IN THE SUPREME COURT OF FLORIDA

ALVIN L. MORTON,

Appellant,

vs..

STATE OF FLORIDA,

Appellee.

Case No.: 83,422

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE NO.:

OTHER AUTHORITIES CITED

STATEMENT OF THE FACTS

Appellant's statement of the facts is somewhat incomplete, biased and argumentative. The following additions and corrections are offered to balance and complete the statement of facts:

Deputy David Buhs testified that on January 27, 1992, that he met with Lee Sowell, John Pacheco and Kurt Butcher. (T 223 - 224). The young men took him to a house in Hudson on Sanderling Drive. They arrived at about 5:00 a.m. (T 224) Deputy Buhs testified that the house appeared to be on fire and that the front door was kicked in. He called the fire department and then, based on Sowell's information, he put out a BOLO for Morton, Chris Walker, Tim Kane and Robert Garner (R 227). Upon further investigation, it was found that the phone wires to the house were cut and that there were two victims. One victim was fifty-five year old Bowers and his mother, seventy-five year old Madeline Weisser.

Mr. Bowers died of a fatal shotgun wound to the head. The medical examiner testified that it was a contact wound and that the victim had cuts on his back and other evidence of defensive wounds (T 827 - 838). Dr. Corcoran also testified that the male victim's pinky finger had been removed. Mrs. Weisser had eight stab wounds to the neck, two incised wounds to the back and her neck had been sliced from back to front. Her death was a result of her spinal cord being cut. (T 841 - 843). The medical examiner put

the time of death between 2:30 a.m. and 3:00 a.m. on January 27, 1992. (T 852)

The evidence presented at trial showed that the murders were a result of a well-thought out plan to burglarize the home and murder the occupants therein.[1] This plan was developed by appellant, Alvin Morton, Chris Walker, Michael Rodkey, Tim Kane, and Robert Garner. (T 227) The state presented several witnesses who testified that they were present when Appellant, Alvin Morton, discussed the commission of the burglary and murders both prior to and after the murders were committed. (T 294, 297-302, 304, 320-23, 333-35 369, 385, 389-91, 422, 428, 502, 515-18, 528-33 736, 758, 803, 863-65) Among these witnesses were Michael Rodkey and Chris Walker.

Michael Rodkey testified that on Saturday, January 25, 1992, Morton talked to him about killing the occupants of the home on Sanderling. (T R 774) Morton told Rodkey that after they killed the individuals, they were going to watch the Superbowl and "eat their food and stuff." (T 773, 785) The next evening, the night of the murder, Rodkey was at his house playing Nintendo with Bobby Garner and Chris Walker when Alvin Morton and Tim Kane knocked on the window. (T 757) Morton told him that they were going over to the house [on Sanderling] to break in and kill the people. (T 758) After this conversation, they rode their bikes to Garner's house. (T 759) At Garner's they

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[1]The trial court granted a defense motion to exclude evidence that a day or two prior to the murders , Morton and his group went to the Bowers/Weisser home to break in and rob the occupants. They retreated, however, when they got to the doorway and the dogs started barking. (T 185-86, 195, 200)

continued discussing it for about a half an hour. When they left on their bikes to go to Sanderling, Morton was carrying a blue towel with a sawed-off shotgun inside. (T 762-63) Once they got close, they hid their bikes in the bushes on the side of the road. Morton was still carrying the blue towel. (T 764) They decided that one person would kick the door in, the rest would follow and the last person in would close the door. When they got to the house, they started walking around it and looking in the windows. (T 765) They broke into the vacant house across the street, sat on the porch and discussed their plans. (T 766) Rodkey testified that they knew somebody was home and that's why Morton had Tim Kane cut the telephone wire, after Chris Walker failed. (T 767-9) Rodkey testified that he and Chris Walker decided to leave. Rodkey tried to talk Garner out of going, but Garner went with Morton and Kane to the Bower/Weisser home. As Rodkey left with Walker, he turned around and saw someone kick in the door. Shortly thereafter he heard gunshots. (T 769-7 1)

Although Chris Walker, who used to be a neighbor of the victims, was not as forthcoming in his testimony, he admitted the following: planning the burglary on Sanderling; seeing Morton carrying the bulging blue towel; hiding the bikes in the bushes; peering into the windows of the victim's house; breaking into the vacant house; seeing a gun and a "Rambo" knife in the blue towel while they were at the vacant house; and, seeing Morton head toward the victim's house carrying the shotgun. (T 499, 501, 502, 518, 521, 525, 526, 527, 531)

Among the other state witnesses who heard Morton talk about the murder, was Jason Pacheco. Pacheco testified that the Friday before Superbowl Sunday, January 26, 1992 (the day of the crime), appellant told Jason Pacheco that he was going to use the sawed off shotgun to kill the people across from where Chris Walker used to live. (T 344-352) Shortly after the murders were committed Morton came to Jeff Madden's home with Tim Kane, Bobby Garner, Chris Walker and Jeff Madden. Morton told everyone in the residence to leave except Pacheco, Jeff Madden, and Wayne Whitcomb. Morton showed them a pinky finger in a hanky. (T 297) Morton told them that he had killed some people, that they had kicked the door in, and that a man and lady came out. He ordered them to the floor and put a gun to the head of the man. The man told Morton that he would give him money and that his mother would write him a check. Morton said, "No, you'll call the cops." When the victim said that he wouldn't, Morton replied, "That's what they all say." Morton told Pacheco that he shot the man in the back of the neck toward the face and that he stabbed the lady in the back. (T 299 - 302) Bobby Garner told Pacheco that he (Garner) slit the woman's throat and that someone ran the knife down her spine.

Jeff Madden testified that he was present when Morton told Jason about the murders. He said that defendant said, "It was so cool. I blew the bitch's brains out." (T 320) Madden testified that Morton also claimed responsibility for kicking in the door, (T 321) Madden confirmed that Morton said John Bowers had begged for his life. (T

323) Madden also confnmed that Morton was laughing while he was telling this story and that Morton had said on the prior Friday that he wanted to kill someone at the house on the street where Lee Sowell used to live [Sanderling Drive]. Morton gave Madden the pinky finger because he'd asked for it. (T 349) Wayne Whitcomb also testified and confirmed much of the conversation at Pacheco's after the murder. (T 384-404).

Additionally, the state presented testimony that Morton as an inmate told inmate Chiotasso that the woman was being kicked and the guy turned on him so he shot him (T 863 - 65).

The evidence of Morton's guilt in the instant case included his own confession. The confession was introduced at trial by way of a taped statement wherein the defendant admitted kicking in the door, shooting John Bowers and stabbing Madeline Weisser. The defendant also admitted setting the house on fire, wearing gloves during the crime, and hiding in the attic while the police searched for him. (T 797 - 816)

SUMMARY OF THE ARGUMENT

As to Issue I: In order to obfuscate the fact that appellant committed two cold-blooded murders for no better reason than the pure sport of it, appellant's counsel attempts to portray the trial below as being absent any substantive evidence of appellant's guilt and consisting entirely of out-of-court statements used incorrectly for impeachment purposes. A review of the record, in the instant case, however, shows that not only did the state present overwhelming substantive evidence of appellant's guilt, including appellant's own confession, but that no error was committed in the introduction of out-of-court statements, Notwithstanding, Appellant's characterization to the contrary, appellant had a fair trial which correctly resulted in a guilty verdict and a sentence of death.

As to Issue II: Appellant also contends that the trial court erred in admitting into evidence testimony regarding conversations between the co-perpetrators as "adoptive admissions ". He contends that the statements in question were not admissible as "adoptive admissions" because the statements were not the type a person would normally deny. It is the state's position that the admission of the testimony was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Furthermore, a review of the record shows that as a whole the witnesses specifically recalled that Morton was the dominant speaker during the conversations and were able to attribute specific inculpatory statements to him.

