IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,014

JOSE ANTONIO JIMENEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Department of Legal Affairs
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, Florida 33131

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE

STATUTES

STATEMENT OF THE CASE AND FACTS

The Defendant was indicted for the first degree murder of Phyllis Minas **and** the burglary of her home, on October 2, 1992. (R. 1-3).

A. Guilt Phase

Ms. Virginia Taranco, an assistant vice president with the Bank of New York, testified that in October 1992, she lived at the Tropical Terrace apartment complex in North Miami. (T. 614, 502). Her apartment, no. 208, was immediately next door to that of the victim, Phyllis Minas, who lived in apartment 207. (T. 615). She had known the victim for approximately 10 years. Id.

At approximately five to ten minutes before 8:00 p.m., on the evening of October 2, 1992, Ms. Taranco was returning home from grocery shopping. (T. 616, 636, 647). She was accompanied by her elderly mother, and an elderly neighbor, Ms. Griminger, who lived on the third floor. (T. 616-17, 629-30).

As Ms. Taranco was going up the stairs to her apartment, she saw the defendant, whom she knew lived on the floor above her, at apartment 309, coming down the stairs and into the parking lot. (T. 617-18). She noticed that the defendant was wearing a multi-

colored cap. Id.

MS, Taranco took up her groceries. Within eight to ten minutes of having seen the defendant, she heard a noise, "a thump," which sounded like "somebody falling." (T. 619-20, 629-31). Ms. Taranco went to her door, and, while standing at her doorway, heard a voice, 'oh my God, oh my." (T. 626, 620). Within a minute or two, she heard a second noise, 'louder that the first one." (T. 620, 632). The voice and this second noise were from the victim's apartment. (T. 620).

Ms. Taranco, at this time, noticed that the victim's front screen door was half-way open. (T. 621). This was unusual, because while the victim sometimes left the interior wooden door open, the outer screen door was never open. Id. Another neighbor, Ms. Ponce, had also heard the noise and joined Ms. Taranco outside. (T. 622). The neighbors were concerned that the victim may have had a heart attack, and went to her door, calling out to her. Id. Ms. Ponce went up to the victim's kitchen window and reported that the lights in the apartment were off and it was dark. Id.

Ms. Ponce then turned the door knob to the interior door. Id. Ms. Taranco saw the door open a little, but then the door was

pushed and shut closed from inside the apartment. (T. 622,635). The neighbors started "banging real hard and calling her name real hard but [there] was no response." Id. They then asked Ms. Griminger to try and contact the victim by telephone. Id. Ms. Taranco also went to the parking lot to see if the victim's car was there; it was. (T. 623). At all times since hearing the noises, however, at least one of the neighbors had remained by the victim's door. (T. 623-24, 635).

After approximately 15 minutes of unsuccessful attempts to check on the victim, Ms. Taranco called the police. (T. 624, 635). Shortly after this call and while waiting for the police, Ms. Taranco again saw the defendant. (T. 624). The defendant was now coming down the stairs from his apartment on the third floor. Id.[1] Ms. Taranco noticed a difference in his appearance at this time. Id. The defendant was now "really clean"; he was also no longer wearing a cap. (T. 624, 638). The defendant asked what was happening, and was informed that the victim may have had a heart attack. (T. 625).

Ms. Taranco's aunt then called out that the police were

[1] The stairway was on the left side of the victim's doorway. The defendant's apartment was at the top of the stairway. (T. 505-507).

coming. (T. 625). At this point, the defendant asked Ms. Taranco if he could use her telephone and call a cab. Id. He was allowed to do so. Id. The defendant left prior to the arrival of the police officers. (T. 626).

Ms. Taranco also testified that after the police arrived, they asked for and were provided with keys to open the victim's door. (T. 625-26). The police asked her and the other neighbors to go back to their apartments prior to opening the victim's door. (T. 626). Ms. Taranco did not know what kind of injuries the victim had suffered, or that she had been stabbed, until the police told her about it during her statement at the police station, five (5) days after the victim's death. (T. 626-27, 645-46).

Ms. Ponce testified that she lived in apartment 209, across from the victim. (T. 648-49). She confirmed that she had heard a noise from the victim's apartment, at approximately 8:00 p.m., had seen the victim's screen door open, and had thus joined Ms. Taranco to investigate. (T. 649). She stated that after she saw that the lights were off in the victim's apartment, she turned the door knob to the victim's door, and "the door opened like an inch." (T. 651). Ms. Ponce added that the door then closed from the inside, and she heard three (3) locks closing, "pick, pick, pick." (T. 651). She

also corroborated Ms. Taranco's account of the unsuccessful attempts at contacting the victim, and that at all times after hearing the noise, one of the neighbors had been standing outside the victim's front door until the police arrived. (T. 651-53). Ms. Ponce also saw the defendant coming down the stairs from the third floor to the second floor, after the telephone call to the police. (T. **654).** She stated that the defendant was wearing a white T-shirt, and did not have any cap on. (T. **654-55).** Ms. Ponce also testified that she did not know that the victim had been stabbed, and had found out when she subsequently went to the police station to give a statement (T. 656), approximately twelve days after the crime. (T. 753).

Mr. Clifford Merriweather testified that on October 2, 1992, he had been the custodian for the Tropical apartment complex, for approximately three months. (T. 702-703). His shift was from 6:00 to 8:00 p.m. (T. 703).

Mr. Merriweather **was** waiting for his sister to pick him up from the complex after his shift, when he saw a man jump; **"hang** drop," off of the second floor balcony adjacent to that of the victim. (T. 704-705, 713, 568, 872; R. 240, 246). This incident took place approximately 20 minutes prior to the police arriving at

the complex. (T. 731). The man then walked within eight to ten feet of the witness. (T. 707-708). The man was dressed in dark colored jeans, dark shirt and a cap with gold writing on it. (T. 705). Merriweather observed that the man had his hands under his shirt. (T. 718). His 'eyes were big and he was sweating real bad." (T. 706).

Mr. Merriweather recognized the man as a resident of the apartment complex. Id. Merriweather had seen him, "maybe every other day when he was living in the building." Id. Mr. Merriweather, however, did not know the individual's name. (T. 708). The individual walked away. Id.

Mr. Merriweather testified that approximately 25 to 30 minutes later, he again saw the same man. (T. 708). This time the latter was not sweating, but his "eyes still was big." (T. 709). Mr. Merriweather did not recall how the man was dressed on this second occasion; he was not paying attention to the clothing. (T. 709, 727). The man told Merriweather that he was "waiting on a cab," and again walked off. (T. 709).

Mr. Merriweather, within three days of the crimes, was shown a photo lineup by the police, and identified the defendant as the

person he had described dropping off of the second floor balcony. (T. 710-12, 733, 734, 739-41). Mr. Merriweather also made an in-court identification of the defendant. (T. 712-13).

Officer Sidd testified that he was one of two officers who simultaneously first arrived at the complex, at approximately 8:21 p.m. (T. 682-83, 688). He saw the female neighbors gathered outside the victim's door, but did not see the defendant. (T. 683). Sidd was able to obtain keys for the victim's apartment and unlocked her door, after ordering the neighbors back to their apartments. (T. 684).

Upon entry, Sidd observed the victim on the ground in the kitchen. (T. 684-85). She was in her nightgown. (T. 685). There was "some," "not much," blood on her, and the officer at first could not ascertain the kind of injuries she had suffered. (T. 685). Upon closer examination, the officer saw a laceration in the neck area and blood spots underneath her nightgown. Id. The victim was still conscious, and was able to tell Sidd that the perpetrator was no longer in the apartment. (T.686). Sidd observed that the rear sliding glass door exit was slightly open, (T. 686).

Fire rescue units arrived within another ten minutes. (T.

698). The victim was attempting to communicate at this time, but could not do so. (T. 699). She was transported to Jackson Memorial Hospital where she died. (T. 700).

The medical examiner, Dr. Welti, testified that Ms. Minas died of multiple stab wounds to the chest. (T. 590). There were a total of eight (8) penetrating stab wounds to her body. (T. 574). Two (2) of the stab wounds were to the right side of her neck, and were not lethal. (T. 582). Another two (2) stab wounds were to the upper and lower areas of the left breast, one of which had penetrated the heart. (T. 582-84). Yet another stab wound went between the ribs and also penetrated the heart. (T. 584, 595). The wounds to the heart were approximately four (4) inches deep. (T. 584). They also caused massive internal bleeding; there was one and one half quarts of blood accumulated inside the chest cavity. (T. 584-85). The remainder of the stab wounds were to the abdominal area and left side of the body. (T. 584-85). Due to the location of the stabs, most of the bleeding was internal (T. 587); there was "little" bleeding externally. (T. 587, 592). The locations also reflected that the victim and her attacker were facing each other for the most part. (T. 588). The wounds also reflected a high likelihood of blood transfer, but not a lot of it. (T. 588). There were no defensive wounds, reflecting lack of

resistance. (T. 588-89).

The victim's body also reflected multiple 'fresh bruises," inflicted at or close to the time of death. (T. 573, 579). These bruises were on: the right arm, back of right forearm, back of the right hand, the left hip, right side of the chest, right side of the back, and, around the left eye. (T. 572-73, 579). There were also several cuts on the left side of the neck, and abrasions on the upper and lower lips. (T. 572, 581).

The external examination of the victim's body did not reflect any injury to her head. (T. 586). However, an internal examination of this area revealed 'significant bruising" to the left side, middle and back of the head. (T. 586, 594) . These bruises were caused by blunt force to the head. (T, 587). Although the bruising to the back of the head could have occurred if the victim had fallen and struck her head, such a scenario would not account for the bruises on the side of the victim's head. (T. 594).

Detective Pearce, the crime scene technician, testified that he arrived at the victim's apartment within thirty minutes, after the victim had been taken to the hospital. (T. 497-98). The front door opens to the inside of the apartment, whereas the screen door

outside of it opens in the other direction. (T. 507-10). A dead bolt and two other locks on the inside of the front door were still secure. (T. 567-68, 551). The front door leads to a small entry hallway which in turn opens to the combined living and dining area. (T. 509). Sliding glass doors, leading to a balcony outside, are located in the back of the living area and are visible from the front door. (T. 509-11). The sliding glass doors were still open. (T. 510-11).

Pearce investigated the balcony outside, and observed that it was adjacent to and within two (2) feet of the balcony to another apartment, no. 206. (T. 521-23, 543) . The balconies were separated by a railing which could easily be climbed. (T. 521-23) . An examination of apartment 206 reflected that it was unoccupied and its exit was locked. Id.

Inside the victim's apartment, there were two areas of disturbance; there was no evidence of ransacking. (T. 520). The kitchen, which is to the immediate right of the entry hallway and where the victim was found, had a small amount of blood on the floor. (T. 509, 503, 514, 530). A pair of eyeglasses with a cracked lens, an earring and a towel were also on the floor.(T. 514-16). In the other area of disturbance, the living area with

the sliding glass doors, there was a telephone outside of its holder, on the floor. (T. 511).

Pearce then lifted a total of 10 latents from the balcony of the victim's apartment, the railing which separated it from the adjacent balcony, the sliding glass doors leading to the balcony, the kitchen table and floor, and, the interior surface of the front door to the victim's apartment.[2] (T. 524-25). Four (4) of the ten (10) latents collected were of comparison value. (T. 669). Three (3) of said four (4) latents of value belonged to the deceased victim. (T. 676). The remaining latent, lifted from the interior surface of the front door to the victim''s apartment, matched the defendant's fingerprint. (T. 670-71; R. 378).

Detective Ojeda, from the City of North Miami homicide unit, testified that on October 5, 1992, three days after the crime, he went to the defendant's parents' home in Miami Beach, to make contact with the defendant, as the latter was being evicted from

---

[2] Pearce also collected the victim's bloody clothing, a towel, and blood samples from the victim's apartment. (T. 530-34). Various items of the defendant's clothing from his parents' home, including a pair of jeans with a blood spot and a baseball cap with gold lettering, were also collected. Id. An examination of the above items revealed that the blood on the items inside the victim's apartment was consistent with the victim's own blood; the blood on the defendant's clothing was consistent with his own. (T. 816-28).

the Tropical Terrace complex. (T. 747). No one was home, so Ojeda left his card. Id. A short time later on the same day, Ojeda called the house, and the defendant answered the phone and identified himself. Id. Ojeda told the defendant that he wanted to speak to him, "about some burglaries," and asked if the defendant would come to the police station. (T. 748-49).

The defendant said he was busy and would come in the next day. (T. 749). There was no mention of any particular burglaries nor any mention of a stabbing. (T. 749).

Shortly after this phone call, Ojeda went back to the defendants' parents home. (T. 749-50). He already had a warrant and had asked that a perimeter be set around the home. Id. Upon arrival, Ojeda placed another phone call to the house, and told the defendant that he did not want to wait until the next day. (T. 750). The defendant asked if Ojeda had a warrant. Id. Ojeda responded that he did, again without mentioning the basis thereof. (T. 750-51).

The defendant, who had also been informed that the house was surrounded, nonetheless did not exit the house. (T. 750-51). Ojeda placed several more calls to the house, but did not receive any

answer. (T. 751). The defendant then emerged after approximately 15 minutes, and explained that he had been making a telephone call. (T. 751-52).

