IN THE SUPREME COURT OF FLORIDA

CASE NO. **87,783**

THOMAS KNIGHT,

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

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A. State's Case In Chief

Mr. Dan Gill, now retired, testified that on July 17, 1974, he was the president of the City National Bank, in downtown Miami. (T. 2201-2205). At approximately 9:45 A.M. that day, he saw one of the victims, Mr. Sidney Gans, standing outside his office at the bank. Mr. Gans was a personal friend. His business, Sidney Bag and Paper, had a business account at the bank. Moreover, there was a personal relationship with the bank as Mr. Gans' son was married to the daughter of the bank's chairman. (T. 2205-07). Mr. Gans, who was an "outdoorsman" type, always with a tan, appeared "ashen white". Id. Mr. Gill, immediately sensed something was wrong. Id.

The victim had explained that upon arrival at his company that day, a black male with a "submachine gun" had emerged from the bushes, told him to stay in the car, gotten into the back seat, and told him to drive to Gans' home in Miami Beach. (T. 2212-23). Mr. Gans had been in the habit of employing recent parolees, but had not recognized his abductor. Id. Upon arrival at his house, Mr. Gans had been instructed to honk the horn to get his wife out of the house. Id. Mrs. Gans had then come to the car, and had been instructed to get into the passenger seat by the abductor after she had been shown the weapon. Id. They had then driven back to Miami, where the abductor had instructed Mr. Gans to pull into an alley and stop. Id. At this juncture, the abductor had told Mr. Gans that he wanted $50,000 ransom. Mr. Gans had then come to the bank. Id.

Upon arrival at the bank, the abductor had instructed Mr. Gans to go in, obtain the

ransom, and be back within "20 minutes". Mrs. Gans had been told to move over and drive the car. Id. In addition to these details of abduction, Mr. Gans also gave Gill a description of his yellow Mercedes, which they had been driving.

Mr. Gill then suggested that he call the FBI for assistance, because he had a direct line to the FBI office in Miami. The victim had agreed, and FBI agents had arrived at the bank within 15 minutes. In the meantime, Mr. Gill had instructed the bank tellers to gather the ransom money, which was put in a paper bag, after taking down all the bills' serial numbers. The victim had to sign a check in the amount of the ransom money to the bank. Id.

Mr. Gans was concerned about the time, worried about his wife's welfare, and asked to go outside to check on her. At Mr. Gill's suggestion, Mr. Gans was given a promissory note to be signed by Mrs. Gans, in order to explain the delay to the abductor. The money was finally collected and Mr. Gans left the bank with it at approximately 10:40 A.M., a little less than an hour after his arrival. Id.

Mr. Nelson testified that he was an FBI special agent, involved in all aspects of the surveillance from the bank until the defendant's arrest in South Dade. (T. 2025 et seq). Pursuant to FBI radio transmissions at approximately 10:00 A.M., he and another agent arrived at City National Bank, in an unmarked vehicle, and parked on the west side of the bank. (T. 2029-32). Other agents were inside the bank, and Nelson had already received a description of the Gans' vehicle. Id. He observed the Mercedes pull up and park outside the bank. There were two individuals inside the Mercedes. Mrs. Gans was driving the vehicle and a black male was in the right rear seat of the vehicle. The black male had a rifle across his lap. (T. 2046). Nelson then saw Mr. Gans emerge from the bank carrying the paper bag containing the

ransom.. (T. 2066). Mr. Gans then got into the front passenger seat of the Mercedes. The vehicle pulled out of the parking lot, and Nelson and other agents followed.

The Mercedes made a series of right and left hand turns from the bank in downtown Miami to the expressway. It went through the toll booth and proceeded south to the end of the expressway. The Mercedes then exited and made a series of turns, going "southwest, south and west, south and west" until it arrived in an undeveloped area with tall trees, where it stopped. (T. 2090). Nelson lost sight of the Mercedes at this juncture, but his radio transmission from other agents reflected that all three occupants had exited the Mercedes for approximately two to three minutes, gotten back in the vehicle and proceeded driving south again. Nelson regained sight of the Mercedes, now driving south. The Mercedes did not have any damage to its windows or windshield at this time. (T. 2046-7, 2050).

The Mercedes then proceeded driving on the ridge of a canal, with excavation piles of dirt and tall trees, at which point Nelson again lost sight of the Mercedes. (T. 2046-7, 2094-5). Nelson and another agent exited their vehicle, and climbed one of the dirt mounds for a better vantage view. Id. They saw and spoke with Metro-Dade homicide detectives who were also in the area, in an unmarked vehicle. The agents and detectives then split up to look for the Mercedes. At this juncture, Nelson received radio transmission from the aircraft above that there were two individuals shot and a black male had been seen running into the woods. (T. 2054, 2101-21).

Nelson stated that the surveillance from the bank to where the Mercedes had come to its final stopping point had lasted approximately an hour, from 10:40 to 11:35 A.M., for a distance of approximately twenty (20) miles. (T. 2101-2). Initially, five FBI vehicles had been

involved; approximately a total of 10 Metro-Dade and FBI vehicles were involved in following the Gans vehicle by the end of the surveillance. All of these vehicles were unmarked, and none of the officers were in uniform. (T. 2076-7, 2083-4, 2097). There was probably one "fixed wing aircraft" (STOL) in the air. (T. 2081). A helicopter later became involved, in the vicinity where the victims' bodies were found. Id.

Agent Nelson had, at times, been following from a distance of only thirty-five feet, but had been more than a block away at other times. Nelson testified that defendant was not aware of being followed by the police throughout the surveillance. (T. 2087-88). He based this on his many years in conducting such surveillances, the speed of the Gans' vehicle, the manner in which it was driven, and the defendant's observable body movements and gestures in the back of the vehicle. Id.

Nelson remained on the scene after the defendant had fled into the surrounding woods. He and other officers set up a command post, at which juncture, marked police cars and uniformed police officers joined a search for the defendant. (T. 2085). Approximately 20-30 officers were involved in this search, which included sending canine units into the area, spraying tear gas into the underbrush and conducting "man to man ground sweeps". (T. 2057). The defendant, however, was able to evade the police from approximately 11:35 A.M. until 4:30 P.M., when a Metro-Dade officer found him hiding in what Nelson described as a "fox hole". (T. 2063-8). The defendant had dug out a shallow hole in the ground, with tall spear grass covering the hole. After the defendant was taken out of the hole, Nelson saw a rifle and the paper bag, which bag he had earlier seen Mr. Gans carrying out of the bank, inside the fox hole. Id. Agent Nelson testified that he recognized the defendant, when the latter was taken out of

the fox hole, as the man he had been following from the bank to the scene of the shooting; subsequently he also made a positive identification of the defendant at a pretrial lineup. (T. 2062-3, 2067).

Lieutenant Kubic testified that he had been the officer who finally captured the defendant. (T. 2103, 2109-31). The general area where the victims and defendant were found was described as being "really boondocks" at the time, "undeveloped", but bulldozed to some degree, with mounds of coral rock, canals, "still kind of wild". (T. 2112-13). A command post, consisting mainly of police vehicles, had been set up near a wooded area which was being kept under constant aerial surveillance. The aircraft had seen the defendant run into the woods and had not seen him come out. (T. 2119). Kubic had delivered tear gas, which had been sprayed by "pepper foggers" over the wooded area, in a big fog. The temperature on that day was 90 degrees, with the humidity close to the temperature. The tear gas had its desired effect of causing severe irritation to the skin and eyes, even on the officers. (T. 2116-17). The defendant, however, had not emerged. Kubic and seven other officers thus volunteered to do a ground sweep in the wooded area. (T. 2120, 2124). The officers were unsuccessful on the first sweep; upon returning and switching positions, however, Kubic observed a mound of grass and dirt which did not appear natural. (T. 2124-30). He went closer and saw part of a foot, which he first attributed to a dead body having been dumped there. Upon closer examination, however, he discovered it was a live body. Id. Kubic, pointed his pistol to the defendant's head and ordered him to stand up. The defendant stood up, stating: "please don't kill me". Id. The hole in which the defendant was hiding was approximately 40 feet away from the command post set up by the police. Kubic also saw the defendant's rifle and paper bag, which the

defendant had been lying over. Id.

The original 1974 crime scene technician, now retired, Mr. Zahn, introduced his crime scene sketches, photos and evidence gathered in 1974. (T. 1938 et seq.) Sidney Bag Company, from where Mr. Gans was initially kidnaped, in northwest Dade County. (T. 1944-47). Mr. Gans' space in the company's parking lot was marked with his name, and a hat with hairs matching the defendant's was found near it. Id. The Gans' home, from which Mrs. Gans was subsequently kidnaped, was located in Bay Harbor Islands, Dade County. (T. 1952-3). City National Bank, from where the ransom money was collected, was in downtown Miami. (T. 1953-55). The Gans' bodies and their Mercedes were found in Southwestern Dade County. This area, at the time, was primarily undeveloped, with some construction, but no one living within several blocks in any direction. (T. 1956-60). The Gans' Mercedes was found on the north side of a canal in the area. Id. The road leading to the area was "gravel type", with a gate made of pipes, so as to discourage people from traveling on it. Id. The area surrounding the canal had tall grass and trees, interspersed with high piles of dirt and rocks, with very dense underbrush on them. Id. A vehicle could drive along the edge of the canal, although there was no roadway. (T. 1960-65).

The Gans' Mercedes, when found, had a bullet hole through the front windshield. (T. 1965-8). The front driver's seat window was also shattered from a bullet's impact. Id. There was blood on the front and rear seats and floor. Id. Mrs. Gans was found dead, behind the steering wheel. The front and rear passenger doors were open. Id. There was a trail of blood on the ground, starting from the front passenger door to the rear of the vehicle, proceeding to an area with underbrush or foliage, and then into some bushes. (T. 1078-82). Mr. Gans' body

was found in these bushes. Id. The vegetation had been matted down as though he had been dragged there. Id. Mr. Gans' pants were "bunched around the crotch", also indicating that he had been dragged into vegetation. Id.

Mr. Zahn also found a .30 caliber carbine casing on the right side of the rear seat. (T. 1966-8). An unfired .30 caliber projectile was found on the ground outside the vehicle, next to the left rear fender. (T. 1972-3). The vehicle's trunk was also open. (T. 1965-6). Zahn recovered a latent fingerprint of value from the trunk's lid. (T. 1976-7). The fingerprint was that of the defendant.

The defendant had been found in the same area as the vehicle, near a big concrete pipe, where the grass had grown eight (8) to ten (10) feet high. (T. 1983-4). In this grassy area, which had been matted and dug, Zahn also recovered a bag containing the $50,000 ransom money. (T. 1990). He additionally collected a .30 caliber rifle from the same area; the weapon had one casing inside, along with 27 live rounds. (T. 1990, 1972-3).

Technician Hart, the original 1974 firearm examiner, testified that the weapon collected from underneath the defendant was an "M-1 carbine", a "short rifle" approximately 22 inches in overall length. (T. 1995-2000). The weapon, a "paratrooper carbine model", was originally a semi automatic weapon, with a telescoping stock, enabling it to be fired from the shoulder. Without using the stock, it could also be fired from the hip or any other position. Id. The original barrel on the weapon, as furnished by the factory, was 19 inches long, but the barrel had been sawed off to approximately 12 inches in length; the weapon could not be legally sold in that condition. Id. The word "trouble" had been written on both sides of the weapon. (T. 2012-14). The shortened barrel meant that the weapon would have to be cycled manually, "racked",

every time before firing. (T. 2001, 2008). There were two magazines inside the rifle. These had been manually attached together for more efficient use of the ammunition. (T. 2002).

The casing found on the rear seat of the Gans' vehicle was fired from the above rifle. (T. 2004-5). Another casing, which remained inside the weapon, meant that it also had been fired from the rifle. Id. The live round on the ground outside the vehicle also had enough markings to determine that it had been cycled through the rifle. (T. 2003). Bullet fragments recovered from Mr. Gans' body were "probably fired from the weapon, although no conclusive determination could be made due to the small size of the fragments. (T. 2006). The location of the casings and the live round was consistent with the weapon having been "racked" outside the vehicle to make it ready to fire, ejecting the live round. It had then been fired inside the vehicle and "racked", ejecting one casing on the back seat, and fired again without the "racking", such that the casing was left in the weapon. (T. 2007-10).

Dr. Davis, the original medical examiner, who had gone to the homicide scene and conducted autopsies on the victims, also testified. (T. 2152, 2156-63). Mrs. Gans, who had been 60 years old at the time, had been killed instantly with a bullet which had entered the back right side of the neck and exited her left cheek. (T. 2166-72, 2188). The path and location of the injuries were consistent with her being seated behind the steering wheel with one arm extended, when shot from behind by a shooter in the right rear passenger seat. Mr. Gans, who had been 64 years old at the time, 6 feet 2 inches tall and weighing 190 pounds, had been shot in the lower right side of the face, with the bullet having exited his jaw. (T. 2175-81, 2188-9). His wound had stippling or gunpowder marks burnt into the flesh, reflecting that he had been shot at point blank range. The path of his injury and blood splattering were consistent with his

having been seated in the front passenger seat, and having started to turn slightly to the right, with his face perpendicular to the shooter's position, when shot. Id. A trail of blood from the passenger seat to nearby vegetation at the rear of the vehicle, in addition to the condition of Mr. Gans' clothing, reflected that he had been dragged out and away from the vehicle after having been shot. (T. 2187-88, 2199-2200).

Detective Smith testified that he was a member of the cold-case squad, assigned to the instant case in 1989, because the lead detective, Ojeda, was no longer in law enforcement. (T. 2345-9). Smith's function was to reinvestigate and re-evaluate the evidence, due to the advances in evidence processing techniques, and, because some of the witnesses were physically missing, dead, or otherwise unavailable. Id, He thus, in fact, reviewed the testimony and reports of those witnesses who were "no longer available", in the instant case. (T. 2349).

Smith first recounted the testimony of the victims' company's comptroller, Mr. Marinek, who was deceased at the time of the resentencing. (T. 2351-71). On the day of the murders, Mr. Marinek had found a hat near victim Gans' parking space at the company; the hat was similar to that which he had previously seen the defendant wear. Id. The defendant was employed by the victim's company as a "bundler" or "packer", and earned approximately a little more than $6 per hour. On the day of the murder, there had been a telephone call to the company reporting the defendant sick and unavailable for work that day. A physical check of the company that day also showed that the defendant was absent. Id.

Smith also reported Detective Ojeda's trial testimony. (T. 2373-81, 2393-4). The latter had seen the Gans' Mercedes, with Mrs. Gans slumped over the driver's seat, at 11:37 A.M. on the day of the murder. At that time he had observed a black male running away from the

vehicle into the woods. The black male had stopped and turned, bringing "what appeared to be a machine gun" around. Ojeda had thus gone towards an embankment, taking cover. At this time, Ojeda had heard a helicopter and motioned it towards the running black male. Ojeda had also identified the defendant as the above said black male. Id.

Finally, Detective Smith also recounted the physical evidence at trial. The hat recovered by Marinek had several hairs inside, which were consistent with the defendant's. (T. 2405-07). The fingerprint recovered by Officer Zahn on the trunk of the Mercedes belonged to the defendant. (T. 2404-05). A pair of glasses recovered at the scene matched those worn by the defendant, as reflected on the latter's driver's license photo. (T. 2389-90). Blood on the defendant's pants at the time of his arrest, was consistent with that of both Mr. and Mrs. Gans. (T. 2410-12). A chemical test of Mrs. Gans' blouse reflected powder residue from the defendant's rifle. (T. 2409-10). Firearm registration records reflected that the defendant had purchased the rifle approximately five months prior to the murders. (T. 2397-2401).

Correctional Officers Jarvis and Owens testified as to the defendant's conviction for the first degree murder of correctional officer James Burke in 1980, in Bradford County. On October 12, 1980, the defendant was to receive a visit from his mother. (T. 2259-62). He was informed that he would have to shave prior to entering the visitor area. The defendant had had previous visits from his mother. Id. The prison rule book clearly provided that: "prior to entering the visiting room or returning to your quarters, you must be clean-shaven and have a neat haircut". (T. 2302). The rule book had been provided to the defendant; the latter could both read and write. The only exception to the rule was if an inmate had a valid medical pass, allowing a trimmed beard. These passes were for limited time periods and automatically

expired. The defendant had obtained such passes in 1979 and the early part of 1980, but these had expired. (T. 2286-7). The defendant had then shaved on a regular basis in 1980. (T. 2259). Moreover, grievance procedures were in effect to redress any problems with the rules. The defendant, although having utilized these procedures on other occasions, did not do so with respect to shaving. (T. 2314-15). The prison officers offered the defendant an opportunity to shave on the day of this visit, but he refused, announcing that, "I guess I'm going to have to start sticking people." (T. 2257, 2262).

Later that day, at approximately 5:50 P.M., the defendant was escorted to the shower by the victim, Officer Burke. (T. 2318-21). Victim Burke had not been present during the earlier shaving incident, and had not had any prior problems with the defendant; Burke had started working at the prison only three months before his murder. (T. 2317-18; 2264). Prior to reaching the shower, however, the defendant attacked Burke. (T. 2318-25). Officer Owens saw Burke on the floor, with the defendant bent over him and stabbing him in the chest, six or seven times. Burke was pleading "please, please, please don't hurt me." Id. When Owens finally reached the defendant, the latter stepped back, and disposed of his weapon in a "garbage box". Id. The weapon was later found to be a metal serving spoon, from the food trays provided to inmates, which had been sharpened to "a point". (T. 2328-9). Officer Owens had testified at the defendant's trial, where he had been convicted of first degree murder. (T. 2330, 2269). The defendant had represented himself at that trial. (T. 2271, 2330).

B. Defendant's Case

Dr. Brad Fisher was accepted as an expert in forensic psychology, although the "bulk" of his work and expertise was in predicting whether a person would be dangerous in the future.

(T. 2506-09). He testified that his opinions were in part based upon his interviews of the defendant, the first of which had occurred five years after the crimes herein, in 1979, another encounter in 1989, and an interview the day before his testimony, on January 21, 1996.[1] (T. 2510). He had also relied upon HRS records, family member affidavits, and 1971 competency records from North East Florida State Hospital (NEFSH), in addition to 15 reports by other medical health experts who had examined the defendant throughout the years. Dr. Fisher opined that the defendant was a chronic schizophrenic, and thus acting under an extreme mental or emotional disturbance, at the time of the crimes. Defendant's ability to appreciate the consequences of his actions was also substantially impaired. (T. 2529-30). Fisher stated that his findings were based "primarily" on the North East Florida State Hospital (NEFSH) findings in 1971 that the defendant had been given Thorazine and that the defendant was a paranoid schizophrenic. (T. 2527-8). Dr. Fisher also testified that the defendant's intelligence was "average or above" and that he was capable of manipulating people and of being deceitful. (T. 2564, 2569).

Dr. Joyce Carbonell, a clinical psychologist, hired by the defendant's other defense counsel, the Capital Collateral Representative, testified that she examined the defendant in 1989. (T. 2846, 2877). She reviewed the defendant's background, reviewed other mental health reports, HRS records, jail records, affidavits from friends and family members, and

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[1] This last interview had been a competency examination at the request of defense counsel. (T. 2470-99). Dr. Fisher testified, outside the presence of the jury, that in this examination he had diagnosed the defendant being the same as in his prior exams. (T. 2477). He did not know whether the defendant was "faking" it or if he is "incompetent". (T. 2485).

administered various psychological tests on the defendant. (T. 2847-8). She found the defendant to have average intelligence. (T. 2902). She testified that on some of the test scores, the defendant scored as possibly having an organic dysfunction. (T. 2853). She did not believe that the defendant was malingering. She concluded that the defendant was schizophrenic. He had also been diagnosed as a "paranoid personality before, after, and continuing on, for all of his life since he had come into contact with any mental health." (T. 2952). Dr. Carbonell opined, that at the time of the homicides, the statutory mental mitigators were present. (T. 2870-2)

Dr. Thomas McClaine, a psychiatrist, hired by defendant's present counsel, testified that he evaluated the defendant in 1991. (T. 2949). During his interview with the defendant, Dr. McClaine testified that the defendant's behavior was consistent with psychotic manifestations. (T. 2950). He also testified that he thought that during part of the interview the defendant was malingering, trying to exaggerate his behavior.(T. 2951). Dr. McClaine concluded on the basis of his interview with the defendant, as well as other mental health experts' reports, that the defendant:

> ...diagnostically he falls somewhere between chronic undifferentiated or chronic paranoid schizophrenia and a severe mixed personality disorder with manifestations of five different types of personality disorders, including paranoid schizotypal, antisocial, borderline and narcissistic, not meeting the full criteria for some and having aspects of all the others.
>
> ...so I think he falls somewhere between the severe personality disorder and the schizophrenic, and then superimposed upon that is a manipulative tendency that often comes across as outright lying and exaggerating various kinds of symptoms.