As to Issue III: The court, in the instant case, considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances that were established by the evidence or on which was any significant evidence produced as they related to the murder charge as required by this Court's decision in Campbell v. State, 571 So.2d 415 (Fla. 1990). Accordingly, the state maintains that the trial judge sufficiently considered the mitigating evidence presented on this factor.

As to Issue IV: As his fourth claim Morton argues that the trial court's finding of cold, calculated, and premeditated was erroneous. He claims that the court's finding is based in large part on statements made in the state attorney's investigation and introduced during the guilt phase as impeachment evidence and, therefore, the factor is invalid. It is the state's position that the factor was well supported by the substantive evidence introduced at trial and that the factor was correctly found.

As to Issue IV: The trial court's findings of CCP and avoid arrest are not inconsistent. To the contrary, Morton obviously meticulously planned the entire episode with the objective that there would be no evidence of his involvement. His determination that Bowers would have to be killed because he would call the "cops" is not undermined by the evidence of prior planning.

As to Issue V: This finding was within the trial court's discretion and Morton has failed to show an abuse of that discretion, Nevertheless, should this Honorable Court fmd

that the avoid arrest factor was improperly found, reversal of the sentence is not warranted in light of the remaining aggravating factors.

As to Issue VI: As appellant concedes, this Court has repeatedly rejected his claim that the trial court erred in refusing to give specific jury instructions on the nonstatutory factors offered by the defense.

ARGUMENT

ISSUE I

WHETHER MORTON'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR'S INTRODUCTION OF OUT-OF-COURT STATEMENTS TO EITHER REFRESH THE RECOLLECTION OR IMPEACH THE TESTIMONY OF THE STATE'S WITNESSES WHERE THE JURY WAS REPEATEDLY INSTRUCTED THAT SUCH EVIDENCE WAS BEING ADMITTED FOR IMPEACHMENT PURPOSES ONLY AND COULD NOT BE CONSIDERED AS SUBSTANTIVE EVIDENCE AND WHERE THE EVIDENCE OF APPELLANT'S GUILT WAS OVERWHELMING?

In order to obfuscate the fact that appellant committed two cold-blooded murders for no better reason than the pure sport of it, appellant's counsel attempts to portray the trial below as being absent any substantive evidence of appellant's guilt and consisting entirely of out-of-court statements used incorrectly for impeachment purposes. A review of the record, in the instant case, however, shows that not only did the state present overwhelming substantive evidence of appellant's guilt, including appellant's own confession, but that no error was committed in the introduction of out-of-court statements. Notwithstanding, Appellant's characterization to the contrary, appellant had a fair trial which correctly resulted in a guilty verdict and a sentence of death.

The murder in the instant case happened on January 27, 1992 and the trial was held two years later in February of 1994. The witnesses to the crimes and to the planning of

these crimes consisted of a large group of teenagers. Each of the teenagers was questioned immediately after the murder and cooperated fully with the investigation. Naturally, more than two years later at the trial, several of these witnesses had problems recalling specific details of the crime. Similarly, as might be expected among a group of the defendant's friends, several were reluctant to testify against the defendant. Therefore, several of the witnesses gave testimony that was contrary to their prior statements or claimed a lack of memory as to the specifics. Under the circumstances, the trial court correctly allowed the state to use their prior statements to either refresh the recollection of the witness or as impeachment evidence. In both cases, the jury was repeatedly instructed that such evidence was not to be considered by the jury as substantive evidence, but was to be considered only as evidence reflecting on the witnesses' credibility.

In general an out-of-court statement may be introduced as a prior inconsistent statement to impeach a witness (Florida Statutes $90.608) or to refresh the recollection of a testifying witness (Florida Statutes 590,613). Specifically, Florida Statutes $90.608, states:

> **§90.608 WHO MAY IMPEACH**
>
> Any party, including the party calling the witness, may attack the credibility of a witness by:
>
> (1) Introducing statements of the witness which are inconsistent with his present testimony.
>
> (2) Showing that the witness is biased.
>
> (3) Attacking the character of the witness in accordance with the provisions of $90.609 or $90.610.
>
> (4) Showing a defect of capacity, ability, or opportunity in

> the witness to observe, remember, or recount the matters about which he testified.
>
> (5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

In 1990, $90.608 was amended to provide that a party may impeach its own witness, even if not adverse, by introducing prior inconsistent statements. Street v. State, 636 So. 2d 1297 (Fla. 1994). The sponsor's notes to the Rule reflect that this change was to eliminate the necessity of surprise in order to use prior inconsistent statements to impeach an adverse witness. The scope of impeachment of an adverse party is that of any other witness upon cross examination and is not limited to inconsistent statements or by doctrines of surprise and prejudice.

Florida Statutes $90.614 provides for the method to be used in order to properly impeach a witness with a prior inconsistent statement:

> (1) When a witness is examined concerning his prior writing statement or concerning an oral statement that has been reduced to writing, the court, on motion of the adverse party, shall order the statement to be shown to the witness or its contents disclosed to him.
>
> (2) Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it, or the interests of justice otherwise require. If a witness denies making or does not distinctly admit that he has de the prior inconsistent statement, extrinsic evidence of such statement is admissible. This subsection is not applicable to admissions of a party-opponent as defined in §90.803(18).

Florida Statutes §90.614(1) requires that if there is a timely motion and if the prior statement is written, or is an oral statement reduced to writing, the statement itself must be shown

to the witness, or its contents disclosed. If this foundation is not laid, counsel may not examine a witness about the contents of his or her statements or subsequently introduce proof of the statements. §90.614(2) provides that before extrinsic evidence of the contents of the prior statement is admissible the cross-examiner must ask the witness whether he or she made the prior statement and give the witness the opportunity to admit, explain, or deny making the statement. This procedure was used in the instant case. Each time an out-of-court statement was used as impeachment the statement itself was shown to the witness, or its contents were disclosed as required by the rule, The witness was also reminded of the date and circumstances surrounding the giving of the statement and was allowed the opportunity to explain or adopt the prior inconsistent statement.

Appellant concedes that evidence of prior inconsistent statements may be admissible under certain circumstances, but contends that it was improperly admitted here because none of the testimony was challenged was genuinely adverse to the state's cause. As previously noted, the rule has been amended to delete the requirement that the testimony be adverse or prejudicial and to allow impeachment of the state's witnesses as if they were defense witnesses. Thus, those cases relied upon by appellant that found error where a trial court made a witness a court witness without a sufficient showing of adversity do not support a claim of error under the new rule, The scope of impeachment of an adverse party is that of any other witness upon cross examination and is not limited to inconsistent statements or by doctrines of surprise and prejudice, Furthermore, as review of the specific statements being challenged will show, many of the impeached statements were adverse and prejudicial to the state.

