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IN THE SUPREME COURT OF FLORIDA

ALVIN L. MORTON, :

Appellant, :

vs. : Case No. 83,422

STATE OF FLORIDA, :

Appellee. :

________________________________:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, ALVIN L. MORTON, was the defendant in the trial court, and will be referred to in this brief as appellant or by name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R". The trial transcript will be referred to by use of the symbol "T". All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Alvin Morton, age 19, along with Robert Garner (17) and Timothy Kane (14), was charged'by indictment returned February 4, 1992 in Pasco County with first degree murder of John Bowers (Count One) and Madeline Weisser (Count Two) (R8-9). The three co-defendant were tried separately. After a trial held February 1-9, 1994, before Circuit Judge Craig C. Villanti and a jury, Morton was found guilty as charged on both counts (R184-85, T974-75). The jury recommended a death sentence by a vote of 11-1 (R194-95, T1377), and on March 18, 1994 the trial court imposed the death penalty (R198-99, 202-04, 656-66, 1114). Notice of appeal was filed on March 24, 1994 (R670, 678).

STATEMENT OF THE FACTS

In the early morning of January 27, 1992, firefighters responding to a report of a structure fire, and police officers

acting on information provided by Lee Sowell, went to a residence at 6730 Sanderlin Drive in Hudson, where they discovered the bodies of John Bowers, age 55, and his mother Madeline Weisser, age 75 (T225-26, 229-30, 234-35, 239, see T568--69, 818, 830, 837). The fires, which appeared to have been set to mattresses in two bedrooms, were nearly out by the time the firemen got there (T232, 238, see T289-91). Based on the information received from Sowell, BOLOs were put out for Alvin Morton, Robert Garner, Chris Walker, and Tim Kane (T227).

Underneath Garner's mother's trailer, officers found a sawed-off shotgun and a knife, both wrapped in a blue towel (T443-45). Garner, Walker, and Kane were arrested at that time (T495-96, 584, 788-89). A short while later, Morton was found hiding in the attic and he too was arrested (R480-81, 789-90).

Morton (appellant) was interviewed by Detective William Lawless, and he made a tape recorded statement. Appellant told Lawless that he had been with Hobby (Garner), Chris (Walker), Tim (Kane), and Mike (Rodkey) at Bobby's mom's trailer (T789-99). Lawless asked him what made them decide to go to this particular house, and appellant said "Nothing" (T798). Chris and Bob used to live on Sanderling, right next door to the house (T811). Appellant didn't remember if either one of them had mentioned anything about the house to him (T811).

When they got to the house, Tim cut the phone line with the knife (T799-800). Originally, everyone except Mike was planning to go in, but Chris stayed outside also (T801). Appellant kicked in

the front door, and he, Bob, and Tim went inside (T800-01). At that point, appellant had the shotgun and one of the others had the knife (T801-02). They began looking around the living room for something to take (T802). A guy came into the living room; appellant told him to get on the ground and he did (T802). Then the old lady came out and Bob told her to get down (T803). The man and the lady were asking them what they wanted, but they didn't tell them (T803). Bob hit the man in the head with a metal pipe (T804). Same time later, the man started to get up. Appellant told him to get down, but he didn't, so appellant shot him in the back of the head (T803-04). When the lady tried to get up, Bob kicked her in the ribs several times and stomped on her head (T804). Appellant put the knife to her neck and told her stay down. She didn't, so he tried to push the knife in, but it wouldn't go through (T804). Bob then stepped down hard on the knife and it went through (T805). Appellant told Lawless that he would have shot the lady instead of stabbing her, but the shell wouldn't go into the chamber (T814).

They searched the house some more, and then they left (T805). Before leaving, Bob cut off the man's pinky finger (T805-06). They went to Bob's house, where appellant wrapped the gun and the knife in a towel and threw them under the trailer (T806). The finger was wrapped in a bandanna; they took it to Jeff Madden's house and gave it to him "and he almost had a heart attack" (T806-07). [Appellant told Detective Lawless that one time before, Jeff had said he wanted someone's pinky (T809)]. On the way back to appellant's house, they went back to the house on Sanderlin Drive and tried to

set it on fire. Appellant lit the beds in both bedrooms with a lighter (T812). Then they returned to appellant's house and threw their clothes in the washer (T807).

Appellant told Detective Lawless that they didn't know whether the people were going to be home or not (T813). Asked whether they had made any "contingency plans" in a case they were home, appellant said "Nope" (T813). Lawless asked him why they didn't run when the people came out of the bedroom; appellant said he had no idea (T813). Lawless asked "What were you thinking?" Appellant answered '*Probably wasn't, that's why we're in trouble" (T814).

The prosecution, seeking to show intent to burglarize the house, as well as premeditated design to kill the occupants, called numerous witnesses to testify as to statements purportedly made by appellant -- or by an unidentified member of the group[1] -- both before and after the crime. On January 27, 1992 -- the day after the crime -- and on February 3 and 4, 1992, several potential witnesses (including Angela Morton, Victoria Fitch, Chris Walker, Wayne Whitcomb, and Jeff Madden) had been interviewed by Assistant State Attorney Halkitis and Detective William Lawless (T790-91). Sworn statements were taken from these witnesses; the purpose, according to Detective Lawless, was "[s]o they could document this . . . while it was still fresh in their mind" and to prevent them from changing their testimony at a later date" (T791; see T790). At trial, Jeff Madden (T344-45, 350-52, 358-59), Chris Walker

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[1] The statements in which the speaker could not be identified by the witness were introduced under the theory of "adoptive admissions." See Issue II, infra.

(T502-03, 511-17, 541-42, 587), Victoria Fitch (649-53), Angela Morton (appellant's sister) (T707-18, 727-30), and Mike Rodkey (T758-61, 764-65, 773-75) all were questioned on direct examination by the state about statements allegedly made by appellant in the days before the crime occurred, and on the day it occurred.[2] In addition, Detective Brad Kokoris was called to testify as to what Angela Morton told him when he questioned her the day after the crime (T752-54). The state also examined Madden (T316-24, 329-38, 345-48), Walker (T544-50, 554-56), Wayne Whitcomb (T386-95, 399-405, 411-12), and Jason Pacheco (T294, 297-309, 311) about statements allegedly made at Madden's house when appellant, Garner, Walker, and Kane showed them the finger wrapped in the bandanna.[3] A pattern developed at trial, which was repeated throughout the testimony of Angela Morton, Victoria Fitch, Chris Walker, Wayne Whitcomb, and Jeff Madden, where the prosecutor's questioning would

[2] Walker and Rodkey testified that they all rode their bikes to Sanderlin Drive and hid them in the bushes. They went into the vacant house across the street and talked about what they were going to do (T517-32, 764-67). [According to Rodkey the killings were planned, while Walker did not recall hearing what appellant and Bobby Garner were saying]. Neither Walker nor Rodkey went into the house at 6370 Sanderlin (T531-32, 769-70). Rodkey went home, while Walker met up with the others at an abandoned Circle K shortly afterward and accompaniedthemto Jeff Madden's (T539, 580, 772).

[3] After appellant, Garner, Walker, and Kane left Jeff Madden's, the three boys who remained phone Jason Pacheco's brother John and Lee Sowell. They came over, along with Kurt Butcher (T307, 334, 420). Sowell phoned appellant and asked him what happened, and appellant told him (T367-69, 385, 415-17, 420-26). Sowell, Butcher, and John Pacheco went looking for the house and eventually found it. They then went to a Jiffy Store and called 911 (T371-72, 416-18, 427).

track the witness's out-of-court statement,[4] and whenever the witness did not recall any aspect of it the prior statement would then be introduced. (See T323-25, 336, 391-93, 395, 399-400, 402, 404-405, 412, 593, 513, 515, 522-23, 534-34, 540-45, 548-49, 551, 553, 555, 562-64, 574-75, 602, 607-08, 612, 614-15,649-51, 706-11, 713, 715-17, 721, 725-29, 752). The prosecutor would frequently follow up by asking the witness if he or she was telling the truth in the prior statement, or whether the prior statement was accurate. (See T330, 336, 400-03, 412, 515-16, 542, 550-51, 555, 575, 606, 612, 614, 651, 710-11, 713, 722, 725-27). The defense objected continuously to the state's introduction of the prior statements and to its use of those statements as substantive evidence. (T325-28, 339-43, 392, 395-98, 502-10, 602-06, 650, 700-1, 713, 725-27, 729, 747-49, 752, 754, 868-69, 892-93, 920, 929, 936, 943, 1335. [Due to their length, the contents of the statements are set forth in Issue I, Part J., p38-79].

The associate medical examiner testified that John Bowers died as a result of a shotgun wound to the back of the neck (T831, 834-35). Death probably occurred within seconds after the gunshot (T835, 853). He had a bruise to the back of the head consistent

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[4] The prosecution introduced statements from the State Attorney's investigation (and the investigation by the Pasco County Sheriff's Office) made by all five of these witnesses -- Angela Morton (T704-17, 721-22, 725-29); Victoria Fitch (T650-51); Chris Walker (T502-03, 513-14, 548-50, 608); Wayne Whitcomb (T391-93, 400-03); and Jeff Madden (T323-24, 329-30, 335-36). The prosecution also introduced statements from depositions given by two of the same witnesses, Chris Walker (T522-25, 533-36, 541-48, 551-55, 562-64, 574-75, 602, 606-07, 611-15) and Wayne Whitcomb (T393-95, 399, 404-05).

with being hit with a pipe, and three facial cuts (T831-33). One of his little fingers had been cut off (T836). The cause of death of Madeline Weisser was eight stab wounds and two incised wounds to the neck (T841-42). She had sustained bruises to her face and body, and defensive cuts to her left hand (T837-39).

A firearms expert testified that when he examined the shotgun, there was a problem with the loading capacity of the magazine. The gun was capable of firing the round that had been loaded directly into the chamber, but once that was fired other rounds would not be able to feed into the chamber (T684-85).

The fire marshal testified that the fires in the two bedrooms were set with a match or lighter. No accelerants or flammable liquids were used (T289-91).

The state introduced statements made by appellant to other inmates which were overheard by a transport officer and a corrections officer. Appellant told one inmate that he never would have gotten caught if he didn't brag about it (T825). He told the other inmate that when Bob (Garner) was kicking the old lady in the head, the old man turned and looked so appellant shot him. "I didn't have a choice, he looked" (T864-65).

Mike Rodkey testified that Chris Walker was the one who selected the house (T782). Walker denied ever saying these people should be killed, except "[p]erhaps jokingly way before" (T616-17). He may have mentioned that the people were well-off; they had a satellite dish and a pool (T569). Walker testified that he never said the people should be killed because they caught him swimming

in their pool and told on him (T617). On one occasion when Walker lived next door to them, John Bowers (while either intoxicated or not in his right state of mind,) approached Walker's mother and said "I'm a turkey and I'm going to gobble you up" (T567-68, 623-24). There was also an incident when Walker and Bobby Garner were playing ball and the ball went into Mr. Bowers' yard. He picked it up and took it inside (T624).

SUMMARY OF THE ARGUMENT

The theory for admitting a prior inconsistent statement as impeachment "is not that the prior statement is true and the testimony in court is false, but that because the witness has not told the truth in one statement, the jury should disbelieve both statements." Ehrhardt, Florida Evidence, §608.4 (1993 Ed.)-; see Wingate v. New Deal Cab Company, 217 So. 2d 612, 614 (Fla. 1st DCA 1969). Conversely, when the litigant seeks to persuade the trier of fact that the prior statement is true, he is using it as substantive evidence. Ellis v. State, 622 So. 2d 991, 996 (Fla. 1993).

In this case, over strenuous defense objection, the prosecutor, under the guise of impeaching his own witnesses, saturated the trial with improper and prejudicial hearsay. Morton's right to a fair trial, due process, and confrontation were destroyed by this tactic. In the vast majority of these instances, the introduction of the prior statement was not triggered by the witness giving testimony contrary to anything he or she had said earlier. Rather, the prosecutor's questioning would track the prior statement, and

whenever the witness did not recall any aspect of it -- down to the details -- the statement would then be read into evidence. Next the prosecutor would follow up by asking the witness if he OK she was telling the truth in the prior statement, or whether the prior statement was accurate. Also, the prosecutor repeatedly used these statements as substantive evidence (i.e., urging the jury that they were true) in his guilt phase and penalty phase closing arguments.

In sentencing appellant to death, the trial court erroneously found and instructed the jury on several aggravating factors, and arbitrarily and unreasonably minimized the proven mitigating factors.

ARGUMENT

ISSUE I

MORTON'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR'S REPEATED INTRODUCTION OF THE OUT-OF-COURT STATEMENTS OF HIS OWN WITNESSES IN THE GUISE OF IMPEACHMENT, AND HIS USE OF THOSE STATEMENTS -- MOST OF WHICH WERE MADE DURING THE STATE ATTORNEY'S INVESTIGATION -- TO PROVE THE TRUTH OF THE MATTERS ASSERTED.

A. Introductory Statement

Over repeated and strenuous defense objection,[5] the prosecutor, under the guise of impeadhing his own witnesses, saturated this trial with improper and prejudicial hearsay. Morton's rights to a fair trial, due process, and confrontation, guaranteed by the

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[5] See T325-28, 339-43, 392, 395-98, 502-10, 602-06, 650, 700-01, 713, 725-27, 729, 747-49, 752, 754, 868-69, 892-93, 920, 929, 936, 943, 1335. At the beginning of the testimony of Angela Morton (whose direct examination was probably the most egregious example of the prosecution's tactic), the trial judge said "I've ruled on it. I've listened to thousands of objections, let's not approach the bench a thousand times. You can have a standing objection on that issue" (T701). Standing or continuing objections were also recognized by the trial court at T434, 604, 752, and 892-93. Note also that defense counsel not only objected to the introduction of the out-of-court statements, but alsotothe prosecutor's misuse of those statements. (See especially T892-93, 943-44, 1335). The issue is fully preserved for review. See e.g. Haves v. State, ___So. 2d ___ (Fla. 1995) [20 FLW S296, 297]; Hopkins v. State, 632 So. 2d 1372, 1376 (Fla. 1994); Thompson v. State, 615 So. 2d 737, 744 (Fla. 1st DCA 1993); Donaldson v. State, 369 So. 2d 691, 694 (Fla. 1st DCA 1979). See also Williams v. State, 619 So. 2d 487, 492 (Fla. 1st DCA 1993) (where trial judge acknowledged that defendant's objection had been made and noted, appellate court would not rule that the issue was not preserved for review; "to do so would be plainly contrary to the purpose underlying the requirement for contemporaneous objections before the trial court, i.e., to fully advise the trial court of the ground of the objection").

Florida and United States Constitutions,[6] were effectively destroyed by this tactic. This can only be remedied by a new trial.

It is necessary to lay out in detail the state's presentation and use of the out-of-court statements, in order (1) to fully convey the pervasive effect of the prosecutor's overreaching upon the trial; (2) to show that the purported impeachment was merely a subterfuge for placing before the jury a plethora of otherwise inadmissible and highly damaging hearsay statements; (3) to demonstrate that the prosecutor constantly used these statements not to show that his witnesses were unworthy of belief (i.e., as impeachment), but rather to prove the truth of the matters asserted in the out-of-court statements (i.e., as substantive evidence); and (4) to show that since the improper impeachment was such a feature of the prosecution's trial strategy, the state's appellate arm cannot now meet its burden of showing beyond a reasonable doubt that its tactic could not have contributed to the jury's guilt phase and penalty phase verdicts. [For reasons of organization, the evidence, the objections and grounds, and the jury arguments pertaining to this issue are set forth comprehensively in Part J of this Point on Appeal].

The main disputed issues in this trial were premeditation, intent to commit a felony, and (in the penalty phase) the coldness and "careful plan or prearranged design"[7] elements of the CCP aggra-

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[6] Art. I, Secs. 9, 16, Fla. Const.; Amends. V, VI and XIV, U. S. Const.