Ms. Rochelle Baron testified that the defendant had placed a telephone call to her at the approximate time when the police were attempting to serve the warrant. (T. 773). The defendant had told her that the police had surrounded his house, and, "[t]hey say I stabbed somebody," (T. 773-74).

The State then rested its case-in-chief. (T. 776). The trial judge denied the defense motion for judgment of acquittal, having found that the fingerprint evidence, coupled with Mr. Merriweather's observations of the defendant jumping out of the rear of the victim's apartment, and, the defendant's statements to Ms. Barron about being wanted for a stabbing when there had been no mention of this by the police or neighbors, constituted sufficient evidence. (T. 783-85).

The defense then presented testimony from Dr. Kahn, a DNA analyst, and Detectives Korland and Ojeda, which testimony has been exhaustively detailed by the Appellant and thus will not be repeated herein. (T. 816-58 Brief of Appellant at pp. 21-23). The

defendant did not testify. The State then presented rebuttal testimony from Detective Ojeda, which again has been detailed by the Appellant. (T. 872-74; Brief of Appellant at p. 23) . On October 6, 1994, the jury returned a verdict of guilty as to first degree murder, and, burglary with a deadly weapon, with an assault or battery, of an occupied dwelling. (T. 957; R. 449-50).

B. **Penalty Phase**

The sentencing hearing before the jury was held on November 10, 1994 . (T. 972) The State's first witness was former Metro-Dade Police Detective Kenneth Schwartz, who had arrested Defendant for burglary on July 9, 1986. (T. 986). He and Detective Carl Spath had observed Defendant outside of his house. They got out of their vehicle and approached him. Schwartz had identified himself, showed Defendant his badge and ID, and had informed him he was under arrest. (T. 986). He had asked Defendant if he was Jose Jimenez and Defendant told Schwartz he was. Defendant had then said "okay," but that he needed to get something from the house, and proceeded to run toward the house. Schwartz had grabbed him and Defendant had proceeded to fight back. Defendant had punched and kicked the detectives and they had ended up rolling on the ground. Defendant had kicked at Schwartz' ankle and dislodged the latter's firearm from his ankle holster. Defendant had attempted

to grab the gun after it came loose. (T. 996). Schwartz had managed to kick the firearm away, and after about five minutes, the detectives had subdued the Defendant. (T. 987). Defendant did not appear to be under the influence of drugs or alcohol at the time of this arrest. Schwartz placed him under arrest for dealing in stolen property and resisting arrest with violence. (T. 988).

Defendant's conviction in the above case, number 86-19524, Eleventh Judicial Circuit, Dade County, for resisting arrest with violence, was admitted into evidence. (T. 998).

Dorothy Lennox, a probation officer, testified that the Defendant was placed on community control on June 26, 1992, for a period of one year, for unrelated convictions of presenting false insurance claims and grand theft. (T. 1004). Defendant was still on community control as of the date of the instant murder on October 2, 1992. (T. 1004). Defendant violated the conditions of his community control on October 2, 1992, by failing to remain confined to his residence. (T. 1006).

Defendant's conviction for burglary in the instant case was also admitted into evidence. (T. 1011). The State then rested. (T. 1020).

Defendant's first witness was his father, Jose Jimenez, Sr., who had been a waiter at the Harbor House Restaurant in Miami Beach for 23 years. (T. 1020-21). The Jimenez family consisted of Defendant, his parents and his sister. (T. 2032). The defendant was born on October 12, 1963 and was thus 29 years old at the time of the murder. (T. 1023).

Defendant was not a good student and got bad grades in school. (T. 1021-22). Mr. Jimenez was called in to talk to the principal of the private Catholic school that Defendant attended. Defendant's performance improved for a while, but he eventually began to get bad grades again. (T. 1021). After Defendant finished 8th grade, his father sent him to a military academy in Miami. The father believed Defendant needed more discipline. (T. 1022). Defendant got in trouble at the academy for bringing marijuana to school. Id. Thereafter, Defendant was withdrawn from the academy and attended the Miami Beach Senior High School. (T. 1023). Defendant eventually dropped out of school. Id,

The defendant then attended the Spectrum drug program between the ages of 17 and 19. (T. 1023). The father testified that he had first noticed Defendant acting differently between the ages of 18 and 20, when he returned home to live after having moved out and

lived with his girlfriend. (T. 1023). Eventually, the father told the Defendant to leave the house. Defendant was "maybe" high on drugs and got wild. (T. 1024). He was never violent. Id. He did not hit anyone, but tried to punch his father during the argument that led the father to tell Defendant to leave. Id.

After Defendant moved out, the family still tried to help him. Defendant went to the Warehouse drug program and was "clean" for 18 months, but then started using drugs again. (T. 1024). The father assumed that Defendant used crack or cocaine; he had never personally observed the Defendant using drugs. (T. 1025). When the Defendant was using drugs he would have a temper and would not listen to people. When he was not on drugs, he behaved "all right". (T. 1025).

On cross-examination, the father conceded that both parents loved the Defendant a lot and had tried to give him everything he needed when he was growing up. (T. 1026). They tried to help him when he had problems in school. They would go to the school, and talked to both the teachers and the defendant. Id. They tried to show him the right way. They took him to a therapist. (T. 1026). Defendant would not do what the therapist told him to do. (T. 1027). They tried to get him drug treatment. Defendant would not

follow the program. Even as a small child, Defendant was very strong-willed, and would talk back to his mother. (T. 1027). Defendant would lie to his parents, which made them angry because they loved him and tried hard to help him. (T. 1028).

Gary Schwartz, a psychologist, testified that he had interviewed Defendant on September 27, 1994, approximately two years after the crime. (T. 1037). IQ testing revealed that Defendant functioned in the average range. The Bender-Gestalt showed no sign of neurological deficiency. (T. 1038). Schwartz also administered the Carlson Survey, in a subsequent visit. On the substance abuse scale, Defendant scored in the 75th percentile. (T. 1039). Schwartz also administered the MMPI. (T. 1040). Defendant's score on this test indicated to Schwartz that Defendant had a problem with substance abuse. Defendant had told Schwartz that he began drinking beer when he was twelve and progressed to drinking a bottle of vodka once or twice a month. As a teenager he began to drink more and started snorting cocaine and then smoking crack. (T. 1041). Schwartz had also spoken to defendant's father about drug use, but the father couldn't be very specific because he had not seen the defendant using drugs. (T. 1042).

The Defendant had told Schwartz that on the day of the murder,

he woke up and started smoking crack and smoked about $200 worth before 8:00 or 8:30 p.m. Defendant ♋●♦□ claimed that he ♦♋♦ feeling paranoid that day. Schwartz opined that feelings of paranoia were consistent with some level of crack use. (T. 1042). Schwartz was thus of the opinion that Defendant was under the substantial influence of crack cocaine on October 2, 1992. (T. 1042-43).[3] Schwartz opined that without the use of drugs Defendant would be impulsive. (T. 1044). He further felt that Defendant had low self-esteem. Schwartz stated that defendant would feel better about himself, and more aggressive if using large amounts of drugs. Schwartz believed that without the use of drugs, Defendant would probably break the law 'less often." (T. 1045). Without the use of drugs, the defendant would be able to adjust and function within the regular population. (T. 1046). Finally, Schwartz was asked if he had been provided with any information as to statements by Mr. Merriweather, with respect to the defendant's behavior on the night of the offenses, (T. 1046). Schwartz stated that he had only read

---

[3] The State had previously moved to exclude this statement and Schwartz' opinion based on self-serving hearsay, i.e. defendant's statements; the defendant would not be testifying and there was no independent corroboration of drug use on the night of the murder. (T. 1012-1015). The defense argued that it was also relying on Mr. Merriweather's testimony that immediately after the crime, the defendant's eyes were big, he was sweating and appeared to be high. (T. 1015-17). Based upon said representation, the trial court allowed the doctor to render his opinion. (T. 1037).

a newspaper article. Id.[4]

On cross-examination, Schwartz acknowledged that he was not familiar with the facts of the murder. (T. 1063-4) The defendant had not provided any such information. Id. Furthermore, Schwartz had not read any police reports, witness depositions, trial transcripts, or "anything whatsoever about this case." (T. 1055-6).

Schwartz stated that Defendant never completed any drug rehab programs. He left them because he did not agree with the "philosophy" of the programs. (T. 1058). The literacy tests indicated Defendant read at the 12th grade level despite dropping out of school, The MMPI reflected no evidence of any psychological disorder (T. 1061). The defendant's family was close and loving; there were no indications of any abuse. Schwartz conceded that Defendant knew right from wrong, and, was able to conform his conduct to the requirements of the law. (T. 1061).

---

[4] At this juncture, the State again moved to strike Schwartz' opinion based on drug use on the night of the offenses, as it was now clear that the expert had solely relied upon the defendant's statements. (T. 1047-52). The trial court denied the motion to strike, stating that the jury had already heard the opinion and striking it would be meaningless.

Schwartz also conceded that he knew of no evidence of drug usage the day of the murder other than Defendant's statements. (T. 1062). Schwartz also admitted that even if Defendant was on crack at the time of the murder, it would not have prevented him from knowing right from wrong, or from conforming his conduct to the requirements of the law. (T. 1067-68).

On redirect, Schwartz stated that he was not familiar with the wording of the statutory mental mitigator. (T. 1068). Upon defense counsel showing Schwartz the printed statutory language, Schwartz then opined that, based on crack use, Defendant's "capacity to appreciate the criminality of the requirement of law" [sic] would be "substantially impaired." (T. 1069).

Defendant's **final witness** was his sister, Iris Deleria, 33, who was a legal secretary with a downtown Miami law firm. She had been a legal secretary since 1980. She was a high school graduate and had taken some college and legal secretarial courses. (T. 1078). Deleria had heard that Defendant had used marijuana and cocaine. (T. 1080). Defendant was normal until he reached the age of about 15, when he changed. Their parents were normal and they had a normal family life. Deleria felt that she had done well so far in life. (T. 1080). She had never been arrested, or had any

legal problems, or used drugs. She felt Defendant hung around with the wrong crowd. (T. 1081).

The defense rested. (T. 1081). After closing argument, the jury was instructed and retired to consider its sentencing recommendation. (T. 1084-1111). After 40 minutes of deliberation, the jury returned a 12-0 recommendation of death. (R. 487).

The parties then submitted memoranda, (R. 494, 520), and a sentencing hearing was held before the court on December 8, 1994. (T. 1119). At the hearing, Defendant introduced a letter from his mother. (T. 1123). Defendant also addressed the court and expressed dissatisfaction with his attorneys and maintained his innocence. (T. 1123). Defendant added that he should be sentenced to life because a death sentence would adversely affect his mother. (T. 1126). He also stated that he had personally contacted the 'classification officer" at "South Florida Reception Center", and surmised that, if given a life sentence, he would "leave prison at the ripe old age of 81." (T. 1126-67). After brief argument by counsel (T. 1128-32), the court retired to consider the sentence.

At a hearing on December 14, 1994, the trial court pronounced

sentence. (T. 1138). The trial court found the existence of four aggravating circumstances: (1) that Defendant had been convicted of a prior violent felony, resisting arrest with violence, which the court gave moderate weight (R. 530); (2) that the murder occurred during the burglary of the victim's home, which the court gave great weight (R. 530); (3) that Defendant was on community control at the time of the murder, which the court gave great weight (R. 531); and (4) that the murder was heinous, atrocious and cruel, which the court also gave great weight. (R. 531-33).

The court then analyzed the proffered mitigation. With respect to the proffered statutory mitigation of substantial impairment of ability to appreciate criminality of conduct due to cocaine use, the trial judge noted that the expert testimony thereon was based solely upon the hearsay statements of the defendant to the expert as to drug usage on the day of the crimes. (R. 535). The trial judge then detailed the defendant's actions before, during and after the homicide, concluding that defendant 'used sound judgment and quick thinking to cover his tracks and to avoid detection". (R. 535-37). The trial judge thus held that, "while the court is convinced that the Defendant was a drug abuser" (R. 535), "the court is unconvinced that the Defendant was under the influence of drugs to any appreciable degree when he committed

the killing." (R. 538). The trial judge further found that, based upon the defendant's actions at the time of the crime and the expert's contradictory and equivocal answers, "even if the Defendant **was** under the influence of drugs when he committed those acts, he was still able to think rationally and react quickly. ...this court cannot say that the Defendant's capacity to conform his conduct to the requirements of the law was substantially impaired." (R. 538-39). The trial judge nonetheless gave this mitigator 'minimal weight". (R. 539)

The trial court also found that proposed nonstatutory mitigation that Defendant could be rehabilitated **was** entitled to "very little weight," as the Defendant has shown "great resistance" to rehabilitation. (R. 540-41). Finally, the trial court noted that the fact that Defendant would probably never be released if he were sentenced to life imprisonment was entitled to great weight. (R. 541-42).

In weighing the aggravating and mitigating circumstances, the court concluded that the aggravators "clearly and remarkably" outweighed the mitigators. The court further noted that:

> This Court unequivocally finds that even had I given sreat weiaht to the statutory mitigator presented by the Defendant, as opposed to the minimal weight I did give

it, the aggravating circumstances would still outweigh the mitigating circumstances.

(R. 542). The court further added that:

> The Defendant's offered mitigating circumstances pale when considered and weighed against the fact that this dimuative [sic] sixty-three year old woman was violently attacked in her own home by the Defendant, that she was beaten and stabbed repeatedly even though she offered little or no resistance, that the Defendant purposely and deliberately locked out her neighbors so they could not get in to help her and perhaps save her life, all while the Defendant was on supervision by the Court and the Department of Corrections and required to remain in his own apartment under house arrest on a totally unrelated crime.