Appellant also contends that the witnesses' statements that they could not remember or

could not recall making a specific statement does not open the door for the state to introduce a prior inconsistent statement. Ehrhardt addresses this argument, stating:

> There is disagreement as to whether the lack of memory of a witness while testifying is inconsistent with an earlier statement of fact. One view is that a feigned lack of memory is simply an easy method of denying an earlier statement and it should be recognized as an inconsistency. See United States v. Williams, 737 F.2d. 594, 608 (7th Cir. 1984), cert. Denied, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985) ("Inconsistency 'may be found in evasive answers, silence or changes in positions .' In addition, a purported change in memory can produce 'inconsistent' answers. Particularly in a case of manifest reluctance to testify, 'if a witness has testified to (certain) facts before a grand jury and forgets them at trial, his grand jury testimony falls squarely within Rule 801(d)(1)(A).'"); United States v. Russell, 712 F.2d 1256 (8th Cir. 1983); United States v. Dennis, 625 F.2d 782 (8th Cir. 1980). The other view is that, if a witness does not remember a fact, there simply is no inconsistency between the in court testimony and the prior statement. Calhoun v. State, 502 So. 2d 1364 (Fla. 2d DCA 1987) (Deputy testified on cross-examination that she could not remember ever making a statement that she was an aggressive female officer. The trial court correctly excluded a defense witness who would have testified that he had heard the deputy make such a statement. There was "no inconsistent prior statement of the deputy shown to have been made." Apparently, the deputy was not asked whether she was an aggressive officer, If she had denied that she was aggressive, then her prior statement would have been inconsistent and extrinsic evidence would have been appropriate had the necessary foundation been laid); Graham, Handbook of Federal Evidence.
>
> (P. 402, 403, $608.4)

In the instant case, the interest of justice was served by the state being allowed to use the prior inconsistent statements. As previously noted a majority, if not all, of the witnesses called to testify were either friends of the defendant or prior friends of the defendant. As such, they were reluctant to testify against him. In Freeman v. State, 547 So, 2d 125 (Fla. 1989), this Court

rejected Freeman's contention that the trial court erred by declaring his stepbrother a hostile witness and by permitting the state to impeach and bolster his testimony with prior consistent statements. The court noted that on direct examination, the stepbrother stated that he made his earlier sworn statements under pressure by the State Attorneys Office and implied that the statements were not true. This Court held that where the record indicates that where the stepbrother was being both difficult and recalcitrant in responding to inquiry, that the trial judge did not abuse his discretion in declaring the stepbrother a hostile witness. This Court noted that the witness' responses indicated more than a mere lapse of memory. Similarly, in the instant case, the testimony of state witnesses Walker, Madden, Whitcomb, Fitch and Morton indicated more than a mere lapse of memory. Rather, the witnesses were obviously reluctant to testify and, therefore, proved both difficult and recalcitrant in responding to the prosecutor's questioning.

As previously noted, much of the challenged testimony was simply a result of the state offering the witness his or her prior testimony in order to refresh the witness' recollection of the events that occurred two years before the trial. Florida Statute $90.613, which provides for the refreshing of a witness' memory, states:

> **§90.613 REFRESHING THE MEMORY OF A WITNESS**. --- When a witness uses a writing or other item to refresh his memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence. If it is the testimony of the witness, in evidence. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If

> a writing or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.

When a witness' recollection is refreshed by the use of a document or other item, the witness is testifying from his or her own present memory and not the document. It is not necessary in that situation to comply with §90.803(5).

Furthermore, much of the evidence was admissible under §90.803(5) Middleton v. State, 426 So. 2d 548, 550 - 551 (Fla. 1982), cert. denied, 463 U.S. 1230 (1983). Florida Statutes § 90.803 provides, as follows:

> **§ 90.803 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL.**
>
> The provision of §90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> . . .
>
> (5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but not such memorandum or record is admissible as an exhibit unless offered by an adverse party.

Admittedly, the state did not seek to introduce any of the prior statements under this exception. The failure to do so below, however, does not preclude this Court from rejecting a

claim of error on this basis. If a judge's order is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been bottomed on an erroneous theory, an erroneous reason, or an erroneous ground, the order should be affirmed. Owens **v. State, 354** So. 2d 118 (Fla. 3d DCA 1978).

It is difficult to imagine a more appropriate use of the past recollection recorded exception than the way it was used here.

> The reasoning behind the "past recollection recorded" exception to the hearsay rule, permitting a witness's written record of past events to be read into the record in place of or augmenting the witness's testimony from present recollection, is somewhat analogous to the reasoning that justifies one witness vouching for the fidelity of the tape recording, having personally heard the conversation, and another vouching for the fidelity of the transcript of that recording. Formerly it was held that "past recollection recorded" evidence is inadmissible unless the witness whose record is offered has a total memory failure. [] But under the Florida Evidence Code, **§ 90.803 (5), Fla. Stat. (1981)**, a recorded recollection may now be read into evidence if the witness merely "now has insufficient recollection to enable him to testify fully and accurately. " On the competency question alone, this more hospitable treatment of recorded recollections recognizes that a faithfully recorded recollection, recorded when the witness had the matter fresh in his memory, can be more probative than direct testimony from an imperfect memory.

Golden v. State, 429 So. 2d 45, 52 (Fla. 1st DCA 1983) at fn. 4, **rev. denied, 431 So.** 2d 988 (Fla. **1983), appeal dism.**, 438 So. 2d 833 (Fla. 1983).

Records of past recollection are admitted into evidence because they are

> [O]ften essential to the discovery of truth at

> trial and generally much more reliable than oral testimony . . . Thus, to exclude such a record when honestly made would be to reject the best and frequently the only means of arriving at the truth . . . Always the trustworthiness of the record received in evidence is of paramount concern. [] We have said that the trial judge is in the best position to pass on all the facts and circumstances regarding the reliability of records of past recollection and that his discretion should be questioned only when its abuse is clearly shown.

Walker v. Larson, 169 N.W.2d 737, 741, 743 (Minn. 1969)

As appellant concedes, numerous witnesses claimed they could not recall certain statements they had previously made. Even absent the obvious reluctance to testify against a friend or former friend, the record also shows that between the time of the murder and the trial, two years had elapsed. The two-year time period in the mind of a teenager is a considerable time and it is entirely plausible that many facts were indeed forgotten. The statements given to the State Attorney's investigator were given under oath and recorded by a stenographer. As such, the statements fall within the parameters of the past recollection recorded exception, With regard to this section, Erhardt states:

Past Recollection Recorded

> When a witness does not have a present memory of a fact, the contents of a record made by the witness of that fact may be admissible as an exception to the hearsay rule if the record meets the requirements of section 90.803(5). This exception is commonly called "past recollection recorded. In addition to the person's lack of present memory, if it is shown that a record or memorandum concerns a matter about which the witness once had knowledge, that it was made by the witness when the facts in the record were fresh in the witness' memory and that it reflects that knowledge correctly, the necessary predicate has been laid for the exception. Usually this foundation is laid through the testimony of the witness who made

the prior record. Rather than the witness supplying the facts from his or her memory, the facts are being offered from the record or memorandum. The foundation may be laid by testimony that the witness remembers making an accurate recording of the fact or event or by testimony that the witness is confident that the fats would not have been written unless they were true.

In order for the contents of a writing or memorandum to be admissible under section 90.803(5), it is not necessary that the witness' memory be totally exhausted. Section 90.803(5) provides that the exception is applicable "when the witness has insufficient recollection to enable him to testify fully and accurately." Therefore, if the witness has some memory of the fact but does not fully remember the incident, section 90.803(5) may be applicable.

When a foundation is laid for the admission of the contents of a memorandum as past recollection recorded, section 90.803(5) provides that the memorandum itself may not be admitted as an exhibit and then taken to the jury room, unless the party against whom the testimony is admitted offers it as an exhibit. Since the record is a substitute for oral testimony and since testimony cannot be taken to the jury room, the jury is not permitted to consider the memorandum itself. However, the contents of the record or memorandum may be read into evidence. Section 90.803(5) permits the admission of the record when it is offered by the adverse party.

The prosecutor's reading from the transcript made during the SAO investigation was properly done as a past recollection recorded. Appellant's case is controlled on this issue by Middleton v. State, 426 So. 2d 548 (Fla. 1982), cert. denied, 463 U.S. 1230, 103 S. Ct. 3573, 77 L. Ed. 2d 1413 (1983). In Middleton, this Court held that the trial court properly permitted a stenographer to read a defendant's prior confession into the record as a past recollection recorded, even though the defendant never saw, signed, or acknowledged the transcript as his statement.

