IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,638

JESUS DELGADO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

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

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STATEMENT OF THE CASE AND FACTS

On July 27, 1993, the defendant was indicted for the first degree murders of Tomas and Violetta Rodriguez on August 31, 1990. (R. 1-2). The defendant was also charged with one count of armed burglary. Id.

A. Guilt Phase

The victims' next door neighbor, Ms. McField, testified that on August 30, 1990, at approximately 7:00 p.m., she saw the victims, Tomas and his wife, Violetta, arrive at their home. (T. 564). They went in through the garage. (T. 565). At approximately 10:00 p.m. that night, she heard unusual and odd wailing from two dogs in the house directly behind the victims'. (T. 572). The next morning, McField needed diapers for her son, Chad, and went to the victims' house at approximately 8:00 a.m. (T. 565-66). The victims were Chad's godparents, and had a supply of diapers and bottles. (T. 561).

The victims' house was gated, with a doorbell on the side of the gate. (T. 566). The gate was always kept locked, as the victims were security conscious. (T. 575). No one answered the doorbell, but Chad was moving around and the gate opened. (T. 566). McField heard keys in the inside lock of the gate, which was again unusual, as the victims were always warning her to keep the gate locked. (T. 566, 570). McField took out the keys from the gate; these belonged to Violetta. (T. 571, 566). She then walked up the pathway from the gate to the front entry door, rang the other doorbell, and called out to the victims. (T. 566-67). There was no answer. Id. She thus called the police.

The first officers on the scene arrived within a few minutes. (T. 580-81). The officers entered the gated area and knocked, but got no response. They touched the lock on the front door, and it was open. (T. 569). There was no sign of a forced entry. (T. 640).

The entrance door opened to the living-dining area. (T. 622). These areas were immaculate and clean, with no signs of any disturbance or struggle despite the presence of glass, tables, china and various other breakables. (T. 622, 586, 641, 679-80). A hallway off the living areas led to the bedrooms on one side of the house. (T. 641). These bedrooms were undisturbed with no signs of struggle. (T. 641). The lights were on in the hallway and the television was also on. (T. 642).

The kitchen was behind the living areas and opened to a utility room. (T. 622). The utility room led directly to the garage through a screen door and a separate wooden door. (T. 622, 683). The wooden door in the utility room opens into the garage. (T. 689). The first sign of disturbance in the house was damage to this wooden door. The hinges were broken and there was a crack in the center of the door, consistent with someone having pushed against it. (T. 683-84, 735-36). The screen door, however, was intact. Other items in the utility room were not displaced and did not show any signs of a struggle.(T. 848-50).

Three bullet casings were found in the utility room. (T. 643). There were also one set of bloody footprints in this room, leading from the garage to the kitchen. (T. 643). There was a faint bloody shoe impression in the kitchen which stopped at the kitchen counter. (T. 664-66). The spacing of the footprints was indicative of someone walking at a normal pace towards the kitchen. (T. 863).

Two drawers were found open in the kitchen counter. (T. 670-76). The drawer closest to the entrance of the kitchen from the utility room contained aluminum foil and plastic wrappings. (T. 673-76). The other drawer contained knives and silverware. (T. 670). Both drawers had specks of blood in front. (T. 634). There was also a drop of blood on a piece of carpet on the kitchen floor. (T. 668). The telephone in the kitchen had smeared blood and fingerprints on it. (T. 6990).

A bloody knife and a .22 caliber handgun were found on the floor outside the utility room.

(T. 634-35). This knife was similar to those found in one of the open kitchen drawers. (T. 725). The handgun was a .22 caliber Ruger, with a silencer still attached. (T. 637). The silencer was dented. (T. 712-16). The butt of the gun also had hair and blood on it. (T. 736-37).

The firearms examiner testified that the serial numbers were "drilled off" of the above Ruger, .22 caliber semi-automatic pistol. (T. 880-82). The pistol was thus impossible to trace. (T. 883). The gun's barrel had also been altered and drilled so as to attach the silencer to it. (T. 883-84). The silencer was homemade; not a professional type. (T. 883-84).

A total of six casings, three in the utility room and three in the garage, were found. All had been fired from the above pistol. (T. 889). The victims' gun, with serial numbers intact, was a .38 revolver. (T.645-47). It was found in a zippered pouch, inside a closed cabinet in the television stand in the master bedroom. Id. It was tested and found not to have been fired. Id. Furthermore, despite a search therefore, no .22 caliber ammunition was found anywhere in the victims' premises. (T. 660).

Tomas Rodriguez's body was found on the garage floor, immediately inside the doorway from the utility room, near the driver's side of the Volvo parked in the garage. (T. 855). Violetta Rodriguez's body was also found in the garage, "wedged in" between the front passenger side of the Volvo and the south side of the garage wall. (T. 689, 694, 593). There was a substantial amount of blood on the floor throughout the garage. (T. 601). Tomas Rodriguez was wearing shorts. He had no shoes on, and there was no blood on the soles of his feet. (T. 691). Violetta was in her nightgown and robe. (T. 695). Her slippers were found near her body. These were examined and found to be inconsistent with the bloody footprints in the utility room and kitchen. (T. 689-90).

Tomas Rodriguez was 53 years old. (T. 1247). He was 5'7" and weighed 173 pounds. (T. 1222). Three (3) separate bullets had been fired, in a "cluster," at this victim's chest, from a distance of less than three feet. (T. 1229-35). One of these bullets had severed this victim's spinal cord,

whereupon he fell on the spot and was instantaneously rendered incapable of any voluntary movement in the lower part of his body. (T. 1232-34). Another of these bullets had penetrated the aorta, causing massive internal bleeding and cutting off the oxygen supply. (T. 1229-30). In addition to the three (3) chest wounds, Tomas had two separate bullet injuries to his right thigh. (T. 1235-38). A sixth injury, a graze wound to the scrotum, was consistent with yet a separate bullet wound, or one of the prior bullets to the legs having exited and stricken the scrotum. (T. 1265, 1238-39). The medical examiner testified that in addition to these bullet wounds, this victim had sustained five (5) separate stab wounds to his neck and chest area, which had been inflicted after he was incapacitated by the bullet wounds. (T. 1222-23). The medical examiner added that the victim had died approximately two hours after having had his dinner, as evidenced by the partial digestion of his stomach contents. (T. 1240-41). Tomas had ingested "much less" than one beer with his dinner. (T. 1244).

Violetta Rodriguez was forty one years old, 5'3" and 152 pounds. (T. 1147). She had sustained a total of ten (10) blunt-force-trauma wounds to her head and shoulder area. Id. The blunt force injuries were consistent with having been inflicted by the pistol. (T. 1166). Four (4) of these wounds were skull fractures. Each fracture had been caused by a separate blow. (T. 1168-71). Three (3) of the fractures were to the back of her head. Another of these fractures, on her forehead, had been inflicted with such force as to push the skull bone back to the inside of her brain. (T. 1166-68). The pattern of this injury was lined up with, and matched, the butt of the pistol used to kill Tomas. Id. The skull fractures would render this victim "pretty incapacitated." (T.1200). However, she would still be conscious. (T. 1258).

Violetta had additionally been stabbed twelve (12) times. At least five (5) of these stab wounds were to her chest area. (T. 1201-08). One of these lethal wounds, to the left side of the

chest, had penetrated between the ribs, gone through the lung, and severed the aorta, cutting off the oxygen supply. (T. 1203-05). Another potentially lethal stab wound had penetrated the peritoneum cavity, terminating with a cut on the liver. (T. 1207). Another stab wound had penetrated the interior abdominal wall on the left side. Id. The remainder of the stab wounds were to the side and back of the neck, and the upper back and shoulder areas. (T. 1201-08). The blunt force and stabbing injuries to Violetta's back all reflected that she was turned away from her attacker at the time. (T. 697-98). This victim had also sustained multiple defensive wounds, as evidenced by the multiple abrasions, bruises and cuts on the back of her hand and wrist, inside her fingers, on her forearm, and on her leg. (T. 1148, 1269-72, 1254, 1209-11). This victim had also had one beer with her dinner. (T. 1213-14).

Despite at least five separate bullet wounds, only three projectiles were retrieved from Tomas Rodriguez's body. (T. 792, 1234-35). Another projectile was found on the garage floor. (T. 643). All of these had been fired from the .22 caliber pistol with the silencer. (T. 890). The firearms expert testified that the ammunition utilized was approximately a quarter of an inch in size to begin with. (T. 889). Due to the soft substance utilized in the ammunition, the projectiles could shatter into "pin head" size upon impact with concrete surfaces such as the bones inside the body or the garage floor. (T. 891-97, 902). Such particles would be difficult to find given the substantial amounts of blood on the garage floor, not to mention the various boxes and assortment of items kept in the garage. (T. 891-97, 902, 786).

The physical evidence reflected that neither of the victims had fired any gun. Expert Rao testified that when a gun is discharged, a cloud of microscopic residue particles is emitted. (T. 944-53, 966). This residue is mostly emitted from the "bottom part or back of the gun"; however, some is also discharged through the barrel. (T. 961). The microscopic particles are deposited in the ridges and wrinkles of the hand holding the gun when it is fired. Even if the shooter's hand is covered by

another's hands during the course of a struggle, the shooter's hand would have residue by virtue of having gripped the gun. (T. 949-52). The smaller the caliber of the gun and ammunition, the more residue emitted. (T. 946). Likewise, more residue is discharged when the gun is fired more than once. (T. 965). In the instant case, due to the homemade nature of the silencer and the alterations on the barrel, the gun was also not aligned properly. (T. 966-67). There were a lot of "cracks" where the silencer had been placed. (T. 967). There was thus, "a tremendous amount of particles deposited all over the gun." Id. If one even touched the weapon, "you would have a lot of gunshot particles by the very touching of it." Id. Rao had analyzed the swabs from the gunshot residue (GSR) test of both of the victims' hands at the scene of the murder. He testified that neither victim had any gunshot residue particles on their hands. (T. 944-53).

The evidence also reflected that there were no scratches or other marks on Tomas' hands indicating any struggle for the gun. (T. 702-03). Technician Fletcher additionally testified that a person firing a gun during a struggle is also likely to have "blowback" on heir hands. Blowback is blood splatter out of the gunshot wound onto the shooter's hands. (T. 703). There was no blood on Tomas Rodriguez's hands. (T. 710).

The forensic serologist testified that the amount, location and pattern of the defendant's blood on the scene were inconsistent with his having been shot. (T. 1111-14, 1066-68, 1079). A single drop of blood, which had fallen at a 90 degree angle, on the garage floor, was identified as that of the defendant's. A stain on the garage floor at the rear of the Volvo was also identified as the defendant's blood. (T. 1087-92). Otherwise, there was only a mixture of the victims' and defendant's smeared blood, which was found on the grip and barrel of the gun, on the telephone in the kitchen, and on the kitchen floor at the base of the telephone. Id. The serologist also testified that this blood evidence was consistent with the defendant having injured his hand on the knife utilized

during the stabbing. (T. 1098-1101, 1111-14). This knife did not have a hilt to protect the hand against slipping on he blade. When multiple stab wounds such as those inflicted on Violetta occur, the knife and the hand holding it become wet with the blood splatter, causing the hand to slip on the blood and be cut. (T. 1099-1101). Circular blood drops at a 90 degree angle on the floor are typical of such a knife injury, when the attacker's hand is bleeding and he is walking around. Id. The hand could also suffer injury from the gun's slide or while the attacker is hitting someone with the butt of the gun. (T. 800-01).

As noted above, a mixture of the defendant's and victims' blood was found on the butt of the handgun. The defendant's "palm print" was found on the victims' telephone in the kitchen. (T. 1287-89). The palm print had been left in a wet mixture of the victims' blood on said telephone. (T. 1293-94, 1091-92). A pen register device was attached to the above telephone. (T. 780-83). The last number dialed was to the defendant's girlfriend's house. (T. 784). The defendant resided with her at the time. Id. The day after the homicides, however, the defendant could not be located at this residence. (T. 796-97). Despite numerous attempts, the police were unable to find the defendant at his residence, or in Dade County, for a period of 2 ½ years thereafter. Id. The defendant was arrested on December 23, 1992. (T. 905). He was over 6 feet tall and weighed 180 pounds. (T. 907).

The victims had sold their dry cleaning business to the defendant's girlfriend's father several months prior to the homicides. (T. 785). The defendant worked there. In the beginning the defendant maintained a normal work schedule. (T. 805-06). The business was operating normally at this time. Id. The defendant then altered his work schedule, leaving the business at 11:00 a.m. and not returning until closing time. (T. 806, 818). The quality of the business suffered. (T. 808). Approximately one month prior to the homicides, the defendant would become upset quite frequently. (T. 808, 815). He would complain and blame the victims for having "tricked him" with

the machines and business that they had sold. (T. 808-09, 819).

The defendant, at the request of his counsel, then displayed his hands and a "scar or mark" on his left shoulder, to the jury. (T. 1323, 1342). In closing argument, defense counsel then argued that the scar or mark was consistent with Tomas Rodriguez having shot the defendant first during a struggle. The jury was instructed on both premeditated and felony murder. The jury was also instructed on armed burglary of an occupied dwelling. The jury returned a verdict of guilty, as charged. (T. 1542-44).

B. Sentencing Phase

The guilt phase concluded on October 27, 1995. The penalty phase before the jury began on November 20, 1995 and concluded on November 21, 1995. The final sentencing hearing before the trial judge was conducted on May 30, 1996.

1. Evidence Presented before the Jury and the Recommendation

The State introduced a certified copy of the defendant's prior conviction for aggravated assault in 1985. (T. 1684-85). The defendant had withdrawn a revolver from his waistband, and threatened two victims with it. The victims had originally approached the defendant and a codefendant, because the latter were in possession of a motorcycle belonging to one of the victims' sisters. (T. 1622-24). The defendant was twenty years old at the time. (T. 1625).

The medical examiner testified that Tomas Rodriguez was alive when the five gunshot wounds were inflicted. (T. 1634). He was also conscious at the time of these injuries. (T. 1641). This was based upon this victim's injuries having caused internal bleeding, and evidence that he had been coughing up blood. (T. 1641-42). This victim was aware of his impending death. (T. 1642). Violetta Rodriguez had also been alive and conscious while being beaten and stabbed, as evidenced by her defensive injuries. (T. 1644-46, 1652, 1658-59). She suffered tremendous and severe pain.

(T. 1647-49). Given the close proximity in the garage where both victims had been killed, they were both aware of what was happening to the other, when the injuries were inflicted. (T. 1653-54).

Marlene McField testified that she was the victims' neighbor. (T. 1686). The victims were her son's godparents. Id. The victims had been very supportive, warm and caring during Ms. McField's pregnancy. (T. 1687). The victims were like family and McField came to rely on them for emotional support. (T. 1688). They also would take care of McField's son when she was working. (T. 1688-89). Ms. McField did not want to stay in the area after the victims' deaths, and moved. (T. 1689).

Denise Silver testified that Violetta had lived with the Silver family, in order to take care of Silver's retarded brother. (T. 1690). Her brother was a difficult child and Violetta was the only person who could calm him. (T. 1691). Violetta also took care of Denise until the latter was twelve years old. (T. 1691-92). Violetta was like a second mother. (T. 1692). Violetta had then moved away and married Tomas. (T. 1692-93). Ms. Silver and her family maintained their relationship with the victims through regular visits throughout the years as Silver was growing up. (T. 1693-95). Violetta was very kind and Silver loved her very much. (T. 1685).

The defense then presented background testimony through the defendant's mother, stepmother and sister. The defendant's mother testified that he was born in 1965 in Cuba. (T. 1698-99). The defendant had an older sister. Id. The defendant's parents separated when the mother was two months pregnant with the defendant. Id. The defendant's parents got divorced in 1967, when the father left Cuba. (T. 1699). Prior to leaving, the father wold visit with the family. (T. 1701-02).

The defendant's birth was difficult. (T. 1699). He was hospitalized after birth due to "gastritis"; he could not tolerate milk. (T. 1700). After hospitalization, they lived with the defendant's grandparents. (T. 1701). The defendant then developed meningitis when he was two

years old, and was in the hospital, unconscious, for 25 days. (T. 1702). However, the defendant was able to walk, talk and behave normally by the age of three. (T. 1712-13). The defendant was also asthmatic since birth, and still suffers from allergies. (T.1703). He is also still lactose intolerant. (T. 1713).

The defendant was hyperactive and restless in school, and his teachers would discipline him. (T. 1704). He was also unhappy that his mother had not left Cuba with the father. Id. The defendant's mother remarried when he was 8 years old. (T. 1705). She married a doctor, an anesthesiologist, and stopped working to attend to her house and the children. (T. 1705, 1765). The doctor would beat the mother when he was drunk, and the defendant would fight and defend the mother. (T. 1706). The defendant had once picked up a chair and broken it over the doctor's head to protect his mother. (T. 1771). The doctor had also hit the defendant, "like on two or three occasions." (T. 1731). However, the defendant had not been injured so as to require any medical attention. (T. 1732).

In 1980, the family applied for permission to leave Cuba, but they actually left in 1984. (T. 1707). Their neighbors shunned them in the interim, as the family was leaving the country. Id. The defendant's mother went to Venezuela after leaving Cuba in 1984, and remained there until 1990. (T. 1709). The defendant, however, left Venezuela in 1984, when he was 19 years old, and came to the United States. Id. The defendant began living with his father and stepmother. (T. 1713-14). The defendant and his mother had very little contact, two brief visits, from 1984 to 1990. (T. 1720-21). The mother was unable to offer any evidence with respect to this time period preceding the crimes.