[7] See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987).

vating circumstance. While appellant, in his taped statement to Detective Lawless, admitted breaking into the house and killing the two occupants, his description of what happened -- a break-in of a house which they weren't sure was occupied or unoccupied, followed by unplanned, spur-of-the-moment homicides[8] -- differed markedly from the picture of coldly prearranged murders which the state sought to portray, largely by means of introducing the out-of-court statements of teenage witnesses Angela Morton, Victoria Fitch, Chris Walker, Wayne Whitcomb, and Jeff Madden.[9] (See T324, 336, 392-93, 395, 402, 405, 503, 513, 523, 534, 535, 542, 544-45, 549, 551, 553, 555, 562-64, 574-75, 602, 607-08, 612, 614-15, 650-51, 706, 708-11, 713, 715, 721, 725-29, 752-54). In the vast majority of these instances, the introduction of the prior statement was not triggered by the witness giving testimony contrary to anything he or she had said earlier. Rather, the prosecutor's questioning would track the prior statement, and whenever the witness did not recall any aspect of it -- down to the details -- the statement would then be read into evidence. (See T323, 391, 399-400, 402, 404, 412, 515, 522, 540-41, 543-44, 548, 551, 553, 607, 649-50, 707, 710-13, 715-17, 725-28). Then the prosecutor would follow up by asking the witness if he or she was telling the truth in the prior statement, or whether the prior statement was accurate. (See

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[8] See T798-99, 802-04, 808, 811, 813-14.

[9] These witnesses, at the time of the crime and at the time they were questioned during the State Attorney's investigation (two years before the trial) were 17, 17, 16, 14, and 16, respectively (T701, 647, 493, 386, 312).

T330, 336, 400-03, 412, 515-16, 542, 550-51, 555, 575, 606, 612, 614, 651, 710-11, 713, 722, 725-27). Also -- over objections and motion for mistrial -- the prosecutor used these statements as proof of the assertions made therein (i.e., as substantive evidence) both in his guilt phase and penalty phase closing arguments to the jury. (See T892-93, 915-16, 919-20, 922-23, 936, 943-44, 1335-36, 1348). See Ellis v. State, 622 So. 2d 991, 996 (Fla. 1993).

B. The Purpose of Impeachment With a Prior Inconsistent Statement

The theory for admitting a prior inconsistent statement as impeachment "is not that the prior statement is true and the testimony in court is false, but that because the witness has: not told the truth in one statement, the jury should disbelieve both statements," Ehrhardt, Florida Evidence, S608.4 (1993 Ed.); see Wingate v. New Deal Cab Company, 217 So. 2d 612, 614 (Fla. 1st DCA 1969). Conversely, when the litigant seeks to persuade the trier of fact that the prior statement is true, he is using it as substantive evidence. Ellis v. State, 622 So. 2d at 996.

C. Impeachment as a Subterfuge to Get Inadmissible Out-of-Court Statements Before the Jury for Their Substance

Historically, attacks on the credibility of a witness were permitted only by the party against whom the witness' testimony was offered. This rule -- sometimes called the "voucher rule" -- has fallen into disfavor. By 1986, at least 33 states had either

judicially or legislatively adopted rules substantially similar to Federal Rule 607, which permits any party, including the party calling the witness, to impeach the credibility of a witness. See State v. Graham, 509 A. 2d 493, 497-98 (Conn. 1986). In 1990, the Florida legislature amended section 90.608(1) of the Evidence Code and adopted Federal Rule 607. See Ehrhardt, Florida Evidence, §608.2 (1993 Ed.). While this Court and the District Courts of Appeal have had -- until now -- little occasion to interpret the new statutory provision, Professor Ehrhardt has observed:

> In construing section 90.608, the Florida courts should follow the federal decisions interpreting Federal Rule 607. While the language of the rule seems clear, the federal decisions have recognized that the provision can be abused and have imposed judicial limitations on the impeachment of a party's own witness. The most frequent situation in which a limitation has been recognized is when a party calls a witness for the primary purpose of placing before the jury the impeaching evidence, which is usually a prior inconsistent statement. The federal courts have condemned this practice when the impeachment of a party's own witness is a "mere subterfuge" for placing before the jury a prior statement or other evidence attacking the character of the witness. Judge Weinstein urges a similar result through the application of a 403 balancing. Since the probative value of the testimony of a witness who is called only to impeach is low, and the danger is significant that the jury will be prejudiced by the evidence used to attack credibility, the application of 403 will frequently exclude attacks on the credibility of a witness who is called as a device to place the impeaching evidence before the jury. [Footnotes omitted].

Ehrhardt, Florida Evidence, §608.2 (1993 Ed.).

Every federal Circuit Court of Appeals has recognized that evidence which is inadmissible for substantive purposes may not be

introduced under the pretense of impeachment. United States v. Peterman, 841 F. 2d 1474, 1479 n.3 (10th Cir. 1988) (citing cases from each of the eleven other circuits); United States v. Ince, 21 F. 3d 576 (4th Cir. 1994); United States v. Gomez-Gallardo, 915 F. 2d 553, 555-56 (9th Cir. 1990). Numerous state appellate courts -- in states where the rules of evidence allow impeachment of a party's own witness -- have similarly held that the rule "may not be used as an artifice by which inadmissible matter may be revealed to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury a favorable extrajudicial statement previously made by the . . . witness." The Pelican, Inc. v. Downey, 567 NE 2d 847, 850 (Ind. App. 1 Diet. 1991).[10] "Because of the recognized conceptual difficulties juries may have in distinguishing testimony admissible for impeachment from testimony admissible for its substance", the maximum legitimate effect of the impeaching testimony can never be more than cancellation of the in-court testimony which it contradicts. State v. Marco, 368 NW 2d 470, 473 (Neb. 1985), citing United States v. Crouch, 731 F. 2d 621, 623 (9th Cir. 1984); see also United State v. Gomez-

[10] See e.g. State v. Hunt, 378 SE 2d 754, 757-59 (NC 1989); State v. Marco, 368 NW 2d 470 (Neb. 1985); Miranda v. State, 813 SW 2d 724, 735 (Tex. App. - San Antonio 1991); Scifres-Martin v. State, 635 NE 2d 218 (Ind. App. 1 Dist. 1994); State v. Collins, 409 SE 2d 181, 188-89 (WVa. 1990); State v. Rufener, 401 NW 2d 740, 743-45 (SD 1987); State v. Tracy, 482 NW 2d 675, 679 (Iowa 1992); State v. Turecek, 456 NW 2d 219, 224-24 (Iowa 1990); State v. Graham, 509 A. 2d 493, 498 (Conn. 1986); Roberts v. State, 648 SW 2d 44, 46 (Ark. 1983); State v. Lavaris, 721 P.2d 515, 517-18 (Wash. 1986). See also Bradley v. State, 636 A.2d 999, 1008-09 (Md. 1994).

Gallardo, supra, 915 F. 2d at 555. As previously noted, when a prior inconsistent statement is introduced genuinely for impeachment purposes, the aim is not to show that the prior statement is true, but rather to discredit the witness and to persuade the jury to disbelieve both statements.[11] In contrast "[b]y definition, substantive evidence is that which tends to prove the truth of the matter asserted." Ellis v. State, 622 So. 2d 991, 996 (Fla. 1993). When a litigant makes an active effort to persuade, the jury to believe in the truthfulness of an out-of-court statement, he is using the statement "for its substantive effect on the fact finder." Ellis, 622 So. 2d at 996. See State v. Rufener, 401 NW 2d 740, 744 (S.D. 1987) (while impeachment of one's own witness is permitted, that rule cannot be used as a subterfuge to get otherwise inadmissible evidence before the jury; trial court "must exercise extreme caution when . . . impeaching evidence goes beyond simply proving that the witness was incredible and begins to persuade by illegitimate means").

See also State v. Hunt, 3.78 SE 2d 754, 757-58 (NC 1989), in which the Supreme Court of North Carolina disapproved of "the tactic of masking impermissible'hearsay as impeachment in order to get it substance before the jury,"[12] and stated that "the difficulty with which a jury distinguishes between impeachment and substantive evidence and the danger of confusion that results has

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[11] Wingate v. New Deal Cab Co., supra, 271 So. 2d at 614; see Ehrhardt, Florida Evidence, §608.4 (1993 Ed.).

[12] Citing State v. Bell, 626 SE 2d 288 (NC App. 1987).

been widely recognized."[13] The court said it was guided and impressed by "the unanimous recognition by the federal circuit courts [in interpreting Rule 607] of the unfairness and potential prejudice of permitting hearsay evidence to be considered substantively under the guise of impeachment evidence." 378 SE 2d at 758.

D. Sources of the Prior Statements (Investigative Interrogations and Depositions)

The out-of-court statements involved in this Point on Appeal came from two different sources. The prosecution introduced statements from the State Attorney's investigation (and the investigation by the Pasco County Sheriff's Office) made by' all five of these witnesses -- Angela Morton (T704-17, 721-22, 725-29); Victoria Fitch (T650-51); Chris Walker (T502-03, 513-14, 548-50, 608); Wayne Whitcomb (T391-93, 400-03); and Jeff Madden (T323-24, 329-30, 335-36). In addition, the state called Detective Brad Kokoris to testify to one of Angela Morton's most damaging out-of-court statements (T750-54); and called Detective William Lawless (the officer who -- along with Assistant State Attorney Halkitis -- took the witnesses' statements during the investigation) who testified:

> PROSECUTOR: And were these witnesses like Angela Morton, Victoria Fitch, Jeff Madden and

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[13] See e.g. United States v. Morlang, 531 F. 2d 183 (4th Cir. 1975); United States v. Webster, 734 F. 2d 1191 (7th Cir. 1984); United States v. Ince, 21 F. 3d 576, 581 (4th Cir. 1994). See also Ehrhardt, Florida Evidence 5801.7 (1993 #e.); Parnellv. State, 500 So. 2d 558, 560 (Fla. 4th DCA 1986); rev.den. 509 So. 2d 1119 (Fla. 1987); State v. Marco, 368 NW 2d 470, 473 (Neb. 1985); Bradlev v. State, 636 A. 2d 999, 1008-09 (Md. 1994).

> other individuals who had key information about this particular case?
>
> DETECTIVE LAWLESS: That's correct.
>
> Q. And, again, what was the purpose-of having them give an oral statement that was transcribed by a court reporter?
>
> A. So they could document this in a sworn statement while it was still fresh in their mind, and again, knowing they were friendly with the defendant, I didn't want them to change their testimony at a later date.

(T791; see T790).

The prosecution also introduced statements from depositions given by two of the same witnesses, Chris Walker (T522-25, 533-36, 541-48, 551-55, 562-64, 574-75, 602, 606-07, 611-15) and Wayne Whitcomb (T393-95, 399, 404-05).

As to the latter statements, from the depositions of Walker and Whitcomb, appellant's position is that they were improperly introduced as impeachment because they were not materially inconsistent with the witnesses' in-court testimony [see Part F]; nor could they properly be read into evidence for the purported reason of refreshing the witnesses' memories [see part G]. However, if the deposition statements had satisfied the criteria for admission as prior <u>inconsistent</u> statements, then Fla. Stat. §90.801(2)(a) would have allowed them to be considered substantively as well as

for impeachment.[14]

As to the statements from the State Attorney's investigation (as well as the unsworn statements to law enforcement officers) -- which comprised the bulk of what was presented and argued substantively by the prosecution -- there is an additional, overriding problem. Here again, the out-of-court statements could not properly have been admitted to impeach (because they were not materially inconsistent), nor to refresh. recollection (because they were improperly read aloud before the jury). Most importantly, even under circumstances where statements made during police or prosecutorial interrogations would be admissible if confined to impeachment, reversible error occurs when the prosecutor uses the statements as substantive evidence. Ellis v. State, 622 So. 2d 991, 1196-98 (Fla. 1993); Dudley v. State, 545 So. 2d 857, 859-60 (Fla 1989); cf. Parnell v. State, 500 So. 2d 558, 560 (Fla. 4th DCA 1986), rev. den. 509 So. 2d 1119 (Fla. 1987); Everettv. State, 530 so. 2d 413, 415 (Fla. 4th DCA 1988). See also United States v. Gomez-Gallardo, 915 F. 2d 553, 555 (9th Cir. 1990) ("In determining the government's purpose, we examine its use of the evidence during the trial. . . "); State v. Hunt, 378 SE 2d 754, 759 (NC 1989) (all

[14] § 90.801(2)(a) provides that a statement is not hearsay if it is:

> Inconsistent with [the declarant's] testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; . . .

earlier apparent efforts to restrict statements to impeachment were mooted by their substantive use).

In the instant case, as in United States v. Ince., 21 F. 3d 576, 581 (4th Cir 1994), the probative value of the extrajudicial statements for impeachment purposes was nil. The purpose of true impeachment is cancellation of contradictory in-court testimony, and here there was nothing to cancel. [See Part F]. It is clear that the prosecutor's goal was not to show the jury that the state was calling a parade of liars to the stand. See Parnell v. State, supra, 500 So. 2d at 560 (although trial judge instructed the jury that statements were to be considered solely as impeachment and not as proof of the truth of the assertions; nevertheless, they "could have been so considered by the jury, and if the only purpose of calling Dallas Nelson as a witness was to show that he was a liar, what then was the relevancy of his testimony?"). Rather, the prosecutor's goal -- revealed repeatedly in his direct examination and in his closing argument, was to persuade the jurors that the prior statements were truthful and accurate (T330, 336, 401, 402-03, 412, 515, 550, 608, 651, 710, 711, 713, 722, 725, 726, 727, 752-54, 790-91, 915-16, 919-20, 922-23, 936, 1335-36, 1348).[15] And that, as this Court observed in Ellis 622 So. 2d at 996, is the definition of substantive evidence.

[15] A particularly flagrant example from the prosecutor's penalty phase closing argument: "And then on January 27, when they were looking for her brother,':, [Angela Morton] came to the State Attorney's Office under oath' and said a lot of incriminating truthful thinss about her brother" (T1348).

E. The Delgado-Santos Rule

In State v. Delgado-Santos, 497 So. 2d 1199 (Fla. 1986), adopting 471 So. 2d 74 (Fla. 3d DCA 1985), this Court adopted a "bright line" test and held that a statement made under oath during a police interrogation cannot be a statement given in an "other proceeding* within the meaning of Fla. Stat. §90.801(2)(a), and therefore cannot be admissible under that section. See Ehrhardt, Florida Evidence, §801.7 (1993 Ed.); Ellis v. State, supra, 622 So. 2d at 997-98; Dudlev v. State, supra, 545 So. 2d at 859; Kirkland v. State, 509 So. 2d 1105 (Fla. 1987); J.J.H. v. State, 651 So. 2d 1239, 1241 (Fla. 5th DCA 1995); Tisdale v. State, 498 So. 2d 1280, 1282 (Fla. 4th DCA 1986), rev.den. 506 So. 2d 1043 (Fla. 1987). See also Wilkes v. State, 541 So. 2d 1211 (Fla. 1989) noting that "[t]o rule otherwise would effectively deny the defendant his right of cross-examination."

In State v. Smith, 573 So. 2d 306, 315-16 (Fla. 1990) this Court specifically held that statements made during a State Attorney's investigation may not be used as substantive evidence:

> . . . [T]he question in this case is whether, under the statute, the Delsado-Santos rationale applies to a prosecutor's investigative interrogation. We conclude that it must. [Footnote omitted] When Estes gave the statement at issue, she was brought into a room where a deputy sheriff and a prosecutor were waiting with a court reporter to interrogate the seventeen-year-old about a homicide in which she had just been involved. No counsel was present to advise her or to protect Smith's interests; no cross-examination was possible, and no judge was present or made available to lend an air of fairness or objectivity. This prosecutorial interrogation was

> "neither regulated nor regularized," Delgado-Santos, 471 So. 2d at 781; it contained "none of the safeguards involved in an appearance before a grand jury" and did not "even remotely resemble that process," id.; nor did it have any "quality of formality and convention which could arguably raise the interrogation to a dignity akin to that of a hearing or trial." Id, At bottom, prosecutorial interrogations such as the one here provide no "degree of formality, convention, structure, regularity and replicability of the process" that must be provided pursuant to the statute to allow any resulting statement to be used as substantive evidence to prove the truth of the matter asserted. . . .