(T. 2952)

Dr. McClaine opined that, at the time of the homicides, the defendant was under the

influence of an extreme mental or emotional disturbance, because he had been under one his whole life. (T. 2961-2). The defendant's abilities to conform his conduct to the requirements of law were "somewhat impaired all the time and have been for most of his 45 years." Id.

Dr. Jethro Toomer, a psychologist, testified that he was retained by defendant's present counsel to evaluate the defendant. He saw the defendant in October of 1994. (T. 3028). Dr. Toomer stated that he was unable to give a particular diagnostic category. (T. 3078-9). However, he recited, the conclusions of other doctors who had diagnosed the defendant as, "...an individual...suffering from some form of mental disorder or mental dysfunction...Also what I found consistent with regard to -- with regard to the doctors' evaluations, was that most of them alluded to the fact that there was some type of paranoid dysfunction that characterized his behavior." (T. 3040). Dr. Toomer opined, that at the time he killed the Ganses, the defendant was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. However, Toomer's understanding of these statutory mitigators is any mental or emotional state which "impacts" on behavior. (T. 3090-2).

Dr. David Rothenberg, a clinical psychologist, who was retained by the Public Defender's Office prior to trial in 1974, testified that he interviewed the defendant four times in 1974, for determination of competency and sanity. (T. 3139-40). After interviewing the defendant and administering various psychological tests, Dr. Rothenberg opined that the defendant was a chronic paranoid schizophrenic. (T. 3140-46). He testified, without any knowledge of the facts of the crimes, that the defendant did not understand that it was wrong to shoot and kill people. The defendant did not know the difference between right and wrong

and could not appreciate the nature and consequences of his actions. (T. 3207-12).

Dr. William Corwin, a psychiatrist, who had been hired by the Public Defender's Office in 1974, testified by reading his 1974 report. (T. 2681-5). He stated that the defendant was argumentative, evasive, hostile, and angry. (T. 2686-92). Defendant had denied committing the crimes and had no memory of his involvement in the crimes. (T. 2692, 2696, 2704). Corwin did not opine as to what the defendant's mental condition was at the time of the offenses. (T. 2698-2701). Dr. Corwin stated that, "there was some conscious exaggeration of his symptoms with a tendency to present himself as being actually ill." (T. 2698).

Dr. Wells testified that he saw the defendant in 1971 at the Northeast Florida State Hospital for a period of approximately sixty (60) minutes. (T. 2780). Dr. Wells' opinion was that defendant is "most likely a borderline personality disorder with paranoid ideation and anti social traits,". (T. 2768). Wells stated that the defendant was "in --- pretty intact state of mind when he planned the robbery." (T. 2795). He was, "in fairly good, intact state of mind when he carried it out." Id. However, "at the moment that he pulled the trigger, the man was 50 percent or more out of control, had no ability to reason, to judge what he was doing." Id.

The defendant then presented the testimony of his sisters, Mary Ann Knight, (T. 2668-79), Doris Benjamin, (T, 2707-20), and Edna Knight. (T. 2721-28). He also presented the testimony of Pat Duval, the deputy sheriff who arrested the defendant numerous times as a child. (T. 2927-37). They described a childhood in which there was a lot of poverty and abuse by the defendant's father. The defendant's sisters testified that their father would beat them all, but the defendant the most. (T. 2717-18). They also testified that there were other family members with mental problems; i.e., a grandfather who killed two women and was sent to a

mental hospital, and a brother and a sister who have mental problems. (T. 2715). The defendant's mother tried to teach them all right from wrong. (T. 2718-19). Mary Ann testified that her father raped her when she was ten years old. Mary Ann, however, became a missionary and a certified nurse. (T. 2678-9).

C. State's Rebuttal Case

In rebuttal, the State called three mental health experts. Dr. Eileen Fennell was a court appointed neuro-psychologist, who was initially appointed to evaluate the defendant's competency to stand trial in 1991. (T. 3273-77). She testified that she saw the defendant three times at Florida State Prison, along with his defense attorney, for a total of six hours. Id. She relied upon her observations, transcripts of testimony, mental health, hospital, prison, and defendant's correspondence records. (T. 3275-77). She stated the defendant was clearly intelligent, articulate, and that he would pick and choose the times when he wanted to cooperate with her. (T. 3297, 3284). The defendant presented a picture that was not consistent with a person suffering from paranoid schizophrenia. (T. 3305-07). Dr. Fennell testified that the defendant was "faking" or malingering. (T. 3374).

Dr. Fennell diagnosed the defendant as having a paranoid personality disorder. (T. 3301-02). The defendant's history is also consistent with an anti social personality. (T. 3308). A diagnosis of personality disorder precludes a finding of schizophrenia. (T. 3313-14). Schizophrenia is a major mental disorder. (T. 3303-05). She testified that a personality disorder was significantly different than a major mental illness. A personality disorder is an element of one's personality that can be controlled by the person; one's ability to think is intact. (T. 3303-05). A major mental illness, however, alter's one's ability to think and control behavior. Dr.

Fennell further found that the defendant did not suffer from any neurological damage. (T. 3318-19). She noted that the 1971 hospitalization records, relied upon by defense experts, reflected a discharge diagnosis of paranoid personality. (T. 3300). The doses of Thorazine prescribed in 1971 reflected that it was for tranqualization purposes, not for treatment of schizophrenia. (T. 3309). The defendant's prison records, which include a psychological evaluation every 30 days, were also inconsistent with any major mental illness. (T. 3368-9; 3358-61; 3299).

Dr. Fennell would not opine what the defendant's mental condition was at the time of the homicides because she believed that it would be unprofessional to provide such an opinion due to the length of time between the event and the evaluation. (T. 3328). However, Dr. Fennell testified that at or about the time of the homicides, an opinion could only be given if the professional looked at all of the facts and circumstances of the crimes. (T. 3326-7).

Dr. Lloyd Miller, a forensic psychologist, also appointed by the court to evaluate the defendant's competency in 1991 and again on January 23, 1996, testified that he interviewed the defendant on both occasions. He opined that the defendant was malingering and intentionally exaggerating his symptoms. (T. 3503-2, 3526). He found no evidence that the defendant was suffering from a major mental illness.

Dr. Charles Mutter, a forensic psychiatrist, testified that in 1975, he was court appointed to evaluate the defendant for competency and sanity. He testified that he saw the defendant three times. After the first interview, he found the defendant to have a paranoid personality, but no major mental illness. (T. 3601). After the other two interviews, Dr. Mutter also opined that the defendant was an antisocial personality. (T. 3633). He again found no major mental disorder. Id. He also found no evidence of organic brain damage, but because of a concern that

the defendant might have epilepsy, because the defendant claimed to have some periods of blackouts, Dr. Mutter recommended that an EEG, a brain scan, and a skull series of x-rays be administered to the defendant. Those tests were negative for any evidence of neurological or brain damage. (T. 3619-20; 3318-19). Dr. Mutter also testified that the defendant had been discharged from NEFSH in 1971, not with schizophrenia or as being psychotic, but with a diagnosis of a paranoid personality disorder. (T. 3658-60).

The defendant had denied having committed the crimes. (T. 3616-17). He had denied using any drugs or alcohol before the crimes. Id. (T. 3658-60). The defendant is very bright, very articulate. (T. 3607). He was "sharp," with very clear and intact reasoning ability and memory. (T. 3619). He had received his GED and also took college credits while confined. (T. 3612).

Dr. Mutter testified that the facts of the homicides, planning an alibi, the manner in which the defendant had kidnaped Sidney Gans, held the firearm in his lap so that it could not be easily seen, having the Mercedes move from a semi-open area to a more secluded area where he shot the Ganses, followed by the manner in which he hid himself and the money and the firearm, are all indications of goal oriented behavior, and an organized plan. (T. 3620-28). Dr. Mutter opined that such planning demonstrated controlled behavior that was well thought out, and was not the result of someone acting under an extreme mental or emotional disturbance. The defendant could conform his behavior to all requirements of law if he wanted to. Id.

Dr. Mutter testified that there was a difference between a personality disorder and a major mental illness. He stated that a major mental illness interferes with a person's ability to know right from wrong, but that someone with a personality disorder can control his will and

behavior. (T. 3661-62). Dr. Mutter testified that a person who is an antisocial personality fails to develop a conscience, but if he is caught, he can conform to all requirements of the law, when it is to his benefit. (T. 3644, 3651-52). He stated that the defendant knows what is going on, but does not care. He is very bright and tries to manipulate his environment. Id.

Captain Jarvis was recalled and testified that the majority of the defendant's 543 disciplinary violations were subsequent to the Burke homicide. (T. 3537). The defendant reads a lot of law books, short stories, novels and magazines. (T. 3538). He also plays chess with other inmates. (T. 3539).

Detective Smith was also recalled and testified that his review of the prior testimony did not reflect any uniformed officers or marrked vehicles involved in the surveillance. (T. 3551). Based upon his experience with STOL aircraft, Smith stated that it is used for surveillance because of its maneuverability for covertness and because the engine is fairly quiet. (T. 3552-53). The prior testimony of the STOL pilot reflected that he had first seen the Mercedes after it had stopped and the defendant was running away. (T. 3554-56). The STOL pilot had then notified the helicopter of the vehicle's position. Id. The helicopter pilot's report confirmed this. Id. Smith had also measured the distance from where Mr. Gans had first been abducted to where the victims' bodies were found. The distance was 44.5 miles. (T. 3562).

D. Trial Court's Findings.

The jury recommended a sentence of death by a vote of 9-3 on February 8, 1996. The trial court entered its order imposing the death sentence on February 20, 1996. (SR. 1-39).[2] The

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[2] The symbol "SR. ___" refers to the sentencing order, parts of which have been omitted from the record on appeal. The State has filed a motion to supplement the record

trial judge found six (6) aggravating circumstances: 1) prior violent felonies - the contemporaneous murders of Mr. & Mrs. Gans in addition to the murder of correction officer Burke in 1980 (SR. 2-4); 2) murder committed during the course of a kidnaping (SR. 4-5); 3) murder committed to avoid arrest (SR. 5-6); 4) murder committed for pecuniary gain (SR. 6); 5) the capital felony was especially heinous, atrocious or cruel (SR. 6-11); and, 6) capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (SR. 11-13). The trial court considered and rejected the statutory mental mitigators. (SR. 13-33). He found three non-statutory mitigating circumstances: 1) defendant was a victim of abuse as a child (SR. 34-5); 2) defendant suffers from some degree of paranoia (SR. 35-6); and, 3) the defendant was raised in poverty (SR. 36). The trial judge concluded:

> In weighing the aggravating factors against the mitigating factors the court understands that the process is not simply an arithmetical one. It is not enough to weigh the number of aggravators against the number of mitigators, the process is more qualitative than quantitative. The court must and does look to the nature and quality of the aggravators and the mitigators which is has found to exist.
>
> This court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances. The mitigating factors pale when compared to the aggravators herein. (SR. 38).

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with the sentencing order attached and labeled as SR. 1-39.

SUMMARY OF THE ARGUMENT

I. The current arguments with respect to violation of constitutional rights are unpreserved. The testimony of Detective Smith, summarizing unavailable witnesses' prior guilt phase testimony at the resentencing, did not violate the defendant's rights under the Confrontation Clause and was not prejudicial.

II. Permitting Detective Smith to remain in the courtroom during the trial did not violate the sequestration rule, where the trial court held a hearing and determined that defendant would not be prejudiced.

III, IV. The State did not rely on future dangerousness as an aggravator; the prosecutor's comments referred to evidence of the three murders committed by the defendant. There was no error in declining to predetermine a sentence, and the defendant fully argued that consecutive sentences could be imposed.

V. Comments as to the defendant's absence from the courtroom were in accordance with both this Court's decisions and defense counsel's requests.

VI. Testimony regarding prior competency evaluations was not objected to and came in after the defense opened the door to it.

VII. The claim as to the peremptory challenge was not preserved for review. Additionally, under Melbourne, infra the court properly held an inquiry and denied the challenge.

VIII. Three jurors were properly removed during the trial after they were exposed to extrajudicial information which was prejudicial to the defendant.

IX. Claims regarding prosecutorial comments are not preserved for review and, when

viewed in their full context, those comments were properly based on the evidence.

X, XI, XII, XIII, XIV. Claims regarding instructions on the sentencing factors were not preserved for review; or, alternatively, those instructions were in accordance with this Court's decisions.

XV. The aggravating factors are supported by the evidence. The trial court gave weight to the mitigating factors which were established by the evidence; the weight to give such factors rests within the trial court's discretion and no abuse of discretion has been demonstrated.

XVI. Attacks on the constitutionality of the death penalty statute are either unpreserved or have repeatedly been rejected by this Court.

XVII. The cruel and unusual punishment argument, based on the duration of the defendant's post-trial litigation, is without merit, as the State simply provided the defendant with the appellate and collateral review to which any defendant is entitled.

ARGUMENT

I.

THE TRIAL COURT'S ADMISSION OF DETECTIVE SMITH'S TESTIMONY IS IN ACCORDANCE WITH PRIOR PRECEDENTS.

The Appellant argues that the admission of hearsay testimony by Detective Smith violated the defendant's rights to confrontation, due process, and a reliable sentencing proceeding. A large part of the arguments now made on appeal were never presented in the court below, and as such are procedurally barred. See, Lawrence v. State, 691 So. 2d 1068, 1072 (Fla. 1997) (where admission of evidence is objected to, only the basis upon which the defendant objected will be addressed; other challenges are procedurally barred); Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994) ("Because Rhodes failed to challenge the admission of much of the hearsay testimony addressed in this claim, those portions of the claim have been waived."); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Moreover, as will be seen below, Detective Smith's testimony was properly admitted in accordance with this Court's substantial precedents in this regard, and section 921.141(1), Fla. Stat., as the defendant had a fair opportunity to rebut Smith's testimony. Chandler v. State, 534 So. 2d 701, 703 (Fla. 1988). Finally, no prejudice has been demonstrated because Smith's testimony recounted the events surrounding the murder for which the defendant had been convicted. Since this evidence was admitted before the guilt-phase jury, the defendant can show no prejudice. But for this being a resentencing, the sentencing jury would have heard this testimony in the guilt phase. Lawrence, 691 So. 2d at 1073; Rhodes, supra.

In the instant case, defense counsel's position was that Fla. Stat. 921.141, which provides

for hearsay testimony at sentencing when the defendant has a fair opportunity to rebut same, was incompatible with the Confrontation Clause of the Sixth Amendment, and thus Detective Smith's testimony was not allowable at all. Defense counsel objected to Detective Smith providing a summary of what other people did or said, because the confrontation right "can't be changed by the statute [921.141]. That right would be watered down in the statute." (T. 2352-53). The defense also noted that if testimony was allowed, the best evidence of an unavailable witness' statements was the transcript of prior testimony. Id.

The trial court stated that the statute allowed hearsay, and Smith was testifying as to "what he read" in the prior trial's transcripts. The trial judge then asked if the defense would really prefer that Smith read some 4,000 pages of testimony, instead of summarizing the testimony in an hour. (T. 2363-64). The defense remained silent, without stating a preference. The trial judge thus ruled that if Smith mischaracterized any prior testimony, the prior trial's transcripts, instead of Smith's testimony would be read:

> **[THE COURT]:** If you find that the officer mischaracterizes what the testimony is, I will let you bring in the whole transcript. We will sit here until doomsday and read it to the jury.
>
> But if the witness can testify in this manner and you do not find that he is misrepresenting things or that he is saying things that are not true, there is no problem with this procedure.

(T. 2364). The trial judge expressly stated that his ruling was based upon this Court's ruling in Chandler v State, 534 So. 2d at 702-3 (T. 2425-6) which provides:

> In sentencing proceedings subsection 921.141(1), Florida Statutes (1985), provides that "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant" and that "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence,

provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Chandler claims that the trial court improperly allowed the state to introduce hearsay statements into evidence pursuant to subsection 921.141(1). He also claims that the statute is unconstitutional, on its face and as applied in this case, because it denied his sixth amendment right to confront the witnesses against him.

The sixth amendment's confrontation clause guarantees an adequate opportunity to cross-examine adverse witnesses. United States v. Owens, --- U.S. ----, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988); Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). There is nothing in subsection 921.141(1) which denies a defendant the right to confront the state's witnesses. Moreover, Chandler's counsel conducted a vigorous and extensive cross-examination of the witnesses presented by the state. We do not find subsection 921.141(1) unconstitutional on its face.

A resentencing is not a retrial of the defendant's guilt or innocence. King v. State, 514 So.2d 354 (Fla.1987), cert. denied, --- U.S. ----, 108 S. Ct. 2916, 101 L. Ed. 2d 947 (1988). Because a jury cannot be expected to make a decision in a vacuum, it must be made aware of the underlying facts. Teffeteller v. State, 495 So.2d 744 (Fla.1986). Both the state and the defendant can present evidence at the penalty phase that might have been barred at trial because a "narrow interpretation of the rules of evidence is not to be enforced." State v. Dixon, 283 So.2d 1, 7 (Fla.1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974); Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S. Ct. 3234, 49 L. Ed. 2d 1226 (1976). To be admissible, however, evidence must be relevant, Muehleman v. State, 503 So.2d 310 (Fla.), cert. denied, --- U.S. ----, 108 S. Ct. 39, 98 L. Ed. 2d 170 (1987); Teffeteller, and the admission of evidence is within the trial court's wide discretion. King; Muehleman; Teffeteller. Subsection 921.141(1) recognizes these principles and provides that evidence which "the court deems relevant" or which "the court deems to have probative value" may be presented. To protect against the unwarranted admission of evidence, the statute also directs that a defendant must be "accorded a fair opportunity to rebut any hearsay statements."

We do not find that the introduction of hearsay testimony rendered subsection 921.141(1) unconstitutional as applied in this case. As stated before, Chandler's counsel vigorously cross-examined the state's witnesses. That Chandler chose not to rebut any hearsay testimony does not make the admission of such testimony erroneous. The currently objected-to testimony came from a police detective and concerned statements made by a police chief, another detective, and a state expert. Those individuals had testified, consistent with what the detective stated they said, during the guilt phase. Chandler has not

demonstrated an abuse of the trial court's discretion regarding hearsay testimony in allowing the recitation of this testimony by the detective.

(Emphasis added); See also, Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla. 1992) (hearsay testimony of an investigating officer as to the details of a prior murder was admissible at resentencing as defense counsel was afforded the opportunity to cross-examine the officer); Clark v. State, 613 So. 2d 412, 415 (Fla. 1992) (no error in admitting testimony from a detective about prior conviction, when detective related "the gist of other witnesses' testimony in that trial," at resentencing). (T. 2425-6). See also, Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989) (when hearsay statements at penalty phase came from a tape recording and not from a witness present in the courtroom, there was no fair opportunity to rebut. The investigating officer's hearsay testimony concerning events which resulted in the conviction was properly admitted, however, since the defendant could cross-examine the officer).

Moreover, it should be noted that allowing a summary of prior transcripts of the guilt phase was also in accordance with Fla. Stat. 90.956 which provides: "[w]hen it is not convenient to examine in court the content of voluminous writings, ... a party may present them in the form of a chart, summary, or calculation by calling a qualified witness." It is thus clear that the trial court's ruling, based upon the argument presented in that court, was entirely proper.

The Appellant, however, now first claims that the admission of Smith's testimony was error because the State did not establish the unavailability of the witnesses whose testimony Smith had summarized. This claim is waived because it was not raised in the court below. As noted in issue II herein, prior to resentencing, the State had requested that Detective Smith remain in the courtroom. The prosecution represented that Smith's presence was necessary

because of death and inability to locate some of the witnesses; that Smith would present guilt phase evidence, "[i]n essence for those portions of the case, that we cannot present through live testimony." (T. 124). The trial court had expressly inquired of the defense to address why this was inappropriate, "considering the fact that guilt is not the issue." (T. 126). The defense did not challenge the State's representation of inability to locate some witnesses. (T. 126-7).