The defendant's stepmother testified that the defendant's father drank and used drugs. (T. 1735-36). The defendant lived with her and his father for two years. (T. 1738). The defendant

would protect the stepmother when she fought with defendant's father. (T. 1738-39). The defendant's father also sold drugs. (T. 1741). The defendant, however, never used drugs or alcohol. (T. 1753). The defendant was not violent; he was never disrespectful. (T. 1752). The defendant then began seeing Barbara, in 1987, and stopped visiting the stepmother and the rest of the family. (T. 1752-55). The stepmother thus could not testify as to the defendant's behavior from 1987 until the time of the crimes. (T. 1735).

The defendant's sister testified that she was one year older than the defendant. (T. 1751). After their father left, they lived with their grandparents, "who were basically raising" them. (T. 1757). The grandparents loved the children a great deal, and took care of them. (T. 1767).

The defendant's mother was a receptionist in a hospital. Id. She kept a strict household with a lot of rules. (T. 1758). The mother hit the children with a stick or sandals, but had never burned them with anything. Id. The sister remembered that the defendant was sick with asthma during childhood, but did not remember any hospitalizations. (T. 1759). She left Cuba prior to the rest of the family, in 1980. (T. 1759-60). She lived with the defendant's father and stepmother. (T. 1768). Her father was moody and used drugs. Id. The defendant then moved in with them in 1985. (T. 1769). He and the father would fight. The defendant would get involved in the fights between the stepmother and father and tried to protect the stepmother. Id. The defendant would work in a body shop and send his mother money. 1763). The defendant stopped seeing the family when he met Barbara in 1987. (T. 1763-64). The sister thus had no knowledge of the defendant's behavior or actions in the three year period prior to the crimes.

The jurors were instructed as to the following aggravating factors: prior violent felony; during commission of a burglary; CCP; and, HAC. (R. 576-88). The jury also received instructions on the statutory mitigator of age, and, "Any other aspect of the defendant's character, record, or background

and any other circumstances of the offenses." Id.

The jury returned a recommendation of death, by a vote of seven to five as to Tomas Rodriguez's murder. (R. 589). The jury unanimously recommended the death sentence as to Violetta Rodriguez's murder. (R. 590).

2. The Circumstances of Defendant's Various Evaluations, and the Trial Judge's Sentence

On October 27, 1995, at the conclusion of the guilt phase, defense counsel had asked for two evaluations of the defendant. (T. 1544). One was for competency. The other was for "a neurology exam," because the defendant had contracted "meningitis as a child, and that conceivably could be a cause of some organic brain damage." (T. 1544-55). The trial judge asked if the defense desired any particular experts, and defense counsel responded that he would "suggest some people." (T. 1545). The trial judge thus delayed the penalty phase before the jury for a period in excess of three (3) weeks to allow for the requested examinations. (T. 1546). The jury was thus instructed to return for the penalty phase on November 20, 1995. (T. 1553).

On November 1, 1995, defense counsel informed the court that he wanted Jackson Memorial Hospital (JMH) appointed to do the "neurological examination" of the defendant. (R. 1316). Defense counsel also asked for a "Spanish speaking doctor" to conduct the competency evaluation, in addition to the appointment of the "post-conviction mitigation expert" who had been present throughout trial. (R. 1316). All three requests were granted. (T. 1316-24). The trial judge asked that the order for the neurological exam be hand-carried to JMH to avoid any delay. (R. 1322). A written order for JMH to conduct a "Medical Neurological" exam was entered on the same day, November 1, 1995, with instructions for a written report by November 15, 1995. (R. 358).

A Spanish speaking psychiatrist, Dr. Castillo, examined the defendant and filed his report on November 10,1995, finding the defendant competent and noting average intellectual capacity. (R.

504-06). JMH initially conducted an orthopedic exam of the spine.[1] (SR. 9). Pursuant to defense counsel's request, the trial judge then specifically called and ordered JMH to conduct a "neurological exam." (SR. 9). Another written order was entered on November 14th, also stating:

> a complete NEUROLOGICAL EVALUATION to be performed by a NEUROLOGIST, an MD. in the field of Neurology, to rule out any type of neurological deficit or organic brain damage or any other disability that the Defendant may have suffered secondary to childhood Meningitis or automobile accident.

(R. 503). JMH neurologist, J. Schwartzbard, M.D., filed her written report on November 16th, having conducted the exam the same day as the order, on November 14, 1995. (SR. 87). She conducted a "neurological exam," after having been informed of defendant's childhood meningitis and his herniated disc problem. (SR. 87). Her physical examination reflected no abnormality, except pain associated with disc problems. (SR. 87).

On November 20, 1995, immediately prior to the commencement of the penalty phase before the jury, defense counsel announced that the JMH neurological exam was insufficient and inconsistent with what the trial court had ordered. (SR. 8-9). Defense counsel stated:

> [DEFENSE COUNSEL]: What I am requesting is what I requested the day of the verdict, a proper neurological exam be done to determine whether or not the defendant has any organic brain damage.
>
> If the Court wish to rely on the exam we have, we are ready to proceed. But we requested that. The fact they didn't do a competent report--
>
> [THE COURT]: Let me point out when you requested the exam you wanted a neurological exam. First they did an orthopedic exam of the spine. The court resolved that, and had the neurological clinic do a neurological exam. I called them to make sure they would physically do it. It's up to them to decide what tests are necessary, if any. The

[1] The defendant had injured his back.

> neurological department make its professional judgment after evaluating him. They didn't need any further testing to rule out organic brain damage. You had the option for weeks if you wanted to have anybody of your choice to evaluate him, and I of course would have signed the order.

(SR. 9). The penalty phase before the jury commenced and was completed on November 21, 1995.

On December 7, 1995, the defense filed a written objection to the adequacy of the court-ordered neurological examination by JMH. (R. 601-05). An affidavit by a neurologist, Dr. Cagen, was attached, stating that he had been contacted on November 26, 1995 and reviewed the JMH report. (R. 606). The affidavit stated that the JMH exam was not a complete neurological examination: "For example, there is no indication that the patient's cranial nerves were examined or that the patient's pupils were examined." (R. 606). The affidavit stated that a complete "neurological exam to determine organic brain damage would include a complete physical examination, appropriate blood analysis and a CT or MRI scan of the brain." Id.

The defense also attached an affidavit from a psychologist, Jorge Herrera, Ph.D., which stated that on December 5, 1995 he had conducted a preliminary neuro-psychological interview, and that his preliminary consultation should be followed with a "full neuro-psychological and psychological evaluation as well as a full neurological evaluation, including a EEG examination." (R. 607).

The day after the filing of said affidavits, the trial judge appointed Dr. Antonio Lorenco to assist the defense in doing "a brain topography." (R. 1264). The trial judge also entered orders appointing both the neurologist, Cagen, and the psychologist, Herrera, to assist defense counsel as defense experts. (R. 615, 617).

A hearing was then conducted on December 12, 1995. (R. 1261). At that hearing the trial judge inquired whether another "neurologist," apart from JMH, had examined the defendant. (R. 1286). The trial court ascertained that Dr. Lorenco had in fact examined the defendant and

conducted a "brain topography" prior to the hearing. (R.1290-91). The State had requested access to the test results. (R. 1286-88). Defense counsel objected on the grounds the Dr. Lorenco was a "confidential" expert, and that "[w]e may just decide it's not strategically in our best interests to use it [Lorenco's topography test]. If we don't use it, then there is no reason to provide it." (R. 1288). The defense also added the reason they were not going to utilize Dr. Lorenco and his exam was because "they are not probative pro or con." (R. 1290).

It should be noted that at the commencement of the above December 12, 1995 hearing, defense counsel had first moved for a new penalty phase jury to be impanelled so that "Dr. Herrera," who was neither a neurologist nor an M.D. as originally requested by the defense, could testify before the new jury. (R. 1271, 1273). Defense counsel stated that the JMH neurology exam had been deficient and he had thus obtained the services of Dr. Herrera. (R. 1266-71). The trial court reminded counsel that despite the appointment of two neurologists at this juncture, no testimony as to the alleged insufficiency of the JMH neurological exam was being presented:

> [THE COURT]: I don't have any testimony from a neurologist.
>
> By the way, take a look. The standard in this state is that if you want to test a neurologist's opinion, it has to be another neurologist to say whether it was competent.
>
> [DEFENSE COUNSEL]: If you give me enough time, we will get another neurologist.
>
> [THE COURT]: I am sure.

(R. 1276).

The trial judge denied defense counsel's request for impanelling a new jury to hear testimony from psychologist Herrera, additionally noting that there had been no request for a psychologist at any juncture prior to the completion of the penalty phase before the jury, and that even on the day of the penalty phase, the defense had been asking for a neurologist:

> [THE COURT]: The jury didn't get to hear from Dr. Herrera because nobody asked to have him appointed before the jury.
>
> . . .
>
> I was asked to appoint another neurologist. They didn't like the findings of that exam [JMH] and felt they were incomplete.
>
> Nobody talked about having a Ph.D. appointed who is a psychologist.

(R. 1274). The trial judge added that while there were no grounds for a new jury penalty phase, the defense was free to present any new psychological evidence to the court:

> [THE COURT]: . . . Some of [defendant's] problems as a youth and other things have been known for a long time.
>
> I am fully aware of that.
>
> That is why the Court would not impanel another jury, because if you want to find new things as you go along, that does not mean you can work on old things that you know about and now bring in new witnesses, and that doesn't mean you get a new jury.
>
> You got your jury and argued in front of them, and the jury's recommendation is going to stay where it is; however, as far as giving me new evidence to consider in mitigation within a reasonable period of time, the court's door has to be open, and it is.

(R. 1280-81).

Three (3) days after the above hearing, on December 15, 1995, the trial court then, in fact, appointed yet another "neurologist," Dr. Calderon, solely to assist defense counsel. (R. 637). The record reflects that this neurologist examined the defendant and found no abnormality, on December 19, 1995. (R. 759-61).

At a subsequent hearing, on January 10, 1996, defense counsel then announced: "We are not calling Dr. Calderon." (R.1301). Defense counsel noted that, "the court gave me additional time to get the neurologist, but we are not using the neurologist." (R. 1302). Defense counsel stated that he

would rely solely on the psychologist, Herrera. (R. 1301-02).

The prosecution, at this juncture, then again requested that its own experts be provided access to the defendant to examine him. (R. 1303-06).[2] Defense counsel then moved to prohibit any examination. (R. 1306). The trial judge denied the defense motion, and allowed the State to obtain an expert to examine the defendant in person and testify in court if necessary. (R. 1309-10).

A psychologist, Dr. Garcia, was thus appointed to conduct a psychological examination of the defendant, and assist the State. (R. 744). The trial judge also granted the State's request for MRI and EEG exams of the defendant. (R. 1345). The defendant, however, refused to be examined by Dr. Garcia or undergo any MRI or EEG. (R. 1346).

At the final sentencing hearing before the trial judge, on May 31, 1996, defense counsel acknowledged that the defendant had, in fact, refused to cooperate with any experts or any testing requested by the State. (R. 1348). The court conducted a colloquy and the defendant reaffirmed that he would not cooperate with Dr. Garcia and would not undergo any physical tests such as an MRI. (R. 1351-54).

Defense counsel also informed the court that he would not present any testimony, but would rely on "reports." (R. 1337). Defense counsel then presented Dr. Herrera's report, Dr. Calderon's report, and a document in Spanish, retrieved from Cuba. (R. 1338). The latter document had been obtained by the defendant's mother in February, 1996, and was in the possession of defendant's counsel at least four (4) weeks prior to the hearing. (R. 1341-42). The document, which was in Spanish, had been provided to the State, "four minutes" prior to the hearing, without a translation. (R. 1342).

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[2] The prosecution had previously requested appointment of experts immediately after the defendant first requested a neurological exam. (T. 1545; R. 353-55).

The prosecution, pursuant to Fla.R.Crim.P. 3.202, Dillbeck v. State, infra, and Hickson v. State, infra, and in light of the defendant's refusal to cooperate with the State's experts, argued that it was being deprived of any rebuttal opportunity. (R. 1346-47). The State thus requested that the "reports" not be considered. Id.

The trial judge asked whether the State would change its position if the court decided to admit and consider the defense reports, but also consider that the defendant had refused to be examined by the state's experts. (R. 1360). The prosecutor, "[i]n an abundance of caution, limiting the issues the defendant would have for the inevitable appeal of this case," withdrew the objection. (R. 1360).

The reports were thus admitted into evidence. The report of the defense neurologist, Dr. Calderon, as previously noted, reflected no abnormality. (R. 759-61). The document from the Cuban hospital reflected that an EEG exam of the defendant had been conducted, with normal results. (R. 1344). The EEG had been conducted when the defendant was 15 or 16 years old, long after his childhood meningitis, giving rise to the neurological exam initially at issue herein. Id.

Dr. Herrera's report, in the section for psychological testing, reflected that the defendant had a "Full scale **IQ** of 108. These results place Mr. Delgado within the **average** range of intellectual functioning." (R. 773). With respect to said testing, the report added:

> No discrete or lateralized pattern of deficits has been identified in the profile obtained by Mr. Delgado. Furthermore, the values obtained by Mr. Delgado in the Wechsler Adult Intelligence Scale Revised are estimated to reflect age appropriate intellectual functioning.

(R. 773). Dr. Herrera had also conducted the Minnesota Multiphasic Personality Inventory, "an objective questionnaire designed to identify areas of psycho-pathology presented by the patient as compared to a normative sample." (R. 774). With respect to this test, the report reflects:

> The highest elevations in the personality profile obtained by Mr. Delgado were noted in scale 1 and scale 8. This pattern is consistently found in patients who have difficulty handling anxiety and may present delusional thinking relative to bodily functions and illness. Mr. Delgado is likely to experience feelings of hostility may have considerable difficulties expressing them to others for fear of retaliation.

(R. 774).

Based upon family history from the defendant and the testing, Dr. Herrera, however, concluded that the defendant suffers, "from what may be described as an organic brain syndrome related to an adult form of attentional deficit hyperactivity disorder[3] in which his behavior is prone to being impulsive and poorly regulated. The nature of the crime committed by Mr. Delgado may well represent an organically determined state of fugue within the context of the disinhibition of behavior associated with organic brain disorders." (R.777).

The trial judge entered his comprehensive sentencing order on June 19, 1996. (R. 813-35). With respect to the murder of Violetta Rodriguez, the trial judge found three (3) aggravating factors: (1) defendant was convicted of another capital felony, Tomas' murder, and a prior violent felony, aggravated assault with a firearm; 2) the capital felony was committed during commission of an armed burglary; and, 3) the murder was heinous, atrocious and cruel (HAC). (R. 815-18). With respect to Tomas Rodriguez' murder, the trial judge found the same aggravating factors with the exception of HAC. Id. The trial court did not find any statutory mitigating factors. (R. 819-22).

As to non-statutory mitigating circumstances, the judge listed eleven (11) physical and

[3] This alleged disorder was based upon an interview of the defendant's mother who had described the defendant as "being prone to behavioral disorders, as well as being hyperactive and having attentional deficit disorders." (R. 765). Dr. Herrera added, "A Spanish language adaptation of the Wender-Utah Hyperactivity Scale done retrospectively by [defendant's mother], reveals that Mr. Delgado is quite probably suffering from the adult form of attentional deficit hyperactivity disorder, as this syndrome was present throughout his childhood." Id.

psychological ailments enumerated by the defense under the heading presented by the defendant that he, "suffers from serious life long physical and psychological impairments." (R. 822-25). The court gave this evidence "limited weight." (R. 825). The trial judge also categorized twelve (12) background items enumerated by the defense under the heading that the defendant had been a "physically and emotionally battered child." (R. 825-28). The judge gave the defendant's difficult childhood "substantial weight." (R. 828). The court also found that: defendant's father used drugs (some weight); defendant loved and protected his parents (moderate weight); defendant had little contact with his mother during adulthood (little weight); defendant has the capacity to work hard (some weight); and, defendant's courtroom behavior was appropriate (some weight). (R. 828-33). The trial judge also enumerated thirteen (13) other items proposed by the defendant and found that there was no evidence to support same, or that they did not constitute mitigation. (R. 828-35).

The trial judge sentenced the defendant to death, having found that the aggravating circumstances "far outweigh" the above mitigation. (R. 834).

SUMMARY OF THE ARGUMENT

I. The instruction on felony murder was a proper statement of the law and supported by the evidence. If there was any error, it was induced by defense counsel's actions in precluding an instruction on felony murder with aggravated assault as the underlying felony.

II. Prosecutorial comments at issue were either based on the evidence or referred to a general absence of evidence. There were no improper comments on the defendants' failure to testify or his burden of proof.

III. The evidence was sufficient as to premeditation and was inconsistent with the claim of self-defense.

IV. Four prospective jurors were properly excused for cause, as they expressed an inability to be impartial with respect to the death penalty.

V. Crime scene photos and an autopsy photograph were properly admitted, where they were relevant to evidentiary issues and were neither cumulative, nor unduly gruesome.

VI. Numerous mental health experts were appointed, pursuant to the request of the defense, and there was no demonstration that he was deprived of an adequate evaluation.

VII. Koon v. Dugger, infra, is inapplicable, as the defendant did not preclude defense counsel from presenting any mitigating evidence in the penalty phase.