(R. 542-43). The court therefore followed the jury's recommendation and sentenced Defendant to death. (R. 543). This appeal has ensued.

SUMMARY OF THE ARGUMENT

I. Denial of the request for new a 'second chair" counsel was proper, where it was based upon a full inquiry, and neither the defendant nor counsel established any indicia of incompetence or conflict.

II. The claim based upon Coney, infra, is without merit, as Coney does not apply to cases such as this, where the trial was conducted prior to the Conev decision. Furthermore, the defendant was present in the courtroom, had the opportunity to consult with counsel, and could not have assisted with the legal arguments as to the cause challenges at issue herein.

III. Cross-examination of two state witnesses was properly limited, where the questions were clearly beyond the scope of direct examination and entailed inadmissible hearsay evidence.

IV. An instruction on third degree murder, which is not a necessarily lesser included offense, was not required, as there was no evidence to support that offense. Alternatively, any error in failing to so instruct the jury was harmless, as that offense was two steps removed from the offense for which the jury did convict.

V. Evidence of the defendant's unexplained fingerprints inside the victim's apartment, eyewitness testimony identifying the defendant as having exited the rear of the victim's apartment at the approximate time of the crimes, the defendant's statements about stabbing prior to his arrest, and, the nature of the injuries inflicted during the repeated stabbing and beating, support a conviction for either premeditated murder or felony murder.

VI. Assorted prosecutorial comments during the penalty phase do not constitute reversible error, where claims are unpreserved for appellate review, comments are not improper, and, if any error is found, it is not of sufficient magnitude to require reversal.

VII. A murder committed by repeatedly stabbing the victim, in the course of a burglary of her home, coupled with four aggravating factors and minimal mitigation, warrants the death penalty and is proportionate to other death sentences which have been affirmed by this Court.

VIII. Evidence of repeated stab wounds, beatings and the victim's lingering death are sufficient to sustain the finding that the murder was heinous, atrocious and cruel. The weight to be given mitigating evidence rests within the court's discretion, and

the court's findings are fully consistent with the evidence.

IX. Claims regarding the constitutionality of the death penalty are unpreserved and have repeatedly been rejected.

ARGUMENT

I.

THE TRIAL COURT CONDUCTED AN ADEQUATE INQUIRY AND PROPERLY DENIED THE DEFENDANT'S REQUEST TO DISCHARGE CO-COUNSEL.

The Appellant contends that there **was** an insufficient hearing on the defendant's motion for discharge of his "second chair" counsel, as "the trial judge did not fully explore other bases of conflict between Mr. Kassier and Defendant," and, did not "inform Defendant of his right to self representation." See Appellant's Brief at pp. 36-38. The record, however, reflects that the trial court conducted a full inquiry, and denied the request to remove co-counsel Kassier, based upon the lack of any legitimate indication of incompetence or conflict. Moreover, as there was no request for self-representation, there was no error in failing to inform the defendant of his right to represent himself. Finally, there is no showing of prejudice, as there is no constitutional right to co-counsel or second chair counsel, and even if said counsel were removed, the lead counsel would remain and defendant would not be representing himself.

A. The sequence of appointment and discharge of various counsel

The record reflects that the defendant was originally represented by Ms. Harman. (T. 12). Approximately five months later, this attorney was allowed to withdraw because the defendant stated that he did not want her to represent him. (T. 32).

A second attorney, Ms. Cohen, was thus appointed to represent the defendant, (T. 44). More than three months later, this attorney then requested that a "second chair" counsel also be appointed. (T. 58). The defendant had spoken with, and desired that, Mr. Houlihan be appointed as co-counsel. (T. 69). The prosecution noted that Mr. Houlihan was, at the time, involved in several other death penalty cases and that said trials were already being delayed due to his busy schedule. Id. The trial court then inquired whether the defense would be ready within approximately three months if Mr. Houlihan was appointed. (T. 72). Defense counsel responded that they would not be ready because Mr. Houlihan would "be in another trial." Id. The trial court thus suggested that the defense counsel find another qualified attorney for second chair, and denied the request to appoint Mr. Houlihan. (T. 73).[5]

[5] At a subsequent hearing shortly thereafter, Mr. Houlihan's schedule was further discussed and it appeared that he would be busy in trial even beyond the time limits discussed at the

Approximately a month later, on September 9, 1993, defense counsel announced that, "the second choice for second chair" was Mr. Kassier. (T. 80). The trial court, after ascertaining Mr. Kassier's availability, appointed him as second chair counsel, and scheduled the trial for approximately four months later, on January 10, 1994. (T. 82-84).

In December, 1993, however, the defense informed the court that despite diligent discovery efforts, the trial needed to be continued due to unavailability of some witnesses for depositions. (T. 92-94). In March, 1994, the trial was rescheduled for June, 1994, as defense counsel Cohen was going in for a C-Section." (T. 116-17). In May, 1994, however, Ms. Cohen filed a motion to withdraw from the case, due to problems relating to her newly born baby. (T. 135; R. 127). The trial court was informed that the public defender's office would be ready for trial within a month and a half. (T. 135-37). The assistant public defender, Mr. Koch, was able to so proceed, because he was handling the defendant's other criminal case and had become familiar with the instant case during the course of that representation. Id.

---

prior hearing. (T. 81-83). The trial court's written findings reflect that trial would have been delayed for a period of seven months to a year given Mr. Houlihan's schedule. (R. 100).

The trial court then attempted to coordinate the parties' schedules so as to set a trial date. The assistant public defender's second chair, Ms. Georgi, however, was not present and her schedule could not be ascertained. (T. 137-39). The prosecution noted that second-chair, Kassier, had not withdrawn and could assist Mr. Koch. (T. 139-40). At this juncture, Ms. Cohen informed the court she "believe[d] that there may some kind of conflict between Mr. Jimenez and Mr. Kassier." (T. 140). The parties agreed to postpone the question, as Mr. Kassier was not present in court **and** Ms. Georgi's schedule **was** to be ascertained in order to "see whether Mr. Kassier needs to remain on for the death phase of this case." (T. 143).

A week later, however, the public defender's office informed the court that they had a conflict of interest and had to withdraw, because they had previously represented one of the witnesses in the instant case. (T. 148).[6] The trial court allowed the public defender to withdraw, as soon as another attorney could be appointed. (T. 148-49).

Five days later, Mr. Matters accepted appointment to the

[6] The public defender, at the prior hearing, had stated that their preliminary checks reflected no conflicts of interest. (T. 136-37).

instant case. (T. 153). Mr. Matters then stated that, based upon conversations with previous counsel and the defendant, he would request a hearing to address "the issue of replacing Mr. Kassier as second chair." (T. 153-54) . Mr. Matters stated that Mr. Kassier had informed him that, "he has absolutely no problem at all in asking to withdraw as second chair." (T. 158) . Mr. Matters wished to have Mr. Kassier replaced with Mr. Peckins. (T. 160) .

The trial court expressed concern over the delays which had already occurred and that which would be caused by additional substitutions of counsel. (T. 160-61). The trial court also noted that Mr. Kassier had not previously moved to withdraw from the case. (T. 161). The trial court then inquired if "there's some reason that Mr. Kassier is incompetent or not representing--" (T. 164). Lead counsel assured the court that, "I don't think there's any indication he's incompetent," but that there were "problems," "in certain regards." (T. 164). The trial court scheduled a hearing where Mr. Kassier and the defendant would explain the problems. (T. 164-65) .

B. **Circumstances** of the **hearing** to substitute co-counsel

At the subsequent hearing, the defendant, lead counsel, Mr. Matters, and second chair, Mr. Kassier, were all present. (T. 173-83). Lead counsel announced that the reason for the hearing was "because I had been advised by my client of a conflict between him and Mr. Kassier and I know the court wanted to hear from Mr. Kassier reference this matter." (T. 173). The trial judge stated that she also wanted to hear from the defendant, "because I have not heard anything from him as to what this conflict supposedly is." Id.

The defendant was then sworn and asked to explain "the problem" between him and Mr. Kassier. (T. 174). The defendant stated that he did not "know what's going on with my case," that he did not "get along with an attorney who I can't reach," that his case had been "scheduled for trial and they weren't ready for trial," and that he needed "an attorney that is going to be ready to defend me." (T. 174). The trial judge then explained what had transpired throughout the prior proceedings. The trial judge exhaustively detailed the sequence of the attorneys who had been appointed and the reasons they had withdrawn from the case, explaining the lack of readiness for trial and continuity of contact, in accordance with the facts set forth in section A

herein. (T. 174-77). Having explained what **was** going on in the case, the trial judge then expressly asked the defendant:

> **COURT** : In your meetings with Mr. Kassier, have you had any personal conflict with him as **a** lawyer?
>
> **DEFENDANT:** As a lawyer, no, but it's like again I say I don't know what's going on with my **case.** . . .

(T. 177). The defendant then referred to his previous request for the appointment of Mr. Houlihan as second chair and how that request had been denied in order to prevent delays in trial. (T. 177-78). The defendant then requested another second chair attorney, without any additional reasons or explanations: "Defendant: Issue is, can I have another attorney, you know, aside from Mr. Kassier?" (T. 178). The Court explained that good cause had to be demonstrated before such a substitution:

> **THE COURT** : You haven't given me any good cause to believe Mr. Kassier is not representing you to the fullest. You are only saying you haven't been meeting with any of the lawyers on your case and don't know what's going on with your **case.** That doesn't tell me you have any problems with your lawyer on your case.
>
> I can ask Mr. Kassier since he is here before the Court to meet with you so he can tell you what's happening in terms of his representation of you.
>
> Certainly you have the right to know what kind of representational work they are doing on your case.
>
> Mr. Matters clearly is new on your **case** and it is going to take him some time to go over the file so he can properly discuss the facts with you.

> I am sure he will meet with you-- That's really where the status is at this point.

(T. 178-79) .

The defendant did not say anything further during the hearing. Second chair, Kassier, however, at this juncture, stated that he "will concur that [there] is a conflict between Mr. Jimenez and I." (T. 180). The court inquired as to the "nature" of the conflict, but Mr. Kassier declined to state any problem. Id. Instead, Mr. Kassier stated that he had not asked to withdraw from the case previously because he had been trying to resolve "whatever conflict" he had with the defendant, and did not feel it was necessary to file a motion to withdraw, because, Ms. Cohen had moved and been allowed to withdraw. (T. 181).

The trial court noted that "there is no right under the law to have a second seat," that seven attorneys had already been involved in the case, and that the substitution of yet another attorney, aside from delays, would involve duplication of labor and costs. (T. 181-82). The judge noted that Mr. Kassier, in addition to review of the file and other information, had also spoken to all of the witnesses in the case, and would have to be paid for this work. (T. 182).

The trial court then again stated that neither the defendant nor counsel had articulated any specific problems which would mandate the discharge of Mr. Kassier. (T. 182). Lead counsel, Mr. Matters, at this juncture, stated that the defense would not explain any further and that the court would have to rule based upon the foregoing presentation:

> **MR. MATTERS:** My position is clearly that I would just once again tell the court the conversations I had with my client were the basis for my request for Mr. Kassier to be allowed to withdraw and appointment of another second chair and that is all the record needs to reflect.
>
> I have requested and i the court can deny it and leave Mr. Kassier on and we'll proceed.

(T. 182). The trial judge thus denied the request that Mr. Kassier withdraw and another second chair be appointed:

> **THE COURT:** At this time the court is making a finding there is nothing that I have heard that leads me to believe that Mr. Kassier has not been properly representing the defendant, that there is some conflict in his representation of the defendant, therefore, the motion to withdraw is denied and the motion to appoint new counsel is denied.