At resentencing, prior to defense's objection that Fla. Stat. 921.141 was incompatible with the confrontation clause, Detective Smith had again stated that he had reinvestigated and re-evaluated the evidence herein, because some of the witnesses were physically missing, dead, or otherwise unavailable. (T. 2345-9). He stated that he had thus reviewed the trial testimony and reports of those witnesses who were "no longer available" in the instant case. (T. 2349). There was no request to further elaborate the unavailability of witnesses. Moreover, although the defense specifically objected as to whether a witness (Perry), who is not at issue herein, was unavailable or dead, there was never any challenge to the representation that the witnesses complained of on appeal (i.e. ex-detective Ojeda, and the two aircraft pilots) were unavailable. (T. 2362). As such this issue is waived. See Rhodes, 638 So. 2d at 924-5, where defense counsel initially objected to the admission of prior testimony from the original trial, on the basis of whether the absent witnesses "were truly unavailable." The trial judge then heard testimony that there were no attempts to locate the absent witnesses. Id. This Court held the claim of unavailability to be procedurally barred, as defense counsel, despite the hearing, "appeared to have acquiesced in the Court's decision to admit the [prior] testimony because no further argument was presented on the issue." Id. See also, Lawrence v. State, 691 So. 2d at 1073 (Specific objection on the grounds of unavailability required to preserve the instant

confrontation claim); Steinhorst, 412 So. 2d at 338 ("in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). Appellant's arguments herein with respect to availability of witnesses are thus barred.

Likewise, the Appellant's claims with respect to Smith having relied upon reports, especially those of the helicopter pilot, as opposed to prior testimony, are also barred for failure to object. As seen previously, based upon the State's representations of witness unavailability, the trial court specifically ruled that Smith would testify as to what he had read in the prior trial transcripts, and that if he "mischaracterizes what the testimony is, I will let you bring in the whole transcript." (T. 2363-4). Defense counsel's prior objection, which had given rise to the use of this procedure, had been a general hearsay objection as to the summary of the guilt-phase witnesses' prior testimony. (T. 2352-64). One week and 1,200 transcript pages later, when Smith refers to the reports of the helicopter pilot, there are no objections on any grounds. (T. 3555-58, 3586-87). Defense counsel never asserts that Smith's summary of the prior guilt-phase testimony has exceeded its limits and incorporated matters which were never presented during the guilt-phase. Indeed defense counsel vigorously cross-examined Smith on the basis of said reports. (T. 3564-86). This claim is thus also unpreserved. Rhodes, supra; Lawrence, supra; Steinhorst, supra.

Moreover, the State would note that the information complained about on appeal was clearly established by the non-hearsay testimony of agent Nelson at the resentencing, in addition to the prior guilt phase testimony. The helicopter pilot's report, complained of herein, was merely cumulative to said testimony. Agent Nelson, who was personally involved in all stages

of the surveillance until the defendant's arrest in South Dade, testified that throughout the surveillance, all of the vehicles involved were unmarked, and none of the officers were in uniform. (T. 2076-7, 2083-4, 2097). There was one STOL aircraft in the air. (T. 2081). A helicopter later became involved, in the vicinity where the victim's bodies were found. Id. Most importantly, however, he testified that the defendant was not aware of being followed by the police throughout the surveillance. (T. 2087-88). This was based upon his many years in conducting such surveillances, the defendant's observable body movements and gestures, the speed of the Gans vehicle and the manner in which it was driven. Id. Likewise, the record clearly establishes that Officer Ojeda had previously testified, at the guilt phase, that the helicopter first arrived after he saw the defendant fleeing towards the woods, at a time when the physical evidence reflected the victims had already been shot, and Mr. Gans' body had already been hidden by the defendant. Detective Smith stated that Ojeda "testified" that he had approached the Mercedes, observed Mrs. Gans "slumped over", and the defendant running away. (T. 2378-9). "[I]n his testimony", Ojeda had added that the defendant then turned and aimed his weapon at Ojeda, who then ran to take cover along the canal. (T. 2379). Again, "in his trial testimony", Ojeda stated that as he took cover, he could hear the helicopter, and he motioned the helicopter pilot in the direction of where the defendant had run. (T. 2380). The STOL aircraft pilot had also, "in his testimony", stated that he had first seen the Mercedes after it had stopped and the defendant ran away, at which time he was at an altitude of 1000 feet; he had then notified the helicopter pilot of the location. (T. 3554-5; 3585). Detective Smith, based upon his own experience of STOL, testified that this type of aircraft is utilized for surveillance purposes due to its maneuverability and covertness; it can fly at an altitude that can't be seen,

and, "it's fairly quiet." (T. 3552-3). The helicopter pilot's report, which confirmed that he had been notified by the STOL as to the location of the Mercedes, and had first located the vehicle after defendant was running away, was thus cumulative to the prior trial testimony. As such no prejudice has been established.

The defendant's claim of prejudice, that his mental health experts testified that he suffered from schizophrenia, and that discovery of police presence caused him to lose contact with reality and lose control over his impulses, is without merit. First as noted in claim XV (C) herein, the trial judge, based upon substantial and competent evidence, had rejected the claim that defendant suffered from the major mental illness of schizophrenia. The second premise of the defendant's claim, discovery of police presence leading to loss of contact with reality, was also not supported by the record. It should be noted that none of the defense experts had any knowledge of the facts of the crimes. The defendant himself had also denied even having committed the crimes. The experts were, however, each given a three page hypothetical set of facts[3] by defense counsel which was not supported by the record. As noted by the trial judge, the defense hypothetical:

> constantly suggest[ed] that the pursuit of the Gans car with the defendant in the back seat resembled the St. Patrick's Day Parade with police cars surrounding the Gans vehicle in full police regalia. The hypothetical goes on to suggest that simultaneous with this Keystone Cop pursuit on the ground there was a fixed wing aircraft in the air and a helicopter. As the State argued in their objection, these were not the facts of this case. Although the argument can be made that the original police work in this case was not stellar, it was not as inept as the defense has suggested. The evidence shows that the law enforcement officers involved in the pursuit of the Gans car were in unmarked vehicles; that they were dressed in civilian clothes and that they kept a discreet distance from the car so as not to

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[3] See, e.g., T. 2760-63.

> alarm the defendant. Indeed a solid argument can be made that the distance was too discreet because the agents lost the defendant and the victims. Special Agent Nelson of the FBI testified that he was able to observe the defendant in the back seat of the Gans car and that at no time did the defendant act "hinky." He defined this term as meaning that the defendant never looked back over his shoulder to counter-surveil; that he never gave any indication of nervousness consistent with acknowledging the presence of police.
>
> The evidence showed that during the pursuit of the Gans vehicle along the 836 and Palmetto Expressways there were no police aircraft in the air. It was only at the very end of the pursuit that the aircraft joined the chase.

(SR. 28-29). The Appellant's claim of prejudice is thus without merit. See Lawrence, 691 So. 2d at 1073 (Admission of former trial testimony, even when it was properly objected to and witnesses were not established to be unavailable, was harmless error because defense counsel had examined the witness at the original trial and could have offered the cross examination during the resentencing but did not. Nor did defense proffer any other rebuttal to the trial court. Moreover, there was no prejudice where the former testimony recounted the events surrounding the murder for which defendant was convicted. "Since this evidence was admitted before the guilt phase jury, Lawrence can show no prejudice. But for this being a resentencing, the sentencing jury would have heard this testimony in the guilt phase.").

Finally, the Appellant complains about Smith's statement that he had reviewed "testimony" from Gans Company employees, and found no evidence that defendant acted in an unusual or bizarre manner while he worked there. The argument that Smith was drawing inferences from the summarized testimony and expressing his own opinion was not raised in the lower court; no objection at all was raised as to this testimony. (T. 3559). Thus, the claim is not preserved for review. In addition to being unpreserved, there was no confrontation clause violation, as the record reflects that Smith had previously stated that the employee's testimony

was offered because the latter was dead. (T. 2351-71). See, Mattox v. United States, 156 U.S. 237 (1895); California v. Green, 399 U.S. 149 (1970). Furthermore, as to the claim that Smith was expressing his "opinion," any inference which was being drawn was nothing more than common sense that anyone could draw from the summarized testimony; if the conclusion was in any way debatable, defense counsel could have introduced, in its entirety, the employee's testimony from the guilt phase, for the purpose of showing any alleged bizarre behavior. Consistent with the lack of prejudice inherent in the foregoing, any such conclusion by Smith was equally without prejudice as the defense experts were not relying upon any unusual or bizarre behavior prior to the crimes. They stated that the defendant could appear normal and still suffer from the alleged mental disorders. The Appellant's other arguments with respect to this claim were never presented below and are thus procedurally barred. The instant claims are thus unpreserved, without merit and harmless. Rhodes, supra; Lawrence, supra; Steinhorst, supra; Chandler, supra; Clark, supra.

II.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ALLOWING DETECTIVE SMITH TO REMAIN IN THE COURTROOM IN ACCORDANCE WITH FLA. STAT. 90.616.

The Appellant contends that the trial court erred in excepting Detective Smith from the sequestration rule. No abuse of discretion has been demonstrated, as the trial court acted in accordance with this Court's precedents.

Prior to trial the State filed a motion to allow its principal investigating officer, Smith, to remain in the courtroom. (R. 1168-75). The trial court, in accordance with Randolph v. State, 463 So. 2d 186, 191 (Fla. 1984), held a pretrial hearing to determine whether the

witness's presence was necessary and non-prejudicial. (T. 123-29). At the hearing, the State represented that, because of death and inability to locate some of the witnesses, it needed Detective Smith to present guilt phase evidence, "[i]n essence for those portions of the case, that I cannot present through live testimony, I will be presenting through Detective Smith." (T. 124). The prosecution added that Detective Smith had familiarized himself, "to whatever extent he reasonably can", with the physical evidence and transcripts of testimony, such that he could be cross-examined in accordance with Fla. Stat. 921.141. (T. 125). The trial court, noting that the decision of allowing the witness to remain was discretionary, expressly inquired of the defense, "to address yourself to why in particular you feel this is inappropriate, especially considering the fact that guilt is not the issue." (T. 126). The defense responded that it did not have "somebody like Detective Smith" to assist them, and thus the State's request was not "appropriate".[4] (T. 127). The State then added that Smith's presence was necessary and non prejudicial, in light of the age of the case, unavailability of witnesses, and, the fact that Smith's was not a prime actor in the case and his testimony could not be colored by what he heard since he was limited to prior testimony. (T. 128-9). (emphasis added). The trial court then inquired if the defense had anything to add; the defense responded that it did not. The trial court then ruled that excepting Detective Smith from the sequestration rule was necessary and would not prejudice the defense:

> **THE COURT:** Fine. This is not a case of a witness who for example saw a particular thing happen. He is going to testify about how something occurred or

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[4] Immediately prior to this hearing, the defense had requested and in fact been granted additional funds to hire an investigator for the sole purpose of coordinating and assisting the defense presentation of witnesses at the resentencing. (T. 72-75).

did not occur.

He is basically going to do a little more [than] report what others have said.

It is an old case. I see no problem with him sitting in during the course of the trial.

(T. 129). The defense did not further object or present any additional arguments, in support of why Detective Smith should be excluded, throughout the remainder of the course of resentencing.

The trial court's ruling was in accordance with this Court's well established precedent in Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961), where this Court held that the presence of two deputy sheriffs, who had had a major part in the investigation of the crime and were known at the outset that they would subsequently be called to testify, was not error because:

> The trial judge was of the view that inasmuch as they were law enforcement officers, who had no personal interest in the results, he would permit them to remain in the courtroom. The rule in Florida and elsewhere is that the trial judge is endowed with a sound judicial discretion to decide whether particular prospective witnesses should be excluded from the so-called sequestration of witness rule 53. Am.Jur. 'Trial' p.46, § 31-33. Ordinarily, when requested by either side, the trial judge will exclude all prospective witnesses from the courtroom during the trial. The obvious reason for the rule is to avoid the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand. It is often less likely that such a result will follow in the case of some law enforcement officers who have had experience in criminal trial work and whose interest in the result is not apt to be personal. Unless a trial judge can be said to have abused the discretion which is his to exercise in such situations, then his judgment will not be disturbed. The burden is on the complaining party to demonstrate an abuse of discretion with resultant injury.

See also, Randolph 463 So. 2d at 191-2 (presence of principal investigating officer in courtroom not error, despite lack of a hearing as to necessity of presence); Burr v. State, 466 So. 2d 1051, 1054 (Fla. 1985)(no error in witness having been present in the courtroom where her testimony

was not substantially different from what it would have been had she not heard other witnesses' testimony); Stano v. State, 473 So. 2d 1282, 1287 (Fla. 1985)(no error in allowing deputy clerk to recount testimony and authenticate exhibits from prior trial, where he had remained in the courtroom despite invocation of sequestration rule); Strausser v. State, 682 So. 2d 539, 541 (Fla. 1996)(no abuse of discretion in allowing State's mental health expert to remain in the courtroom, despite invocation of sequestration rule, during defendant's testimony where sanity was the main issue at trial). No abuse of discretion has been demonstrated, especially in the context of a witness who simply recounted what the unavailable witnesses had previously stated in the transcript of the prior trial.

III.

THE PROSECUTION DID NOT RELY ON ANY NONSTATUTORY AGGRAVATING CIRCUMSTANCES.

The Appellant argues that the State improperly elicited that defendant's mental illness was difficult or impossible to cure, and that the prosecutor then argued that defendant would kill again if not electrocuted. The complaints are unpreserved, as there were no contemporaneous objections thereto. Moreover, the cross-examination was proper and in response to the answers elicited on direct examination of the defense witnesses. Likewise, the prosecution's closing argument was proper and did not suggest that the defendant would kill in the future. Rather, the argument was a proper comment on the evidence of defendant's past conduct in having killed three individuals.

The Appellant has first complained about Dr. Fisher's cross-examination. On direct examination, Dr. Fisher testified that the defendant is a paranoid schizophrenic. (T. 2518).

According to this witness, the defendant's condition is "chronic"; it was present before, during and after the crimes. (T. 2518, 2537). These opinions were based upon Fisher's two interviews, conducted 5 and 15 years after the crimes, respectively, in addition to other expert reports, the defendant's criminal history and prison records. (T. 2510-15). On cross-examination, the prosecutor verified the defendant's criminal history. (T. 2552-53). Based on the voluminous criminal history, the prosecutor asked whether, in the expert's opinion, the defendant was "incorrigible, incapable of living within society's laws?" (T. 2554). Dr. Fisher responded:

> In the course of my evaluations over the last 20 years, he is just about as close as I have seen to someone who, unless he has got heavy structure and I believe probably heavy medication, would not be able to function without great difficulties in disturbance which may well include aggression in the outside community.

Id. There was no objection of any kind to the above. The defendant's current complaints on appeal are thus procedurally barred. Moreover, as seen above, the prosecutor had not asked about treatment or the defendant's prognosis; the issue was interjected by the witness. Indeed, it should be noted that the subject of treatment and improving defendant's condition through structure and medication were first interjected by defense counsel, on direct examination. Dr. Fisher had stated that his diagnosis of defendant was "primarily" based upon 1971 reports where defendant had been adjudged incompetent, but then hospitalized, given medication, and improved. (T. 2527-28). Defense counsel had then elicited that a structured, isolated environment and medication would improve the defendant's condition:

> **[Defense counsel]:** Thorazine is a drug, is it not to help treat the schizophrenic to keep them into a remission state?
>
> . . .
>
> Thorazine will help them in these areas and if it helps them enough where their system is less delusional, their hallucinations are abated or desist, then that

is called being in remission, you know.

In other words, you are better. Better enough that you can function perhaps close enough to normal that you do not have to take the Thorazine.

. . .

[Defense counsel]: . . . What would the effect be on a person of this nature [paranoid schizophrenic], if you placed them within a confines of a small room where you have taken society or the stresses of the environment away from them?

[Dr. Fisher]: It might vary but if -- the problem is frequently for schizophrenics over stimulation. Too much, too many stimuli coming at me. Common sense dictates an isolated room would decrease the number of stimuli.

(T. 2528-29) (emphasis added).

In light of the above opinions on improving the defendant's condition, on direct examination, and the expert's reiteration, without prompting, of treatment and prognosis on cross-examination, the prosecutor then elicited that the defendant had committed the Burke murder while in the structured environment envisioned by Dr. Fisher. (T. 2555). Again, there were no objections.

In keeping with the theme of structure, Dr. Fisher also noted that while in prison, the defendant's disciplinary reports largely consisted of only his failure to shave. (T. 2556-57). The prosecution then elicited that, in fact, the disciplinary reports, in large part, had nothing to do with shaving. (T. 2559-61). There were no objections to these questions either.[5]

As seen above, none of the evidence on cross-examination of Dr. Fisher was objected to; none of the current arguments on appeal as to this point were presented to the trial court. These arguments are thus procedurally barred. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention

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[5] The defense did object and successfully prevented the State from exploring the defendant's prison escape immediately after the crimes, where he had successfully hidden from a nationwide search for a period of at least 100 days. (T. 2557-59). The trial judge ruled that although the defendant's actions were relevant, the prejudice would outweigh the probative value. Id.

asserted as legal grounds for the objection, exception or motion below.") Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985) (same); San Martin v. State, 23 Fla. L. Weekly S1, 3-4 (Fla. December 24, 1997) (same).

Moreover, the remarks with respect to treatment and prognosis were first elicited on direct examination, and repeated on cross without any prompting. The evidence with respect to the murder of Officer Burke and the defendant's prison record was properly elicited to rebut Fisher's opinion that defendant was schizophrenic and would improve with medication and structured environment. Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978) (purpose of cross-examination is to contradict, rebut or make clearer the facts testified to on direct); Wuornos v. State, 644 So. 2d 1000, 1009 (Fla. 1994) ("Once the defense argues the existence of mitigators, the state has a right to rebut through any means permitted by the rules of evidence, and the defense will not be heard to complain otherwise."). This evidence was also a proper subject of cross-examination in light of Fisher's reliance upon the criminal and prison records in formulating his opinions. Valle v. State, 581 So. 2d 40, 46 (Fla. 1991) (state could introduce rebuttal evidence and specific prior acts of prison misconduct where defense experts had formed their opinions from defendant's prison and criminal records). See also, Parker v. State, 476 So. 2d 134, 139 (Fla. 1985). Muehleman v. State, 503 So. 2d 310, 315-16 (Fla. 1987) (same); Hildwin v. State, 531 So. 2d 124, 127 (Fla. 1988).

Likewise, the Appellant's complaint with respect to Dr. Toomer's cross-examination is without merit. On direct examination, Dr. Toomer testified that the defendant suffered from, "some type of paranoid dysfunction that characterized his behavior." (T. 3040). Defense counsel then asked, "how long" the defendant has suffered from this "chronic" disturbance. (T.

3050). Dr. Toomer responded that the defendant has suffered the disturbance from "age nine up," and the condition existed at the time of Toomer's interview in 1994, twenty (20) years after the crimes herein. (T. 3050). On this basis, Dr. Toomer opined that both statutory mental mitigators were applicable at the time of the crimes herein.

On cross-examination, the prosecution established that in Toomer's opinion, both statutory mental mitigators were applicable whenever any mental or emotional disturbance exists and has "an impact on behavior." (T. 3091-93). Dr. Toomer thus stated that the defendant was suffering from an extreme mental disturbance and could not conform his conduct to the requirements of law at any stage of the crimes, from the time he first ambushed Mr. Gans, to the retrieving of Mrs. Gans, through the time of his arrest. (T. 3094-95). He concluded that the defendant "will always make bad judgments, . . . That has been his history. This has been his life. That has been what he has always done." (T. 3096). The prosecutor thus asked whether the defendant, "will always have these types of personality disorders," to which Toomer responded in the affirmative. Id. Defense counsel objected on the grounds that, "it is repetitious. It is beginning to go into a questionable area." Id. The trial court sustained the objection. Id. None of the arguments now made on appeal were presented. The defendant did not request any curative instructions, nor was there any motion for mistrial. Id. The Appellant's current arguments of misconduct are thus procedurally barred. Steinhorst, supra; Tillman, supra. Moreover, as is abundantly clear from the foregoing, the defense, itself, on direct examination, established that the defendant suffered from and would always suffer from a "chronic" mental disturbance. The prosecution did not elicit anything more in this regard; it merely established the flaws in Toomer's opinions as to what constitutes a statutory mental mitigator.