VIII. Some of the comments of which the Appellant complains in the penalty phase were defense counsel's own comments. Other comments, by the prosecutor, are proper arguments on the evidence as to the aggravating and mitigating factors.

IX. Instructions on aggravating factors were proper instructions, supported by prima facie evidence as to each factor. Specific instructions on alleged nonstatutory mitigating factors were not required. Claims regarding instructions on consecutive life sentences and the diminishing of the

jury's responsibility have repeatedly been rejected by this Court.

X. Victim impact evidence was properly introduced pursuant to Florida's sentencing statute.

XI. A comparison of the instant case to other death sentences which have been affirmed, demonstrates that the death sentence is proportionate in this case.

XII. The trial court's sentencing order reflects a careful and thorough evaluation of the mitigating evidence, and there is no showing of any abuse of discretion as to the weight accorded.

XIII. The alleged errors in the preceding 12 arguments, neither individually, nor cumulatively, constitute reversible error.

XIV. Claims regarding the constitutionality of Florida's death penalty statute have repeatedly been rejected by this Court.

Additionally, it should be noted that, as to several of the foregoing claims, procedural bars have been asserted, in the alternative, as many claims were not properly raised in the trial court.

ARGUMENT

I.

THE CLAIM BASED UPON ALLEGED CONFLICTS IN THE JURY INSTRUCTIONS REGARDING FELONY MURDER AND THE INTENT TO COMMIT MURDER IS A) UNPRESERVED FOR APPELLATE REVIEW; B) WITHOUT MERIT, WHERE THE INSTRUCTIONS ON BOTH FELONY MURDER AND THE UNDERLYING FELONY WERE PROPER AND SUPPORTED BY THE EVIDENCE; AND C) HARMLESS, WHERE THE QUESTION OF INTENT TO KILL WAS NOT EVEN AT ISSUE.

The Appellant argues that the jury instructions as given, on felony murder and the underlying felony of burglary, created a conflict on the question of intent to kill. This argument is based on the portion of the standard jury instruction on felony murder, which, as given in the instant case, advised the jury that: "In order to convict of first degree felony murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill." (T. 1505; R. 270). Since the underlying felony was burglary, for which the jury was instructed that the State had to prove that the burglary was committed with an intent to kill (T. 1512-13; R. 278), the Appellant contends that the felony murder and burglary instructions were in conflict with one another.

A. Failure to Preserve Issue for Appeal

In the instant case, a careful review of the charge conference and motion for judgment of acquittal compels the conclusion that the only remedy sought by the defendant in the trial court was to preclude the court from giving any instructions on felony murder. (T. 1303-1307, 1351).[4] Trial

[4] Thus, defense counsel argued in the motion for judgment of acquittal that ". . . there is absolutely no facts presented by the State . . . to suggest the underlying felony is sufficient to send the jury, the charge of felony murder." (T. 1303). The defense later reiterated "that this jury should not be instructed on felony murder. . . ." (T. 1351). During the charge conference, defense counsel attacked the State for wanting "to proceed under two theories" - i.e., premeditation and felony murder. (T. 1383). During the motion for new trial, the defense again asserted its position that "the felony murder theory was inappropriate." (R. 593).

counsel's position was "just because a house was broken innto first" did not qualify for felony murder. (T. 1307). In contrast, the issue presented in this Court, by the Appellant, suggests, alternatively, that the trial court either should have not given any instructions on felony murder or that the trial court should somehow have revised the instructions on felony murder.[5]

To the extent that the issue on appeal purports to argue that the jury instructions should have been revised, the instant claim should be deemed unpreserved, as the only claim which the defense clearly presented in the trial court was that the jury should not be instructed on felony murder at all. See, e.g., Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985) (claim presented on appeal must be the specific legal argument advanced by the Appellant in the trial court). By way of analogy, this Court has repeatedly held that claims regarding the unconstitutionality or vagueness of instructions on aggravating factors are not preserved in the trial court through arguments that defense counsel objected to the applicability of the instruction, in toto, based upon the evidence adduced in the case. See, e.g., Roberts v. Singletary, 626 So. 2d 168 (Fla. 1993). Just as the defendants in Roberts and its progeny could not complain, in appellate proceedings, about the propriety of particular language in the given instructions, so too, the defense herein can not complain that the language in the felony-murder instructions should have been modified.

B. Propriety of Instructions

Contrary to the Appellant's arguments, the felony murder instructions were properly given,

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[5] For example, the Appellant argues that "[t]he jury instructions as given, and the evidence adduced at trial, required reversal of Defendant's murder convictions, because the jury was misinformed that the intent to commit murder need not be proven by the State to support a conviction for felony murder." Brief of Appellant, p. 26. Likewise, the Appellant argues: "Therefore, the submission of the case to the jury on the felony murder theory was erroneous, as was the instruction which permitted guilty verdicts for first degree murder without either a finding of premeditation or a finding on each of the elements of an underlying felony." Brief of Appellant, p. 24.

both in terms of the facts of the case and the language of the given instructions. First, the evidence clearly warranted an instruction on felony murder. The statutory elements of first-degree felony murder are simply that a killing occur during the course of one of the enumerated felonies. Section 782.04(1)(a)(2), Florida Statutes. Burglary is one of the enumerated felonies. As the State adduced ample evidence that the killing occurred during the course of a burglary,[6] the giving of a felony-murder instruction, in and of itself, was proper. Burglary requires proof on an intent to commit an offense while either entering or remaining in the property at issue. See, e.g., Toole v. State, 472 So. 2d 1174 (Fla. 1985); Ray v. State, 522 So. 2d 963 (Fla. 3d DCA 1988). Where the intended offense of the burglary is a murder, the specific intent for that particular burglary is an intent to kill. As the State adduced evidence consistent with the intent to kill, the State similarly adduced evidence sufficient to prove the burglary, and the State therefore produced evidence sufficient to demonstrate that the murder occurred during the course of the burglary, thus satisfying the statutory elements of the offense of felony murder and thus enabling that theory to go to the jury.

The essence of the Appellant's argument is that the last sentence of the felony-murder instruction, which dispenses with intent,[7] is inconsistent with the burglary instruction, as given in the instant case, requiring that the burglary be committed with an intent to commit murder. The Appellant's argument fails for several reasons. First, as seen above, the State was clearly entitled to proceed on theories of both felony-murder and burglary. Second, the quoted sentence from the felony murder instruction is an accurate statement of the law, as felony murder does not require proof of any premeditation or intent to kill. While the facts of the instant case presented only an

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[6] See Argument III, pp. 37-45, infra.

[7] "In order to convict of first-degree felony murder it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill." (T. 1505).

intentional killing, the truthfulness of the foregoing quoted portion of the instruction remains. By way of example, convenience store murders routinely involve intentional killings which are nevertheless felony-murders at the same time.

Third, even though the State, in this case, proceeded on a theory of the underlying felony being a burglary with the intent to murder, neither by law nor the facts of this case was the State limited to such a burglary as the underlying felony. In the instant case, the indictment alleged that, inter alia, the murder was committed during the course of a burglary (count I) and that the burglary was committed with the intent to commit murder (count III). (R. 1-2). Language in a charging document regarding the intent of the burglary - e.g., to commit a murder - is viewed as surplusage. Such language is not necessary, as the State need only allege that a burglary was committed with the intent to commit an unspecified offense. Furthermore, when the charging document does allege that the burglary was committed with the intent of committing a specified offense, that language does not preclude the State from offering evidence, at trial, that the burglary was committed with the intent of committing some other offense. See, Toole v. State, 472 So. 2d at 1175, ("that beyond allegation and proof of unauthorized entry or remaining in a structure or conveyance, the essential element to be alleged and proven on a charge of burglary is the intent to commit *an* offense, not the intent to commit a specified offense, therein." Thus, "the exact nature of the offense alleged is surplusage so long as the essential element of intent to commit an offense is alleged and subsequently proven."). (emphasis added); see also, L.S. v. State, 464 So. 2d 1195 (Fla. 1985).

The foregoing principles, which derive from Toole, are highly significant in this case. While the State charged that the burglary was with the intent to commit murder, the State also adduced evidence which would support the theory of burglary with intent to commit an assault. If the case had gone to the jury on the theory of burglary with an intent to commit an assault as the underlying

felony for felony murder, the last sentence of the felony murder instruction - i.e., that intent to kill need not be proved for felony murder - would then have been clearly and completely accurate, not just in theory, but in the context of the facts and charges of the instant case, as burglary with an assault does not require an intent to kill.[8]

While such a theory of burglary existed, which could have gone to the jury, and which would have been fully consistent with the notion that felony murder does not require an intent to kill, defense counsel specifically objected to the jury being instructed on burglary with an intent to commit an assault as the underlying felony. (T. 1365-67). Defense counsel argued that the intent to commit an assault was not alleged in the burglary count and thus should not go to the jury. Id. The trial court accepted this argument. Id. However, as can be seen from the foregoing discussion of Toole, defense counsel's assertions as to burglary with intent to commit an assault were clearly erroneous. As such, it was defense counsel's erroneous legal arguments, precluding the jury from hearing the theory of burglary with an intent to commit an assault, which were the sole cause of any alleged inconsistency in the instructions on felony-murder and burglary.

In view of the foregoing, it can be seen that, not only is the final sentence in the felony-murder instruction an accurate statement of the law, but, any perceived inconsistency between that sentence and the burglary instruction given in the instant case was an inconsistency created solely by defense counsel's erroneous legal tactic of preventing the jury from hearing the theory of burglary with an intent to commit an assault. Thus, if any error is found to exist, such an error must further be deemed invited error, as defense counsel laid the groundwork for the conflict. Absent defense counsel's erroneous legal arguments, which the trial court acted on, no such inconsistency would

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[8] Burglary with intent to commit an assault would only require proof of an intent to threaten or intimidate the victims, falling short of an intent to kill.

ever have gone to the jury. See, Czubak v. State, 570 So. 2d 925 (Fla. 1990) (under invited error doctrine, party may not make or invite error at trial and then take advantage of error on appeal); White v. State, 446 So. 2d 1031 (Fla. 1984) (same); Pope v. State, 441 So. 2d 1073 (Fla. 1983) (same); McCrae v. State, 395 So. 2d 1145 (Fla. 1980) (same).

C. Harmless Error

To the extent that the Appellant is presenting some version of the argument that the felony-murder instructions which were given should have been modified, while such an argument is both unpreserved and lacking merit for the above reasons, any possible error would also have to be deemed harmless error. Most significantly, the jury was properly instructed on the offense of burglary. Having been properly instructed on the offense of burglary with the intent to commit the felony of murder, the jury found the defendant guilty of that offense. It therefore necessarily follows that even though the offense was premeditated as well, the jury, of necessity, found that the defendant had committed the murders during the course of the underlying felony - the burglary. Any alleged contradictions in the language regarding intent are thus of no significance.

Furthermore, neither the prosecution nor the defense was arguing that the murders were unintentional. The State's theory was of premeditated murder (which can overlap with felony murder) and the defense's theory was one of self-defense, with an intentional, but justifiable, shooting. As neither party was proceeding on any theory of unintentional or accidental killings, the felony-murder instruction which refers to the lack of necessity of proof of intent is simply irrelevant surplusage, which can not have any effect on the instant case.

Several cases compel the conclusion that any possible error in the language in the instructions as given must be harmless. First, in the aftermath of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979), many cases arose in which it was asserted that trial courts erroneously

gave jury instructions which created a presumption of intent, thus violating the due process clause of the United States Constitution by relieving the State of its burden of proving each element of the offense beyond a reasonable doubt. Such cases typically found such instructions to constitute harmless error where the question of intent was not at issue. See, e.g., Lancaster v. Newsome, 880 F. 2d 362, 367 (11th Cir. 1989) ("Under the first situation, a Sandstrom error on intent may be harmless where intent to kill is conceded by the defendant or otherwise not put in issue at trial."); Bowen v. Kemp, 832 F. 2d 546, 548 (11th Cir. 1987) (Sandstrom error harmless, inter alia, where the erroneous instruction was applied to an element of the crime that was not at issue in the trial."). See also, Frazier v. State, 530 So. 2d 986, 988-89 (Fla. 1st DCA 1988) (burden shifting instruction regarding blood alcohol level was deemed harmless in light of overwhelming evidence of presumed intent); Tucker v. Kemp, 762 F. 2d 1496, 1501 (11th Cir. 1985) (en banc)(erroneous instruction on intent harmless where sole defense was non-participation in killing).

Apart from the foregoing cases, which focus exclusively on an issue of intent, the broader proposition, which finds compelling support as well, is that an erroneous jury instruction is harmless error whenever it relates to a matter which is not in issue. See, e.g., United States v. Banks, 988 F. 2d 1106, 1111 (11th Cir. 1993) ("An unconstitutional jury charge represents harmless error if the charge only applies to an element 'not at issue in the trial'. . . ."). See also, Johnson v. State, 608 So. 2d 4 (Fla. 1992) (giving instruction on heinous, atrocious, cruel aggravator was harmless error where there was no way that it could have affected jury's consideration of recommended sentence).

II.

THE PROSECUTION'S COMMENTS WERE NOT IMPROPER.

The Appellant contends that the prosecutor's comments, during closing argument, improperly referred to the defendant's right to remain silent or his burden to produce evidence. The comment at issue was one which referred to the serologist's testimony that the State had been unable to examine the defendant's hands for 2 ½ years after the murders because of the defendant's absence during that time. As such, the comment was one which was a proper comment on evidence which was properly before the jury. A careful review of the pertinent comment, and the evidence and arguments leading up to it, compels several conclusions. First, as just noted, the comment was one which was a comment on the evidence and was neither a comment on silence nor on the defendant's burden of proof. Second, the comment was one which was a fair response to prior arguments by defense counsel. Third, instructions to the jury that the defendant does not have any burden of proof would render harmless any possible error. Lastly, as to a second comment by the prosecution, and which the Appellant bases the instant argument on, it will be seen that there was no objection to that comment and, in any event, it was a permissible comment on the absence of any evidence to contradict the State's evidence of guilt.

The prosecution had presented evidence, through a serologist, that the defendant's blood was found at the scene, but that the volume, position and location of the blood were not consistent with the defendant having been shot; they were consistent with him having injured his hand on the blade of the knife, while stabbing Violetta 12 times. (T. 1099-1101, 1103-06, 1111-12).[9] On cross-examination, defense counsel elicited that the knife injury to the defendant's hand could have been

[9] The State had presented physical evidence, gunshot residue (GSR) tests on both of the victims' hands, which established that neither victim had fired any weapon.

significant, although it may also have been minor. (T. 1103-06). Defense counsel then elicited that the expert was not aware of any such injury on the defendant's person. (T.1106). On redirect examination, the prosecutor then elicited that since the defendant had not been found until 2 ½ years after the murders, the expert had been in no position to examine the defendant's hand for any injury. (T. 1122).[10]

At the conclusion of the State's case, defense counsel had the defendant display his hands, in an effort to show that they were uninjured, five years after the homicides. The defendant also displayed his left shoulder, in an effort to show that it had a "mark or scar." Defense counsel then argued that the mark on the defendant's shoulder was evidence of a gunshot wound sustained in self-defense, during the instant offenses. (T. 1323, 1341, 1401-04).

Based on the foregoing, the prosecutor responded, in closing argument, that the claim that the defendant had been shot in the shoulder was inconsistent with the physical evidence, which demonstrated the small quantity of the defendant's blood. (T. 1447-48). In the only comment to which defense counsel objected, the prosecutor referred to the defendant's absence for 2 ½ years:

> The defendant stood before you this morning and he showed you his hands and a mark on his arm. This is, I don't know October 26,1995, the defendant as you have learned during the course of this trial was gone from August 31, 1990 until December 23,1992, or at least was not located.
>
> Have you seen any evidence to suggest to you what was going on during that lapse of time?

(T. 1455). Defense counsel objected, reserving argument. Id.

At the conclusion of the prosecutor's argument, defense counsel initially argued that the

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[10] The prosecution had also previously established, through the lead detective, that the defendant's bloody palm print was on the victims' telephone and that a pen register traced the final call on that phone to the residence of the defendant's girlfriend, with whom he resided at the time. Additionally, the police, despite substantial efforts, were unable to locate and arrest the defendant until 2 ½ years after the homicides. (T. 783-85, 796-98).

comment violated the defendant's right to remain silent and suggested that the defendant had the burden of proof. (T.1463). The prosecution responded that the comment was simply a comment on the evidence which the jury heard from the serologist - that the State had been unable to examine the defendant's hand contemporaneously with the offenses due to his absence for 2 ½ years. (T. 1463-64). The prosecutor added that the defense had made his hands an issue during the preceding argument. (T. 1464). At that time, defense counsel responded that:

> If the comment was merely directed to the fact that a substantial period of time has passed since the injury allegedly occurred that is one thing. But to suggest the Defendant has to come forward, or should have come forward with some evidence to explain his whereabout, that is totally improper again.

(T. 1464-65).

The trial court then found that in context, the prosecutor's remark had not been "improper." (T. 1465). The court then denied the defendant's motion for mistrial, having offered, "in an abundance of caution," to give a curative instruction. (T. 1465). Defense counsel sought one, "to the effect that, as I have previously instructed you a defendant has no obligation to prove anything. And the sole burden of proof rests with the prosecution." (T. 1465). He added that he was "not sure" if the instruction would cure the error. (T. 1465). When the state asked if the defense wanted any additional instruction, defense counsel added, "That should cover it." (T. 1466).