F. Witnesses' Lack of Recollection

"A prior statement of a witness is admissible to impeach credibility only if it is in fact inconsistent." Ehrhardt, Florida Evidence, §608.4 (1993 Ed.). The prior statement must either directly contradict the witness' in-court testimony, or there must be a material difference (as to a significant fact, rather than details) between the two. Ehrhardt, Florida Evidence, §608.4; see State v. Smith, supra, 573 So. 2d at 313. The general rule in Florida is that a totally negative statement -- i.e., no recollection -- cannot be impeached. Rankin v. State, 143 So. 2d 193, 196 (Fla. 1962); Calhoun v. State, 502 So. 2d 1364 (Fla. 2d DCA 1987).[16] As explained in Covington v. State, 302 So. 2d 483, 484 (Fla. 2d DCA 1974):

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[16] See also Shere v. State, 579 So. 2d 86, 93 (Fla. 1991); Davis v. State, 539 So. 2d 555 (Fla. 4th DCA 1989); Barnett v. State, 444 So. 2d 967 (Fla. 1st DCA 1983); Hill v. State, 355 So. 2d 116 (Fla. 4th DCA 1978); Pitts v. State, 333 So. 2d 109 (Fla. 1st DCA 1976).

> Usually evidence offered for impeachment is admissible only because it relates to the credibility of the witness and is inadmissible as to the issues in controversy; hence where a witness does not remember, there is always a good possibility that the prior "inconsistent" statement is actually being offered for the wrongful purpose of getting the prior statement before the jury as substantive evidence of the facts it contains, and the Rankin rule prevents such evidence from being considered when it does not actually impeach and is otherwise inadmissible and prejudicial.

In Smith v. State, supra, 573 So. 2d at 313, this Court noted that when a prior inconsistent statement is admitted for impeachment, the purpose is to test the credibility of a witness whose testimony is harmful to the impeaching party:

> That purpose is disserved when this hearsay evidence is used as substantive evidence of guilt. Using the guise of impeachment to introduce hearsay testimony as substantive evidence is "little more than a thinly veiled artifice to place before the jury that which would be otherwise inadmissible." [Citations omitted].

Here, the witnesses' in-court testimony did not harm the prosecutor's case; it merely f'ailed to satisfy him. The witnesses did not change their testimony; they simply did not recall the events and conversations which took place before and just after the crimes in as much detail two years after the fact, as they did the day or the week after it happened. And that was exactly the point the prosecutor intended to make, by repeatedly asking his witnesses if their memories were fresher at the time of the prior statements, and if those statements were accurate when made (T330, 336,401, 412, 550, 575, 606, 614, 651, 710, 711, 713, 722, 725-27). [In fact, the prosecutor even elicited from Chris Walker that his state-

ments during the State Attorney's investigation (about eight days after the crime) would have been more accurate than those in his deposition (about eight months after the crime (T412)].

In his closing arguments, the prosecutor repeatedly urged the jury to consider the statements for the truth or accuracy of their content. Specifically as to Angela Morton (T915-16, 919-22, 936, 1335-36, 1348), Chris Walker (T916), and Victoria Fitch (T922-23), he told the jury to determine whether the witnesses told the truth back on January 27 (or February 4), 1992 at the State Attorney's office, or whether they were telling the truth now in saying they don't recall.

> That's the reason Lawless got all those folks in here. He took them all one by one on January 27th, February 3rd, and February 4th, he brought them to the State Attorney's Office, we had a court reporter present, they were placed under oath, they were asked questions, and you heard the responses. And you've got to consider for yourselves, was that accurate?

(T916)

Referring to the State Attorney's investigation statements of Victoria Fitch, the prosecutor reminded the jury:

> And I asked her, if you said it back then, would it have been accurate? And she said, yes, if I said it back then under oath, it would have been accurate.
>
> As a matter of fact, folks, use your common sense, that's why this is relevant, these statements these witnesses made. If that were not the case, a trial would proceed nowhere. A witness gets on 'a stand a year, two years after the crime occurred, says I swear to tell truth, I don't recall anything, case would end right there. But you have to use your common sense and judge their credibility.

(T923)

One of the many flaws in the prosecutor's reasoning is that a detailed statement taken by investigators a day or a week after a crime is not materially inconsistent with the witness' inability two years later to fully recall everything that he or she told the investigators. See Shere v. State, 579 So. 2d 86, 93 (Fla. 1991). The prosecutor's obvious purpose was not to show that his witnesses were liars [see Parnell, 500 So. 2d at 560], but to "persuade the jury . . . to believe in the truthfulness of the out-of-court statements." Ellis, 622 So. 2d at 996. See Covinston, 302 So. at 484 ("where a witness does not remember, there is always a good possibility that the prior 'inconsistent' statement is actually being offered for the wrongful purpose of getting the prior statement before the jury as substantive evidence of the facts it contains").

G. Refreshing a Witness's Recollection

The state may try to argue 'on appeal that, if the out-of-court statements were improper for impeachment and substantive use, the prosecutor was entitled to use them to refresh his witnesses' recollections. Such a contention, if made, will be meritless.

The prosecutor used this ploy frequently -- he would read aloud the prior statement in front of the jury, and then ask the witness if it refreshed his or her recollection. (See T392,402, 523, 555, 614, 615, 711, 715, 727).[17] (Sometimes it did and some-

[17] On at least one occasion, he didn't even let the witness finish her sentence before interrupting to "jog [her] memory" by reading into evidence her prior statement (T717).

times it didn't). This technique has been bluntly described as "patent error." Goings v. United States, 377 F. 2d 753, 761 (8th Cir. 1967); see Wilkins v. United States, 582 A. 2d 939, 942-43 (DC App. 1990):

> Refreshing a witness's recollection by memorandum or prior testimony is perfectly proper trial procedure and control of the same lies largely in the trial court's discretion. However, if a party can offer a previously given statement to substitute for a witness's testimony under the guise of '*refreshing recollection," the whole adversary system'of trial must be revised. [Footnote omitted]. The evil of this practice hardly merits discussion. The evil is no less when an attorney can read the statement in the presence of the jury and thereby substitute his spoken word for the written document.

Goings v. United States, supra, 327 F. 2d at 759-60.

When a prior statement is used to refresh a witness' recollection, "the contents of the statement are not to be put in evidence before the jury." Youns v. United States, 214 F. 2d 232, 237 (DC Cir. 1954), quoting United States v. Soconv-Vacuum Oil Co., 310 U. S. 150, 234 (1940), ("there would be error where, under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence"). See Ehrhardt, Florida Evidence, $613.1 (1993 Ed.); Barnett v. State, 444 So. 2d 967 (Fla. 1st DCA 1983); Hill v. State, 355 So. 2d 116 (Fla. 4th DCA 1978).[18]

See also United State v. Turner, 871 F. 2d 1574, 1582 (11th Cir. 1989); United States v. Scott, 701 F. 2d 1340, 1346 (11th Cir.

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[18] Cf. Armstrong v. State, 642 So. 2d 730, 736 (Fla. 1994) (finding no misconduct on the part of the prosecutor "because it was the witness and not the prosecutor who revealed the contents of the prior statement").

1983); Thompson v. United States, 342 F. 2d 137, 142 (5th Cir. 1965) (trial court has an obligation to prevent a party from putting into the record the contents of an otherwise inadmissible writing under the guise of refreshing recollection).

H. Limiting Instructions

The limiting instructions given the jury (T329, 510, 514, 549, 608, 651, 711-12, 966) were an exercise in futility.

In the first place, instructions telling the jury to consider out-of-court statements only for impeachment and not for their truth are of no value where -- as here -- the statements were improper for impeachment as well.[19] See Part F.

Secondly, even when instructed, it is "unreasonable to expect [jurors] to limit the use of the statement only to assessing credibility. If the jurors find that, in fact, the prior statement was made and was true, it is difficult, if not impossible, for them not to consider it." Ehrhardt, Florida Evidence, §801.7 (1993 Ed.). [Professor Ehrhardt's observation is especially on target when the prosecutor keeps asking the witnesses if the prior statements were true when made, and argues to the jury that the statements were accurate and that's what makes them relevant.][20]

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[19] See Bradley v. State, 636 A. 2d 999, 1008 (Md. 1994), citing State v. Watson, 580 A. 2d 1067, 1072 (Md. 1990). (limiting instruction did not cure error where evidence should not have been admitted even for the limited purpose).

[20] T. 923.

It has been widely recognized that, "despite proper instructions to the jury, it is often difficult for [jurors] to distinguish between impeachment and substantive evidence . . . ." United States v. Ince, 21 F. 3d 576, 580 (4th Cir. 1994), quoting United States v. Morlang, 531 F. 2d 183, 1190 (4th Cir. 1975). See also Bradley v. State, 636 A. 2d 999, 1008-09 (Md 1994) (and cases cited therein); State v. Hunt, 378 SE 2d 754, 757 (NC 1989).

The inefficacy of limiting instructions to dispel the jury's confusion, when the prior statements were used or argued for their truth by the prosecution, has been recognized in Florida as well. See Dudlev v. State, 545 So. 2d 857, 859-60 (Fla. 1989) ("Although limiting instructions were given to the jury, the evidence was used by the state as substantive evidence -- not in its limited impeachment capacity. Admission of this evidence was clear error").

In Rankin v. State, 143 So. 2d 193, 196 (Fla. 1992), the trial judge:

> . . meticulously instruct[ed] the jury that the 'questions and answers repeated by the State Attorney could be considered only for the purpose of impeachment and not as substantive testimony. Yet the jury got from the reading of the questions, purportedly asked the witness at the time of the interview, and the answers presumably given and repeated at the trial a description of the horrible crime with which appellant had been charged and convicted and this procedure we cannot sanction. We think it was prejudicial error that requires a reversal of the judgment.

Other decisions finding reversible error, notwithstanding similar limiting instructions, include Everett v. State, 530 So. 2d

413, 415 (Fla. 4th DCA 1988) and Parnell v. State, 500 So. 2d 558 (Fla. 4th DCA 1986), rev.den., 509 So. 2d 1119 (Fla. 1987).

Finally, the prosecutor's closing arguments in this case, in which he emphatically urged the jury to find that the prior statements made during the State Attorney's investigation were truthful (T915-16, 919-23, 935-36, 1335-36, 1348) vitiated any conceivable curative effect the instructions might have had. United States v. Ince, supra, 21 F. 3d at 584. 'See also State v. Hunt, supra, 378 SE 2d at 759 (all earlier apparent efforts to restrict use of statements to impeachment were mooted by their substantive use); State v. Rufener, 401 NW 2d 740, 745 (SD 1987) ("We do not believe these curative instructions atone for the overreaching of the prosecutor).

I. Morton's Conviction & Death Sentence Must Be Reversed for a New Trial

This was not an isolated or inadvertent error, nor even a random and inconsequential combination of errors. Instead, overzealousness to achieve Morton's conviction and a death sentence "led the prosecutor into a pernicious trial strategy" [Bouchard v. State, 556 So. 2d 1215, 1216 (Fla. 2d DCA 1990)], which affected the entire dynamic of the proceeding.

The state's appellate arm will try to keep its tainted victory by claiming "harmless error." However, the standard is not whether, absent the improperly admitted evidence, the remaining evidence is sufficient or even overwhelming. Rather, the burden is on the state, as the beneficiary of the error -- or, as in this

case, multiple and compounded errors -- to prove beyond a reasonable doubt that it could not have contributed to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1138-39 (Fla. 1986). "The focus is the effect of the error on the trier-of-fact." DiGuilio, at 1139; see State v. Lee, 531 So. 2d 133, 137 (Fla. 1988). Even overwhelming evidence does not negate the possibility that an error which constituted a substantial part of the Prosecution's case may have played a significant role in the jury deliberations and thus contributed to the actual verdicts reached. DiGuilio, at 1136; State v. Lee, at 137; Ciccarelli v. State, 531 So. 2d 129, 141 (Fla. 1988). Or, as stated in Sullivan v. Louisiana, 508 U.S. ___, 113 s. ct. , 124 L. Ed. 2d 182, 189 (1993), "[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (Emphasis in opinion).

For this reason, when improper evidence becomes a focal point of the trial, or when the prosecutor strongly emphasizes the improper evidence in urging the jury to return a guilty verdict (or a death recommendation), the reviewing court cannot find the error or errors harmless beyond a reasonable doubt. See e.g., Ellis v. State, 622 So. 2d 991, 998 (Fla. 1993) (prior inconsistent statement improperly introduced as substantive evidence became a prominent feature of the trial, and thus could not be found harmless); State v. Lee, 531 So. 2d at 138 (because of emphasis placed on improper collateral crime evidence, this Court could not say it had

no impact on verdict); Clark v. State, 632 So. 2d 88, 90 (Fla. 4th DCA 1994) (nature and extent of police officer's injuries "became one of the features of the trial utilized by the state to obtain a conviction"); Rivadeneira v. State, 586 So. 2d 500 (Fla. 3d DCA 1991) (state's characterizations of defendant as a drunkard became a feature of the trial); Bouchard v. State, supra, 556 So. 2d at 1216 (prosecutor's pernicious trial strategy was aimed at converting defendant's indifference and lack of remorse into a feature of the trial); Guerrero v. State, 532 So. 2d 75, 77 (Fla. 3d DCA 1988) (repeated emphasis on defendant's unexplained possession of car "precludes a finding that the'error . . . did not contribute to the verdict); Garsone v. State, 503 So. 2d 421, 424 (Fla. 3d DCA 1987) (blood alcohol reading was constantly emphasized by prosecutor throughout trial, and compounded by her repeated exhortations to the jury that the test results were scientifically reliable).

The prosecutor in the instant case, Mr. Halkitis, undoubtedly believed that his trial strategy would have an impact on the jury. Otherwise, he would not have pursued it, nor would he have argued so vociferously to overcome defense counsel's constant objections. See Gunn v. State, 78 Fla. 599, 83 So. 511, 512 (1919).[21]

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[21] The Gunn opinion contains the following -still-cogent observation:

> It is contended that as the prisoner had already testified that he had made trips away from his home; that no harm could have been done him by the admission of the sheriff's testimony. Then why was it offered by the state and admitted by the court? Surely not merely to consume time and swell the record? The state's attorney must have believed that

(Footnote Continued)

On top of the sheer volume and drumbeat repetition of the improper evidence, and on top of its extremely damaging nature, the prosecutor's <u>use</u> of the out-of-court statements in his guilt and penalty phase closing arguments plainly reveals the impact he intended it to have.

Prior to closing arguments, defense counsel asked for a standing objection to any comment the prosecutor might make:

> . . . where he refers to these police interrogations or State Attorney invests where he starts to argue it as substantive evidence of the crime, I'm going to be objecting to it.
>
> I don't know how much of it is going to be in his closing argument. For example, in other words, if he get up and say Angela Morton said during the investigation, da, da, da, da, that's -- obviously I'm going to make an objection at that point in time.
>
> I hate to interrupt, professional courtesy I think dictates you don't do that, but I need to protect the record.

(Footnote continued)

> the sheriff's testimony would tend to establish the guilt of the prisoner, and the court, in admitting it, considered it competent for that purpose. Having gotten it before the jury over the objection of the defendant, and a conviction obtained, the state cannot be heard to say it was harmless error. Who can say that the testimony that the court, on the offer of the state's attorney over the objection of the defendant, permitted to go to the jury for consideration in determining the guilt of the defendant did not and could not have the effect that the state's attorney intended?

> THE COURT: I don't know that he's intending to.
>
> MR. HALKITIS [prosecutor]: I am intending to. I'm entitled to because it's an inconsistent statement. It's evidence. I can comment on the evidence. That's an evidence issue.
>
> MR. SWISHER: The instruction says that is not evidence.
>
> MR. HALKITIS: It's evidence, the lack of a witness' credibility.

(T892-93)

The judge ruled that such argument would be "fair comment", but allowed the defense to have a standing objection (T893).