Finally, the Appellant's complaints with respect to the State's closing argument are also without merit. Defense counsel, in opening argument, had stated that a defense expert [Dr. Wells] would testify that, prior to the crimes herein, he had opined: "if we let him [defendant] back out on the street and he gets back out into the stresses of life, he could be dangerous." (T. 1930). Defense counsel added, "the evidence is going to show that this man [defendant] can not control himself." Id. The defense then presented psychological opinions that defendant suffered from "chronic" paranoid schizophrenia, which was not a condition within his control. The defense also presented evidence that in 1971, prior to the crimes herein, there were reports that defendant was "homicidal, wants to kill, see blood." (T. 3189). The prosecution, through cross-examination of defense experts and presentation of its own experts, established that defendant is an anti-social personality without a conscience, whose actions are within his control. At closing argument, the prosecution, in response to the defense's theme of lack of control, then stated:

> When the defense attorney made an opening statement to you, the words that were used were that the defendant was a man who can't control his aggressions like you and I.
>
> . . .
>
> It is not that he can't control himself. He would not control himself. He chose a path of crime, and now he wants you to excuse that criminality.
>
> Back in 1970, the only time in his life he was sent to a hospital and the report says, "Homicidal, wants to kill to see the blood."
>
> That is Thomas Knight. That is what he is all about, and on July 17, 1974, that was what he did. He was like that in 1970. He was like that in 1974. He was like that in 1980 when he killed Officer Burke.
>
> You have heard all the defense doctors and all the state doctors and whatever experts you want to listen to. They say that is all him, today, yesterday, tomorrow, forever.
>
> You are going to have to decide if that is some form of mitigation, if that is an excuse, an explanation for his actions. This is a man who has no conscience. He does not feel for other people.

> What is the proper recommendation for a person like that? How do we punish somebody who has no conscience, who can act again, kill, and kill and kill again but does not have a conscience about it? Somebody who won't control himself.

(T. 3773-4). There was no contemporaneous objection to the above remarks made at the commencement of the state's closing argument. Instead, defense counsel moved for a mistrial at the conclusion of the closing, without specifying the above remarks, and without any request for any curative instructions. The Appellant's current contention is thus procedurally barred. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982); Nixon v. State, 572 So. 2d 1336, 1340-41 (Fla. 1990) (a motion for mistrial at the close of state's argument, without a contemporaneous objection to the specific comments, does not preserve a claim of improper argument): Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (unobjected comment, which implied that defendant was likely to commit future crimes if not sentenced, was not preserved for appeal and fell "far short" of the prejudice required for reversing penalty phase).

Moreover, as seen above, the argument was in response to the defense argument, and a proper comment on the psychological evidence presented by the parties. The Appellant's focus on the comment that defendant deserves punishment as someone, "who can act and act again, kill, and kill and kill again but does not have a conscience about it," as an argument of future dangerousness, is unwarranted. The defendant had killed Mr. Gans, Mrs. Gans and then Officer Burke. The prosecutor's comments were thus proper comments on the evidence of the defendant's actions in having killed three people, not what he would do in the future. See, Mann v. State, 603 So. 2d 1141,1143 (Fla. 1992) ("arguing a conclusion that can be drawn from the evidence is permissible fair comment"); Burr v. State, 466 So. 2d 1051, 1054 (Fla. 1985)

(statements that people were afraid and that defendant "executes" people were fair comment on evidence and were not so prejudicial as to warrant a mistrial); Jones v. State, 652 So. 2d 346, 352 (Fla. 1995) (reference to "assassination" of victim in a discussion of possible mitigation was a "reasonable characterization" of the offense and proper); Allen v. State, 662 So. 2d 323, 331 (Fla. 1995) (rejecting future dangerousness/non-statutory aggravator claim, based upon comment that "no form of control" was adequate to take care of the defendant). The instant claim is unpreserved and without merit.

IV.

THE TRIAL COURT DID NOT ERR IN REFUSING TO DETERMINE PRIOR TO THE PENALTY PHASE WHETHER THE DEFENDANT WOULD BE SENTENCED TO CONSECUTIVE LIFE SENTENCES.

The Appellant argues that the trial court erred in denying his motion to determine, prior to submission of the case to the jury, whether the defendant, if sentenced to life, would receive concurrent or consecutive minimum mandatory sentences. This argument is without merit, as the Court has previously held that such a determination would be contrary to Florida's capital sentencing scheme. Walker v. State, 22 Fla.L.Weekly S537 (Fla. Sept. 4, 1997). Moreover, the trial court, in fact, informed the jury that it could impose consecutive life sentences with a total minimum mandatory term of 50 years, prior to parole eligibility. Additionally, defense counsel was allowed to and did argue, without limitation, that such consecutive sentences could be imposed. There was thus no error, and the defendant received all that he was entitled to pursuant to both the Florida and Federal Constitutions.

This Court, in response to the same argument raised herein, has previously determined that a trial judge can not determine, in advance of the penalty phase, whether it would impose

concurrent or consecutive sentences, if a defendant was sentenced to life:

> Walker makes the further argument that... the trial court [erred] in rejecting his request to determine prior to the penalty phase trial whether Walker's sentences for capital murder would be consecutive or concurrent,...
>
> Our case law is adverse to Walker's position. ... Walker's request that the trial court determine whether it would sentence him to consecutive or concurrent life sentences for the murders is inconsistent with Florida's jury override provision. See Section 921.141(3), Florida Statutes (1995). In any event, a pre-penalty phase determination of defendant's sentence for the capital offenses should the jury return verdicts of life would be premature given that the trial court would not have available for its consideration the facts and circumstances surrounding the offenses and the defendant's life history -- information adduced at the penalty phase proceeding.
>
> We conclude that Walker was afforded what Florida and U.S. Supreme Court case law deem sufficient, i.e. the opportunity to argue to the jury potential parole ineligibility as a mitigating factor. Consequently, we find that the trial court's denial of all aspects of Walker's claim was an appropriate exercise of its discretion. See Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992); Jones v. State, 569 So. 2d 1234, 1237-70 (Fla. 1990).

Walker v. State, 22 Fla. L. Weekly at S542-3; See also Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, 145-6, 149 (1994) (Majority of the Supreme Court of the United States agreed that in the penalty phase of a state capital trial, due process requires that the defendant be allowed to inform the capital sentencing jury, through either argument of counsel or instructions by the trial court, of his ineligibility for parole under state law even if future dangerousness is at issue. The Court additionally acknowledged that, "[i]n a state in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second guess a decision whether or not to inform a jury of information regarding parole."). As noted in Issue III, herein, future dangerousness was not put at issue by the prosecution in the instant case.

In any event, as noted by the Appellant, in addition to the standard jury instructions, the trial judge twice informed the jury that he could impose consecutive life sentences, with a minimum mandatory term of 50 years, before parole eligibility. (T. 898-99, 1017). The trial judge also added that although parole eligibility would begin after the 50 year term, "That does not mean that there will be a release at that point." (T. 1017). The trial judge then informed the defense that it could not only argue consecutive sentencing, but that, "you can say only an irresponsible judge could give a concurrent sentence in this case. You can go as far as you like in that regard." (T. 3738-9).

The defense then argued consecutive sentencing with no limitations. (T. 3893-4). The defense stated, "we are talking 50 years consecutively", and added that with the Burke murder, "[c]onceivably, it could be longer". Id. Defense counsel then stated that with consecutive sentencing, the defendant would be "[n]inety some odd years...". Id. The State objected to defense counsel's arithmetic, when she stated that even with a concurrent sentence and one minimum mandatory term, the defendant would be 65 years old, before eligible for parole. Id. The objection was proper, as defendant was born in 1951, had been incarcerated since 1975, and he would be 49 years old with one minimum mandatory term. It should be noted that defense counsel was then allowed to continue:

> **[Defense counsel]:** It is a life sentence, however. A life sentence does not mean this gentleman is due to get out in that period of time.
>
> All it means is that he could come up for parole in that time, and I submit to you, factually, that the parole board is not going to release him.
>
> I also submit to you that this judge is not going to say I am going to make it a concurrent sentence.
>
> This judge will go on with that consecutive sentence because nobody wants the man --

(T. 3894). As seen above, the jury herein received accurate information with respect to sentencing, and the defendant was not in any way precluded from presenting argument as to consecutive sentencing. There was thus no error. Walker, supra, Simmons, supra.

V.

THE TRIAL COURT'S INSTRUCTIONS AS TO THE DEFENDANT'S ABSENCE WERE PROPER, AND THIS CLAIM HAS NOT BEEN PRESERVED FOR APPEAL.

The Appellant claims that the lower court's instructions with respect to the defendant's absence during resentencing were erroneous. This claim is unpreserved due to the lack of contemporaneous objection. Moreover, the trial court's explanations were in accordance with Peede v. State, 474 So.2d 808 (Fla. 1985). Finally, no prejudice has been demonstrated in light of the fact that the trial judge and both parties' counsel instructed the jury that the defendant's conduct and absence were not an aggravating circumstance, and were not to be considered against the defendant.

A. Reasons for the Defendant's Exclusion

At the outset, it should be noted that there were extensive hearings prior to the resentencing, where, based upon testimony from six mental health experts, the defendant was found to be competent. The day prior to voir dire, defense counsel acknowledged that the defendant's condition had not changed since the time of said hearings. (T. 77-80).

Immediately prior to voir dire, however, the defendant announced that he was sitting to hear evidence, but that he would not listen or follow anything the judge had to say, because the judge was a "Shaytan" (the devil or Satan). (T. 174-80). The defendant then added that he did not know why he was in court; that he had not been convicted of anything; that he would not

hear any explanations from the court; and, that he was sick. Id. The defendant then began commenting on "this evilness, this corruption." Id. The judge repeatedly asked whether the defendant wished to be excused, but the latter would not respond. Id.

At this juncture, defense counsel requested a competency evaluation. (T. 181). A number of mental health experts were considered and rejected due to concerns about how the defendant would react to them. (T. 181-202). Based upon availability, prior court appointment for competency evaluation, and consent of defense counsel, the judge then appointed Dr. Miller to examine the defendant. Id. Throughout these discussions, the defendant was praying that the Lord "kill the damn judge," and that, "the damn judge is a snake." (T. 194-201).

The lower court then held a competency hearing where Dr. Miller, and the correctional officers in daily contact with the defendant, testified. (T. 203-46). Dr. Miller based his opinion on current and prior interviews with the Defendant, and a jail history reflecting lack of unusual behavior in the preceding 4 years and over the course of the weekend prior to the in-court outburst. He concluded that defendant's in-court behavior was within the latter's "control", "volitional", "voluntary", and subject to his "will and whim." (T. 218-20). The defendant was competent, and had the capacity to "completely conform" to proper in-court behavior. Id. The defendant's current behavior was "contrived", "staged for the purpose of court proceedings to be uncooperative or disruptive or to give the impression that he may be mentally disturbed." (T. 206). The corrections officers then testified that the defendant was "very cooperative" and "communicative", when outside the courtroom. He would ask questions about his rights at the Dade County Jail, inquiring and requesting availability of Kosher meals, Islamic literature, prayer beads, etc. (T. 224, 232, 235). The defendant did not exhibit any abnormal behavior

outside the courtroom; even after his prior outburst in court in 1991, he had calmed down by himself upon being returned to his cell. (T. 236-39). The defendant continued his outburst throughout this competency hearing. (T. 203-46). The trial judge found the defendant to be competent, and his in-court behavior to be "voluntary" and "contrived." (T. 245-46).[6]

There was a recess after the above competency hearing. The first panel of the prospective jurors were then brought in.(T. 251-52). The defendant's remarks as to "snakes," and, "Damn snakes," continued. (T. 258-62). The panel was taken out of the courtroom. (T. 262). The trial judge noted that the defendant had had many loud outbursts, and admonished him as follows:

> I will not allow the proceeding to be disrupted. I believe it is in your best interest to be at this proceeding and to assist your lawyers.
>
> You are on trial here for your life; however, the proceeding will go forward with or without you.
>
> If you do not behave in an appropriate courtroom manner, I will remove you from the courtroom and the proceedings will take place in your absence. I urge you to think of this during the lunch hour.

(T. 262-63).

After the above recess, the defendant, outside the presence of the jury, announced that: "I don't want my constitutional rights." (T. 266). Upon inquiry, the defendant added he didn't

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[6] It should be noted that subsequently the defendant was also examined by defense expert, Dr. Fisher. Dr. Fisher testified before the trial judge that he could not state that the defendant was incompetent. (T. 2442-46, 2475-90). Dr. Fisher stated that the defendant's condition was the same as in his prior evaluations in 1979 and 1989. (T. 2477). He did not know whether the defendant was faking or incompetent. (T. 2488). Dr. Fisher also acknowledged that the defendant had produced written instructions from his CCR attorneys not to cooperate with any mental health experts, such that additional evaluations would not be fruitful. (T. 2485-86). The trial judge again found the defendant competent, in light of Dr. Fisher's testimony, and the defendant's intervening daily discussions with the Court, which demonstrated that he was aware of the nature of the proceedings, understood everything, and was "fully capable of communicating with his lawyer if that were his agenda." (T. 2496-99).

know what this meant. Id. The defendant then asked if he could leave. (T. 268). The trial court responded that defendant had a right to be present; that his presence would be helpful in terms of assisting his attorney; that in the court's opinion it would be a serious error not to be present; but that the defendant had the right to waive his presence and leave. (T. 268-69). The court suggested that the defendant confer with his attorneys, which he did. (T. 270-71).

A lengthy discourse then ensued where the trial court would repeatedly ask whether the defendant wished to leave, and the defendant would not give a direct answer, persisting in wanting to first waive "all" of his rights, without explaining what this meant. (T. 271-85). The trial judge, noting that defendant was being evasive and not waiving his presence, announced that he would bring the jury into the courtroom. The defendant would be excluded if he was disruptive, and the jury would be told not to consider his conduct under any circumstances. (T. 284-85).

The judge then instructed the defendant to be silent, and the panel was brought in. (T. 285). The defendant then continued talking about giving up his constitutional rights, and how the court was "playing games." (T. 287). The jurors were again removed. Id.

The judge again told the defendant that he would be removed if he did not remain silent. (T. 288). The defendant persisted that he would not leave without his constitutional rights being rescinded first. He proceeded to call the judge "Shaytan," "corrupt," evil," etc. (T. 288-92). At this juncture, the judge announced that the defendant would be removed from the courtroom, "until he promises to conduct himself properly." (T.2 92-94). The judge stated that the defendant would be returned every morning to determine whether he wished to abide by acceptable courtroom behavior. (T. 294). The above mentioned panel of prospective jurors was

stricken at the request of defense counsel. (T. 344).

The next day, prior to voir dire, the defendant was brought back in court. (T. 357-70). During a twenty-five minute discourse, defendant first complained about the corrections officers not delivering his meals in accordance with Islamic rules. Id. He then proceeded to call the judge "Shaytaan," "corrupt," "evil," and, "the King of this den of snakes." Id. Finally, the defendant stated that he was present to "give evidence," and that, "[Y]ou wronged me yesterday when you threw me out the damn Courtroom." (T. 367-68). The trial judge responded that defendant was welcome to stay in court, as long as he remained silent, "except when you are communicating quietly with your lawyers." (T. 370). The defendant stated that, "I am not going to be quiet." Id. The judge thus excluded the defendant, prior to a new panel of jurors being brought in. Id.

Apart from having given the defendant an opportunity to waive his presence voluntarily during the above proceedings, the court also allowed defense counsel an additional opportunity to persuade defendant to "waive his presence." (T. 692). The efforts were not successful. Thereafter, on a daily basis, prior to voir dire or presentation of evidence, the defendant would be brought into the courtroom to ascertain whether he would behave. On a daily basis, the defendant persisted in calling the court and other personnel "Shataan" and snakes; he indicated that he would not observe proper courtroom decorum.[7]

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[7] During one of these daily sessions the defendant mentioned Faretta v. California, 422 U.S. 806 (1975). (T. 2431-45). The trial court repeatedly asked whether the defendant wished to represent himself or be his own attorney. Id. The defendant would not directly respond, and in fact stated: "I will continue to say to you I am not going to answer it. . . ." (T. 2440). The trial court ruled that there was no "unequivocal request for counsel." (T. 2445).

B. Explanation Given to the Jurors

The parties then discussed how to explain the defendant's absence to the jurors. (T. 371-72). Defense counsel stated that defendant's behavior was not "willful", and that he would object to instructions that defendant was "voluntarily absenting himself." (T. 371-72). Defense counsel added, however, that "we can come up with some language but ---." The trial judge thus informed the new panel of jurors, as follows:

> During this proceeding, Mr. Muhammad is not here because he has been unable to conduct himself in a manner consistent with appropriate courtroom decorum and consequently I have removed him from the courtroom.
>
> We will - I will speak with him each day in the morning to see if that condition will change.

(T. 382). There was no contemporaneous objection to the above explanation. Id. Subsequently, additional jurors were brought in. They were also informed that the defendant had been excluded due to his conduct in court. (T. 1158). Again, there were no objections. Id. Indeed, defense counsel expressly conceded that they had accepted the above explanations: "[W]e went along with the instruction to the jury on the advising that he had been disruptive and that is why he was not here." (T. 2419).

Thereafter, in the midst of the state's case, the jurors expressed concern as to whether defendant would be present at any time during trial. (T. 2414). The trial judge instructed the jurors, "not to concern yourselves" with the defendant's absence. Id.

Outside the presence of the jury, the judge then noted that several of the jurors had expressed concerns that defendant was being deprived of his rights. (T. 2420-22). The court then ruled that the jury should be told that the decision to exclude had not been made and forgotten, but that the defendant was given a daily opportunity to participate. (T. 2424-25).

Defense counsel objected on the grounds that the jury should not be told about the defendant's various descriptions of the judge, and that the delays for the daily morning inquiries should not be attributed to him. (T. 2423-25). The trial judge stated that he would not disclose the details of the outbursts. He also noted that the morning delays consisted of a 10 minute period, and the jury would not be upset about it. Id. The judge then instructed the jury:

> The second thing is Mr. Coachman's question of yesterday inquiring why the defendant is not present or whether or not the defendant would join us at any time. I feel compelled to give you a more clear response because this is not the first time that that question has been asked.
>
> This trial began on Tuesday, January 23. When jury selection began. That is a week from this Tuesday.
>
> Every morning at 9:30, I bring Mr. Muhammad into the courtroom. That is why we never begin at 9:30. Every morning I speak with him and every morning he directly or indirectly indicates that he will not conform to accepted courtroom behavior.
>
> I have invited him to sit quietly and consult with his attorneys and it is obvious to me that he is unwilling to do that, so the decision to exclude him is not something that was done at the beginning of trial and then forgotten. It is revisited every single day at 9:30 in the morning.

(T. 2453-54).

It should be noted that during voir dire, defense counsel had ascertained that none of the jurors would consider anything about the defendant's behavior and his absence from the courtroom. (T. 987-89). Defense counsel ensured that the jurors would follow the court's instruction that "there is no aggravating circumstance of the defendant not being in the courtroom." Id. The trial judge, too, then reiterated that, "I also instruct you now that that decision [exclusion of defendant] has nothing to do with your decision. In other words, the fact that the defendant was disruptive does not -- is not an aggravating factor. In other words, it is not something to be considered against him in making your recommendation." (T. 1810). All

jurors then affirmatively indicated that they would follow those instructions. Id. Finally, at the conclusion of the case, during closing argument, the prosecution also stated that the defendant's absence "is not an aggravator. That is not a mitigator." (T. 3815). The prosecutor added that the absence was not the defendant's fault, was not the prosecutor's fault, was not the judge's fault, and not the defense lawyers' fault. Id. The prosecutor concluded, "All of this has to be put out of your mind. No matter how difficult that is, you can't use that in making your decision." Id. At this juncture, the trial court also reiterated that, "[t]his is consistent with my instructions." Id.