Defense counsel then proceeded with his rebuttal closing argument. (T. 1468-94). After its conclusion, the prosecutor reminded defense counsel and the court about the curative instruction. (T. 1496-97). Defense counsel stated that it was his understanding that the instruction was to have been given prior to the completion of his closing argument. (T. 1497). The judge stated: "Nobody asked me to, I would have." (T.1497). The prosecution then stated that the issue was whether the defense wanted the instruction prior to the other instructions, and defense counsel reiterated: "I don't see any purpose in reading it." (T. 1497). The judge then reiterated that he would have given the

instruction previously, "but nobody brought it to my attention. If they had wanted it read right then and there I would have." (T. 1497). Nonetheless, the jury was then instructed, as part of the final, standard instructions, that: "Now the defendant is not required to prove anything." (T.1 518).[11]

As to the above quoted prosecutorial comment, the only one which was the subject of an objection at trial, when viewing the comment in the context of the entirety of the argument and the evidence, it must be concluded that the comment was simply a permissible comment on the evidence which was already before the jury. When the serologist testified, defense counsel elicited testimony about the nature of the knife wound and the prosecution, on redirect examination, elicited that the defendant, who had not been found until 2 ½ years after the murder, had not been available for a timely examination as to his hands. Other evidence established the defendant's 2 ½ year absence from his usual abode, immediately after the homicides. The comment at issue simply refers to the same matter that the serologist was testifying to and, as such, is simply a comment on the evidence that was properly before the jury. See, e.g., White v. State, 377 So. 2d 1149, 1150 (Fla. 1980) ("It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury. . . ."); State v. Jones, 204 So. 2d 515, 517 (Fla. 1967) (same). Similarly, the comment can be seen to be one which is a fair response to defense counsel's arguments. As defense counsel was arguing that the injury-free hand supported the theory of self-defense, the prosecutorial response of focusing on the inability to examine the hand during the aftermath of the murders was a fair response. See, Brown v. State, 367 So. 2d 616, 625 (Fla. 1979); Barber v. State, 288 So. 2d 280, 281 (Fla. 4th DCA 1974).

The defendant's contrary interpretation of the comment, as being one which refers to the defendant's failure to account for his "whereabouts" during his 2 ½ year absence, is an unreasonable

[11] During closing argument, the prosecutor had told the jury the same thing. (T. 1453).

construction. The only significance of the defendant's absence was in its relation to the State's inability to examine his hands or shoulder within the proximity of the murders, as noted by the serologist. The defendant's actual whereabouts, and what he was doing for the 2 ½ year period were otherwise irrelevant. The prosecutor's point during argument was that the knife injury to the hand would have been healed due to the passage of time. Likewise, the "mark or scar" on the defendant's shoulder was due to any number of circumstances occurring at any time from the defendant's childhood until the time of trial. The State had, after all, presented substantial physical evidence that neither of the victims had fired any weapons; and that the pattern and volume of the defendant's blood at the scene were inconsistent with his having been shot, and consistent with a minor knife injury. Construing the comment herein as a reference to the defendant's burden of proof as to his "whereabouts" would thus be unnatural and unreasonable. As noted in Kirby v. State, 625 So. 2d 51, 54 (Fla. 3d DCA 1993), courts have "refused to presume that jurors invariably, draw the wrong conclusions from statements 'in which only lawyers or judges sensitized to possible error could even detect a sinister implication.'" The only reasonable interpretation of the instant comment is the one which is tied to the testimony of the serologist - evidence upon which the prosecutor could properly comment.[12]

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[12] The Appellant's reliance on Dean v. State, 690 So. 2d 720 (Fla. 4th DCA 1997), is misplaced. The conviction in Dean was reversed due to the admission of improper evidence of general habits of criminals who, inter alia, provide false identification and travel under assumed names. The court additionally noted that the State's closing argument, inquiring why the defendant did not tell the officer at the time of his arrest that he had identification and inquiring why he was traveling under an assumed name, and leading up to the comment that "[i]f there is [another reasonable explanation] you haven't heard it in this trial," constituted improper argument. These comments were inappropriate in Dean because, under the unique facts of that case, "the only person who could have testified at trial" and provided the alternative explanation that the prosecution was referring to, was the defendant. Id. at 724. Jackson v. State, 575 So. 2d 181 (Fla. 1991), is also inapplicable. The prosecutor, in Jackson, specifically asked the jurors to draw inferences from the fact that the defendant did not call his mother to testify, under circumstances where the defense did not interject any issue or theory as to which the mother's testimony would even be relevant.

On appeal, the Appellant additionally asserts that a second, distinct comment by the prosecutor similarly referred to his burden to present evidence. That comment, quoted below, was not objected to at trial:

> Have you seen or heard any presentation in this case to tell you, or even demonstrate to you in any fashion that the circumstances under which the State has presented this case to you are inconsistent with the guilt of the defendant?
>
> You saw a mark on his arm, and you saw that he can move his hands, so what. . . .

(T. 1456). In the absence of any objection, any claim based on this comment is not preserved for appellate review, as it does not implicate any form of fundamental error. See, e.g., Clark v. State, 363 So. 2d 331 (Fla. 1978). Alternatively, even if the claim is properly preserved for review, it is clearly a permissible comment on the general absence of contradictory evidence. White v. State, 377 So. 2d 1149, 1150 (Fla. 1980) (comment that "[y]ou haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument); Sheperd v. State, 479 So. 2d 106 (Fla. 1985) ("I had a lot of difficulty trying to figure out exactly what the defense was going to be, because, frankly, for my purpose, I haven't heard any."); Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995).[13] The prosecutor herein was simply stating that the evidence is uncontradicted, as there is no

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Similarly, Hayes v. State, 660 So. 2d 257, 261 (Fla. 1995), involved the elicitation of testimony, by the prosecution, as to the failure of the defense to perform scientific tests on physical evidence, thus suggesting that there was a burden to do so, where the defense had not interjected any issue for which he carried any burden. Hayes did not involve a comment on any properly admitted evidence; the evidence itself was improper. Moreover, the testimony at issue went to the elements of the offense which the State had to prove, not to any claim interjected by the defense.

[13] In Barwick, the prosecutor argued: "But what, what in this courtroom, what evidence, what fact, what testimony, what anything have you heard as a result of him going down to that police station would create a reasonable doubt in your mind what he has done, what he is guilty of. Nothing." When placed in the context in which the comment arose, this Court concluded that it "merely directed the jury to consider the evidence presented." 660 So. 2d at 694. The defense had tried to cast doubts on the circumstances of the police interrogation, and the State was focusing on the lack of any evidence supporting the conclusion of any impropriety.

presentation of evidence which is contrary to the prima facie case of guilt which the State had presented.

Lastly, even if any error is found in any of the foregoing comments, such error must be deemed harmless in light of the instruction which the court gave to the jury, advising the jury that the defendant does not have the burden of proving anything. Defense counsel requested such a curative; the court was prepared to give it at any time; and, defense counsel did not specify that he had wanted it in the middle of his closing arguments. At the conclusion of the closing arguments, the court gave the standard instructions, which included the above noted provision. As can be seen from the foregoing, defense counsel acknowledged that such an instruction would suffice. (T. 1466). Insofar as defense counsel had reserved his objection until the end of the State's closing argument, no curative instruction was ever going to be given immediately after the comment at issue. Whether it is given at the end of the State's closing argument, or the end of the defense's rebuttal argument, some 15 or 30 minutes later, should not make a difference of any significance. Curative instructions are routinely deemed to suffice to cure prior errors with respect to the admission of evidence or improper comments. See, e.g., Duest v. State, 462 So.2 d 446, 448 (Fla. 1985); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Jean v. State, 638 So.2 d 995,997 (Fla. 4th DCA 1994) (complaint of improper comment on silence was waived when defendant refused court's offer of a curative instruction); Greer v. Miller, 483 U.S. 756, 766 at n. 8, 107 S.Ct. 3102, 97 L.Ed. 2d 618 (1987) (curative instruction as to comment on post-arrest silence presumed to be sufficient). That should be all the more true where the comment at issue is an isolated and brief comment, for which the most reasonable construction is simply that it is a comment on evidence which the jury already heard, and any contrary construction is tenuous at best.

III.

THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WERE PROPERLY DENIED WHERE THE CONVICTIONS WERE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

The Appellant contends that the trial judge erroneously denied the defense motions for judgment of acquittal because there was insufficient evidence of premeditation, and the State's evidence was consistent with the defendant's theory of self-defense. The instant claims are without merit as they are based on material omissions of the evidence actually presented.

Initially, the State notes that, "[t]he circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 198), review dismissed, 504 So. 2d 762 (Fla. 1987)." Cochran v. State, 547 So. 2d 928, 930 (Fla. 1984). See also, Orme v. State, 677 So. 2d 258, 262 (Fla. 1996), quoting State v. Law, 559 So. 2d 187, 188-89 (Fla. 1989) ("[t]he State is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.").

Premeditation is defined as:

> . . . a fully formed, conscious puurpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing occurs. [citation omitted] Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. [citation omitted]. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the

> manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of the victim is concerned [citation omitted].

Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed. 2d 862 (1982). Physical evidence of the use of a weapon such as a knife, gun, or other lethal object to inflict deliberate injury to a victim's vital organs provides ample support for a finding of premeditation. See, e.g., Jimenez v. State, 703 So. 2d 437, 440 (Fla. 1997) (murder of female victim in her house where the victim "was beaten and stabbed eight times. At least three stab wounds were to her chest cavity, one of which was four inches deep to her heart. This evidence supports a finding of premeditation."); Cochran, 547 So. 2d at 930 (single gunshot to the victim's stomach inflicted at close range where defendant claimed "accidental" shooting but the physical evidence was in conflict, and this Court concluded: "We find sufficient competent evidence to support a finding of premeditation and accept the jury's evaluation of that evidence."); Wilson v. State, 493 So. 2d 1019, 1021-22 (Fla. 1986) (sufficient evidence of premeditation where the defendant attacked his father by beating him and then firing a single shot to the forehead, at a distance of three feet, while the father was in a passive position); Kramer v. State, 619 So. 2d 274, 276 (Fla. 1993) ("substantial basis for the conclusion that premeditation existed, where the victim was repeatedly hit in the head; the defendant's theory of defense was that the victim had attacked first but this theory was inconsistent with the victim's injury and blood splatter evidence).

The instant case involves a double homicide of victims, trapped and killed in their house inside the garage. Two weapons, a gun and a knife, were utilized. The gun was a semi-automatic .22 caliber weapon with its serial numbers drilled away, and its front barrel drilled and altered so as to attach a home-made silencer to it. The physical evidence established that this gun, with the

silencer attached, had been fired six times. Six casings, found to have been fired from this gun, were located on the scene.

Three (3) separate bullets had been fired from the above weapon, in a "cluster," at victim Tomas Rodriguez's chest, from a distance of less than three feet. (T. 890, 1224-35). One of these bullets had severed this victim's spinal cord, whereupon he fell on the spot and was instantaneously rendered incapable of any movement in the lower part of his body. Id. Another of these bullets had penetrated the aorta, causing massive internal bleeding and cutting off the oxygen supply. In addition to the three (3) chest wounds. Tomas had two separate bullet injuries to his legs. A sixth injury, a graze wound to the scrotum, was consistent with yet a separate bullet wound, or one of the prior bullets to the legs having exited and stricken the scrotum.[14] The medical examiner testified that in addition to these bullet wounds, this victim had sustained five (5) separate stab wounds to his neck and chest area, which had been inflicted after he was incapacitated by the bullet wounds. (T. 1222-23).

Violetta Rodriguez was found wedged in the 18 inch space between the victims' car and the garage wall. She had sustained a total of ten (10) blunt-force-trauma wounds to her head and shoulder area. Four (4) of these wounds were skull fractures. Each fracture had been caused by a separate blow. Three (3) of the fractures were to the back of her head. Another of these fractures, on her forehead, had been inflicted with such force as to push the skull bone back to the inside of

[14] Despite at least five separate bullet wounds, only three projectiles were retrieved from this victim's body. Another projectile was found on the garage floor. The firearms expert testified that the ammunition utilized in the instant weapon was approximately a quarter of an inch in size to begin with. (T. 889). Due to the soft substance utilized in ammunition, the projectiles could shatter into "pin head" size upon impact with concrete surfaces such as the bones inside the body or the garage floor. (T. 891-97, 902). Such particles would be difficult to find given the substantial amounts of blood on the garage floor, not to mention the various boxes and assortment of items kept in the garage. (T. 891-97, 902, 786).

her brain. The pattern of this injury was lined up with, and matched, the butt of the semi-automatic gun used to kill Tomas. The skull fractures would render this victim "pretty incapacitated." (T. 1200). However, Violetta had also been stabbed twelve (12) times. At least five (5) of these stab wounds were to her chest area. One of these lethal wounds, to the left side of the chest, had penetrated between the ribs, gone through the lungs, and severed the aorta, cutting off the oxygen supply. (T. 1203-05). Another potentially lethal stab wound had penetrated the peritoneum cavity, terminating with a cut on the liver. (T. 1207). Another stab wound had penetrated the interior abdominal wall on the left side. Id. The remainder of the stab wounds were to the side and back of the neck and the upper back and shoulder areas. (T. 1201-08). The blunt force and stabbing injuries to Violetta's back all reflected that she was turned away from her attacker at the time. (T. 697-98). This victim had also sustained multiple defensive wounds, as evidenced by the multiple abrasions, bruises and cuts on the back of her hand, inside her fingers, and on her forearm and her leg.

As seen above, the nature and extent of the injuries inflicted and the weapons utilized herein provide ample support for premeditation. Sireci, supra; Jimenez, supra; Wilson, supra; Cochran, supra; Kramer, supra. The Appellant, having first mischaracterized the injuries, has stated that the injuries and weapons utilized were consistent with self defense, because the defendant's actions resulted from Tomas Rodriguez having shot him first. Appellant has argued that the evidence was consistent with self-defense, based upon the following allegations: 1) that the defendant had been "welcomed" into the victims' residence; 2) that there was subsequently an altercation where Tomas Rodriguez retrieved his own gun from his Volvo in the garage and shot the defendant first; 3) that the defendant then struggled with Tomas to disarm him, during which struggle the defendant shot and killed Tomas; and, 4) that Violetta Rodriguez had retrieved a knife from her kitchen drawer and attacked the defendant to assist her husband, whereupon the defendant had defended himself by

"banging her head" with the gun's handle, taking away her knife, and then stabbing her "quickly." (Brief of Appellant, pp. 32-36). The Appellant has entirely omitted any reference to the evidence directly refuting said allegations, which the jury was entitled to rely upon. Cochran, supra; Orme, supra.

First, the physical evidence established that neither of the victims had fired any guns; that the gun had not been discharged during a struggle therefor; and, that neither victim had ever touched the gun during or after it was fired. (T. 944-53). Expert Rao testified that when a gun is discharged, a cloud of microscopic residue particles is emitted. (T. 944-53, 966). This residue is mostly emitted from the "bottom part or back of the gun"; however, some is also discharged through the barrel. (T. 961). The microscopic particles are deposited in the ridges and wrinkles of the hand holding the gun when it is fired. Even if the shooter's hand is covered by another's hands during the course of a struggle, the shooter's hand would have residue by virtue of having gripped the gun. (T. 949-52). The smaller the caliber of the gun and ammunition, the more residue emitted. (T. 946). Likewise, more residue is discharged when the gun is fired more than once.(T. 965). In the instant case, due to the homemade nature of the silencer and the alterations on the barrel, the gun was also not aligned properly. (T. 966-67). There were a lot of "cracks" where the silencer had been placed. (T. 967). There was thus, "a tremendous amount of particles deposited all over the gun." Id. If one even touched the weapon, "you would have a lot of gunshot particles by the very touching of it." Id. Rao had analyzed the swabs from the gunshot residue (GSR) test of both of the victims' hands at the scene of the murder. He testified that neither victim had any gunshot residue particles on their hands. (T. 944-53).

The evidence also reflected that there were no scratches or other marks on Tomas' hands indicating any struggle for the gun. (T. 702-03). Technician Fletcher additionally testified that a

person firing a gun during a struggle is also likely to have "blowback" on their hands. Blowback is blood splatter out of the gunshot wound onto the shooter's hands. (T. 703). There was no blood on Tomas Rodriguez's hands. (T. 710). Likewise, the forensic serologist testified that the amount, location and pattern of the defendant's blood on the scene was inconsistent with his having been shot. (T. 1111-14, 1066-68, 1078).[15]

The remainder of the self-defense scenario allegations were also contradicted by the State's evidence. As noted by the Appellant, the victims were security conscious and always reminded their friend Mrs. McField to lock the doors. The victims' house had an outside security gate with a lock. The front entrance door, separated by a pathway from the gate, also had a double lock on the inside. After the murders, the usually locked security gate was found to be open, with the victims' keys still inside the lock. The front door was also open. The entrance door opened to the living-dining area which was immaculate with no signs of any disturbance or struggle despite the presence of glass, tables, china and various other breakables. Indeed, none of the interior living areas of the house bore any signs of a struggle, consistent with the victims having been marched through the living area to the utility room and into the garage, immediately after they opened their doors.[16] Violetta was still wearing her night gown, robe and slippers, while Tomas was in shorts when they were found.

The Appellant notes that the testimony reflected that the victims, as opposed to the defendant, possessed "a gun" (T. 576, 817), which Tomas allegedly retrieved from the Volvo in the garage.

