelere, Heidle, and Palmieri during the day prior to the murder. In the days after the murder, Larzelere instructed Jason, Heidle, and Palmieri to get rid of anything that might tie them to the murder, kept Jason medicated and in the house (T 3165-66, 4176), sent Jason out of town (T 4205-07, 4533), and directed Heidle and Palmieri to dispose of the shotgun used in the murder and another gun.

Witnesses testified about various statements made by Larzelere and Jason, i.e., Larzelere told Jason that he would get his $200,000 for "taking care of business," (T 3151, 4178); Jason told Heidle that he was waiting for a phone call from Larzelere to tell him "that Norm is dead" (T 3112); Jason and Larzelere told Heidle that Jason had left something in Heidle's attic that he needed to get; Heidle discovered a shotgun from his attic (T 3159, 4179); Larzelere told Heidle and Palmieri to dispose of the shotgun and a .45 handgun (T 3164-65, 4183-91);[11] Larzelere told Jason that he had "fucked up" on the day of the murder by being late to the scene (T 3186-87); Larzelere told Palmieri

[11] The state firearms expert testified that shells from the shotgun recovered were consistent with the evidence found at the scene (T 5264).

that, when the victim fell to the floor calling Jason's name, "she tried to cover his mouth with hers to make it look like she was going to give him mouth to mouth" (T 4281); Larzelere told Heidle that she had invented the robbery scenario on the day of the murder because Jason was late (T 3187, 4280); Larzelere told Heidle that she expected to be arrested for the murder (T 3190, 4204); Larzelere told Heidle that she would find a way around the requirement that an insurance policy had to be in place for 18 months before collecting on it, and that no one would interfere with her collecting the insurance money "or they [would] wind up just like Norm" (T 3194); Larzelere told Heidle to get rid of his mother's car because it might have been seen when Jason used it at the scene (T 3201-12, 4193); and, while at the dental office on March 24, Jason showed Heidle how he killed the victim (T 3219-21).[12]

Witnesses also completely rebutted Larzelere's version of events surrounding the murder, i.e., that biker Gatzy likely stole the Valium from the safe and murdered the victim (T 2391, 4138, 4533, 4679), that there was a commotion in the lab immediately after the shooting (T 2423), that Larzelere struggled with the shooter (T 2423-25), that a robbery occurred (T 2395-96), Larzelere's ever-

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[12] Jason and Larzelere also reenacted the murder, Jason pretending to hold a gun and Larzelere pretending to be the victim by spinning around and falling on the floor (T 4282).

changing account of the murder (T 2409-19, 4570-73, 4584-85, 4633, 4680-84, 4869-70, 5360, 5470), Larzelere's varying account of an alleged drive-by shooting at her home (T 4535-36, 5282-83),[13] and that Jason was physically helpless (T 2091-95, 2272, 2335, 4155, 4282, 4457-58, 4483, 4504, 4584).

As shown above, the record clearly indicates that the state introduced competent evidence which not only proved Larzelere guilty beyond a reasonable doubt but disproved her theory of events. Accordingly, the trial court correctly denied Larzelere's motion for a judgment of acquittal.

Issue XIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING JASON LARZELERE'S STATEMENTS AS A CO-CONSPIRATOR INTO EVIDENCE.

The decision to admit evidence is committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in admitting the statements of Jason Larzelere, because they were admissible

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[13] Larzelere predicted a "hit" on herself because she had witnessed the murder (T 3999).

as the statements of a co-conspirator pursuant to **Fla. Stat.** § 90.803(18)(e) (1991).

The state proposed a jury instruction to the trial court to address the independent proof element of the conspiracy (T 2931). Larzelere submitted a different version (T 2932). The trial court edited and combined, and all parties agreed (T 2937, 2979-80). The trial court ruled that Jason's statements were admissible as those made in furtherance of a conspiracy, and that Jason's statements to Heidle at the dental office were not admissible only under the co-conspirator exception, but as admissions against interest as well (T 2982-83).

