IN THE SUPREME COURT OF FLORIDA

ROBERT CONSALVO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 82,780

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Robert Consalvo, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Although Appellant's statements of the case and the facts are reasonably accurate, they are incomplete. Therefore, the State offers the following additional facts:

1. Real Favraeau testified that he managed a motel in Margate in September 1991 and had rented rooms before to Appellant. (T 1098-99). In fact, Appellant had rented a room for the evening of September 29, 1990. (T 1101). A blonde woman was with Appellant, and they had two cars--a two-door Oldsmobile, and a newer maroon compact car. (T 1102-03). Appellant rented the room for a second night, and reported that he had lost his keys. (T 1104). Another customer found the keys later and Mr. Favraeau called the phone number that Appellant had given him. The police came by shortly thereafter and took the keys. (T 1104-05).

2. Officer Williams, who apprehended Appellant inside Myrna Walker's apartment on October 3, 1990, testified that he drove Appellant to the Broward County Jail for booking. (T 1175). At the police station, during the booking procedure, Appellant asked several times what he was being charged with, what his bond would be, and how long he would be in jail. (T 1176, 1185).

3. Detective Paul Giani testified that Victor D'Angelo had been arrested in October 1991 and confessed to committing approximately 35 burglaries in the same township in which Appellant and Ms. Pezza lived. (T 1276-77). Mr. D'Angelo confessed that he would knock on a victim's door and if no one answered, kick the door in. He stole jewelry and VCR's. (T 1277).

4. Detective Doethlaff testified that Ms. Pezza called him regarding Appellant's theft of her money and keys, but she did not report that either her checkbook or her ATM card was missing. (T 1284).

5. Paul Johnson, a records custodian for Southern Bell, related Ms. Pezza's phone number, Appellant's phone number, the North Broward Detention Center pay phone number, and the Broward County Jail sixth floor pay phone numbers. (T 1333-37).

6. Mickey Glass, a Publix store manager in Margate, testified that he was in charge of maintaining the ATM machine at the store. (T 1388-89). All transactions are taped on a weekly basis. He sent the tape for the week of September 27, 1990, to the corporate office when requested. (T 1390, 1396-97). Similarly, Rita Arlia, the office cashier at the Publix on Coconut Creek Parkway, testified that she sent two tapes covering September 23 through September 30, and September 30 through October 7, to the corporate office as requested. (T 1398, 1401-02).

7. James Andrews, the Director of the Presto Network for Publix in Lakeland, detailed the procedure for making photographs from the taped ATM transactions. (T 1403-05). He then identified and described photographs which showed Appellant using various ATM machines on September 27, 29, and 30. Some of the transactions were denied and some resulted in withdrawals of money. (T 1423-30).

8. Casey Robinson, the Assistant Branch Manager of the California Federal Bank in Boca Raton, testified that money had been withdrawn from Ms. Pezza's account through Publix ATM's in Margate and Coconut Creek on September 27, 28, 29, and 30. (T 1448, 1454, 1456).

9. Jean Corroppoli, Appellant's mother, testified that Appellant knew Ms. Pezza and had been friends with Ms. Pezza's recently deceased live-in boyfriend. (T 1678-84).

10. Detective Gill testified that, after finding Ms. Pezza's car behind a pawn shop near the Seaton Villa Motel in Margate, he took Appellant's girlfriend to the area to look for the keys to the car. They found them in the backyard of a nearby house. (T 1849-53). Keys on the ring did not fit the victim's apartment door because her family had changed the locks after her death. (T 1854). Detective Gill also testified from phone records that Appellant's mother received a collect call from the North Broward Detention Center on October 3, 1990, at 7:32 p.m., which lasted two minutes. (T 1903).

11. Detective Edel, the blood stain analyst from the Broward County Sheriff's Office, testified that the blood on the towel found in Appellant's dresser drawer was transferred to the towel while the blood was still wet. (T 1869). In addition, the blood pattern on the towel was consistent with Appellant wiping blood from his hand onto the towel in a downward motion. (T 1877). From the blood spatter on the furniture, Detective Edel opined that Ms. Pezza was stabbed at least once while lying on the floor near the bed. (T 1872-73). From the blood pattern on her body, the detective opined that Ms. Pezza was fatally stabbed while lying on the bed. (T 1871-72). The sheets and towels covering Ms. Pezza were placed over her within one and a half hours after her death as evidenced by the blood saturation. (T 1874).

12. Richard Ben-Veniste, Lorraine Pezza's brother, testified that his sister called him on September 26, 1990, at 11:32 p.m., and they talked for 38 minutes. (T 2221). Ms. Pezza was feeling "down" because Appellant had stolen her money and keys. (T 22223).

13. Gene Williamson, a friend of Ms. Pezza, identified a shirt found inside the canvas bag retrieved from the dumpster near Ms. Pezza's apartment, as one that Ms. Pezza had worn. (T 2443).

14. After independently assessing the evidence following the jury's recommendation of death by a vote of eleven to one, the trial court found the existence of two aggravating factors--"the murder was committed during the course of a burglary" and "the murder was committed to eliminate a witness or prevent his lawful arrest." After according "very little weight" to Appellant's nonstatutory mitigating evidence of a significant employment history and an abusive childhood, the trial court found that these mitigating factors "in no way offset the aggravating factors." As a result, the trial court sentence Appellant to death for the first-degree murder of Lorraine Pezza. (R 3751-68).

SUMMARY OF ARGUMENT

Issue I - Appellant's challenges to the instruction that proof of the unexplained possession of recently stolen property by means of a burglary may justify a conviction for burglary were not raised in the trial court, and thus were not preserved for review. Regardless, the validity of this instruction has been upheld previously.

Issue II - The State's comments in its guilt-phase closing argument relating to the similarities between the Walker burglary and the Pezza burglary/murder were fair comments on the evidence. Even if they were erroneous, however, they were harmless beyond a reasonable doubt.

Issue III - The trial court conducted an adequate inquiry and properly determined that the State did not commit a discovery violation when it informed defense counsel the day after opening statements that its fingerprint expert had made additional fingerprint comparisons on previously unidentified prints found in the victim's apartment, some of which matched the victim's deceased, live-in boyfriend. Even were it a violation, the trial court properly determined that it was neither willful nor substantial, and that Appellant was not prejudiced in his defense since he had deposed the expert immediately after the additional comparisons were made.

Issue IV - Appellant failed to preserve this issue for review. Even if it were preserved, the trial court conducted an adequate inquiry and properly determined that the State did not commit a discovery violation when it failed to disclose that it requested analysis of some cigarette butts found in the victim's toilet but that an analysis could not be done. Even were it a violation, the trial court properly determined that it was neither willful nor substantial, and that Appellant was not prejudiced in his defense.

Issue V - Based on Appellant's reciprocal discovery and his questions to Eva Bell and Dr. Wright, the trial court did not abuse its discretion in allowing the State to present evidence and argument to rebut Appellant's potential suicide defense. Even if it were error, however, it was harmless beyond a reasonable doubt.

Issue VI - Appellant failed to preserve this issue for review. Even had it been preserved, hearsay testimony relating to a prior incident between Appellant and the victim regarding an alleged theft of money and keys was properly admitted under the state of mind exception to the hearsay rule, as it proved that the victim would not have consented to Appellant's presence in her apartment, which was an element of the armed burglary charge. Were it improperly admitted, however, it was harmless beyond a reasonable doubt.

Issue VII - Appellant failed to preserve this issue for review. Even were it preserved, Officer Williams' testimony relating to Appellant's statement upon his arrest for the Walker burglary that he had permission to be there was properly admitted to show a consciousness of guilt and to rebut a potential defense of consent. Were it admitted in error, however, it was harmless beyond a reasonable doubt.

Issue VIII - Appellant failed to preserve this issue for appeal and makes different arguments on appeal than he made pretrial below. Regardless, the trial court properly admitted Ms. Bell's testimony since Appellant's hearsay statement to his mother was an "admission," and Ms. Corroppoli's statement to Ms. Bell was either a "spontaneous statement" or an "excited utterance." Even if improperly admitted, however, it was harmless beyond a reasonable doubt.

Issue IX - Appellant failed to preserve this issue for appeal. Regardless, the trial court properly admitted evidence of the Walker burglary because it was inextricably intertwined with the

Pezza burglary/murder. Even if it was admitted in error, however, it was harmless beyond a reasonable doubt.

Issue X - Appellant failed to preserve this issue for review. Regardless, instruction and argument on felony murder did not constitute an improper amendment to the indictment which alleged only premeditated first-degree murder.

Issue XI - This Court has repeatedly held that the trial court may instruct the jury on, and the State may argue, felony murder when the indictment only alleges premeditated murder.

Issue XII - The record supports the trial court's finding of the "avoid arrest" aggravating factor.

Issue XIII - The trial court's reliance on information that was not presented in open court in determining the appropriate sentence did not injuriously affect Appellant's right to a fair trial. All of the information obtained from the nonrecord sources was admitted at trial, and it did not, even collectively, constitute a substantial portion of the evidence upon which the trial court found the existence of the aggravating factors.

Issue XIV - The trial court considered all of Appellant's mitigating evidence. To the extent that Appellant did not articulate certain circumstances to the trial court, Appellant cannot fault the trial court for failing to mention it. The record supports the trial court's rejection of some of Appellant's nonstatutory mitigating evidence. The trial court did not apply the wrong standard in considering Appellant's evidence of abuse as a child.

Issue XV - When compared to other cases under similar facts, Appellant's sentence of death is proportionately warranted.

Issue XVI - The trial court did not abuse its discretion in admitting victim-impact evidence. Even if it did, however, it was harmless beyond a reasonable doubt.

Issue XVII - Florida's victim-impact statute is constitutional.

Issue XVIII - The "felony murder" aggravating factor is constitutional.

Issue XIX - The trial court did not abuse its discretion in rejecting Appellant's special requested instructions which detailed his nonstatutory mitigating circumstances.

Issue XX - Death by electrocution is not cruel and unusual punishment.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT PROOF OF UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY BY MEANS OF A BURGLARY MAY JUSTIFY A CONVICTION FOR BURGLARY (Restated).

The following instruction was read to the jury over Appellant's objection during the guilt phase of his trial:

> Proof of unexplained possession by an accused of property recently stolen by means of a burglary may justify **a** conviction of burglary with intent to steal that property if the circumstances of the burglary and of the possession of the stolen property, when considered in the light of all of the evidence in the case, convince you beyond a reasonable doubt that the defendant committed the burglary.

(T 2699-2700). During the charge conference, defense counsel claimed that the facts did not support the instruction because there was no proof that the property was stolen at the time of the burglary, as opposed to either at the time of the previous theft of the victim's keys and money, or sometime after the victim was killed. (T 2480-81). In this appeal, however, he contends that the instruction is internally inconsistent because it "requires the jury to find that the property was stolen by means of burglary before using the presumption. If the jury finds that the property was stolen by burglary, the burglary issue would be resolved." **Brief of Appellant** at 23-24. In essence, Appellant is attacking the validity of the instruction itself rather than the applicability of the instruction to the facts. Because he did not make this argument in the trial court, he may not raise it for the first time on appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Even if it were preserved, it has no merit. **As** Appellant's cited cases establish, "[t]he presumption applies . . . where the property is indisputably stolen and the question is who stole it." Jones v. State, 495 So.2d 856, 857 (Fla. 4th **DCA 1986)** (cited in **Brief of Appellant** at 24). Appellant, however, disputes that any of Ms. Pezza's property was stolen. Specifically, he claims that Ms. Pezza's canvas bag could have been removed from the trash dumpster where it was recovered by the police. **Brief of Appellant** at **24-25.** Alternatively, he claims that the evidence never established that he was actually in possession of Ms. Pezza's canvas bag and, in fact, his mother testified that he was in possession of a different canvas bag. Id. at 25.' In addition, Appellant claims that Ms. Pezza's checkbook "was from **an** account that was closed long before the burglary occurred R1842. Thus, the checkbook was of no value and could have been discarded long ago." **Brief of Appellant** at 25 (emphasis added).[2]

Curiously, Appellant does not mention the fact that he was videotaped using Ms. Pezza's ATM card, and was seen driving her car several days before her body was found. The State's evidence established beyond a reasonable doubt that these items were not "found," but were taken without Ms. Pezza's consent during the burglary of her home. Thus, taken as a whole, the evidence supports the conclusion that Appellant was in possession of items stolen from Ms. Pezza.

Appellant asserts that even assuming the property was stolen his possession of the property "was never unexplained. Appellant was never asked to explain his possession of the property."

'His own attorney, however, conceded to the **jury** that Appellant's mother was mistaken. (T 2507). While his attorney's argument is not evidence, Appellant can hardly ignore his attorney's concession.

[2]Appellant's possession of the checkbook in his back pocket when he was caught burglarizing Mrs. Walker's home belies any claim that he knew it was "of no value." Moreover, Appellant was caught with Mrs. Walker's checkbook down his pants. This particular checking account had also been closed out. (T 1172-73, 1184, 1247).

Brief of Appellant at **25.** Formally offering Appellant an opportunity to explain, however, is not a prerequisite. "If the Government proves possession and nothing more, this evidence remains unexplained unless the defendant introduces evidence, since ordinarily the Government's evidence will not provide an explanation of his possession consistent with innocence." **Barnes** v. United States, 412 U.S. **837,** 846 n.11 **(1973).** Regardless, although the State was not required to ask Appellant to explain his possession of Ms. Pezza's property, it in fact did so when Detective Gill went to the jail after Appellant's arrest for the Walker burglary to question Appellant about his possession of Ms. Pezza's checkbook. Thus, he should not be heard to complain that he was never asked, assuming such a requirement exists.

Finally, Appellant alleges that by giving the instruction, the trial court improperly commented on the evidence. To support this contention, Appellant cites to Barfield v. State, **6**13 So.2d *507,* 508 (Fla. 1st DCA 1993), wherein the First District held that a similar instruction constituted **an** improper comment on the evidence and invaded the province of the jury. **Brief of Appellant** at *25-26.* Again, this argument was not raised before the trial court and cannot be raised for the first time on appeal. Tillman; Steinhorst.

Even were it preserved, however, Barfield is easily distinguishable. In that case, the defendant had been charged with dealing in stolen property and grand theft. Over the defendant's objection, the trial court gave the following instruction which was based on section 812.022(3), Florida Statutes (1**989):**

> Proof of the purchase or sale of stolen property at a price substantially below the fair market value unless satisfactorily explained gives rise to an inference that a person buying or selling the property knew or should have known that the property had been stolen.

613 So.2d at 507. Comparing this instruction to the flight instruction condemned in Fenelon v. State, 594 So.2d 292 (Fla. 1992), the district court noted that, **like** the flight instruction, this instruction was not contained in the standard jury instructions. In addition, the court believed that the phrase "substantially below the fair market value" did not adequately inform the jury of the circumstances under which the presumption should apply. Finally, as in Fenelon, the district court was concerned about the lack of a meaningful standard for determining the type of evidence that warrants the giving of the instruction. 613 So.2d at 508.

The instruction given in Appellant's case, on the other hand, is contained in the standard jury instructions and has been approved by this Court several times. See. e.g., Edwards v. State, 381 So.2d 696 (Fla. 1980), and cases cited therein, It does not contain vague terms, and its application to any given case is easily determined. Thus, it does not suffer the same defects as the instruction in Barfield. Consequently, though not preserved, Appellant's argument is unavailing. **As** a result, this Court should affirm Appellant's conviction for the first-degree murder of Lorraine Pezza.

ISSUE II

WHETHER THE STATE'S GUILT-PHASE CLOSING ARGUMENT RELATING TO A COLLATERAL OFFENSE DENIED APPELLANT **A** FAIR TRIAL (Restated).

During the State's guilt-phase closing argument, the prosecutor made the following comments:

> Okay, the the [sic] Walker burglary. There's some interesting things that I want you to consider about that in comparison to Miss Pezza's burglary because there's a lot of similarities, not only the fact that you have him committing a burglary, and I'm sure you know the layout. It's downstairs and one over from him and Lorraine, who's, of course, next door. What are [sic] do you have?

(T **2634).** At that point, defense counsel objected that the State was arguing the Walker burglary as Williams rule evidence when the trial court had admitted it because the burglary was inextricably intertwined with the facts of the Pezza burglary/murder: "For him to argue the similarities is improper Williams Rule, and he shouldn't be allowed to argue this now to the jury because that wasn't the purpose that it was in." (T **2634-35).** The State responded:

> These are facts in evidence. I can argue and comment on the facts in evidence as similarities if I want. The fact that they are intertwined doesn't make it that they are not similar as well. They are intertwined, They are similar. It's all been deemed relevant testimony in this case, and I can comment on it. **If** he wants to add a jury instruction, you know, that's fine, Williams Rule instruction, that's fine.

(T 2635-36). The trial court overruled defense counsel's objection. (T 2638-39).

Appellant renews his claim that the State should not have been allowed to compare the similarities of the two crimes because the Walker burglary was not admitted **as** similar fact evidence. Appellant further claims that the State should not have been allowed to argue the facts under that

theory. The fact that it did rendered his trial fundamentally unfair because the Walker burglary was not sufficiently similar to qualify as Williams rule evidence. **Brief of Appellant** at **26.**

To the extent Appellant argues that the Walker burglary was not admissible as similar fact evidence, or under any other theory, the State will rely on its arguments made in Issue IX, infra. In that issue, the State submits that the Walker burglary was admissible because it was inextricably intertwined with the Pezza burglary/homicide and was more probative than prejudicial. **As** for Appellant's claim in this issue that the trial court abused its discretion in allowing the State to argue the similarities between the Walker burglary and the Pezza burglary/homicide, the State submits that such argument was proper rebuttal to defense counsel's argument, and proper comment on the evidence.

As this Court has repeatedly stated, "[t]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Bertolotti v. State, **476** So.2d 130, 134 (Fla. 1985). "Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So.2d 1, **8** (Fla. 1982). "Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment." Mann **v.** State, **603** So.2d 1141, 1143 (Fla. **1992). The** issue in this case was the identity of the perpetrator. By comparing the similarities between the two intertwined offenses, the State was attempting to prove circumstantially that Appellant was the perpetrator. It was arguing facts elicited during the trial and drawing legitimate inferences therefrom. Thus, the trial court did not abuse its discretion in overruling Appellant's objection.