Id. The above hearing took place approximately three and a half months prior to the commencement of trial. There was no expression of dissatisfaction, by either defendant or defense counsels, during the interim, or at any time during the guilt phase or the penalty

phase before the jury and their recommendation.[7]

C. **Sufficiency of the hearing for substitution**

At the outset, it should be noted that, "[a]n indigent defendant has an absolute right to counsel, but he does not have a right to have a particular lawyer represent him." Koon v. State, 513 So. 2d 1253, 1255 (Fla. 1987), citing Morris v. Slappy, 461 U.S. ___, 103 S.Ct. 1610, 75 L.Ed. 2d 610 (1983). "A trial court must conduct an inquiry only if a defendant questions an attorney's competence. Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla.), cert. denied, 480 U.S. 871, 109 S.Ct. 185, 102 L.Ed. 2d 154 (1988)." Smith v. State, 641 So. 2d 1319, 1321 (Fla. 1994). Where a defendant expresses dissatisfaction with counsel but does not

---

[7] At the sentencing hearing before the trial judge, the defendant addressed the court and stated that he was dissatisfied with counsel, because he had been found guilty and the jury had returned a recommendation of death. (T. 1123-24). He stated that his counsel had not called a witness; had not directed attention to the fact that if he killed the victim because she recognized him then he would have also had to kill Mr. Merriweather, who witnessed him jumping from the balcony, but that he had not done so; that Mr. Kassier had lied to co-counsel about visiting him in jail, and, that counsel had not prepared him for the sentencing hearing. (T. 1124-25). The defendant noted that counsel had suggested to him to tell the court that he became violent when on drugs, which was, "not necessarily true," and that, he only broke into "unoccupied" houses to support his drug habit. (T. 1125).

question his competence, no inquiry is required. Id.[8]

In the instant case, lead defense counsel, as to whom the defendant had expressed no dissatisfaction at the time, made it clear that there was no question of the complained of second chair, Mr. Kassier, being incompetent. (T. 164) . The defendant and both counsel characterized the problem as a "conflict,' which the defendant explained was due to his alleged lack of knowledge as to what was "going on" with respect to the delays in trial and continuity of contact with various counsel. The trial court exhaustively detailed the reasons for delay, why various counsel had not been in continuous contact, and directed counsel to apprise the defendant of the progress. Thereafter, neither the defendant nor his counsel registered any complaints. In response to the court's explicit inquiry of the nature of conflict, the defendant expressly stated that there was no conflict, and counsel declined to explain the nature of any alleged conflict. Furthermore, lead counsel, in the presence of the defendant, made it clear that any

---

[8] In Smith, 641 So. 2d at 1321, the defendant's complaint was, in part, based upon counsel's inexperience with first-degree murder cases. Additionally, counsel had moved to withdraw based upon the defendant's desire to present testimony that counsel believed was false. Id.

further inquiry would not be fruitful.[9] Thus, even assuming that defendant's complaints could be construed as allegations of incompetence, the trial court conducted a full inquiry. "As a practical matter, a trial judge's inquiry into a defendant's complaints of incompetence of counsel can be only as specific and meaningful as the defendant's complaint." Lowe v. State, 650 So. 2d 969, 975 (Fla. 1994). Where, despite questioning, the complaints are merely generalized grievances, such as allegations that appointed counsel was not doing his best in representation, no further inquiry is necessary. Id; see also, Watts v. State, 592 So. 2d 198, 203 (Fla. 1992) (where, during jury selection, defendant requested that another attorney be appointed, because his attorneys had not been to see him in the jail, there was error in failing to conduct a further inquiry, or substituting counsel; counsel, at a later time had addressed the allegations and explained that they had seen the defendant on a number of occasions); Ventura v. State, 560 So. 2d 217, 219-20 (Fla. 1990) (trial court conducted a sufficient inquiry and did not err in failing to discharge counsel, where defendant was given "an opportunity to fully present all of his allegations," and complained about "conflict," lack of trust and number of continuances granted in his case; counsel had in turn

---

[9] The Appellant's suggestion that an in-camera hearing could have been conducted is thus without merit in light of said representation.

moved to withdraw, based upon "conflict of interest" arising from the inability to form and maintain the attorney/client relationship); Valdes v. State, 626 So. 2d 1316, 1320 (Fla. 1993) (no further inquiry necessary, where defendant only raised vague allegations of disagreement with the line of defense, and had refused to discuss the specific basis of dissatisfaction); compare, Scull v. State, 433 So. 2d 1137, 1139-41 (Fla. 1988) (insufficient inquiry, where the defendant had appeared without his counsel and was not given the opportunity by the trial judge to explain his allegations of conflict of interest, because the judge interrupted the explanation).

Appellant's argument that there was an insufficient hearing in the instant case, because the trial judge did not explain to the defendant his right to represent himself, is without merit. The events at the hearing below have been exhaustively detailed in section B herein. The defendant did not in any manner, equivocal or otherwise, manifest a desire to represent himself. A defendant is not entitled to an inquiry on the subject of self-representation in the absence of an "unequivocal" request for self-representation. Watts, 593 So. 2d at 203; see also, Smith, 641 So. 2d at 1321 ("the trial court was not obligated to inform Smith of this right [to self-representation]," where defendant's complaints about court-

appointed counsel "did not contain an explicit assertion of his right to self-representation."); Valdes, 626 So. 2d at 1320 (no error in failing to explain to defendant his right to represent himself where defendant "never unequivocally asked to represent himself.") .

The State would note that in the instant case, there was no question of self-representation. The defendant expressed dissatisfaction only as to the second-chair, co-counsel Kassier. Assuming, arsuendo, that there was an insufficient inquiry or that Mr. Kassier should have been discharged, the defendant would not be representing himself; the defendant was still being represented by lead counsel, Mr. Matters. As noted by the trial judge, the defendant has no right to co-counsel. Lowe, 650 So. 2d at 974-75. ("We find that, despite the local practice of appointing dual attorneys, the decision of whether to appoint co-counsel is not a right but is a privilege that is subject to the trial court's discretion."). The Appellant's reliance upon Matthews v. State, 584 So. 2d 1105 (Fla. 2d DCA, 1991) and Smith v. State, 21 Fla. L. Weekly D1619 (Fla. 2d DCA, July 10, 1996), is unwarranted. Neither of said cases involved ♋ situation such as that herein, where the defendant was being represented by two attorneys, expressed dissatisfaction as to one of them, and thus was in no position to

represent himself even if co-counsel were to be discharged. Under the circumstances of the instant **case** there was thus a sufficient inquiry and the trial court did not err in failing to substitute co-counsel. Moreover, any error **was** harmless beyond a reasonable doubt as there is no constitutional right to co-counsel.

II.

DEFENDANT'S ABSENCE FROM TWO SIDEBAR CONFERENCES WHEN CAUSE CHALLENGES WERE BEING EXERCISED WAS NOT ERROR AND DID NOT DENY HIM A FAIR TRIAL.

The present **case** was tried before this Court's decision in Conev v. State, 653 So. 2d 1009, 1013 (Fla. 1995), wherein this court, in reliance upon Francis v. State, 413 So. 2d 1175 (Fla. 1982), held that the defendant has a right to be physically present at the "immediate site" where pretrial juror challenges are exercised. This Court noted that in situations where a bench conference for such exercise is required, the defendant can waive his right and exercise constructive presence through counsel. This Court, however, required that the trial court certify, through inquiry of the defendant, that such a waiver is knowing, intelligent and voluntary. This Court concluded that, "[o]ur ruling today clarifying this issue is prospective only." Id. The Appellant claims, that although defendant was present in the

courtroom and had the opportunity to confer with counsel, his physical absence from the sidebar during two (2) bench conferences, where the parties exercised preliminary cause challenges based upon the prospective jurors' language problems and views on the death penalty, was error.[10] This claim is without merit as, at the time of the trial herein, there was no right to be physically present at sidebar, where defendant was present in the courtroom and had the opportunity to confer with counsel as to the exercise of jury challenges. Bovett v. State, No. 81,971 (Fla. December 5, 1996). This Court has ruled that the Coney requirements do not apply to trials that were conducted prior to said decision, and, indeed, said requirement has now been abrogated. Id.[11] Moreover, any error is harmless beyond a reasonable doubt, as the exercise of challenges at issue herein related to cause challenges which involve legal **issues towards which the defendant would** have **had no basis for** input, Coney, supra; Turner v. State, 530 So. 2d 45, 50 (Fla. 1987); Harvey v. State, 529 So. 2d 1083, 1086 (Fla. 1988).

---

[10] The record reflects that the defendant was physically present when the remainder of the cause and all of the peremptory challenges were exercised. (T. 431-55).

[11] See amended Fla.R.Crim.P. 3.180(b), effective January 1, 1997, which defines presence as being "physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed."

In Boyett, supra, the defendant argued that there was error because he was not physically present at the sidebar when peremptory challenges to prospective jurors were exercised. Boyett was tried prior to the Coney decision, and argued that said decision, "should apply to him insofar as it requires that a defendant be present at the actual site where jury challenges are exercised." Slip op. at pp. 3-4. Boyett, like the Appellant herein, had argued that, "he should be entitled to the same relief because his case was not final when the opinion [Coney] issued, or, in the alternative, that the rule announced in Coney was actually not new, and thus should dictate the same result in his case." Id. This Court rejected "both of these arguments," and explained:

> In Coney, we interpreted the definition of "presence" as used in Florida Rule of Criminal Procedure 3.180. We expanded our analysis for Francis v. State, 413 so. 2d 1175 (Fla. 1982), which concerned both a defendant whose right to be present had been unlawfully waived by defense counsel, and a jury selection process which took place in a different room than the one where the defendant was located. In Coney, we held for the first time that a defendant has a right under rule 3.180 to be physically present at the immediate site where challenges are exercised. See Conev, 653 So. 2d at 1013. Thus, we find Boyett's argument on this issue to be without merit. [footnote omitted]
>
> Boyett's second Coney argument--that the rule of that case should apply because Boyett's case was non-final when the decision issued--is also without merit. In Coney, we expressly held that "our ruling today clarifying this issue is prospective only." Conev, 653 so. 2d at 1013. Unless we explicitly state otherwise, a

> rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced. See Armstrong v. State, 642 So. 2d 730, at 737-38 (Fla .1994), cert. denied, 115 S.Ct. 1700, 131 L.Ed. 2d 726 (1995). Because Boyett had already been tried when Conev issued, Conev does not apply.
>
> We recognize that in Conev we applied the new definition of "presence" to the defendant in that case: the state conceded that the defendant's absence from the immediate site where challenges were held was error, and we found that the error was nonetheless harmless. Coney, 653 So. 2d at 1013. It was incorrect for us to accept the state's concession of error. Because the definition of "presence" had not yet been clarified, there **was** no error in failing to ensure Coney was at the immediate site. Although the result in Conev would have been the same whether we found no error or harmless error, we recede from Coney to the extent that we held the new definition of "presence' applicable to Coney himself.

Slip op. at pp. 4-5. There was thus no error in the defendant's physical absence from the sidebars herein, as he **was** tried prior to the Coney decision. The State would also note that under the pre-Coney decisions an objection in the trial court, based upon the right to be present, was required. See Francis, 413 So. 2d at 1177 ("Francis objected to this selection of the jury outside of his presence."); see also, Gibson v. State, 661 So. 2d 288, 290-91 (Fla. 1995) '(claim of violation of right to be present with counsel, while conducting challenges at bench conference, must be asserted as legal ground for objection in the trial court, in order to be deemed preserved for appellate review). In the instant

case, there were no objections based upon any grounds, and this issue is thus also procedurally barred.

Moreover, the State respectfully submits that, assuming, arguendo, there was any error, same was harmless beyond a reasonable doubt, It is undisputed that the exercise of challenges herein solely related to preliminary cause challenges. The defendant could not have assisted counsel in the presentation of legal arguments supporting or rejecting the requested challenges for cause. Physical absence from sidebar under these circumstances was thus harmless beyond a reasonable doubt. Coney, 653 So. 2d at 1013; Turner, 530 So. 2d at 49-50; Harvey, 529 So. 2d at 1086. The Appellant has recognized that as to the jurors who were excused based upon their views on the death penalty, the defendant could not have assisted counsel on the legal arguments presented. See Brief of Appellant, at p. 54, n. 42. Appellant has, however, stated that as to the cause challenges pertaining to language problems by some of the jurors, the defendant would have had a basis for input. Id. This argument is without merit. The record reflects that the jurors who were so excused did not have the ability to understand English and thus could not evaluate the testimony or follow the court's instructions. (T. 244, 314, 327). An adequate comprehension of English is necessary to serve fairly

on the jury, and the trial court's ruling on such a matter will be upheld absent clear abuse. See, Cook v. State, 581 So, 2d 964 (Fla. 1989). The defendant thus could not have assisted counsel in preventing said challenges for cause.

III.

THE TRIAL COURT DID NOT ERR IN LIMITING DEFENSE COUNSEL'S CROSS-EXAMINATION OF STATE WITNESSES, WHERE THE ATTEMPT TO CROSS-EXAMINE THE WITNESSES WAS CLEARLY BEYOND THE SCOPE OF DIRECT EXAMINATION, AND DEFENSE COUNSEL WAS PERMITTED TO RECALL THE WITNESSES DURING THE DEFENSE'S CASE IN CHIEF.

The State's direct examination of Detectives Pearce and Ojeda was expressly limited to well-defined subject areas. Defense counsel attempted to cross-examine both of those detectives as to matters which were clearly beyond the scope of direct examination. As such, the trial court properly sustained the State's objection to the scope of defense counsel's cross-examination. Furthermore, when defense counsel's cross-examination of the two witnesses was limited for the above reason, defense counsel did not make any proffer as to what defense counsel anticipated that the witnesses would say to the intended questions. Due to the absence of any such proffer, this issue is not preserved for appellate review. Lastly, the trial court expressly noted that the defense could call the two witnesses during the defense's case-in-chief with respect

to the matters that defense counsel sought to elicit on cross-examination. Defense counsel did call and present one of the two witnesses during the defense's case, but, notwithstanding the opportunity to call the second witness as well, chose not to do so.[12] Thus, the defense had the ability to present any of the matters which the defense tried to elicit on cross-examination and the defense clearly presented all that it wished to. Under such circumstances, even if the trial court's initial rulings regarding the scope of direct examination were erroneous, any such errors must be deemed harmless.