C. Argument

Initially, it must be noted that when a defendant is absent, the jurors are entitled to an explanation for the absence. Peede, 474 So. 2d at 811-12. In that case, the defendant had personally asked to be excused from trial on several occasions. The trial judge had questioned Peede, and determined that Peede was knowingly and voluntarily waiving his presence at trial. The trial judge had thus, in part, informed the jury that Peede did not wish to participate in trial; that his decision was voluntary; and that, "it's not a decision that's made because of any illness he may be suffering or because of any improper pressures being placed on him." 474 So. 2d at 811.

In the instant case, as noted at pp. 45-49, the defendant would not, despite repeated questioning and opportunities, waive his presence. Defense counsel did not wish the court to inform the jury that defendant's absence was a voluntary decision. The court thus informed the jury, during jury selection, that it had removed the defendant as he was unable to conduct himself in a manner consistent with appropriate courtroom decorum. As noted previously, there

were no contemporaneous objections to the court's instructions. Indeed, defense counsel affirmatively stated that, "[w]e went along with the instruction to the jury or the advising of the jury that he [defendant] had been disruptive and that is why he was not here." (T. 2419). The Appellant's contentions at this juncture are thus waived and procedurally barred. Steinhorst, 412 So. 2d at 338 ("In order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception or motion below"); Tillman, supra.

The defense objection to the court's additional mid-trial explanation does not affect the bar. The initial explanations had been given during voir dire. Subsequently, the jury had voiced concern about the defendant's absence during the presentation of the evidence. The trial judge, after stating that the jury was not to concern itself with the defendant's absence, merely reassured them that he had not forgotten about the defendant. The judge had initially, during voir dire and without objection, informed the jury that he would speak with the defendant, "each day in the morning to see if that condition will change." (T. 382). The court then reaffirmed this position, and stated that he had in fact spoken with the defendant on a daily basis, "so the decision to exclude him is not something that was done at the beginning of trial and forgotten. It is revisited every single day at 9:30 in the morning." (T. 2453-54). Nothing in addition to the unobjected initial instructions was thus conveyed to the jury. The instant claim is thus unpreserved.

In any event, no prejudice has been demonstrated. As noted at pp. 49-51, the trial court repeatedly instructed the jury that the defendant's behavior and absence were not an aggravating factor, and should not be considered by the jury. Defense counsel also ascertained that the jury

would not consider the defendant's exclusion against him. Finally, even the prosecutor emphasized, during closing argument, that the defendant's exclusion was "not an aggravator," and could not be used in the jury's sentencing recommendation. Peede, 474 So. 2d at 815 (no reversible error where the judge instructed the jury not to consider the defendant's absence against him); see also, Greer v. Miller, 483 U.S. 756, 767 at n. 8 (1987) (jurors are presumed to follow the court's instructions).

VI.

DR. MILLER'S TESTIMONY WAS PROPER REBUTTAL AND THE CLAIMS OF ERROR HEREIN HAVE NOT BEEN PRESERVED.

The Appellant has argued that Dr. Miller's testimony during the State's case in rebuttal: a) violated Fla.R.Crim.P. 3.211(e)'s confidentiality provisions; b) violated the defendant's Fifth Amendment privilege against self-incrimination; c) violated defendant's Sixth Amendment right to counsel; and, d) was irrelevant and exceeded the proper scope of rebuttal. In the trial court, however, the defendant did not mention or raise any of the above parts a, b or c of the argument on appeal. The defendant had only objected on the grounds that Dr. Miller's name was not on the witness list;[8] that the issue of whether defendant was competent was irrelevant; and that Dr. Miller's testimony would reveal the details of the defendant's in-court conduct, i.e., calling the judge "a damn snake." (T. 3486-87; 3492-93; 3498-99). Parts a, b and c of the argument herein are thus procedurally barred. Moreover, to allay the defense concerns, the prosecution agreed

[8] The trial court conducted a Richardson inquiry and determined that the violation was not willful; that the defense had previously known that Dr. Miller would testify; and, that the substance of his testimony was known by the defense. (T. 3487-3580). Defense counsel then declined an additional opportunity to depose Dr. Miller. (T. 3500).

to and did not elicit any opinions as to whether the defendant had been found competent by Dr. Miller. (T. 3497, 3503-21). Likewise, the witness was instructed to and did not mention the substance of the defendant's statements during his court outbursts. (T. 3498-99; 3503-21). The expert did not reveal any factual admissions by the defendant with respect to the crimes either. Finally, Dr. Miller's testimony was properly within the scope of rebuttal, as the defense experts had not only relied upon Miller's competency report, but they had also extensively delved into the substance and results of the defendant's other competency examinations.

First, there was no mention of the Fla.R.Crim.P. 3.211(e), nor any Fifth or Sixth Amendment violations, in the trial court. These issues are thus procedurally barred. Hargrave v. State, 427 So. 2d 713 (Fla. 1983). In Hargrave the State presented a court-appointed expert, who had conducted the defendant's competency evaluation, to negate mental mitigation. The Court expressly concluded that any constitutional claim was waived in the absence of objection at trial, and, furthermore, that the claim was not a matter of fundamental error. 427 So.2d at 715. The Court stated: "while invoking the death penalty requires that aggravating and mitigating circumstances be weighed, the failure to object to testimony which might result in the failure to find a mitigating circumstance is not fundamental error." Id. See also, Long v. State, 610 So. 2d 1268, 1275 (Fla. 1992) (testimony of State's expert, who had been appointed to conduct competency and insanity evaluation, which revealed incriminating facts of the crime elicited from the defendant in order to negate mental mitigation, was unpreserved for appellate review); Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA), rev. denied, 576 So.2 d 286 (Fla. 1990) (Fifth Amendment violation, as a result of court appointed psychiatrist's testimony on defendant's factual admission to the crime, found not to be preserved absent objection).

Furthermore, Dr. Miller's testimony was proper, and did not constitute any violation of confidentiality rules or the Fifth and Sixth Amendments. First, the defense was on notice of Miller's evaluations. The defense then opened the door to Miller's testimony by presenting experts who had not only relied upon Miller's report, but who also presented extensive testimony as to the substance and results of the defendant's various competency examinations. It has routinely been held that the defense can open the door to otherwise inadmissible evidence by virtue of its own use of a mental health expert's testimony; all bases of the defense's experts's opinions become the proper subject matter of testimony, even if those matters could not otherwise be elicited. See, e.g., Parkins v. State, 238 So. 2d 817, 820 (Fla. 1970); Hildwin, supra; Parker, supra; Valle, supra; see also, Morgan v. State, 634 So. 2d 6 (Fla. 1994) (defendant waived confidentiality privilege as to statements made while under hypnosis to court appointed psychiatrist by providing results of examination to defense expert and calling that expert as a witness); Lovett v. State, 636 So. 2d 1304, 1308 (Fla. 1994) (". . . the State cannot elicit specific facts about a crime learned by a confidential expert through an examination of a defendant, unless the defendant waives the attorney/client privilege by calling the expert to testify and opens the inquiry to collateral issues."); Buchanan v. Kentucky, 438 U.S. 402 (1987) (The Court rejected defendant's Fifth and Sixth Amendment claims, where the defense was on notice of confidential evaluations, and presented a defense of extreme emotional disturbance. The confidential evaluations presented in rebuttal, included a wide range of psychological and general observations about defendant's mental health, but had not described any statements by defendant as to the facts of the crimes. The portions of the confidential report as to whether or not defendant was competent had also been omitted.); Hargrave, 427 So. 2d at 714-16 (no Sixth

Amendment violation, where the pretrial competency evaluation had been conducted after notice to defense counsel, and the State presented the competency expert to negate the defense mental mitigation).[9]

In the instant case, the first defense expert, Dr. Fisher, on direct examination, stated express reliance upon other expert reports, including Dr. McClaine's report, which, Fisher stated, "I believe found the defendant not competent to stand trial." (T. 2522). Dr. McClaine had been appointed to evaluate defendant's competency in 1991,[10] at the same time that Dr. Miller had been appointed for the same purpose. Dr. McClaine then testified as a defense expert at resentencing. On direct examination, he detailed the defendant's responses during said competency evaluation. (T. 2949-51). The defense also presented Dr. Rothenberg who stated that he had been appointed to assist the defense as to the defendant's competency to stand trial and insanity at the time of the offenses. (T. 3139-40). Dr. Rothenberg first described the purpose and questions asked during the competency evaluations. He then detailed the substance of the defendant's responses, including tape recordings, from the competency/sanity evaluations. (T. 3140-44, 3146-89). Finally, the defense presented Dr. Toomer's testimony. The latter, again on direct examination, expressly stated that he had relied upon "the 1991 evaluation . . . by a Doctor Miller," in arriving at his conclusions. (T. 3039). Moreover, Toomer

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[9] The defendant's reliance upon Holland v. State, 636 So.2 d 1289 (Fla. 1994) and Powell v. Texas, 492 U.S. 680 (1984) is unwarranted. In both of these cases, the mental health experts had conducted their evaluations without any prior notice to defense counsel, thus violating the Sixth Amendment. 636 So. 2d at 1291; 492 U.S. at 683. Additionally, in Powell v. Texas, the State had utilized the undisclosed evaluations to satisfy its burden of proving aggravating circumstances, not to negate mitigation.

[10] This expert had been appointed for competency and to assist defense counsel, but then testified at the 1991 competency hearings. (R. 725; 415-27).

erroneously stated that "all" of the doctors who had examined the defendant agreed that defendant was suffering from a mental disorder or dysfunction. (T. 3040). Finally, Toomer acknowledged that various experts had disagreed with respect to whether defendant was competent. (T. 3039).

As is abundantly clear from the above, the defense experts first opened the door to the subject of defendant's competency and the details of the defendant's responses during competency evaluations, in addition to having specifically relied upon Dr. Miller's competency exam. One of the experts even misstated Miller's conclusions. As such, Dr. Miller's evaluation was the proper subject matter of testimony by the latter. Long, supra; Parkin, supra; Valle, supra; Morgan, supra; Lovett, supra; Buchanan v. Kentucky, supra; Hargrave, supra.

Finally, Dr. Miller's testimony did not prejudice the defendant. The latter did not mention any facts of the crime, and did not express any opinion as to whether defendant was competent or not. (T. 3503-21, 3526). He merely detailed some of defendant's responses to mental status questions (which were not in any way related to the crimes), and concluded that the defendant was "malingering symptoms of mental disorder." (T. 3511-19, 3520, 3526). The defense's own experts, Drs. McClaine and Rothenberg, had also detailed some of the defendant's mental status responses. Based upon these responses, defense expert McClaine concluded that "in at least part of the interview he was malingering when I was dealing with him," and that defendant has "a manipulative tendency that often comes across as outright lying and exaggerating various kinds of symptoms." (T. 2949-52). Dr. Miller's testimony thus did not materially add anything to that which had previously been elicited from the defendant's own experts, on direct examination. The defendant was therefore not prejudiced.

VII.

ALLEGED ERROR WITH RESPECT TO DENIAL OF DEFENSE PEREMPTORY CHALLENGE IS NOT PRESERVED AND IS WITHOUT MERIT.

The Appellant argues that the trial court erred in preventing him from exercising a peremptory challenge against potential juror Rivero-Saiz. This issue has not been preserved as the defense did not renew its objection before the jury was sworn, in accordance with Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993); see also Franqui v. State, 699 So. 2d 1332, 1334 (1997). Moreover, the trial court's ruling was proper, where it conducted an inquiry upon the State's timely objection, and ascertained that the defense's stated reason was not genuine, in accordance with Melbourne v. State, 679 So. 2d 759, 764-5 (Fla. 1996).

The record reflects that during the challenges to the first group of potential jurors, the defense sought to exercise a peremptory challenge against Ms. Rivero-Saiz which was disallowed by the trial court. (T. 1125-27). Jury selection continued with a new panel of potential jurors, over the next two days and numerous other peremptory and cause challenges were exercised. (T. 1127-1870). At the end of this process, both parties "tendered" the jury with no reservation of any prior objections (T. 1869-70). The parties then agreed on alternates; again there were no reservations or objections. (T. 1870-75). The jury was not immediately sworn; the parties had the opportunity to reflect over the weekend, after which the jury was finally sworn in. (T. 1877; 1903). Again, although other objections to the voir dire process were raised, there was no mention of any erroneous denial of peremptories nor any mention of Ms. Rivero-Saiz. (T. 1900-03). Instead, the Appellant has noted that an objection was raised, after approximately two weeks of presentation of testimony. (T. 3475). Clearly, such an

objection is not timely. Joiner, 618 So. 2d at 176. ("[C]ounsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his entire objection."); Melbourne 629 So. 2d at 765 ("Melbourne failed to preserve this issue because she did not renew her objections before the jury was sworn. Any error could have been corrected easily at that point without compromising the whole trial at the outset. It is entirely possible that events transpiring subsequent to the initial objection caused Melbourne to become satisfied with the jury and abandon her claims".); Franqui, 699 So. 2d at 1334, n. 3. (Claim of improper denial of peremptory was procedurally barred where defense, although renewing objections to other excluded jurors, did not mention the specific juror at issue on appeal).

Moreover, no error has been demonstrated in the instant case. The record reflects that the State specifically articulated a timely objection: "We would like -- we object to that excusal. Ms. Rivero-Saiz is a Hispanic female. We think she is being excused because of her gender as well as her ethnicity". (T. 1125). The prosecution added that there was no "race neutral reason" for the juror's challenge in light of her voir dire which reflected that she would probably not recommend the death penalty, and which reflected that: "she had no police family; she was not a victim of a crime; she consistently said she could give the defendant a fair trial." Id. The defense did not in any way challenge these representations.[11] The trial judge then asked the defense, "your reason for excusing her?" (T. 1126). Defense counsel responded that, "She would be a very weak juror. That is what she evidenced to me. She is just going to go along with somebody." Id.

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[11] The State's reasons were supported by the record. (T. 650-1; 808-10; 1006-08).

The trial court then expressly stated that, while defense counsel's reason could constitute a valid reason, it did not do so in the instant case because it was not supported by the record:

> **THE COURT:** ...Such perceptions as you have indicated are acceptable. The trial court can confirm that it observed the same thing.
> I did not make that observation.

(T. 1126). (emphasis added). The trial judge then inquired if there were any additional ethnic or race neutral reasons; none were forthcoming. (T. 1126-7). The trial judge then added that he had observed the juror's demeanor, that she appeared "completely congenial, very cordial..., attentive," and, that there was nothing in her personal history that indicates that she would be anything less than a fair juror. (T. 1127). The trial judge thus held, "There is no ethnic or gender neutral reason given. Consequently, I will disallow the peremptory. Id. At this juncture, defense counsel stated that the victims were not Hispanic and the defendant was black. (T. 1128). The trial judge responded, "it has nothing to do with the victim. It has nothing to do with the defendant. It is rather the juror's right not to be discriminated against." Id.

As is abundantly clear from the foregoing, the trial court found defense counsel's reason was not genuine, but rather a pretext, because the reason was contrary to the judge's own observations and the juror's record answers. The trial judge made an adverse credibility finding to the defense counsel's stated reason, and it was well within its province to do so. Melbourne, 679 So. 2d at 765 ("the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous."); See also Franqui v. State, 699 So. 2d 1332, 1335 (Fla. 1997):

> Standing alone, defense counsel's statement, "I don't like him," may appear to be a race-neutral reason. However, the trial court was obligated to evaluate the credibility of this statement in the full context in which this statement was made.

> The present record reveals that juror Diaz was questioned extensively by the court, the State, and defense counsel. The questioning takes place over nearly a half-dozen pages of transcript and yields no obvious reason for disqualification. When defense counsel, as an after-thought, later made an attempt to justify the challenge with other reasons, it was the trial court's responsibility to evaluate these reasons to determine whether they were credible. As we explained in *Melbourne*, "the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." 679 So. 2d at 764-65.

The determination to strike the challenge of prospective juror Rivero-Saiz was thus not preserved, and not shown to be clearly erroneous.

VIII.

THE TRIAL COURT PROPERLY EXCUSED THREE JURORS WHO HAD IMPROPERLY RECEIVED AND CONSIDERED OUT-OF-COURT INFORMATION ABOUT THE CASE.

The trial court excused three (3) jurors who had been exposed to extrinsic, extrajudicial information related to the defendant's violent out-of-court behavior, his mental condition, his faked suicide attempt, and, court security measures which had not been disclosed to the remainder of the jury. The trial judge, upon individual voir dire of said jurors, had determined that the defendant would be prejudiced as a result of the improper communications, which were directly related to the mental health defense. The Appellant, while acknowledging both in the court below and on appeal that prejudice from the improper contact was obvious,[12] has argued that there was error because the State, and not the defense, requested that the jurors be excused. This claim is without merit, as the extrinsic communications herein are deemed to be presumptively prejudicial, and the State has the burden of proving same harmless beyond a

[12] See Initial Brief of Appellant, at p. 70; see also, T. 3468-69.

reasonable doubt:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229 (1954). See also, Amazon v. State, 487 So. 2d 8, 11-12 (Fla. 1986) (juror's viewing of a news account involving a videotape of testimony which was actually presented at trial was deemed to establish a "prime facie case of potential prejudice"); Larzerlere v. State, 676 So. 2d 394, 403-404 (Fla. 1996) (prejudice exists where there is a reasonable possibility that improper contact affected the jurors); See also, Johnson v. State, 696 So. 2d 317, 323-24 (Fla. 1997) (even intra-jury communications, with respect to properly presented evidence, prior to deliberations, establish a prima facie case of potential prejudice which the State must rebut). In the instant case, based upon the nature of the communications and the jurors' responses which reflected prejudice, the State properly requested that the jurors involved be excused. Moreover, the trial judge's findings do not reflect any abuse of discretion.

The first juror questioned by the trial court, Ms. Zaribaf, reported that, while in the elevator with jurors Weldon and Cunningham, they were prevented from entering the fourth floor of the courthouse. (T. 3442). A lady with a badge (a court clerk) had then commented, "Oh, Thomas Knight," "You know, he is a psycho." Id. Despite being told of the presence of the jurors, the clerk had continued: "He had been trying to starve himself to commit suicide and that he even attempted to commit suicide." (T. 3443). Ms. Zaribaf added that one of the other

jurors, Ms. Cunningham, had started to cry. (T. 3445). Ms. Zaribaf stated that she could set aside what she had heard, and decide the case on what was presented in the courtroom. (T.3444). Despite this, however, this juror added that she "figured" the clerk recounting the events was probably "exaggerating." Id. Ms. Zaribaf also added, ""[w]e were scared that we weren't supposed to listen to that." Id. (T. 3445).

The second juror, Ms. Weldon, stated that when the elevator had stopped, corrections officers had prevented anyone from coming out, and in response to questions by the clerk, had referred to either "bringing in or taking out Thomas Knight." (T. 3446). The clerk had then commented, "Oh, he is real psychopath. He is in a wheelchair now because he is on this hunger strike." Id.

According to Ms. Weldon, the clerk had then stated that the defendant had "faked a suicide attempt," and "was really trying to jump this correction officer." Id. Ms. Weldon added that the other juror involved, Ms. Cunningham, had been "really upset"; Weldon had tried to calm her down, asking: "Has it changed your mind?" (T. 3453). Mrs. Cunningham had then again seen the clerk in question, and asked Ms. Weldon to find out the clerk's name. Id. Ms. Weldon had then in fact done so. Id.

Ms. Weldon assured the judge that she could make her recommendation without reference to the clerk's remarks, and, "Just based on the evidence." (T.3449). However, she then added that when the clerk had said, ""fake" suicide attempt, the information "fit" a newspaper account that she had read "a couple of words out of." (T. 3450-51).

Ms. Weldon stated that she had been thinking about the news account for several days. (T.3 452). She noted, "I'm still wondering how do you fake a suicide in jail? How could he?

What did he use?" Id. Weldon then added that the clerk's remarks about the "fake" suicide attempt were "the only statement I could give a little credibility because I had -- it fits in with what I was missing [from the newspaper account]." Id.