Even were the State's comments improper, however, any error was harmless beyond **a** reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The permissible evidence

upon which the jury could have relied includes the following: Appellant lived with his mother next door to the victim. He knew the victim and had been in her apartment on several occasions. He also knew that Ms. Pezza's boyfriend had recently died, leaving her alone in the apartment. (T 1673-84). Appellant was filmed on September 27, 29, and 30 making withdrawals from Ms. Pezza's bank account using her ATM card. (T 1388-97, 1397-1402, 1403-47, 1448-58). On September 30, a motel clerk saw Appellant with the victim's car. (T 1102, 1114-15). The car was later recovered behind a pawn shop just south of the motel on the other side of the street. The keys were found in the backyard of a nearby house. (T 1849-54). Appellant's mother saw Appellant on September 30 with a beach bag that belonged to Ms. Pezza. (T 1696-98). On October 3, Appellant was caught burglarizing the apartment of an elderly widow who lived downstairs and over from Appellant's apartment. (T 1150-60, 1160-88, 1189-1206, 1216-25, 1234-60). Upon his arrest, he was found in possession of Ms. Pezza's checkbook. (T 1172-73, 1184, 1219-20). From the jail, Appellant called his mother regarding bail and told her that he was going to be implicated in a murder. When his mother told him that the police were next door, Appellant replied, "Oh, shit." (T 1336, 1616-18, 1710-13). After his phone call, the police entered the victim's apartment and found her face down under numerous sheets and pillows on her bed. (T 1300, 1358, 1368-76, 1512). Playing cards found in her bedroom and bathroom matched playing cards found in the beach bag which was retrieved from the top of a nearby dumpster in the apartment complex. (T 1206-15, 1260-65, 1468-75). When Detective Gill asked Appellant at the jail about his possession of Ms. Pezza's checkbook, Appellant responded, "[Y]ou are not going to pin that stabbing on me." At that point, the police did not know that the victim had been stabbed. (T 1815-19). Pursuant to a search warrant, the police found a towel in Appellant's dresser drawer. Blood on the towel, which had been transferred from a hand

onto the towel while the blood was still wet, matched the victim's **DNA** pattern. (T **1717-19, 1746, 1823-30, 1867-69, 1676-77, 2262-67).** Finally, Appellant told another jail inmate that he went to Ms. Pezza's apartment, but she did not answer her door, although he knew she was home. He thought she was passed out, so he broke in to get drugs. She awoke **and** started yelling at him to get out and that she was going to call the police. She reached for the telephone so he grabbed her. She screamed and he stabbed her. When she screamed louder, he stabbed her several more times. (T **2376-77).** Based on this evidence, there is no reasonable possibility that the verdict would have been different had Officer Hopper's hearsay testimony not been admitted. DiGuilio. Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Lorraine Pezza.

ISSUE III

WHETHER THE TRIAL COURT ABUSED **ITS** DISCRETION IN RULING THAT THE STATE DID NOT COMMIT A DISCOVERY VIOLATION AND WHETHER THE TRIAL COURT CONDUCTED AN ADEQUATE RICHARDSON HEARING (Restated).

During the testimony of Thomas Messick, a latent fingerprint supervisor in the Broward County Sheriffs Office, defense counsel claimed that the State had committed a discovery violation by asking Mr. Messick to perform additional fingerprint comparisons after defense counsel had commented in his opening statement about the existence of unidentified prints in the victim's apartment. (T 2145-46,2149). In response, the State argued that the day before opening statements it asked Mr. Messick to try to determine how many of the unidentified latent prints could be matched to the victim. Mr. Messick performed the requested analysis. However, on his own, Mr. Messick also ran the unidentified prints through a computer database which resulted in ten possible matches, one of whom was Scott Merriman, the victim's deceased, live-in boyfriend. Still on his own, Mr. Messick then retrieved Mr. Merriman's prints from archives and matched 18 of the 40 unidentified prints to him. Thereafter, 22 unidentified latent prints remained, two of which positively did not match either Appellant, Ms. Pezza, or Mr. Merriman--one on the rear-view mirror of Ms. Pezza's car and one on **a** role of Scotch tape found in the beach bag. Mr. Messick contacted the prosecutor after opening Statements regarding his additional analysis, and the prosecutor immediately contacted defense counsel. **As** a result, defense counsel deposed Mr. Messick two days after opening statements, which was almost a week before the State called Mr. Messick as a witness. (T 2146-51). Ultimately, the trial court made the following rulings:

> If Mr. Messick of his own accord does an investigation, all be it, [sic] while the trial is in session, and comes up with a result and

> gives it to the State and the State immediately gives it to the defense, there is no discovery violation. It's not **a** discovery violation. It may be a need for a continuance maybe because it has now changed the strategy of the defense's case and as a result they need a couple weeks now to check out this information. But I don't really see it as a discovery violation because I don't see where the State did anything wrong. They didn't have anything that they failed to give. They didn't do anything by way of discovery.
>
> [DEFENSE COUNSEL]: Note the objection for the record.
>
> THE COURT: Okay, **So** I don't find there exists a discovery violation, but assuming for the sake of argument somebody interpreted this as a discovery violation, I find that the - it certainly wasn't a wilful violation. I find that the violation was trivial in the light of the testimony of the officer and in the light of Mr. Messick, and I find that the defendant's ability to prepare himself for trial was not harmed. I find that the imposition of sanctions would be improper, and I find that the State didn't participate in this, so there is no necessity for me to find any reasonable means to avoid prejudice to the defendant, which is one of the suggestions when a Richardson inquiry occurs.

(T 2151-53).

Appellant claims that the trial court erred in finding that the State had not committed a discovery violation because "the state left Appellant with a false impression that prints found at the crime scene would not be identified." **Brief of Appellant** at 31. Appellant also claims that the trial court failed to conduct **an** adequate inquiry into the facts surrounding the violation and the alleged prejudice to Appellant's defense. Id. at 34. For the following reasons, the State submits that the trial court conducted an adequate hearing and properly determined that the State did not commit a discovery violation, but that, if it did, the violation was not willful or substantial, and Appellant was not prejudiced in his defense.

Florida Rule of Criminal Procedure 3.220(b)(1)(J) requires the State to disclose to the defense within 15 days of its request any report or statement of an expert, including the results of

any scientific tests, experiments, or comparisons. In addition, subsection (j) places on the State a continuing duty to disclose such information:

> If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the times of the previous compliance, the party shall promptly disclose or produce the witnesses or material in the same manner as required under these rules for initial discovery.

(Emphasis added). These rules make it clear that the State must disclose the results of all scientific comparisons in its possession within 15 days of a demand for discovery. Any results obtained after the initial disclosure must be disclosed promptly thereafter.

In this case, the State disclosed Tom Messick's name and his 13-page latent fingerprint report almost eight months before the trial. (R 3435). Knowing that there remained 40 unidentified latent fingerprints from the victim's apartment, the prosecutor asked Mr. Messick the day before trial to try to determine if any of those prints could match the victim.[3] Without being asked to do so by the State, Mr. Messick took it upon himself to run the unidentified prints through a computer database. When the computer identified Scott Merriman as a potential match, Mr. Messick again took it upon himself to retrieve Mr. Merriman's prints from archives and compare them with the previously unidentified prints. After confirming that Mr. Merriman's prints matched 18 prints found in the victim's apartment, Mr. Messick immediately notified the prosecutor, who in turn immediately notified defense counsel. Defense counsel deposed Mr. Messick two days later. The State sought to present Mr. Messick's testimony a week later.[4]

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[3]Due to the state of decomposition of the body, the victim's fingerprints were of marginal quality which made matching her prints to latent prints in her apartment difficult. (T **2328).**

[4]The ultimate conclusion rendered by Mr. Messick was that none of the latent fingerprints recovered from Ms. Pezza's apartment match Appellant's fingerprints. (T 2329).

This Court has previously held that when a discovery violation is alleged, the trial court must make an inquiry into the circumstances surrounding the alleged violation. If it finds that no violation occurred, it need not conduct a full-scale Richardson inquiry. Barrett v. State, 649 So.2d 219, 222 (Fla. 1994) ("[A] Richardson hearing is only required where the court determines that a discovery violation has occurred."). Here, the trial court inquired into the events surrounding the alleged violation. After the State explained the circumstances of its newly acquired fingerprint comparisons, the trial court questioned defense counsel about any possible prejudice from the recent disclosure. Ultimately, the trial court determined that the State met its continuing obligation to disclose information to the defense and found no discovery violation. See Sinclair v. State, 20 Fla. L. Weekly S293, 293-94 (Fla. June 22, 1995) (finding no discovery violation when witness testified during trial to statement made by defendant which the witness had failed to disclose either to the state or the defense); Esty v. State, 642 So.2d 1074, 1079 (Fla. 1994) (finding no discovery violation by state's disclosure of additional witness day before trial).

In Barrett. supra, a cased relied on by Appellant, the defendant learned during the middle of trial that the State's fingerprint expert had recently compared and found no match between latent prints found at the crime scene and prints he had recently obtained from the man the defendant claimed had killed the victims. On appeal, this Court found that the trial court erred in determining that the defendant's objection was untimely. In addition, this Court found that the state had violated discovery, and thus the trial court's failure to conduct a Richardson hearing was per se reversible. However, in discussing the need for a hearing under these circumstances, this Court stated:

> Under the continuing discovery obligation, it was incumbent on the State to disclose the newly discovered . . . prints to the defense. Absent such disclosure, when the violation was brought to the judge's attention, he was required to conduct a complete Richardson hearing

> and provide a full record for our review. If the judge had determined that Barrett was prejudiced by the nondisclosure, he could have fashioned an appropriate remedy.

649 So.2d at 222-23.

Unlike in Barrett, the prosecutor in this case immediately disclosed the newly discovered information to defense counsel, who in turn immediately deposed the witness. By the time the witness testified, the information had been disclosed almost a week, and defense counsel had had a sufficient opportunity to investigate the new information. When the matter was raised before the trial court, there was no need to conduct a complete Richardson hearing because there was no violation to analyze.[5]

Out of an abundance of caution, however, the trial court alternatively assessed the evidence as if a violation had occurred and determined that any violation was neither willful nor substantial, and that Appellant was not prejudiced in his defense. As noted previously, the State sought to narrow the number of unidentified latent prints by having Mr. Messick determine if any could possibly match the victim. When Mr. Messick informed the State of his unprompted discovery, the State immediately informed defense counsel, who immediately deposed Mr. Messick. Given the

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'Appellant cites to numerous cases to support his position to the contrary, none of which are availing. In all of Appellant's cases, save Smith v. State, 499 So.2d 912 (Fla. 1st **DCA** 1986), the state either failed to timely disclose information that it previously possessed or misled the defense into believing that it would not use newly acquired information. When a discovery violation was alleged, the trial court either determined that no discovery violation had occurred, or found a discovery violation but failed to conduct an adequate Richardson hearing. Because of this Court's previous per se rule of reversal when a trial court fails to conduct a Richardson hearing, reversal was mandated in all of those cases. Here, on the other hand, the state immediately disclosed newly acquired information to the defense the **day** after opening statements, but the defense did not object until a week later when the witness testified. By then, the defense had deposed the witness and was able to prepare for his testimony. **At** that point, there was no violation to consider.

witness' independent actions, it could hardly be said that the State intentionally withheld discoverable information.

Moreover, Mr. Messick's testimony that he ultimately matched some of the unidentified prints to the victim's previously deceased, live-in boyfriend did not constitute substantial evidence against Appellant. Since none of the latent fingerprints matched Appellant's prints, the fact that some of them could be attributed to Scott Merriman neither proved nor disproved that Appellant committed the murder. They were admitted as **part** of the police department's efforts to investigate this crime.

As for the effect of Mr. Messick's testimony on Appellant's ability to prepare his defense, Mr. Messick testified that there remained two unidentified latent prints that he positively could not match to either Ms. Pezza or Mr. Merriman. Although defense counsel had referenced other unidentified latent prints during his opening statement to **support** his theory that someone else committed the murder, there were ultimately two latent prints that were never identified. Thus, that part of Appellant's defense remained intact, i.e., Appellant's theory of defense was not prejudiced.

In Thompson v. State, 565 So.2d 1311 (Fla. 1990), the defense sought to depose the defendant's wife whom he accused of killing the victim, but she absconded and could not be found. During his opening statement, defense counsel theorized that the defendant's wife murdered the victim. As a result of this argument, the State began looking for the defendant's wife, and an investigator ultimately found her and convinced her to return that evening. Meanwhile, the defendant testified and accused his wife of killing the victim. The next morning, the prosecutor interviewed the defendant's wife and then returned to court to cross-examine the defendant. Following the defendant's testimony, the State informed the defense that it was going to call the

defendant's wife in rebuttal. The defense alleged a discovery violation and moved to exclude her testimony. The trial court denied the motion but allowed the defense an hour to depose her before she testified, Id. at 1315.

On appeal, this Court affirmed the trial court's ruling, although it found that the state's violation was both willful and substantial. In assessing prejudice, this Court found that the defense's ability to depose the witness before her testimony successfully averted any prejudice:

> Had the discovery violation occurred before Thompson presented his opening statement and direct examination, we might easily reach a different conclusion. But the violation occurred after Thompson fully committed himself to the strategy of blaming his wife for the murder. The prejudice to Thompson under these circumstances must focus on his ability to prepare for his own cross-examination and redirect examination, and the examination and possible rebuttal of Janice. Thompson's cross-examination and redirect examination necessarily were limited to the scope of his direct testimony, so there could have been no substantial prejudice in that regard. The deposition substantially cured Thompson's inability to prepare to cross-examine Janice and rebut her testimony. We find no reversible error.

Id. at 1317.

As in Thompson, Appellant had committed himself to his defense that someone else killed Lorraine Pezza. In assessing prejudice, the focus must be on his ability to prepare for his cross-examination of Mr. Messick and to rebut his testimony. Appellant's deposition of Mr. Messick a week before his testimony gave Appellant ample time to refine his theory of defense. As noted, his defense remained intact because there remained two unidentified latent prints. Thus, besides the fact that any violation in the present case was neither willful nor substantial, as it was in Thompson, any prejudice to Appellant was minimal if not nonexistent. See Cohen v. State, 581 So.2d 926, 927-28 (Fla. 3d DCA) (finding no prejudice to defense when medical examiner reassessed his opinion

during trial as to the victim's time of death), rev. denied, 592 So.2d 679 (Fla. 1991); Smith v. State, 499 So.2d 912, 913-14 (Fla. 1st DCA 1986) (finding no prejudice to defense by state's failure to disclose until morning of trial that one of two unidentified prints matched victim's house mate); State v. Zamora, 538 So.2d 95, 96 (Fla, 3d DCA 1989) (stating that the discovery rule "was never intended to provide a defendant with a procedural device to escape justice where the State fails to disclose trivial information"); State v. Lewis, **543** So.2d 760, 766 (Fla. 2d DCA 1989) (finding that defendant's discovery of victim's diary during his trial, the existence of which the state had known about and had failed to disclose, did not support new trial). Since the trial court did not abuse its discretion in allowing Mr. Messick to testify, this Court should affirm Appellant's conviction for the first-degree murder of Lorraine Pezza.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION **IN** RULING THAT THE STATE DID NOT COMMIT **A** DISCOVERY VIOLATION RELATING TO TEST RESULTS **AND A** LETTER THAT WAS USED DURING THE TRIAL AND WHETHER THE TRIAL COURT CONDUCTED **AN** ADEQUATE RICHARDSON HEARING (Restated).

During Appellant's cross-examination of Detective Thomas Gill, the lead detective from the Broward County Sheriffs Office, the following colloquy occurred:

> Q. [BY DEFENSE COUNSEL] There are [sic] a tremendous amount of cigarette butts both in Lorraine Pezza's apartment, correct, and in the vehicle?
>
> **A.** [BY DETECTIVE GILL] Yes, sir.
>
> Q. Any of those taken into evidence?
>
> **A.** Yes. There were cigarette butts taken from the apartment, filter tips, and I believe the cigarettes from the ashtray may have been there, may have been cigarettes from the ashtray taken.
>
> Q. Do you know if any **DNA** testing was ever done on those cigarette butts?
>
> **A.** I'm not sure, I think that there was an attempt on the - of DNA on the butts that was [sic] found in the toilet but I'm not sure about that.
>
> Q. Have you ever even seen a report that indicated **an** attempt was done on any of the cigarette butts?
>
> **A.** No, sir, I haven't.
>
> Q. Was any test done to your knowledge on the cigarette butts in the toilet as to how long they had been in there?
>
> A. I know Sergeant Rogers had done some examination of the cigarette butts and had submitted them for further examination. What the findings were, I don't know.

> Q. Did you ever see any report that would indicate a finding of how long the cigarette butts was [sic] in there?
>
> A. No, I didn't.

(T 1987-88) (emphasis added). On redirect examination, the State inquired further, "You were asked if the cigarette butts, if anything was done with them. Were you aware of Sergeant Rogers [sic] attempt to send them away to a Daniel Nippets [sic]?" Detective Gill responded, "Yes, I was." (T 2015-16). At that point, defense counsel objected that he had never been informed that the State sent the cigarette butts anywhere to be tested. (T 2016-17). The State responded that Sergeant Rogers wrote a letter and requested that the butts be analyzed, but no analysis could be done on them. (T 2017-24). Ultimately, the trial court ruled:

> First of all, I find that there is no discovery violation. . . . It appears that **an** attempt was made to get some evidence examined and that's it.
>
> [DEFENSE COUNSEL]: Judge, are you going to allow him to rehabilitate his witness with that letter?
>
> THE COURT: Yeah, I'm going to allow that because there's been inference made that the results of this entire investigation was inadequate because of failure to do a multiplicity of things, and it appears that the cigarette butts in this case there was an attempt to analyze those by sending those away to the chief criminalist at Indian River Community College, but having received negative results, it was the opinion of the State and the opinion of this Court that it's not necessarily discoverable. Every time they receive negative information and it never resolved itself in the form of any sort of report.
>
> * * * *
>
> Anyway, I'm going to find no prejudice exists to the defendant. That if there was a discovery violation, which I don't deem to be that, it was certainly - certainly it was not wilful [sic] and it was certainly as it relates to a trivial insignificant piece of evidence

> in this case and certainly the defendant was not prejudiced in his abilities to prepare this case for trial.

(T **2021-25).** The State made no other mention of the analysis of the cigarette butts, nor made use of the letter requesting analysis.

In this appeal, Appellant complains that the trial court erred in finding that the State did not commit a discovery violation by not informing him that it had sent the cigarette butts off for analysis and that the analyst was unable to perform an analysis. Appellant also complains that the State withheld the letter requesting the analysis which the State sought to use during its redirect examination. Finally, Appellant complains that the trial court did not conduct an adequate inquiry into the violation and the resultant prejudice to Appellant's defense. **Brief of Appellant** at 35-38.