Defense counsel, in his closing argument, reminded the jury that it could not consider the out-of-court statements introduced by the prosecution for the truth of the matter asserted or as evidence of guilt (T898-90; see T911, 944-46).

The prosecutor, in his closing argument, advised the jury that "[w]hat he meant by that is that you can't utilize that type of evidence to prove an element of a crime, rather you could use it to assess credibility" (T915). He told them:

> When Angela says that they were bragging about what happened back on January 27th, and now she's says, I don't recall, you can utilize that to determine if she was accurate, whether she was truthful back then.
>
> Remember, every one of these witnesses got on the stand, pretty much they're all friends of the defendant, it's his sister, every one of them got up there and said, right now I don't recall anything, but what I said back on January of 1992, or February 3rd or 4th of 1992 was accurate. If I said it then under oath, it was accurate, but now I don't recall. So you can use that to determine for yourself was Angela Morton telling the truth back on

January 27th, or is she telling us the truth now when she says I don't recall?

> Christopher Walker, was he truthful when he gave a confession to Detective Lawless on tape? Or is he truthful now when he says I don't recall? And we're not vouching for these people's credibility now, they're all friends, they're buddies, they're related to him. You're not going to find swans in a sewer, folks.
>
> That's the reason Lawless got all those folks in here. He took them all one by one on January 27th, February 3rd. February 4th. he brought them to the State Attorney's Office, we had a court reporter present, they were placed under oath, they were asked questions, and you heard the responses. And you've got to consider for yourselves, was that accurate?

(T915-16)

The prosecutor called the jury's attention to when Detective Kokoris questioned Angela Morton the day after the crime:

> And what did she tell Kokoris. You heard Kokoris, he read from a report, something he wrote out that very day Angela Morton told him that Alvin had talked, that if anybody messed with him, he was going to kill them, and he had been planning this burglary, it referred to a home in Hudson that had a satellite dish and a pool.
>
> MR. SWISHER [defense counsel]: Same objection.
>
> THE COURT: Same ruling.
>
> MR. HALKITIS [prosecutor]: He assumed they all had money. He also advised there was an old couple who lived there and if they had to kill them, he would, and he'd burn down the house to destroy any evidence. This is before Angela knew what her brother had done. Se we know there had been talk by Alvin, talk by

> Alvin Morton, there had been talk by the group.[22]

(T919-20)

The prosecutor continued in the same vein, to bolster his contention that appellant was the dominant participant:

> What did Angela Morton say? I said, who was the boss, Angela? She said, well, they all listened to one another. Well, that's not what she said, right? Remember, I asked her, remember coming to the State Attorney's Office giving a sworn statement on January 27th, and I asked you, is Alvin the oldest? And she said, yea. And I said, who is the boss? And she said, Alvin. And if Alvin says something, do the others follow what he says? And she said, yes.

(T921-22)

He then moved on to Victoria Fitch:

> Remember her also, I'm not recalling real well two years later, and me asking her, remember coming to the State Attorney's Office back on February 4th, right after this happened in 19921 And do you remember Alvin saying something about they were going to rob this house in Hudson? and she said, I remember that they said they wanted to rob a home, they wanted to kill somebody, but they never stated when or where. And who was doing most of the talking? And she said Alvin was doing most of the talking. And I asked her, <u>if YOU said it back then, would it have been accurate? And she said, ves, if I said it back then under oath, it would have been accurate.</u>
>
> As a matter of fact, folks, use your common sense, <u>that's whv this is relevant, these statements these witnesses made</u>. If that were not the case, a trial would proceed nowhere. A witness gets on a stand a year, two years after the crime occurred, says I swear to tell truth, I don't recall anything, case would end

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[22] All of these statements came in by means of the State Attorney's investigation (T708-09,716-18,753-54).

right there. But you have to use your common sense and judge their credibility.

(T922-23)

After noting that he -- the prosecutor -- had done "more cross-examination than [defense counsel] did" of Chris Walker (T925) -- he turned to the matter of bringing the male victim's finger to Jeff Madden's house (T935).

> MR. HALKITIS: What about the head? I submit to you folks, that after you heard Dr. Corcoran, you were probably thinking they were going to cut her head off as a souvenir. And what did he tell -- what did he tell Angela Morton? Remember in her State Attorney's office investigation I asked her, was there any mention about human body parts? And she said, yes --
>
> MR. SWISHER: Objection.
>
> MR. HALKITIS: -- going to bring back a human --
>
> THE COURT: What's your legal objection?
>
> MR. SWISHER: State Attorney invest.
>
> THE COURT: Same ruling.
>
> MR. HALKITIS: <u>That's in evidence, folks. You can consider that what she said, what she said at the State Attorney's invest.</u> What did she say? He said he was going to bring her back a human heart or gouged out eyeballs.[23]

(T935-36)

At the end of the state's closing argument, defense counsel moved unsuccessfully for a mistrial based on the prosecutor's mis-

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[23] Note that the trial court had earlier sustained the defense's objection to the statement about gouging out eyeballs as being unduly prejudicial (T729).

use of the statements from the State Attorney's investigation (T943-44).

The prosecutor also used the State Attorney's investigation in his penalty phase closing argument. Seeking to persuade the jury to find the CCP aggravating factor, he argued:

> And I submit to you there is no doubt, no doubt this defendant Alvin Morton planned the murder of Mr. Bowers. How do we know that? Remember Ansela Morton? Remember her testimony way back, when her recollection wasn't as good as it was this morning? Well, what did she say? Remember she said that she recalls her brother Alvin Morton talking about the murder prior, days prior to the murder --
>
> MR. SWISHER (defense counsel]: I'm going to object, if he's reading again from the State Attorney's investigation, that's not substantive evidence.
>
> MR. HALKITIS [prosecutor]: Judge, I can read from the New York Times.
>
> THE COURT: The jury will rely on their recollection of the evidence.
>
> MR. HALKITIS: That what she said was, her brother told her he was going to break into a house that had a satellite dish and a swimming pool and steal stuff, and if the old people caused anything he would kill them and burn down the house so there would be no evidence. That's what I recall Ansela Morton's testimony to be during the trial stage of this case.[24]

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[24] These statements came in via the State Attorney's investigation, purportedly as impeachment of Angela Morton (T708-09,716-18,753-54). It is important to note that in appellant's taped statement to Detective Lawless -- introduced by the state -- appellant said they weren't sure whether the house was occupied or unoccupied, and he describes unplanned, spur-of-the-moment killings (See T798-99, 802-04, 808, 811, 813-14). In order to persuade the jury that, to the contrary, the killings were prearranged and coldly planned, the state relied heavily on the out-of-court statements of Angela Morton and the others. See Dudlev v. State, 545 So. 2d 857, 860 (Fla. 1989).

(T1335-36)

The prosecutor also sought to denigrate the mitigating evidence concerning appellant's abused and neglected childhood, and the resulting effects on his development, by suggesting that his sister Angela had grown up in the same environment without killing anyone. [See Issue III, infra]. The prosecutor argued:

> The only difference between the two was that when the defendant was plotting this plan to kill these people and he went to Angela and told Angela, just Angela you drive the getaway car. She said not me. And then on January 27, when they were looking for her brother, she came to the State Attorney's Office under oath and said a lot of incriminating truthful things about her brother.

(T1348)

Prejudicial evidence which was improperly introduced and improperly used infected this trial to the core. The state cannot meet its burden of showing beyond a reasonable doubt that it could not have influenced the jury in the manner intended.

J. The Out-of-Court Statements (Chronology)

The following is a chronology of the prosecutor's introduction of the extrajudicial statements at trial, as well as the objections, legal arguments, and jury instructions relating thereto:

Testimony of Jeff Madden (Direct Examination)

[On the night of January 26, 1992, after the killings occurred, appellant, along with Bobby Garner, Tim Kane, and Chris Walker

went to Madden's house, where various statements were made in the presence of Madden and two other teenage males.][25]

The prosecutor asked Madden if he ever asked appellant why he did it and appellant answered "For the hell of it" or "For the fun of it." Madden said he wasn't sure (T323). The prosecutor asked him if he remembered giving a statement under oath, in response to questioning by the assistant state attorney, at the State Attorney's office on January 27, 1992, the day after the crime occurred. (T323-24, see T321). Madden said he did, and the prosecutor asked:

> Q. Do you remember being asked the question, Line 10, Page 34:
>
> "Does Alvin ever mention holding the shotgun to the man's head?"
>
> And your answer: "He said he went in the house somehow, he got him on the floor, holding the gun to the back of the neck underneath the skull. From what I heard what he told me, he said, why are you doing this, why are you doing this, the man is saying this. Alvin goes -- I can't remember if Alvin says for the hell of it or for the fun of it, or what he said.

(T324)

Defense counsel objected on the grounds that (1) the out-of-court statement could not properly be used as substantive evidence, since the state attorney's investigation was not an "other proceeding" within the meaning of §90.801(2)(a), Florida Statutes (T324-28), and (2) the out-of-court statement was not proper impeachment

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[25] In a number of instances, the witnesses testified to statements although they were not sure who made them. These were introduced against appellant, over objection, on the theory that they constituted "adoptive admissions." See Issue II, infra.

(T325,327-28). The prosecutor countered that under the new rule of evidence (Fla. Stat. §90.608(1))) he is free to impeach his own witness (T326), and argued:

> I'm not utilizing this as substantive evidence to prove the crime. I'm introducing it to show that he has made a statement on one day that's inconsistent with a statement he made now. He can't recall, so I can impeach him on anvthins.
>
> As a matter of fact, counsel is correct on saying it's not substantive evidence. I don't care if you tell the jury, folks, what Halkitis is reading from is not substantive, but rather impeaching.

(T325)

The prosecutor expressed the view that "substantive evidence" meant proof of an element of the crime which is otherwise lacking:

> You see, if this was a prior proceeding statement, would it come in both as substantive and impeachment. If we couldn't make our case, there was an element lacking there, the Court can use that to make an element, prove up an element. We're not at all suggesting that we're going to use that to prove up an element. We're rather saying, this is proper impeachment of a witness who's given inconsistent statements.

(T327)

Defense counsel suggested that the prosecutor was actually trying to get inadmissible hearsay evidence before the jury under the guise of impeachment:

> Here's the difference. Number 1, [the witness] doesn't give an inconsistent statement. He says, I don't remember. So he's trying to get into evidence a statement made at a State Attorney invest which is not a prior proceeding; therefore, that evidence does not go before the jury as substantive evidence. And that's what he's trying to do.

(T327-28, see also T325)

The trial court allowed Madden's out-of-court statements to be introduced, and said to the jury:

> . . . I'm going to give you a cautionary instruction as to the current line of questioning from the prior statement that the State Attorney is questioning on.
> Please be advised that the evidence received by you is for impeachment purposes only, and not as substantive evidence.
> Proceed.

(T329)

The prosecutor immediately continued:

> Mr. Madden, I was reading from your sworn statement, and I asked you this question. And it's Line 10, Page 34. You were under oath back then right?
>
> A. Yes.
>
> Q. I assume back then you were giving truthful answers, to the best of your recollection?
>
> A. Yes, sir.
>
> Q. And you told us that your recollection back then was better then than it is today, two years later?
>
> A. Yes.
>
> Q. Do you remember this question, Line 10, "Does Alvin ever mention holding the shotgun to the man's head?"
> Your answer, "He said he went in the house somehow, he got him on the floor, holding the gun to the back of the neck underneath the skull, from what I heard what he told me. And he said, why are you doing this, why are you doing this. The man is saying this. And Alvin goes -- 1 can't remember if he says, for the hell of it or for the fun of it."
> Do you remember making that statement?
>
> A. Now that you have read it to me, yes.

Q. What that statement truthful back then?

A. Yes.

(T329-30)

Shortly thereafter, the prosecutor asked Madden if appellant ever talked with him about burning the house. Madden replied "I believe he said Chris Walker lit the sheets on fire (T335). The prosecutor said:

> Let me go back to that sworn statement. Okay. That's back on January 27th, Page 35, Line 21. My question to you, "Does he," referring to Alvin Morton, "ever talk to you about burning sheets or burning the house, or anything about the fire?"
>
> And your answer, "He called me up later that night. He went back to the house, tried to set it on fire and burned the bed sheets."
>
> Was that Alvin Morton telling you that?
>
> A. Yes.
>
> Q. Was your memory fresher back on January 27th or it is fresher today, two years later?
>
> A. I believe it was fresher back then.
>
> Q. Would you have been telling me the truth when you told me Alvin Morton talked to you on the phone about this?
>
> A. Yes.

(T336)

Defense counsel once again renewed his objection -- again unsuccessfully (T339-43). He argued:

> At a State Attorney invest, and that's the case I gave you (indicating), at a State Attorney invest., there's only two people there, the detective and the State Attorney.

It's not a proceeding. [under §90.801(2)-(a)]

What you can do, you can put in the deposition you don't remember, as substantive evidence. But this is different. He's trying to do the same thing with a State Attorney invest that you do with a proceeding. There's a distinction between those. That's the case I just handed to you that you looked at. That's what they talk about when it's a prior proceeding. So he can use it to refresh his memory that's all. If he says, I don't remember, he's stuck with it. His witness, he's stuck with it. If he says, no, Alvin didn't say it, Bobby said it, no Alvin said this, he made it an inconsistent statement, then they can bring it in. But I don't remember doesn't allow him to bring that in.

What he's trying to do is set the witness to say, I don't remember, and then he shoves in the State Attorney invest, which weren't subject to cross-examination.

(R342)

Defense counsel had also pointed out that if the prosecutor was trying to refresh the witness' recollection, "He can do what he's done before.[27] He can show it to him and can ask him if he remembers now. He can't sit here and read this to the jury. He's testifvins to the jury and getting him to agree to it" (T339-40). The judge concluded, "Well, I think the preliminary cautionary instruction is still applicable. You can have a standing objection as to the form" (T343).

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[26] The case referred to by defense counsel is State v. Smith, 573 So. 2d 306, 312-16 (Fla. 1990). See T.505.

[27] See T302-07 (Jason Pacheco) and 321-22 (Jeff Madden), where the prosecutor showed the witnesses their out-of-court statements in order to refresh their present recollections, but without reciting the contents of the prior statements to the jury.

Testimony of Wayne Whitcomb (Direct and Redirect Examination)

[Whitcomb was another one of the youths present at Jeff Madden's house when appellant Garner, Kane, and Walker arrived and began making statements about the crime]. The prosecutor asked Whitcomb if appellant had said anything about the elderly lady in the house. Whitcomb said "I don't remember" (T391). The prosecutor asked:

> Q. Mr. Whitcomb, do you remember speaking to me on February 3rd of 1992 in my office with a Court Reporter present, and I asked you certain questions, you told me certain things, and a lady recorded them?
>
> A. Yeah.
>
> Q. Would it be fair to say that back on February 3rd, <u>a week after this whole thing went down, your memory was a lot better than it is now, two years later?</u>
>
> A. <u>Yes</u>.
>
> Q. Now, going to that statement, Page 25, do you remember me asking you this question:
>
> "Did he say," referring to Alvin, "Did he say anything about the old lady?"
>
> And your answer was, "Yeah.
>
> And my question was, "Did he say what happened to her?"
>
> And your answer was. "Yeah."
>
> My question was, "What did he say?"
>
> And your answer, "I think it was him or Bobby that said he stabbed her in the throat, and something about running a knife down her back. ,

(T392)

Defense counsel's objection was overruled (T392). The prosecutor continued:

> Does that refresh your recollection?
>
> A. Yes.
>
> Q. Does that refresh your recollection now as to what they said about the old lady?
>
> A. Yes.
>
> Q. This was Alvin Morton who was telling you this?
>
> A. I'm not sure.
>
> Q. Well, let's go back a little bit further. Okay. On that same page, question on Line 11, "Did he say anything about shooting the old man?"
>
> "Answer: Yeah."
>
> My question, "Who did Alvin say shot the old man?"
>
> Your answer was, 'He did."
>
> My question, "Did he say anything about the old lady? Obviously, referring to Alvin.
>
> Do you want to read this? Can you read?
>
> A. Yes. I can read.
>
> Q. Why don't you read that?
>
> A. Which part?
>
> Q. Read it all, that whole page.
>
> A. He said one of them kicked down the door.
>
> Q. No, no. Read it to yourself, I mean.
>
> Okay. Does that refresh your recollection as to whether Alvin said he killed the old lady or not?