A. Detective Pearce

On direct examination Detective Pearce testified that he was the lead crime scene detective. (T. 499). His testimony focused on the scene of the murder, the victim's apartment, at 13725 N.E. 6th Avenue, apartment 207. (T. 497, et seq.). Pearce identified and explained numerous photographs which had been taken, of both the interior and exterior of this apartment. (T. 499-524). He further detailed the physical evidence collected from this apartment (T. 530), and he detailed the areas which were processed for latent fingerprints at this apartment. (T. 525-29). The foregoing

[12] The record reflects that defense counsel, after consultation with the defendant, announced that he had decided not to call the second witness, Officer Cardona; but that, instead, he would call Officer Korland. (T. 788).

testimony also included descriptions of Pearce's own observations at the scene, such as the presence of blood on the kitchen floor, broken eyeglasses found on the floor, and substantial amounts of cash and jewelry found in the bedroom dresser. (T. 513-14, 516, 519, 520). The final area of direct examination was Pearce's search of the residence of the defendant's parents, at which location Pearce retrieved items of the defendant's clothing. (T. 531-32). Photographs from that crime scene were introduced into evidence. (T. 532).

On cross examination, defense counsel attempted to get into an area which was never touched upon in direct examination - the subsequent search of the defendant's own apartment. (T. 559-60). Thus, defense counsel queried: "Now, there did come a time when you participated in the search of my client's apartment, did you not?" (T. 559). The prosecutor objected that this was beyond the scope of direct examination, asserting that he "deliberately avoided going into that area of the defendant's apartment. If he wants to call him as a witness he's free to do that. I didn't go into that on purpose and I don't see how he can cross examine him on this area if I didn't question him." (T. 559). The judge sustained the objection, adding that defense counsel could "call him as your witness." (T. 559). Defense counsel then noted that he had Pearce

under subpoena and the prosecutor agreed to make Pearce available. (T. 559-560). Defense counsel in no **way** proffered what Pearce was expected to say about the separate and distinct search of the defendant's apartment.

This Court has held that when **a** trial court precludes defense counsel from presenting evidence, "[a] proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence." Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990). The same principle has been routinely applied in many cases. See, e.g., Finney v. State, 660 So. 2d 674, 684 (Fla. 1995); Salamy v. State, 509 So. 2d 1201 (Fla. 1st DCA 1987); Phillips v. State, 351 So. 2d 738 (Fla. 3d DCA 1977), cert. denied, 361 So. 2d 834 (Fla. 1978); Parnell v. State, 627 So. 2d 1246 (Fla. 3d DCA 1994); Bennett, 405 so. 2d 265 (Fla. 4th DCA 1981); Ketrow v. State, 414 So. 2d 298 (Fla. 2d DCA 1982).

Even if the issue is deemed preserved for appellate review, it is still without merit, as the subject area of questioning was clearly beyond the scope of direct examination. Detective Pearce's direct examination was limited to the investigations conducted at the victim's apartment and at the search of the defendant's

parents' house; the questioning on direct examination never touched upon the distinct search of the defendant's apartment. The purposes and scope of cross-examination have been carefully delineated by this Court, in Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982):

> The proper purposes of cross-examination are: (1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case. [citations omitted]. Therefore it is held that questions on cross-examination must either relate to credibility or be germane to the matters brought out on direct examination. [citations omitted]. If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the testimony of the witness on direct examination, other than matters going to credibility, he must make the witness his own. Stated more succinctly, this rule posits that the defendant may not use cross-examination as a vehicle for presenting defensive evidence.

Additionally, rulings regarding the scope of cross-examination rest within the sound discretion of the trial court. Cruse v. State, 588 So. 2d 983, 988 (Fla. 1991). In light of the above details regarding the nature of direct examination and the distinct area which defense counsel sought to examine on cross-examination, the trial court acted properly in concluding that cross-examination improperly went beyond the scope of direct-examination, The separate search of the defendant's apartment clearly did not relate to any matters of credibility. See also, - S t a t e , 660 So.

2d 244, 251 (Fla. 1992) (prosecution called detective as a chain-of-custody witness **and** defense counsel's attempted cross-examination was clearly outside the scope of direct and thus properly limited); Echols v. State, 484 So. 2d 568, 573 (Fla. 1986) (defense counsel properly prevented from cross-examining prosecution witnesses as to matters going beyond scope of direct examination); Cruse, supra (precluding cross-examination of State's expert witness regarding examination of a criminal defendant in a different capital case was proper); Finney, supra, 660 So. 2d at 684.

B. Detective Ojeda

On direct examination, Ojeda testified as to the following: he arrived at the scene of the murder, after the victim had already been removed. (T. 745-46). He did a brief walk-through of the victim's apartment and assigned Pearce as the lead crime scene investigator, before going to the hospital to attempt to talk to the victim. Id. However, he got to the hospital after the victim had already died. (T. 746). On October 5, 1992, Ojeda contacted the defendant, at the defendant's parents' residence, and inquired if the defendant would voluntarily come to the station to talk about some burglaries. (T. 748-50). Ojeda already had a warrant for the defendant's arrest. (T. 746). When the defendant stated that he would come in the next day, Ojeda, with back-up officers,

went to the defendant's parents' residence, where they proceeded to arrest the defendant. (T. 749-52). At that time, the defendant had been on the telephone with Rochelle Baron, whom the police interviewed two days later. (T. 750-53). Ojeda also stated that he had had the opportunity to observe the defendant writing, with his right hand. (T. 754).

On cross-examination, defense counsel once again attempted to question the officer about the search of the defendant's residence, an area which the prosecution did not question Ojeda about on direct-examination. (T. 755). Once again, the prosecutor objected that the questioning was beyond the scope of direct-examination, and once again, the court sustained the objection. (T. 755-58).

Subsequently, defense counsel sought to question Ojeda about Officer Cardona's observations of the defendant, which observations allegedly formed part of the basis for the arrest warrant. (T. 765). Ojeda had not personally obtained the warrant. (T. 766). He was not an affiant to the warrant either; a completely unrelated officer, Diecidue, was the affiant providing the information which defense counsel wished to delve into. (T. 764-66). The prosecutor again objected, on the basis of the scope of direct examination, asserting that on direct examination, Ojeda had simply said that he

had a warrant prior to the arrest of the defendant; direct examination did not focus on what evidence formed the basis for that warrant. (T. 766-67) . Furthermore, the prosecutor pointed out that any questioning about information, furnished by others, which formed the basis for the arrest warrant, was not only beyond the scope of direct-examination, but constituted inadmissible hearsay **as well.** (T. **767).** The trial court agreed that such evidence would constitute inadmissible hearsay, and therefore precluded defense counsel from questioning Ojeda **as** to what information had been provided by Officer Cardona. (T. 767-68).[13] The trial court again stated that the defense could call Officer Cardona in its own case. (T. 768-9). The Appellant has not even attempted to argue, in his brief herein, that testimony as to what Officer Cardona had said would not constitute inadmissible hearsay. The Appellant has simply ignored the court's ruling based on hearsay. Neither in the trial court proceedings nor in this Court has the Appellant relied upon any recognized exception to the hearsay rule.[14]

---

[13] Defense counsel then asserted that he wanted to elicit that Officer Cardona told Ojeda that she observed the defendant coming out of the elevator; and that she had provided a description. (T. 768).

[14] Defense counsel, in the trial court, asserted that the summary of Cardona's statements somehow constituted impeachment. Not only has that argument not been asserted in this Court, but, the Appellant has never demonstrated that impeachment testimony can ever be presented in the form of inadmissible hearsay. Moreover, there is no apparent basis for the assertion that the testimony in

For reasons identical to those detailed with respect to Detective Pearce, questioning as to both the search of the defendant's residence and Officer Cardona's observations of the defendant were both subject matters beyond the scope of direct examination. There was thus no abuse of discretion in limiting cross-examination. Steinhorst, supra. Similarly, there was no proffer as to what the anticipated evidence regarding the search of the defendant's residence was going to show. Therefore, this claim is likewise unpreserved for appellate review. Lucas, supra; Finney, supra.

Additionally, as to Officer Cardona's observations, since these were out-of-court statements, being proffered to prove what Cardona saw, such statements were being proffered as to the truth of the matter asserted therein, and, as such, they were inadmissible hearsay. Sections 90.801, 90.802, Florida Statutes.

---

question had impeachment value, as it did not refer to any prior inconsistent statements made by Detective Ojeda; it did not demonstrate bias of Ojeda; it did not attack the character of Ojeda; it did not show a defect in Ojeda's ability to observe or remember; and it did not constitute proof by witnesses other than Ojeda that Ojeda's testimony was incorrect. See, section 90.608, Florida Statutes. The prosecutor observed that defense counsel appeared to be attempting to show that the description Officer Cardona gave Ojeda of the defendant when she saw him was different from a description given by other female witnesses who saw him. (T. 767). Insofar as Ojeda never testified as to any descriptions of the defendant given to him by any witnesses, this was not a subject matter for impeachment.

In the absence of any recognized exception to the hearsay rule, the trial court's ruling was correct for the second reason as well.

Lastly, defense counsel did present Detective Ojeda, as a defense witness, in the defense's case-in-chief. (T. 835, et seq.). During that questioning, defense counsel was permitted to question Ojeda about the search of the defendant's own residence. (T. 837). Defense counsel never called Detective Pearce as a witness, even though Pearce was available and even though the court expressly stated that Pearce could be called to testify. Likewise, Officer Cardona was not called as a defense witness.

In view of the foregoing, while the above matters are not preserved for appellate review, and are otherwise devoid of merit, even if any error were to be found, it must be deemed harmless. Defense counsel could have called any of the witnesses at issue as defense witnesses. One such witness was presented,[15] and questioning regarding the search of the defendant's residence was permitted. Defense counsel never attempted to call Officer Cardona during trial, even though counsel could have presented such testimony, for whatever value it might have. The defendant's fingerprint was found on the inside of the front door to the

[15] The defense called other witnesses as well.

Victim's residence. The victim's neighbors had testified that after hearing "thumping" noises from the victim's apartment and her screams, they tried to open the front door. They pushed the door open approximately an inch when the door was shut from the inside; the neighbors heard the locks being pushed into place as the door was shut. At this approximate time, the custodian of the apartment complex observed the defendant, who lived on the third floor, dropping out of the second floor balcony outside the rear of the victim's apartment, wearing dark clothing and a cap, and sweating profusely. The neighbors testified that after approximately 15 minutes of trying to reach the victim, they finally called the police. After having called the police, these neighbors saw the defendant emerge from his third floor apartment. He was now dressed in a white shirt, without a cap and very clean. The defendant asked them to call a cab, and left before the police arrived, When the police arrived, they had to utilize keys to open the front door. The rear sliding glass doors leading to the balcony outside were found open. Defense counsel's generic reference, during the trial court proceedings, to his desire to elicit Cardona's description of the defendant's appearance, after the police had arrived, does not, in any way, refer to any matter of substance which could demonstrate harmful error. Sae v. Diquili0, 491 so. 2d, 1129 (Fla. 1986).

IV.

THERE WAS NO ERROR IN THE TRIAL COURT'S FAILURE TO OBTAIN A PERSONAL WAIVER BY DEFENDANT AS TO CATEGORY TWO LESSER OFFENSES, WHERE SUCH INSTRUCTIONS WERE NOT REQUESTED AND THERE WAS NO EVIDENCE OF SUCH OFFENSES.

The trial court, in the instant case, in accordance with defense counsel's request, instructed the jury as to all of the necessarily included lesser offenses of the capital offense,[16] - second degree murder and manslaughter. (T. 793; 935-38). The Appellant, in reliance upon Harris v. State, 438 So. 2d 787 (Fla. 1983) and its progeny, Mack v. State, 537 So. 2d 109 (Fla. 1989), contends that the trial court erred in failing to instruct on all possible lesser offenses, such as the category two offense of third degree homicide, without obtaining a personal waiver from the defendant. This contention is without merit, as there is no requirement to obtain a personal waiver as to offenses which are not necessarily lesser included offenses, pursuant to Harris v. State, supra. Moreover, any error herein was harmless beyond a reasonable doubt because the omitted instructions relate to offenses which are two or more steps removed from the crime which the defendant was convicted of. See, Pope v. State, 21 Fla. L. Weekly S257, S258 (Fla. June 13, 1996); see also, Perry v. State,

---

[16] See, Florida Standard Jury Instructions in Criminal Cases, Schedule of Lesser Included Offenses.

522 So. 2d 817, 819-20 (Fla. 1988).

In Harris v. State, supra, 438 So. 2d at 796-97, in reliance upon Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed. 2d 392 (1980), this Court held that there is a "procedural right to have instructions on necessarily included lesser offenses," which right can not be abrogated absent a voluntary, knowing and intelligent waiver. Mack, supra, 537 So. 2d at 109, reaffirmed this principle and held that where defense counsel waived "all the instructions on the lesser included offenses of first-degree murder," there was error because there was no personal statement by defendant, in the record, that he wished to waive all said instructions. (emphasis added). This Court has noted that its holdings in the above cases stem from the United States Supreme Court's rationale in peck, supra, that presenting a jury with the stark choice of guilty or not guilty of the charged capital offense might lead a jury to convict on the capital offense, even though it had a reasonable doubt, because it was clear from the evidence that the accused had committed a murder and should not be totally acquitted. See Parker v. Dugger, 537 So. 2d 969, 971 (Fla. 1988). This Court, however, has also noted that the United States Supreme Court, in Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed. 2d 367 (1982), has revisited Beck and recognized that, where the capital offense was

clearly proven and the evidence would not have permitted a jury to rationally find defendant guilty of a lesser offense and not guilty of the greater capital offense, the lack of lesser included instructions does not prejudice the defendant. Parker, 537 So. 2d at 971.