Initially, the State submits that Appellant failed to preserve this claim for appeal because he failed to object upon learning that the cigarette butts had been sent away for analysis. Detective Gill testified during defense counsel's cross-examination that he thought the cigarette butts had been sent away, yet defense counsel made no objection and raised no claim of a discovery violation, Rather, defense counsel waited to object until after the State had elicited further testimony during redirect examination. By waiting, defense counsel failed to preserve his objection for review. Tillman v. State, **471 So.2d 32, 35** (Fla. **1985);** Steinhorst v. State, **412 So.2d 332, 338** (Fla. **1982).**

Even if it were preserved, however, the State submits that the trial court conducted **an** adequate hearing and properly determined that the State did not commit a discovery violation, but that, if it did, the violation was not willful or substantial, and Appellant was not prejudiced in his defense. When defense counsel objected, the first question raised by the trial court was, "Are we going to have a Richardson Hearing now?," to which defense counsel responded, "I think so. I think we need to do it outside the presence of the **jury."** (T 2016). The next eight pages of the transcripts

reflect the discussion between the court and the parties regarding the circumstances surrounding the attempted analysis of the cigarette butts and defense counsel's claims of prejudice. (T 2017-25). This discussion was more than adequate for the trial court to determine whether there was a discovery violation. Based on this discussion, it determined there was not.

As noted in Issue III, Florida Rule of Criminal Procedure 3.220(b)(1)(J) requires the State to disclose to the defense within 15 days of its request any report or statement of an expert, including the results of any scientifictests, experiments, or comparisons. Appellant claims that "[t]he analysis of the laboratory concluding that the evidence could not yield DNA results is in itself the result of scientific analysis and thus is itself discoverable." **Brief of Appellant** at 35-36. Appellant's claim fails, however, because there was no "report[] or statement[]" of an expert. Both the witness and the prosecutor stated that there was not a "report" from the expert. (T 1987-88,2017). Moreover, Rule 3.220(b)(1)(B) defines "statement" as "a written statement made by the person and signed or otherwise adopted or approved by the person and . . . any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording." There was no written or recorded statement of any kind. Thus, the fact that the State sought to have the cigarette butts analyzed, but no analysis could be done, does not constitute discoverable information. See State v. Lewis, 543 So.2d 760, 767-68 (Fla. 4th DCA 1989) (finding that a detective's simulation of the lighting conditions under which the victim's boyfriend claimed he saw the victim lying in the hallway did not constitute a "scientific test or experiment" which was subject to discovery).

As for the letter from Sergeant Rogers to Daniel Nippes requesting analysis, Appellant claims that "any documents or materials that the prosecution used at trial must first be disclosed to the defense." **Brief of Appellant** at 37. Until it became an issue in the trial, however, the letter

constituted "work product" of the State which was exempt from disclosure pursuant to Rule 3.220(g)(1). See State v. Gillespie, 227 So.2d 550,556-57 (Fla. 2d DCA 1969) (footnotes omitted; emphasis added) ("Of a different genre of 'work product' are . . . statements or documents used as investigatory techniques to procure or elicit evidence. These items are examples of 'work product' in its purest and narrowest sense, to which the accused is not ordinarily entitled, except perhaps as may be required under the Jencks rule, I. e., made available to the accused at trial for purposes of effective cross-examination within the scope of the right of confrontation."). The State was required to disclose the letter to the defense only at the time that it was used by the State. Although the prosecutor may have been poised to use the letter during its redirect examination of Detective Gill, it ultimately never did so. Regardless, defense counsel was informed of the letter at that time. As a result, the trial court properly determined that the State had not committed a discovery violation regarding the letter.

Out of an abundance of caution, however, the trial court alternatively assessed the evidence as if a violation had occurred and determined that the violation was neither willful nor substantial, and that Appellant was not prejudiced in his defense. The record reveals that Detective Gill and Sergeant Rogers, the crime scene supervisor, were listed by the State well before trial in its initial answer to demand for discovery. (R 3351-53). Although defense counsel initiated questioning at trial regarding the cigarette butts, he failed to elicit this information from either witness during their depositions. (T 2019-20). As such, he should not have asked questions to which he did not know the answers.

Be that as it may, the record supports the trial court's finding that the State's failure to inform defense counsel of the attempted analysis was inadvertent. In addition, the record supports the

finding that the information relates to a trivial piece of evidence. No cigarettes of any kind were ever linked to Appellant. Finally, the record supports the trial court's finding that Appellant suffered no prejudice to his defense. Appellant's theory of defense was based partly on the sloppiness and ineptitude of the police in their investigation. While defense counsel may have failed to score points regarding the cigarette butts, there were numerous other pieces of evidence that counsel attacked. Thus, even if the State committed a discovery violation relating to the analysis and letter, it was harmless beyond a reasonable doubt. See State v. Schopp, 653 So.2d 1016 (Fla. 1995). Consequently, this Court should affirm Appellant's conviction for the murder of Lorraine Pezza.

ISSUE V

WHETHER THE STATE'S GUILT-PHASE CLOSING ARGUMENT RELATING TO APPELLANT'S SUICIDE DEFENSE DENIED APPELLANT **A** FAIR TRIAL (Restated).

Pursuant to discovery, defense counsel disclosed to the State copies of medical records relating to the victim in this case, Lorraine Pezza. (R 3395). Four days later, defense counsel sought **an** in camera hearing for the authorization to expend funds relating to his defense. (SR1 138). At a hearing on that motion, from which the prosecutor was excluded, defense counsel sought additional funds for a mental health expert, Defense counsel explained that he had obtained all of the victim's mental health records and had provided them to his expert, Dr. Abbey Strauss. Dr. Strauss, however, needed additional funds to do a "psychological autopsy" on the victim. From this evaluation, the doctor could determine whether defense counsel could prove as a potential mitigating factor in the penalty phase "that the victim participated in her death from a psychological point of view." (T 467-70). When asked if he was attempting to show that the victim provoked Appellant into killing her, thereby raising a legal justification for the murder, defense counsel responded that he was investigating this issue only for penalty-phase purposes, but that it was too early to know whether the doctor could testify to such. (T 470-73). The trial court ultimately authorized the doctor to spend ten more hours investigating this theory, with a possible five more hours if the doctor believed that he could render **an** opinion on such within a reasonable psychological certainty. (T 474-76). **An** order was filed with the clerk and served upon the State authorizing Dr. Strauss to "review the psychological background of the victim and the effects of any and or [sic] medication the victim might have been taking." (R **3596).**

On the first day of trial, prior to opening statements, defense counsel invoked the rule of sequestration and the State argued that the victim's brother should be allowed to sit in the courtroom. The prosecutor explained that Mr. Ben-Veniste would probably be a witness in the penalty phase, but would only be a witness in the guilt phase if defense counsel raised a suicide defense, which it had "sometimes hinted about." (T 1043). Defense counsel responded, "Let me say this, that is not our theory in defense in the sense of it is not our purpose to say that it was a suicide. That doesn't mean that areas that come out in this case about potential suicide won't be presented." (1**043-44).**

During defense counsel's cross-examination of Eva Bell, a social worker with the Mobile Crisis Unit of the Broward County Mental Health Division who was asked to check on the victim, counsel questioned her about her first contact with the victim in August of 1990. Over the State's relevancy objection, Ms. Bell testified that Scott Merrirnan, the victim's boyfriend, called the crisis unit to report that Ms. Pezza was threatening suicide and that she had previously been hospitalized. (T 1623-25). When defense counsel questioned Ms. Bell about Ms. Pezza's history of suicide threats, the State objected on hearsay grounds **and** the trial court called a side-bar conference. (T 1626). At side-bar, the following colloquy occurred:

> THE COURT: I think it's - first of all, it's in direct support of a potential defense that he has, and I think that it's a proper matter of cross-examination.
>
> [THE STATE]: Mr. Glass announced that suicide was not going to be a defense.
>
> [DEFENSE COUNSEL]: What I said was it's coming in. It's relevant whether or not --
>
> THE COURT: Right.
>
> [THE STATE]: What is the relevance if it's not a defense to the murder? What is the relevance?

[DEFENSE COUNSEL]: There's a lot of relevance.

[THE STATE]: Let him state what it is. There's none.

[DEFENSE COUNSEL]: Because, one, we know the M.E. is going to talk about off the board, so he says, drugs which is through the roof in this case, five times the normal dosage that's on board for this lady at the time of death. It has to do with her reaction to things in her life. It has to do with her demise in terms -- he had to testify as to what bipolar personality and manic depressive is, that she's out of control. I'm going into what does that mean, out of control, and the particular history of this lady?

[THE STATE]: What is the ultimate point?

[DEFENSE COUNSEL]: The point is the same reason they are there, the same reason he asked the last officer on the scene did they investigate this as a suicide or not. I think it's important to know that, and what is coming down the line that it was originally called in as a potential suicide.

[THE STATE]: What is the relevance if a suicide is not a defense? There's none.

THE COURT: I think it's a proper matter of cross-examination. I think he has a right to try his case. I'm going to overrule the objection.

(T 1628-29) (emphasis added). Thereafter, Ms. Bell testified that Ms. **Pezza** had had suicidal thoughts in 1990 and had considered stabbing herself to death with her own kitchen knife. (T 1630-33). In September 1991, Ms. Pezza was having suicidal thoughts and threatened to commit suicide on September 26 because the Nova Mental Health Clinic rejected her for their treatment program. (T 1633-36).

Later in the State's case-in-chief, the prosecutor indicated that he wanted to call the victim's brother, Richard Ben-Veniste, as a witness. Defense counsel immediately moved to exclude Mr.

Ben-Veniste from the courtroom during other witnesses' testimony and reserved an objection to his testimony. During this discussion with the court, the following colloquy occurred:

> THE COURT: Mr. Marcus, do you think there is a possibility that you may call Mr. Ben-Veniste as a witness?
>
> [THE STATE]: Yes, sir. As the Court may recall, before the trial started [defense counsel] had indicated that while the fact that - the fact of Lori being suicidal may come up, that a suicide defense was not going to be raised. In that light, I advised the Court that if that was raised, Mr. Ben-Veniste would be a relevant witness to testify.
>
> There has been testimony, cross-examination of Eva Bell, and [defense counsel] has indicated that there may be the statement of Dr. Wright as to the possibility of a suicide of Miss Pezza. So based on [defense counsel's] prior representation that he wouldn't be doing it, his violating those representations, we are intent to call Mr. Ben-Veniste as to any conversations.
>
> * * * *
>
> [DEFENSE COUNSEL]: Let me say one thing in response to what [the prosecutor] said so the record isn't silent on behalf of myself My remembrance of what was said before the trial began was [the prosecutor] asked if I was going to raise suicide as a defense. I told him that is not our defense in the case, but it is going to come in because of everything that has happened, That position has not changed, and I think at the time the position was that the State acts at their peril. It's not my defense. You know what the defense is. I have been putting it up from opening argument on, but the aspects of suicide, the reason that Eva Bell came, the Court allowed relevant testimony throughout the case regarding it and some relevance is going to come in through Dr. Wright.
>
> THE COURT: I disagree with that. I don't want to make any findings at this point, but certainly, the State was prepared to specifically exclude Mr. Ben-Veniste at the initial stage of this trial based upon your response to the question that they asked you that formulated part of this record. They said, look, if you are going to rely on suicide defense, we are going to call Mr. Ben-Veniste as a witness in this case.

[DEFENSE COUNSEL]: I am not relying on a suicide.

THE COURT: If you are not, he's going to sit here throught [sic] the course of this trial. That's what happened. Although, you didn't specifically acknowledge and ascent to it, by virtue of him staying here at that time, I believe, there was certainly some cord of tacit acknowledgment that he would have a right to sit here throughout the course of this trial. To say the State has allowed him to sit here at their peril.

[DEFENSE COUNSEL]: No, no, I didn't mean that. What I said is exactly the position. Suicide is not our defense. It never has been. It never will be.

[THE **STATE]:** Why did that testimony come out?

[DEFENSE COUNSEL]: Excuse me. That doesn't mean when a witness is on the stand and the reason for her being there or certain things concerning suicide, and Dr. Ron Wright is going to testify as part of what he did concerning suicide, that doesn't mean it doesn't come in. You can't take what the witness knows and chop it out if it's relevant.

THE COURT: Okay.

(T 2041-44). At that point, the parties scheduled Mr. Ben-Veniste's deposition for the following morning. (T 2047-48).

During the direct examination of the medical examiner, Dr. Wright, the State asked the doctor whether he had considered suicide as a cause of death. The doctor explained that he had initially because of the limited amount of information he had about the circumstances of her death, but changed his mind after the autopsy. (T 2090-92). On cross-examination, defense counsel specifically asked Dr. Wright, "In this case are there characteristics suggestive of suicide?" (T 2108). The doctor answered affirmatively and noted the lack of defensive wounds, the presence of superficial wounds to the back which could be hesitation **marks,** and the presence of psychoactive medications which is more often than not found in people who commit suicide. (T 2109). Defense

counsel asked Dr. Wright whether he knew that Ms. Pezza had told her therapist on September 26 that she did not see a reason to live. (T 2109-10). Defense counsel also inquired into the possibility that Ms. Pezza's wounds were consistent with suicide assistance. (T 2110-11). Finally, defense counsel questioned the doctor about the prevalence of suicide among persons who take Prozac, which Ms. Pezza had been taking for some time. (T 2118-19).

The following day, the parties again discussed the admission of Mr. Ben-Veniste's testimony. (T 2168-2218). Defense counsel indicated that he had not taken Mr. Ben-Veniste's deposition and insisted on an in camera hearing, which was denied. (T 2168-85). After the State proffered the substance of Mr. Ben-Veniste's testimony, defense counsel objected on the grounds that it was based on hearsay, that it constituted victim-impact evidence, that Mr. Ben-Veniste had heard most of the previous witnesses' testimony, and that his testimony was not relevant. (T 2186-87).

As for the relevancy objection, the State responded that Mr. Ben-Veniste's testimony was relevant in part regarding his familiarity with the victim's house and car keys. Regarding the hearsay objection, the State responded that the out-of-court statements of the victim were being offered to prove the victim's state of mind, not for their truth. Citing to a legal treatise, the State indicated that when a defendant claims the victim committed suicide such a claim can be rebutted by statements of the victim that are inconsistent with suicide. (T 2190). At that point, the following comments were made:

> [DEFENSE COUNSEL]: I repeat, I'm not claiming she committed suicide. I'm not going to ask the Court to instruct on the suicide defense.
>
> * * * *
>
> THE COURT: Well, certainly the nature of the questions that have been asked of the medical examiner and other witnesses in this

> case would at this point lead the jury to believe otherwise. And because of that, I find that the testimony of Mr. Ben-Veniste is relevant as to that issue. And I find that the testimony of Mr. Ben-Veniste relative to the [victim's] keys is relevant as to the issue raised by the State and the case that the State cited.

(T 2190,2192).

Thereafter the State proffered Mr. Ben-Veniste's testimony, and the parties made plans to take his deposition. During this discussion, Mr. Ben-Veniste informed the court that he and the prosecutor **and** defense counsel had conferred previously about his potential for testifying, and that he indicated to defense counsel that he would not be testifying unless counsel raised a suicide defense which counsel indicated he would not. The following comments ensued:

> [DEFENSE COUNSEL]: ***So*** the record is clear, the conversation with [the prosecutor] is [sic] whether or not the defense was going to raise a suicide defense. And I have advised the Court we haven't and we're not going to.
>
> THE COURT: [Defense counsel], so the record is clear, you can say whatever you want to say, but I heard the questions that you asked the doctor. I heard the questions that you asked other witnesses. As far as I'm concerned. if I have to make a finding I'm going to make **a** finding that a suicide defense was. whether You are saving: it's raised or not. has been raised in this case.
>
> [DEFENSE COUNSEL]: I'm not going to ask the Court further to instruct on it.
>
> THE COURT: Okay.

(T 2208-09) (emphasis added).

After a recess, during which defense counsel deposed Mr. Ben-Veniste, the State called Mr. Ben-Veniste as a witness. He testified that Ms. Pezza called him on September 26, 1991, at 11:32 p.m., and they talked for **38** minutes. (T 2221). She indicated that she was "down" because Appellant had moved in next door and had stolen her keys and money, her boyfriend had recently

died, her children were living in California with her ex-husband, and a mental health facility had recently rejected her for a mental health program. (T 2223,2229-32). Later in the conversation, Ms. Pezza discussed several job prospects, her belief that a correct combination of medication would cure her, her need to enter a mental health facility, and her hopes and plans for regaining custody of her children, (T 2236-38). Ms. Pezza did not talk about suicide. (T 2238).

The following day, defense counsel moved for a mistrial based on the admission of Mr. Ben-Veniste's testimony. Defense counsel claimed that the State was improperly allowed to introduce such testimony during its case-in-chief to rebut a defense that he had not raised. According to counsel, the testimony did not show the victim's state of mind as the State contended, but rather amounted to prejudicial victim-impact evidence, (T 2251-56). When the trial court denied the motion, defense counsel then asked the court to strike those portions of the testimony that did not relate to the purpose for which they were admitted. (T 2256). The trial court responded:

> THE COURT: Well, I think it's very difficult to strike every piece of testimony by a witness, especially a witness that testified in somewhat [of] a narrative form. I don't know that it's physically possible, but I think that there was nothing inadmissible that he testified to. I think it all related, and I think it all occurred as a result of the defense indicating to the State in specific form that it wasn't going to rely on the defense of suicide, but in general form it did. And it was, I think, as a result of the actions of the defense that I had to allow the witness to testify, and for that reason, I'm going to deny your motion for mistrial and deny your right to have the jury be instructed that they are to disregard all irrelevant portions.

(T 2256-57).