Prior to Heidle's testimony, the trial court instructed the jury:

> Every act and declaration of each member of a conspiracy is the act and declaration of them all and is therefore original evidence against each of them.
>
> However, before this co-conspirator rule may be invoked and the evidence of alleged acts and declarations of Jason Larzelere, the alleged co-conspirator of the defendant, may be considered by you, there must first be independent of said acts or declarations substantial evidence of the existence of a conspiracy between Virginia Larzelere and the said alleged co-conspirator.
>
> Accordingly, in this case, before any alleged statements of the alleged co-conspirator, Jason Larzelere, may be considered by you as evidence against

> Virginia Larzelere, there must be such independent evidence of the existence of a conspiracy between Virginia Larzelere and Jason Larzelere to commit the murder of Dr. Norman Larzelere with the intent to share in the life insurance benefits of Dr. Norman Larzelere and/or the estate of Dr. Norman Larzelere.
>
> The elements involved in a conspiracy that must be shown by independent evidence are that the intent of Virginia Larzelere was that the offense that was the object of conspiracy would be committed and that in order to carry out that intent, Virginia Larzelere agreed, conspired, combined or confederated with Jason Larzelere to cause said offense to be committed either by them or one of them or by some other person.
>
> It is not necessary that the agreement, conspiracy, combination or confederation to commit that offense be expressed in particular words nor that words pass between Virginia Larzelere and Jason Larzelere. It is not necessary that Virginia Larzelere do any act in the furtherance of the offense conspired.
>
> It is a defense to a charge of criminal conspiracy that a defendant after conspiring with one or more persons to commit the offense that was the object of the alleged conspiracy, persuaded the alleged co-conspirators not to do so or otherwise prevented commission of the offense that was the object of the conspiracy.

(T 3009-11).

Larzelere claims that the trial court erred because the state failed to prove the conspiracy independent of Jason's

statements. Initial Brief at 81.[14] This claim is bunk. The record clearly shows that the state proved a conspiracy between Jason and Larzelere independent of Jason's statements by a preponderance of the evidence. See Romani v. State, 542 So. 2d 984, 985 n.3 (Fla. 1989). Among other things, the state showed that Larzelere had secured large amounts of insurance covering the victim's life; that the victim's will left everything to Larzelere; that Larzelere had promised $200,000 to Jason for "taking care of business"; that Lombardo had described the assailant as looking like Jason; that Larzelere had directed Jason to act medicated and disabled; and that Jason and Larzelere had reenacted the murder together in front of witnesses. Contrast Miller v. State, 545 So. 2d 343 (Fla. 2d DCA 1989).

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[14] Larzelere also claims that the trial court erred in failing to give her proposed limiting instruction. Initial Brief at 81. In so claiming, Larzelere misrepresents the record. As shown in text, after the state proposed its limiting instruction, Larzelere propounded her own, and the trial court combined the two with the agreement of both parties. Subsequent to that, defense counsel requested an additional limiting instruction at transcript page 2984. As the trial court correctly pointed out in denying this instruction, such an instruction defeated the purpose of the agreed-upon instruction (T 2985).

Issue XIV

WHETHER FLA. STAT. § 921.141 (1991) IS CONSTITUTIONAL.

Below, Larzelere moved for a special verdict form in which the jury would note the aggravating circumstances relied upon in reaching an advisory sentence (R 20-24);[15] to preclude comments and instructions to the jury that its recommendation was only advisory and for a Tedder[16] instruction (R 30-37);[17] for a bifurcated jury (R 61-62);[18] to preclude sentencing under sections 921.141 and 775.082(1), based on the claims that section 921.141 constitutes a legislative effort to dictate judicial procedure and section 775.082(1) is impermissibly broad, vague, overreaching, indefinite, is violative of the Eighth Amendment, and unconstitutional as applied (R 100-02);[19] to declare section 921.141(5)(i) unconstitutional, based on a claim that it establishes an automatic aggravating factor in

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15 The trial court denied this motion without explanation (R 309-10).

16 Tedder v. State, 322 So. 2d 908 (Fla. 1975).

17 The state agreed with the defense motion and stated: "The Court can grant the motion." (T 418).

18 The trial court denied this claim without explanation (R 305).

19 The trial court denied this motion "based on Medina and Peavy as cited and Lightbourne v. State, 438 So. 2d 380 (Fla. 1980). See also Proffitt v. State, 482 U.S. 242 . . . (1976)." (R 303).

premeditated and felony murders and impermissibly shifts the burden of proof (R 112-14);[20] to declare section 921.141 unconstitutional, based on a claim that the aggravating and mitigating circumstances are impermissibly vague and overbroad and do not permit a defendant to present all relevant mitigating evidence (R 140-47);[21] and to declare section 922.10 unconstitutional, based on a claim that death by electrocution is violative of the Eighth Amendment (R 158-59).[22]

On appeal, Larzelere claims that: (1) the CCP aggravating factor is applied arbitrarily and, because it is vague, the CCP jury instruction is vague and relieves the state of its burden of proving the elements of the factor; (2) section 921.141 is unconstitutional because it authorizes a death recommendation on the basis of a bare majority vote; (3) the lack of a unanimous verdict as to any aggravating circumstance is unconstitutional; (4) the jury is told its role is only advisory; (5) because the sentencing judge was selected by a racially discriminatory system, the death penalty is unconstitutional; (6) the death

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20 The trial court denied this motion based on Medina (R 303).