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[15] The serologist testified that the amount, location and pattern of the defendant's blood were consistent with the defendant having injured his hand on the blade of the knife during the stabbings. (T. 1098-1101, 1111-14). He could also injure his hand from the gun's slide or while hitting Violetta with the butt of the gun. (T. 860-61).

[16] The utility room led directly to the garage through a screen door and a separate wooden door. The first sign of disturbance was damage to this wooden door. The hinges were broken and there was a crack in the center of the door, consistent with someone having pushed against the door. (T. 683-84, 735-36).

Appellant neglects to mention that the victims' gun was a .38 caliber revolver, with its serial numbers intact. It was found in a zippered pouch, inside a closed cabinet in the master bedroom, which again showed no signs of any disturbance. The victims' revolver had been tested. It had not been fired. (T. 645-47). Moreover, the crime scene technician testified that there was no disturbance in the interior of the Volvo. (T. 678-79). Furthermore, no .22 caliber ammunition which could be used in the murder weapon was found anywhere on the victims' premises, despite a search for same. (T. 660).

In light of the fact that Tomas had not fired a gun, during a struggle or otherwise, the Appellant's theory with respect to Violetta having retrieved a knife to assist her husband in the attack is also without merit. It should be noted that the State presented yet additional evidence reflecting that Violetta had not retrieved any knife. The knife utilized in the stabbings was similar to other knives in one of the victims' kitchen drawers which was found open. Another kitchen drawer, closer to the entrance of the kitchen from the utility room was also found open. The latter drawer contained aluminum foil and plastic wrappings. Both drawer fronts had smeared blood on them. There was one set of bloody footprints leading from he garage through the utility room and into the kitchen. The footprints became faint as they led into the kitchen, near the kitchen counter where the two drawers had been open. Violetta's slippers, found near her body in the garage, were examined against the bloody footprints. They were inconsistent with the footprints.[17] Moreover, as noted by the prosecutor, a victim in her own home would know where she kept her knives and would not be searching the drawer containing plastic wrappings for a weapon of choice in either attacking someone or defending herself.

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[17] Likewise, Tomas had not been wearing shoes and no blood was found on his feet so as to attribute any bloody footprints to him.

Finally, the uncontroverted evidence established the defendant's presence at the scene at the time of the killings. A blood smear from the butt of the semi-automatic reflected the presence of a mixture of the defendant's and the victims' blood. The defendant's palm print was found on the victims' telephone in the kitchen. The palm print was found in a mixture of the victims' blood on said telephone. A pen register test of this telephone reflected that the last number dialed had been he defendant's girlfriend's home. The defendant was residing with her at the time. The day after the homicide, however, the defendant could not be located at his residence. Despite numerous attempts, the police were unable to find the defendant at his residence or in Dade County for a period of 2 ½ years thereafter. The State also presented evidence that from approximately a month prior to the homicides, the defendant "would become upset quite frequently," accusing the victims of business-related "trickery," and blaming them for his own lax business practices. (T. 815, 808-09).[18]

As seen above, the State produced substantial and competent evidence to refute the Appellant's hypothesis of innocence. Orme, supra; Cochran, supra. As such, the Appellee is entitled to the view of evidence in the light most favorable to it. Cochran, 547 So. 2d at 930; Orme, supra. In this light, the evidence reflects that the defendant brought one of the murder weapons, a semi-automatic pistol with a silencer attached, into the victims' house. He additionally used a knife he obtained from the victims' kitchen. He shot Tomas Rodriguez at least five times. Three of these shots, in a "cluster" to Tomas' chest, were fired at a distance of less than three feet. Although Tomas had been rendered incapable of movement, the defendant then stabbed him five times for good

[18] The victims had sold their dry cleaning business to the defendant's girlfriend's father several months prior to the homicide. The defendant worked there and in the beginning would keep normal work hours. Business was normal at this time. The defendant then changed his work schedule. He would leave the business at 11:00 a.m. and not return until closing time. The quality of the business then suffered. Contrary to the Appellant's suggestion, there was no evidence that the victims were under any contractual obligation after the sale or that they were remiss in any of said obligations.

measure. The defendant also beat Violetta with the gun so viciously that her skull fractured in four (4) separate places and the gun was dented. Not content with the beating, the defendant then stabbed this victim twelve (12) times, with at least five (5) stabs to her chest area. The stab wounds were inflicted with such force that one penetrated between the ribs, went through the lung, and severed the aorta. Another stab penetrated the peritoneum cavity and cut the liver. This evidence abundantly supports premeditation in accordance with Sireci, supra; Jimenez, supra; Cochran, supra; Wilson, supra; and Kramer, supra.

Assuming arguendo that this Court finds insufficient evidence of premeditation, the State submits that the convictions herein were also supported under the felony-murder theory. As noted previously, the jury was properly instructed upon and found the defendant guilty of burglary. Whatever "welcome" or consent that the victims had initially extended to the defendant when he entered their house, was revoked upon the defendant's vicious attack on them. See, e.g., Jimenez, 707 So. 2d at 442 (felony murder, during the course of a burglary, upheld based upon "ample circumstantial evidence from which the jury could conclude that [victim] withdrew whatever consent she may have given for [defendant] to remain [in her house], when he brutally beat her and stabbed her multiple times. . . ."); Raleigh, 22 Fla. L. Weekly at S712 ("ample circumstantial evidence from which the jury could conclude that [victim] withdrew whatever consent he may have given for [defendant] to remain when Raleigh shot him several times and beat him so viciously that his gun was left bent, broken and bloody."); Robertson v. State, 22 Fla. L. Weekly S404 (Fla. July 3, 1997) (same).

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING CAUSE CHALLENGES.

The Appellant, in reliance upon Witherspoon v. Illinois, 391 U.S. 510 (1968), has argued that the trial court erroneously excused four (4) prospective jurors because said jurors did not indicate an "irrevocable commitment to ignore the facts and the law." (Appellee's Brief at pp. 38-41). The Appellant's reliance upon Witherspoon is misplaced, as the standards enunciated therein have been modified in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985). The record herein reflects that the jurors of whom the Appellant complains expressed their inability to be impartial about the death penalty in accordance with Witt, and the trial judge did not abuse his discretion in excusing said jurors.

First, as expressly noted by this Court, the United States Supreme Court has "clarified the Witherspoon test in Wainwright v. Witt [citation omitted.]" Robinson v. State, 487 So.2 d 1040, 1042 (Fla. 1986). Indeed, the Court has recently reaffirmed that Witt remains the "controlling authority" for delineating the standards for determination of when a juror may be excused for cause because of his or her views on the death penalty. Greene v. Georgia, ___ U.S. ___, 117 S.Ct. 578, 136 L.Ed. 2d 507, 508 (1996).[19]

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[19] Witt is "not controlling authority" as to the standard of review (presumption of correctness) to be applied by state appellate courts reviewing trial courts' rulings on jury selection. 136 L.Ed. 2d at 579. The State courts, however, are "free to adopt the rule laid down in Witt for review of trial court findings. . . ." Id. This Court, even prior to Witt, had adopted the abuse of discretion standard for appellate review of such jury selection issues. See, e.g., Christopher v. State, 407 So. 2d 198, 200 (Fla. 1981) (Determination of cause challenges, based upon ability to be impartial with respect to the death penalty, is within the trial judge's discretion. "Manifest error must be demonstrated before the trial judge's decision will be disturbed."). This court has subsequently expressly adopted the Witt standard of review for the trial judge's findings. See, e.g., Hannon v. State, 638 So. 2d 39, 41 (Fla. 1994).

Pursuant to Witt, 469 U.S. at 424, a juror may be excused for cause where his views on the death penalty would, "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." In light of the narrowed standards in capital sentencing schemes, however, "it does not make sense to require simply that a juror not 'automatically' vote against the death penalty; whether or not a venireman *might* vote for the death penalty under certain *personal* standards, the state still may properly challenge that venireman. . . ." 469 U.S. at 422. Furthermore, a prospective juror's views regarding capital punishment need not be made "unmistakably clear," because:

> . . . determination of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when forced with the death sentence, or may be unable to articulate or may wish to hide their true feelings.

Witt, 469 U.S. at 424. Thus, as noted by this Court: "Despite a lack of clarity in the printed record, 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" Hannon, 638 So. 2d at 41, quoting Witt, 422 U.S. at 245-26. Therefore, where a prospective juror's responses are equivocal, conflicting or vacillating with respect to the ability to be impartial about the death penalty, this Court has upheld the decision of the trial judge on whether such a juror was properly excludable. See, Randolph v. State, 562 So. 2d 331, 335-37 (Fla. 1990); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Taylor v. State, 638 So. 2d 30 (Fla. 1994); Hannon, supra.

In the instant case, as will be seen below, each of the jurors of whom the Appellant complains, although vacillating, clearly expressed an inability to be impartial with respect to the death penalty. The trial judge thus did not abuse his discretion in sustaining cause challenges to said

jurors.

A. Juror Melvin

Prospective juror Melvin, "because of my spiritual beliefs," first responded affirmatively to the question of whether any juror's "very strong philosophical reasons, religious reasons" would prevent them from sitting as a juror. (T. 155-56). Ms. Melvin then stated that if she committed a murder and "repented," she would be "sorry" that she did it, and "if I'm forgiven by God who says that man should kill me." (T. 159). Ms. Melvin also added that she could not say she would "never" consider the death penalty. Id.

Upon questioning by defense counsel, Ms. Melvin then first agreed to consider repentance as a mitigating factor. (T. 272-74). However, immediately thereafter she stated:

> **MS. MELVIN:** Yeah, yeah, like I said, if he's [defendant] repentant, then regardless of the aggravating factors I'm going to recommend life.

(T. 274).

Upon subsequent questioning by the prosecution, Ms. Melvin confirmed that: "[R]egardless of what the aggravating circumstances are," she would recommend a life sentence if her "gut feeling" was that the defendant had "repented." (T. 318). The prosecution thus challenged Melvin for cause (T. 322). The trial judge sustained the challenge, stating: "I watched her [Melvin] very carefully, and I listened to her very carefully in the last few days. It's the Court's opinion that her personal and religious beliefs would substantially impair her from following the law." (T. 325).

No abuse of discretion has been demonstrated. As previously noted, the State may properly challenge a juror for cause when the juror's "personal standards" interfere with the ability to follow the law and weigh the evidence in aggravation and mitigation. Witt, 469 U.S. at 422; Randolph, 562 So. 2d at 337 ("The trial court had the opportunity to evaluate the demeanor of the prospective juror, and given juror Hampton's equivocal answers, we can not say that the record evinces juror

Hampton's clear ability to set aside her own beliefs 'in deference to the rule of law' [citation omitted].").

B. Juror Watkins

Prospective juror Watkins stated that she could not be fair or impartial due to her religious beliefs against the death penalty, in addition to the fact that she would have difficulty in viewing photographs of the deceased victims:

> **[PROSECUTOR]:** . . . is it a fair statement that you feel that the nature of those pictures or the testimony would be so difficult for you to view and consider that you would not be an appropriate juror to sit and hear the issues in this case?
>
> **MS. WATKINS:** That's right.
>
> **[PROSECUTOR]:** So the court reporter knows, that was a yes?
>
> **MS. WATKINS:** Yes.
>
> **[PROSECUTOR]:** Now let me just address the death penalty issue because you brought it up and I want to give you an opportunity to be heard on that as well.
>
> Again, are your feelings about the death penalty in and of itself strong enough so that you feel that you would not be able to sit and evaluate the issues in this case, evaluate the charges in this case in a fair fashion?
>
> **MS. WATKINS:** That's true.

(T. 165-66). Ms. Watkins added that she did not believe in the death penalty "from a religious point." (T. 166). She explained, "God takes lives not me. I'm not the one to say you should die. This is my belief that I feel." Id.

When questioned by defense counsel as to whether she could set aside her feelings and "follow the law as a juror in this case," Ms. Watkins then stated: "I will try, yes--." (T. 305). Upon later questioning by the prosecutor, however, Ms. Watkins again stated that her views on the death penalty would substantially impair her ability to be impartial:

> **[PROSECUTOR]:** Yesterday you told me you couldn't impose it. . .

MS. WATKINS: Yes.

[PROSECUTOR]: . . . the same question was posed to you today and I was concerned about the language, . . . Do you think that you can actually impose the death penalty?

MS. WATKINS: I do not believe in the death penalty. That point would bother me.

. . .

[PROSECUTOR]: . . . Do you think that the fact that you're opposed to it and that it would bother you would substantially impair your ability to impose it, would it significantly [sic] be a problem for you?

MS. WATKINS: (Nodding head in the affirmative).

[PROSECUTOR]: It would. That's what I thought you told me. Okay. I just wanted to clarify. Thank you.

(T. 316-17). The trial court then sustained the state's challenge for cause on the basis that Watkins' ability to sit as an impartial juror was substantially impaired due to both her views on the death penalty and her ability to view the necessary evidence in the case. (T. 334-35).

Again, no abuse of discretion has been demonstrated. Ms. Watkins initially stated unequivocally that she would not be fair and impartial based upon her religious beliefs. She then equivocated and stated she would "try" to set aside her personal feelings. However, she then reverted to her original responses and agreed that her religious beliefs would substantially impair impartiality as a juror. The trial judge who was observing the juror's demeanor, was well within his discretion to find that Ms. Watkins was unable to consider a death sentence in accordance with the law. Witt, supra; Randolph, supra; Hannon, supra.

C. Juror Dixon

Ms. Dixon first told the trial court that she did not wish to serve as a juror because, "I'm really mentally not in the mood." (T. 1186). Ms. Dixon then responded affirmatively to the

prosecutor's question as to whether consideration of the death penalty would affect her judgment in the guilt phase. (T. 153-54). Upon further questioning, Ms. Dixon stated that her personal feelings were so strong that she could not be fair:

> **[PROSECUTOR]:** And I think, Ms. Dixon, you indicated strong feelings about the death penalty as well; is that correct?
>
> **MS. DIXON:** Yes.
>
> **[PROSECUTOR]:** . . . I'm gathering you are opposed to it.
>
> **MS. DIXON:** Yes.
>
> **[PROSECUTOR]:** Okay. Are your feelings so strong about in opposition to the death penalty that it wouldn't be fair for you to sit as a juror in this case?
>
> **MS. DIXON:** I believe I feel so strong against it that I would not be fair.
>
> **[PROSECUTOR]:** I understand, and we all appreciate it because we have to know.
>
> **MS. DIXON:** I just don't really think in this case three wrongs make a right.

(T. 167).

In response to defense counsel's questioning, Ms. Dixon then stated, "there are cases that I could consider [death recommendation]." (T. 303). However, in response to whether she could "consider the evidence and put your personal feelings aside," Ms. Dixon stated: "I think so." (T. 304) (emphasis added). The prosecutor then reminded Ms. Dixon that she had previously expressed a "strong statement" against the death penalty, and asked if Ms. Dixon had changed her mind. (T. 313-14). Ms. Dixon responded, "And I still believe in what I said, three wrongs don't make a right." (T.3 14).

The trial judge, having noted said statements by Ms. Dixon, then sustained the State's challenge for cause. (T. 335-38). Again, no abuse of discretion has been demonstrated in light of Ms. Dixon's initially unequivocal statements as to lack of fairness and her subsequent vacillation

and indefinite answers. Witt, supra; Randolph, supra; Hannon, supra.

D. Juror Seidenman

Mr. Seidenman initially stated that he had "philosophical problems" with the death penalty. (T. 157). He stated that he could not feel comfortable voting for the death penalty. (T. 158). Defense counsel then asked:

> **[DEFENSE COUNSEL]:** Can you envision any circumstances, any type of situation, where you would be able to vote for the death penalty?
>
> **MR. SEIDENMAN:** When the prosecution asked me that the other day, I've been thinking about that ever since.
>
> I think the closest I would ever come is in a case similar to the Susan Smith case where she drove her kids down. Yet, I think if I listened to factors about how she was brought up and things that happened to her in her early life, I think some of those factors would incline me to vote against the death penalty.
>
> There are several reasons I just feel very uncomfortable with the death penalty.

(T. 288). Defense counsel repeatedly asked if this juror would be able to consider all of the evidence and follow the law, without ever getting a definite answer. (T. 288-92). Mr. Seidenman's final response to defense counsel, as to whether he could base his recommendation on the evidence presented was:

> **MR. SEIDENMAN:** Yes, with the qualification again that as open minded as I would try to be, my inclination is just away from the death penalty.

(T. 292).

The prosecutor then asked this juror to state what he really believed and the juror would still not give any definite answers, and stated, "I just find that I always come up on the side of feeling that the death penalty is not the way to go." (T. 310). The prosecutor then asked if the juror's views, "would substantially impair at the very least your ability to impose the death penalty regardless of

the circumstances?" The juror stated:

> **MR. SEIDENMAN:** It bothers me in a way to say that because I understand we're supposed to --
>
> **[PROSECUTOR]:** Bud don't let that bother you.
>
> **MR. SEIDENMAN:** -- put our prejudices aside and in and follow the law. So I've been trying to be frank all along. I will try to follow the law, but I know where my instincts lie.
>
> **[PROSECUTOR]:** And so is that a yes it would substantially impair --
>
> **MR. SEIDENMAN:** It would yeah.

(T. 310) (emphasis added).