The State's final witness was Gene Williamson, who was a personal friend of Ms. Pezza's and who had talked to her several days before her murder. During his direct examination, the State asked Mr. Williamson, over defense counsel's objection, to relate Ms. Pezza's mental condition between

the time that her boyfriend had died and the last time that he had spoken with her on September **24,** 1991. (T **2443-45).** The State also asked over objection whether she had been on medication and what affect it had on her. (T **2445-46).** When the State inquired whether the death of her boyfriend affected her in any way, defense counsel objected again, and the parties had a side-bar conference. (T **2446).** At side-bar, the trial court stated:

> Let me indicate now that I feel I have to explain myself every time there is an objection, the reason I am allowing the witness to testify in the manner in which he is, is because even though the defense didn't claim suicide in their opening statement, certainly, by the nature of the questions asked of Miss Bell and the medical examiner there were some inferences or reference to the fact that the victim in this case may have committed suicide. And because of that, I allowed Mr. Ben-Veniste to testify, **and** I am also allowing Mr. Williamson to testify.
>
> * * * *
>
> [DEFENSE COUNSEL]: Judge, again, you are allowing him to do anticipatory rebuttal on his side of the case.
>
> THE COURT: Okay. Well, I believe, though, as I indicated before, that there has been some testimony elicited by you, by the defense, and as a result of that, I am going to allow the State a limited area of inquiry into that area. But don't not object if you think **an** area is objectionable. I am encouraging the defense to object any time they think it's valid.

(T **2447,2449-50).**

Following Mr. Williamson's testimony, the State and the defense rested their cases. (T **2477).** During the State's closing argument, the prosecutor made the following comments without objection by defense counsel:

> Suicide. He tells you a lot of things about suicide, and you know, he finally comes out and says, well, I am not claiming that this is a suicide, that she killed herself. But and in the same token, he can't help himself, it's interesting to know 15 to **20** percent of the

people who use Prozac kill themselves. What is the point of this? That the governor had a one in five chance of killing himself because he used Prozac? It's ridiculous.

He's the one who asked Eva Bell about her suicide attempts. The fact that she at one point said that she would even maybe stab herself. Why did he ask that if it wasn't to try to establish suicide? It's an interesting fact in the case, and it makes the case a little unusual that, apparently, earlier in the day on September 26th, she indicated it would be tough to go on living, Then later in the day you hear she was fine and told people she was fine. Eva Bell told you that when she contacted her. And Richard told you about how she was hopeful toward the future, what things she was looking forward to, getting on her medication, the Prozac helping her out, the job possibilities, how she had these resumes out, all kinds of things in the hopes that she could get her children back to live with her. That was the point of Richard's testimony to show that this was not a person who was suicidal. This was a person who was mentally ill. So you have to ask yourself then why does Mr. Glass bring this out? Is there some kind of subtle suggestion that he is making that a person who's mentally ill doesn't have a - their lives are less valuable than others?

* * * *

You know, the suicide thing is just so insulting because, you know, she's stabbed in the back. She has those five wounds to her back. She's completely covered up. There is no knife there. So, I guess, the theory, until it fell completely flat on its face, was that, well, what she did was she broke into the Consalvo home, stole the knife, cut her way through the screens, decided to kill herself, stabbed herself in the chest. In the 20 seconds that she had left, she managed to get back to his apartment, hide the knife, and put the bloody towel in his dresser. That's about his only reasonable hypothesis of innocence, and that, I submit to you, is completely impossible; but that's about the best that he has.

(T 2592-94).

In this appeal, Appellant claims that he was denied due process and a fair trial because the State created a straw man defense and then proceeded to rebut it during its case-in-chief and closing argument. To support this contention, Appellant cites to Bayshore v. State, 437 So.2d **198** (Fla. 3d

DCA 1983), and Brown v. State, 524 So.2d 730 (Fla. 4th DCA 1988). **Brief of Appellant** at 38-41. In Bayshore, the district court reversed the defendant's convictions for burglary and grand theft "[b]ecause the whole issue of alibi was raised by the state, [and] . . . the prosecutor's comments may have led the jury to believe that appellant had the burden of proving his innocence." **437** So.2d at 199-200 (emphasis added). Likewise, in Brown, the district court reversed the defendant's conviction for robbery because "the record makes clear that *but for* the prosecutor's creation of the impression that alibi witnesses existed, i.e., appellant's fiiend and his friend's father, there would not have been even a hint as to the existence of a possible alibi defense." **524** So.2d at 731.

Here, on the other hand, despite defense counsel's protestations that no suicide defense was being or going to be advanced, his actions belied that account. Prior to trial, defense counsel obtained the victim's mental health records and had an expert review the victim's psychological background and the effects of any medication she may have been taking. During the trial, defense counsel elicited testimony from Ms. Bell that Ms. Pezza had been hospitalized for a mental illness and that she had threatened to kill herself in 1990 by stabbing herself to death. He also elicited testimony from Dr. Wright that there were characteristics of suicide surrounding Ms. Pezza's death, that Ms. Pezza's wounds could have been self-inflicted or suicide assisted, and that suicide was prevalent among people like Ms. Pezza who took Prozac.

At no time during its case-in-chief did the State know whether Appellant was going to present witnesses on his own behalf. **As** it turned out, he did not. Thus, the State had no opportunity to present "rebuttal" witnesses. Moreover, the State had only one closing argument. Appellant, on the other hand, had two--one rebuttable and one not--with which to present his hypotheses of innocence. Based on Appellant's pretrial discovery and his questions to Eva Bell **and** Dr. Wright,

the trial court properly allowed the State to present evidence and argument to rebut Appellant's potential suicide defense. Unlike in Bayshore and Brown, the State did not concoct a defense where none existed. Rather, it anticipatorily rebutted a defense being developed by defense counsel during the State's case-in-chief. Based on defense counsel's actions, the State's questions and argument did not deny Appellant a fair trial. See Biondo v. State, 533 So.2d 910, 910-11 (Fla. 2d **DCA** 1988) (finding no error in allowing state to rebut prematurely defendant's entrapment defense where defendant had raised defense in opening statements and through cross-examination of state witnesses); Kramer v. State, 619 So.2d 274, **277** (Fla. **1993)** (finding no error in instructing on voluntary intoxication and allowing state to argue that voluntary intoxication did not exist where "[i]n effect, the defense raised voluntary intoxication albeit without asking for the instruction"); Highsmith v. State, 580 So.2d **234,** 236 (Fla. 1st **DCA** 1991) (finding that defendant opened door to state comment on defendant's failure to offer testimony of companions where defendant "made it appear" that these potential witnesses could exonerate him).

Even if the State's evidence and argument were erroneously admitted, however, any error was harmless beyond **a** reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. **1986).** Given the quantity and quality of evidence upon which the jury could have relied to find Appellant guilty, as detailed in Issue II, supra, there is no reasonable possibility that the State's comments, if erroneous, contributed to the verdict. Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Lorraine Pezza.

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING TESTIMONY RELATING TO A PRIOR INCIDENT BETWEEN APPELLANT AND THE VICTIM REGARDING AN ALLEGED THEFT (Restated).

Prior to trial, the State filed a notice of intent to present collateral crime evidence. One incident involved the theft of keys and money belonging to Lorraine Pezza, which she accused Appellant of stealing on September 22, 1991. (SR2 129-31). Appellant filed a motion in limine and memorandum of law seeking to exclude such evidence on the grounds that the alleged theft and the instant homicide were factually dissimilar, that such evidence was irrelevant, and that it was based completely on hearsay. (R 3411,3462-63,3480-91). The State responded in a memorandum of law that the evidence was not being offered to prove the truth of the matter asserted, but rather was being offered as evidence of either Appellant's or the victim's state of mind, or both. In addition, the State argued that the evidence was relevant to prove premeditation and to rebut any defense of suicide. (R 3451-54, 3492-96).

At the hearing on the motion in liminc, Officer William Hopper of the Coconut Creek Police Department testified that he was dispatched to Lorraine Pezza's apartment on September 22, 1991, at approximately 3:00 a.m. (T 101). In Appellant's presence, Ms. Pezza reported that she and Appellant were out earlier in the evening and that she withdrew $200 from an automatic teller machine around 8:00 p.m. She kept $60 and put the remaining $140 in her glove Compartment. Around 2:30 a.m., Ms. Pezza went to retrieve her money from the glove compartment, and the money was missing, as were her car keys from the dining room table. (T 102-03). Officer Hopper questioned Appellant, but Appellant denied taking the keys and money. (T 103). Officer Hopper left, and while writing his report downstairs in his cruiser, he was dispatched again to Ms. Pezza's

apartment. Appellant having left, Ms. Pezza directly accused Appellant of taking the keys and money. (T **104).**

On his next working day, Officer Hopper received a phone call from Ms. Pezza, who wanted him to arrest Appellant for the theft because she was afraid of him. Officer Hopper informed her that there was not enough evidence to arrest him and that she should call the detective who was following up on the case. (T 108).

Detective Douglas Doethlaff then testified that he received a call from Ms. Pezza on September **24, 1991,** regarding the theft. Ms. Pezza told him that she had confronted Appellant about taking the keys and money, but Appellant denied it, so she wanted the police to arrest him. Detective Doethlaff told her that since the case was a misdemeanor she would have to file charges herself. Because she did not have sufficient information regarding the suspect, Detective Doethlaff called Appellant and informed him that Ms. Pezza was interested in filing charges but needed biographical information about him. Appellant cooperated fully with the detective and gave him the information Ms. Pezza needed. (T 111-15, **124-25).**

At a later hearing, Appellant complained that this prior incident was only being offered to show a propensity to lie, i.e., that Appellant lied when he said he did not steal Ms. Pezza's keys and money, and he is lying now when he says he did not kill her. (T **259-62).** The State responded that the evidence was relevant to show motive and premeditation, and to show that the victim would not have let Appellant into her apartment after that incident, thereby establishing an element of the armed burglary charge. (T **258-59).** Ultimately, the trial court found that the evidence was relevant and material, and that its prejudicial effect did not outweigh its probative value. (T **260-62).**

At the trial over three months later, the State's second witness was Officer Hopper who testified regarding the victim's allegation of the prior theft of her keys and money by Appellant. At the start of Officer Hopper's testimony, defense counsel made the following objection:

> Judge, while [the prosecutor], before he starts the testimony of Hopper, there's portions of the testimony that the Court, I know, is going to let out that you have talked about, the previous incident when the defendant is present and there's conversations between Lorraine Pezza, the officer, and the defendant and/or accusations in front of the defendant and/or the times when Hopper may speak to the defendant directly. I believe that the State may try to elicit conversations that Hopper has with Lorraine Pezza later on and that other officers have with Lorraine Pezza later on that are clearly hearsay and/or that leads this officer to certain conclusions and opinions, i.e. that she was afraid of Mr. Consalvo and things like that. Those conversations, just as we had spoken earlier about conversations that are hearsay versus conversations that are admissible, I want to make sure that the State doesn't go into those that are hearsay and not admissible.
>
> [THE STATE]: I have already advised the officer not to go into the substance of the private conversations he had.
>
> THE COURT: You just make your objections. See, what I don't want to happen is that you anticipate everything that they are going to do before they do it, and we have a side bar on everything.
>
> [DEFENSE COUNSEL]: This was a key thing. I didn't want it sneaking in.
>
> THE COURT: Don't feel like you can't make your objections. Well, I know you don't feel that you can't. You make whatever objections you deem necessary.

(T 1119-20). No objections were interposed by defense counsel during the State's examination of Officer Hopper. (T 1121-29).[6]

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[6]Defense counsel made numerous hearsay objections, however, during Detective Doethlaff s testimony, but Appellant does not challenge his testimony in this appeal. (T 1282-87).

In this appeal, Appellant claims that the trial court abused its discretion in admitting Officer Hopper's hearsay testimony. **Brief of Appellant** at **42-43.** Initially, the State submits that Appellant failed to preserve this issue for appeal because he made no objection to the testimony **as** required by the trial court. Although Appellant filed a motion in limine prior to trial and interposed an objection at the beginning of the officer's testimony, the trial court specifically told defense counsel to raise objections during the officer's testimony. Since he failed to do so, he failed to preserve his claim for review. Thompson v. State, 589 So.2d 1013, 1014 (Fla. 2d **DCA** 1991) (finding that defendant waived objection to hearsay testimony: "Defense counsel made a general hearsay objection to the entire statement made by the victim to the police officer. Portions of that statement were admissible as exceptions to the hearsay rule. No attempt was made to limit the objection to the inadmissible portions of the statement."). Although defense counsel made a somewhat specific hearsay objection to those statements made by Ms. Pezza and Officer Hopper after the initial encounter, the trial court wanted defense counsel to make specific objections to specific questions. Some of Officer Hopper's testimony was not based on hearsay or was not being challenged, e.g., actions the officer took and statements made during the initial encounter when Appellant was present in Ms. Pezza's apartment. Thus, as the trial court requested, it was incumbent upon counsel to object during the testimony. Since he failed to do so, he failed to preserve this issue for review.

Even if this issue had been preserved, however, it is wholly without merit. **As** the State argued and the trial court found, Officer Hopper's testimony, to the extent that it was based on

hearsay from Ms. Pezza, was relevant and admissible to show the victim's state of mind.[7] Section 90.803(3)(a) of the Florida Evidence Code excludes from the general hearsay rule

> (a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

(Emphasis added).

In Peede v. State, 474 So.2d 808 (Fla. 1985), cert. denied, 477 U.S. 909 (1986), this Court explained the state of mind exception. In Peede, the victim's daughter was allowed to testify at the defendant's murder and kidnaping trial that her mother had told her that she was going to pick up the defendant at the airport, that she was afraid for her life, that her daughter should call the police if she did not return by midnight, that she was afraid of being with people whom the defendant had threatened to kill, and that the defendant was going to kill them all on Easter. On appeal, this Court held that the daughter's testimony was relevant and admissible under the state of mind exception to the hearsay rule because "the victim's state of mind was at issue regarding the elements of the kidnaping which formed the basis for the state's felony murder theory." Id. at 816.

> Under [the kidnaping statute], it was necessary for the state to prove that the victim had been forcibly abducted against her will, which was not admitted by defendant. The victim's statements to her daughter just prior to her disappearance all serve to demonstrate that the

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[7] To the extent the State argued and the trial court found that Officer Hopper's hearsay testimony was relevant to show Appellant's state of mind, they were in error. Hodges v. State, 595 So.2d 929, 931-32 (Fla.), cert. granted & judgment vacated on other grounds, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992). This does not doom the trial court's ruling, however, since "[a] conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it." Caso v. State, 524 So.2d 422,424 (Fla. 1988).

> declarant's state of mind at that time was not to voluntarily accompany the defendant outside of Miami or to North Carolina. We hold that the trial court did not abuse its discretion in admitting the testimony at issue,

~~Id.~~ ~~See~~ also State v. Bradford, 20 Fla. L. Weekly D1527, 1528 (Fla. 5th **DCA** June 30, 1995) (finding that victim's daughter should be able to testify in defendant's murder trial that victim told her she was afraid of defendant, and had changed apartments and cars so defendant would not be able to find her, in order to rebut defense that victim willingly let defendant in her car where he left fingerprint).

Similarly, in the present case, one of the charges against Appellant was armed burglary. Among other things, the State was required to prove beyond a reasonable doubt that Appellant did not have the permission or consent of Ms. Pezza, or anyone authorized to act for her, to enter or remain in her apartment at the time. Fla. Stat. § 810.02 (1991). Since Appellant lived next door and had on occasion visited Ms. Pezza and/or her boyfriend before his death, and since Ms. Pezza was deceased and could not testify as to this element, the State had to prove by circumstantial evidence that she did not consent to Appellant's presence in her apartment at the time of her death. To do that, the State sought to introduce Officer Hopper's testimony to show that Ms. Pezza would not have invited Appellant into her apartment after the theft incident, In other words, Officer Hopper's hearsay testimony relating to the theft was offered to prove Ms. Pezza's state of mind or emotion at the time of her death, which was an element of the burglary offense. **As** in Peede, the relevance of such testimony outweighed any prejudice, and the trial court did not abuse its discretion in allowing Officer Hopper's testimony for this purpose.*

'Likewise, the trial court properly could have admitted the officer's testimony under the state of mind exception to rebut Appellant's suicide defense or to rebut his defense that he was not the (continued...)

Even if Officer Hopper's testimony relating to the victim's statements was admitted in error, however, such error was harmless beyond a reasonable doubt, See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Given the quantity and quality of evidence upon which the jury could have relied to find Appellant guilty, as detailed in Issue II, supra, there is no reasonable possibility that the officer's testimony, if erroneous, contributed to the verdict. Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Lorraine Pezza.

(...continued)
perpetrator of the burglary/murder. State v. Bradford, 20 Fla. L. Weekly at 1528; Peterka v. State, 640 So.2d 59, 68-69 (Fla. 1994).

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING APPELLANT'S STATEMENT TO THE POLICE UPON HIS ARREST FOR **A** SUBSEQUENT BURGLARY THAT HE **HAD** PERMISSION TO BE IN THE VICTIM'S RESIDENCE (Restated).

When Appellant was apprehended inside Myrna Walker's apartment, Appellant stated to both Officer Williams and Corporal Markland that he had permission to be in the apartment. (T **38).** Prior to trial, Appellant filed a motion in limine seeking to exclude any testimony relating to these statements. (R 3506). At a hearing on this motion, defense counsel claimed that such testimony was not relevant and was only being offered to show that Appellant was a liar since he, in fact, did not have permission to **be** in Mrs. Walker's apartment. (T 248-49). The trial court denied the motion, but stated that "[i]f facts develop during the course of the trial that will show me that I should readdress it, I'll readdress it." (T 251).

At the trial, Officer Williams and Corporal Markland both testified without objection by defense counsel that Appellant said he had permission to be in Mrs. Walker's apartment. (T 1166, 1191). At that point, the State called a side-bar conference and reminded the trial court of its previous rulings relating to the voluntariness of Appellant's statements to Detective Gill, and defense counsel stated,

> I would at this point renew our previously made motions as to all the pretrial motions, and I guess the reason [the State] is bringing it up now, I guess, is because he's going to have the officer again testifying as to certain things Detective Gill did. I would renew our motion to suppress and incorporate by reference all of the arguments made at that point in time regarding that. And as well, all the pretrial motions that were made.

(T 1194-95).

In this appeal, Appellant renews his claim that his false statement relating to his permission to be in the Walker residence was irrelevant to the charged crimes, and that its admission deprived him of a fair trial. **Brief of Appellant** at 44.[9] The State submits, however, that Appellant failed to preserve this issue for appeal because he failed to make **a** contemporaneous objection when the testimony was elicited. It is well-established that the failure to object to the introduction of evidence at the time it is introduced waives the issue for appellate review even though a prior motion in limine has been denied. See Castor v. State, 345 So.2d 701,703 (Fla. 1978); Lawrence v. State, 614 So.2d 1092, 1094 (Fla. 1993); Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994); Correll v. State, 523 So.2d 562, 566 (Fla. 1988); Gilliam v. State, **602** So.2d 986,986 (Fla. 4th DCA 1992) (Farmer, J., specially concurring).