A. No.

Q. It doesn't. Okay.

(T392-93)

The prosecutor then called Whitcomb's attention to a deposition he gave on September 21, 1992 (T393-94), and said:

> Q. Now, going to Line 10, it looks like, or 9, of Page 11, when you were under oath at a deposition. It's actually Line 6.
>
> "Question: Did they say anything about a woman in the house that got killed?
>
> "Answer: Yeah.
>
> "Question: Who told you about that?
>
> "Answer: Alvin. He said that the woman was in there too and that he killed her."
>
> Do you remember saying that?
>
> A. No.

(T395)

Defense counsel moved to strike and moved for a mistrial, arguing that the prosecutor -- by reading the contents of the out-of-court statement before the jury -- was using an improper method for refreshing a witness' recollection (T395-98). He added:

> They're using evidence, veilina it as impeachment that would otherwise be totally inadmissible, because otherwise, if the arguments were true, we would never refresh the witness's recollection any more, we simply impeach them, and this goes out the window. The testimony would come in that's otherwise been inadmissible as hearsay.
>
> The man is saying I don't remember.

(T398)

The trial judge said, "It seems to me thia is old ground. Haven't we gone over this before?" He denied the request for a mistrial (T398).

The prosecutor then asked Whitcomb:

> (By Mr. Halkitis) In regard to that last statement in the deposition, you don't recall making that statement?
>
> A. I don't remember.

(T399)

Almost immediately thereafter, the prosecutor asked Whitcomb in appellant showed him the knife, or if he [Whitcomb] saw a knife or a gun. Whitcomb testified that appellant did not show him the knife (T399), and he did not see a gun (T400). In response to the question "Did you see any knives on him or anybody. else in the house?", Whitcomb said "I don't remember" (T399-400). The prosecutor asked him if he remembered talking to a Corporal Long about this case, or "talking to anyone from the sheriff's office and telling them orally what you knew about this case?" (T44). Whitcomb said he did not remember that (T400). Nevertheless, the prosecutor went on:

> When you talked to the police officers right after it happened, did you tell them the truth as best you recalled it?
>
> A. Yes.
>
> Q. Did you do that every time you were asked under oath about this?
>
> A. Yes, I did.
>
> Q. Was your memory better on all those other occasions than it is today?

A. Yes.

Q. Is there any other reason why you have poor recall?

A. No.

(T400-01)

The prosecutor then asked him if appellant ever told him about the house being started on fire. Whitcomb answered "No" (T401-02).

Q. Did Alvin Morton ever tell you what happened to the finger?

A. I heard what happened, but I don't remember him telling me.

Q. Let's go back to that State Attorney investigation on February 3rd. We just talked about that right?

A. uh-huh.

Q. You were placed under oath?

A. Yes.

Q. Asked questions, and it was recorded by a Court stenographer, right?

A. Do you remember on Page 6, Line 21, "What did you hear Alvin say?

"Alvin said they got rid of the finger.

"Question: Did he say how?

"Answer: They threw it in a canal."

A. Yes.

Q. Do you remember that?

A. Yes.

Q. Does that refresh your recollection?

A. Yes.

> Q. <u>Was that truthful when you made that statement?</u>
>
> A. <u>Yes.</u>

(T402-03)

Shortly thereafter, the prosecutor asked Whitcomb "Just prior to Alvin Morton showing you . . . the finger, did he make any statements to Jeff Madden, that you can recall" (R404). Whitcomb answered "I don't remember" (T404). The prosecutor referred him to the September 21, 1992 deposition, and said:

> Once again, I assume your answer is your memory of the events was a lot better then that it is today?
>
> A. Uh-huh.
>
> Q. That's because it was closer in time, right?
>
> A. Yes.
>
> Q. Going to Page 8, Line 23. I asked you this question. "Okay. What did he say," referring to Alvin Morton and the finger and the bandanna.
>
> "Answer: He said, 'I got you what you wanted Jeff,' and he did it, and he dropped it out."
>
> Do you remember that? Does that refresh your recollection of Alvin Morton making a statement, "I got you what you wanted, Jeff."?
>
> A. Yes.

(T404-05)

On redirect, the prosecutor asked Whitcomb, "As you sit here now, do you remember what Alvin Morton said about stabbing the old lady?" Whitcomb said he did not, although he remembered that the

topic was discussed (T411-12). The prosecutor stated "Now, you have given a number of sworn statements. One was February 3rd, about eight days after the crime.[28] And you gave another statement that's been referred to as the deposition on September 21st, 1992, about eight months after the crime" (T412):

> Could you tell us which version would have been more accurate: eisht davs after or eight months after?
>
> A. Eight days.
>
> Q. What you said under oath eight days after the incident was more accurate than eight months after, risht?
>
> A. Yes.
>
> Q. Right now, you have no recollection'of what you said back on February 3rd, 1992, as it pertains to the stabbing of the old lady incident?
>
> A. Yes.

(T412-13)

Testimony of Chris Walker (Direct Examination)

[Walker was the state's key witness in this trial. He had been with appellant, Garner, and Kane throughout much of the day, both before and after the crimes occurred. Although he did. not enter the house, he testified to numerous statements and actions of appellant and the others, bearing on the issues of premeditation, heightened premeditation, and intent to commit a felony].

---

[28] The February 3, 1992 statement was made in the State Attorney investigation (T391,402).

The prosecutor was asking Walker about the conversation at Bobby Garner's house -- involving appellant, Garner, Kane, Rodkey, and Walker -- during the late afternoon prior 'to the crime. Asked whether there was any discussion about robbing the house on Sanderling Lane, Walker repled "A burglary, yes. A robbing, no." (T502). Now, at the time of the trial, Walker knows the difference between a robbery and a burglary --"[a] robbery is when people are home" -- but he didn't know the difference at the time of his arrest (T502). The prosecutor asked:

> And would it be fair to say that at the time of your arrest, and in your statement, confession to Detective Lawless, you told him you were planning a robbery?

(T502)

Defense counsel objected (T502), and said "It's a prior consistent statement. There's been no impeachment" (f503). The prosecutor said "Inconsistent statement, Judge" (T503). At the judge's direction, he rephrased the question:

> Did you tell Detective Lawless at the time of your arrest, when he asked what you were planning, you said, "Well, like a robbery?"
>
> A. Yes, I did say that. I was very nervous and I didn't know the difference at the time.

(T503)

Defense counsel objected again, and also requested a limiting instruction (T503,505), The judge observed that he was not sure there was any inconsistency; the witness seemed to be having a

semantics problem (T503-04). The prosecutor objected to the giving of a limiting instruction, and the defense attorney countered:

> First, I contend it shouldn't even come in. This is what's happening, this is a case I showed you yesterday, State versus Smith. The purpose of admitting evidence of a prior inconsistent statement is to test the credibility of a witness whose testimony was harmful to the interest of the impeaching party. that purpose is disserved when this hearsay evidence is used as substantive evidence of guilt using the [guise] of impeachment 'to introduce testimony.

(T505)

* * *

> He's using hearsay testimony to a police officer that's not subject to cross-examination. That's when you get into the 801 problem, because it's not a prior proceeding, they're intertwined.
>
> He's trying to get in something he can't normally get in under the [guise] of impeachment. He's trying to get before the jury an element of the felony murder, that they planned a robbery or a burglary, that's exactly what he's trying to do.

(T505-06)

The trial court commented that it was not coming in as substantive evidence; defense counsel suggested that the jury would not be able to tell the difference (T507). When the judge said he was going to give a limiting instruction, defense counsel insisted "I want it given each time he reads from the police report and tries to impeach him so there is no mistake as to what's going on here" (T508, see T509-10).

The judge asked the prosecutor, "What's the distinction between saying it's not being used as substantive evidence and not

being used as proof of the defendant's guilt?" (T508). The prosecutor explained his understanding of the term:

> Substantive evidence refers to the element of the crime. The guilt of the defendant here can relate from a combination of what all the witnesses say. So what we're talking about is, that you can't use substantive evidence to prove an element of the crime.

(T508)

The judge then instructed the jury "that the evidence tending to impeach this witness is not being introduced to prove the truth of the matter asserted, but only as evidence of the witness lack of credibility" (T510).

Shortly thereafter, the prosecutor asked Walker if there was any conversation about getting cash or easy money. Walker answered "No. Valuable items perhaps, but not cash or easy money" (T513). He did not recall who was making these statements (T513). The prosecutor asked:

> When you told Detective Lawless, at the time of your arrest, "That we went there basically just to get easy money, and we talked about it for months," were you referring to cash ox valuable --

Defense counsel requested and got the limiting instruction (T513-14). Walker testified that they were not talking about getting money at this particular house or from the people who lived there (T514). The prosecutor asked Walker:

> Was it discussed at any time that it [the house on Sanderling Lane] would probably be easy to rob, or something like that?
>
> A. It might have been mentioned.
>
> Q. Do you remember?

A. No. Not exactly.

Q. When you told Detective Lawless at the time of your arrest on tape --

A. I was very jittery and nervous.

Q. Let me finish, Mr. Walker. would you let me ask the question before you respond? When you told Detective Lawless, it probably be pretty easy to rob, or somethins like that, was that accurate when you made that statement?

A. I would auess.

(T515)

At defense counsel's request, the limiting instruction was again read to the jury (T515). The prosecutor told Walker not to guess -- was his statement to Detective Lawless accurate or inaccurate? Walker said it was inaccurate (T515-16).

Shortly thereafter, the prosecutor asked Walker what appellant said while they were in the vacant house across the street from where the crimes took place, just before Walker and Rodkey left. Walker said that appellant and Garner were whispering on the other side of the porch and he didn't know what they were discussing (T522). He didn't recall anything appellant said in the vacant house (1522). The prosecutor referred him to his September 1993 deposition, and said:

Going to page 31, line 16 -- line 14.

"Question: What was talked about? What you were going to do if the people were home?"

"Answer: Tim asked the question, 'What are we going to do if the people are home? Alvin said, 'I'm sick of playing around, I'm tired of playing around,' one or the other, 'And I'm going to get something.' I believe that that

was the statements. He unrolled the towel and I saw a gun and a knife."

Does that refresh your recollection?

A. Yes, sir.

Q. Is that what was said in that vacant house?

A. I don't recall.

Q. You don't recall now?

A. No.

(T523)

Next, the prosecutor asked Walker if, as he was leaving, he saw who kicked in the door. Walker said "I think it was Mr. Morton. I have no idea." The defense moved to strike as speculation; the court sustained the objection*, and the prosecutor said to the witness "I don't want you to guess" (T532). Walker then testified that he didn't see who kicked in the door (T532-33).

> MR. HALKITIS [prosecutor]: Let me ask you, do you remember giving that deposition back in September, just a couple of months ago?
>
> A. Yes.
>
> Q. And you've already told us your memory was better then --
>
> A. I do recall. I think that Mr. Morton kicked in the door at that point, I would guess. Yes, he did.

Nevertheless, the prosecutor read from the deposition:

> Okay. And I'm going to refer you to page 36, and it looks like about line 3, and you're answering a question, and you say, "As we were going down the street, I ran, I looked back and I saw Mr. Morton kick in the door, Mr. Garner followed in, and I saw the door shut after Mr. Kane went in.

Question: You saw Mr. Kane went in?

Answer: Yes. "

A. Yes . That's correct.

(T534-35)

The direct examination of Walker continued in the same vein. He testified that he didn't hear any gunshots while he was running toward his bike (T536). When the prosecutor asked him if he'd said something different in his deposition, he replied "I said in the deposition that I recalled the gunshot, looking across the canal afterwards, not when I was running down the street" (T536). The prosecutor said:

> Let's go back to that deposition, page 37, it looks like about line 9.
>
> "Mr. Rodkey and myself, we were looking across, and Mike said, 'I wonder if they left yet?' He said, 'No, I doubt it."'
>
> Are you referring to the time you were looking across the canal, in that statement?
>
> A. Yes.

(T536-37)

The prosecutor asked Walker:

> Was there any -discussion there by Morton, Garner, yourself or Kane about not wearing bright clothing?
>
> A. No, sir. I believe that discussion occurred in Mr. Garner's house.

(T541)

Walker explained, "I guess they would have assumed that brighter colors would have made you a lot easier to see. No one actually discussed it" (T541) Asked if there was a change of

clothing, Walker said "I don't recall. I believe someone did, either Mr. Garner, Mr. Rodkey or somebody** (T541). The prosecutor asked Walker if he remembered his deposition:

> Q. How about page 23, line 11.
>
> "We spent roughly 10 to 20 minutes there, they were changing clothes, doing stuff like that, because they didn't want to wear any particular whites or bright colors because it was easier to be sought."
>
> Do you remember that?
>
> A. Yes, sir.
>
> Q. <u>Is that true?</u>
>
> A. <u>Yes</u>.

(T542)

After Walker and Mike Rodkey parted company with appellant, Garner, and Kane; Walker met back up with the latter three a little bit later at an abandoned Circle K (T538-39). Appellant was holding the shotgun. The prosecutor asked him if he saw the knife; Walker answered 'I don't recall. It was either Mr. Morton's hand or Bobby was holding it, I don't know. I think Mr. Morton had them both" (R540). Moments later, the prosecutor asked again:

> Now, you said earlier that when you first saw them Morton had the shotgun. And who had the knife?
>
> A. Either Mr. Garner had the knife or Mr. Morton was holding them both, I don't recall.
>
> Q. Well, did you recall a lot better back in September?
>
> A. I would guess.'
>
> Q. When you give your deposition, right?

A. Yes.

Q. And do you remember being asked that question on page 41, line 22, your answer:

"We went to Mr. Garner's house, it was dark, we put the bikes in the screened porch, Alvin was holding the firearm and knife in one hand?"

A. Yes.

(T543-44)

Next the prosecutor asked Walker what he remembered appellant saying at the Circle K after the shooting.

A. He repeated, "I did it," a couple of time, and then he said something as, I shot the person in the head, something like that.

Q. Well, if you would trv to use his words as you best recall?

A. I don't recall.

Q. Do you recall them a few months ago?

A. No, not exactly. That was speculation.

Q. Let's go to page 40, Mr. Walker, we will go to line 12 or 13:

"I came around the corner to the Circle K onto 19, there was a broken down old abandoned Circle K. Bobby, Timmy and Alvin were riding on bikes towards me and we met there. When he said, 'I did it, Alvin said, 'I did it, I did it, I blew the old fucker's head off.'" It's even italicized in that depo.

(T545; see T546)

Walker testified that he was not positive that was what appellant said, but it was something to that effect (T548; see T546-48).

The prosecutor's next question was whether anybody at the Circle K was bragging about the.killing. Walker answered "Not that

I can recall" (T548). The prosecutor asked him if he remembered giving a statement on tape to Detective Lawless where he said they were bragging about it. Walker said he believed appellant might have mentioned it, but he didn't think it was like bragging (T548). At that point, at defense counsel's request, the judge gave the limiting instruction (T548-49). The prosecutor then read from the transcript of Walker's January 27, 1992 statement during the state attorney's investigation:

> The question was, "What happens next? Did they show you anything? Tell you anything? What did they say?" And your answer, "Well, they were bragging about it for awhile, we went to Bobby's house.
>
> Question: So they were -- what were they bragging about?
>
> Answer: They were bragging about killing?"
>
> A. Yes, sir. That's what I said.
>
> Q. Was it true there, when you talked to Lawless and told him that?
>
> A. It was true. Mr. Morton had said something about it. I would not have called it bragging.
>
> Q. But you did back --
>
> A. I did say bragging.
>
> Q. Back on January 27th?
>
> A. Yes, sir.
>
> Q. And when you said, "Bragging," was the conversation that you had on the 26th a lot fresher in your mind a day after than it is today?
>
> A. Yes, sir.