The trial judge sustained the State's subsequent challenge for cause, having noted:

> **THE COURT:** No matter what you say, he [Seidenman] squirmed in his chair. He wants to be a good citizen and do the right thing. I don't know if it's a religious feeling, but his personal and other views will obviously substantially impair him from following the law even though he doesn't want it to affect him that way.
>
> It's obvious to the court, based on the fact that he couldn't even give straight answers no matter how many times people questioned him on this area, that he's physically unable to follow the law. So it's for that reason that the court feels I'm required to strike him.

(T. 330-31).

The trial court's assessment of Mr. Seidenman's ability to follow the law is well supported by the record and no abuse of discretion has been demonstrated. Randolph, supra; Hannon, supra; Witt, supra.

V.

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING RELEVANT PHOTOGRAPHS WHICH DOCUMENTED THE SCENE WHERE THE VICTIMS WERE

FOUND AND ESTABLISHED PREMEDITATION.

The Appellant contends that five crime scene photos, and a photo of one of the injuries to one of the victims, taken during an autopsy, although "marginally relevant," were erroneously admitted. Appellant's Brief, p. 43. The Appellant's claim is in part unpreserved and entirely without merit. The photos complained of herein were relevant as they documented the crime scene, established premeditation, and refuted the defendant's version of self-defense. Moreover, the photos were neither cumulative nor unduly gruesome. Indeed, as even noted by defense counsel, who withdrew his objection to the autopsy photo complained of herein, the prosecution had kept gruesomeness to a "minimum" (T. 788-89).

"Generally, the admission of photographic evidence is within the trial judge's discretion and a trial judge's ruling on this issue will not be disturbed unless there is a clear showing of abuse." Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995). "The basic test of a photograph's admissibility is its relevance." Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990); see also, Mills v. State, 462 So. 2d 1075, 1080 (Fla. 1985) (even gruesome or inflammatory photographs may be admitted if relevant, regardless of the defendant's willingness to stipulate to the matter of which the photo is probative). Photographs which are introduced to assist a law enforcement officer in documenting the scene where victims are found are relevant and admissible. Pangburn, 661 So. 2d at 1188.

The Appellant has first stated that Exhibit 4 depicted the "body" of Mr. Rodriguez, and Exhibit 5 depicted said body with three wounds visible. The Appellant argues that Exhibits 6 and 7 depicted the "same things" and were admitted over objection. Appellant's Brief at p. 44. The State originally wished to present two photos in Exhibit 4. (T. 587-88). Upon objection by the defense, only one photo, that of the utility room which did not depict any bodies, was admitted. (T. 587-88;

R. 126). The photo depicted bloody footprints and the lack of any disturbance to indicate a struggle in the utility room. Id. Exhibit 5 depicted a general perspective of the garage when the police first went and saw one of the victims. (T. 589). There was no objection to this photo. Id. Exhibits 6 and 7 depicted victim Tomas Rodriguez's location and general condition when the police first found him. (T. 590; R. 127-30). They corroborated observations of the first officer at the scene. These two photos were objected to on the grounds that they were the same. The prosecutor noted that the photos were of different vantage points, and documented different items on the scene. (T. 591-92; R. 127-30). The trial judge, having first examined the photos, admitted them. Id. Exhibits 6 and 7, apart from documenting the scene and the decedent as he was originally found, were utilized to refute the defendant's allegations. One of said exhibits reflects that there was no blood on victim Tomas' feet. (T. 1220-21; R. 127-30). The other shows that this victim's hands were also free of blood. Id.

The photos thus supported the State's evidence that the victim had not been involved in any struggle when the defendant had been shot, as evidenced by the lack of blood splatter or blowback on the victim's hand. Nor could the bloody footprints, which lead to where the knife had been retrieved, be attributed to him. Exhibit 7 also depicts the assortment of items around this victim, in accordance with the State's theory that the bullets fired at the scene, upon having shattered into pin head size, would be difficult to find.

The other crime scene photos, exhibits 8, 9 and 10, depicted different vantage points of the other side of the garage, where the second victim had first been found. (T. 593-94; R. 131-36). Defense counsel objected on the grounds that these photos were "basically showing the same general area, the same person," that exhibits M and O were "particularly gory," and that only one photo should be admitted. (T. 594-95). The prosecutor noted that said photos were not gory, and in fact

had been chosen because they were less offensive than the other photos taken. (T. 596). The record reflects that each photo documents different evidence at the scene, in addition to again corroborating the officer's first observation of this victim. Exhibit 8 primarily depicts a slipper and eyeglasses on the bloody garage floor. (R. 132). Exhibit 9 depicted the second victim's face; her attire; and, the fact that she was injured, without showing the specific wounds. (R. 134; T. 593). Exhibit 10 depicted part of the second victim's body "wedged" in between the Volvo and the wall. (R. 136; T. 573).

The trial court noted that, "I can see that they are taken from different views, and each one shows something that the other one doesn't." (T. 597). The trial judge then held that "[a]fter looking at those photographs, I won't find under 90.403 that they are inadmissible." (T. 598).

The trial judge then directed the parties to view all photographs in the case and advise him of any agreements. (T. 598). The parties did so at a subsequent recess. (T. 609). The parties then represented that there was disagreement only as to one photo. Id.[20]

Thereafter, the defense objected to the autopsy photo at issue herein, on the grounds that it was gruesome and no sufficient predicate had been set forth. (T. 788-89; R. 205-06). The photo is that of an injury to victim Violetta's forehead, which showed that it lined up with and matched the pattern of the gun with which the injury had been inflicted. (R. 205-06; T. 791-95). It should be noted that defense counsel had previously objected when the State attempted to elicit that some of Violetta's injuries were consistent with having been inflicted by the gun. (T. 696-97). The record also reflects that defense counsel withdrew his objection, in toto, upon establishment of a sufficient predicate:

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[20] The court found that said photo was "obviously relevant," but also gruesome due to its size. (T. 609-10). The court thus disallowed its admission. (T. 612).

[DEFENSE COUNSEL]: My objection at this point is it goes to the gruesomeness of the picture. As I certainly can understand the State has made efforts to keep that to a minimum in this case. My objection goes to the contents of the photograph, in that it reflects tests that were apparently conducted by Dr. Welti in this case. Which would be hearsay.

If this officer had conducted the test, and can testify to the test as to first hand knowledge, as to the action depicted in this photograph, then I have no objection.

[THE COURT]: Did he [officer] physically see this?

[PROSECUTOR]: Yes.

[DEFENSE COUNSEL]: Apparently he saw this.

[PROSECUTOR]: It's his [officer's] hand in the picture.

[DEFENSE COUNSEL]: Let me see which hand?

[PROSECUTOR]: It's not Dr. Welti's hand, that is Reyes [officer] right there.

[THE COURT]: In the hospital gown?

[PROSECUTOR]: Yes. It's a lab coat. Here is his I.D.

[DEFENSE COUNSEL]: Then I withdraw my objection.

[THE COURT]: Okay.

(T. 788-89) (emphasis added). There was no further mention of gruesomeness or an objection, and the photo was admitted. (T. 789-90). The defendant's claim with respect to this photo is thus procedurally barred. Tillman, supra. Moreover, the State would note that even on appeal, as detailed in Issue III, the defendant has claimed insufficient evidence of premeditation by glossing over the nature, extent and manner of infliction of injuries which establish premeditation. This photo was thus clearly relevant.

As seen above, the photographs at issue herein were all relevant to document the scene of the crime to corroborate the testimony of the witnesses, establish premeditation, and refute the defense version of the events. The trial judge examined each photo, and determined that it was relevant, was

not cumulative, and its probative value was not outweighed by the prejudice. Thus, no abuse of discretion has been demonstrated. Pangburn, supra; Haliburton, supra; Mills, supra. Moreover, the State submits that the photos at issue were "neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant." Williams v. State, 228 So. 2d 377, 379 (Fla. 1969); see also, Bush v. State, 461 So. 2d 936, 939-40 (Fla. 1984) ("blow up of victim's bloody face" and "close up" of a gunshot wound to the victim's hand, were not "so shocking in nature" as to "defeat their relevancy."). No error has been demonstrated.

VI.

THE DEFENDANT WAS AFFORDED THOROUGH AND COMPETENT EVALUATIONS BY HIS CHOSEN EXPERTS, WHILE REFUSING TO COOPERATE WITH ANY OF THE STATE'S EXPERTS.

The Appellant contends that the trial judge reversibly deprived him of a competent neurological evaluation. The instant claim is without merit as it is based upon material omissions. The circumstances of the defendant's initial request for a neurology exam, the number of experts appointed to assist him, and his refusal to cooperate with any of the State's experts, have been detailed at pp. 12-19 and are relied upon herein. The record reflects that the trial judge provided the defense with ample time and resources to timely obtain whatever evaluations he desired. The defendant was evaluated by at least six (6) experts of his own choosing, while refusing to cooperate with any experts appointed to assist the State in rebuttal. Despite the assistance of numerous experts, the defendant was unable to prove any incompetency with respect to his initially requested neurological examination. Indeed, the defense chose not to rely upon the results of most of its own experts' examinations, and even the experts relied upon were not submitted for cross-examination. Instead, the defense relied upon the written report of two of these experts, on the grounds that these were part of the "record" and the trial judge could not preclude consideration of any mitigation appearing in the record. The trial judge then did in fact consider the conclusions in said reports, and accepted same in mitigation with "limited weight," in light of the fact that the defendant had refused to cooperate with any state experts. No error has been demonstrated in these circumstances. See, Fla.R.Crim.P. 3.202(e)(2), infra; Dillbeck v. State, infra.

The record reflects that a second chair penalty phase counsel was appointed more than two years prior to trial. (R. 88-99). The trial judge also appointed a separate mitigation expert who had

been present throughout the guilt phase. (R. 1316).[21] Immediately after the verdict of guilt, second chair counsel stated that, although he had known about the defendant's childhood meningitis, he had recently found out that same "conceivably could be a cause of some organic brain damage." (T. 1545). Defense counsel requested a "neurology exam" and stated he would suggest some experts to the court. The trial judge thus postponed the penalty phase proceedings for a period in excess of three (3) weeks.

On November 1st, defense counsel then requested a "neurological examination" to be performed by JMH. On the same day, the trial judge entered an order for JMH to perform a "medical neurological" examination. As JMH had initially performed a non-neurological medical exam, the trial judge then entered another order directing JMH to perform: "a complete NEUROLOGICAL EVALUATION to be performed by a NEUROLOGIST, an MD. in the field of Neurology," on November 14th. (R. 503). The JMH neurologist examined the defendant and issued a written report, finding no neurological abnormality, on November 16th.

On the scheduled day of the penalty phase before the jury, November 20th, defense counsel stated that JMH had not performed a "proper neurological exam," and its report was not "competent," without any accompanying proffers from any mental health experts as to the alleged incompetency. (SR. 9). The trial judge noted that the neurological department made its own professional judgments and had not needed further testing. Id. The judge also noted that the defense, "had the option for weeks if you wanted to have anybody of your choice to evaluate him, and I of course would have signed the order." Id. Defense counsel then proceeded with the jury penalty phase and presented family background testimony from the defendant's mother, sister and

[21] The trial judge also appointed yet a separate licensed post-conviction social worker to assist the defendant. (R. 507).

stepmother.

Seventeen (17) days later, after the completion of the jury penalty phase, the defense then filed an affidavit from another neurologist, stating that the JMH exam was insufficient because the defendant's pupils and cranial nerves had not been examined, and that a complete neurological exam entailed an MRI or CT scan. (R. 606). The trial judge appointed this neurologist, Dr. Cagen, as a defense expert. The trial judge also appointed another medical expert in brain topography, Dr. Lorenco, to assist the defense with neurological exams. The defense, at this time, had also filed an affidavit from a psychologist, Dr. Herrera, who had performed preliminary psychological testing and found alleged signs of organic brain damage. The trial judge also appointed Herrera to assist the defense.

The trial judge, subsequent to the appointment of the above experts, then held a hearing on December 12, 1995. The defense first requested a new penalty phase before a new jury because the JMH neurological exam was allegedly incompetent, based upon the affidavits from Cagen and Herrera. As noted by the trial judge, however, the defense counsel neither presented nor proffered any "testimony" from a neurologist to prove incompetence on the part of JMH. (R. 1276). Indeed, the defense conceded that its own expert had, in fact, conducted a brain topography, but the defense would not rely on the results as a "strategic" matter, and because said results were not "probative pro or con." (R. 1288, 1290). As noted by the trial judge, "the standard in this State is that if you want to test a neurologist's opinion, it has to be another neurologist to say whether it was competent." (R. 1276).

Defense counsel then requested yet another neurologist to prove incompetency on the part of JMH. (R.1 276). The trial judge granted the request and appointed yet another neurologist, Dr. Calderon, three days after the above hearing, on December 15, 1995. (R. 637). The record reflects

that despite in excess of a five (5) month interim prior to the final sentencing hearing before the judge, on May 30, 1996, the defense neither proffered nor presented any neurologist's testimony to establish any incompetence in the original JMH neurological exam. Indeed, the record contains the results of Dr. Calderon's neurological exam, which reflects no neurological abnormality.[22] Likewise, despite defendant's refusal to undergo an EEG or MRI examination by the State experts, the defense reports reflected such exams had been conducted and were normal. As noted previously, the brain topography conducted by defense expert Lorenco was not probative pro or con. (R.1 290). Likewise, the EEG conducted in Cuba, years after the defendant's childhood bout with meningitis, was also "normal." (R. 1344).

The Appellant's reliance upon Ake v. Oklahoma, 470 U.S. 68 (1985), for the claim that the defendant was deprived of a competent neurological exam is thus entirely unwarranted. Ake was "limited to one" competent expert to assist the defense, in order to protect society's interest in "fair and accurate adjudication of criminal cases." 470 U.S. at 79. Ake did not envision the incessant appointment of experts whom the defense chooses not to present for strategic reasons. Ake does not apply to the circumstances herein, where a defendant, while cooperating with his own experts, refuses to be examined by the State's experts, thus precluding a "fair and accurate" adjudication. Compare, Hoskins v. State, 22 Fla. L. Weekly S643 (Fla. 1996) (the trial judge erred in refusing to order any neurological exam where funds for same were available and the defendant made a showing that the exam would assist his defense).

The Appellant, having entirely ignored the basis for his original request to the trial judge,

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[22] The State notes that the defendant's "pupils' and "cranial nerves" were examined and found to be normal by Dr. Calderon. (R. 759-61). The alleged failure to report on such an examination was the basis for allegations in Dr. Cagen's affidavit that the JMH report was deficient. (R. 606).

additionally argues that he was entitled to a new jury in order to present the psychologist Herrera's conclusions. This claim is also entirely without merit. As noted by the trial judge, despite the liberal practice of appointment of experts herein, there was never any request for a psychological examination of the defendant, prior to the penalty phase before the jury. (R. 1274). The defendant chose to retain Herrera after the completion of the presentation before the jury.

More importantly, the defendant, due to his refusal to cooperate with a comparable expert appointed to assist the State, Dr. Garcia, is precluded from any reliance upon Dr. Herrera's report in any new penalty phase. See, Hickson v. State, 630 So. 2d 172, 176 (Fla. 1993) (if a defendant wishes to present psychological testimony of an expert who has examined her, "she must submit to an examination by the State's expert, whose testimony may be used to rebut her expert's testimony."); Dillbeck v. State, 643 So. 2d 1027, 1030 (Fla. 1994) (holding in Hickson extended to presentation of psychological mitigation evidence by a capital defendant in the penalty phase as, "n]o truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved."); Fla.R.Crim.P. 3.202(e) ("If the defendant refuses to be examined by or fully cooperate with the State's mental health expert, the court may, in its discretion: . . . (2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant.").

The State would also note that the defense did not even present any testimony from Dr. Herrera, in an attempt to curtail cross-examination and rebuttal by the State. The defense merely relied upon the hearsay report from Dr. Herrera. Yet, the trial judge considered Herrera's conclusion and accepted the latter's report that defendant "may" suffer from organic brain damage. (R. 777, 824-25). The trial judge's finding that Herrera's conclusion was to be afforded "limited weight" (R. 825) under the circumstances herein, cannot be faulted, as the judge could have precluded the presentation

of the report in its entirety, and was not obligated to give any weight to this hearsay. Fla.R.Crim.P. 3.202(e)(2), supra; Dillbeck, supra; see also, Wuornos v. State, 644 So. 2d 1012, 1020 (Fla. 1994) (where the bulk of the case for mitigation is hearsay with strong indicia of unreliability, there is no duty for the trial court to accept same). No prejudice has been demonstrated in the circumstances herein.

VII.

THERE WAS NO VIOLATION OF PROCEDURES SET FORTH IN KOON V. DUGGER, INFRA.

The Appellant contends that the defendant advised his attorneys that he wanted to die, and the latter thus did not present potential mitigation due to the defendant's "veto" thereof. The Appellant argues that the trial judge committed reversible error because he did not follow the procedures set forth in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). The instant claim is without merit as the record refutes the factual premise of the Appellant's argument. This was not a case where the defendant refused to permit presentation of mitigating evidence. To the contrary, the record reflects that the defendant fully cooperated with his attorneys, experts and family members, and permitted the presentation of all evidence in his favor. The only refusal to cooperate was when the State sought to examine the defendant to rebut his claims. The procedures set forth in Koon are thus inapplicable herein as the defendant in fact permitted the presentation of all evidence in his favor.

In Koon, this Court required that:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what the evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters

> with him, and despite counsel's recommendation, he wishes to waive the presentation of penalty phase evidence.