Here, the trial court specifically told defense counsel that it would readdress the issue if necessary at the time the evidence was admitted. Defense counsel failed to raise an objection. To the extent that counsel attempted to "renew all of his pretrial motions," such a declaration did not sufficiently preserve his objections, especially since he attempted to do so **after** Appellant's statement had been elicited from Officer Williams and Corporal Markland.

Even if this claim were preserved, however, it is without merit.[10] If voluntarily made, as it was in this case, a defendant's false statement may be admitted as substantive evidence to show a consciousness of guilt. Simpson v. State, **562** So.2d 742 (Fla. 1st DCA), rev. denied, **574** so.2d 143

'Appellant cites only to Officer William's testimony as error. **Brief of Appellant** at 44.

[10]At best, this issue is academic because Appellant claims error only with regard to Officer William's testimony; he does not claim error in the admission of his statement through Corporal Markland. See **Brief of Appellant** at 44 ("Over Appellant's objection R248-49,1194-95,3506, the state introduced Appellant's statement, upon being arrested for the Walker burglary, that he had permission to be in the Walker residence R1166."). Page 1166 of the record relates only to Officer William's testimony.

(Fla. 1990). Although Appellant made the statement in the context of a collateral crime, it is nevertheless admissible. See Jackson v. State, 538 So.2d 533, 534-35 (Fla. 5th DCA 1989) (finding that officer's testimony regarding a false statement made by defendant in reference to a collateral crime was admissible as to charged crime to rebut defense).

Were Appellant's statement to Officer Williams improperly admitted, however, any error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Based on the evidence recounted previously in Issue 11, supra, and the fact that Corporal Markland related the same statement made by Appellant without objection, there is no reasonable possibility that the verdict would have been different had Officer Williams not testified as such. See Jackson, supra. Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Lorraine Pezza.

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING EVA BELL TO TESTIFY TO STATEMENTS MADE BY APPELLANT OVER THE TELEPHONE TO APPELLANT'S MOTHER WHO IN TURN RELATED THEM TO MS. BELL (Restated).

When Appellant was arrested for burglarizing Mrs. Walker's residence, he was taken to the jail for booking and then to the North Broward Detention Center. (T 1175). From the detention center, he called his mother about posting bail. During this conversation, Appellant told his mother that if she did not bail him out of jail the police were going to implicate him in a murder. (T 1709-10). Immediately upon hanging up the telephone, Appellant's mother told Eva Bell, who had come to check on Ms. Pezza, that her son was in jail and that he had told her the police were going to implicate him in a murder. (T 1616-18, 1714). Ms. Bell immediately contacted Officer Westberry, who was downstairs filling out a report, and Officer Westberry kicked in Ms. Pezza's door and found her dead. (T 1357-58, 1618-19).

Prior to trial, the State filed a motion to determine the admissibility of Eva Bell's testimony recounting the statements made by Appellant over the telephone to his mother. The State argued that Appellant's statements to his mother were admissible under the "admissions" exception to the hearsay rule, and that Ms. Corroppoli's statements to Ms. Bell were admissible under the "spontaneous statement" exception. (R 3469-73). Appellant responded in writing that his statement to his mother did not "qualify as an admission which would then allow it at trial," and that his mother's statement to Ms. Bell did not constitute a spontaneous statement. (R 3476-79).

At the hearing on the motion, Ms. Bell recounted the circumstances surrounding her presence in Ms. Corroppoli's apartment and the telephone call. (T 80, 85, 93-94, 97-98). According to Ms.

Bell, when Ms. Corroppoli related the substance of the call to her Ms. Corroppoli was "very upset and sort of hysterical, like, you know, she couldn't believe that she had heard that." (T **86).**

At a subsequent hearing on the motion, defense counsel renewed his arguments that the testimony did not fall within the exceptions to the hearsay rule relied upon by the State. Defense counsel also claimed that, before the trial court could determine the admissibility of Ms. Bell's testimony, it had to determine the availability of Ms. Corroppoli, because she would be the better witness to testify. (T 212-17). Ultimately, the trial court decided to admit Ms. Bell's testimony without regard to whether Ms. Corroppoli was available. (T 223-24).

At the trial, Ms. Bell testified, without objection by Appellant, to the statements made by Ms. Corroppoli. (T 1616-18). In addition, Ms. Corroppoli testified without obiection to the statements made by Appellant. (T 1710). Ms. Corroppoli testified that she "just blurted it out" to Ms. Bell because she was "nervous and devastaed [sic] over the whole thing." (T 1714).

In this appeal, Appellant claims that the hearsay statement made by Appellant to his mother should not have been admitted under the "admissions" exception to the hearsay rule because "the state failed to establish by evidence independent of the hearsay claim that Appellant was the person with whom Corroppoli conversed." **Brief of Appellant** at 45-46. In addition, Appellant claims that the hearsay statement made by Appellant's mother to Ms. Bell should not have been admitted because "the circumstances of the statement do not corroborate the trustworthiness of the statement. In fact, the relaying of the statement shows a lack of trustworthiness." Id. at 47.

Initially, the State submits that Appellant failed to preserve this issue for review because he failed to make a contemporaneous objection to the testimony when it was admitted at the trial. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Although the trial court determined pretrial,

pursuant to the State's motion, that Ms. Bell's testimony was admissible, it was incumbent upon Appellant to object to the testimony at the time of its admission. Lawrence v. State, 614 So.2d 1092, 1094 (Fla. 1993); Lindsey v. State, **636** So.2d 1327, 1328 (Fla. **1994); Correll** v. State, 523 So.2d **562,566** (Fla. 1988).

Appellant does not address preservation in his initial brief, but he cites to pages 1194-95 of the transcripts as evidence that the testimony was admitted over his objection. At those pages, the State called **a** side-bar conference and reminded the trial court that it had previously determined that a statement made ~~to the police~~ was admissible. At that point, defense counsel renewed his objection to the admissibility of the statement and, in passing, renewed all of his pretrial motions. (T 1194-95). Such a declaration, however, did not sufficiently preserve his objections to Ms. Bell's testimony which was presented three days and fifteen witnesses later. Not only was the declaration too general and untimely, defense counsel had filed no motion in which to renew. The State had filed the motion to determine the admissibility of the testimony. Without question, Appellant failed to preserve his objections for review.

Even if Appellant had made contemporaneous objections in the trial court, he does not make the same arguments on appeal that he made below. In the trial court, he claimed that his statements to his mother did not constitute "admissions" which would except them from the hearsay rule. Here, he claims that the State did not prove his identity **as** the caller. In the trial court, Appellant claimed that his mother's relation to Ms. Bell of his comments did not constitute a "spontaneous statement," but he did not explain why. Rather, he focused on the fact that his mother should be shown to be unavailable to testify before her statement is admitted through Ms. Bell. Here, Appellant claims that the State failed to show that the circumstances of the statement corroborate its trustworthiness.

Although defendants on appeal may expound on their arguments made below, they may not, as Appellant has done, make wholly different arguments from those made below. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332,338 (Fla. 1982).

In any event, none of Appellant's arguments have merit.[11] Section 90.805 of the Florida Evidence Code authorizes the admission of hearsay within hearsay "provided that each part of the combined statements conforms to an exception of the hearsay rule," As for Appellant's statement to his mother--that the police were going to implicate him in a murder--this was properly admitted under section 90.803(18)(a), which excepts from the hearsay rule "[a] statement that is offered against a party and is . . . [h]is own Statement in either an individual or a representative capacity." See Swafford v. State, 533 So.2d 270,271 (Fla. 1988), cert. denied, **489 U.S.** 1100 (1989).

As for Appellant's claim on appeal that the State failed to prove independently of the hearsay statement that he was the caller, the record reflects the following: Appellant was arrested around noon on October 3 for burglarizing Mrs. Walker's residence and sent to the North Broward Detention Center. (T 1175). His mother's phone records indicated that she received a collect call from the detention center at 7:32 p.m. on October 3. (T 1336, 1709). Moreover, Appellant's own mother testified that Appellant called her from the detention center and told her that the police were going to implicate him in a murder. (T 1709-13). By this evidence, Appellant was clearly identified as the caller.

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[11] At best, this issue is academic because Appellant did not object to his mother's testimony which related Appellant's statement to her, (T 1710). In fact, in objecting to Ms. Bell's testimony initially, defense counsel argued that Appellant's mother would be the more appropriate witness since Appellant's statement was made directly to her. (T 212-17). Be that as it may, the State will address Appellant's claims out of an abundance of caution.

As for Ms. Corroppoli's statement to Ms. Bell, this was properly admitted as either a "spontaneous statement" or an "excited utterance." Professor Ehrhardt explains that these two provisions often overlap, but that they differ "mainly in the amount of time that may lapse between the event and the statement describing the event." Ehrhardt, Florida Evidence § 803.2 (1995 Ed.). With an "excited utterance," there need not be contemporaneity between the event and the statement, only an excited state of mind. Id. With a "spontaneous statement," however, "[t]here must be a substantial contemporaneity between the event and the out-of-court statement. The spontaneity of the statement negatives the likelihood of conscious misrepresentation by the declarant and provides the necessary circumstantial guarantee of trustworthiness to justify the introduction of the evidence." Id. § 803.1.

Ms. Bell testified at the pretrial hearing that Ms. Corroppoli hung up the phone and immediately stated that her son was in jail and that he told her that the police were going to implicate him in a murder. (T 85, 93-94). According to Ms. Bell, Ms. Corroppoli was "very upset and sort of hysterical, like, you know, she couldn't believe that she had heard that." (T 86). At the trial, Ms. Corroppoli testified that she "just blurted it out" to Ms. Bell because she was "nervous and devastaed [sic] over the whole thing." (T 1714). Under these facts, Ms. Corroppoli's statement to Ms. Bell was not only sufficiently contemporaneous to constitute a "spontaneous statement," but it was also made under the stress of excitement caused by a startling event so as to constitute an "excited utterance." Therefore, the trial court did not abuse its discretion in admitting Ms. Bell's testimony. See Power v. State, 605 So.2d 856, 862 (Fla. 1992) (finding testimony of deputy relating to hearsay statements by witness admissible under "excited utterance" exception); McDonald v. State, 578 So.2d 371, 373-74 (Fla. 1st DCA) (finding testimony by victim's friend relating to hearsay statements made by

victim immediately after sexual battery while victim was "hysterical and crying" admissible as spontaneous statement or excited utterance), rev. denied, 587 So.2d 1328 (Fla. 1991); Ware v. State, 596 So.2d 1200, 1201 (Fla. 3d DCA 1992) (finding tape recording of victim's mother's 911 call admissible as excited utterance or spontaneous statement).

Assuming for argument's sake, however, that Ms. Bell's testimony in this regard was admitted in error, such error was harmless beyond a reasonable doubt. See Slate v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Based on the evidence recounted previously in Issue 11, supra, and the fact that Appellant's mother related the same statement made by Appellant without objection, there is no reasonable possibility that the verdict would have been different had Ms. Bell not recounted Ms. Corroppoli's statement to her after speaking to Appellant. **See** Power; McDonald. Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Lorraine **Pezza.**

ISSUE IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING COLLATERAL CRIME EVIDENCE (Restated).

Prior to trial, the State filed a notice of intent to present collateral crime evidence. One incident involved Appellant's arrest for the burglary of Myrna Walker's residence on October 3, 1991. (SR2 129-31). Appellant filed a motion in limine and **a** memorandum of law seeking to preclude such evidence because the circumstances of the Walker burglary were not sufficiently similar to the circumstances of the Pezza homicide. Appellant conceded, however, that the fact that Ms. Pezza's checkbook was found on his person when arrested while burglarizing Mrs. Walker's apartment was relevant and admissible. (R **3386-87,3457-64,3480-91).**

At the hearing on the motion, Myrna Walker testified that she lived at 3293 Carambola Circle South in Coconut Creek. (T 13). Appellant lived with his mother at 3305 Carambola Circle South, which was upstairs and over from Mrs. Walker's apartment. Appellant had previously been in her apartment to move a couch and knew that her husband had recently died. (T 13-1**8).**

She further testified that on October 3,1991, at around 12:00 p.m., she was leaving to meet some friends for lunch when Appellant approached her in the parking lot and asked her how she was doing. He seemed concerned that no one was staying with her so soon after her husband's death. He appeared to be coming from the pool and had a brown towel around his neck. Their brief conversation ended, and she left. (T 18-19). When she returned around 3:00 p.m., the police were outside and told her that her apartment had been burglarized. (T 19). She had not given Appellant permission to be in her apartment, (T 23).

Officer Greg Williams testified that he was called to Mrs. Walker's apartment on October 3, 1991, at 12:40 p.m. regarding a burglary. He then recounted his apprehension of Appellant inside

Mrs. Walker's apartment. (T 35-37, 45). A search of Appellant's person revealed a checkbook belonging to Lorraine Pezza in Appellant's rear pocket, and a checkbook belonging to Mrs. Walker down his pants. (T 40-49). Corporal Markland, who was also dispatched to the scene, testified that, after Ms. Pezza's checkbook was found in Appellant's pocket, he went to Ms. Pezza's apartment and knocked on the door but got no answer. He noticed that the screen door was ripped and that there were fresh pry marks around the door, but the door was locked, so he left. (T 62-63). Detective Doethlaff also testified that he went to Ms. Pezza's apartment and knocked on the door, but got no answer. While sticking his business card in the door jam, he too saw the ripped screen and pry marks on the door. (T 118-19).

Eva Bell testified that she went to Ms. Pezza's apartment around 6:00 p.m. that same day (October 3) to check on her because her family had not heard from her. (T 77-78). When she got no answer at the door, Ms. Bell spoke to Appellant's mother, who lived next door to Ms. Pezza. (T SO). Ms. Bell called the police and an officer came by, but he too got no answer at the door, and left. (T 97-99). Shortly thereafter, Appellant called his mother, who immediately related to Ms. Bell that her son was in jail and he said he was going to be implicated in a murder. (T 84-85). Ms. Bell related this statement to the police, and they kicked in the door of Ms. Pezza's apartment and found her dead. (T 122).

At 10:10 p.m. that night, after Appellant had waived his Miranda rights, Detective Gill attempted to speak to Appellant at the jail about his possession of Ms. Pezza's checkbook. Appellant responded, "[Y]ou're not going to pin that stabbing on me." When asked how he knew about a stabbing, Appellant stated that he had spoken to his mother. When confronted with the fact that his mother knew nothing about it, Appellant immediately invoked his right to an attorney. Significantly,

Detective Gill did not yet know that Ms. Pezza had been stabbed to death. (T 154-59). Detective Gill then recounted the circumstances surrounding **Ms.** Pezza's death: a locksmith was the last person to see Ms. Pezza alive around noon on September 27, 1991; Appellant had used Ms. Pezza's ATM card at 4:08 p.m. that day and numerous days thereafter; Appellant had shown up with a beach bag early one morning at the apartment he shared with his mother and told his mother to mind her own business about it; tree trimmers in the area saw Appellant throw the beach bag in **a** dumpster on October 3, 1991; the beach bag contained a deck of cards, the joker from which was found on the floor of Ms. Pezza's bedroom; a towel was found in Appellant's room with Ms. Pezza's blood on it; phone records showed that Appellant called his mother on October 3, 1991, from the jail at 7:32 p.m.; the screens on both Appellant's and Ms. Pezza's back porch were torn; and the screen on Ms. Pezza's front window was torn and fresh pry marks were found around the window. (T 161-67).

On October 16, 1992, at a subsequent hearing on the motion, Appellant renewed his argument that the two incidences were not sufficiently similar for admission of the Walker burglary. The State responded, as it had in its memorandum of law, that the Walker burglary was not only relevant and sufficiently similar under the Williams rule, but that it was also so inextricably intertwined with the murder that it was admissible to put the murder in context. Ultimately, the trial court agreed with the State that the evidence was admissible under either theory, but more properly admitted because of its interconnection with the murder. (R 3445-56; T 224-45).

Three months later, at Appellant's trial, the State called as its fourth witness Nancy Murray, who testified without objection that she saw a young **man** under suspicious circumstances enter a nearby apartment which she knew to be occupied by **an** elderly couple. As a result, she called the police. (T 1150-60). Officer Williams then testified without objection that he responded to Ms.

Murray's residence, was directed to Myrna Walker's apartment where he subsequently apprehended Appellant inside, and discovered both Mrs. Walker's and Lorraine Pezza's checkbooks on Appellant's person. (T 1160-88). The State also presented Corporal **Markland's** testimony without objection by Appellant. (T 1190-91).

During Corporal Markland's testimony, the State requested a side-bar conference **and** reminded the court that it had previously ruled Appellant's statement to Detective Gill admissible. At that point, defense counsel commented:

> I would at this point renew our previously made motions as to all the pretrial motions, and I guess the reason [the State] is bringing it up now, I guess, is because he's going to have the officer again testifying as to certain things Detective Gill did. I would renew our motion to suppress and incorporate by reference all of the arguments made at that point in time regarding that. And as well. all the pretrial motions that were made.

(T 1194). The parties then discussed defense counsel's need to renew his objection to the admission of Appellant's statement to Detective Gill at the time it is offered, and the parties agreed that defense counsel's objection was sufficiently preserved. (T 1195-97) (emphasis added).

Thereafter, Detective Shackoor testified without objection that he found a beach bag in a dumpster near the apartments of Mrs. Walker and Ms. Pezza. (T 1206-15). Sergeant Dicintio then testified without objection that he too responded to Mrs. Walker's apartment regarding a burglary in progress. Checkbooks belonging to Mrs. Walker and **Ms.** Pezza were found on Appellant at the scene. (T 1216-25). The following day, Myrna Walker testified about the burglary of her apartment. During her testimony, defense counsel interposed the following objection:

> [DEFENSE COUNSEL]: Two aspects. One, when you originally ruled pretrial that you were going to allow the testimony of Mrs. Walker **and** the Walker burglary, the question arose whether it was proper Williams rule; and I believe the Court's ruling was you

were going to allow it in, one, because you found either that it was or that they were such interconnected offenses that you were going to allow it in.

The State is highlighting throughout this case the Walker burglary, and they are doing it again. They have had eight witnesses so far about the Walker burglary. Cops repeating the same testimony as other cops. Now we have Mrs. Walker on the stand. **So** I'm going to renew my motion that I think it's improper that the State is using it, which is either Williams rule or limited because of the interconnection between the cases. But they are highlighting it in this case, and they shouldn't be doing that.