21 The trial court denied this motion "based on Medina v. State, 466 So. 2d 1046 (Fla. 1985), and Peavy v. State, 442 So. 2d 200 (Fla. 1983)." (R 303).

22 The trial court denied this claim without explanation (R 303).

penalty statute unconstitutionally prevents the evenhanded application of appellate review and independent reweighing; (7) the CCP, heinous, atrocious, or cruel (HAC), felony murder, and hinder law enforcement aggravating factors[23] are unconstitutional because they do not rationally narrow the class of death eligible persons or channel discretion; (8) through use of the contemporaneous objection rule, section 921.141 has institutionalized disparate application; (9) Tedder has not been applied consistently; (10) section 921.141 does not provide for special verdict forms; (11) **Fla. R. Crim. P.** 3.800(b) unconstitutionally forbids mitigation of a death sentence; (12) section 921.141 creates a presumption of death where a single aggravating circumstance appears, and HAC applies to any murder;[24] (13) section 921.141 unconstitutionally instructs juries not to consider sympathy; (14) and electrocution is cruel and unusual punishment.

As is readily apparent, Larzelere failed to preserve most of these claims in the lower court.[25] The only claims

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[23] This Court should refuse to hear the merits concerning the HAC, felony murder, and hinder law enforcement aggravating factors. Larzelere has no standing to challenge these factors, as none of these were applied to her.

[24] Because the HAC aggravating factor was not applied to Larzelere, she has no standing to challenge it.

[25] Notably, regarding the CCP instruction, Larzelere made no complaint other than the combination of pecuniary gain and CCP being impermissibly duplicative (T 6175).

which Larzelere raised below are numbers 4,[26] 10, 12,[27] and 14. This Court has held consistently that, for an issue to be preserved properly for appellate review, the appellate arguments must be the same as the arguments raised in the lower court. Peterka v. State, 640 So. 2d 59 (Fla. 1994); Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990); Jackson v. State, 451 So. 2d 458 (Fla. 1984), cert. denied, 488 U.S. 871 (1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). In the event this Court reaches the merits of any of the subissues presented under this issue heading, the state addresses the merits of all of these sentencing claims, while initially asserting that all are without merit. See Windom v. State, slip op. at 4 n.4, Case No. 80,830 (Fla. Apr. 27, 1995); Marquard v. State, 641 So. 2d 54, 58 n.4 (Fla. 1994).

Accordingly, under Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994), any challenge to the CCP instruction is procedurally barred.

[26] Although this issue is technically preserved in that Larzelere raised it below, this Court should refuse to consider it for several reasons. First, the state agreed with the defense motion on this point. Second, the trial court offered a proper instruction on this point (R 442-45). And third, and most significant, Larzelere did not object to the instruction as read (T 6257-62).

[27] The portion of this claim dealing with HAC was not presented below, and accordingly is not preserved for appellate review. Furthermore, because HAC was neither found nor applied in the instant case, Larzelere lacks standing to complain.

1. This Court previously has held that the CCP aggravating factor is not unconstitutionally vague or overbroad. Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992); Klokoc v. State, 589 So. 2d 219 (Fla. 1991). Larzelere has shown nothing to the contrary.

2. A majority recommendation has been deemed sufficient to recommend the death penalty. Brown v. State, 565 So. 2d 304 (Fla. 1990).

3. Aggravating circumstances are not separate penalties or offenses, but are standards to guide the choice-making between the alternative verdicts of death or life imprisonment. Walton v. Arizona, 110 S. Ct. 3047 (1990); Hildwin v. Florida, 109 S. Ct. 2055 (1989); Lowenfield v. Phelps, 484 U.S. 231 (1988).

4. The instruction as given stressed the gravity of the jury's undertaking and did not improperly describe the role assigned to the jury and was not erroneous. Dugger v. Adams, 489 U.S. 401 (1989).

5. Larzelere has no right to any particular judge. Kruckenberg v. Powell, 422 So. 2d 994 (Fla. 5th DCA 1982). This includes judges of African-American ancestry. Larzelere did not move to disqualify the instant judge as biased or question the sentence on this basis.