619 So. 2d at 250. There was no waiver of presentation of mitigation in the instant case. Rather, after the verdict of guilt, defense counsel requested that the defendant be examined for competency. This was based upon conversations with the defendant which "indicated" that if convicted as charged, he wants to get the death penalty. (T. 1544-45). The trial judge granted the request for the competency exam, and, as noted previously, delayed the penalty phase for several weeks.

On November 1, 1995, several days after the above representation by defense counsel, and three (3) weeks before the jury penalty phase, defense counsel further represented that the above conversations with the defendant had no effect on the presentation of mitigating evidence:

> [Defense counsel]: . . . The competency exam has come up because of certain problems that I have seen with the defendant that I have already related to the Court in terms of him [Defendant] <u>not being sure</u> that he wants me to actually do anything in the second phase.
>
> Right now <u>I'm pursuing it anyway. If it gets to a head with the Defendant where he insists that I do not, I'm going to have to come back before the Court with some other motions which may include possibly withdrawing because I do not intend to participate in this to help him get the death penalty. I will only participate if I can fight for his life.</u>
>
> <u>If he refuses to let me do that, I do not intend to assist him in that</u>. . . .

(R. 1320) (emphasis added). The defendant was then examined and found competent, with no mention of any desire to die or prevent presentation of mitigation, to the examining psychiatrist. (R.504-06). Likewise, there was no further mention of "not being sure" about presenting mitigation. Indeed, as detailed in pp. 9-11, the defendant presented extensive background evidence from his mother, sister and stepmother at the penalty phase before the jury. As detailed in issue VI, thereafter the defendant fully cooperated with all of the mental health experts chosen by defense counsel, and

presented all such evidence, in the form desired by defense counsel. The only evidence of lack of cooperation in this record appears when the State sought to examine and rebut the veracity of the mitigation presented.[23] In any event, as detailed at pp. 19-20, and issue VI herein, the trial judge nonetheless considered and accepted all the evidence presented by the defense.

The record is thus abundantly clear that there was no "waiver" of presentation of mitigating evidence. The procedures set forth in Koon are therefore inapplicable.

VIII.

THE CLAIM AS TO THE PROSECUTOR'S ARGUMENTS DURING THE PENALTY PHASE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The Appellant contends that the prosecution made an "improper and unethical" argument "vouching for its own decision to seek the death penalty," and, that it improperly argued that the mitigating evidence was supposed to excuse or justify the crimes. These claims are procedurally barred as they were not properly objected to in the lower court and the defense declined any curative instructions. See, Ferguson v. State, 417 So. 2d 639, 643-43 (Fla. 1982). Moreover, as will be seen below, the prosecutor's comments, in context, were in response to those made by defense counsel and were also based upon the evidence presented. As such, no prejudice has been demonstrated.

Initially, the Appellant asserts that the prosecutor, during opening argument to the jury, first argued: "that the death penalty was reserved for 'only the worst of cases,' 'the really worst of them.' Tr. 1612." (Appellant's Brief at p. 55). The Appellant argues that this argument "set the stage" for

[23] The Appellant's suggestion that the defendant refused to permit his family members and friends to testify at the final hearing before the judge is also without merit. The record reflects that defense counsel proffered that said relatives and friends were present and would testify only to their desire that the defendant not receive the death penalty, and the impact of any execution on them. (R. 1354-55). Such testimony is not admissible as it is not mitigating. See, e.g., Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993); Burns v. State, 699 So. 2d 646, 654 (Fla. 1997).

the prosecutor's closing argument that she considered the facts herein more egregious than those of other cases. Id. The Appellant is mistaken. The opening comments complained of herein were not made by the prosecutor; it was defense counsel who stated that the death penalty was reserved for "only the worst of cases," the "really worst of them." (T. 1612). Thereafter, during closing argument, the prosecutor first argued that she had the burden of establishing aggravating circumstances beyond a reasonable doubt, and, that mitigating circumstances should be considered in light of the facts presented and pursuant to a lower standard of proof. (T. 1839-47). The prosecutor then argued the proof of the aggravators, and stated:

> . . . and those are only some of the reasons why that aggravating circumstances carries so much weight, such great weight that they in and of themselves are enough. You will remember at the very beginning of this trial in voir dire that you were told by the state and by Defense Counsel that not every case of first degree murder cries out for the death penalty. The state seeks the death penalty in fact in very few first degree murders. And you were put on notice in the very beginning that this is one of those very unique cases. I think during the course of the evidence and in reaching your verdict you now understand.

(T. 1847). There was no contemporaneous objection to the above. Id. Rather, after the conclusion of the prosecutor's closing arguments, defense counsel then presented arguments wherein he again stated, "we already discussed how the law requires that death be reserved for only the worse murders, . . ." (T. 1874). After the conclusion of his own arguments, defense counsel then moved for mistrial and imposition of a life sentence, due to the prosecutor's above comments. (T. 1897-1900).

The prosecution noted that in context, its comments were a correct statement of the law; that in order for the state to seek the death penalty, aggravating circumstances must be present. Id. The prosecution also offered a curative instruction, to be fashioned by defense counsel, which the latter declined. Id. The trial judge thus denied the motion for mistrial. Id.

As seen above, the instant claim is procedurally barred for failure to object contemporaneously and failure to seek a curative instruction. Ferguson, supra. Moreover, in context,

the remark in no way vouched for the prosecutor's decision to seek the death penalty, as argued by the Appellant. Rather, it is clear that the prosecutor was stating that the death penalty was appropriate in light of the evidence of the aggravating circumstances herein.[24] Furthermore, the State fails to see how the remark could undermine the fairness of the penalty phase, where defense counsel had previously made the same remarks to the jury, both during voir dire (T. 183, 185, 208, 210), and in its opening arguments at the penalty phase. (T. 1612). See, Darden v. Wainwright, 477 U.S. 168, 179-81 (1986) (egregious remarks by the prosecutor which were made after defense counsel had made similar remarks did not render trial unfair); Ferguson, 417 So. 2d at 642 (defense trial tactics will not be insulated from fair comment by the prosecution); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (penalty phase misconduct was not "so outrageous as to taint the validity of the jury's recommendation in light of the evidence of aggravation presented.").

The Appellant's final claim is that the prosecutor also improperly argued that mitigating evidence is supposed to excuse or justify crimes. The record reflects, however, that the prosecutor was commenting on the lack of evidence mitigating the instant crimes. Mitigating circumstances are factors that, "in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime." Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). In the instant case, defense counsel presented the defendant's mother's testimony, establishing a variety of physical illnesses by the defendant from the time he was

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[24] The Appellant has also complained that the prosecutor vouched that the legislature had determined that defendant was the "particular person for whom it passed the capital sentencing statute." (Brief of Appellant, p. 57; T. 1866-67). There was no objection to the prosecutor's remark, nor was any such argument ever made at any juncture in the trial court. Moreover, the prosecutor never made the remark complained of herein. Rather, the context in the record reflects that the prosecutor was arguing that the propriety of the death penalty, in general, was a legislative decision, and that the jury's function was to consider the aggravating and mitigating circumstances set forth by law. In addition to being unpreserved, there was no impropriety. See, Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995); Ferguson, supra.

born until the age of two, such as colic, meningitis, etc. The defendant's mother, on cross-examination, however, had admitted that by the age of three, the defendant was talking, walking and developing normally, despite these childhood illnesses. Likewise, the defendant's sister had testified that although their father had left the family, they lived with their grandparents, who loved and cared for them. In light of this evidence, the prosecutor argued that many people suffer childhood diseases and grow up with an absent father, but do not inflict the brutality evidenced in the instant crimes. She stated that the evidence presented did not mitigate, did not "excuse" the defendant's behavior. (T. 1861-63).

The prosecutor had also argued that the jurors "should give all of the mitigating circumstances your attention." She had added that mitigating factors were "factors and elements of the defendant's background that may or may not be established to your satisfaction." (T. 1842).

The defendant objected to the "excuse" comment, without stating any grounds. Id. At the end of closing arguments, as noted previously, the defense declined any curative instruction. (T. 1897-1900). This claim is thus also unpreserved. Ferguson, 417 So. 2d at 641 (objection to prosecutorial comment must be made with specificity to preserve issue for appeal); Jones v. State, 652 So.2 d 346, 352 (Fla. 1995) (same). Moreover, as noted by the trial judge, in context, the argument was not improper. (T. 1898). The prosecutor was merely arguing that the background evidence had not been shown to reduce or extenuate the moral culpability for the instant crimes. See, Hoskins, supra, (trial judge's statement that no excuse or justification has been shown was not error, when considered in context of recognizing that all mitigating circumstances were to be considered and that the death penalty was reserved for the most aggravated and unmitigated of crimes); Jones v. State, 652 So.2 d at 352 (prosecutor's comment, "what can explain what is in mitigation of an assassination of [victim]," and, comments urging the jury to use its commons sense to reject early

abandonment by defendant's mother as mitigation, were not so prejudicial as to warrant mistrial). In sum, the instant claims are unpreserved, and no prejudice has been demonstrated so as to justify a new penalty phase. Darden, supra; Ferguson, supra; Jones, supra; Bertolotti, supra.

IX.

THERE WAS NO ERROR IN THE PENALTY PHASE JURY INSTRUCTIONS.

A) The State Presented Sufficient Evidence To Justify A Jury Instruction On CCP Factor

The Jury herein was properly instructed with the current instructions approved by this Court on the CCP aggravating factor. (R. 580). The trial judge, however, ultimately found that the "heightened premeditation" element of the CCP factor was not proven beyond a reasonable doubt, and thus rejected this aggravator. (R. 817).

The Appellant has argued that it was reversible error to give the CCP instruction as the facts did not support the instruction. This claim is without merit as the State presented prima facie evidence of heightened premeditation. The prosecution relied upon the fact that the defendant had drilled out the serial numbers in the gun which he had brought to the victims' house, in order to prevent it from being traced. He had also attached a home-made silencer to the gun to prevent noise and detection. He then surprised the victims under the cover of darkness, marching them to the garage area, again in order to prevent noise and detection. Such pre-planning is ample evidence of heightened premeditation and calm reflection. See, Rogers, 511 So. 2d at 523; Cruse v. State, 588 So. 2d 983, 991-92 (Fla. 1991) (advance procurement of weapons sufficient for a finding of heightened premeditation element of CCP). There was thus no error in instructing the jury on this factor where the State presented prima facie evidence of CCP. See, Raleigh v. State, 22 Fla. L. Weekly S711 (Fla. Nov. 13, 1997), citing Bowden v. State, 588 So. 2d 225, 231 (Fla. 1991) ("The

fact that the State did not prove this aggravating factor to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of a robbery to allow the jury to consider the factor. Where as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required."). Moreover, any error was harmless beyond a reasonable doubt because, "a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence." Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995), citing Sochor v. Florida, 504 U.S. 527, 538 (1992). No prejudice has thus been demonstrated herein.

B. The Trial Judge Properly Instructed The Jury And Properly Found The HAC Circumstance

The jury herein was instructed with respect to the HAC circumstance currently approved by this Court. (R. 579). Indeed, at the request of the defendant, the jury was additionally instructed that, "Actions taken after victim dies or loses consciousness can not be considered in determining whether the murder was especially heinous, atrocious or cruel." (R. 579; T. 1781). The State relied upon evidence that victim Tomas Rodriguez was surprised in his own house and was marched into the garage, at gunpoint, knowing that his wife was also present and in danger. Tomas Rodriguez was shot five times, and the medical examiner testified that, although incapable of moving because his spine had been severed, this victim was alive, conscious and in pain after being shot. (T. 1639-42). This was evidenced by the fact that the victim had been coughing up blood after having been shot through the aorta, which caused internal bleeding. The medical examiner further opined that due to the fact that both victims were killed in the garage in close proximity to each other, each was aware of the other's impending death. (T. 1653-54).[25]

[25] The State recognizes that the post-mortem stab wounds for this victim are irrelevant with respect to the applicability of HAC. They are, however, compelling proof that the victim was

With respect to Violetta Rodriguez, the physical evidence established that she was beaten so viciously that she sustained at least four (4) separate skull fractures. The medical examiner testified that she was conscious during the beating, as evidenced by the defensive abrasions and bruising on the back of her hands, forearm and leg. This victim had additionally been stabbed twelve (12) times and was also conscious during the stabbing, as evidenced by defensive cuts and abrasions to the inside of the fingers and hands. (T. 1658-59).

The trial judge found that the State had not proven HAC with respect to victim Tomas Rodriguez, but that this factor had been established beyond a reasonable doubt as to Violetta Rodriguez. (R. 817-18). The Appellant has first argued, again, that the jury was improperly instructed as to the HAC factor with respect to Tomas, as the trial judge ultimately rejected this factor. However, as detailed above, the State presented prima facie evidence in support of this factor. See, Pooler v. State, 23 Fla. L. Weekly S697, 698 (Fla. Nov. 6, 1997) ("fear, emotional strain, and terror of the victim during the events leading up to the murder may be considered in determining whether this aggravator is satisfied,even where the victim's death was almost instantaneous," and as a result of shooting); Cole v. State, 701 So. 2d 845 (Fla. 1997) ; Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) (HAC aggravator supported when victim had been shot, but conscious and walking when he was shot several more times); Farinas v. State, 569 So. 2d 425 (Fla. 1990) (HAC found where victim was paralyzed by first shot, then shot two additional times in the head).

As detailed in Section A herein, there was thus no error in having instructed the jury on HAC when the State had presented evidence of this aggravator. Raleigh, supra; Bowden, supra. Moreover, as the jury instructions were a correct statement of the law, any error with respect to the instructions

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conscious after having been shot. If Tomas had immediately lost consciousness, there would have been no need to thereafter obtain a knife and stab him repeatedly.

not being supported by the evidence was harmless beyond a reasonable doubt. Kearse, supra; Sochor v. Florida, supra.

The Appellant has also argued that the trial judge erroneously found the HAC factor to apply to Violetta's murder. The trial judge's findings were as follows:

> This crime was accompanied by additional acts that sets it apart from the norm of capital felonies, and is the type of crime intended to be included in this aggravating circumstance. Floyd v. State, 569 So. 2d 1225 (Fla. 1990); Perry v. State, 522 So. 2d 817 (Fla. 1988); Johnston v. State, 497 So. 2d 1059 (Fla. 1986).
>
> Violetta Rodriguez had twenty-two injuries. She was stabbed twelve (12) times. Additionally, Mrs. Rodriguez suffered ten lacerations on her head which were, according to the testimony, caused by blunt force trauma and consistent with the victim having been repeatedly struck with the butt of a hand gun. The Medical examiner testified that the victim was alive when all the lacerations were inflicted. Four of the wounds resulted in fractures to the victim's skull. Although there is no evidence as to the exact time the victim lost consciousness, the defensive nature of the lacerations on the back of the hands indicate that she was conscious, aware, and trying to defend herself. All of the wounds inflicted would have been extremely painful.
>
> Accordingly, the evidence establishes this aggravating circumstance beyond a reasonable doubt as to the first degree murder of Violetta Rodriguez. Atkins v. State, 497 So. 2d 1200 (Fla. 1986); Delap v. State, 440 So. 2d 1242 (Fla. 1983).

(R. 818). The above findings were supported by the evidence presented by the medical examiner, as noted on pp. 8-9 herein. Moreover, the trial judge applied the right rule of law. See, e.g., Jimenez v. State, 703 So. 2d at 441 (beating, stabbing death of conscious female victim in her own home constitutes HAC). There was thus no error. Willacy v. State, 696 So. 2d 693 (Fla.1997) (this Court does not reweigh the evidence to determine whether each aggravating circumstanced was proven beyond a reasonable doubt. Rather, the record is reviewed for a determination of whether the trial court applied the right rule of law and if so whether competent, substantial evidence supports its finding).

C) The Trial Court Properly Refused To Determine Whether The Defendant Would Be Sentenced Consecutively Or Concurrently In The Event Of A Life Recommen-

dation By The Jury

The Appellant was allowed to (T. 1790-93) and, in fact, argued before the jury that the trial judge could sentence him to consecutive life sentences with a total minimum mandatory of 50 years. (T. 1896). The jury was also instructed that it could recommend a life sentence, with a minimum mandatory of twenty five years as to "each count." (R. 576). The Appellant argues that the trial court should have predetermined consecutive sentences, and instructed the jury that the defendant would, in fact, receive consecutive life sentences. This Court has repeatedly rejected such a contention. See, Walker v. State, 22 Fla. L. Weekly at S537, 542 (Fla. Sept. 9, 1997) (no error in trial judge's refusal to predetermine consecutive or concurrent sentences for capital felonies, as such a premature determination is inconsistent with Florida's capital sentencing scheme); Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992); Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990) (the opportunity to argue potential parole ineligibility is sufficient under Florida and federal law).

D) The Caldwell v. Mississippi, Infra, Claim, Has Been Repeatedly Rejected By This Court

The jury in the instant case was instructed that "the final decision as to what punishment shall be imposed is the responsibility of the judge; by law the judge is required to give great weight to your recommendation." (R. 576). The Appellant's argument that such an instruction was in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), has been repeatedly rejected by this Court. Johnson v. State, 660 So. 2d at 647; Preston v. State,531 So.2 d 154, 160 (Fla. 1988); Wuornos v. State, 644 So.2d 1012, 1020, n. 5 (Fla. 1994); Walker v. State, 22 Fla. L. Weekly at S545, n.4.