So I want to renew my motion, and I think it's an improper area of inquiry, the whole area. I want to renew by pretrial motion and have the Court again, now that the Court has heard this testimony, forbid the State from going any further into it.

* * * *

THE COURT: . . . I don't find that this Walker case is being made a feature of this trial. I think that when I ruled it was so inextricably intertwined - I mean, this was the case where they caught him. This is the case where they found the evidence on him. There was [sic] no eye witnesses to the other incident. I find this is significantly relevant to the prosecution of the State's case, and I'm going to continue to allow testimony.

And I will tell you another thing. I thought the State was very brief in its witnesses yesterday, when he called these police officers and had them testify as to what occurred during the course of the Walker burglary. In fact, yesterday we started at 1:30. We went until about seven, **and** about two hours of the case was opening statements; and they put on, I think, ten witnesses yesterday in a very short span. I don't think they are making this a feature of the trial.

(T 1239-42).

In this appeal, Appellant renews his claims that the facts surrounding the burglary of Mrs. Walker's apartment were not sufficiently similar, were not relevant, were more prejudicial than probative, and were not so inextricably intertwined **as** to make them admissible. **Brief of Appellant**

at 48-51. Initially, however, the State submits that Appellant failed to preserve this issue for appeal. Alternatively, the State submits that the record supports the trial court's ruling that such evidence was admissible because it was inextricably intertwined and because its prejudicial nature did not outweigh its probative value.

Citing to his motion in lirnine, his renewal of his pretrial motions during Corporal Markland's testimony, and to his objection during Mrs. Walker's testimony, Appellant implicitly asserts that these motions and objections to this evidence properly preserved his arguments for appeal. Id. at 48. The State submits, on the other hand, that Appellant's objections were not timely, and thus did not preserve his arguments for appeal. Appellant's motion in limine was argued and denied over three months prior to the trial. When the State began its case-in-chief with evidence of the Walker burglary, Appellant made no objection. Although he perfunctorily renewed all of his pretrial motions during Corporal Markland's testimony, such a declaration did not adequately preserve his objection to this evidence. The subject matter of that side-bar conference was Appellant's post-arrest statements to the police, not the Walker burglary. And although Appellant later claimed that the Walker burglary was becoming a feature of the trial, and he sought to prohibit the admission of any further testimony while renewing his objection to all that had been introduced, Appellant's objection did not sufficiently preserve his claim that all of the evidence was admitted in error.

This Court has repeatedly held that the failure to object to the introduction of evidence at the time it is introduced waives the issue for appellate review even though a prior motion in limine has been denied. Correll v. State, 523 So.2d 562, 566 (Fla. 1988); Lawrence v. State, 614 So.2d 1092 (Fla. 1993); Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994). Here, Appellant's motion in

limine was denied on October **6,** 1992. (T 245). Over three months later, the State presented its witnesses relating to the Walker burglary at Appellant's trial. It was not until the second day of trial that defense counsel posed a specific objection to the Walker burglary evidence. Four witnesses, however, had already testified about it.[12] Such an objection was not timely and did not satisfy the objective of the contemporaneous objection rule.

> The contemporaneous objection rule is not a mere mechanical formality which appellatejudges may overlook in an effort to do substantial justice. It serves the prophylactic function of requiring a renewal of the objection in order that the trial judge can reconsider the earlier ruling in limine in light of the evidence since adduced and while the witness is present in court to testify **as** to any factual inquiry made necessary by the circumstances. Hence, it is not a question of the temporal span between the ruling in limine and the actual presentation of the evidence sought to be excluded, so much as it is a recognition of what has transpired between the two events.

Gilliam v. State, 602 So.2d **986, 986** (Fla. 4th **DCA** 1992) (Farmer, J., specially concurring).

Regardless, even if Appellant did preserve this claim, it is wholly without merit. In Griffin v. State, **639** So.2d **966,968** (Fla. 1994), this Court distinguished between evidence admitted under section 90.404(2)(a) of the Florida Evidence Code--so-called Williams rule evidence--and evidence admitted to establish the entire context of the charged crime:

> "The Williams rule, on its face, is limited to "*[s]imilar fact* ***evidence.***" § 90.404(2)(a), Fla.Stat. **(1991)** (emphasis added). . . . [E]vidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue. . . . [I]t is necessary to admit the evidence to adequately describe the deed."

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[12]Nancy Murray, Officer Williams, Corporal Markland, and Sergeant Dicintio had testified about the Walker burglary. Although Detective Shackoor testified that he was called to Mrs. Walker's residence, he testified only about finding and retrieving a beach bag from a dumpster located nearby. Mrs. Walker was testifying when defense counsel specifically objected to the collateral crime evidence.

Griffin, **639** So.2d at **968** (citations omitted). **As** the State argued, and the trial court ruled, the circumstances surrounding the Walker burglary were relevant and necessary to describe adequately the events surrounding the murder of Lorraine Pezza. To admit only the fact that Appellant was found in possession of Ms. Pezza's checkbook on the day her body was found, as Appellant wanted, would have painted an inaccurate and incomplete picture of the events surrounding her death.

The State's case was largely, though not entirely, circumstantial. Although it argued both a premeditated and felony murder theory, the evidence more strongly suggested a murder committed during the course of a burglary. The fact that Appellant was apprehended burglarizing a nearby apartment while in possession of Ms. Pezza's checkbook, and later making separate statements while in jail on the burglary charge implicating himself in the murder, was necessary to establish the context of events surrounding the murder. After all, Ms. Pezza's body was discovered that day based on Appellant's possession of the checkbook and his subsequent call to his mother from jail. "[T]o try to totally separate the facts . . . would have been unwieldy and likely have led to confusion." Henry v. State, 649 So.2d 1366, **1368** (Fla. **1994).** Reference to the Walker burglary was necessary to place the events in context, to describe the investigation leading up to Appellant's arrest and subsequent statements, and to account for his possession of Ms. Pezza's checkbook immediately preceding the discovery of her body. Given the fact that the Walker burglary was inseparable from the Pezza burglary/murder and that its probative value was not outweighed by undue prejudice, the trial court did not abuse its discretion in admitting such evidence. Henry; Griffin, **639** So.2d at 969; Bryan v. State, **533** So.2d **744,747** (Fla. **1988).**

Were this Court to find, however, that the trial court should not have admitted evidence of the Walker burglary, any error was harmless beyond a reasonable doubt. See State v. DiGuilio, **491**

So.2d 1129 (Fla. 1986). Based on the evidence recounted previously in Issue II, supra, and the fact that Appellant's possession of Ms. Pezza's checkbook and his statements to his mother and to Detective Gill would be admissible regardless, there is no reasonable possibility that the verdict would have been different had the factual circumstances around Appellant's arrest while burglarizing Ms. Walker's apartment not been admitted. **See** Bryan, supra. Therefore, this Court should affirm Appellant's conviction for the first-degree murder of Lorraine Pezza.

ISSUE X

WHETHER THE INDICTMENT **WAS** CONSTRUCTIVELY AMENDED BY INSTRUCTION AND ARGUMENT ON FELONY MURDER (Restated).

In this appeal, Appellant claims that "the Grand Jury Clause was violated in this case where the indictment by the Grand Jury charged only one method (premeditation in this case), for violation of a particular law, but there was a constructive amendment of the indictment by instructing the jury on a different method (felony-murder in this case) for violation of a particular law." **Brief of Appellant** at 53. The State submits that Appellant failed to preserve this issue for review.

> **An** [indictment] that completely fails to charge a crime is fundamentally defective. However, where the charging allegations are merely incomplete or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives the defense, and it cannot be raised for the first time on appeal.

Carver v. State, 560 So.2d 258,260 (Fla. 1st DCA), rev. denied, 574 So.2d 139 (Fla 1990). See also White v. State, **446** So.2d 1031, 1035-36 (Fla. 1984); Huene v. State, 570 So.2d 1031, 1031-32 (Fla. 1st DCA 1990), rev. denied, 581 So.2d 1308 (Fla. 1991). Here, the pith of Appellant's complaint is that the indictment was incomplete because it did not allege felony murder as an alternative theory of prosecution. Thus, by instructing on felony murder, **the** trial court improperly amended the indictment. Although Appellant filed a motion in the trial court relating to the absence of felony murder allegations in the indictment, he did not move to dismiss the indictment. Rather, he merely moved to prohibit the State from arguing, and the trial court from instructing on, this theory. (R 3569-71). Based on the cases cited above, because Appellant never moved to dismiss the indictment, his motion did not preserve this issue for appeal.

Even were it preserved, however, it has no merit. In fact, Appellant fails to acknowledge that this issue has been repeatedly rejected by this Court. E.g., Knight v. State, 338 So.2d 201,204 (Fla. 1976); O'Callaghan v. State, 429 So.2d 691, 695 (Fla. 1983); Kearse v. State, 20 Fla. L. Weekly S300, 301-02 (Fla. June 22, 1995). In Kearse, this Court recently reaffirmed the long-standing principle that "[t]he State need not charge felony murder in an indictment in order to prosecute a defendant under alternative theories of premeditated and felony murder when the indictment charges premeditated murder." 20 Fla. L. Weekly at 301-02. The element of premeditation is presumed when a homicide is committed in the commission of one of the enumerated felonies. Knight, 338 So.2d at 204. Thus, Appellant's argument must fail. As a result, this Court should affirm Appellant's conviction for the first-degree murder of Lorraine Pezza.

ISSUE XI

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON, AND ALLOWING THE STATE TO ARGUE, FELONY MURDER WHEN THE INDICTMENT CHARGED ONLY PREMEDITATED MURDER (Restated).

Prior to trial, Appellant filed a "Motion to Prohibit Argument and/or Instructions Concerning First Degree Felony Murder," claiming that it would violate his Sixth Amendment right to be informed of the charges against him to allow the State to argue felony murder and to instruct the jury on felony murder when only premeditated murder had been charged in the indictment. (R 3569-71). At the hearing on the motion, the trial court denied the motion without further argument by defense counsel. (T 272).

In this appeal, Appellant claims that "[t]his lack of notice denied [him] due process of law and the effective assistance of counsel." **Brief of Appellant** at 55. As noted in Issue X, he fails to even acknowledge that his due process claim has been repeatedly rejected by this Court. E.g., Knight v. State, 338 So.2d 201, 204 (Fla. 1976); O'Callaghan v. State, 429 So.2d 691, 695 (Fla. 1983); Kearse v. State, 20 Fla. L. Weekly S300, 301-02 (Fla. June 22, 1995). Since Appellant has failed to establish any valid reason why this Court should recede from its long line of precedent, his claim should be denied, **As** for his ineffective assistance of counsel claim, this Court has previously held that "[c]laims of ineffective assistance of counsel are generally not reviewable on direct appeal but are more properly raised in a motion for postconviction relief." McKinney v. State, 579 So.2d 80, 82 (Fla. 1991). Thus, this Court should reject this allegation as inappropriately raised, and affirm Appellant's conviction for the first-degree murder of Lorraine Pezza.

ISSUE XII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "AVOID ARREST" AGGRAVATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings regarding the "avoid arrest" aggravating factor:

> The relative sizes of the victim, an extremely small woman at four feet ten inches and one-hundred and ten pounds versus the Defendant, an average sized adult male, indicates that the Defendant could easily have subdued the victim and avoid[ed] using deadly force to escape from the residence. Furthermore, the eight stab wounds, both to the front and back of the victim indicate that the murder was not done out of panic or instinct. Dr. Wright testified that the five puncture wounds to Ms. Pezza's back could be consistent with torture. The nature of these wounds being consistent with torture indicates a deliberate action on the part of the Defendant and would eliminate panic as the motive for the killing.
>
> * * * *
>
> [William] Palmer testified regarding a conversation with the Defendant while in jail in which the Defendant told Palmer:
>
> > "While he was in there, she woke **up** and started yelling she was going to call the cops and get out of her house and this and that. And she reached to grab the phone, and he grabbed her and tried to pull, you know, tried to stop her from screaming, so he said he stuck her. Then she really started screaming, so he stuck her a couple more times."
> >
> > Excerpts of Proceedings, February **3,** 1993, at page **89.**
>
> [T]his court agrees that the state has met the burden required under Riley v. State[, 366 So.2d 19 (Fla. 1978),] in order to establish this aggravating factor.
>
> * * * *

> In the case at bar clearly the only dominant motive for killing Ms. Pezza was to avoid identification and arrest for the burglary he committed. Therefore, the requisite intent to avoid detection has been established clearly by the record beyond any doubt, See Riley v. State, 366 So.2d 19 (Fla. 1978); Lightbourne v. State, 438 So.2d 380 (Fla. 1983).

(R 3759-60).

In this appeal, Appellant claims that the record does not support this aggravating factor because there was insufficient evidence to show that the dominant or only motive for the murder was to eliminate Ms. Pezza as a witness or to prevent his arrest. **Brief of Appellant** at **56-66.** The record reveals, however, that Ms. Pezza believed that Appellant had stolen her money and keys after an evening out together. She was in the process of filing a criminal complaint against him, and had had the locks to her apartment and mailbox changed. According to William Palmer, Appellant said that he broke into Ms. Pezza's apartment knowing that she was home, and she awoke. She yelled at him to leave and threatened to call the police. When she reached for the phone, he grabbed her and she screamed. He stabbed her and she screamed louder, so he stabbed her some more, killing her

As this Court has recently reaffirmed, "[a] motive to eliminate a potential witness to **an** antecedent crime . . . can provide the basis for this aggravating factor. An arrest need not be eminent at the time of the murder. Such a motive can be inferred from the evidence presented in th[e] case." Fotopoulos v. State, 608 So.2d 784, 792 (Fla. 1992) (citations omitted). Based on the facts of this case, the trial court properly found that Appellant's dominant motive for killing Lorraine Pezza was to eliminate her as a witness either to the prior theft or to the burglary **and** to prevent his arrest therefor.

Appellant cites to numerous cases to support his contention to the contrary, none of which are availing. In Cook v. State, 542 So.2d 964 (Fla. 1989), the defendant confronted a husband and

wife cleaning crew after hours at a Burger King restaurant and demanded money from the safe. When the husband hit the defendant with a metal rod, the defendant shot him. **As** he fled the restaurant, the wife started screaming and grabbed the defendant around the knees, so he shot her and ran out the back door. Witness elimination was clearly not the dominant motive for either murder.

Similarly, in Robertson v. State, 611 So.2d 1228 (Fla. 1993), the defendant walked **up** to a couple sitting in their car on the side of the road and demanded money. He shot the driver, and the passenger got out. The defendant ran to her and demanded her rings. **As** the woman was crying and screaming that she did not have any money, the defendant shot her, stole her rings, and fled. Again, witness elimination was clearly not the dominant motive for either murder.

In Garron v. State, 528 So.2d 353 (Fla. 1988), the defendant was at home drinking and in "a foul mood." He made an obscene remark to one of his step-daughtersjust as his wife came home. The stepdaughter told her mother, and her mother argued with the defendant. The defendant got a gun and shot his wife in the chest. The stepdaughter ran to the phone, and the defendant followed her and shot her. **A** second stepdaughter ran from the house, and the defendant shot at her but missed. When the police arrived, the defendant had shot himself. Again, the dominant motive for killing his stepdaughter on the phone was not to eliminate her as a witness, but to eliminate her as a member of his family

In Davis v. State, 604 So.2d 794 (Fla. 1992), the defendant stabbed the victim to death in the foyer of her home, then ransacked the house. "The only evidence argued to the jury in support of [the "avoid arrest"] factor was that the victim knew Davis and could have identified him to the police." Id. at 798. Likewise, in Geralds v. State, 601 So.2d 1157 (Fla. 1992), the defendant beat

and stabbed the victim to death in the kitchen of her home, then ransacked the house. Again, the only evidence that she was murdered to avoid arrest was the fact that she knew the defendant and could have identified him. Id. at 1164.

Finally, in Green v. State, 583 So.2d 647 (Fla. 1991), the victims threatened to evict the defendant from his apartment if he did not pay his back rent by a certain date. The defendant did so, but went back to the victims' house later that night to reclaim his money. When the wife refused to give him his check back, he stabbed her to death, then followed the husband into the bedroom and stabbed him to death. This Court found that witness elimination was not the dominant motive for the murders. Id. at **652.**

To support its position that the evidence in Appellant's case supported the "avoid arrest" aggravating factor, the State relies on Lightbourne v. State, 438 So.2d 380,391 (Fla. 1983) (finding strong evidence to support factor where defendant surprised victim, whom he admitted knowing, after breaking into her home, sexually assaulting her, robbing her of money and jewelry, and shooting her in the head despite her pleas for mercy); Walls v. State, 641 So.2d 381,390 (Fla. 1994) (finding factor supported by defendant's statements, and evidence that defendant broke into victims' home to burglarize it, male victim fought with defendant, and female victim killed to eliminate witness); Henry v. State, 613 So.2d 429,433 (Fla. 1992) (finding factor supported by evidence that defendant "could have effected the robbery without killing [female victims]"); Correll v. State, 523 So.2d 562, 568 (Fla. 1988) (finding elimination of witness only conceivable motive for killing daughter who had cordial relationship with defendant but who likely witnessed other murders); Clark v. State, 443 So.2d 973,976-77 (Fla. 1983) (finding factor supported by record where victim knew defendant and defendant had just robbed and shot victim's husband in adjacent building); Sweet v.

State, 624 So.2d 1138, 1142 (Fla. 1993) (finding that defendant's motive was to eliminate victim as a witness to defendant's prior robbery of her); Hodges v. State, 595 So.2d 929, 934 (Fla. 1992) (finding that defendant's motive was to eliminate victim as a witness to defendant's prior indecent exposure to her). Based on the fact that Ms. Pezza knew Appellant, that she was pressing charges against him for the prior theft, that she awoke while Appellant was burglarizing her home, and that she threatened to call the police and reached for the phone, this aggravating factor is **supported** by the evidence. Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Lorraine **Pezza.**

ISSUE XIII

WHETHER THE TRIAL COURT'S RELIANCE ON INFORMATION IN SENTENCING APPELLANT THAT WAS NOT PRESENTED IN OPEN COURT INJURIOUSLY AFFECTED APPELLANT'S RIGHT TO A FAIR TRIAL (Restated).

In its written sentencing order, before discussing the aggravating and mitigating factors, the trial court detailed a chronology of the events surrounding the murder of Ms. Pezza, which included the prior theft of the victim's money and keys several days before her murder. (R 3752-57). In its statement of the "facts," the trial court began by recounting the evidence of the prior theft. It related that Ms. Pezza called Officer Hopper back to her apartment after Appellant left and directly accused Appellant of stealing the money and keys. The court then wrote, "She also stated that 'she was a little scared of Robert.'" (R 3753).