In the latter case [of a recorded recollection],

> the memorandum furnishes no mental stimulus, and the testimony of a witness by reference thereto derives whatever force it possesses from the fact that the memorandum is the record of a past recollection, reduced to writing while there was an existing independent recollection. It is for that reason that a memorandum, to be available in such cases, must have been made at or about the time of the happening of the transaction, so that it may safely be assumed that the recollection was then sufficiently fresh to correctly express it.

Id. at 551. Pursuant to Middleton, the trial court properly permitted the State to utilize the transcript of statements made during the SAO investigation as a prior recorded recollection

Regardless of the particular basis for admission of these statements, it must be noted that the prosecutor agreed that the impeachment evidence was not admissible as substantive evidence and the jury was repeatedly instructed by the court that the evidence only went to credibility. Thus, unlike State v. Smith, 573 So. 2d 306 (Fla. 1990), where this Court found it was error to rely on impeachment evidence as substantive evidence, this evidence was not admitted for substantive purposes. The state produced substantial substantive evidence of appellant's guilt without any necessity to rely on the impeachment evidence to establish Morton's guilt. A review of the specific statements challenged on appeal demonstrates the propriety of each statement admitted and/or the lack of prejudice that resulted therefrom. Error, if any is harmless beyond a reasonable doubt as numerous witnesses testified to the same facts and/or statements with regard to the planning and commission of the murder.

Jeff Madden

Appellant's first challenge is to the testimony of Jeff Madden. Madden, Jason Pacheco

and Wayne Whitcomb all testified at trial that they were having a Superbowl party when Morton and his gang arrived at Jeff Madden's house to tell Madden, Whitcomb, and Pacheco about their "great adventure." Prior to calling Madden as a witness, the state presented the unchallenged testimony of Jason Pacheco. Pacheco testified that the Friday before Superbowl Sunday, January 26, 1992 (the day of the crime), appellant told Jason Pacheco that he was going to use the sawed off shotgun to kill the people across from where Chris Walker used to live. (T 344-352) With regard to the conversation at Madden's house, Pacheco testified that after the murders were committed Morton came to Jeff Madden's home with Tim Kane, Bobby Garner, and Chris Walker (T 294) Morton told everyone in the residence to leave except Pacheco, Jeff Madden, and Wayne Whitcomb. Morton showed them a pinky finger in a hanky. (T 297) Morton told them that he had killed some people, that they had kicked the door in, and that a man and lady came out. He ordered them to the floor and put a gun to the head of the man. The man told Morton that he would give him money and that his mother would write him a check. Morton said, "No, you'll call the cops." When the victim said that he wouldn't, Morton replied, "That's what they all say." Morton told Pacheco that he shot the man in the back of the neck toward the face and that he stabbed the lady in the back. (T 299 - 302) Bobby Garner told Pacheco that he (Garner) slit the woman's throat and that someone ran the knife down her spine.

The state then presented the testimony of Jeff Madden. Madden similarly testified that Morton and this group came to Madden's house. Morton cleared the room and pulled a bandana out of his pocket and showed the three of them Mr. Bowers severed pinky finger, stating, "I brought you what you wanted." (T 3 18) Morton then told them about the murders. Morton said, "It was so cool. I blew the bitch's brains out." (T 320) Madden testified that Morton told them

about kicking in the door and that Morton was laughing while he was telling about the murders. At that point the prosecutor, Michael Halkitis, asked Madden, "What else did Morton tell you?" and Madden replied, "I'm not sure." Mr. Halkitis offered Madden an opportunity to review a specific portion (line 10, page 34) of his statements made under oath on January 27, 1992, the day after the murder to refresh his recollection. (T321) Madden reviewed it, stated that it refreshed his recollection and testified that they somehow kicked in the door. Madden then could not recall why they kicked in the door and was once again offered his statement (line 13 - 24) to refresh his recollection. He then testified Morton said he kicked in the door, woke the people up, got them to the floor, and put a gun to the back of the man's head, (T 322) The man started telling him that, why are you doing this, what did we do to deserve this. Madden then said he didn't remember why Morton had said he was doing it. Morton told him he pulled the trigger after the man said his mother would write a check and that they wouldn't call the cops. (T 323) Madden was not sure whether Morton had said he'd done it for the "hell of it or the fun of it." Mr. Halkitis then read the relevant portion of Madden's statement. Defense counsel objected. The objection was overruled and the jury was given a cautionary instruction that the evidence was for impeachment purposes only and was not substantive evidence. (T 329) Madden then testified that his recollection was better back then and that the prior statement was true. (T 330)

This statement was properly admitted. Furthermore, when considered in context, the statement was clearly not prejudicial. Both Pacheco and Madden testified that Morton was laughing while he was telling about the murders. Furthermore, Michael Rodkey testified that Morton told him they were going to break in the house, kill the people, and then hang around, watch the Superbowl, and eat their food and stuff. The import of this unchallenged testimony is

that Morton was committing the murders for the "fun" of it.

Morton also complains about Madden further being questioned about a statement he made during the investigation. Madden testified during a subsequent telephone conversation Morton told him there were brains and pools of blood he had to jump over and that Chris Walker had set the home's sheets on fire. To impeach this statement the state referred Madden to his sworn statement where he had said that Morton claimed responsibility for setting the fire. This testimony was admissible as a prior inconsistent statement. Assuming, arguendo, it is error, it was harmless beyond a reasonable doubt as appellant confessed to setting the sheets on fire. (T 812) Madden then testified, without challenge, that Morton had told him on the prior Friday that he wanted to kill someone at the house on the street where Lee Sowell used to live [Sanderling Drive] and that Morton gave Madden the pinky finger because he'd asked for it. (T 349)

Wayne Whitcomb

After Jason Pacheco and Jeff Madden had already testified about the statements made by Morton at Madden's house on January 26, 1992, the state called Wayne Whitcomb. Thus, Wayne Whitcomb was the third witness for the state that testified about Morton's joyful recollection of the double homicide. On appeal Morton challenges the admission of the following for impeachment purposes: 1) whether Morton had said anything about the elderly lady; 2) whether Morton said he'd shot the man; 3) whether Morton had said he killed the woman; 4) whether Morton had said what happened to the finger; and 4) whether Morton had told Madden he got the finger for him, This evidence was proper impeachment evidence. Furthermore, the state presented considerable substantive evidence, including Morton's own confession that established Morton had made the statements as well as committing the acts. Morton confessed to shooting

the man in the back of the neck and stabbing the woman in the neck. (T 803-05) Pacheco and Madden testified that Morton told them he killed both people. (T 299-301, 320-22) Morton also confessed to wrapping the pinky finger in a bandanna and giving it to Jeff Madden because he'd asked for it. (T 806-7, 809) Chris Walker testified that Morton handed him the pinky after he got it back from Madden. Walker then threw it and the bandanna in the canal. (T 586) Sheriffs diver Wanda11 Everett testified that he retrieved the bandanna out of the canal, but could not find the finger. (T 438) In light of the fact that the jury heard this same evidence from numerous witnesses and was clearly instructed that this evidence was for impeachment purposes and not substantive evidence, error, if any, was harmless beyond a reasonable doubt.