(T549-50)

Walker testified that, when they were at the vacant house, he and Timmy Kane said something about leaving. The prosecutor asked "Did Alvin Morton say anything?", and Walker answered that he basically said "You're coming with me" (T551).

> Q. What did you say?
>
> A. I think it was something to the effect, I know where your grandmother lives.
>
> Q. Well, maybe that was a poor question. What specifically did you say about getting out or leaving?
>
> A. I would like to leave. I don't recall exactly what I said there in the statement.
>
> Q. Well, let's go to page 40 again, we're going to line 21 or 22, "I think Timmy said, 'I'm going to leave,' and Alvin said, 'No, nobody's leaving." And I said, 'Well, I'm getting the fuck out of here.' He said, 'Chris, don't go nowhere, you're coming with me, and if you get away, I know where your grandparents lives' I believe those were his exact words."
>
> That's coming from you?
>
> A. Yes. To the best of my knowledge, yes.
>
> Q. So back on Sestember 21st of 1993, those were Morton's exact words, as best vou recall?
>
> A. Yes, six.

(T551)

When they got back to Bobby Garner's house, after the crimes occurred, they put their bikes on the screen porch. The prosecutor asked Walker where were the gun and the knife. He answered "I don't recall at that point in time because it was dark, I couldn't see" (T553).

> Q. Do you remember the deposition, Mr. Walker, where you were sworn to tell the truth, the whole truth and nothing but the truth?
>
> A. Yes.
>
> Q. Going to page 41, line 22, your answer, "We went to Mr. Garner's house, okay, it was dark, we put the bikes in the screened porch, Alvin was actually -- I believe he was holding the firearm and the knife both in one hand?"

(T553)

Walker said he couldn't be dead positive of that because it was dark; the prosecutor asked him if he was dead positive on September 21, 1993 (T553).

Next Walker testified that, at Garner's house, he saw what appeared to be a pinky finger on the couch. The prosecutor asked "Did Alvin Morton say anything?", and Walker answered "I think he said something to the effect of, Bobby cut it off, and then they argued among themselves about it" (T554)

> Q. Let me see if this refreshes your recollection, Mr. Walker. Going to the deposition again, page 42, top of the page, "We road with the towel -- he rode with the towel in the other hand on the handlebars, rode to the house, he was wrapping them in the towel, and a light came on." And I assume that's inside the house?
>
> A. Yes, sir.
>
> Q. "And I saw something unusual on the couch, and I said, 'What is that?' Alvin giggled and he said at this time, 'Old fucker's finger,' I believe they were his exact words, he said something to that effect?"
>
> A. Yes, sir.
>
> Q. Refresh your recollection?

A. Yes, sir.

Q. Is that what happened?

A. Yes, sir.

(T555)

After reading several more of Walker's statements in the deposition concerning the finger (T562-64), the prosecutor's direct examination moved on to when they were in Jeff Madden's room and appellant took the finger out of the bandanna (T571-75). The prosecutor asked if anyone was laughing or snickering, and Walker answered that he believed appellant was (T573). Moments later, the prosecutor asked:

> Q. Now, was this the point in time when you said Morton was laughing?
>
> A. It might have been Mr. Morton. Someone was giggling somewhere, I didn't exactly -- I would have guessed it was Mr. Morton.
>
> DEFENSE COUNSEL: I object and move to strike, speculation.
>
> THE COURT: I'll sustain the objection.
>
> BY MR. HALKITIS [prosecutor]:
>
> Q. Let's go to your deposition again, okay?
>
> A. Yes, sir.
>
> Q. Page 50. Once again, this is going into that room at Jeff Madden's house. Line 14 or 15, there was a question, "Stop, back up in the house, did Kane say anything?" Your answer, "No, nobody. Tim and I said nothing. The only words out of Bobby's mouth was 'you're right,' when Jeff said 'You're fucking crazy.'
>
> Question: All right. Was there any laughing of snickering about the finger?

Answer: The only laughing and snickering came solely out of Jeff and Alvin. Jeff stopped laughing when he saw the finger but Alvin still giggled?"

DEFENSE COUNSEL: I object. The statement was stricken how can you impeach a stricken --

PROSECUTOR: That's because he guesses.

THE WITNESS: Yes, sir. I did make that statement.

BY MR. HALKITIS:

Q. Was it accurate when made?

A" Yes, sir.

Q. Was that what happened?

A. Yes, sir.

(T574-75)

After the lunch break, the prosecutor asked Walker in front of the jury if he had had time to review the transcript of his deposition (T600,602). Referring to the events after the crime, the prosecutor said:

Q. And you told us earlier this morning that at the Century 21, you met up and that's when Morton went back to light the house on fire?

A. No. We didn't meet there.

Q. Okay. How did you get there?

A. I rode a bike there from Garner's house.

Q. With the rest of the group?

A. No. I believe Mr. Morton and Mr. Garner split off on Sanderling Lane.

Q. Was that before or after you went to Jeff Madden's house?

A. That was after.

Q. Sure of that?

A. I'm almost positive.

Q. Are you as sure of that as everything else you told us today?

(T601-02)

Then referring to the deposition, the prosecutor read:

> Okay. Let's go to page 53, top of the page.
>
> "Question: All right. Then what happened?
>
> And here's your answer: "I guess they either hid them --" at that point you're talking about the gun and the knife or the point beforehand when they said, "I don't know if it was before Jeff's of after, but they did hide them I believe under the trailer. We did go over to Century 21 when they tried to burn down the house."
>
> And the question: "No. " And you stop and you say, "See, I forget that part every time. This was after we originally met and he threatened us. And when they just came from the house, they stopped there, Alvin told us, after he threatened us, to go to Century 21 and wait.
>
> Question: After he threatened?"
>
> Your answer: "After he threatened us. Well, I don't think the words actually came out of his mouth that he would kill us. He said, 'Don't go anywhere, I know where you all live and Chris, I know where your grandparents live'".

(T602)

Defense counsel objected and moved for a mistrial (T602-03):

> MR. SWISHER: My, objection is that it's improper impeachment. I'm moving for a mistrial, because he has repeatedly put into evidence depositions and police reports, because his witnesses don't remember, so

> that's how he's getting this whole case in front of the jury. It's highly prejudicial. I can't cross-examine that.

(T603)

The trial court disagreed:

> We have already been throush this. It's proper impeachment if someone doesn't remember. He can impeach then one way or the other, whether they remember now differently or before. The case law is clear, he entitled to impeach. He might be doing it incorrectly.
>
> Now, rather than have this as a continuing problem, if you want a standing objection, thus being the impeachment is improper, I'll give you a standing objection.

(T604)

The judge denied the motion for mistrial (T605). The prosecutor then read several more of Walker's statements from the depo and from the police report, getting him to acknowledge that his memory would have been better at the time of the earlier statements, and that those statements were accurate (T606-08,611-15). At defense counsel's request, the trial court read the limiting instruction (as to the taped statements to Detective Lawless) (T608). On one occasion, the prosecutor used the deposition to refresh Walker's memory by having him read it silently (rather than his usual procedure of reading the prior statement aloud to the witness in front of the jury, and then asking if it refreshed his recollection) (T611; compare T614-15). Here, he told Walker to read it to himself "because it's a whole page" (T611). The prosecutor asked whether appellant had said anything about hiding the weapons, and when Walker answered that he did not recall him saying

anything about it, the prosecutor read a statement from the deposition to the effect that "[Alvin] was going to hide them in the trailer. Bobby started to protest. He told him to shut up, and that was it" (T614)

<u>**Testimony** of Victoria **Fitch** (Direct Examination)</u>

Ms. Fitch, a friend of appellant's sister Angela Morton, was called to the stand and asked by the prosecutor:

> Q. Now, I want to direct your attention to January of 1992, Victoria, and do you remember being present with Angela Morton and Alvin Morton, and Alvin Morton making a statement about wanting to rob' a house and kill somebody?

(T649)

When Fitch said "I don't remember that statement exactly, no", the prosecutor immediately asked her if she remembered being present at a State Attorney's investigation on February 4, 1992 (T650):

> PROSECUTOR: And I asked you on Line 23, "Do you remember any conversation . . . "
>
> DEFENSE COUNSEL: Could we ask -- I'm going to object -- ask her if she can refresh her memory before he starts reading into evidence a statement that I wasn't present at?
>
> THE COURT: All right. Overrule the objection. Proceed.

(T650)

The prosecutor then read her statement in the State Attorney's investigation:

> And your answer, "I remember them talking about they wanted to rob a house, they

wanted to kill someone, but they never stated where or when." And I asked you, "Who was doing the talking?" and your answer on the next page, "Mostly Alvin."

Do you remember that?

A. I remember some of that, not exactly, it's been a while.

Q. Been a long time?

A. Yes.

Q. Was your memorv better on February 4th of 1992, than it is todav?

A. I would have to say, yes.

(T651)

At defense request, the trial court read the limiting instruction (T651).

Testimonv of Angela Morton (Direct Examination)

Angela Morton is appellant's sister. At a bench conference immediately before she took the stand, defense counsel stated:

> Judge, I'm going to make a motion at this point, as far as the State's interrogation. Angela Morton had her deposition taken, he knows at the deposition she says she didn't remember. He's merely putting in substantive --
>
> THE COURT: This is the same objection?
>
> DEFENSE COUNSEL: But the difference is, we have got now a deposition, and she doesn't remember, so there is only one purpose of doing this, he's no. longer planning to impeach.
>
> PROSECUTOR: I'm not putting anything in evidence. I'm asking her questions. And the reason the statements are taken by witnesses, whether they be by a police officer, a minis-

ter, State's attorneys, it doesn't matter, so that you have somebody locked in to prevent them from changing testimony at trial. The purpose of questioning witnesses is to seek the truth, and if they make a statement that is inconsistent --

> THE COURT: Okay. I've ruled on it. I've listened to thousands of objections, let's not approach the bench a thousand times. You can have a standing objection on that issue.

(R700-01)

Angela testified that her brother Alvin, Bobby Garner, Tim Kane, and Chris Walker were like best friends. The others probably listened to Alvin more because he was the oldest (T703-04). The prosecutor, unsatisfied, said:

> Q. I'm going to repeat the question. You told me Alvin Morton was the oldest. Who was the leader? Who was the boss, or who did they listen to the most?

(T704)

Angela replied "I wouldn't call him a boss, just because he talked more, was more outspoken, they listened to him" (T704). The prosecutor asked her if she remembered answering questions under oath at the State Attorney's office on January 27, 1992, the day after the crime, and whether the events were a lot fresher in her mind then (T704-05).

> And remember me asking you this question on Page 4, Line 5: Is Alvin the oldest of the group? Your answer: Yes. My question: Who's is the boss? And your answer: Line 8, "Alvin." Remember that?

(T706)

Angela stated that she didn't remember that day very much at all (T707).

The prosecutor then called her attention to January 18, 1992 -- a week and a day before the crime -- when she was at her house with her brother and his friends and Victoria Fitch (T706-07):

> Did you hear Alvin Morton say anything about breaking into a home with a satellite dish and a pool?
>
> A. They talked about a house that had a satellite dish and a pool.
>
> Q. And what do you remember him saying about this house with the satellite dish and a pool?
>
> A. Just that it-had a satellite dish and a pool.
>
> Q. What else did they say?
>
> A. That's all that I can remember that they said.
>
> Q. Remember coming to the State Attorney's Office on January 27th? We just talked about that, right?
>
> * * *
>
> Q. Miss Morton, going back to that State Attorney's Office statement that you gave back on January 27th of 1992, do you remember me asking you this question and you giving these answers:
>
> "Did you overhear a conversation which was kind of unusual? Did you hear something?" And your answer was. "Not just overhear it, they told us about it."
>
> My question: "Who actually was telling you?"
>
> And your answer: "It was mainly my brother. He was bragging about what he was going to do."
>
> My question: "What room of the house were you in?"

And your answer was: "My brother's bedroom."

My question: "What did you hear him say?"

And your answer: "That he was going to break into a house that had a satellite and a swimming pool and steal stuff, and if the old people caused anything, he would kill them, burn the house down so there would be no evidence."

Do you remember telling me that on January 27th?

(T707-09)

Angela testified that she did not recall those statements (T709). The prosecutor then asked her if she remembered her brother telling her what town or part of the county the house with the satellite dish and pool was in. She replied "He never said, I don't think" (T709). Going back again to the State Attorney investigation, the prosecutor read:

. . . Page 6, first line.

"Question: And did he tell you what part of the county this house was in? What city?"

Your answer: "No, but I'm almost positive that it was in Hudson. I'm pretty sure that I recall him saying Hudson." Do you remember that?

A. No.

Q. <u>Was it accurate when you told me that back on January 27th, under oath?</u>

A. <u>If I told you that then, then it was probably accurate, I 'iust don't remember what I said.</u>

(T709-10)

Defense counsel objected and asked for the limiting instruction, which was given (T710).

> Q. Now, Angela, I think you said that if it was said then, it was accurate, you just don't recall now?
>
> A. Yes.
>
> Q. Did Alvin Morton tell you what he wanted to steal from this house with the satellite dish and the pool?
>
> A. I don't remember.
>
> Q. Let's go back to that statement that your gave under oath, one day after the bodies were found.
>
> "Question: Did he tell you what he wanted to steal?
>
> Answer: No, but he tdld me if I could drive the car, that they could get a TV and VCR. And I told them that I didn't want anything to do with it."
>
> Does that refresh your recollection about the TV set and VCR?
>
> A. I don't know. , I don't remember that.
>
> Q. If you told me that back on January 27th, under oath, was it accurate?
>
> A. If I told you that then, I'm sure it's true.

(T710-11)

The limiting instruction was given again, at defense counsel's request. The judge told the jury that it was a "standing instruction" as to any time the prosecutor might refer to the prior statements (T711-12).

During the conversation, everyone -- including Angela and Victoria Fitch -- was laughing. The prosecutor asked if appellant

mentioned anything about kicking the people. Angela said she didn't remember if he said that (T712-13). The prosecutor referred again to the State Attorney investigation:

> Do you remember making this statement on Line 1:
>
> "Alvin said he would kick one of them in the head, one of the elderly people in the head, and that Chris and all of them, like we could each get in our shot."

(T713)

Defense counsel's objection was overruled (T713).

> Q. Do you remember Alvin making that statement, Alvin Morton, your brother?
>
> A. No.
>
> Q. If you told me back then on January 27th, under oath, would it have been accurate?
>
> A. If I told you that.

(T713)

The prosecutor then called Angela's attention to the Friday afternoon two days before the crime, and asked if she heard appellant say anything about breaking into the elderly people's home. She answered:

> I don't remember if he said anything, I was talking on the phone to a friend.
>
> Q. Let's go back to that same statement given a day after the crime occurred, okay.
>
> Question, Line 13, "What did you see? What did you hear that made you think how maybe he was serious about killing somebody?"
>
> Your answer: "He was talking about that night they were supposed to break into the elderly people's home."

"Question: Who was he talking to?

Me.

Question: Anybody else present?

Answer: No. I was talking on the phone to my friend Amanda, I was telling her what he was saying."

Does that refresh your recollection?

(T715)

Angela stated that she remembered talking on the phone, but not what was said (T714-15).

The prosecutor asked her if she remembered talking with Detective Rokoris shortly before she was interviewed under oath by the assistant state attorney and -Detective Lawless (T716):

A. Yes. They came to my house.

Q. Okay. Do you remember telling Detective Kokoris that Alvin had told you if anyone messed with him at that home he was going to kill them and then torch the residence or burn the residence?

A. No.

Q. And that you told Detective Kokoris, when he asked you what home was Alvin . . . referring to, you said the people had a satellite dish and a pool. Do you remember telling that to Brad Kokoris?