In recognition of the above principles, this Court, in accordance with Fla.R.Crim.P. 3.490, and Fla.R.Crim.P. 3.510, has agreed that "[t]he judge shall not instruct on any lesser included offense as to which there is no evidence." See, Green v. State, 475 So. 2d 235, 237 (Fla. 1985). Thus, this Court has held that where a defendant is charged with first-degree murder, he is entitled to the not necessarily included lesser offense (category two offense) of third degree homicide, only if there is evidence to support such a charge. Green, 475 So. 2d at 237; Perry, 522 So. 2d at 819-20; Pope, 21 Fla. L. Weekly at S258. The offense of third-degree homicide requires the elements that the murder be committed without any design to effect death, and, during the course of an attempt to perpetrate any felony other than those required for a finding of first-degree felony murder. See, Fla. Stat. 782.04(4). Third degree homicide is thus not a necessarily included offense of either first-degree premeditated or felony murder. Green, supra; Florida Standard Jury Instructions in Criminal Cases, Schedule of

Lesser Included Offenses.

In the instant case, the trial court was thus not required to instruct on offenses which were not necessarily included lesser offenses, such as third degree homicide. The defendant has not, either in the court below or indeed in this Court, proposed any scenario where the evidence is consistent with a finding of third-degree homicide. Thus, any suggestion at this juncture that the trial court should have instructed on third-degree murder is procedurally barred. See, Steinhorst, 413 So. 2d at 338. Finally, the jury herein found the defendant guilty of the charged offense, first degree murder, which is two steps removed from third-degree murder. Pope, 21 Fla. L. Weekly at S258; Perry, 522 So. 2d at 819-20. Thus, even if there was evidence to support the instruction on third-degree homicide or other offenses, any error in failing to give instructions on such offenses is harmless beyond a reasonable doubt, in accordance with State v. Abreu, 363 So. 2d 1063 (Fla. 1978) ; see also, Pope, supra; Perry, supra.

V.

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION FOR FIRST DEGREE PREMEDITATED AND FELONY MURDER.

The Appellant contends that the evidence in the instant case was circumstantial and did not exclude a reasonable hypothesis of innocence. This contention is without merit.

The State first presented evidence that the defendant's fingerprints were present on the interior surface of the front door to the victim's residence. There was no explanation for said fingerprints. At trial the defense claimed that the defendant had been given access to use the telephone in a neighbor's residence. Such evidence, however, does not establish that the defendant was similarly given access to the victim's residence, and does not account for said fingerprints. The Appellant's reliance upon Jaramillo v. State, 412 So. 2d 257 (Fla. 1982), is unwarranted. In said case, the defendant took the stand and testified that he had known the victim's nephew for several years. Jaramillo stated that shortly before the victim's murder he had been invited to the victim's residence, the crime scene, and had handled various objects in the residence in the course of helping out. The prosecution did not rebut this testimony. Moreover, the State's case in Jaramillo consisted solely of the fingerprint evidence,

and, there were identifiable fingerprints on the wrapping of the murder weapon and binding materials on the victim's person, which did not belong to Jaramillo. In the instant case, the only identifiable latent fingerprints belonged to the victim and the defendant. The latter did not testify and did not provide any legitimate explanation for his fingerprints on the inside of the front door. It should be noted that the victim's neighbors testified that after hearing the victim's cries, they tried to fully open the front door which was not locked, as they pushed it open for approximately an inch, but that they saw and heard this door closed and locked from the inside before they could get in. Where "the State proves that the [finger] print was found in a place or on a thing not accessible to the general public, such proof, standing alone, is legally sufficient, and the jury may infer from it that the print was made at the time of the crime." Sorey v. State, 419 So. 2d 810, 813 (Fla. 3d DCA, 1982).

Moreover, the State's case herein, in addition to the fingerprints, presented eyewitness testimony that the defendant, at the approximate time of the murder and while the neighbors were blocking the front door exit from the victim's apartment, was seen exiting the back of the victim's apartment by dropping out of the second floor balcony adjacent to that of the victim's. In

corroboration, police officers testified that upon arrival at the scene within minutes of the crime, they found the sliding glass doors leading to this rear balcony were open. The testimony further reflected that the victim's balcony was only a couple of feet away from the balcony of the vacant apartment next door, which the defendant was seen dropping out.[17] Finally, the defendant's statements reflecting his consciousness of guilt, were also admitted into evidence. The testimony reflected that the victim's neighbors all thought that she had had a heart attack; they did not know that she had been stabbed because they had not been allowed to enter the apartment. They were told of the stabbing, by the police, several days after the defendant's arrest. Detective Ojeda testified that, at the time of defendant's arrest, he had only told the defendant that he was under arrest and the police wanted to talk to him in reference to a burglary. There was no mention of any stabbing. Yet, prior to his arrest, the defendant had placed a phone call to Ms. Barron, stating that the police wanted to talk to him about a stabbing. The combination of said circumstances, which were in no way explained at trial, in addition to the fingerprint evidence, thus does not establish any reasonable

[17] The officer further testified that the physical separation between these balconies was such that any person could have easily gained access to the balcony area from which the defendant was seen climbing down.

hypothesis of innocence.

The Appellant's argument, that there was no evidence of premeditation, is likewise without merit. "Premeditation does not have to be contemplated for any particular period of time before the act, and may occur at a moment before the act. [citation omitted]. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of victim is concerned. [citation omitted]". Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The evidence in the instant case reflects that the victim was beaten, as there were multiple bruises on her body and on the inside of the scalp on the back and sides of the head.[18] She was further stabbed eight (8) times. At least three of said

[18] The latter bruises were caused by blunt force to the head. While the bruise inside the back area of the scalp was consistent with the victim having fallen and hit her head on the floor, such a scenario was incompatible with, and did not account for, the bruises to the side of the head.

stabs were to the chest cavity, one of the wounds to heart was four (4) inches deep. (T. 584). The deliberate use of a knife to stab a victim multiple times in vital organs, is substantial evidence which clearly supports a finding of premeditation. Preston v. State, 444 So. 2d 939, 944 (Fla. 1984). See also Henry v. State, 574 So.2d 73 (Fla. 1991)("there was enough evidence to present a jury question on the issue of premeditation, where "the victim was killed by being stabbed thirteen times.") .

Finally, the Appellant has also argued that the underlying burglary, in support of the felony murder theory, was not proven, as there was no evidence of a forced entry, and no proof that the victim had not consented to the entry, or that she had expressly demanded that defendant exit her residence. This contention is without merit. First, Section 810.02(1), Florida Statutes (1985), defines the crime of burglary as:

> entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

"Forced entry" or breaking is not a requisite element of the Statute. State v. Hicks, 421 So. 2d 510, 511 (Fla. 1982). Moreover, "consent to entry is an affirmative defense to, rather

than an essential element of, burglary". 421 So. 2d at 510-11. As noted previously, the defendant herein did not testify or present any evidence that the victim had consented to his entry. Moreover, even if there is an initial consent and lawful entry, "[i]t is undeniably true that a person would not ordinarily tolerate another person remaining in the premises and committing a crime, and that when a victim becomes aware of the commission of a crime, the victim implicitly withdraws consent to the perpetrator's remaining in the premises." Rav v. State, 522 So. 2d 963, 966 (Fla. 3d DCA, 1988). There is no requirement that a victim expressly ask the perpetrator to leave, before it can be concluded that any license to remain on the premises was withdrawn. Id. In sum, there was ample evidence of both premeditated and felony murder in the instant case.

VI.

DEFENDANT'S CLAIMS OF PROSECUTORIAL IMPROPRIETY DURING THE PENALTY PHASE CLOSING ARGUMENT ARE UNPRESERVED AND WITHOUT MERIT.

Defendant's first claim with respect to the penalty phase is that he is entitled to resentencing because of allegedly improper remarks made during the prosecutor's summation. Specifically, Defendant argues that (1) the prosecutor urged the jury to consider nonstatutory aggravating factors; (2) the prosecutor

impermissibly informed the jurors that they were required to recommend the death penalty; (3) the prosecutor made an impermissible "message to the community" argument; (4) the prosecutor impermissibly discussed the victim's death; and (5) the prosecutor's argument improperly diminished the jury's role. Each of these claims will be addressed in turn. It will be shown that they have not been preserved for appellate review, that they are without merit, and that, in any event, any purported error would be harmless beyond a reasonable doubt.

Defendant's first sub-claim is that the prosecutor's discussion of the "catchall" mitigator constituted improper argument of nonstatutory aggravating circumstances. In closing, the prosecutor first discussed the evidence as it related to the aggravators. (T. 1089-91). He then turned to the mitigating circumstances, first addressing the only statutory circumstance proffered by the defense, that Defendant was allegedly unable to conform his conduct to the requirements of law. (T. 1091-93). The prosecutor then quoted the 'catchall" instruction,[19] and summarized the defendant's background evidence (T. 1093), which evidence was

[19] "Any other aspect of the defendant's character or record, and any other circumstance of the offense." (T. 1093). This instruction was given to the jury at the defense's request. (T. 1108).

elicited from the defendant's father on direct examination by the defense. (T. 1021-25). The prosecutor then continued, "I hate to compare people, but something you should consider is what has he done in his life--." (T. 1093). Defense counsel interrupted with 'Objection." Id. The objection was sustained, and the prosecutor summed up his argument regarding the nonstatutory mitigation:

> In terms of character and record, you can consider that mitigation, any evidence of that whatsoever, and I suggest to you there is not. And again, you as members of our jury will decide what weight you should give this.

(T. 1094). At no point did the defense either request a curative instruction or move for a mistrial. As such, this claim is not preserved for review. Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994) (to preserve issue for review after objection is sustained, counsel must either request a curative instruction or move for mistrial); Riechmann v. State, 581 so. 2d 133, 139 (Fla. 1991) (failure to move to strike, for a curative, or for mistrial after objection to prosecutorial comment was sustained, waived issue for review); Allen v. State, 662 So. 2d 323, 331 (Fla. 1995) (claim that prosecutor allegedly argued nonstatutory aggravating circumstance waived for appeal where not properly preserved below); Sochor v. State, 619 So. 2d 285, 291 (Fla. 1993) (same). Defendant thus may not now raise this claim.

Furthermore, the comments were not improper, but rather a fair comment on the evidence. The defense itself had brought out evidence that despite a caring, loving, stable upbringing and no intellectual deficits, Defendant had, from an early age, misbehaved, disobeyed his parents, drunk and used drugs, rejected various school, therapy, and drug rehabi litation programs, and generally done nothing worthwhile in his thirty years of life, preceding the murder. (T. 1021-25). The prosecutor was simply summarizing the evidence presented, and pointing out that nothing concerning Defendant's life, during or after childhood, reduced his moral culpability within the meaning of the "catchall" instruction. It should be further noted that the defense had also presented testimony from Dr. Schwartz and proposed that the defendant could be rehabilitated. The prosecutor's summary of the background evidence reminded the jury that the defendant had a history of rejecting all previous attempts at help by his parents, various schools, various drug programs, therapists, and the authorities. As such, the argument also rebutted the non-statutory mitigating factor of rehabilitation proposed by the defense. See, Mann v. State, 603 So. 2d 1141, 1143 (Fla. 1992)(argument that Defendant **was** a pedophile not nonstatutory aggravation, but proper comment on evidence presented by defense); Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995)(argument rebutting proffered defense mitigation

proper].

Finally, even assuming, arsuendo, that the comments were improper, any error would be harmless. There were four aggravating circumstances in the instant case: (1) that Defendant had a prior violent felony, wherein he assaulted a police officer and attempted to take his gun; (2) that Defendant was on community control at the time of the murder; (3) that the murder was committed during a burglary; and, (4) that this murder, during which the victim, Defendant's neighbor, was stabbed eight times, was assaulted with a blunt object, and ultimately bled to death while conscious for at least ten minutes, was heinous, atrocious, and cruel. Defendant concedes the existence of the first two aggravators, and the remaining two were amply supported by the record, as more thoroughly discussed at Point VIII, infra. The only statutory mitigation presented to the jury was the assertion by Dr. Schwartz, founded wholly on Defendant's self-serving statements, that due to crack use on the day of the murder, Defendant was unable to conform his conduct to the requirements of the law. As noted by the trial judge, this contention was contrary to the facts of the crime, which showed that Defendant slammed the apartment door in the face of Minas's rescuers and locked it multiple times, then fled through the rear, disposed of the murder weapon and his bloody clothing,

sneaked into his apartment and cleaned himself up. He then emerged clean from his apartment within twenty minutes, calmly inquired of his neighbors what the ruckus was about, and asked one of the people he had locked out of the apartment to call a cab. The only other nonstatutory mitigation ultimately argued was that Defendant could be rehabilitated[20] and that he would probably never get out of prison if sentenced to life.

Additionally, the jury was instructed that the enumerated aggravators were the only ones they could consider. (T. 1107). The trial court likewise **stated that it did not consider any** aggravating circumstance not enumerated in its sentencing order. (R. 533). The trial court found that the aggravation "remarkably" outweighed the mitigation. (R. 542-43). There is thus simply no possibility that the brief comments could have affected the sentence herein. In view of the foregoing, any alleged error was harmless beyond a reasonable doubt. Allen, 662 So. 2d at 331 (any improper argument harmless in view of strong aggravation, minimal mitigation and trial court's statement that it only considered statutory aggravating circumstances); Sochor, 619 So. 2d at 291

[20] The contention that Defendant could be rehabilitated was rebutted by his prior history of 2 juvenile and 10 adult offenses, as well as his violation of community control. (T. 1006, 1056). Furthermore, he had a history of rejecting all previous attempts at help by both his parents and the authorities. (T. 1026-28, 1058).