Chris Walker

Chris Walker used to be neighbor of the victims. Walker testified that he helped plan the burglary on Sanderlmg and that he went with the group to Sanderling drive. Rodkey and Walker left as the rest of the group broke into the Bowers/Weisser house. Walker then met up with the group after the murders and went with them to Madden's. (T 499, 501, 502, 518, 521, 525, 526, 527, 531)

On appeal Morton challenges the states use of Walker's prior inconsistent statements to establish the following:

1) Whether they were planning a robbery as he had told Detective Lawless versus a burglary as he; In Morton's confession he stated that as soon as they got into the house they began looking around for something to take. (T802) He also told Rodkey that he was going to kill the people and that they might take something if they had anything to take. (T 773) Thus, there was plenty of evidence that Morton had the intent to commit a robbery. More,

importantly, there was substantially more evidence that Morton planned to commit murder first and foremost.

2) What Walker meant by cash or easy money when he testified that they were after valuables, but not cash or easy money: A plan to kick in the door to a house, kill the occupants therein and take valuables or cash, is sufficient to establish an intent to commit a robbery. In any case, Walker's testimony established the intent to commit murder.

3) Whether Walker heard Morton say he was "sick and tired of playing around" or "I'm going o get something" as he had testified to during his deposition versus his trial testimony that Morton and Garner were whispering on the other side of the porch and he could not hear them; Walker's reluctance to testify or absence of memory on this point merely absolved Walker, not Morton, of guilt in the instant case, Clearly, Morton had made similar statements and plans prior to the conversation on the porch.

4) Whether he saw Morton kick in the door as he testified to during ha deposition; On cross examination, Walker reaffirmed that he was "80 percent sure" that Morton had kicked in the door. (T 633)

5) Whether he had heard the gunshot as he was running toward his bxke versus hearing it from across the canal as he recalled stating in his deposition; Rodkey testified that he and Walker heard the gunshot when they rode their bikes over to the next street. (T 771) In either case they heard the gunshot. There certainly is no question that the gun was shot, Mr. Bowers died as a result of the shotgun firing and Morton told several people that he was the one who fired it.

6) Whether there was a discussion about wearing bright colors as he testified to during h deposition; Again even without this statement there was substantial evidence that Morton preplanned these murders; in addition to the numerous conversations and the excluded evidence of the prior attempt, Morton brought the weapons and the extra ammunition to commit the unprovoked murders of two helpless victims, sleeping in their own home.

7) Whether Garner had the knife or, as he testified to during his deposition, Morton had the gun and the knife; After being offered his deposition to review to himself, Walker was able to testify from his own recollection that Morton had the gun and knife wrapped in the blue towel. (T525-27) Furthermore, everyone agreed that Morton brought both weapons and even Morton admitted that he had the knife when he stabbed the seventy-five-year-old woman in the back of the neck. (T 389, 762, 804)

8) Whether Walker recalled Morton saying "I did it, I did it. I blew the old fucker's head off' as he testified to during his deposition; Morton told Detective Lawless, Jeff Madden, John and Jason Pacheco, Wayne Whitcomb, and Lee Sowell that he'd killed Mr. Bowers. (T299-301, 369, 389, 803) Even Walker testified that Morton had said something to that effect. (T 548)

9) Whether they were bragging about the killings; Appellant's defense to the admissions he made, and is challenging on appeal, is that he was a braggart. (See, Issue 2, infra.) Counsel repeatedly questioned witnesses as to whether Morton had a tendency to brag, so the admission of this statement was clearly harmless, if not helpful to the defense.

10) the content of Morton's threat that he knew where Walker's grandparents live as testified to durig Walkers deposition on September 21, 1993; Prior to the prosecutor

showing Walker his prior statement Walker testified that Morton told him to come with him, that he knew where Walker's grandmother lived. (T 551) After being shown the statement Walker testified that he felt like Morton was threatening him. The statement offered to either impeach or refresh merely assisted Walker in recalling the events and, therefore, allowing him to testify from his own memory.

11) Whether he saw the gun and knife when they hid the bikes on Garner's porch. as he testified in the **deposition;** Walker subsequently testified, in response to another question, that Morton was wrapping the gun or the knife, or both, in the blue towel when they got to Garner's house. (T 554) Walker had previously testified that they hid the bikes on Garner's porch (T 553)

12) Whether Morton was giggling when they showed Madden the finger as he testified to during his deposition; Walker was presented with his prior statement and he agreed that it was accurate and that was what had happened Walker specifically stated, "Yes, sir. And the only laughing is coming out of Alvin Morton at that point in time. It was a very small giggle, it stopped very shortly. (T 575) This was also one of those facts that everyone pretty much agreed on, (T 320, 333,404)

13) Whether Walker was at Century 21 when went back to set the fire. as he testified to during his deposition; Regardless of where Walker was when Morton went back to set the fire, Morton repeatedly admitted that he had set the fire. (T 812)

14) Whether Morton had said anything about hiding the weapons as Walker stated during his deposition. When Walker was presented with his prior statement, he said that it had refreshed his recollection and that it was true. (T 614)

As the foregoing review shows, the challenged testimony was largely a result of the witnesses' recollection being properly refreshed and his affirmation that the prior statement was correct. Regardless, each of these facts were well established and did not result in any prejudice to the defendant.

Victoria Fitch

During her testimony Miss Fitch admitted being a friend of Appellant's sister, Angela Morton, and through her knowing the rest of the group. (T 647-8) She remembered being in a car with Angela and Alvin Morton when Morton said he wanted to kill someone, seeing the sawed-off shotgun with white tape, and seeing Morton with the knife. (T 652-54) The prosecutor's presentation of her prior statement was proper and, apparently, refreshed her recollection as she was able to testify to the foregoing from her own recollection.

Angela Morton

Angela Morton is appellant's sister. Although she had apparently given a complete statement during the State Attorney investigation, once she realized the consequences testifying against her brother she was very reluctant to admit anything either at trial or previously in her deposition. The fact that the state was on notice that she was a reluctant witness, is of no import As previously noted, the rule no longer requires surprise or prejudice before a party can impeach his or her own witness. This situation is analogous to this Court's decision in Freeman v. State, 547 So. 2d 125 (Fla. 1989), where this Court rejected Freeman's contention that the trial court erred by declaring his stepbrother a hostile witness and by permitting the state to impeach him and bolster his testimony with prior consistent statements. This Court held that where the witnesses' responses indicated more than a mere lapse of memory, that the stepbrother was being both

difficult and recalcitrant in responding to inquiry, that the trial judge did not abuse his discretion in declaring the stepbrother a hostile witness. No prejudicial error was committed during the questioning of this witness. Freeman.

As the foregoing review shows, no error was committed in the introduction of the out-of-court statements. Accordingly, appellant had a fair trial which correctly resulted in a guilty verdict and a sentence of death. Furthermore, error if any is harmless beyond a reasonable doubt. In State v. Clark, 614 So.2d 453 (Fla. 1992), this Court held:

> Neither Basiliere nor Brown, however, considered whether a harmless-error analysis could be applied to using a discovery deposition as substantive evidence. In State v. DiGuilio, 491 So.2d 1129, 1134 (Fla. 1986), we stated "that constitutional errors, with rare exceptions, are subject to harmless error analysis, " and adopted the harmless-error test from Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), i.e., "the burden [is] on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." DiGuilio, 491 So.2d at 1135. The United States Supreme Court has held that violations of the Confrontation Clause are subject to a harmless-error analysis. Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). As stated in Van Arsdall: "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. " 475 U.S. at 681, 106 S.Ct. at 1436 (citation omitted). We agree with this statement and answer the certified question in the affirmative.
>
> State v. Clark, 614 So.2d at 454,

In the instant case, where the impeachment evidence was properly admitted and not used

to support the conviction and where the state presented overwhelming substantive evidence of appellant's guilt, including appellant's own confession that he killed both victims, error, if any, was harmless beyond a reasonable doubt. cf., Wallace v. Rashkow, 270 So. 2d 743 (Fla. 3 DCA 1972). Accordingly, this Court should affirm appellant's convictions for the murders of John Bowers and Madeline Weisser.