6. Evenhanded application is insured by virtue of Florida's trifurcated death penalty procedure. Regardless of what the trial judge does, this Court certainly knows and applies its own law, and is entitled to the Walton v. Arizona, 110 S. Ct. 3049 (1990), presumption that it has so applied the law in making its decisions. Furthermore, in Sochor v. Florida, 112 S. Ct. 2123 (1992), the United States Supreme Court indicated that review for harmless federal error is acceptable as independent appellate reweighing.

7. The very existence of appellate narrowing constructions of the CCP aggravating factor sufficiently narrows the class of death eligible persons. Compare Herring v. State, 446 So. 2d 1049 (Fla. 1984), with Rogers v. State, 511 So. 2d 526 (Fla. 1987), and Swafford v. State, 533 So. 2d 270 (Fla. 1988). See also Alford v. State, 307 So. 2d 433, 436 (Fla. 1975).

8. The practice of procedurally defaulting claims not properly presented has been conducted consistently by this Court, see Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990), cert. denied, 112 S. Ct. 164 (1991); Rose v. State, 461 So. 2d 84, 86 (Fla. 1984), and is authorized by the United States Supreme Court. See Wainwright v. Sykes, 433 U.S. 72 (1977).

9. Since 1975, this Court has determined consistently that Tedder v. State, 322 So. 2d 908 (Fla. 1975), means precisely what it says, i.e., that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989).

10. There is no constitutional requirement that the jury render written findings, much less indicate unanimous agreement as to the applicability of each aggravating circumstance. Hildwin v. Florida, 109 S. Ct. 2055 (1989); Jones v. State, 569 So. 2d 1234 (Fla. 1990). A jury recommendation is based on a weighing of the totality of aggravating circumstances against the totality of mitigating circumstances. Double jeopardy concerns are not implicated by the rendering of an advisory recommendation. Spaziano v. Florida, 468 U.S. 447 (1984). Jury error should not be presumed because the jury in Florida does not reveal the aggravating factors on which it relies. Sochor v. Florida, 112 S. Ct. 2114, 2122 (1992).

11. Section 921.141 provides that a defendant may present matters in mitigation to the judge in the penalty phase of a capital case. A condemned prisoner may also present mitigating information to the Governor of this state in clemency proceedings. The fact that the procedural

vehicle for presenting mitigating evidence is not **Fla. R. Crim. P.** 3.800(b) hardly calls into question constitutional principles.

12. The claim that section 921.141 shifts the burden to the defendant to prove sufficient mitigating circumstances exist which outweigh aggravating circumstances is without merit. See Kennedy v. Dugger, 933 F. 2d 905 (11th Cir. 1991). The automatic aggravating circumstances claim was rejected in Lowenfield v. Phelps, 484 U.S. 231 (1988). See also Clark v. State, 443 So. 2d 973, 978 (Fla. 1983).

13. The claim that the jury was improperly instructed not to consider sympathy was decided adversely to Larzelere in Saffle v. Parks, 494 U.S. 484 (1990). Mitigating circumstances are not designed to be the subject of sympathy. Their importance lies in determining whether a defendant is of such legal responsibility as to be a candidate for a sentence less than death.

14. There is no question that the death penalty is constitutional. Patten v. State, 598 So. 2d 60 (Fla. 1992); Thomas v. State, 456 So. 2d 454 (Fla. 1984). The mere possibility that the electric chair may malfunction at some unknown time in the future is not a concern for this Court.

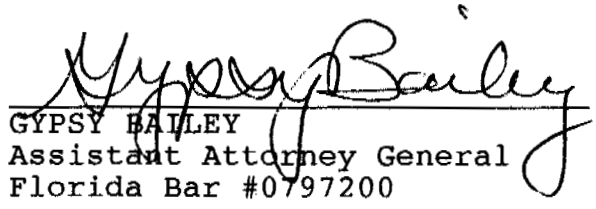
Louisiana ex rel. Frances v. Resweber, 329 U.S. 459 (1947); Buenoano v. State, 565 So. 2d 309 (Fla. 1990).[28]

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Larzelere's sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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[28] Although not raised, the state submits that Larzelere's sentence (two aggravating factors, no statutory mitigation, "some" nonstatutory mitigation -- ability to adjust to prison (R 1297)) is proportionate to death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances. See Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Zeigler v. State, 580 So. 2d 127 (Fla. 1991); Buenoano v. State, 527 So. 2d 194 (Fla. 1988); Byrd v. State, 481 So. 2d 468 (Fla. 1985).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CHRISTOPHER S. QUARLES, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 4th day of May, 1995.

GYPSY BAILEY
Assistant Attorney General