In response to defense counsel's questioning, Ms. Weldon stated that she could set aside the remarks about suicide. (T. 3456). However, she then immediately added:

> **[WELDON]:** Can I make a statement here? To be honest with you, I'm thinking that he [defendant] is realizing that he is high profile at the moment. If he draws attention to himself, that is all he is after and I don't fall for attention getting devices from anyone.
>
> That is how I interpret it.

Id.

Finally, prior to being excused, Ms. Weldon inquired whether the clerk was going to get into any trouble. (T. 3458). The following then ensued:

> **THE COURT:** Don't worry about it.
>
> **MS. WELDON:** That is going to worry me.
>
> **THE COURT:** Is that going to affect your ability to deliberate in this case?
>
> **MS. WELDON:** Yes, if she is going to get into trouble. I'm responsible. I would feel directly responsible.

(T. 3458-59).

The last juror, Ms. Cunningham, stated that she had heard that the defendant was: "a total psycho"; "he is in a wheel chair"; "he is trying to starve himself to death; and that, "he tried to commit suicide." (T. 3460-61). The record reflects that this juror was still visibly upset at the time of the court's inquiry. (T. 3460). Mrs. Cunningham stated that she could set aside what the clerk had said. (T.3 462). However, she then immediately added, "It's just that it upset me

so much because I thought something would happen, you know." Id. None of the above jurors had communicated with the remainder of the jury, and they were instructed not to do so prior to being excused. (T. 3442-63).

The prosecution then argued that, although all three jurors had "the potential of being very favorable state jurors," they had received improper information which had both the potential of influencing them, and of "killing us on the appellate record in this litigation." (T. 3466-67). The defense acknowledged that at least Ms. Weldon's remarks were prejudicial to the defendant (T. 3468), but added: "We just -- we object to [removing any jurors]." Id. The defense added that the prosecutor, "is arguing the jurors are going to be adversely affected in this case against the defendant. I don't think that is his position to argue." (T. 3471).

The trial court then ruled that it was compelled to excuse the three jurors and replace them with alternates, based upon the following findings:

> **[THE COURT]:** These three jurors are now privy to that mental state. We have gone to great lengths to keep the jury from knowing the security measures that are used when Mr. Knight is brought over.
>
> These three jurors are now aware that people are not even allowed to leave the elevator on the fourth floor when he is being moved. We have gone to great lengths to make sure they don't know of any of the histrionics or any of the activities of the defendant.
>
> They now know he has been on a hunger strike. We have done everything we could to keep the news away from them.
>
> They now know that not only of the attempt[ed] suicide but that it was a fake attempted suicide, which casts doubt, not only on the possibility of his mental state, but also on the integrity of the defense.
>
> Mrs. Cunningham was visibly trembling when she came in. She was scared. She had difficulty speaking. . . .
>
> . . .
>
> That has had a substantial impact on this woman, although she is the least significant because she is an alternate.
>
> Ms. Weldon, going beyond what the others felt, has actually reached the conclusion and that being that the defendant's activity, that she has accepted it,

the fake attempt at suicide and concluded that it is, in fact, an attention getting device.

. . .

I am convinced that it is going to be impossible for her but even more significantly as concerns Ms. Weldon she seems to be most affected by the prospect of punishment of Mrs. Coachman [the clerk].

I asked her, "Can you set that aside?" She said, "No." I asked her, "Will it affect your judgment in this case?" And she said, "Yes." That the prospect of punishment, what I might do to Mrs. Coachman, is something that is going to hang with her and affect her deliberations, her ability to judge.

. . .

Although Ms. Zaribaf made none of the statements that the others made, she knows -- she knows things that the other jurors do not know. She knows things that are significant, things that I have, that we have all struggled to keep from her these past three weeks, and in a case where the defendant's mental status, if the jury is to recommend life, it would be on the weight and the nature and the quality of the mental mitigators you have presented.

. . .

I cannot imagine it is appropriate to have one juror who knows these things and not the others. It again is unfortunate that these things arise and pollute records that are going to be so -- possibly be so carefully scrutinized that I am compelled to excuse them all.

(T. 3472-75). The trial court's findings are supported by the record, and in accordance with prior precedent. Remmer, supra; Amazon, supra; Larzerlere, supra. No impropriety or abuse of discretion has been demonstrated.

IX.

THE CLAIM OF PROSECUTORIAL MISCONDUCT IS UNPRESERVED AND WITHOUT MERIT.

None of the claims of misconduct raised by the Appellant were preserved for appeal. Moreover, none of the claims, either individually or collectively, were so prejudicial as to warrant a new sentencing proceeding. Suggs v. State, 644 So. 2d 641, 69-70 (Fla. 1994) ("No objection was made by Suggs to the solicitation of testimony during the penalty phase, and the arguments regarding that testimony are procedurally barred."); Bertolotti v. State, 476 So. 2d

130, 133-4 (Fla. 1985) (Comments on silence, golden rule argument, and comments appealing to the sympathy, emotions and fears of the jurors were not so egregious as to require reversal of the sentence). As will be seen below, most of the Appellant's characterizations are either without record support, or constitute proper rebuttal and fair comment on the evidence.

The defendant first claims that the prosecution's cross-examination of Drs. Fisher and Carbonell established that a previous jury, the appellate courts, and the Governor have all come to the conclusion that a death sentence was appropriate in this case, thereby pressuring the resentencing jury to recommend a sentence of death. No such argument was ever presented in the court below. The instant claim is thus procedurally barred. Steinhorst, supra; Suggs, supra.

Moreover, the record reflects that the first mention of a prior death sentence having been imposed was elicited by defense counsel, through its cross-examination during the State's case in chief. (T. 2286). Likewise there was no mention of an "unsuccessful" clemency or appellate proceeding in the record citations relied upon by the Appellant. Indeed, common sense dictates that at least one of the authorities mentioned by the Appellant had not deemed the sentence to be appropriate. Otherwise there would be no need for a resentencing.

In any event, the record reflects that the State utilized the transcript of the defendant's statements at his clemency hearing. Said transcript was not, however, used to establish an "unsuccessful" plea to the Governor. Rather the transcript was utilized to impeach the defense experts' portrayals of the defendant. Dr. Fisher, on direct examination, stated defendant was a chronic schizophrenic who would lose touch with reality under stress and had difficulties coping in a "daily environment." (T. 2517-18, 2523, 2528-30). According to reports relied upon by Fisher, defendant exhibited various symptoms of the alleged disease such as loose

association, rambling, tangential speech, language disorder, and difficulties in coherent thinking and concentration. (T. 2522, 2855-60, 2943, 2963). Dr. Fisher's first evaluation was in 1979.

On cross-examination, the prosecutor elicited that said evaluation, "was in anticipation of a clemency hearing," which is a hearing before the Governor regarding the death sentence. (T. 2540-41). The prosecutor asked if the defendant had been sentenced to death at the time and Fisher responded in the affirmative. Id. The defense objected that, "He indicated [defendant] was under a sentence of death." (T. 2541). The trial court, as noted above, correctly observed that the defense had itself previously elicited the fact that defendant had received a death sentence (T. 2543), and that the prosecutor was thus authorized to establish the expert's "perspective of the evaluation." (T. 2544). The prosecution then established that a clemency hearing, where one's life is on the line, is a highly stressful situation. (T. 2546). Yet the transcripts of his statement reflected that the defendant had maintained a lengthy, highly coherent, relevant, lucid and goal oriented discourse with the clemency board. (T. 2546-50). This was inconsistent with the defendant's alleged symptoms of drifts, ramblings, difficulty in coherent thinking and concentration, etc. Id.[13] There was thus nothing improper about the cross-examination. The purpose of cross-examination after all, "is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief..." Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978) (quoting Coco v. State, 62 So. 2d 892, 895 (Fla. 1953);

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[13] It should be noted that the defendant had not received any assistance in preparing the clemency statement. (T. 2974-5).

see also, Wuornos v. State, 644 So. 2d 1000, 1009 (Fla. 1994) ("Once the defense argues the existence of mitigators, the State has a right to rebut through any means permitted by the rules of evidence, and the defense will not be heard to complain otherwise.").

Likewise, references to the jury and plea of insanity in Dr. Carbonell's examination were also unpreserved and within the proper scope of cross-examination. On direct examination the expert testified that the defendant's symptoms and history were consistent with schizophrenia, and a paranoid personality. (T. 2850, 2859-60). Schizophrenics, according to Carbonell, have a different perception of "right and wrong". Id. The expert added that, "[t]he course of sanity can change fairly rapidly" in such people. Id. On cross-examination the prosecutor then inquired whether the prior jury had found the defendant "guilty" and rejected the plea of insanity. (T. 2893). Defense counsel objected, without stating any grounds. The objection was immediately sustained, and no answer was given. Id. There were no additional arguments, request for a curative instruction or a motion for mistrial. The claim is thus procedurally barred. Steinhorst, supra. Moreover, the original jury's finding of guilt is binding on the resentencing jury. That a plea of insanity was rejected is obviously subsumed within such a finding of guilt. The prosecutor's question was thus not only proper rebuttal of Carbonell's opinions as to lapses of sanity and lack of perception of right and wrong, but was also not prejudicial in any way. Coxwell, supra, Wuornos, supra.

The Appellant next argues that Dr. Toomer was asked about defendant having done "bad things" as a juvenile, and that a subsequent question, quoting the DSM with respect to the history required for a diagnosis of antisocial personality, thus misled the jury about the defendant's actual juvenile history. First, neither the record citation relied upon by the

Appellant, nor a review of Toomer's entire testimony, reflects any questioning about "bad things". The premise of this claim is thus non-existent. Moreover, there were no objections on the grounds now stated to the prosecutor having quoted the DSM criteria. This claim is thus unpreserved. Steinhorst, supra, Suggs, supra. Additionally, it should be noted that a preceding defense expert, McClaine, on direct examination, had extensively quoted and relied upon the DSM, concluding that the defendant met the criteria for the antisocial personality. Dr. Toomer, however, had stated the defendant was not anti-social. The prosecutor was thus entitled to contradict or rebut Toomer's opinion with the DSM. Moreover, there was no prejudice in light of Dr. McClaine having done the same thing previously. Finally, the defendant's criminal history had been extensively detailed by the defense witnesses Duval and Fisher. The jury was not misled. This claim too is unpreserved and without merit.

The Appellant's third argument is also unpreserved. Dr. Carbonell, having based her opinions, inter alia, upon the defendant's prison record, testified that virtually all of the defendant's disciplinary reports in prison involved incidents as to shaving and not being called by his name. (T. 2894-6). The prosecutor attempted to correct her by asking about defendant's numerous other disciplinary reports, which Carbonell acknowledged but discounted as being the norm in prison. Id. The prosecutor then asked about a disciplinary report "concerning a law student that was interviewing him" and allowed him to look up her dress. (T. 3896-7). Dr. Carbonell responded, "one should chastise the law student for being so inappropriate." (T. 2897). There were no objections, nor were any of the arguments now presented ever made in the court below. Moreover, there was no mention of any inappropriate conduct by any defense attorney in the State's closing argument. The instant claim is thus unpreserved and within the

scope of rebuttal, and no prejudice has been demonstrated. Suggs, supra. (unobjected to solicitation of testimony as to uncharged prior offenses found procedurally barred); Steinhorst, supra; Coxwell, supra; Wuornos, supra; Valle, supra.

Finally, the Appellant has claimed error as to the prosecutor's closing argument. The Appellant's claim as to a future dangerousness argument has been previously addressed in issue III and relied upon herein. That claim was unpreserved, and, in context, was not a comment about future dangerousness. The claim as to the prosecutor's alleged improper appeal to the sympathies of the jury is also unpreserved, as there was no objection and no motion for mistrial. (T. 3795). Even if improper, such an isolated and unpreserved comment does not constitute fundamental error so as to reverse the penalty phase. Crump v. State, 622 So. 2d 963, 971-2 (Fla. 1993) (Arguments which improperly gained sympathy for the victim, denigrated defense counsel, and asked for a death sentence to send a message to the community, were not fundamental error so as to require reversal of death sentence); Bertolotti, supra, (several improper comments which, inter alia, included an appeal to jury's sympathy based on the victim not having had lawyers to beg for her life, were not deemed to be so egregious as to reverse penalty phase). The Appellant's reliance upon Rhodes v. State, 547 So. 2d 1201, 1205-6, (Fla. 1984) is unwarranted as that case "was riddled with improper comments," all of which were objected to, but the trial judge had overruled all objections. This Court specifically noted, "none of these comments standing alone may have been so egregious as to warrant a mistrial,". Id. In sum, the Appellant's arguments herein are unpreserved and without merit.

X.

CLAIM OF INSTRUCTIONAL ERROR IS UNPRESERVED AND WITHOUT MERIT.

The Appellant argues that the trial court erred in failing to give a doubling instruction with respect to the merger of the kidnaping (felony murder), pecuniary gain, avoid arrest, and HAC aggravators. This argument has not been preserved, and is without merit.

In the court below, the defendant initially argued that the CCP and HAC aggravators were duplicative. (T. 3719-22). The defense then argued that there was "some element of doubling" in kidnaping and avoid arrest, because of "flight"; the defendant was: "fleeing. He is fleeing from lawful arrest. He is fleeing from kidnaping." (T. 3721-2). The defendant had run away after the murders when he saw the police. However, as noted by the trial court, the State's theory of the avoid arrest aggravator was not based upon flight from police; it was based upon "witness elimination." (T. 3722). The Appellant's current claims with respect to merger of kidnaping, pecuniary gain, avoiding arrest and HAC are thus not preserved as there were no such arguments in the court below. Steinhorst, supra; Castro v. State, 597 So. 2d 259, 261 (Fla. 1992); Jones v. State, 652 So. 2d 346, 350-1 (Fla. 1995); Gore v. State, 22 Fla. L. Weekly S471, 473 (Fla. July 17, 1997) ("Gore's argument regarding the doubling instruction was not properly preserved for review. At trial, Gore's argument in favor of the doubling instructionwas that the prior violent felony and under sentence of imprisonment aggravators should be merged. However, on appeal he grounds his argument for the doubling instruction on two different aggravators;").

In any event, the Appellant's argument is without merit. Improper doubling only occurs

where one aggravator necessarily encompasses the conduct subsumed in the other. See Fotopoulos v. State, 608 So. 2d 784, 793 (Fla. 1992), citing Echols v. State, 48 So. 2d 568, 575 (Fla. 1985):

> There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement. *Squires v. State*, 450 So. 2d 208 (Fla.), cert. denied, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984); *Combs v. State*, 403 So. 2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982).

See also, Trepal v. State, 621 So. 2d 1361, 1367 (Fla. 1993) (same); Toole v. State, 479 So. 2d 731, 733 (Fla. 1985) (same).

This Court has "consistently rejected" the argument that pecuniary gain and committed-during-the-course-ofa kidnaping are duplicative. Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1996), citing Preston v. State, 607 So. 2d 404 (Fla. 1992), Bryan v. State, 533 So. 2d 744 (Fla. 1988), Routly v. State, 440 So. 2d 1257 (Fla. 1983). Moreover, as noted by the trial judge, even in the absence of any objection, the State had waived reliance upon robbery as a separate felony so as to preserve the pecuniary gain aggravator. (T. 3720, 3702-3; 3714). Finding pecuniary gain in aggravation is not error when more than one felony, including robbery, has occurred. Monlyn v. State, 22 Fla. L.Weekly S631 (Fla. Oct. 9, 1997); see also Bates v. State, 465 So. 2d 490, 492 (Fla. 1985) (same), Smith v. State, 424 So. 2d 726 (Fla. 1982) (same). Likewise, the felony murder, HAC and avoid arrest aggravators are not restatements of each other. Felony murder concerns the actions of the defendant in committing murder during the course of a felony. HAC concerns the victims' state of mind - their suffering and emotional strain. The

avoid arrest aggravator concerns the defendant's desire to avoid detection. See, e.g., Hartley, supra (separate findings of during kidnaping and avoid arrest aggravators proper); Smith, supra (separate findings of kidnaping and HAC proper). Finally, the State would note that the trial judge expressly stated that, "It is not enough to weigh the number of aggravators against the number of mitigators, the process is more qualitative than quantitative. The court must and does look to the nature and quality of the aggravators and the mitigators which it has found to exist. This Court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances." (SR. 38). Thus, no prejudice has been demonstrated. In sum, the instant claim is unpreserved and without merit.

XI.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURORS ON THE PRIOR VIOLENT FELONY AGGRAVATOR.

The Appellant argues that the trial court erroneously allowed the prosecution to present evidence of the Burke murder, and thus should not have instructed the jury on the prior violent felony aggravator, because that murder occurred after the crimes herein. The defendant, however, was convicted of the Burke murder prior to the sentencing herein. As such, the Appellant's argument has been repeatedly rejected by this Court. See, Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977) (application of the prior violent felony aggravator for subsequent convictions obtained before sentencing is proper - the purpose of sentencing is to engage in a character analysis of the defendant); Lucas v. State, 376 So. 2d 1149 (Fla. 1979); Dougherty v. State, 417 So. 2d 1067, 1069 (Fla. 1982); Brown v. State, 473 So. 2d 1260, 1266 (Fla. 1985), Castro v. State, 644 So. 2d 987, 991, n.3 (Fla. 1994). Moreover, the State would note that the

sentence of death would have been imposed even absent consideration of the Burke murder. The trial judge specifically stated, "[t]he defendant argues that because the murder of Officer Burke occurred subsequent to the murders of Sydney and Lillian Gans it cannot be considered for purposes of this aggravator... even if the defense's strained reading of Elledge is correct, the court would nevertheless give this aggravator great weight because of the contemporaneous murder of Sydney and/or Lillian Gans". (SR. 3, n. 5). The instant claim is without merit.

XII.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURORS ON THE CCP AGGRAVATING CIRCUMSTANCE.

The Appellant argues that: a) the application of CCP aggravating factor herein constitutes an ex post facto violation of the law; b) the CCP aggravating circumstance itself is unconstitutionally vague; and, c) the jury instructions herein, which were in accordance with Jackson v. State, 648 So. 2d 85, 89, n.8 (Fla. 1994), did not properly define the "cold" element and were thus unconstitutional. These arguments are without merit and unpreserved.

First, this Court has repeatedly held that the application of the CCP factor to murders which occurred prior to its adoption is proper, and does not constitute any ex post facto violation. See Combs v. State, 403 So. 2d 418 (Fla. 1981); Justus v. State, 438 So. 2d 358 (Fla. 1983), Stano v. State, 473 So. 2d 1282 (Fla. 1985); Sireci v. State, 587 So. 2d 450, 454 (Fla. 1991); Hall v. State, 614 So. 2d 473, 478 (Fla. 1993).

This Court has also repeatedly rejected the Appellant's argument that the CCP aggravating circumstance is itself vague. Jackson, 648 So. 2d at 87 (Fla. 1994); Walls v. State, 641 So. 2d 381, 387 (Fla. 1994); Fotopoulos v. State, 608 So. 2d 784, 794 (Fla. 1992); Klocock

v. State, 589 So. 2d 217, 222 (Fla. 1991); See also, Arave v. Creech, 507 U.S. 436 (1993).

Finally, the claim with respect to the jury instructions on this factor is not preserved. Initially, at the charge conference below, the defendant objected to the CCP instruction on the grounds that it was "overly vague", even though the language of the instruction had not yet been proposed. (T. 3718-20). Subsequently, the court provided the instruction approved in Jackson, supra, at which point defense counsel objected on the grounds that, "[t]here must be something wrong with it". (T. 3756). The arguments now raised on appeal were not presented below, nor were any additional instructions requested. Id. The instructional error has thus not been preserved. Hartley, supra. In any event the jury was instructed in accordance with Jackson, and the "cold" element was defined as, "the murder was the product of calm and cool reflection". (T. 3919). There was thus no error. Walker v. State, 22 Fla.L.Weekly at S543 (the CCP instruction in Jackson, supra, is constitutional). Finally, any error is harmless beyond a reasonable doubt, as the trial court specifically noted that, "even in the absence of this [CCP] aggravating circumstance, the court's analysis and conclusions herein would not change." (SR. 11, n.9).

XIII.

THE TRIAL COURT'S INSTRUCTION ON THE HAC AGGRAVATING CIRCUMSTANCE WAS PROPER.