ISSUE II.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING CONVERSATIONS BETWEEN THE CO-PERPETRATORS AS ADOPTIVE ADMISSIONS.

Appellant also contends that the trial court erred in admitting into evidence testimony regarding conversations between the co-perpetrators as "adoptive admissions". He contends that the statements in question were not admissible as "adoptive admissions" because the statements were not the type a person would normally deny. It is the state's position that the admission of the testimony was within the trial court's discretion and appellant has failed to show an abuse of that discretion. Furthermore, a review of the record shows that as a whole the witnesses specifically recalled that Morton was the dominant speaker during the conversations and were able to attribute specific inculpatory statements to him

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

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

statement itself must be such as would, if untrue, call for a denial under the circumstances. "

Id. at 806

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

> "In this case the testimony was clear that the defendant Privett was present and heard extensive discussions of bank robberies and his participation in them. No claim of physical impediment is raised, and the statements implicating Privett in bank robberies certainly seem to be ones, if untrue, that would call for a denial. Clearly, an admission by acquiescence can be seen by these repeated statements made in Privett's presence, without any objection by him, and, indeed, the statements of his own tending to show the truth of the conversations. Here, the statements were admissible against Privett via 90.803(18)(b), and were properly allowed in by the trial court, "
>
> Privett v. State, at 807.

The facts surrounding the making of inculpatory statements in the instant case are virtually identical to those in Privett. Applying the six-prong test set forth in Privett it is clear that the admission of the statements was not an abuse of discretion. (1) The statement must have been heard by the party claimed to have acquiesced: each witness testified that Morton was present when the statements were made and, for the most part; led the conversations; (2) the statement must have been understood by him: Morton's participation in the crime and the conversations about the crime is evidence that he understood the content of same; (3) the subject matter of the statement is within the knowledge of the person: again, even Morton's confession shows that he had knowledge of the subject matter of the statements; (4) there were no physical or emotional impediments to the person responding; Morton claims no such impediments; (5) the personal makeup of the speaker or his relationship to the party or event are not such as to make it

unreasonable to expect a denial; Morton was the oldest in the group and generally considered to be the leader; (6) the statement itself must be such as would, if untrue, call for a denial under the circumstances: As most of the statements concerned Morton's plans and actions with regard to a double murder, it would be expected that he would deny blame when it was being assessed. In fact, contrary to appellant's assertion that since the conversation was in the nature of bragging he wouldn't be inclined to dispute any erroneous statements, the record shows that at one point Morton and Garner got into an argument over who had actually removed the victim's fmger. (T554) Under these circumstances, the statements do not constitute hearsay and were admissible against the defendant.

On appeal Morton challenges the admission of Jason Pacheco and Jeff Madden's testimony. He claims that Jason was unable to remember who stated that they were holding the lady up to the wall and stabbing her. While it is true that Jason could not originally attribute that statement to Morton, he subsequently recalled that Morton had made the statement. (T 303) The witness also specifically recalled Morton showing him the pinky finger and telling him that they got it from an old man and an old lady they had killed. (T 299) Morton said he ordered them to the ground and while the man begged for his life, Morton shot him in the back of the neck with the shotgun. (T 299-301)

Morton also challenges the testimony of Jeff Madden who testified that Garner claimed responsibility for stabbing the woman. Since this statement did not implicate Morton, it is hard to imagine how he was prejudiced by its admission. Madden, however, did specifically remember that Morton told him that, "It was so cool. I blew the bitch's brains out" (T 320).

Assuming, arguendo, it was error for the trial court to admit the testimony, error, if any,

was harmless in light of the quantum of statements that were specifically attributed to Morton. The testimony is further rendered harmless by the fact that appellant confessed to the crime and affirmed the critical evidence now challenged on appeal.

ISSUE III

WHETHER THE TRIAL COURT FAILED TO CONSIDER ALL NONSTATUTORY MITIGATING FACTORS, FOR WHICH EVIDENCE WAS PRESENTED WHEN IMPOSING SENTENCE.

As his third claim of error, Morton claims that although the trial court found the nonstatutory mitigating circumstances of Morton's abused childhood, his dysfunctional family and the resulting mental problems, that the trial court abused his discretion in failing to accord sufficient weight to these nonstatutory circumstances.

With regard to mitigating factors the court specifically found:

> The defense also argued nonstatutory mitigating factors, the defendant's character or record including, (a) family background of the defendant; (b) mental problems of the defendant; physical or mental abuse of the defendant by his parents; and (d) voluntary confession and cooperation of the defendant.
>
> As to factors a - c above, the evidence reveals that the defendant was a product of a highly dysfunctional family at least through age eight, The defendant did not bond with his family and had minimal physical contact with his mother during the first four weeks of life. Moreover, this family moved in and out of state on regular basis, disrupting any stable home and social life. The defendant was repeatedly physically abused by his alcoholic father. This abuse stopped at about age eight when the mother took refuge at a shelter, divorced, and later remarried, thereby providing a substitute stable father figure for the defendant. The defendant's sister, Angela Morton, also sustained sexual abuse in the presence of the defendant by the same alcoholic father. However, this sibling has never been arrested for any crime and has led a normal productive life. While the court considers this mitigating circumstance, the court gives little weight in the weighing process.
>
> As to the factor d above, the defendant's cooperation can only arguably come from his voluntary confession. Because this followed an extensive manhunt on two occasions before the

> defendant was apprehended, the court although considering the foregoing a mitigating circumstance, gives it little weight in the weighing process.
>
> The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present. (R 664-5)

In Lucas v. State, 568 So. 2d 18 (Fla. 1990), this Court set forth the responsibility of the parties under Campbell:

> We have previously held that a trial court need not expressly address each nonstatutory mitigating factor in rejecting them, Mason v. State, 438 So. 2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984), and "[t]hat the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered." Brown v. State, 473 So. 2d 1267, 1268 (Fla.), cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985). More recently, however, to assist trial courts in setting out their findings, we have formulated guidelines for findings in regard to mitigating evidence in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), and Campbell v. State, no. 72,622 (Fla. June 14, 1990). We have even note broad categories of nonstatutory mitigating evidence which may be valid. Campbell, slip op. at 9 n. 6. However, "[m]itigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So. 2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. Hudson v. State, 538 So, 2d 829 (Fla.), cert. denied, ___ U.S. ,___ 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); Brown v. Wainwright, 392 So. 2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). Id. at 23

In a sentencing memorandum to the court, Morton outlined the evidence that was presented and suggested that the evidence of his childhood and family background supported the mitigating

factor of substantial impairment. (R 639) The memorandum also alleged that Morton was a sociopath and had other serious personality disorders resulting from his background. (R 641) With these exceptions the memorandum does not suggest specific nonstatutory mitigating factors for the court to consider.