E) There Was No Error In Failing To Instruct That Imperfect Self-Defense Was A Nonstatutory Mitigator

The Appellant argues that the trial judge erred in refusing to give a separate instruction that the jury should consider "evidence of self defense as a mitigating factor tending toward the

imposition of a life sentence. Additionally, you may consider any participation by the victims in the case with respect to the theory of self defense and the weight that it deserves in mitigation." (R. 559). This Court has previously rejected such arguments. First, specific instruction as to nonstatutory mitigation which falls short of statutory mitigation is not required. Gamble v. State, 659 So.2 d 242, 246 (Fla. 1995). Second, where the jury rejects a claim of self defense during the guilt phase, the trial judge is not obligated to either instruct the jury on, or, consider "imperfect self-defense as a mitigating circumstance." Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996). The State would note that defense counsel was allowed to argue self defense as negating the CCP factor. (T. 1811-13). No error has been demonstrated.

F. There Was No Error In Failing To Instruct On Mitigating Factors Which Were Waived By Defense Counsel And As To Which No Evidence Was Presented

The Appellant first contends that the jury should have been instructed with respect to statutory mental mitigators. However, the only testimony before the jury at the penalty phase was that of the defendant's family members, who had not even seen him for a substantial period of time prior to the murders. These family members gave no evidence with respect to the defendant's mental or emotional status at the time of the crimes. Likewise, there was no presentation of any expert mental health testimony before the jury either. Due to the total lack of evidence as to the defendant's mental condition at the time of the crimes, there was no error in failing to instruct on statutory mental mitigators. Geralds, 674 So. 2d at 101 (no error in failing to instruct on the extreme mental or emotional disturbance factor where defense psychotherapist stated that defendant suffered from a variety of mental problems, but "did not comment on Gerald's actual or probable mental condition at the time of the murder."). The Appellant's reliance upon Stewart v. State, 558 So.2 d 416 (Fla. 1990), is unwarranted. In Stewart, a mental health expert testified that the defendant's control over his behavior at the time of the crimes was reduced, due to ingestion of drugs and alcohol, although

not substantially so. This Court held that whether the impairment was substantial was a question for the jury. In the instant case, there was no evidence of the defendant's mental condition at the time of the crimes. Likewise, Appellant's reliance upon Robinson v. State, 487 So. 2d 1040, 1042-43 (Fla. 1986), is also unwarranted. Robinson presented "some evidence" that his co-defendant had actually killed the victim, that Robinson's participation in the crimes was relatively minor, and that his capacity to appreciate criminality of conduct was impaired. In the instant case, there was no evidence of the statutory mitigators complained of on appeal. The State would further note that there was no request for, and the defense waived, the lack of prior criminal history mitigator, in order to prevent the State from presenting rebuttal evidence of his past activities. (T. 1827-29). There was thus no error in failing to instruct on this statutory mitigator either. Raleigh, 22 Fla. L. Weekly at S712.

G. There Was No Error In Failing To Specifically Instruct The Jury With A List Of Proposed Nonstatututory Mitigators

The Appellant contends that it was error for the trial judge not "to simply read a list of potential non-statutory mitigating circumstances for the jury to consider." This claim has been "repeatedly" rejected by this Court. See, Davis v. State, 698 So. 2d 1182, 1192 (Fla. 1997), and cases cited therein.

X.

THE APPELLANT'S CLAIMS WITH RESPECT TO ADMISSION OF VICTIM IMPACT TESTIMONY HAVE BEEN PREVIOUSLY REJECTED BY THIS COURT.

The testimony of the two friends who described the victims' uniqueness as individual human beings and the impact of the victim's loss on these friends, has been set forth at p. 9 herein. The testimony was in accordance with Fla. Stat. 921.141(7) (1993) (victim impact evidence should "demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death"); see also, Bonifay v. State, 680 So.2 d 413, 419 (Fla. 1996); Burns v. State, 699 So.2 d 646, 653 (Fla. 1997). The Appellant's claim that "victim impact is irrelevant under Florida's sentencing statute because it does not go to any aggravator or to rebut any mitigator" has also previously been rejected in Burns, 699 So. 2d at 653. The Appellant's equal protection claim and reliance upon Payne v. Tennessee, 501 U.S. 808 (1991), have also been rejected. Id. The Appellant's contention with respect to the impropriety of the prosecutor's argument on victim impact was not presented in the lower court and is thus procedurally barred. Burns, 699 So. 2d at 653-54. The State would also note that there was no impropriety. The prosecutor specifically stated that the victims' friends' testimony, "are not aggravating circumstances. And should not be considered by you in reaching your decision. They are presented for a different reason. They are presented so that you can understand the uniqueness, and the type of people that Violetta and Tomas Rodriguez were." (T. 1854). Moreover, in accordance with defense requests, the jury was specifically instructed that this evidence did not concern aggravating or mitigating circumstances, and that the jury was, "strictly limited to weighing aggravating and mitigating circumstances." (R. 586).

Finally, the State notes that in the lengthy penalty phase proceedings herein, the defendant

was extended every opportunity to litigate every conceivable claim before the judge. There was not one shred of evidence set forth to support Appellant's current allegations with respect to the victims' "corrupt and illegal business," "personal," and "religious" practices. Brief of Appellant at pp. 72-73. The Appellant's effort to malign the victims in this Court is reprehensible.

XI.

THE DEATH PENALTY IS PROPORTIONATELY WARRANTED IN THE INSTANT CASE.

The jury in the instant case unanimously recommended a sentence of death for Violetta's death, and recommended the same for Tomas, by a vote of 7 to 5. The trial judge found the aggravating factors with respect to the murder of each victim "far outweigh" the mitigating circumstances. (R. 834). As to each murder count, the trial judge found that the defendant had not only committed a contemporaneous capital felony, but also a prior violent felony, aggravated assault with a firearm, in 1985. (R. 815-16). The trial judge also found that each capital felony was committed during the commission of an armed burglary. (R. 816-17). The trial judge additionally found that Violetta's murder was heinous, atrocious and cruel. (R. 817-18). The trial judge then addressed every item of mitigation proposed by the defendant, categorized that which could be categorized, detailed his findings based upon the evidence actually presented, and specified the weight he gave to mitigation found to be valid. (R. 819-33).[26] He found nonstatutory mitigating

[26] The trial judge's exhaustive order detailing the nonstatutory mitigating circumstances has been, in part, set forth in issue XII, where the Appellant claims that the trial judge failed to properly address these. In the instant claim, to the extent that the Appellant argues that the trial judge erroneously failed to consider statutory circumstances of age and lack of prior criminal history, the State notes that these were specifically addressed and rejected. (R. 822, 819). The trial judge found that defendant's age of 25 was not mitigating, in light of the psychological testing which reflected that he was, "within the normal range of intelligence (full scale I.Q. 108)." (R. 822). The defendant's own expert report stated that his IQ scores, "reflect age appropriate intellectual functioning." (R. 773). There was thus no error in rejecting this mitigator. See, e.g., Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988) ("This Court has frequently held that a sentencing court may decline to find age as

circumstances that: defendant's childhood was difficult (substantial weight); defendant suffers from physical and psychological impairments (limited weight); defendant's father used drugs (some weight); defendant loved and protected his parents (moderate weight); defendant had little contact with his mother during adulthood (little weight); defendant has capacity to work hard (some weight); and, defendant's courtroom behavior was appropriate (some weight). (R. 828-33).

The trial judge's sentencing order thus affords ample opportunity for appellate review. Sims v. State, 681 So. 2d 1112, 1119 ((Fla. 1997) ("We are able to conduct an appropriate proportionality review in Sims' case because the order specifies which statutory and nonstatutory mitigating circumstances the trial judge found and the weight he attributed to these circumstances in determining whether to impose a death sentence."). The Appellant's claim that this Court can not conduct proportionality review, because the defendant prohibited presentation of mitigating evidence, is not supported by the record, as detailed in issues VI and VII herein. The balance of the aggravating and nonstatutory mitigating circumstances found by the trial judge herein reflect that the Appellant's sentences are proportionate to others found valid by this Court. See, e.g., Johnson v. State, 660 So.2 d 648, 652 (Fla. 1995) (single murder count with a jury recommendation of death by a vote of 10 to 2; three aggravating factors: 1) prior violent felony; 2) during commission of armed burglary and for pecuniary gain; 3) murder was HAC; nonstatutory mitigating circumstances: 1) defendant raised in single-parent household; 2) deprived upbringing; 3) excellent relationship with family members; 4) good son and provided for his mother; 5) excellent employment history; 6) good husband and father; 7) showed love and affection; 8) cooperated with police and confessed; 9) demonstrated artistic and poetic talent; 10) age at the time of the crime; 11) potential for

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a mitigating factor in cases in which the defendants were twent to twenty five years old."). As previously noted, the defendant has waived the lack of prior criminal history circumstance. There was thus no error in failing to find this statutory mitigator either. Raleigh, supra.

rehabilitation and productivity; 12) potential punishment of a life sentence; 13) no significant history of criminal activity before 1988; 14) good behavior at trial; and, 15) mental pressures not reaching the level of statutory mitigation); Pooler v. State, 22 Fla. L. Weekly at 569 (three aggravating circumstances: 1) contemporaneous violent felony; 2) during commission of a burglary; and, 3) HAC; statutory mitigating circumstance of mental or emotional disturbance; nonstatutory circumstances of honorable military service; good employment record; good parent; good characteristics and specific good deeds).

XII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH RESPECT TO THE FINDINGS OR WEIGHT OF THE PROFFERED MITIGATION.

The Appellant argues that the trial judge erroneously failed to address various alleged mitigating factors, erroneously failed to find some factors, and, did not assign appropriate "weight" to mitigation. The Appellant has primarily relied upon alleged mitigation contained in the defense's sentencing memorandum and, the hearsay reports and arguments presented at the final sentencing hearing before the judge. Initially, the State notes that, "whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard." Blanco v. State, 22 Fla. L. Weekly S575, 576 (Fla. Sept. 18, 1997). A trial judge is under no obligation to accept hearsay evidence of mitigation where there is strong indicia of unreliability. Wuornos v. State, 644 So. 2d at 1020 (Fla. 1994). Moreover, the "weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard." Blanco, supra. Discretion is abused, "only where no reasonable man would take the view adopted by the trial court." Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). The sentencing order herein, with respect to the Appellant's claims, speaks for itself:

Any other aspect of the defendant's character or record and circumstances of the offense which warrant mitigation.

In its presentation to the jury and the court, its sentencing memorandum and legal argument, the defense has requested the court consider the following non-statutory mitigation;

The defendant suffers from serious lifelong physical and psychological impairments.

The following has been included in this mitigating circumstance:

a. Organic Brain damage
b. An impulse control disorder
c. A delusional disorder with paranoid ideations
d. Behavioral and attentional deficit disorder
e. Damaged digestive system in utero/lactose intolerance
f. Asthma
g. Allergies
h. Meningitis
I. Trauma to the head
j. Mentally or emotionally disturbed
k. Nervous disorder

The evidence is uncontroverted that Mr. Delgado suffered from a number of illnesses throughout his childhood. The evidence indicates that he had a damaged digestive system which interfered with his early childhood development. He contracted Meningitis as a young child and was in a coma for nearly a month. He developed seizures from the Meningitis. He also suffered a number of head traumas throughout his early life. He developed allergies and was hyperactive in school. According to the mother, however, by the age of three the defendant was walking, talking and behaving normally.

As was previously discussed, the court ordered Jackson Memorial Hospital to conduct a neurological examination of the defendant prior to the commencement of the penalty phase. The examination found no indication of neurological problems. After the jury returned its advisory verdicts, the court at the defendant's request, appointed additional experts to examine the defendant. As previously noted, the court ordered the defendant to undergo an MRI and EEG examination. Although the defendant originally stipulated to undergoing both examinations, he refused to be examined on the day the examinations were scheduled. The defendant reiterated that he had refused to be tested during the sentencing hearing. At the sentencing hearing the defendant called no further witnesses, but chose to rely on the testimony presented to the jury as well as two expert reports and a document from Cuba. The court has reviewed the two reports submitted by the defendant as well as all other

evidence, testimony and argument on this issue.

Dr. Calderon's report recommended that the defendant consider undergoing an EEG and MRI examination. Dr. Calderon did not offer an opinion as to whether the defendant suffers from any neurological problems.

Dr. Herrera does offer a number of opinions and observations. Dr. Herrera first concludes that the defendant suffers from "what might be described as an organic brain syndrome related to an adult form of attentional deficit hyperactivity disorder. The nature of the crime committed by Mr. Delgado may well represent an organically determined state of fugue within the context of the disinhibition of behavior associated with organic brain disorders." Dr. Herrera believes this opinion is consistent with the defendant's medical history of meningitis, seizures and head trauma.

Dr. Herrera also concludes that the defendant "is a very disturbed person who is masking a significant degree of pent up frustration and aggression." He attributes this to the history of domestic violence and child abuse which was reported to him by the defendant's mother and the defendant.

The court has thoroughly reviewed both expert's reports and all other testimony and evidence in the case concerning the defendant's physical, mental and psychological condition. Dr. Herrera bases his opinion on the history given to him by the defendant's mother and the defendant. The court is mindful of the fact the defendant refused the MRI and the EEG examination which were scheduled in order to verify the existence or non-existence of any organic brain syndrome or problem. While the court is not reasonably convinced that the evidence presented established any of the statutory mitigating circumstances, the court is reasonably convinced that the evidence presented does prove the existence of this non-statutory mitigating circumstance. The court gives this mitigating circumstance limited weight based on the evidence and testimony presented.

<u>Mr. Delgado was a physically and emotionally battered child.</u>

The defendant has requested the court consider the following as non-statutory mitigation.

a. The defendant was born after a difficult birth and was hospitalized for nine months.

b. The defendant was abandoned by his birth father.

c. The defendant lived with his sister and mother in one room of his grandparents' home.

d. The defendant had Meningitis as a child.

e. The defendant was subjected to severe physical abuse and had to wear protective clothing to school. The mother's routine of stretching and tugging Jesus' ear when she would scream at him culminated in her tearing away his ear from his face and then trying to glue it back with his own blood.

f. The defendant's step-father was an abusive alcoholic.

g. The defendant was ridiculed after his sister left Cuba during the Mariel Boatlift.

h. Because his family had declared their intent to leave Cuba, his welfare was taken over by the ministry, his family life was destroyed and he along with his mother and step-father were beaten. He was treated like a prisoner in his own home by the Cuban government and government backed neighbors.

I. The defendant suffers from asthma.

j. The defendant was battered physically and emotionally by his own mother, by his step-father, and eventually also by the birth-father who had abandoned him before he was born.

k. Mr. Delgado, as a youth, endured torture and trauma as a citizen of Cuba for four years following the Mariel boat lift when his sister was selected to leave the country for the United States.

l. Mr. Delgado has a nervous disorder that kept him from being accepted by the Cuban military for service.

The defendant's family testified about his early childhood. Although some of the factors and circumstances under this mitigating circumstance were already included under the prior requested statutory and non-statutory mitigating circumstances, the court has also included them in this non-statutory mitigating circumstance.

The testimony is uncontroverted as to some of defendant's background concerning his childhood diseases. (a.-d., f., g. and I.). However, as noted previously, by the age of three the defendant was walking, talking and behaving normally. The evidence is in conflict as to other parts of the defendant's background.

There was testimony that their family life was unpleasant in Cuba and their neighbors shunned them. The defendant's sister testified that while they were in Cuba, they were beaten by their mother. The testimony did not support the allegations that the defendant was burned with an iron, wore protective clothes to hide his bruises or that his mother's routine of stretching and tugging his ear resulted in his ear being torn away from his face.

> After the defendant's father left, the family moved into the grandparent's home. Although the living quarters were cramped, the evidence indicates that the grandparents were loving and supportive.
>
> According to the defendant's mother, the step-father was an alcoholic and would beat the defendant. During cross-examination the witness admitted that the defendant was never injured and never needed medical attention. The defendant's sister testified that living with the step-father was a nightmare and that the defendant would protect his mother from his step-father when he was drunk.
>
> The court is reasonably convinced of this mitigating circumstance. The court gives this mitigating circumstance substantial weight.

(R. 823-28).

The trial judge similarly analyzed every other item or category listed by the defendant. (R. 828-33). No error has been demonstrated. Blanco, supra; Wuornos, supra.

XIII.

THE APPELLANT'S CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT.

The Appellant argues that the preceding twelve claims establish cumulative error which denied him a fair trial. The State relies upon its argument with respect to each of said claims, which reflects that none of the alleged errors, whether individually or cumulatively, deprived the defendant of a fair trial.

XIV.

FLORIDA'S CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL.

This Court has repeatedly upheld the constitutionality of Florida's capital sentencing statute. See, e.g., Thompson v. State, 619 So. 2d 261, 267 (Fla. 1994). The Appellant's assorted list of factors allegedly contributing to the unconstitutionality of the statute has been previously rejected by this Court. Wuornos, 644 So. 2d at 1020, n. 5.

CONCLUSION

Based on the foregoing, the convictions and sentences should be affirmed

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by prepaid first class mail to **REV. MELODEE A. SMITH,** 5236 S.W. 3rd Avenue, Cape Coral,, Florida 33914, and **ROY D. WASSON, ESQ.**, Gables One Tower, Suite 450, 1320 S. Dixie Highway, Miami, Florida 33146, on this 3rd day of April, 1998.

_____
FARIBA N. KOMEILY
Assistant Attorney General

/blm