While relating Detective Doethlaff s involvement in the investigation of this incident, the trial court noted that the detective called Appellant on behalf of Ms. Pezza in order to obtain information for her complaint, and told him that the victim wanted to press charges against him. The trial court then stated, "Doethlaff further told the Defendant that, 'she was there, you were there. You're going to have to go to court over it and she wants to take action.' The Defendant continued to deny his involvement in stealing the property." (R 3753).

Later in the statement of "facts," the trial court wrote,

> The Defendant's girlfriend, Gail Russell, testified that during the period of September 27, 1991 until approximately September 30, 1991 the Defendant drove the victim's vehicle and had the keys to the vehicle in his possession. Furthermore, Ms. Russell was present with the Defendant when he withdrew money using Ms. Pezza's ATM card.

(R 3754).

In this appeal, Appellant claims that the trial court violated the dictates of Gardner v. Florida, 430 U.S. 349 (1977), because it quoted from the depositions of Officer Hopper and Detective Doethlaff which were never presented in open court, and it never notified Appellant that it would be relying on the depositions. He also claims a violation based on the trial court's reference that Gail Russell "testified," when in fact Ms. Russell did not testify to these facts. **Brief of Appellant** at 67-69.

Initially, the State submits that Appellant failed to preserve this issue for review. At the final sentencing hearing, during which the trial court provided copies of its order to the parties and read the order into the record, neither Appellant nor his counsel posed an objection to the information referenced by the trial court in its order. By failing to do so, he waived his objections to it. See Brown v. State, 473 So.2d 1260 1266 (Fla. 1985) (finding that defendant had opportunity to, but did not, explain, rebut, or deny information in PSI); Armstrong v. State, 642 So.2d 730, 737-38 (Fla. 1994) (finding that defendant had opportunity to present additional evidence at sentencing hearing even though trial court had already prepared sentencing order).

Even were this claim properly raised for the first time on appeal, it does not warrant relief. To support his claim to the contrary, Appellant relies on Porter v. State, 400 So.2d 5 (Fla. 1981), wherein this Court vacated Porter's sentence because the trial court substantially relied on a witness' deposition testimony to support two of the three aggravating factors found to override the jury's life recommendation. Porter, however, is easily distinguishable from the facts of this case.

In Porter, the trial court found the existence of two aggravating factors--"pecuniary gain" and "avoid arrest." According to this Court, "[a] substantial portion of the basis for these findings was the testimony of an acquaintance of the appellant, Larry Schapp. The difficulty lies in the fact that

the critical findings did not come from Schapp's *trial* testimony, but rather from testimony he had given in a *deposition."* Id. at 7 (emphasis added). After discussing the dictates of Gardner, this Court held:

> In the instant case the trial judge sentenced Porter to death, relying in part on information concerning appellant's alleged discussion of a plan to select newly arrived residents, steal their automobiles, and, if necessary, kill them. These facts were not proved at trial. Neither Porter nor his counsel was advised that this information, gleaned from the deposition, was going to be used. By proceeding in this manner, the trial judge deprived Porter of due process of law.

Id. (emphasis added).

Unlike in Porter, the information taken from the officers' depositions and Ms. Russell's alleged "testimony" in the present case did not constitute even **a** minimal portion, much less a "substantial portion," of the basis for the trial court's findings for the "felony murder" and "avoid arrest" aggravators. The "felony murder" aggravating factor, which Appellant does not challenge, was based primarily on Appellant's burglary of Ms. Pezza's apartment at the time of her death, not the prior theft. Similarly, the "avoid arrest" aggravator was based primarily on Appellant's decision to eliminate Ms. Pezza as a witness to the burglary and to prevent his arrest therefor. Although the trial court noted that "the victim could have easily identified [Appellant] **as** the perpetrator of the crime he committed three days earlier," it concluded that "the only dominant motive for killing Ms. Pezza was to avoid identification and arrest for the burglary he committed." (R 3759-60) (emphasis added).

A second distinguishing factor between this case and Porter is that, unlike in Porter, the information used by the trial court in this case was proved at trial. As for Ms. Pezza's fear of Appellant after the prior theft, the evidence at trial revealed that Officer Hopper was dispatched on

September 22, 1990, to Ms. Pezza's apartment regarding the loss or theft of money and keys. After Appellant left her apartment, he was dispatched a second time regarding the same matter. (T 1121-25). The evidence also revealed that Ms. Pezza called Detective Doethlaff two days later regarding the missing money and keys, and he in turn called Appellant who was identified by Ms. Pezza as a suspect. Detective Doethlaff told Appellant that Ms. Pezza wanted to pursue charges against him and that she needed biographical information from Appellant to do so. Appellant provided the information but vehemently denied taking the money and keys. (T 1282-92). On September 26, 1990, Ms. Pezza told her brother that she was feeling "down" because Appellant had stolen her money and keys. She indicated that she had made arrangements to have her locks changed, that she had called the police, and that she had spoken to Appellant's mother about it. (T 2221-26). The following day, a locksmith, in fact, changed the locks on Ms. Pezza's apartment and mailbox. (T 1135-48).

From this testimony, the trial court could have inferred, without reference to Officer Hopper's deposition, that Ms. Pezza was "a little scared" of Appellant. To support certain aggravating factors, a trial court "may apply a 'common-sense inference from the circumstances.'" Gilliam v. State, 582 So.2d 610,612 (Fla. 1991) (quoting Swafford v. State, 533 So.2d 270,277 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989)). The common-sense inference from the above testimony is that the victim was afraid of Appellant following the prior theft. This inference, however, does not prove that the murder was committed during the course of a burglary or to eliminate a witness to the burglary. Thus, again, the fact is of little consequence to the ultimate findings.

Similarly, regarding the testimony from Detective Doethlaff s deposition, the detective testified at the trial that he called Appellant to obtain information for Ms. Pezza's complaint:

> 1told him, for starters, it was his word against her's because there was no police there at the time of the alleged incident, and it was basically his word against her's. And she evidently wanted to **pursue** the situation so I was just updating the report, And she stated to me she was intending on filing charges and it would be handled through the courts. She believed he had taken the property, and she wanted it handled through the courts.

(T 1291). The substance of the information from the deposition was admitted at trial. Thus, the trial court did not rely on information ***dehors*** the record. As with the victim's fear of Appellant, this information was of little consequence to the ultimate findings.

Finally, regarding Gail Russell's alleged "testimony" that Appellant drove Ms. Pezza's car **and** had the keys in his possession between September **27** and September **30,** 1990, and that she was present with Appellant when he used Ms. Pezza's ATM card, the substance of this information was elicited at trial. Real Favraeau testified that he saw Appellant with Ms. Pezza's car at his motel on September 30, 1990, (T 1098-1102). Detective Gill testified that he found Ms. Pezza's car on October 8, 1990, parked behind a pawn shop just south of Mr. Favraeau's motel on the other side of the street. (T 1849). Detective Gill took Ms. Russell out to the site and they located the **keys** to the car in the backyard of a nearby house. (T 1850-53). Further, James Andrews authenticated photographs taken from video tapes which recorded Appellant withdrawing money from Ms. Pezza's accounts from various ATM machines. (T **1403-30).** Thus, unlike in Porter, the trial court did not rely on any information that was not otherwise proven during the trial. Regardless, as with the other information, these facts were of minimal relevance in determining the existence of the aggravating factors. Thus, given the overwhelming evidence supporting the two aggravating factors, and the unavailing nature of Appellant's mitigating circumstances, the trial court's reference to this information in his sentencing order did not injuriously affect Appellant's rights to due process and

a fair trial. Lockhart v. State, 655 So.2d 69, 74 (Fla. 1995). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Lorraine Pezza.

ISSUE XIV

WHETHER THE TRIAL COURT FAILED TO FIND SOME NONSTATUTORY MITIGATING EVIDENCE AND WHETHER THE TRIAL COURT APPLIED AN IMPROPER STANDARD IN FINDING OTHER NONSTATUTORY MITIGATING FACTORS (Restated).

In this appeal, Appellant claims that the trial court failed to address and consider and find the following nonstatutory mitigating factors which he claims were not controverted by any competent evidence: (1) Appellant's potential for rehabilitation, (2) Appellant's ability and amenability to learn as evidence of a "potential for good adaptation to prison," (3) Appellant was "courteous, respectful, a gentleman, well-liked by others and was helpful to others," and (4) the possibility that Appellant's behavior may have been different if raised in a different environment. **Brief of Appellant** at **70-72.**

As for his potential for rehabilitation, Appellant neither argued this to the jury nor to the trial court during any of the post-recommendation hearings. As this Court held in Lucas v. State, 568 So.2d 18, 23-24 (Fla. 1990), "the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish." Having failed to do so, Appellant cannot fault the trial court for failing to consider this potential mitigating factor.

Regardless, contrary to Appellant's assertion, this evidence was not uncontradicted. Dr. Strauss equivocally testified on direct examination that Appellant could be treated: "It's not an impossibility, but truthfully, it's difficult but not impossible." (T 3052). On cross-examination, the doctor admitted that Appellant could be rehabilitated only "if he is lucky enough to be in a good area

where there are nurses and groups and therapists that are good. If he is left in general population, nothing may change." (T 3080-82). When the prosecutor asked, "You know in the State Prison System that just does not exist, correct?," the doctor responded, "Obviously, what you are saying is he has no chance because of where we're sending him." The prosecutor asked, "That's correct, isn't it?" The doctor responded, "Yes." (T 3082). Thus, even if Appellant had argued his potential for rehabilitation to the trial court, the trial court would have been well within its discretion to reject it. See Lucas, 568 So.2d at 23; Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991).

Regarding Appellant's ability and amenability to learn, the trial court noted Michael Rudasill's testimony that Appellant wanted to further his education, and that he had the ability to learn as well as be taught. However, the trial court found:

> It was also established that the Defendant was placed in jail in October of 1991 and did not actually sign up for classes until January of 1993. Thus, Defendant was in the adult classes for approximately three weeks as his trial began on January 26, 1993. It was also established that the school program had been established for "quite some time" prior to Defendant arriving at the jail.

(R 3762). This evidence was considered and properly rejected. Lucas; Gunsby.

Similarly, as for the evidence that Appellant was "courteous, respectful, a gentleman, well-liked by others and was helpful to others," the trial court noted the testimony of three witnesses "who the defense contends testified that the defendant was a dependable and congenial employee, hard worker, and a quick learner." (R 3762). In addition, the trial court noted the testimony of Lynn Kolkmeyer that Appellant "had a good work ethic, exhibited a lack of violent behavior, and was courteous and trustworthy." (T 3762). However, the trial court noted that Appellant had only been employed for ten months and was fired from his job because of his inability to get to work, even though he only lived three miles away. (R 3762-63). Nevertheless, the trial court found that,

"[a]lthough there is no indication that the Defendant had any significant employment history, this Court considers this non-statutory mitigating circumstance established by a preponderance of the evidence, but accords it very little weight." (R 3763).

Finally, as for Appellant's claim that the trial court failed to consider the possibility that Appellant's behavior may have been different if raised in a different environment, such was not argued to the trial court as a nonstatutory mitigating factor. Thus, Appellant cannot fault the trial court for failing to consider it. Lucas.

Even if the trial court had considered such evidence, however, there is no reasonable possibility that the sentence would have been different. The trial court stated in its sentencing order that "[t]he sentence in this case as fully supported by the record is based upon two statutory aggravating factors and two non-statutory mitigating factors. As these mitigating factors have been given very little weight they in no way offset the aggravating factors." (R 3767). Thus, even if the trial court had considered this evidence in mitigation, there is no reasonable possibility that it would have imposed a life sentence. See Rogers v. State, 511 So.2d 526,535 (Fla. 1987), cert. denied, **484** U.S. 1020 (1988); Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

Appellant also complains that the trial court used the wrong standard in evaluating his turbulent family history. **Brief of Appellant** at 72-75. In its sentencing order, the trial court noted Dr. Strauss' testimony that Appellant suffered from a disadvantaged childhood, abusive parents, lack of education and training and came from a broken home. It also noted that such evidence is valid non-statutory evidence that it may consider. The trial court then stated, "However, it has also been held that a trial court does not need to consider a defendant's abusive childhood history as a

mitigating factor where the murder was not significantly influenced by the Defendant's childhood experiences. **See** Lara v. State, 464 So.2d 1173, 1180 (Fla. 1985)." (R 3763). After quoting extensively from Dr. Strauss' testimony, the trial court concluded:

> The Defendant characterizes his childhood as abusive. Although it appears that there may have been some abuse by his father when he was younger it does not appear to this Court that this murder stems from that abuse or childhood trauma[;] rather, it appears to have been prompted by purely selfish motives. This Court considers this mitigating circumstance established by a preponderance of the evidence, but accords it very little weight.

(R 3766).

Appellant claims that the trial court improperly used the standard that this mitigation need not be found if the 'murder was not significantly influenced by the Defendant's childhood experiences' R3763." **Brief of Appellant** at **72.** In Jones v. State, 648 So.2d 669, 679-80 (Fla. 1994), the defendant complained that the trial court "all but rejected evidence of Jones' traumatic childhood when it noted that, because of the remoteness in time and the fact that Jones' similarly situated sisters have become productive citizens, this factor is not entitled to great weight." Id. at 680 (emphasis added). This Court upheld the trial court's finding, noting that the trial court had considered the evidence as required: "While th[is] mitigating factor[] [was] entitled to some weight, the weight to be given was within the trial court's discretion." Id. See also Barwick v. State, 20 Fla. L. Weekly S405, 408 (Fla. July **20,** 1995) (finding that trial court properly considered evidence of child abuse even though it found such evidence nonmitigating in nature); Francis v. State, 529 So.2d 670,673 (Fla. 1988) (finding evidence of cultural deprivation and abuse **as** child too remote in time from murder by 31-year-old defendant to constitute mitigating evidence). Here, the trial court considered Appellant's mitigating evidence, found it to be mitigating in nature, but gave it little

weight. "Reversal **is** not warranted simply because [Appellant] draws a different conclusion." Sireci v. State, 587 So.2d 450, 453 (Fla. 1991). Even if the trial court applied the wrong standard in evaluating this evidence, however, there is no reasonable possibility that the sentence would have been different. See Pietri v. State, 644 So.2d 1347, 1354 (Fla. 1994); Rogers v. State, 511 So.2d 526,535 (Fla. 1987), cert. denied, 484 U.S. 1020 **(1988);** Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). **As** a result, Appellant's sentence of death should be affirmed.

ISSUE XV

WHETHER APPELLANT'S SENTENCE OF DEATH IS PROPORTIONATELY WARRANTED (Restated).

Appellant claims that his death sentence is not proportionately warranted because, after striking the "avoid arrest" aggravating factor, there remains only one aggravator and significant mitigation. **Brief of Appellant** at **76-77. As** argued in Issue XII, however, the State maintains that the "avoid arrest" aggravating factor is supported by the record in this case.

Alternatively, Appellant claims that, even if the "avoid arrest" aggravator is upheld, "[a]s in other cases, the substantial mitigation takes this case from the group of the most unmitigated cases for which the death penalty is reserved." To support his contention, Appellant relies principally on Kramer v. State, 619 So.2d 274 (Fla. 1993); Livingston v. State, 565 So.2d 1288 (Fla. 1988); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); and Jackson v. State, **575** So.2d 181 (Fla. 1991), all of which are easily distinguishable. In Kramer, this Court found that "[t]he evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk." Such was hardly the case here.

In Livingston, which involved the murder of a convenience store clerk, this Court found that

> Livingston's childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him. Livingston's youth [seventeen years of age], inexperience, and immaturity also significantly mitigate his offense. Furthermore, there is evidence that after these severe beatings Livingston's intellectual functioning can best be described as marginal. These circumstances, together with the evidence of Livingston's extensive use of cocaine and marijuana, counterbalance the effect of the factors found in aggravation [prior violent felony and felony murder].

565 So.2d 1292. Here, in contrast, Appellant was 29 years old, with no evidence of drug or alcohol abuse, and only vague references to "beatings" by his father.

Similarly, in Fitzpatrick, which involved the murder of a police officer after the defendant took several persons in a real estate office hostage, this Court found the death penalty unwarranted where there was substantial evidence by a "panel of experts" that Fitzpatrick had extensive brain damage and that his emotional age was between nine and twelve years of age. Such evidence established both statutory mental mitigators and the statutory mental mitigator of age: "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." 527 So.2d at 811-12. The mitigating evidence in the present case, however, does not even remotely compare to that in Fitzpatrick. No statutory mitigators were argued or found in Appellant's case.

Finally, and most distinguishable, is Jackson, which involved the murder of a hardware store owner by Jackson and his brother, wherein this Court found that Jackson's death sentence was not proportional to his culpability because there was insufficient evidence that he was a major participant and that he actually killed, intended to kill, or attempted to kill the victim. 575 So.2d at **189-93.**

There is no question that Appellant killed Lorraine Pezza; there was no co-perpetrator. Thus, Jackson is not applicable.

To support its argument that Appellant's sentence is proportionately warranted, the State relies on Wright v. State, 473 So.2d 1277 (Fla. 1985), and Johnston v. State, 497 So.2d 863 (Fla. 1986). In Wright, the defendant broke into an elderly woman's home to steal money and when the woman confronted him he stabbed her to death. This Court found his death sentence proportionally warranted in light of three aggravating factors--"felony murder," "avoid arrest," and HAC--and no mitigation. 473 So.2d at 1282. In Johnston, the defendant broke into an elderly woman's home to commit a theft and when the woman awoke he stabbed and strangled her to death. This Court found his death sentence proportionally warranted as well in light of three aggravating factors--"prior violent felony," "felony murder," and HAC--and no mitigation. 497 So.2d at 872. Although these cases include the HAC aggravating factor and no mitigation, whereas the trial court in this case found two nonstatutory mitigating factors to which it gave "very little weight" and refused to instruct on HAC as requested by the State, the factual similarities are dispositive. As this Court has repeatedly held "it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). This was a brutal, senseless murder of a woman in her own home which was committed during the course of a burglary. Although Appellant, who was 5'10" and 160 lbs (T 1127), could have easily subdued Ms. Pezza, who was 4'10" and 110 lbs (T 2063), without killing her, he nevertheless stabbed her to death because she knew him and was threatening to call the police. "If a proportionality analysis leads to any conclusion, it is that death was a penalty

the jury properly could recommend and the trial court properly could impose" in this case, Wickham v. State, 593 So.2d 191, 194 (Fla. 1991). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of Lorraine Pezza.