The standard instruction which was given in the instant case is the same as that approved by this Court in Hall v. State, 614 So. 2d 473, 478 (Fla. 1993). In Hall, this Court expressly found that the version of the HAC at issue herein was sufficient to save both the instruction and the aggravator from vagueness challenges. Id. The Appellant's claims herein have been

repeatedly rejected since Hall. See, e.g., Fennie v. State, 648 So. 2d 95, 98 (Fla. 1994); Johnson, 660 So. 2d at 648; Walker, 22 Fla. L.Weekly at S543.

XIV.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE ADDITIONAL INSTRUCTIONS ON THE STATUTORY MENTAL MITIGATING CIRCUMSTANCES.

This Court has repeatedly upheld the standard jury instructions on mitigating factors, and has found no error in failing to give additional or more detailed instructions thereon. Walls, 641 So. 2d at 389; Johnson, 660 So. 2d at 642. The Appellant claims that the requested instruction was necessary because Dr. Mutter suggested that the statutory mental mitigators were dependent on whether the defendant knew right from wrong. This claim is refuted by the record. Defense counsel in fact affirmatively elicited from both Drs. Mutter and Fennel that the mitigator at issue meant any mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong, in accordance with the requested instruction. (T. 3650, 3351-2). There was thus no error.

XV.

THE TRIAL COURT'S SENTENCE OF DEATH WAS PROPER.

A. The Weight Given To The Nonstatutory Mitigating Factors Was Within The Trial Court's Discretion.

The Appellant argues that the trial judge erred in assigning "weight" to the nonstatutory mitigators, but concluding that "the aggravating circumstances in this case far outweigh the mitigating circumstances. The mitigating factors pale when compared to the aggravators here." (SR. 34, 38). This argument is without merit as, "[O]nce the factors are established, assigning

them weight relative to one another is a question entirely within the discretion of the finder of fact." Johnson, 660 So. 2d at 647. The trial court's findings, which were as follows, were proper:

NON-STATUTORY MITIGATING CIRCUMSTANCES

In his sentencing memorandum the defendant urges this court to consider the existence of one non-statutory mitigating circumstance. He refers to that circumstance as CHRONIC SEVERE MENTAL DISTURBANCE CONTRIBUTED TO BY CHILD ABUSE AND BY DEFENDANT BEING RAISED IN A POVERTY LEVEL FARM WORKER. The court sees this single non-statutory mitigator as three and will deal with them accordingly.

The defendant was the victim of abuse as a child.

In support of this mitigator the defense called the defendant's three sisters, Mary Ann Knight, Doris Benjamin and Edna Knight. These witnesses testified that their father, Stephen Knight, brutally beat the defendant on many occasions. They described a tyrannical man who was violent for no apparent reason and flew into rages that placed his entire family in harms way. In very moving testimony, Mary Ann Knight testified as to how her own father raped her when she was ten (10) years old and how the defendant learned of this act either as it happened or immediately thereafter.

The court IS reasonably convinced that the defendant has established the existence of this mitigating factor and gives it weight.

The defendant suffered from chronic, severe mental disturbance.

The court has determined that there is insufficient evidence to establish the existence of the statutory mental health mitigators in this case. The court now considers whether the testimony and evidence offered by the defendant to prove the statutory mental health mitigators might establish the existence of a lesser, non-statutory mitigator.

In his conclusory remarks on February 15, the prosecutor, referring to the defendant's mental state said, "something went wrong." Although it is extremely difficult to identify exactly what went wrong, the court is reasonably convinced that the defendant suffers from some degree of paranoia which made him the aggressive, hostile and extremely violent and dangerous man he was on July 17, 1974. No doubt these characteristics came about, at least in part, because of the brutal way his father treated him and other factors which may or may not be before the court. The court does not believe this mental state to have been "severe", but, in light of the very slight burden placed on the defendant for proving mitigating factors, it is sufficient to establish the existence of a non-statutory mitigating factor. The Court IS reasonably convinced of the existence

of this non-statutory mitigating factor and gives it weight.

The defendant was raised in poverty.

The defendant argues that the fact that he was raised in poverty should constitute a non-statutory mitigating factor. The court does not believe that poverty, standing alone, is sufficient to establish a non-statutory mitigating factor. However, poverty, when accompanied with the type of abuse described by the defendant's sisters can and does in this case.

The court is reasonably convinced of the existence of this non-statutory mitigating circumstance and gives it weight.

(SR. 34-6). The Appellant's novel argument that the State of Florida is responsible for the defendant's upbringing and mental problems was not presented below and should not be relied upon herein. Steinhorst, supra. In any event, the State would note that the defendant's siblings, all of whom had the same upbringing and one of whom suffered even more abuse than the defendant, testified that they went on to become law abiding and productive members of society. As to the lack of treatment for the defendant's mental condition, it should be noted that the defendant's only hospitalization, in 1971, was due to the excessive ingestion of drugs. (T. 3299-3300, 3309-11, 3658-60). The defendant denied having ingested any drugs or alcohol prior to the instant murders. (T. 3617). Moreover, the defendant had in fact been treated prior to release in 1971. At the time of discharge, the records reflect that he had a paranoid personality disorder, not schizophrenia as now claimed by his experts. (T. 3299-3300, 3309-11, 3658-60). As noted by the trial judge, "[t]he court must and does look to the nature and quality of the aggravators and the mitigators which it has found to exist". (SR. 38). There was no abuse of discretion in the trial court's findings, "that the aggravating circumstances in this case far outweigh the mitigating circumstances." Id. Johnson, supra; Raleigh, 22 Fla.L.Weekly S711, 712 (Fla. November 13, 1997).

B. The Trial Court's Finding Of The HAC Aggravator Was Proper.

Initially, the State would note that this Court has previously affirmed the HAC factor herein based upon the victims' emotional strain and fear during the course of the several hours prior to their murders. Knight v. State, 338 So. 2d at 202, 205. The court below also relied upon these same facts and this Court's prior precedent in Preston v. State, 607 So. 2d 404, 410 (Fla. 1992) ("Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous."). (SR. 11). The sentencing order states:

> The heinous, atrocious or cruel nature of the murder of Lillian and Sydney Gans lies not in the method of their execution style murder but in the torturous hours that preceded them.
>
> There is nothing to suggest that Sydney Gans' day began any differently than any other day. Upon his arrival at his business, however, the day took a horribly unexpected turn, because waiting for Mr. Gans at the Sydney Bag and Paper Company was Thomas Knight and with him, "Trouble", the defendant's term of endearment for his sawed off, semi-automatic rifle.
>
> One can only guess at the degree of horror Mr. Gans must have experienced when he saw the defendant holding the intimidating rifle and ordering him to enter his car. Whatever the degree of horror may have been it could have been only a fraction of the horror Mr. Gans felt when the defendant ordered him to drive to his home, where Mr. Gans knew his wife could still be found.
>
> What conversations may have taken place between the defendant and Sydney Gans during the drive to the Gans residence; what questions Mr. Gans may have asked; what pleas he may have made to leave his family out of the situation; what rewards he may have offered are not a part of this record and therefore cannot be considered in this analysis. It is clear however that Mr. Gans must have understood that upon his arrival at his home, his wife would also be in harms way.
>
> When they arrived at the Gans home the defendant instructed Mr. Gans to use the horn to summon his wife into the car. It must have been both humiliating and horrifying to be forced to be the instrument through which his wife was ensnared by the evil man in the back seat of the car.
>
> The horror that had been Sydney Gans' alone was now also the horror of his frail and elderly wife. One need only use one's common sense and common

life experience to understand the terror Lillian Gans must have felt as she perceived the situation and desperately made her initial eye contact with her husband seeking some form of comfort and reassurance. Still, the terror had just begun.

Once the Ganses were inside the car the defendant ordered them to drive to their bank. Once again Mr. Gans was forced to take a long drive while having a gun pointed in his direction. Mrs. Gans now experienced what her husband had experienced on the way to the house - the uncertainty, the confusion, the horror.

Upon their arrival at the bank Mr. Gans exited the car and entered the bank. The bank official who attended him described his appearance as ashen. His fear was exceeded only by his concern for his wife. As he labored in the bank getting the money the defendant had requested, Lillian sat in the driver's seat of their car - alone with the defendant, who, according to FBI surveillance, was still holding the gun. In assessing what Mrs. Gans must have been thinking one can, once again, only use common sense and life experience. Without getting into the realm of speculation, it is clear that her fears must have been multiplied exponentially when her husband stepped out of the car and left her alone with their assailant. It is also reasonable to believe that her fears were mixed with the hope that once the defendant got what he wanted he would leave them alone and go on his way. The uncertainty of what was going on inside the bank and the uncertainty of how the day would end were surely overwhelmingly terrifying for this woman.

Mr. Gans made a fateful and courageous decision in the bank. He decided that his wife's life was more significant than his own safety. He decided to return to the car in the hope that the defendant, having received his money, would spare his and his wife's lives. He turned to the wrong man for mercy.

When he returned to the car the defendant ordered Mrs. Gans to drive. After a number of turns he directed them onto the 836 expressway. They traveled west to the Palmetto expressway then turned south on the Palmetto and headed towards the south end of Dade County. When they exited the expressway they drove south on U.S. 1 then turned west. Surveillance officers described their pursuit of the Gans car at that point as being one of constant turns. The Gans vehicle constantly turned south then west until it was lost by the surveillance units.

As the Ganses realized that they were being directed to drive to what was then the most unpopulated area of southern Dade County the reality of their destinies must have become apparent to them. At one point they were ordered to stop the car and exit the vehicle. Once outside the vehicle the evidence suggests that the defendant "racked" the action of his weapon, ejecting a live round onto the ground. That moment must have been horrifying for the Ganses. The apparent loading of the weapon was the final, definitive evidence of the defendant's intentions. Still, the defendant decided to prolong their agony by telling them to get back into the car and continue to drive. No reasonable person

in the Gans' place could have thought anything other than that they were being driven to their deaths. The thought of never returning to their families, the thought of never seeing their beloved children and grandchildren again, the anticipation of a horrible and painful death. These must have been the final thoughts that filled the minds of Sydney and Lillian Gans as they took their last ride in an automobile.

Having stopped the vehicle in the deserted area next to the canal and the heavy brush, Sydney and Lillian Gans awaited their fate. No one can know how long they waited, how long they agonized, how long they suffered before the defendant executed the first to die. Whoever died first, however, was spared the final seconds of knowing the certainty of impending death. [fn. 8]

The court finds that the state has established beyond and to the exclusion of every reasonable doubt the existence of this aggravating circumstance and gives it great weight.

[fn. 8] See *Preston,* supra, 607 So. 2d at page 409, 410, ("Preston forced the victim to drive to a remote location, made her walk at knifepoint through a dark field, forced her to disrobe, and then inflicted a would certain to be fatal. Undoubtedly, the victim suffered great fear and terror during the events leading to her murder. Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous.") See also *Wyatt v,. State*, 641 So. 2d 1336 (Fla. 1994); *Hitchcock v. State*, 578 So. 2d 685, 693 (Fla. 1990), cert.denied, 112 S.Ct. 311 (1991); *Rivera v. State*, 561 So. 2d 536 (Fla. 1990); *Adams v. State*, 412 So. 2d 850 (Fla.), cert.denied, 103 S.Ct. 182 (1982). (SR. 6-11).

The Appellant claims that the above findings and analysis are flawed because the judge mistakenly stated that the defendant "racked" his weapon after the first stop. The State respectfully submits that the trial court's findings of emotional strain and fear over the course of several hours are not negated on this basis. The record reflects that the defendant did in fact "rack" his weapon outside the vehicle; that is, cycle it manually in preparation for firing. He then entered the vehicle and executed one victim after another. This took place after the second stop, not the first as noted by the trial court. However, the second stop was only three tenths of a mile and only a few minutes after the first stop. (T. 2045-47; 2375-77). This distance and timing when considered in light of the fact that the victims' ordeal had lasted several hours

while each spouse was being held hostage for the other, during the course of being driven a distance of more than 40 miles into an ever increasing secluded and unpopulated part of the county, do not negate the element of the victims' fear and emotional strain which the HAC factor rests upon. See, e.g., Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1996) (factual mistake in finding aggravator was harmless beyond a reasonable doubt where other record evidence supported the aggravator). In any event, in light of the other weighty aggravators herein and the trial judge's findings as to mitigation, any error with respect to finding this factor is harmless beyond a reasonable doubt. Rogers v. State, 511 So. 2d 526 (Fla. 1992)

C. The Trial Court Properly Rejected The Statutory Mental Mitigators.

As noted previously in section A of this claim, the trial court found, as non-statutory mitigation, that the defendant suffered from a paranoid personality disorder. The trial court rejected the defense position that, statutory mental mitigation had been established because its experts stated that defendant suffered from a major mental illness, schizophrenia, as opposed to a personality disorder. The Appellant argues that the trial court's rejection of the defense experts' testimony is not supported by the evidence. This claim is without merit, as the trial court's findings are well supported by the record.

Initially, it should be noted that conflicting evidence regarding mitigating factors will support a trial court's conclusion that the factor does not exist. Johnson, 660 So. 2d at 646-7; Wuornos, 644 So. 2d at 119. When there is such conflicting evidence, the record is viewed "in the light most favorable to the prevailing theory." Wuornos, 644 So. 2d at 419. Furthermore, opinion testimony is "not necessarily binding even if uncontroverted." Walls, 641 So. 2d at 390-1. "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." Id.

The Appellant first argues that the trial judge erred in finding that the defendant was a schizophrenic, because numerous mental health experts had diagnosed him as such and psychological tests supported these opinions. The record does not support the Appellant's contention. For example, defense expert Fisher stated that his diagnosis of schizophrenia was "primarily" based upon defendant's 1971 state hospital stay, where he had been found incompetent and schizophrenic, and received medication for schizophrenia. (T. 2527-8). The 1971 hospital records, however, actually reflected that the defendant had been admitted for drug or alcohol induced psychosis, and that he had received medication for tranquilizing purposes; the dosages prescribed were not for treatment of schizophrenia. (T. 3299-3300, 3309-11, 3658-60). More importantly, the treating physician's discharge report at the time reflected that the defendant had been diagnosed as suffering a personality disorder, with paranoid ideations. Id.

Another defense expert, Carbonell, also stated that defendant had been diagnosed as a "paranoid personality before, after, and continuing on, for all of his life since he had come into contact with any mental health." (T. 2871). Likewise, defense expert McClaine testified that diagnostically, the defendant "falls somewhere between" schizophrenic and a mixed personality disorder with, inter alia, paranoid and anti-social manifestations. (T. 2952). Defense expert Wells also opined a diagnosis of borderline personality disorder with paranoid ideation and anti-social traits. (T. 2768). Defense expert Toomer testified that he was unable to personally diagnose the defendant. (T. 3078-9). However, based on other mental health reports, there was evidence of schizophrenia, and a paranoid delusion disorder. Id. State expert Fennell stated that her diagnosis was paranoid personality disorder, not schizophrenia. (T. 3301-2; 3305). State

expert Mutter's initial diagnosis was also that of a paranoid personality, not schizophrenia. (T. 3601).

Dr. Fennell also testified that a diagnosis of personality disorder precludes a finding of schizophrenia. (T. 3313-14). Schizophrenia is a major mental disorder. Such a disorder alters one's ability to think and control behavior. (T. 3303-05). A personality disorder, however, is not a major mental illness; one's ability to think is intact. Id.

The Appellant's reliance upon "objective" psychological tests is likewise unwarranted. For example, Dr. Carbonell testified that she had administered the Rorschach, which is a "projective test (T. 2847, 2853); "it really is a series of inkblots. A person responds to them." (T. 2844). Dr. Carbonell had also administered another test, reflecting an aphasic or language disorder. (T. 3322-24). The defendant's statements in court, his writings, and his speech during clinical interviews, however, negated any aphasic disorder. Id. This expert had also given the defendant an I.Q. test which reflected that the defendant's intelligence was normal. Defense experts Fisher, Toomer, and Rothenberg concurred that the defendant was normal, even "highly intelligent." (T. 2525, 3074-5, 3226). Yet another defense expert's I.Q. testing, however, reflected a score of 75, in the borderline intelligence level. (T. 3524). As even the defense experts admitted, there are "problems" with the tests; their validity is dependent upon the level of defendant's cooperation and the skill of the examiner. (T. 2902-3, 2915; 3325). Additionally, even the defense experts acknowledged that the defendant has, "a manipulative tendency that often comes across as outright lying and exaggerating various kinds of symptoms." (T. 2952). State experts Mutter and Fennell both testified that the defendant had been "faking his problems" and malingering to appear mentally ill. (T. 3374; 3653).

As is abundantly clear from the above expert opinions, the trial judge's rejection of the defense position that defendant suffered from chronic schizophrenia and had, as a result, decompensated into a psychotic state on the day of the crimes, is well supported by the record.

Finally, the Appellant has also faulted the trial court's reliance upon the defendant's actions during the crimes in rejecting the defense experts' opinions. It should be noted that none of the defense experts were actually familiar with the facts of the instant crimes; they had not reviewed any witness testimony or trial transcripts. The defendant had not related any such facts to the experts either. Indeed, the defendant had denied having committed the crimes. (T. 3616-17). State experts Mutter and Fennell, however, testified that the defendant's behavior at the time of the crimes was the indicator of his mental state, and important. (T. 3605, 3620-28; 3326-27). Even the defense experts had agreed that the facts, such as planning an alibi, having hidden one of the victim's bodies, and hiding from the police thereafter, were all important indicators of whether the defendant had lost touch with reality, or understood and appreciated the consequences of his actions. (T. 2801-03; 2995-6; 3087-88).

Contrary to the Appellant's assertions, Dr. Mutter's opinion with respect to the import of the facts of the crime was properly stated within the parameters for evaluating mental mitigation. Dr. Mutter testified that the advance planning by procuring a weapon and obtaining an alibi, lying in wait for Mr. Gans, taking Mrs. Gans hostage, the position of the weapon during the car ride, running away after securing the money and retaining the weapon, and, hiding thereafter, all showed "organized thinking" and goal oriented, "controlled behavior", which was incompatible with either a major mental illness or any loss of reality. (T. 3620-28). He added that a person who has lost touch with reality believes his actions to be right and thus would not

attempt concealment. He stated that the defendant's mental state was not impaired, and that defendant had the ability to conform his conduct to the requirements of law if he wanted to. Id.

As noted previously, however, the defense experts were not familiar with the facts. These experts testified that the statutory mental mitigators were applicable based upon a diagnosis of schizophrenia, in conjunction with hypothetical facts provided by defense counsel. The trial judge, as noted previously, had found that the defendant suffered from a personality disorder. The trial judge then addressed the facts of the crime and the fallacy of defense counsel's hypothetical, concluding that Dr. Mutter's evaluation, which had been conducted immediately after the defendant's arrest in 1974 and corresponded to the facts, was the most credible:

> The most significant test for the expert opinions offered by the defendant are the facts of the case. The suggestion that the defendant was suffering from extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired is completely inconsistent with the defendant's actions on July 17, 1974.
>
> The defendant's actions on the day of the murders were, at all times, deliberate, purposeful and goal oriented. The planning that went into the commission of the crimes, i.e., the need to secure an adequate weapon, the need to establish an alibi, the need to select a wealthy target for the crime, the need to pick up a hostage, the need to conceal the weapon he was carrying at all times, the need to flee the bank quietly and without any sign of distress, the need to drive through the city at a normal speed well within the speed limit, the need to drive to a secluded area of the community where the last phase of the crime could be discreetly committed and the need to eliminate any possibility of identification were all considered in the execution of the crimes. None of these actions suggest a perpetrator in any kind of mental distress.
>
> Some of the doctors have suggested that the defendant may not have been psychotic at all times during the events of July 17, 1974. It has been suggested that as the stress of the situation mounted, the defendant's mental state deteriorated. These claims need to be addressed.