As previously, noted, however, the court considered the evidence of Morton's abusive childhood as nonstatutory mitigating evidence but, gave it little weight in the weighing process. This is clearly a matter within the trial court's discretion and he did not abuse that discretion by failing to afford it more weight. Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991) (resolution of factual conflicts is solely the responsibility and duty of the trial judge and as appellate court we have no authority to reweigh that evidence); Ziegler v. State, 580 So. 2d 127, 130 (Fla. 1991) (no error in weight trial judge assigned to mitigating evidence; judge could properly consider witnesses' relationship to defendant and their personal knowledge of his actions in deciding what weight to give their testimony). In Barwick v. State, 660 So.2d 685 (Fla. 1995), this Court rejected an identical claim, stating:

> Bat-wick claims that the court erred in its findings regarding several mitigating and aggravating circumstances. First, he claims that the court erred in rejecting child abuse as a nonstatutory mitigator. With respect to this mitigator, the trial judge found:
>
> The evidence establishes that the defendant was abused as a child by his father and grew up in a dysfunctional family. The evidence also established that the defendant's siblings were likewise abused and they apparently grew up to be responsible persons. Two of the siblings had the unfortunate experience of being compelled to testify against their brother. While there are doubtless numerous cases where the abuse received by children influence their actions in adult life and result in or contribute to criminal behavior. [sic] The Court does not find in this case that the abuse received by the defendant as a child is a mitigating circumstance.

> We have held that a trial court must find as a mitigator each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. Campbell v. State, 571 So.2d 415, 419 (Fla.1990). We have also expressly recognized an abused or deprived childhood as one factor that is mitigating in nature. Id. at 419 n. 4. In addition, the judge here recognized that the evidence established that Barwick was abused as a child. Consequently, this abuse was an appropriate mitigating circumstance for the court to consider.
>
> Although the trial judge stated that he did not consider Bar-wick's history of child abuse a mitigating factor, we find that the sentencing order indicates that the judge properly considered evidence of abuse in imposing the death sentence. The sentencing order provides:
>
> The Court has considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances that are established by the evidence or on which there has been any significant evidence produced as they relate to the murder charge.
>
> This statement indicates that the trial judge weighed the factor as ultimately required by our decision in Campbell. We therefore conclude that the trial judge sufficiently considered the mitigating evidence presented on this factor. Any error in articulating the particular mitigating circumstance was harmless. See Armstrong v. State, 642 So.2d 730 (Fla.1994).
>
> Barwick v. State, 660 So.2d 685, 695-7 (Fla. 1995).

Similarly, the court, in the instant case, considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances that were established by the evidence or on which was any significant evidence produced as they related to the murder charge as required by this Court's decision in Campbell v. State, 571 So.2d 415 (Fla. 1990). Accordingly, the state maintains that the trial judge sufficiently considered the mitigating evidence presented on this factor.

Appellant also argues that the court should not have considered the fact that Morton's sister was subjected to equal or more abuse and was living a normal life without ever having been arrested for any crime as evidence to refute Morton's claim that the senseless murder of two helpless victims was mitigated by his childhood. This Court has charged trial judges with the responsibility to consider and weigh evidence presented in mitigation. If a fact is presented to the court that either explains or refutes evidence presented in mitigation, then the trial court is required to consider how such evidence impacts on whether the factor has been established and, if established, the weight it should be given. Evidence that Angela Morton was able to rise above the experiences of her early years is no different from any other evidence that diminishes the weight afforded a particular factor in consideration of the sentence. See, Barwick, at 695 a l judge sufficiently considered the abused childhood, where evidence established that the defendant's siblings were likewise abused and they apparently grew up to be responsible persons)

Appellant also argues that his status as a sociopath should also be considered as mitigating. As noted by Justice Thomas, concurring, in Graham v. Collins, 506 U.S. ___, 122 L.Ed.2d 260, 291 (1993):

> Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigating relevance "beyond the scope" of the State's sentencing criteria. It may be evidence of voluntary intoxication or of drug use. Or even -- astonishingly -- evidence that the defendant from chronic ant-personality disorder" -- that is. that he is a sociopath. See Pet for Cert in Demouchette v. Collins, OT 1992, No. 92-5914, p 4, cert denied, 505 US ___, 120 L Ed 2d 952, 113 S Ct 27 (1992). We cannot carry on such a business, which makes a mockery of the concerns about racial discrimination that inspired our decision in Furman.

Graham v. Collins, 122 L.Ed.2d 260, at 291(emphasis supplied) See, also, Harris v. Pulley, 885 F.2d 1354, 1381 - 1384 (9th Cir. 1988), wherein the court explained that a personality disorder such as antisocial personality was to be distinguished from a mental disorder such as psychosis or neurosis:

> "A personality disorder is not analogous to 'the incurable and dangerous mental illness' of a person diagnosed as suffering from paranoid schizophrenia and hallucinations. "
>
> * * *
>
> "This interaction between general social attitudes and what seems appropriate for medical diagnosis is suggestive that what is classified as a mental disorder by the American Psychiatric Association is not necessarily a condition that a state is constitutionally required to take into account in assessing punishment. In the case of the condition described as an antisocial personality there is a substantial tension between the implications of its being seen as a "can't help" characteristic and what are the frequent accompaniments of this condition. The disorder, the American Psychiatric Association observes, often leads to "many years of institutionalization, more commonly penal than medical. " DSM-III, p. 3 18. In adulthood those with this condition are marked by a "failure to accept social norms with respect to lawful behavior. " Id.
>
> Zant suggested that "mental illness" might actually militate in favor of a penalty less than death. The "mental disorder" of such antisocial personality is not "mental illness" in the sense used by Zant. For the ordinary citizen it would, to say the least, be paradoxical that a person who was likely not to accept social norms with respect to lawful behavior should be treated more kindly than the person who was law-abiding. The paradox is all the stronger when it is the view of the American Psychiatric Association that persons with this condition are capable of understanding the consequences of their actions and are willing to perform or not to perform particular volitional acts. We may go further and say that it is difficult to suppose that there are any persons who commit the

> kind of vicious crime for which the death penalty is now imposed in this country who do not possess one or more of the personality disorders or one or more of the neuroses recognized as mental disorders by the American Psychiatric Association, To hold that each of these conditions must be a mitigating factor when the death penalty is considered would be to undermine the death penalty under the guise of acknowledging that what the American Psychiatric Association finds to be a mental disorder must be treated as a factor that calls for less severe punishment than death. We cannot say that the evolving standards of decency that have characterized interpretation of the eighth amendment require a state to conform its scheme of capital punishment to such a norm. "
>
> Id. at 1382-1383

The trial court properly considered all the evidence before and found, nevertheless, that the aggravating factors were not outweighed by the mitigating. The sentences in the instant case were properly imposed. However, even if this Honorable Court should find that certain mitigating factors should have been given more weight, the mitigating evidence presented was still clearly outweighed by the valid aggravating factors. As reversal of a sentence is warranted only if correction of the errors could reasonably result in a different sentence, this Court should affirm the sentences imposed. Rogers v. State, 511 So.2d at 535 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); Barwick v. State, 660 So.2d 685 (Fla. 1995)

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING AND INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED.

As his fourth claim Morton argues that the trial court's finding of cold, calculated, and premeditated was erroneous. He claims that the court's finding is based in large part on statements made in the state attorney's investigation and introduced during the guilt phase as impeachment evidence and, therefore, the factor is invalid. It is the state's position that the factor was well supported by the substantive evidence introduced at trial and that the factor was correctly found.

In the written sentencing order the trial court set forth the facts upon which it relied to find the CCP aggravating factors in both Counts 1 (John Bowers victim) and 2 (Madeline Weisser victim):

> a, The murder for which the Defendant was convicted was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. The defendant had a heightened level of premeditation as indicated by his having dwelled on committing this murder for several days beforehand to the point of apparent obsession, having enunciated this intent on several occasions to several individuals, having considered and solicited the suggestions of what proof would be needed to establish the murder - such as a human body part as a trophy; having evidence by the thought process demonstrated in choosing a victim who lived only with his elderly mother in an isolated area, on a deadend street, across from a vacant dwelling which served as headquarters for a preliminary stakeout and/or "dry run", arranging for the phone wires to be cut, carrying out the preordained plan, under cover of darkness, to kick in the front door and rush into the dwelling while heavily armed with a sawed-off shotgun loaded with four rounds, and rambo style knife; both being serious deadly weapons which could have no other purpose than implements of destruction or death, and extra ammunition; having taken the time to carefully conceal the shotgun

> in a towel, and concealing the getaway bikes in nearby brush; having expressed a hope that the killing would produce a rush; all as further evidenced by the defendant's own confession and statements to others, clearly demonstrates a cold, calculated and premeditated plan to kill over a course of time without any pretense of moral or legal justification."