A. I don't remember talking to them people, I was extremely upset.

Q. Do you remember telling Brad Kokoris anything about an old couple that lived there?

A. I don't remember that man, let alone what I told him.

Q. So you have a bad recollection of everything you said on January 27th, would that be a fair statement?

A. Yes.

(T716-17)

Next the prosecutor asked Angela about the gun she saw appellant wrap up in a towel on the Friday before the' crime. She described it as a 12-gauge shotgun, sawed off (T721-22). Asked if she knew how it got to be sawed off, she said "If it was Alvin's gun, I guess he sawed it off" (T721).

> Q. We don't want you to guess, Miss Morton. Do you know if he sawed it off?
>
> A. I do not know if it was Alvin's gun and it was sawed-off.
>
> Q. Let's go back to your statement of January 27th under oath. Line 16.
>
> "Question: Do you know how it got sawed-off?
>
> Answer: He sawed it off.
>
> Question: How do you know that?
>
> Answer: Because he bragged about it."
>
> A. I don't remember saying that.
>
> Q. You don't remember saying that either?
>
> A. No.
>
> Q. <u>You said it to me, though. and it was recorded by a court reporter, would it have been accurate?</u>
>
> A. <u>If I said it then, it was probably accurate.</u>
>
> Q. <u>Was it probably accurate or was it accurate?</u>
>
> A. <u>It was accurate if I said it then.</u>

(T721-22)

Angela also saw her brother with a knife wrapped in a towel. He was on his bike, so he couldn't carry them (T724).

> Q. . . . Did you ask him what he was doing with the knife and the shotgun wrapped in towels?
>
> A. I don't remember if I asked him, I just watched him do that.
>
> Q. Let's go back to that statement back on January 27th, under oath.
>
> Question, Line 9, page 10,
>
> "Did he say or did you ask him what he was doing with the weapons? Did he make any mention of weapons?"
>
> Answer, Line 12, "I asked him what he was doing. He said wrapping them up to take them with him. I asked him why he was wrapping them up. He said no one could tell that they were on his bike."
>
> MR. SWISHER [defense counsel]: Objection, Judge. Same objection.
>
> THE COURT: Same ruling.
>
> BY MR. HALKITIS:
>
> Q. Do you recall'asking him that question and him giving you that answer?
>
> A. No.
>
> Q. <u>Would it have been accurate if you qave it under oath back on January 27th, 19921 Would that have been accurate?</u>
>
> A. <u>If I said that then, then that's probably accurate.</u>

(T724-25)

The prosecutor asked Angela if she saw appellant leave the house with the towels and the gun and knife; she answered "He left the house" (T726). Then she was asked:

Q. He did. Did you leave the house?

A. I don't remember if I left before he did or if he -- I know that -- I don't know. All I know is I watched him wrapped them up. I don't remember when he left.

Q. Let's go back to your statement of January 27th, 1992, question, Page 10, Line 16,

"Did he leave on his bicycle?

Answer: Yes."

(T726)

The judge overruled the defense's objection, whereupon the prosecutor asked Angela if her statement under oath on January 27, 1922 was accurate, and she replied "If I said it then, yes" (T726). Next :

Q. Had you ever seen your brother Alvin Morton sharpening a knife?

A* I don't know. I don't remember if he ever --

Q. Let me try to jog your memory a little bit. Let's go back to January 27th, that sworn statement, Page 10, Line 25, bottom of the page.

"Question: Did you ever see your brother sharpening that knife?"

Your answer, Page 11, "Yes."

MR. SWISHER: Same objection.

THE COURT: Same ruling.

* * *

Q. Was it accurate when you said it?

A. If I said it then, yes.

(T727)

The prosecutor then went back to the Saturday eight days before the crime, and asked her if she recalled appellant saying he would bring back "certain body parts" to Angela and her friend Victoria Fitch (T728).

> A. I don't remember him saying he'd bring them back, but they talked about a human heart.
>
> Q. What do you remember Alvin Morton telling you about a human heart?
>
> A. I just remember that everybody was saying that it would be neat to see a human heart beating.

(T728)

The prosecutor then read from page 13 of Angela's statement of January 27, 1992 during the State Attorney investigation:

> *'Question: Do you know anything more, anything about it, remember any more conversations between you and Alvin or any of these people, Kane, Garner, Walker?" And your answer: "Alvin told me and my friend Vicky that he would bring us back a heart."
>
> My question: "A heart?"
>
> Your answer: A human heart."
>
> "Question: You mean like a jewelry heart?
>
> Your answer: "A human heart.
>
> Question: He told you he'd bring you back a human heart?"
>
> Your answer: "And he said he wanted to gouge out someone's eyeballs."

(T728-29)

Defense counsel objected to the remark about the eyeballs as being inflammatory and improper impeachment; the judge sustained

the objection, finding that the, prejudice outweighed the probative value (T729).

Testimony of Detective Brad Kokoris

Immediately before Detective Kokoris took the stand, defense counsel made the following objection:

> [N]ow we're getting into -- he's offering his statement in as substantive -- he's going to ask him what Angela Morton said, which is hearsay.
>
> He's going to use it under the [guise] of impeachment, but that's what this Court -- bringing in testimony under the [guise] of impeachment to present as substantive testimony, this jury is not going to be able to distinguish what is actually impeachment from what he's trying to'offer through this witness.
>
> MR. HALKITIS: That's why you give the instruction.

(T747-48)

Defense counsel reiterated that the State Attorney's investigation is not a "proceeding" within the meaning of §90.801(2)(a), and provided the court with caselaw (T747-49). Counsel's repeated objections were overruled (T749,752,754), and the court again recognized a standing objection (T752).

Detective Kokoris testified that he questioned Angela Morton on January 27, 1992 (T750-51). She told him about some conversations which her brother and his friends had had (T752).

> BY MR. HALKITIS [prosecutor]:
>
> Q. . . . [D]id she describe the residence at all as to what it had?

> A* She stated that it was a house, what she described as a regular neighborhood, and that the residence had a satellite dish and a pool, and they felt that it was an elderly couple she believed, and she believed that they had money.
>
> Q. Did Alvin 'Morton discuss with her what would happen if the old people were home?
>
> A. I believe the statement she gave me was that if they messed with him, he would kill them and torch the residence and destroy any evidence.

(T752-53; see T754)

Testimonv of Detective William Lawless

Detective Lawless was the officer who -- along with Assistant State Attorney Halkitis -- took sworn witness statements on January 27, 1992 and on February 3 and 4, 1992 (T790-91).

> PROSECUTOR: And were these witnesses like Angela Morton, Victoria Fitch, Jeff Madden and other individuals who had key information about this particular case?
>
> A. That's correct..
>
> Q. And, again, <u>what was the purpose of having them give an oral statement that was transcribed by a court reporter?</u>
>
> A. <u>So they could document this in a sworn statement while it was still fresh in their mind, and, again, knowing they were friendly with the defendant, I didn't want them to change their testimonv at a later date.</u>

(T791; see T790).

Renewed Motion for Mistrial

After unsuccessfully moving for judgment of acquittal, defense counsel renewed his motion for mistrial **because of the cumulative effect, putting in this impeachment evidence that I discussed as substantive, it's been done over and over. . . . " (T868-69)

Jury Instructions

In his final instructions to the jury, the trial court included the following:

> Any prior inconsistent statement made by a witness which tended to impeach that witness was not introduced to prove the truth of the matter asserted or the defendant's guilt; therefore, any prior inconsistent statement is to be considered by you only as evidence of the lack of credibility of any witness who may have given a prior inconsistent statement.

(T966)

While this instruction was requested by defense counsel (whose repeated objections to the introduction and misuse of the out-of-court statements had been repeatedly overruled), counsel also warned that the jury here would be unable to make that distinction (T884).

K. Conclusion

A defendant is entitled to a fair trial, although not necessarily a perfect trial. Hoffman v. State, 397 So. 2d 288, 290 (Fla. 1981). Morton has received neither. His conviction and

death sentence must be reversed and the case remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE CERTAIN STATEMENTS AGAINST MORTON AS "ADOPTIVE ADMISSIONS", WHERE THE WITNESS COULD NOT IDENTIFY WHICH OF THE FOUR INDIVIDUALS (MORTON, GARNER, WALKER, OR KANE) MADE THE STATEMENTS, AND THE CRITERIA FOR ADOPTIVE ADMISSIONS OR ADMISSIONS BY SILENCE WERE NOT MET.

Prior to trial, the state filed a memorandum of law contending that "certain incriminating statements made by Co-Defendants to lay witnesses while in the presence of this Defendant are admissible as tacit admissions" (R151-53). The state selectively quoted the following portion of Privett v. State, 417 So. 2d 805, 806 (Fla. 5th DCA 1982):

> If a party is silent, when he ought to have denied a statement that was made in his presence and that he was aware of, a presumption of acquiescence arises.

[At this point, without indicating an omission, the state left out the sentence which reads "Not all statements made in the presence of a party require denial"].

> The hearsay statement can only be admitted when it can be shown that in the context in which the statement was made, it was so accusatory in nature that the Defendant's silence may be inferred to have been assent to its truth. To determine whether the person's silence does constitute an admission, the circumstances and nature of the statement must be considered to see if it would be expected that the person would protest if the statement were untrue.

See Daughtery v. State, 269 So. 2d 426 (Fla. 1st DCA 1972); Tresvant v. State, 396 So. 2d 733 (Fla. 3d DCA 1981), rev. den., 408 So. 2d 1096 (Fla. 1981).

The state did not mention in its memorandum the factors enumerated in Privett which must be present "to show that an acquiescence did in fact occur":

> 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 make-up of the speaker or his relationship to the sartv or event are not such as to make it unreasonable to expect a denial.
> 6. The statement itself must be such as would, if untrue, call for a denial under the circumstances.

Even when the other requirements are met, a defendant's silence should not be admitted as an adoptive or tacit admission if the circumstances surrounding the statement or the party's mental or physical condition would make it unreasonable to expect the party to deny the statement. Ehrhardt, Florida Evidence, §803.18-(b) (1993 Ed.). See also Brown v. State, 648 So. 2d 268, 270, n.2 (Fla. 4th DCA 1995) ("To determine whether a person's silence constitutes an admission . . . the circumstances and nature of the statement must be considered to see if it would be expected that a person would protest if the statement were untrue. . . . Once it is determined that a statement is of such character, there are numerous factors required to be present to show that an acquies-

cence did occur. . . . We find that these factors were not adequately shown by the prosecutor to be present so as to justify its use against defendant as substantive evidence of his guilt").

In the instant case, at trial, the prosecutor made it clear that he was not seeking to have the statements admitted as coconspirator statements, but only as adoptive admissions (T295-96). Defense counsel countered that statements can only be admissible under that theory if the statements were accusatory and it would be customary for the person to deny it, whereas here the evidence would show that appellant -- like the others -- was bragging (T295-96). The trial court ruled the statements admissible as adoptive admissions, saying "It goes to the weight, not admissibility" (T296).

Jason Pacheco testified that one of the four individuals -- Kane, Walker, Garner, or appellant -- gave instructions to clear everyone except Madden, Whitcomb, and Pacheco out of Madden's bedroom (T293-94, 297). Pacheco did not remember who said it (T297). One of the four boys said they were holding the lady up against the wall and started stabbing her (T302). [Defense counsel renewed his objection for the record, and the judge granted a continuing objection on the same grounds (T302)]. Pacheco testified that he was pretty sure all four of them were making statements (T304). The prosecutor asked if either appellant, or any of the other three in appellant's presence, mentioned anything about running the knife down the lady's spine (T304). Pacheco remembered hearing about that, but did not remember who was making those statements (T304).

There was a lot of noise in the room; Pacheco didn't remember if there was any laughter (T306). One of the four -- Pacheco did not remember who -- mentioned the cutting off of the finger (T311). Also, one of the four said they were going to get rid of the finger by throwing it in the canal. Pacheco didn't remember who told him that, but appellant was in a position where he could hear the statement being made, if he wasn't the one making it (T308-09).

Jeff Madden testified that Bobby Garner said that he (Garner) was stabbing the lady in the neck and running the knife up and down her spinal cord; he could hear the bones popping and cracking (T332-33). Appellant was in a position where he could hear Bobby Garner talking (T332). Bobby and the others were all pretty much giggling and laughing while this conversation was going on (T333; see 320).

Madden testified that appellant like to brag and talk big (T353). Chris Walker said appellant boasted sometimes, and would make off-the-wall statements as a joke (T625). According to Jason Pacheco, appellant's demeanor was "like it wasn't true" (T306).

The surrounding circumstances here fail to show that the statements which were being made at Jeff Madden's were accusatory in nature, or that appellant would have protested if they weren't true. Privett; Brown. If anything they show just the opposite; Bobby Garner and appellant and the others were bragging, laughing, and trying to impress their peers. Given the personal characteristics of these four disturbed teenagers -- and in light of the fact that even normal teenagers tend to be preoccupied with the

approval of their peers -- the statements do not meet the criteria for admissions by silence, much less the criteria for adoptive admissions. See State v. Palmore, 510 So. 2d 1152, 1153 (Fla. 3d DCA 1987).

While the statements erroneously put before the jury as "adoptive admissions" did not pervade this trial to anywhere near the extent of the State Attorney's investigation statements challenged in Issue I, the error should not be repeated on retrial. See e.g., Czubak v. State, 570 So. 2d 925, 928-29 (Fla. 1990).

ISSUE III

THE TRIAL COURT ABUSED HIS DISCRETION IN MINIMIZING THE WEIGHT GIVEN TO THE MITIGATING CIRCUMSTANCES OF MORTON'S ABUSED CHILDHOOD AND SEVERELY DYSFUNCTIONAL FAMILY BACK.-GROUND, AND HIS RESULTING MENTAL PROBLEMS@ ON. THE THEORY THAT MORTON'S YOUNGER'SISTER HAD THE SAME BACKGROUND AND SHE DID NOT COMMIT CRIMES.

A. Evidence

Appellant is the son of a drunken bully named Virgil Morton. Virgil was an alcoholic, who, according to appellant's mother Barbara Stacy, came home drunk 99% of the time (T116, see T1070, 1078-79, 1081, 1089, 1092-93, 1102, 1113, 1122, 1124, 1173, 1177, 1223). Barbara described Virgil as a "Dr. Jekyll and Mr. Hyde" who became a monster (T1127). He savagely abused appellant -- physically and psychologically -- from the time he was an infant until Barbara finally left him when appellant was seven OK eight.

Virgil would beat appellant, slap him upside the head, and kick him. (See T1066-67, 1069, 1078-19, 1080-81, 1093-94, 1112-13, 1115-17, 1121-23, 1146, 1151, 1220-22, 1225-27). Once when he was three, his aunt saw Virgil hit him so hard he flew across the room, from one end of the trailer to the other (T1093-94). Two other aunts described Virgil as treating the children like animals (T1067-68, 1079). He was constantly cruel to them (T1067).

Virgil would beat up Barbara nearly every night, often in front of the kids (T1115-16, 1222-23). One time he had her on the couch on top of the kids while he beat her (T1115, 1226-27). Virgil also beat up appellant's sister Angela, who was two years younger (T1129, 1220). Appellant would try to protect Angela, and between the two of them it was he who got the most of the brunt of the beatings (T1116, 1146, 1151, 1225). Angela testified that she was also sexually abused by her father (T1220-21, 1223-25).

Barbara testified that there was no way she could describe the amount of violence that she and the children endured with Virgil (T1115). He would come home drunk after being with other women and beat Barbara; accusing her of sleeping with every man in town, or her own brother or her own father. "If you answered yes you got beat; if you answered no, you got beat; if you refused to answer, you got beat" (T1116).

Often the kids would be put to bed hungry to try to spare them Virgil's wrath. After he passed out drunk, she would wake them up and feed them (T1113, 1226).

Years before, while in the Navy, Virgil had been convicted of manslaughter in an alcohol related incident, and had done prison time (T1099, 1102, 1109, 1114, 1177). Virgil like to brag to his children about having killed a person (T1109, 1118, 1177). In his drunken states, Barbara testified, "He loved to brag about how he had killed and how he would kill me and anyone in my family if I left him. And he was serious" (T1118). He would demonstrate this to the children by wringing a dish towel real hard; then popping them with it (T1118).