Defense counsel posed a lengthy hypothetical to each of the defense experts. The hypothetical purported to represent the facts of the present case. At the conclusion of the posing of the hypothetical defense counsel would ask the expert whether he or she felt that, given those facts, the statutory mitigators discussed above applied to the defendant. The state repeatedly objected to the hypothetical as being unfaithful to the true facts of the case. The court overruled these objections because counsel is free to pose whatever hypothetical he or she wishes to his or her expert. Such a ruling did not mean to imply that the state's reasons were in error. In each hypothetical the defense included the following:

> Thereafter, the FBI with agent Terry Nelson began to follow suit as the vehicle turned out of a side street onto West Flagler Street heading west; that the car drove some twelve plus blocks where it turned again into a northerly direction and it was during this period of time, traveling a normal rate of speed; that during this period of time certain police cars would be alongside the vehicle, behind the vehicle, in front of the vehicle, alongside the vehicle and that cars would switch on and off from the various streets and change - positions were changed of the cars from a period of time; that the vehicle then exited off the Northwest 12th Avenue street in a westerly -- heading west on what was called the 836 expressway or the east west expressway; again, continuing with this procession of vehicles, FBI and other police vehicles following in suit.

The hypothetical continues along the same lines, i.e., constantly suggesting that the pursuit of the Gans car with the defendant in the back seat resembled the St. Patrick's Day Parade with police cars surrounding the Gans vehicle in full police regalia. The hypothetical goes on to suggest that simultaneous with this Keystone Cop pursuit on the ground there was a fixed wing aircraft in the air and a helicopter. As the state argued in their objection, these were not the facts of this case. Although the argument can be made that the original police work in this case was not stellar, it was not as inept as the defense has suggested. The evidence shows that the law enforcement officers involved in the pursuit of the Gans car were in unmarked vehicles; that they were dressed in civilian clothes and that they kept a discreet distance from the car so as not to alarm the defendant. Indeed a solid argument can be made that the distance was too discreet because the agents lost the defendant and the victims. Special Agent Nelson of the FBI testified that he was able to observe the defendant in the back seat of the Gans car and that at no time did the defendant act "hinky." He defined this term as meaning that the defendant never looked back over his shoulder to counter-surveil; that he never gave any indication of nervousness consistent with acknowledging the presence of police.

The evidence showed that during the pursuit of the Gans vehicle along the 836 and Palmetto Expressways there were no police aircraft in the air. It was only at the very end of the pursuit that the aircraft joined the chase.

These discrepancies are extremely significant. It is clear that in the doctors' opinions the increasing stress crested by the police presence aggravated the defendant's psychotic state. For example, during cross-examination of Dr. Fisher the following exchange occurred:

> Q. All right you will agree with me... but there is a difference in terms of the stress level on Mr. Knight or on anybody else, between him knowing that the police are hot on his tail and about to arrest him as opposed to him just going to a place where he thought it was convenient to kill, carries out the killings and then discovers afterwards that the police were on his tail, there is a difference in those two descriptions?
>
> A. A significant difference, yes.
>
> Q. A very substantial difference? In other words, he may be shooting in one situation because he sees a police officer running at him and he may be shooting in another situation just to shoot and kill the victim?
>
> A. Yes.

It is eminently clear from the evidence that the defendant was unaware of the police presence until after he murdered the Ganses. It is also clear that even upon seeing the police helicopter and making his dash for the woods he had the presence of mind to collect his weapon and, more significantly, the money.

. . .

Like Drs. Rothenberg and Corwin, Dr. Mutter had the advantage of seeing the defendant shortly after the murders. He conducted three (3) examinations, one on March 30, one on April 3, and one on April 5, 1975. Dr. Mutter testified that his initial impression of the defendant was that he had a paranoid personality. He did not believe that the defendant was suffering from any major mental illness. Indeed he described the defendant as being "...sharp, clear, crisp, articulate. His memory was in tact. His general reasoning on normal types of reasoning questions were very clear and in tact." Dr. Mutter concluded that at the time of the murders the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were not substantially impaired. He also opined that at the time of the killings the defendant did not suffer from an extreme mental or emotional disturbance.

Of the three doctors who were able to see the defendant at or near the time of the commission of these crimes Dr. Mutter is the most persuasive. Dr. Corwin

could not reach definitive diagnosis and Dr. Rothenberg's conclusions are not consistent with the facts of the case.

For the reasons stated above the court is NOT reasonably convinced of the existence of this mitigating circumstance.

SR. 26-32.

The above findings were in accordance with this court's precedents in Walls, supra; Johnson, supra; Wuornos, supra, and no error has been demonstrated.

D. The Trial Court Properly Found The CCP Aggravator To Be Applicable.

The trial court found the CCP aggravator to be applicable as follows:

The court begins by acknowledging that the premeditation necessary for the finding of this aggravating factor is far greater than that necessary to secure a conviction for first degree murder.

The facts of this case establish beyond and to the exclusion of every reasonable doubt that this aggravator applies.

The underlying motivation for this crime was greed. The defendant's greed was not however randomly directed at just any passerby in an act of random violence evincing only a few seconds of reflection barely sufficient to qualify as premeditation. The defendant chose his victims well. Sydney Gans was a successful and wealthy merchant. The object of the defendant's greed was not a fancy watch on Mr. Gans' wrist or even the cash he might have been carrying on July 17, 1974. Mr. Gans' Mercedes Benz presented no temptation for the defendant. The defendant set out for big game that day and he brought along a weapon worthy of big game hunting.

The defendant began July 17, 1974 with an alibi. A telephone call that advised his employer/victim that he would be unable to come to work that day. He lay in wait at the executive parking lot of the Sydney Bag and Paper Company and awaited his target. When Mr. Gans arrived the defendant did not order him to go to the bank directly, it is clear that he knew that he would be unable to accompany Mr. Gans into the bank with his weapon. So he ordered Mr. Gans to drive to his home where the defendant could take a hostage. A hostage that would insure Mr. Gans' cooperation while he was inside the bank.

After he received his money the defendant did not hesitate to tell the Ganses where they would be going. He directed them to what at that time was

> one of the most remote areas of Dade County. When he reached a quiet, remote and concealed location he coldly executed his victims. From beginning to end, over a period of several hours, the defendant knew exactly what he was doing, how he was going to do it and how it was going to end - with no witnesses.
>
> The state has proven beyond and to the exclusion of every reasonable doubt the existence of this aggravating factor. The court gives it great weight. (SR. 11-13).

The Appellant's reliance upon Spencer v. State, 645 So. 2d 377 (1994), Maulden v. State, 617 So. 2d 298 (Fla. 1993) and Klocock v. State, 589 So. 2d 219 (Fla. 1991), is entirely unwarranted. All of said cases involve longstanding domestic dispute situations. There was no such relationship between the defendant and the victims herein. Moreover, even these cases do not support Appellant's proposition that the presence of mental mitigation "will negate the 'coldness' element of CCP, despite evidence of planning." Appellant's brief at p. 91. See Klocock, 589 So. 2d at 522 (CCP aggravator was applicable despite the presence of statutory mental mitigator of extreme emotional distress); See also, Cruse v. State, 588 So. 2d 983 (Fla. 1991) (CCP finding proper, as evidenced by advance procurement of weapons and ample time for reflection, notwithstanding contemporaneous finding that defendant acted under extreme mental or emotional disturbance). In any event, the Appellant's hypothesis of a sudden break with reality has been addressed at length in subsection C of this claim and Issue I, which arguments are relied upon by the State. The State's theory of the case with respect to sentencing factors prevails when there is conflicting evidence, as in the instant case. Wournos, 644 So. 2d at 1019. The Appellant's argument is thus without merit. Moreover, as previously noted in claim XII herein, any error is harmless beyond a reasonable doubt, as the trial court stated, "even in the absence of this aggravating circumstance the court's analysis and conclusions

herein would not change." (SR.11).

E. The Trial Court's Finding Of The Prior Violent Felony Aggravator Was Proper, And The Weight Given This Factor Was Within The Court's Discretion.

The Appellant has first reargued claim XI with respect to the propriety of applying the prior violent felony aggravator with respect to the Burke murder. The State relies upon its argument as to that issue. The Appellant has then claimed error because the trial court gave great weight to said aggravator. This argument is also without merit as, "[O]nce the factors are established, assigning their weight to one another is a question entirely within the discretion of the finder of fact". Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995). In any event, the defendant's reliance upon "uncontroverted" mental mitigation with respect to this murder is unwarranted. As seen in subsection C of the instant claim, the trial judge properly rejected the defense expert's opinions relied upon herein. Moreover, the trial judge specifically stated, "[T]he court has considered this testimony [defense mental health experts' opinions on defendant's mental status on the day of the Burke homicide] in determining the existence of aggravating factor." (SR. 3-4). The trial judge herein also specifically added: "The court would nevertheless give this aggravator great weight because of the contemporaneous murder of Sydney and/or Lillian Gans." (SR. 3, n.5). This claim is thus without merit.

F. The Trial Court Properly Found The Pecuniary Gain Factor To Be Applicable.

The Appellant argues that the pecuniary gain aggravator is not applicable, because murders herein were not "an integral step" in obtaining money. This argument is without merit. Initially the State notes that the pecuniary gain aggravator is established where, "the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain".

Finney v. State, 660 So. 2d 674, 680 (Fla. 1995); See also, Allen v. State, 662 So. 2d 323, 330 (Fla. 1995) ("to establish the pecuniary gain aggravating circumstance, the State must prove a pecuniary motivation for the murder."); Walker, 22 Fla.L.Weekly at S841 (same). Appellant's reliance upon Chaky v. State, 651 So. 2d 1169 (Fla. 1995), Peterka v. State, 511 So. 2d 526 (Fla. 1987), Hardwick v. State, 521 So. 2d 1076 (Fla. 1988), Rogers v. State, 511 So. 2d 526 (Fla. 1987), Hill v. State, 549 So. 2d 179 (1989), Scull v. State, 533 So. 2d 1137 (Fla. 1988) and Simmons v. State, 419 So. 2d 316 (Fla. 1982), is unwarranted. In said cases there were interpretations of the evidence from which it could be concluded that there was no motive of any specific financial gain for the murders; that any taking of property may have been an afterthought. Clearly, such is not the situation here where the trial judge found:

> The state has proven beyond and to the exclusion of every reasonable doubt that the murders of Sydney and Lillian Gans were committed for financial gain. Every act committed by the defendant on July 17, 1974 was geared towards his ultimate goal of making fifty thousand (50,000) dollars. This is most clearly illustrated by the fact that after killing Lillian and Sydney Gans he fled the scene with the money Sydney Gans had withdrawn from the bank. Indeed when he buried himself in the dirt trying to escape the police, he still had the money in his possession.
>
> The court finds the existence of this aggravating factor and gives it great weight.

(SR. 6). The trial judge's ruling was in accordance with this Court's precedents in Finney and Allen, supra; See also, Mendoza v. State, 22 Fla.L.Weekly S655, 658 (Fla. October 16, 1997) (pecuniary gain aggravator proper when "entire episode ... was motivated by the prospect of pecuniary gain", even though defendant did not actually take any money); Knight, supra.

G. The Trial Court Properly Found The Avoid Arrest Aggravator To Be Applicable.

The trial judge found the avoid arrest aggravator to be applicable based upon the

following factual findings and legal precedents from this Court:

> The state has proven beyond and to the exclusion of every reasonable doubt that the defendant murdered Sydney and Lillian Gans for the purpose of eliminating them as potential witnesses against him. Had the sole motive for the murders been financial gain, the defendant's purpose would have been accomplished upon the receipt of the money. Even if he had wanted to perfect his get-away he could have taken the car after he asked the Ganses to exit the vehicle and driven away. His actions clearly indicate however that he ordered them back into the car, told them to drive to an even more secluded area and executed them. The only reason for killing them at that point was to eliminate them as witnesses. [fn.7]
>
> [fn.7] *Hall v. State*, 614 So. 2d 473 (Fla. 1993); *Preston v. State*, 607 So. 2d 404 (Fla. 1992); *Swafford v. State*, 533 So. 2d 270 (Fla. 1988), cert.denied, 109 S.Ct. 1578 (1989); *Engle v. State*, 510 So. 2d 881 (Fla. 1987), cert.denied, 108 S.Ct. 1094 (1988); *Cave v. State*, 476 So. 2d 180 (Fla. 1985), cert.denied, 106 S. Ct. 2907 (1986); *Copeland v. State*, 457 So. 2d 1012 (Fla. 1984), cert.denied, 105 S.Ct. 2051 (1985); *Card v. State*, 453 So. 2d 17 (Fla.), cert.denied, 105 S.Ct. 396 (1984); *Martin v. State*, 420 So. 2d 583 (Fla. 1982), cert. denied, 103 S.Ct. 1508 (1983).

(SR. 5-6). In Hall, 614 So. 2d at 477, relied upon by the trial judge, this Court held "circumstantial evidence can be used to prove this [witness elimination] aggravator, and we have uniformly upheld finding this aggravator when the victim is transported to another location and then killed."

The Appellant's contention that the mental mitigation evidence raised a "reasonable hypothesis" that the killings were the result of the defendant's break with reality upon being discovered by the police, is without merit. Initially, the State notes, "that the relevant evidence was conflicting does not of itself undermine a trial court's findings on aggravators and mitigators. The State's theory of the case prevailed here, and we therefore view the record in the light most favorable to the prevailing theory". Wuornos, 644 So. 2d at 1019. As previously

set forth in issue I and subsection C of the instant claim, defendant's theory of break with reality was properly rejected in accordance with competent and substantial evidence. The evidence clearly reflected that when defendant discovered the police presence, he had already hidden one of the victim's bodies and was interrupted in the process of disposing of the other. Moreover, even upon actually having seen police officers, the defendant, far from panic and loss of control, pointed his weapon at them, causing the police to take cover and giving defendant the time to run and hide in the woods. The defendant, of course, had had the presence of mind not only to carry his weapon, but the bank money as well. Finally, the alleged panic and loss of control did not prevent the defendant from successfully hiding from a massive manhunt for a period of several hours. The Appellant's claim is without merit. Hall, supra; Wuornos supra. Moreover, in light of the other weighty aggravators herein, and the trial judge's findings with respect to mitigation, any error with respect to finding this factor was harmless beyond a reasonable doubt. Rogers, supra.

H. The Trial Court Properly Found The Felony Murder Aggravator To Be Applicable.

The trial judge found that the State had established the elements of kidnaping. (SR. 4-5). The Appellant's merger argument has been addressed in issue X, and is relied upon herein. This Court has previously found that the facts of the instant case are sufficient to support this aggravator. Knight v. State, 338 So. 2d 201 (Fla. 1976). Moreover, as noted by the trial judge, the defendant did not challenge the applicability of this factor in the court below. (SR. 5).

XVI.

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

The Appellant first claims that the death penalty statute is unconstitutional because it

creates a presumption that, once one or more aggravating circumstances is established, death is the appropriate penalty. Such "burden shifting" claims have been repeatedly rejected by this Court. Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Wuornos v. State, 644 So. 2d at 1012, 1020, n.5 (Fla.. 1994); Johnson, 660 So. 2d at 647; Walker, 22 Fla.L.Weekly at S545, n.4.

The Appellant next argues that the statute is unconstitutional because it does not give the jury adequate guidance for finding and weighing sentencing factors. This claim, too, has been repeatedly rejected. Wuornos, 644 So. 2d at 1020, n.5; Armstrong v. State, 642 So. 2d 730, 734, n.2 (Fla. 1994); Walker, 22 Fla.L.Weekly at S545, n.4.

Finally, the Appellant's claim with respect to lack of written findings by the jury is also without merit. Wuornos, supra, Walker, supra; Hildwin v. Florida, 490 U.S. 638 (1989).

XVII

CLAIM OF CRUEL AND UNUSUAL PUNISHMENT AS A RESULT OF DELAY BETWEEN CRIME AND EXECUTION IS WITHOUT MERIT.

The defendant's original trial and sentencing took place in 1975. He successfully obtained federal habeas corpus relief, based upon the change of law in Hitchcock v. Dugger, 481 U.S. 393 (1987), from the Eleventh Circuit Court of Appeals in 1988. See, Knight v. Dugger, 863 F.2d 705 (1988). The Appellant acknowledges that the delays in resentencing, after he obtained relief in 1988, are attributable in large part to him. However, he seeks to label the 14 year period between the original trial and federal habeas relief as a delay, attributable to the State, in carrying out his execution. On this basis, the Appellant claims that his execution, after he has been incarcerated for more than 20 years, is cruel and unusual punishment, in reliance upon Lackey v. Texas, 115 S.Ct. 1421 (1995) (memorandum of Stevens, J., respecting

denial of certiorari). He argues that his "long-term suffering" is a separate form of punishment equivalent to an actual execution, and, that retribution and deterrence purposes are no longer served. The Appellant's claims have been rejected in the well reasoned opinion in State v. Smith, 931 P.2d 1272, 128 (Mont. 1966), as follows:

> At the time of the oral argument in this appeal, Smith had spent approximately thirteen years on death row and had four sentencing hearings. In arguing that his execution after such a long period of incarceration would amount to cruel and unusual punishment, he relies on Lackey v. Texas, 514 U.S. 1045 (1995).
>
> ***
>
> Justice Stevens' memorandum in connection with the Court's denial of certiorari cannot be construed as a controlling decision on this issue and has not been regarded favorably in the federal courts. In McKenzie v. Day, 57 F.3d 1461, adopted en banc, 57 F.3d 1493 (9th Cir.1995), Duncan McKenzie attempted to obtain a stay of his execution by showing the likely success of his claim that the twenty-year delay in his execution was cruel and unusual. The Ninth Circuit Court of Appeals denied the stay of execution. The court stated, "we conclude that it is highly unlikely that McKenzie's Lackey claim would be successful if litigated to its conclusion." McKenzie, 57 F.3d at 1467. The court reasoned that the cause for the delay in carrying out McKenzie's sentence was that "McKenzie has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances." McKenzie, 57 F.3d at 1466-67. Thus, the court reasoned, the delay was "a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences." McKenzie, 57 F.3d at 1467. The court recognized the ultimate irony and lack of logic in the Lackey claim: If an Eighth Amendment challenge based on delay were to prevail, then the procedures designed to promote fair adjudication in death penalty cases would in themselves be used to ultimately defeat their own purpose. See also White v. Johnson, 79 F.3d 432 (5th Cir.1996), and Stafford v. Ward, 59 F.3d 1025 (10th Cir.1995).
>
> In White, the Fifth Circuit Court of Appeals reasoned:
>
> > [T]here are compelling justifications for the delay between conviction and the execution of a death sentence. The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as White to challenge their convictions for years.

White, 79 F.3d at 439.

> It is clear from the record in this case that Smith has benefitted from the appellate and federal review process of which he has availed himself and which has resulted in the delay and the multiple sentencing hearings in this case. We hold that Smith has not established violation of his right to due process or his right to be free from cruel and unusual punishment as a result thereof.
>
> Smith further argues that imposition of the death penalty after a long delay cannot have any deterrent effect. The United States Supreme Court has recognized, however, that "the value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." Gregg, 428 U.S. at 186. Accordingly, this argument should be presented to the Montana Legislature, not to this Court.

See also, White v. Johnson, 79 F.3d at 437 ("As a panel of this Court noted in Fearance v. Scott, federal courts have encountered the claim that prolonged incarceration before execution is cruel and unusual punishment for decades. [cite omitted]. To date, no federal court has recognized such a theory of cruel and unusual punishment."). The Appellant's reliance upon State v. Richmond, 886 P.2d 1329, 1334 (Ariz. 1994), is unwarranted. In that case, the court, while expressly avoiding the "constitutional" issues, "reweighed" the evidence. It found "serious" problems with the aggravators, and significant mitigation that the defendant had been rehabilitated. The court thus reduced the defendant's sentence to life. The instant case is not comparable. The defendant committed murder while in prison, for which he is serving yet another valid death sentence. The Appellant's due process and Eighth Amendment claims are thus without merit.

Finally, the Appellant's reliance upon the "norms of international law" is also unwarranted. As noted by the Appellant, the federal government's position is that its treaties will be interpreted in accordance with the Eighth Amendment. See Brief of Appellant, p. 99, n. 32. The Appellant's request that this Court do otherwise is inappropriate. See, Johnson, 660

So. 2d at 646 ("once the legislature has resolved to create a death penalty that has survived constitutional challenge, it is not the place of this or any other court to permit counsel to question the political, sociological, or economic wisdom of the enactment."). The instant claim should thus be denied.

CONCLUSION

Based on the foregoing, the Appellee respectfully submits that the sentence of death in the instant case be affirmed.

Respectfully submitted,
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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 **LOUIS CAMPBELL,** Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, on this 16 day of January, 1998.

FARIBA N. KOMEILY
Assistant Attorney General

/blm