(R657-8,659-61)

Jason Pacheco testified that Morton told him that he ordered the man and woman to lie on the ground, that the man begged for his life, and that he put the shotgun to the back of the man's neck and shot him. (T 299-301) Jeff Madden testified that on the Friday before the Superbowl Morton told him that they were going to break into the house and murder the people. (T 344-45, 352) Morton also told him about the murders. (T 320) This testimony was also confirmed by Michael Rodkey. Morton told him prior to the murders that he was going to break into the house and kill the residents, (T 758) Rodkey's testimony, as well as Morton's taped statement, established the planning that was involved. This planning included bringing the weapons, staking out the house from across the street, cutting the phone wires, wearing gloves and setting the house on fire to eliminate any evidence, (T758-68, 773, 803, 812, 816)

Based on the foregoing, the state maintains that the court's findings were well supported by the substantive evidence before it and that this evidence properly supports the CCP aggravating factor. Atwater v. State, 626 So. 2d 1355 (Fla. 1993) (Evidence supported finding of CCP, where there was proof that defendant had stated he intended to kill victim, defendant gained entrance to victim's apartment by misrepresenting himself as victim's grandson, and, upon gaining entrance,

defendant murdered victim, robbed him, and left building in calm manner); Foster v. State, 614 So. 2d 455 (Fla. 1992) (murder was cold, calculated, and premeditated, where victim was severely beaten prior to having his throat slit, pulled from vehicle by his genitals and stabbed in the throat a second time); Craig v. State, 510 So. 2d 857 (Fla. 1987) (CCP properly found where appellant planned the murders in advance based on a coldly rational, calculated scheme arrived at for reasons of his interest in maintaining and expanding his position of control over the cattle ranch.)

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING AND INSTRUCTING THE JURY ON THE AVOID ARREST AGGRAVATING FACTOR.

Appellant argues that the trial court's finding of the aggravating circumstances of avoid arrest factor and cold, calculated and premeditated are mutually inconsistent. He contends that if the motive for the break-in was committed for the purpose of killing Bowers and Weisser, then the motive for killing them was not to avoid arrest. This argument is without basis.

With regard to this aggravating factor, the trial court stated:

> c. The capital felony was a homicide committed for the dominant purpose of avoiding or preventing a lawful arrest. It is apparent from the overall testimony and evidence the defendant wanted to commit a murder and he did not want to get caught; this was not an impulsive killing, and as such aggravators a and c are not mutually exclusive. Specifically, the killing occurred immediately after the victim begged for his life, asserting that he wouldn't inform on the defendant, and the defendant remarking, 'That's what they all say!"; and then pulling the trigger of the shotgun against the victim's neck. The defendant later also admitted that he "had no choice" but to kill this victim since he turned and looked at the defendant.
>
> (R659)

This conclusion is not inconsistent with the cold, calculated, and premeditated finding. In Stein v. State, 632 So.2d 1361 (Fla. 1994), this Court held:

> Next, Stein contends that the trial judge erroneously found both that the murders were committed to avoid arrest and that the murders were cold, calculated, and premeditated because these two aggravating factors were based on the finding that the murders were committed to eliminate witnesses. Although Stein admits that either aggravating circumstance may be proper under the circumstances of this case, Stein argues that the trial judge could not find both based on the same factual circumstances.

> We conclude that both of these aggravating circumstances were properly found by the trial judge. The aggravating circumstance that the murders were committed to avoid arrest focuses on a defendant's motivation for a crime. For instance, in this case, the record clearly reflects that Stein and Christmas planned to eliminate any witnesses to avoid arrest. Consequently, that circumstance was proper under these circumstances. The aggravating circumstance of cold, calculated, and premeditated focuses on the manner in which the crime was executed, i.e., the advance procurement of the murder weapon, lack of resistance or provocation, the appearance of a killing carried out as a matter of course. So long as each aggravator is supported by such distinct facts, we hold that no impermissible doubling of aggravating factors has occurred. See, e.g., Hodges v. State, 595 So.2d 929 (Fla.), rev'd on other grounds, --- U.S. ----, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992).

632 So.2d 1367. Accord, Christmas v. State, 632 So.2d 1368 (Fla. 1994).

In Fotopoulos v. State, 608 So.2d 784 (Fla. 1992), this Court rejected a similar claim, stating:

> We find no merit to Fotopoulos' claim that the trial court improperly doubled its consideration of the pecuniary gain (FN4) and cold, calculated, and premeditated (FN5) aggravating factors in connection with the Chase murder. Fotopoulos recognizes that we have rejected a similar claim in Echols v. State, 484 So.2d 568 (Fla.1985), cert. denied, 479 U.S. 871,107 S.Ct. 241, 93 L.Ed.2d 166 (1986). The two aggravating factors at issue were properly found in this case because, as in Echols, they "are not based on the same essential feature of the crime or of the offender's character." 484 So.2d at 574. The trial court's finding of the pecuniary gain aggravator is based on evidence that Fotopoulos killed Chase in furtherance of his plan to receive life insurance proceeds upon his wife's death. The finding of cold, calculated, and premeditated is based on evidence that Chase's murder was "carefully choreographed" to make it appear that Chase was killed during a burglary and that Chase's "execution" was "the culmination of several schemes and plots to kill Lisa Fotopoulos." As we stated in Echols;
>
> > There is no reason why the facts in a given case may not support multiple aggravating factors

> provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement. Squires v. State, 450 So.2d 208 (Fla.), cert. denied, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984); Combs v. State, 403 So.2d 418 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). 484 So.2d at 575.
>
> Likewise, we reject Fotopoulos' claim that the aggravating factors of pecuniary gain and to avoid arrest which were found in connection with the Chase murder were improperly doubled. As noted above, the pecuniary gain factor was found based on evidence that Chase hoped to receive life insurance proceeds upon his wife's death. The avoid arrest aggravator was found based on evidence that Fotopoulos shot Chase to eliminate him as a witness to Lisa Fotopoulos' murder." Id. at 793 -94

Based on the foregoing the state maintains that the trial court's findings of CCP and avoid arrest are not inconsistent. To the contrary, Morton obviously meticulously planned the entire episode with the objective that there would be no evidence of his involvement. His determination that Bowers would have to be killed because he would call the "cops" is not undermined by the evidence of prior planning.

This finding was within the trial court's discretion and Morton has failed to show an abuse of that discretion. Nevertheless, should this Honorable Court find that the avoid arrest factor was improperly found, reversal of the sentence is not warranted in light of the remaining aggravating factors.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GIVE SPECIFIC JURY INSTRUCTIONS ON THE NONSTATUTORY MITIGATING FACTORS OFFERED BY THE DEFENSE.

As appellant concedes, this Court has repeatedly rejected this claim. Finney v. State, 660 So. 2d 674,684 (Fla. 1991); Robinson v. State, 574 So, 2d 108, 111 (Fla. 1991). The state maintains that Finney and Robinson were correctly decided and that this claim should be rejected by .

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to: the Office of the Public Defender, Polk County Courthouse, P. 0. Box 9000, Drawer, P.D., Bartow, Florida 33830, this 27 day of March, 1996

COUNSEL FOR APPELLEE.