(improper comments harmless where when considered in their totality, they did not "pinpoint" a nonstatutory aggravator).

The Appellant next asserts that the prosecutor improperly argued that the jury was required to return a recommendation of death. First, the comments at issue were not objected to, on any grounds. There were no motions for mistrial at any time, either. As such, the Appellant's claim is not preserved for appeal and is procedurally barred. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1986); Craig v. State, 510 So. 2d 857, 964 (Fla. 1987). In any event, the instant claim is also without merit. The complained of comments are as follows:

> [W]e're not here to discuss the issue of the death penalty. Our legislature made a decision for you, like it or not, and no one wants to participate in a process where a life will be taken...
>
> It's not an easy task we're asking you to do... you promised you would follow the law, whether or not you like the law...
>
> If you find the aggravating circumstances outweigh the mitigating circumstances, there's only one recommendation you can come back with...

(T. 1095). Taken in context the prosecutor was plainly stating that the propriety of the capital punishment, in general, as opposed to in this particular case, was within the legislative domain and not the jury's; that, regardless of the jurors' individual beliefs regarding the propriety of capital punishment,

the question has been settled by the legislature, and the jurors' only duty was to apply the **law** as it exists. This **was** a proper statement of the law. See Johnson, 660 So. 2d at 646 (the propriety of capital punishment per se is not **a** proper subject for the jury's consideration).

Likewise, the prosecutor's statement that if the jurors found that the aggravators outweighed the mitigating circumstances, there **was** "only one recommendation" they could return **was also** a proper statement of the **law.** In essence, Defendant is complaining that the jurors were informed that they could not grant a jury pardon. A capital sentencing jury, however, does not have unfettered discretion. Dousan v. State, 595 So. 2d 1, 4 (Fla. 1992); see also Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 1262-63, 108 L. Ed. 2d 415 (1990) ("the State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice"). The claim that the jury was improperly led to believe that it arbitrarily "had to" impose the death penalty is thus without merit. On the contrary, the prosecutor merely informed the jurors of matters which they should not consider in their deliberations, instead focusing their attention on the circumstances of the crime and Defendant's record, and advising

them of the appropriate sentence under Florida **law** if the aggravation outweighed the mitigation. This was proper. Finally, even if any error occurred it was harmless beyond a reasonable doubt. As noted above, the mitigation was minimal and the four aggravating circumstances, 'remarkably" outweighed it, as noted by the trial judge. There is no reasonable possibility that the outcome would have been different if the brief comments at issue were not made.

The Appellant next asserts that the prosecutor's unobjected-to comments also constituted a "message to the community" argument, in violation of Campbell v. State, 21 Fla.L.Weekly S287 (Fla., June 27, 1996). This court has disapproved of 'message to the community" comments, but has not deemed same to be fundamental error. See Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985); Crump v. State, 622 So. 2d 963, 971-72 (Fla. 1993). In Campbell a specific objection was raised in the court below and the comment, in conjunction with an inflammatory evidentiary presentation and arguments thereon, led to **a** new sentencing hearing. The instant claim is not in the same posture and is thus unpreserved for appeal. Berlotti, Crump, susra. Moreover, such comments, in the absence of other circumstances, even if deemed preserved, are not so outrageous as to taint the sentence of death. Crump, 622 So. 2d

at 972. In any event, the State would note that in the instant case, there was no mention of any "message" to the community in the prosecutor's comments. The prosecutor stated:

> You sit as an advisory board to this Court. You tell the judge how you feel about this crime, and we have young people and people not so young, African Americans, Latins, people from all walks of life. You tell the court how you feel about this crime, and we are not talking about any other crime or what goes on outside of this courtroom. We are only concerned with this charge. You tell the Court what society's reaction is to this crime, and what the punishment should be.

(T. 1094) (emphasis added). As is clear from the above, the prosecutor in no way referred to anything transpiring out of court, let alone the community at large. The above comments are in accordance with this Court's precedents. See Grossman, 525 So. 2d 833, 846 (Fla. 1988) (the jury's recommendation in Florida reflects the 'conscience of the community."); see also Richardson v. State, 437 so. 2d 936, 942 (Fla. 1983) (same); McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982) (jury's recommendation represents 'the judgment of the community as to whether the death sentence is appropriate..."); Odom v. State, 403 so. 2d 936, 942 (Fla. 1981) (same). Finally, given the afore-cited balance of the aggravating and mitigating evidence, and the overall argument with which the jury was presented, it cannot reasonably be said that absent the above-cited comments the outcome of the proceedings would be different. As such any purported error would be harmless.

Defendant next asserts that reversal is required because the prosecutor stated that the victim was not afforded the protection of the law before she was killed. (B. 73, T. 1095). Again, this claim is unpreserved in that Defendant did not object to the comment in the court below. Ferguson, Craig, supra. Furthermore, even assuming that the claim was properly before the court, the comment, although not ideal, was brief, and not made a feature of the argument. The bulk of the prosecutor's argument was devoted to the aggravating and mitigating factors and the weight which should be ascribed to them. The entirety of the argument, combined with the afore-cited balance of the aggravating and mitigating evidence herein, compel the conclusion that any error is harmless beyond a reasonable doubt. Jackson, 522 So. 2d at 809 (similar comments held not sufficiently egregious to warrant a new sentencing).

Defendant's final contention is that the jury's role was diminished because the prosecutor informed the jury that its sentence was advisory.[21] Again, there was no objection to the comments at issue and this claim is unpreserved. Sochor, 619 So. 2d at 291 (alleged Caldwell error must be raised below to be considered on appeal); Ferguson, Craig, Supra. Further, even were

[21] The word appears as "adversary" in the transcript. Read in context, this is obviously a typographical error. (T. 1094).

it properly before the court, this claim is without merit. Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), upon which Defendant relies, 'is relevant only to certain types of comment -- those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Darden v. Wainwright, 477 U.S. 168, 184, n. 15, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). Here, the prosecutor did comment that the ultimate decision regarding Defendant's sentence would be in the hands of the judge. As noted by the Appellant, however, this is a proper statement of Florida law. Combs v. State, 525 So. 2d 853 (Fla. 1988); Grossman v. State, 525 So. 2d 833, 839 (Fla. 1988). Moreover the prosecutor's statements herein did not create the misleading impression condemned in Caldwell. The State's entire argument, rather than diminishing the jury's role, emphasized its importance:

> The importance of your role, the seriousness was probably fleeting. It was only once the Judge read to you why we're here, and the importance of this case that the enormous ressonsibility that you have assumed became evident.
>
> * * *
>
> You will make a decision this evening. You are the finders of the facts, and you must abide by your oath. You reached a verdict in this case. You said this defendant, Jose Jimenez, is responsible for those events which occurred on the 2nd of October, 1992.

> The next question you have to answer, and perhaps more difficult, is what is the appropriate punishment for this crime?
>
> * * *
>
> [W]e're here for you to determine or help the judge determine what the appropriate punishment should be for that crime.
>
> * * *
>
> The Court will weigh your recommendation carefully before coming to a final decision, so it's not something to be taken lightly at all.
>
> * * *
>
> You know there is nothing easy about this job for you at all. This time you spend here, particularly this evening, will probably represent the hardest decision, the most soul-searching time of your life.

(T. 1086-89, 1094) (emphasis supplied). As such, the comments herein did not serve to diminish the jury's sense of responsibility, but emphasized the gravity of their duties. This claim is thus also procedurally barred and without merit.

VII.

DEFENDANT'S SENTENCE IS PROPORTIONAL.

The Defendant argues that his sentence is disproportionate. This claim is wholly without merit. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwrisht, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, U.S. , 111 S.Ct. 1024, 112 L.Ed. 2d 1106 (1991). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." State v. Henry, 456 So. 2d 466, 469 (Fla. 1984).

The trial court found the existence of four aggravating circumstances: (1) that Defendant had been convicted of a prior violent felony, resisting arrest with violence, which the court gave moderate weight (R. 530); (2) that the murder occurred during a burglary, which the court gave great weight (R. 530); (3) that Defendant was on community control at the time of the murder, which the court gave great weight (R. 531); and (4) that the murder was

heinous, atrocious and cruel, which the court also gave great weight. (R. 531-33). The court analyzed the proffered mitigation and reached the following conclusions: (1) that the proffered statutory mitigation, expert testimony that the defendant was unable to conform his conduct to the requirements of law, was contrary to the facts of the crimes herein, and entitled to minimal weight (R. 534-39); and, (2) that the proposed nonstatutory mitigation of defendant's potential for rehabilitation was entitled to very little weight, 'as the defendant has shown great resistance to rehabilitation". (R. 540-41). The fact that Defendant would probably never be released if he were sentenced to life imprisonment was also considered, and given great weight. (R. 541-42).

A comparison of this crime and its circumstances to other cases reveals that the sentence of death is warranted here. See, e.g., Johnson v. State, 660 So. 2d 637 (Fla. 1995) (Sentence of death upheld for the stabbing death of an elderly female victim inside her home during a burglary. Aggravating factors were prior violent felony, pecuniary gain, and, heinous, atrocious and cruel. Mitigation consisted of mental pressure not reaching the statutory level, potential for rehabilitation, deprived background, good provider, excellent employment history, cooperation with the

police, age, and lack of a significant history of criminal activity.); Davis v. State, 648 So. 2d 107 (Fla. 1992) (Sentence of death upheld for stabbing death of an elderly female victim inside her home, during burglary. Aggravating factors were heinous, atrocious and cruel, and, commission of murder during course of burglary. Mitigation consisted of age, schooling, family background, employment, education and health); Allen v. State, 662 So. 2d 323 (Fla. 1995) (Sentence of death upheld for stabbing death of elderly female victim in her home, Aggravating factors of 1) Heinous, atrocious and cruel; 2) under sentence of imprisonment; and 3) pecuniary gain. Mitigation consisted of family background and military service); Breedlove v. State, 413 So. 2d 1 (Fla. 1982) (Sentence of death upheld for stabbing death of victim inside his home. Three aggravating factors of prior conviction of violent felony, committed during a burglary, and, heinous, atrocious or cruel. There was conflicting evidence of impaired mental capacity which did not rise to a mitigating level,).

VIII.

THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED THE EVIDENCE PRESENTED DURING THE PENALTY PHASE.

The Appellant argues that the sentence herein is flawed because the court should not have found that this crime was

heinous, atrocious, or cruel (HAC), or that it **was** committed in the course of a burglary. The Appellant further faults the weight the trial court gave to the mitigating circumstances. These contentions are contrary to the law and the record.

A. The evidence supported the aggravators found by the trial court.

Defendant first asserts that the trial court erred in finding that the murder occurred during the course of a burglary. However, the jury convicted Defendant of the burglary of Minas's apartment during the guilt phase. The conviction was admitted into evidence. (T. 1011). The conviction was proper as previously noted in Argument V herein. As such the trial court properly found this aggravating circumstance to exist.

Defendant also asserts that the HAC aggravator is without evidentiary support. The trial court made the following findings regarding the WAC aggravator:

> The State has proven beyond and to the exclusion of every reasonable doubt that the murder of Phyllis Minas by the defendant was especially heinous, atrocious and cruel. Ms. Minas, a 63 year old woman, was beaten and stabbed to death in her own home. The medical examiner testified that she had fresh bruises on her right arm and shoulder, the back of her hand, her left hip, the right side of her chest and on her back. She had multiple abrasions which Dr. Wetli indicated were inflicted when she was moved or dragged. She was stabbed eight separate times, and

sustained several other superficial cuts about the neck. The two stab wounds to the neck penetrated soft tissue, but were not lethal and were inflicted while Ms. Minas was alive. A third stab wound was found on the left side of her body and was approximately four inches deep. Two other stab wounds were inflicted from a frontal assault and were both to the chest, entering the heart and were lethal wounds. These two wounds to the heart caused massive internal bleeding. Ms. Minas was alive and conscious during the entire attack which was for the most part with the defendant facing her. What alerted her friends were her cries of, "Oh my God, Oh my God," as she was being attacked by the defendant. When Dr. Wetli removed Ms. Minas's scalp, he found a large bruise on the back of her head and other bruises on the side of her head. Dr. Wetli testified that while it was possible that the bruise to the back of the head could have been inflicted when she fell to the floor, the side bruises were not the result of a fall and were blunt trauma wounds inflicted by a blunt instrument, a fist or being slammed up against a wall. The court takes particular note in the fact that when rescue arrived several minutes after the defendant had inflicted the wounds, and had left Ms. Minas to bleed to death on her kitchen floor, she was still alive and coherent enough to indicate when asked that her attacker was no longer in her apartment. This court finds the defendant's conduct to have been unnecessarily torturous to this small elderly woman. She sustained no defensive wounds, which indicates she put up essentially no resistance, and yet, she was beaten and stabbed time after time, eight separate times. The defendant then left her to die alone in pain and in fear on the floor of her home. When her friends from the building came to render aid the defendant slammed the door in their faces and locked the door with two or three separate locks so they could not get to her. As Phyllis Minas lay bleeding to death on her kitchen floor she most likely could hear her friends calling to her outside her window and was helpless to respond. It is certainly reasonable to infer that during this brutal and torturous attack, after being stabbed in the neck, in the side, and several times in the chest and abdomen, that Ms. Minas must have been aware of what was happening to her, and must have known she was going to die. The killing was not done quickly or painlessly. She lingered at least

> ten minutes while she bled to death. She suffered in pain and in fear, all the while feeling helpless and alone, knowing that help was outside her door, but could not get in and she could not even call out to them. This court finds the existence of this aggravator and based upon the above facts gives it great weight.