Before her disastrous marriage, Barbara had been religious. Virgil took every Bible and religious book in the house and made a bonfire out of them (T1114). If Barbara talked about God, Virgil beat her, and he forbade her from being around a lot of her family because they were Jehovah's Witnesses (T1114).

While the children were small, they were constantly moving from state to state (T1082, 1119-21, 1178). Although appellant had just started school, he had to change schools about eight times (T1121, 1178).

Barbara finally left Virgil when she caught him in bed with Angela, fondling her (T1122, 1128). Appellant was seven or eight at the time; Angela was about five (T1123, 1227). The three of them went to a shelter for abused women in Cleveland, Ohio, near where they were living at the time (T1122-23, 1228).

Several years later Barbara married Lester Stacy. She wanted someone who was completely different than appellant's father Virgil

Morton. Lester is a good stepdad, but he and appellant are not close (T1074, 1085-86, 1129-30, 1202, 1237).

Barbara Stacy also testified that appellant was born prematurely. He had to stay in the hospital for the first month of his life. Due to transportation problems, his mother was only able to see him three or four times, for about an hour each (T1109-11, 1175-76). He was in poor health as an infant, with severe allergies, a collapsed lung, and a double hernia (T111-12, 1176). When appellant was nine months old and the allergies were draining down his throat into his lungs, his crying got on Virgil's nerves. Virgil threw him on the bed and "hit his butt so hard that his back bowed like this (indicating) and scared me quite bad" (T1112-13).

Three mental health experts testified in the penalty phase: Dr. Delbeato and Ms. Pisters for the defense and Dr. Gonzalez for the state. Dr. Delbeato stated that appellant denied having been abused (T1013, 1060-61). His denial could be explained by shame or lack of trust (T1060-61). Delbeato described appellant's present family as dysfunctional, and described appellant as just kind of floating around in that family like an air bubble (T1019). Appellant is chronically anxious and emotionally unstable, with low self-esteem and a lot of repressed anger (T1023, 1025). He is isolated and devoid of any interests or goals (T1015). People with appellant's kind of personality development do not bond or form attachments; they feel estranged from other people and they distance themselves from them (T1025). Conscience does not develop

(T1026, 1041). Such people are not "crazy", but they are very dysfunctional and are marginal in society (T1026).

According to Dr. Delbeato, appellant has an antisocial personality disorder (T1040-41). He. further stated that, given appellant's background and environment in his formative years, the probability of his developing into a functional individual would have been "quite low" (T1028). Dr. Delbeato testified that typically the environmental factors which contribute to the later development of personality disorders occur between ages three and nine (T1028-29). Appellant experiences during those years "had a significant impact on him" (T1028). In addition, genetics play a role in the development of personality disorders (T1028). Asked whether these defects can be cured later in childhood or adolescence by the parent giving the child material things like toys or TVs, Dr. Delbeato answered "No. Research tends to indicate it probably makes it worse" (T1029).

Mimi Pisters, a psychiatric social worker and mental health counselor whose work has been focused for the last nine years on children with severe bonding and attachment problems, was qualified as an expert in that field (T1056-63). She testified that if bonding between an infant and his mother does not occur after the child is born, the child is at much greater risk of developing severe personality problems (T1165-67). During childhood, frequent moves aggravate attachment problems; the child tends to disconnect himself from other people and "ultimately become very much preoccupied with themselves" (T1167). When a child has been physically abused,

that also significantly interferes with his ability to bond or form attachments (T1167-68). Unattached children are angry, aggressive, suspicious, manipulative, and have very poor self-esteem (T1166-67). According to Ms. Pisters, an unattached child, if untreated, most frequently grows up to become an adult criminal (T1170).

Ms. Pisters testified that as a result of appellant's premature birth and his hospital stay with almost no maternal contact, bonding did not take place from the very beginning (T1175-76). The situation was then aggravated by living with a drunken, abusive father; by the mother's lack of parenting skills; by the lack of structure the children had in the family; and by their frequent moves (T1173-74, 1177-78). Appellant became the classic picture of an unattached child, and was very lonely and isolated with no goals or direction (T1174, 1178-79, 1184). According to Pisters, it was absolutely predictable that appellant would develop into the person he is now (T1179).

The state's expert, Dr. Gonzalez, also found that appellant has an antisocial personality disorder (T1249, 1261-62). The traits which develop into this disorder begin to be observable as early as age five to eight (TX-249-50). Dr. Gonzalez testified that he was sure that appellant's premature birth and his inability to bond with his mother would have traumatized the child, but an unattached child does not inevitably grow up to commit crimes (T1250-51, 1265). However, he acknowledged that the early years of childhood are very criticalto the development of one's personality, and that the degree of violence a child is exposed to is a factor to be

considered in personality makeup (T1283-84). The more violence, the more the impact (T1284). Parental alcoholism also would play a role (T1284). Dr. Gonzalez -- the prosecution's expert -- also agreed that there is a strong genetic component in the development of antisocial personality disorder, particularly in males (T1282-83). The incidence is five times greater when a parent has had a similar type disorder (T1282-83).

During his cross-examination of appellant's sister Angela, the prosecutor asked her, "And by the way, did you ever try to murder anybody? (T1231). She answered no (T1231). Angela, age 19 at the time of the trial, works at Kash and Karry and lives with her boyfriend (T1145, 1232, 701). She has never been convicted of a felony (T1145, 1232).

B. The Trial Court's Sentencing Order

In his sentencing order, the trial court had this to say about the nonstatutory mitigators:

> 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; c) physical or mental abuse of the defendant by his parents; and d) voluntary confession and cooperation of the defendant.[29]
> As to factors a - c above, the evidence clearly 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 his life. Moreover, this

[29] Appellant is not challenging the trial court's analysis of nonstatutory mitigating factor (d) regarding the confession.

> family moved in and out of state on a 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 a mitigating circumstance, the court gives little weight in the weighing process.

(R664-65).

C. The Trial Court Abused His Discretion in Minimizing the Weight Given to These Mitigating Factors, Especially for the Reason Stated.

"Finding or not finding that a mitigating circumstance has been established and determining the weight to be given . . . is within the trial court's discretion and will not be disturbed if supported bv competent substantial evidence." State v. Bolender, 503 So. 2d 1247, 1249 (Fla. 1987); Bryan v. State, 533 So. 2d 744, 749 (Fla. 1988). A trial court's discretion is never absolute; it is subject to "the test of reasonableness . . . [which] requires a determination of whether there is logic and justification for the result." Cannakiris v. Cannakiris, 382 So. 2d 1197, 1203 (Fla. 1990); Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). In the instant case, the trial court's diminution of the weight accorded these mitigating factors was not supported by substantial, competent evidence, and the reasoning expressed in his sentencing order was arbitrary and illogical. See also Ellard v. Godwin, 77 So. 2d

617, 619 (Fla. 1955); Matire v..State, 232 So, -2d 209, 210-11 (Fla. 4th DCA 1970); State v. Reed, 421 So. 2d 754 (Fla. 4th DCA 1982).

All three expert witnesses, including the state's expert, agreed that appellant's first seven years of life were marked by severe physical and psychological abuse inflicted by an alcoholic bully of a father. That in itself is a well recognized mitigating circumstance.[30] Moreover, as this Court wrote in Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990):

> We find [the trial court's] analysis inapposite. The fact that a defendant has suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would meant that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Next, all three experts, including the state's expert, were substantially agreement that appellant has an antisocial personality disorder.[31] Moreover, while Dr. Gonzalez disagreed with the

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[30] See e.g. Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Santos v. State, 591 So. 2d 160, 163-64 (Fla. 1991); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Livinsston v. State, 565 So. 2d 1288, 1292 (Fla. 1988); Castro v. State, 547 So. 2d 111, 116 (Fla. 1989); Holsworth v. State, 522 So. 2d 3348, 354 (Fla. 1988); Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988); Brown v. State, 526 So. 2d 903, 908 (Fla. 1988); O'Callaghan v. State, 461 So. 2d 1354, 1355-59 (Fla. 1985).

[31] A personality disorder is a serious psychiatric diagnosis. "In any scheme that tries to classify persons in terms of relative mental health, those with personality disorder would fall near the bottom." Comprehensive Textbook of Psychiatry (4th Ed. 1985), p. 958. The fact that a defendant suffers from a personality disorder is a valid nonstatutory mitigating circumstance. Eddinss v.

(Footnote Continued)

defense experts as to the inevitability of appellant's childhood experiences leading to criminal behavior, all three experts were substantially in agreement that appellant's failure to bond with his mother, the constant physical and psychological abuse he suffered at the hands of his drunken father, and his dysfunctional family's lack of structure and stability all were significant factors in the development of his personality disorder. The state's own psychiatrist, Dr. Gonzalez, testified also that there is a strong genetic component in the development of this disorder, particularly in males. [While there was no expert testimony regarding Virgil Morton's psychological condition, his lifelong behavior fits the description of a sociopath to a T. According to information supplied by the prosecutor, Virgil continued to commit offenses after his divorce, and had committed more offenses (including a conviction for arson) during the time appellant was in jail (T987, see T1099, 1103)].

The trial judge discounted three very significant mitigating factors on a demonstrably illogical and insupportable theory. Appellant and Angela were not similarly situated, and there was no reason to expect them to develop identically. First and most obviously, appellant is male and Angela is female. The state's own expert testified that genetics is a strong factor in the development of this disorder, particularly in males. See also the Ameri-

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(Footnote continued)

Oklahoma, 455 U.S. 104 (1982)(antisocial); Heinev v. State, 620 So. 2d 171, 173 (Fla. 1993) (borderline); Wuornos v. State, ___ So. 2d ___ (Fla. 1995) [20 FLW S479, 483].

can Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (Fourth Ed.), p. 647-48 (antisocial personality disorder is much more common in males than females, by about a 3 to 1 ratio); Comprehensive Textbook of Psychiatry (4th Ed. 1985) [Chapter 21, Personality Disorders], p. 976 (prevalence as high as 3% in American men and less than 1% in American women). Moreover, the impact of experiencing or witnessing violence in early childhood often varies depending on the child's gender; girls tend to be more likely to grow up to become victims, while boys tend to become abusers. Walker, "Abused Women and Survivor Therapy" (American Psychological Association, 1994), p. 66. The boy, consciously or unconsciously, will likely identify with the abusive father and see violence as normal male behavior. The girl, consciously or unconsciously, will likely identify with the abused mother, and may tend as an adult or adolescent to become involved in relationships with abusive men, thus perpetuating the pattern. [Is Angela Morton's boyfriend another Virgil, or was she fortunate or level-headed enough to find a decent man? We don't know].

In addition to the gender difference, appellant is two years older than Angela (meaning he got two extra years to develop under Virgil's system of child care). While Virgil sexually molested Angela, the evidence showed that between the two children it was appellant who got the brunt of the beatings. It was appellant -- not Angela -- who was deprived of maternal contact during the first month of his life, and who (because of this and because of what he came home to) developed an inability to bond or form attachments

with other people. For all of these reasons, it was unreasonable for the trial court to minimize three significant mitigating circumstances (on which there was substantial though not total agreement by all three mental health experts) on the basis that Angela didn't develop the same personality disorder, or because she had not as yet committed any crimes.

The Eighth Amendment requires reliability in capital sentencing. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Zant v. Stephens, 462 U.S. 862, 884-85 (1983); Caldwellv. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987). "[M]any of the limits that [the U.S. Supreme] Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." Caldwell v. Mississippi, supra, 472 U.S. at 329. The effects of appellant's traumatic and abused childhood are relevant in mitigation because they shed light on his character or record or the circumstances of the offense;[32] not someone else's character or record. It is arbitrary and unreasonable to devalue a legitimate mitigator on the basis that other people with similar life experiences have not committed crimes. Abused childhood, mental illness, drug or alcohol abuse, borderline retardation, young age and immaturity, good employment or military record, or whatever -- for every capital defendant who presents evidence of the mitigator there will hopefully be a hundred people with the same trait who haven't killed anyone. Still less should

[32] See Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987).

the weight accorded a valid mitigator depend on whether the defendant has siblings, or on the siblings' character.

In the instant case, appellant was 19 years old, with no significant criminal history. He suffers from a severe personality disorder, which, according to the expert witnesses, was probably produced by a combination of (1) Virgil Morton's genes; (2) lack of early maternal contact resulting in an inability to bond with others; and (3) constant and brutal physical and psychological abuse during his first sever years of life. It cannot be said that a fair weighing of the nonstatutory mitigators would have mad8 no difference. Appellant's death 'sentences does not meet the Eighth Amendment's standard of reliability, and it must be vacated and the case remanded for resentencing.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING AND INSTRUCTING THE JURY ON THE CCP AGGRAVATING FACTOR, WHERE MUCH OF THE EVIDENCE OF A "CAREFUL PLAN OR PREARRANGED DESIGN" CAME FROM OUT-OF-COURT WITNESS STATEMENTS MADE DURING THE STATE ATTORNEY'S INVESTIGATION.

The CCP aggravating factor requires proof beyond a reasonable doubt that the homicide was the product of "a careful plan or prearranged design." Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). In the instant case, the state introduced appellant's taped statement to Detective Lawless, in which his description of what happened -- a break-in of a house which they weren't sure was occupied or unoccupied, followed by unplanned, spur-of-the-moment

homicides[33] -- differed markedly from the picture of coldly prearranged murders which the state sought to portray. To achieve this, the state's featured strategy' was to repeatedly introduce its own witnesses' out-of-court statements made during the State Attorney's investigation. [See R649]. The state cannot show that these statements -- improperly introduced and improperly used substantively (i.e., to persuade the trier of fact that the prior statements were true)[34] -- did not influence the jury or the judge to find the CCP aggravator. [See, especially, the prosecutor's penalty phase closing argument, T1335-36, 1348]. Based an Dudlev v. State, 545 So. 2d 857, 860 (Fla. 1989), Espinosa v. Florida, ___U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), and the arguments made in Issue I, both the judge's finding of CCP and the jury's death recommendation are. invalid.

ISSUE V

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

Assuming arguendo that the CCP finding was valid, then, under the facts of this case, it must have been premised on the hypothesis that the break-in was committed far the purpose of killing these particular people, selected by their former neighbor Chris Walker. (See T350-52, 411, 597, 599, 758-59, 782-83, 1344-45, 1347-48). If the motive for the break-in was to kill the occu-

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33 See T798-99, 802-04, 868, 811, 813-14.

34 Ellis v State, 622 So. 2d 991, 996 (Fla. 1993).

pants, then the motive for killing the occupants was not to avoid arrest for the break-in. This aggravating factor, when the victim is not a law enforcement officer, requires strong proof that witness elimination was the sole or dominant motive for the killing. Davis v. State, 604 So. 2d 794, 798 (Fla. 1992). For the reasons argued by defense counsel below (R644-45, 647-49; T1301-08, 1332, 1375), this factor was not proven beyond a reasonable doubt.

ISSUE VI

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

Recognizing that this issue (T1318-19, 1329-32) has been repeatedly rejected by this Court,[35] appellant nevertheless relies on the constitutional principle of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny, as interpreted by the Supreme Court of North Carolina in State v. Johnson, 257 S.E. 2d 597, 616-17 (NC 1979), and respectfully urges this Court to reconsider its position.

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[35] See e.g. Finney v. State, 660 So. 2d 674, 684 (Fla. 1995); Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991).

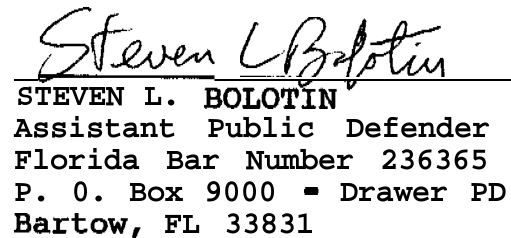
CONCLUSION

Appellant respectfully requests the fallowing relief: a new trial [Issues 1 and 2]; resentencing with a new jury [Issues 4, 5, and 6]; and resentencing by the court [Issue 3].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 19th day of December, 1995.

Respectfully submitted,



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