ISSUE XVI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING VICTIM-IMPACT EVIDENCE (Restated).

Prior to sentencing, Appellant filed a motion and memorandum of law to prohibit the admission of victim-impact evidence during the penalty-phase proceedings. Specifically, Appellant sought to prohibit the victim's family members from characterizing the crime, and from rendering their opinion about the nature of the killing, the nature and character of Appellant, and the appropriate sentence. (R 3685-87). As grounds for his motion, Appellant alleged that such subjects remained forbidden under Payne v. Tennessee, 501 U.S. 808 (1991). In addition, Appellant alleged that section 921.141(7), Florida Statutes (1991), was unconstitutionally vague, that such evidence constituted improper nonstatutory aggravation, that it was "simply not relevant as to the personal responsibility and moral guilt of the defendant," and that even were it relevant, its probative value was substantially outweighed by its prejudicial effect. (R 3680-86). After a hearing on the motion, the trial court overruled defense counsel's objections, but agreed to give an instruction to the jury which explained that any victim-impact evidence was not being offered to support any aggravating factors or to rebut any mitigating ones. (T 2889-2905,2926-37).

During the penalty phase proceedings, the State called the victim's brother, Richard Ben-Veniste, as a witness. At the beginning of his testimony, defense counsel renewed his objection to the testimony, and in particular to the admission of the victim's resume. The trial court overruled

the objections. (T 3002-03). Thereafter, Mr. Ben-Veniste identified a resume that he had helped Ms. Pezza prepare approximately one year before her death. From the resume, he detailed Ms. Pezza's educational background, concluding with her Master's degree. (T 3004-06). Next, he explained that Ms. Pezza had traveled extensively and particularly enjoyed teaching, writing, film, and children. She developed curricula for gifted programs, taught, wrote screenplays, wrote fiction, and filmed documentaries. (T 3006-09). According to Mr. Ben-Veniste, Ms. Pezza suffered postpartum depression with the birth of her first child fourteen years ago. Her depression intensified following the birth of her second child four years later. At that point, she was diagnosed with bipolar disorder, more commonly known as manic/depressive disorder. (T 3010-11). She could not, however, tolerate Lithium, the most successful treatment method. (T 3011). Her children lived in California with their father, and her mother moved to Washington, D.C., to live with him after her death. (T 3011). He recounted that his sister was fiercely independent and could not accept her illness. During her depressive states, she would write at home, and tried desperately not to let her illness overcome her. (T 3015-18). During the penalty-phase instructions, the following instruction was read to the jury:

> You have heard evidence relating to the impact of the victim's death in this case. This evidence should not be considered by you as evidence of an aggravating circumstance or rebuttal of a mitigating circumstance. This evidence may be considered to demonstrate the victim's uniqueness as an individual human being and resultant loss to the community's members by the victim's death.

(T 3112).

In this appeal, Appellant claims that the trial court abused its discretion in allowing Mr. Ben-Veniste to testify. Specifically, Appellant complains that "[t]he overkill of such victim impact evidence denied Appellant due process and a fair sentencing." **Brief of Appellant** at **78.**

Alternatively, Appellant claims that, even if such evidence was relevant, its relevance was substantially outweighed by its undue prejudice. Id. at 78-80.

The State submits, however, that the testimony was relevant, was presented within the confines of the statute, and was not unduly prejudicial. **Mr.** Ben-Veniste related only facts about Ms. Pezza which demonstrated her uniqueness as a human being. Even Appellant concedes that "Ben-Veniste's testimony covered only one subject -- the history of his sister's life." Id. at **78.** He did not, as the statute forbids, relate "[c]haracterizations or opinions about the crime, the defendant, or the appropriate sentence." In Payne v. Tennessee, 501 U.S. 808,827 (1991), the United States Supreme Court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no ***per* se** bar." **As** this Court noted in Allen v. State, 20 Fla. L. Weekly S397, 399 (Fla. July 20,1995) (quoting § 921.141(7), Fla. Stat. (Supp. 1992)), "Florida's legislature has specifically provided for the admission of victim impact evidence 'to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.'" Pursuant to the statute, the trial court properly admitted Mr. Ben-Veniste's testimony and cautioned the jury to consider it as such.

Even were it admitted in error, however, such error was harmless beyond a reasonable doubt. Appellant did not challenge the existence of the "felony murder" aggravating factor. (T 2993). The "witness elimination" aggravator was proven wholly exclusive of the victim-impact evidence. Given these aggravating factors, and the de minimis nature of the mitigating circumstances, there is no reasonable possibility that the recommendation or the ultimate sentence would have been different had Mr. Ben-Veniste's limited testimony not been admitted. Allen; Windom v. State, 20 Fla, L.

Weekly S200, 202 (Fla. **Apr. 27, 1995).** Therefore, this Court should affirm Appellant's sentence of death.

ISSUE XVII

WHETHER FLORIDA STATUTES § 921.141(7) (SUPP. 1992), WHICH AUTHORIZES THE INTRODUCTION OF VICTIM-IMPACT EVIDENCE, IS CONSTITUTIONAL (Restated).

As noted in Issue XVI, Appellant filed a motion and memorandum of law to prohibit the admission of victim-impact evidence during the penalty-phase proceedings. (R **3685-87).** As grounds for his motion, Appellant alleged the following:

> Florida Statute 921.141(7) is unconstitutionally vague, as it fails to properly define "victim impact". **As** well, the Statute fails to set forth any criteria by which a jury could determine what a "victim's uniqueness as an individual human being" means and [what] "the community" of the victim is. **As** well, said Statute allows the State to argue said victim impact evidence, more or less, as another aggravating factor but does not provide any guideline as to the burden of proof regarding same.

(R **3686).** In his accompanying memorandum of law, Appellant explained: "Since victim impact statements concerning the character of the victim are outside of the statutory aggravating factors to be considered by the court, allowing them into evidence would violate the due process clause of the Constitution of the State of Florida. Article I, Section 9, Fla. Const." (R 3675). In addition, he claimed that victim-impact evidence in the sentencing phase of a capital case "is simply not relevant as to the personal responsibility and moral guilt of the defendant." Even were it relevant, its probative value is substantially outweighed by its prejudicial effect. (R **3680).**

At the hearing on the motion, defense counsel sought to have the State proffer its evidence and maintained that the statute was unconstitutionally vague. (T 2889-2905). Although the trial court thought that the statute was somewhat vague, it nevertheless found it constitutional. (T 2893). Instead of requiring the State to proffer its evidence, the trial court directed defense counsel to raise objections to specific testimony. (T 2926-31,2962). Pursuant to defense counsel's request, the trial court also agreed to give an instruction to the jury which explained that any victim-impact evidence was not being offered to support any aggravating factors or to rebut any mitigating ones. (T 2931-37).

During the penalty phase proceedings, the State called the victim's brother, Richard Ben-Veniste, as a witness. At the beginning of his testimony, defense counsel renewed his objection to the testimony, and in particular to the admission of the victim's resume. The trial court overruled the objections. (T 3002-03).

In this appeal, Appellant renews his claim that section 921.141(7) is unconstitutional, and asserts the following grounds: (1) because "one does not know where victim impact evidence factors into the sentencing determination," a sentence of death is rendered arbitrary and capricious, **brief of appellant** at **81-84,** (2) the terms "loss to the community" and "uniqueness as a human being" provide "no definition or limitations" and may lead to racial or class prejudice in a capital sentencing decision, id. at 84-88, (3) victim impact evidence violates Article I, section **17,** of the Florida Constitution, which prohibits "cruel or unusual punishment," and Article I, section 9, which requires stricter scrutiny of capital sentences, id. at 88-89, (4) the statute "invades the province of the Supreme Court by providing an evidentiary presumption that victim impact evidence will be admissible at the penalty phase of a capital case, regardless of its relevance toward proving an

aggravating or mitigating circumstance," id. at **90-91,** and **(5)** application of this statute to Appellant's case violated the ex post facto clauses of the Florida and federal constitutions, id. at **91-**93.

Initially, the State submits that only grounds **(1)** and (2) were preserved for appeal.[13] Since Appellant did not raise grounds (3)-(5) in the trial court, he may not raise them for the first time on appeal. Tillman v. State, **471** So.2d **32, 35** (Fla. 1985); Steinhorst v. State, **412** So.2d **332,338** (Fla. **1982).** Regardless, Appellant's claims have already been rejected by this Court. E.g. Windom v. State, 20 Fla. L. Weekly S200, 202 (Fla. Apr. 27, **1995);** Maxwell v. State, 20 Fla. L. Weekly **S427** (Fla. July **20, 1995),** aff'g **647** So.2d 871 (Fla. 4th DCA **1995);** Allen v. State, 20 Fla. L. Weekly **S397, 399** (Fla. July 20, 1995).[14]

As for Appellant's vagueness challenge, the State submits that the terms of section 921.141(7) are not so vague that persons of common intelligence must necessarily guess at their meaning. This section, newly enacted in 1992, provides:

> **(7)** VICTIM IMPACT EVIDENCE.--Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about

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[13]To the extent Appellant makes an overbreadth challenge on appeal, the State submits that that particular challenge was not made in the trial court. Thus, that part of Appellant's vagueness challenge has not been preserved.

[14]The appellants in Windom and Maxwell both challenged the constitutionality of this statute on vagueness grounds. However, in neither opinion did this Court address that particular issue in upholding the statute's validity. Nevertheless, the State submits that in rejecting those appellants' challenges, this Court has implicitly rejected the vagueness challenge as well. Out of an abundance of caution, however, the State will respond to the merits of this claim.

> the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

This statute is almost identical to the language used in Payne v. Tennessee, 501 **U.S.** 808, ___, 115 L.Ed.2d 720,734 (1991) (emphasis in original), to define what constitutes victim impact evidence:

> [Victim impact evidence] is designed to show each victim's "Uniqueness as **an** individual human being," whatever the jury might think the loss to the community resulting from his death might be.

Given the obvious affinity between the language of the statute and the language in Payne, this Court should reject Appellant's vagueness claim. See Haggerty v. State, 531 So.2d 364,365 (Fla. 1st DCA 1988) ("The statute defines 'obscenity' exactly as it was defined in Miller v. California, 413 **U.S.** 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). We decline to find the highest court's definition vague.").

As this Court has previously stated, "[a] vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement. In determining whether a statute is vague, common understanding and reason must be used." Southeastern Fisheries Ass'n, Inc. v. Dep't of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984). Appellant challenges the terms "uniqueness as **an** individual human being" and "loss to the community's members by the victim's death" as being vague. Since the statute does not define these words, they must be given their plain and ordinary meaning. Id.

The term "unique" has been defined **as** "1. Being the only one of its kind; sole. 2. Being without an equal or equivalent; unparalleled." **The American Heritage Dictionary** 1322 (2d Ed. 1985). The term "community" has been defined as "1.a. A group of people living in the same locality and under the same government. b. The district or locality in which such a group lives: *a small rural community. 2.* **A** group or class having common interests: *the scientific community."* Id. at 299. When applied to the circumstances of a capital sentencing proceeding, these terms are

not too indefinite to result in arbitrary and capricious application. A person's uniqueness can include personality characteristics, skills, artistic abilities, intellectual functioning, and the like. For example, in this particular case, the victim-impact evidence revealed Ms. Pezza's educational background, her professional accomplishments in teaching, writing, film making, and curricula development for gifted children, and her fierce independence in spite of a debilitating mental illness.

As for the "loss to the community's members," this term is defined by the people who knew the victim and who are personally affected by the victim's death, such as family members, friends, co-workers, professional associates, or members of a group or organization to which the victim belonged. Contrary to Appellant's slippery slope argument, this term does not include "anyone" and would not permit "sentencing by petition or public opinion poll." **Brief of Appellant** at 85. For example, in Windom, a police officer described the effect of a victim's death on other children in the elementary school where the victim's children attended, namely, that a lot of the children were afraid. This Court held that such testimony was improperly admitted as victim-impact evidence because it did not relate to the victim's uniqueness or the loss to the community by her death. 20 Fla. L. Weekly at 202. Obviously, the statutory provision authorizes a fairly limited class of evidence.

As for Appellant's contention that this statute will be improperly applied according to the race, ethnicity, socioeconomic status, or popularity of the victim, this claim was explicitly rejected in Payne:

> Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to the community are more deserving of punishment than those whose victims are perceived to be less worthy, As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind--for instance, that the killer of a hardworking devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is

> designed to show instead ***each*** victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community from his death might be, The facts of [South Carolina **v.** Gathers, 490 U.S. 805 (1989)], are an excellent illustration of this: the evidence showed that the victim was **an** out of work mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

508 U.S. at ___, 115 L.Ed.2d at 734. See also Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 117 L.Ed.2d 326, 339-40 (1992) (Court will not consider claims of improper application of death penalty in the abstract).

To the extent that the statute does not define these terms, or more specifically describe the kind of evidence for which it authorizes admission, its failure to do so does not condemn the statute's validity

> [T]he lack of precision is not itself offensive to the requirements of due process. "[T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." . . . "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous."

Roth v. United States, 354 U.S. 476, 491-92 (1957) (citations omitted). The test is whether the law to whom it applies has fair notice of what is prohibited and whether it can be applied uniformly. Southeastern Fisheries Ass'n. Inc., 453 So.2d at 1353-54.

This statutory provision limits victim-impact evidence to unique characteristics of the victim and to the effect of the victim's death on people who knew the victim and were personally affected by the death. It specifically precludes characterizations and opinions about the crime, the defendant, and the appropriate sentence. Moreover, the statute requires the State to establish the existence of at least one aggravating factor before it may introduce victim-impact evidence. Given these

limitations and the limitations inherent in the common understanding of the terms of this provision, this Court should affirm the trial court's finding that this statute **is** constitutional, and affirm Appellant's sentence of death.

ISSUE XVIII

WHETHER THE "FELONY MURDER' AGGRAVATING FACTOR **IS** UNCONSTITUTIONAL ON ITS FACE AND **AS** APPLIED (Restated).

Prior to sentencing, Appellant filed a motion to declare the "felony murder" aggravating factor unconstitutional. (R 3709-13). The trial court denied the motion. (R 3750; T 3260). Appellant renews his claim that this aggravator is unconstitutional because it constitutes **an** "automatic" aggravating factor. **Brief of Appellant** at 93-96. Appellant has failed to acknowledge, however, that **this** Court has repeatedly rejected this claim. E.g. Johnson v. State, 20 Fla. L. Weekly S343, 346 (Fla. July 13, 1995) (citing Lowenfeld v. Phelps, 484 U.S. 231 (1988)); Hunter v. State, 20 Fla. L. Weekly S251, 254 (Fla. June 1, 1995) (same). Since Appellant has failed to present any new argument which would warrant reconsideration of this issue, this Court should deny his claim and affirm his sentence of death.

ISSUE XIX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S SPECIAL REQUESTED PENALTY-PHASE JURY INSTRUCTIONS WHICH SPECIFICALLY ENUMERATED NONSTATUTORY MITIGATING FACTORS (Restated).

During the penalty-phase charge conference, defense counsel requested special instructions which specifically detailed the nonstatutory mitigating circumstances upon which Appellant was relying. The trial court denied the request. (T 2959-60). In addition, defense counsel requested the following special instruction defining nonstatutory mitigating circumstances:

> Mitigating circumstances are those factors which in fairness and mercy, may be considered as extenuating or reducing the degree of blame for the offense. Mitigating circumstances also include any aspect of Robert Consalvo's background and life or any circumstances of the offense which may create a reasonable doubt about the question of whether death by electrocution is the only appropriate sentence for Robert Consalvo.

(R **3701).** The trial court rejected this instruction as well. (T **2951).**

Appellant claims in this appeal that the trial court abused its discretion in failing to give his requested instructions to the **jury. Brief of Appellant** at **96-98.** Once again, however, Appellant has failed to acknowledge that this Court **has** repeatedly rejected identical claims. E.g. Finney v. State, 20 Fla. L. Weekly **S401, 404** (Fla. July 20, 1995); Jones **v.** State, 612 So.2d 1370, 1375 (Fla. 1992) ("[T]he standardjury instruction on nonstatutory mitigators **is** sufficient, and there is no need to give separate instructions on individual items of nonstatutory mitigation."); Robinson **v.** State, 574 So.2d **108** (Fla. **1991).** Since Appellant has failed to present any new argument which would warrant reconsideration of this issue, this Court should deny his claim and affirm his sentence of death.

ISSUE XX

WHETHER DEATH BY ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT (Restated).

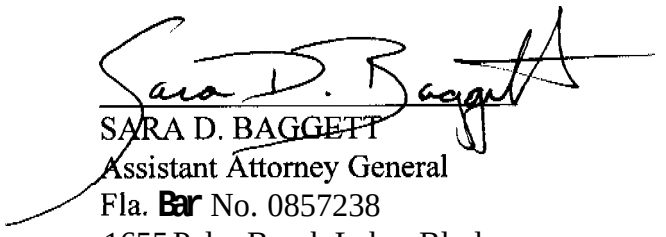
Prior to trial, Appellant filed a motion to declare section 922.10, Florida Statutes (1991), unconstitutional, claiming that electrocution is cruel and unusual punishment under the state and federal constitution. (R 3531-32). The trial court denied the motion. (T 2907). Appellant renews his claim on appeal, **brief of appellant** at **98-99,** but fails to even acknowledge that this Court has repeatedly rejected identical claims. E.g. Hunter **v.** State, 20 Fla. L. Weekly S251,254 (Fla. June 1, 1995); Fotopoulos v. State, 608 So.2d 784,794 n.7 (Fla. 1992), cert. denied, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993). Since Appellant has failed to present any new argument which would warrant reconsideration of this issue, this Court should deny his claim and affirm his sentence of death.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentence of death,

Respectfully submitted,

ROBERT **A.** BUTTERWORTH
Attorney General



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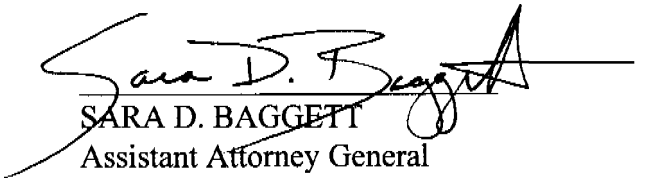
CERTIFICATE OF SERVICE

I hereby certify that th foregoing document was sent by courier to Jeffrey L. Anderson, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 29th day of September, 1995.



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