(R. 531-533) . The trial court's conclusions are amply supported by the evidence,[22] and fully support the finding that this murder was heinous, atrocious, or cruel. Allen v. Stat&, 662 So. 2d 323, 330-31 (Fla. 1995) (HAC supported where older woman was stabbed in neck several times in her own home and left to bleed to death, and could have remained conscious for 15 minutes); Davis v. State, 604 So. 2d 794, 797 (Fla. 1992) (HAC upheld where older woman suffered multiple stab wounds and blunt trauma while in her own home and it was 'unlikely" that she was rendered immediately unconscious); Johnston v. State, 497 So. 2d 863, 871 (Fla. 1986) (evidence that older woman was stabbed, at home, three times in her neck and took three to five minutes to die after knife severed jugular found to support HAC aggravator); Breedlove v. State, 413 So. 2d 1 (Fla. 1982) (single fatal stab wound sufficient to support HAC where victim not die immediately and was attacked in his own home).

Defendant's reliance upon McKinney v. State, 579 So. 2d 80 (Fla. 1991), is misplaced. In that case the victim was shot

---

[22] See Statement of Facts, at pp. 1-9.

Several times. The Court observed that ordinarily, a murder by shooting will not be found to be heinous, atrocious, or cruel. Such is patently not the case here. See, Geralds v. State, 674 So. 2d 96, 103 n.12 (Fla. 1996) (rejecting defendant's contention that stabbing during home burglary did not support HAC, and noting that case relied upon by the defendant involved gunshot wound and was therefore not controlling).

Finally, even if either of these aggravating factors were erroneously found, the error would be harmless. Three aggravators would remain in contrast to minimal mitigation, as discussed below.

B. **The trial court properly weighed the mitigating circumstances.**

Defendant also argues, that the trial court failed to give the proposed mitigating circumstance, that Defendant was unable to conform his conduct to the requirements of the law, sufficient weight. This contention is wholly without merit.

The trial court thoroughly evaluated this proffered mitigation. (R. 534-39). The court first noted that the proffered mitigation was premised on the theory that Defendant was under the influence of cocaine at the time of the murder. (R. **535).**

However, as the court noted, the only evidence of such was Defendant's own out-of-court statements made to Dr. Schwartz shortly before trial. As noted by the judge, such testimony is neither reliable nor binding upon a fact-finder:

> While the Court is convinced that the Defendant was a drug abuser, I am mindful that the issue is not whether the Defendant has used drugs, but whether he was under the influence of drugs at the time he beat and stabbed Phyllis Minas to death and whether at the time he committed these acts his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
>
> The only evidence of the Defendant being under the influence of drugs when he murdered Ms. Minas were the hearsay statements the Defendant made to Dr. Schwartz in anticipation of Dr. Schwartz's testimony to the jury during the sentencing phase. The Defendant was convicted of First Degree Murder, etc. on October 6, 1994 - some two years after having committed these crimes and Dr. Schwartz's first interview with the Defendant was just before trial on September 27, 1994. While case law clearly requires proof of ingestion other than the Defendant's hearsay statements to an expert before these hearsay statements may be introduced,[Footnote 11 I permitted this testimony because there was some evidence from which the jury and the court could infer that the defendant was under the influence of drugs when he committed these offenses and this court wished to give the defendant the opportunity to present all mitigation evidence which could **affect his sentence.**
>
> [Footnote 1] Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Cirack v. State, 201 So. 2d 706 (Fla. 1967). (R. 535).

The trial court's analysis did not, however, end with the above examination of the unreliable basis for the expert's opinion. The

trial judge also exhaustively detailed the facts of the crime, and found the defendant's actions were inconsistent with the defense expert's opinion of impairment:

> While it is conceivable that the Defendant smoked crack cocaine on October 2, 1992, his actions at the time he committed the murder and shortly afterwards refute the conclusion that the Defendant was under the influence of drugs at the time or if under the influence, that he was impaired to any significant degree. During his attack upon Ms. Minas, the Defendant heard the neighbors trying to enter Ms. Minas's apartment through the unlocked front door. The Defendant promptly slammed the door shut, locked the locks on the door and fled the apartment by exiting onto the bedroom balcony, crossing over to a neighbor's balcony and then dropping to the ground. In the Defendant's haste to get out of the apartment before one of the neighbors could get in, he still had the presence of mind to take the murder weapon with him and to conceal it from view when he dropped from the balcony. The Defendant continued to use clear and rational thinking after he left the apartment. Instead of taking the stairs up to his apartment on the third floor, he used the elevator which was at the other end of the walkway. The stairway was close to Ms. Minas's apartment and he had heard her neighbors outside her kitchen window calling out to her. Clearly, he did not want to be seen by these ladies as he made his way back to his apartment. When the Defendant got back to his own apartment, he immediately changed his clothes and cleaned himself up, knowing that he had been seen moments before by a man (Mr. Merriwether) who was near the balcony he had dropped from. He then went out into the hallway to talk to the neighbors to find out what they had seen. Ms. Torenco and Lucrecia Ponce (Ms. Minas's neighbors) testified that the Defendant was no longer sweaty, that he was clean and neat and that he appeared calm. When he asked to use the phone to call a taxi, they let him in their apartment. It is clear from this evidence that the Defendant certainly appreciated the criminality of his actions. He knew right from wrong. He used sound judgment and quick thinking to cover his tracks and to avoid detection. Within a span of ten to fifteen minutes he changed his

> clothes, cleaned himself up and was able to compose himself and to act completely normal while conversing with those ladies. He was no longer sweating. They did not notice anything strange about his eyes.
>
> When Mr. Merriwether saw the defendant drop off the balcony just after the Defendant had stabbed Ms. Minas, the Defendant was sweaty and his eyes were very wide. Based upon those observations, Mr. Merriwether -believed the Defendant looked like he was high on something. However, based upon the Defendant's other actions, it is even more reasonable to conclude that the Defendant became sweaty during his attack upon Ms. Minas and his wide-eyed expression **was** simply a reaction to dropping from the balcony after having murdered an elderly woman and suddenly being confronted by a man who witnessed this flight. (R. 536-8).

In light of the hearsay basis for the expert opinion and the inconsistency of the defendant's actions with the expert's opinion, the trial judge stated that, 'the Court is unconvinced that the Defendant was under the influence of drugs to any appreciable degree when he committed the killing." (R. 538). Nonetheless, the court did not stop at this juncture and analyzed the potential degree of incapacity, even if the defendant was under the influence of drugs at the time of the crime:

> The Defendant's father testified that when the Defendant **was** using drugs, he would get wild and would not listen to anyone and that he had a bad temper. Dr. Schwartz testified that the Defendant had a significant drug problem and that crack cocaine is quite addictive. He testified that when the effects of the drug wear off, the user becomes irritable, agitated and depressed. Dr. Schwartz stated that the Defendant was quite "impulsive", that he doesn't consider the consequences of his acts and the drugs make him more aggressive. During cross

> examination, he testified that the Defendant knew right from wrong, was able to conform his behavior to the requirements of the **law** and if the Defendant was under the influence of crack he would tend to be more daring but the crack would not effect his ability to know right from wrong or to conform his actions to the law. It was not until his lawyer advised him of the wording of this mitigator that the Doctor then modified his opinion by saying that while the Defendant could appreciate right from wrong and conform his actions to the law, his ability to do so would be "substantially impaired".
>
> It is after careful consideration of the above factors, that this Court finds that even if the Defendant was under the influence of drugs when he committed those acts, he was still able to think rationally and react quickly. It is also reasonable to conclude that the Defendant's desire for the high these drugs induced was the motivation behind his criminal conduct - that he was willing to commit crimes to obtain money to buy drugs so he could obtain this "high". While this desired high might have been the motivation behind his conduct, this Court cannot say that the defendant's capacity to conform this conduct to the requirements of the law was substantially impaired. (R. 538-39) .

In an abundance of caution, the trial judge, nonetheless, "gave this mitigator minimal weight". (R. 538).

As seen above, no error has been demonstrated. The weight to be ascribed to a particular mitigating factor is a matter for the jury and judge to determine. Jones v. State, 648 So. 2d 669, 680 (Fla. 1994) ; Slawson v. State, 619 So. 2d 255, 260 (Fla. 1993). Here, in view of the above detailed lack of a reliable factual basis supporting the Defendant's claim that he was high at the time

of the murder, the judge was well within her discretion to have rejected the proffered mitigator in its entirety. Holsworth, Cirach, supra. See also, Walls v. State, 641 So. 2d 381, 390-91 (Fla. 1994) ("certain kinds of opinion testimony . . . are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve"). As such the trial court could properly have found that Defendant's purported drug use at the time of the crime, and allegedly resulting mental impairment, was not established as mitigation. Sochor v. State, 619 So. 2d 285, 293 (Fla. 1993) (whether intoxication establishes a mitigating circumstance is within the trial court's discretion); Duncan v. State, 619 So. 2d 279, 283-84 (Fla. 1993) (intoxication not established as mitigation where no witnesses observed defendant to be intoxicated at time of crime; defendant's own self-serving statements insufficient); Johnson v. State, 608 So. 2d 4, 12 (Fla. 1992) (drug use on night of crime properly rejected as not mitigating where evidence showed careful and purposeful conduct on part of defendant); Preston v. State, 607 So. 2d 404, 412 (Fla. 1992) (trial court properly rejected drug use as nonstatutory

mitigation where no evidence defendant used drugs on night of murder); Ponticelli v. State, 593 so. 2d 483, 491 (Fla. 1991) (claims of drug use properly rejected as mitigating where there was no evidence of drug use on night of murder and Defendant's action were inconsistent with impairment). Given that the judge would have been well within her rights to have rejected this alleged mitigation altogether, plainly there was no abuse of discretion in giving it minimal weight. Jones; Slawson; Walls, supra.

Finally, even if the court erred in not giving the mitigation more weight, any error would be harmless beyond a reasonable doubt. In addition to the mitigation at issue, which the court gave minimal weight, the court found only the proposed nonstatutory mitigation that Defendant could be rehabilitated, and gave it very little weight "as the defendant has shown great resistance to rehabilitation." (R. 540-41). This conclusion is well-supported by the fact that all of the repeated previous attempts by both parents and the "system" had failed to alter Defendant's behavior. The last factor, the probability that the defendant would probably never be released from prison, despite the great weight given by the trial court, is not even the proper subject of mitigation. See, Campbell v. State, 21 Fla. L. Weekly S287, S288 (Fla. June

27, 1996); Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990). In contrast the trial court found four substantial aggravators: (1) that Defendant had been convicted of a prior violent felony, resisting arrest with violence, which the court gave moderate weight (R. 530); (2) that the murder occurred during a burglary, which the court gave great weight (R. 530); (3) that Defendant was on community control at the time of the murder, which the court gave great weight (R. 531); and (4) that the murder was heinous, atrocious and cruel, which the court also gave great weight, (R. 531-33). The trial court concluded that the aggravation "remarkably outweigh[ed]" any mitigating circumstances present. The trial court further stated that even if it had given the lack-of- capacity-to-conform mitigator "great weight," it would still have "unequivocally" found that the mitigating circumstances were outweighed by the aggravating circumstances. (R. 542). Under these circumstances any error would be harmless. Wickham v. State, 593 So. 2d 191 (Fla. 1991) (in light of very strong case of aggravation any error in weighing of mitigators was harmless beyond a reasonable doubt).

IX

DEFENDANT'S CLAIMS REGARDING THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY ARE PROCEDURALLY BARRED AND WITHOUT MERIT.

In his final claim, Defendant urges the Court to consider the questions of whether modern capital jurisprudence contains a fundamental paradox and whether inordinate delay between sentencing and execution renders that system unconstitutional. These contentions were not raised below and may not now be raised for the first time on appeal. Furthermore, even had the claims been properly preserved for appellate review, they would be without merit. The only support cited for his claims is two dissenting opinions in the United States Supreme Court. The majority of the members of that body obviously have found these claims to be without merit. Moreover, the constitutionality of the Florida statute on capital punishment has been repeatedly upheld by this Court. See, e.g., Thompson v. State, 619 So. 2d 261, 267 (Fla. 1994) ; Patten v. State, 598 So. 2d 60,63 (Fla. 1992).

CONCLUSION

Based on the foregoing, the convictions and sentence of death should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

FARIBA N. KOMEILY
Assistant Attorney General
Florida Bar No. 0375934
Office of the Attorney General
Rivergate **Plaza,** Suite 950
444 Brickell Avenue
Miami, Florida **33131**
(305) **377-5441**
FAX (305) 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF** OF **APPELLEE** was furnished by prepaid first class mail to **J. RAFAEL RODRIGUEZ, ESQ.,** 6367 Bird Road, Miami, Florida 33155 on this 16 day of December, 1996.

FARIBA N. KOMEILY
Assistant Attorney General

/blm