IN THE SUPREME COURT OF FLORIDA

WALTER RUIZ,

Appellant,

vs. CASE NO. 89,201

STATE OF FLORIDA,

Appellee.

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CORRECTED
ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

GUILT PHASE

Appellant Walter Ruiz and Mickey Hammonds were charged by indictment with the first degree murder of Rolando Landrian, kidnapping and robbery. (Vol. 1, R 62-64)[1] At trial Hammonds testified that he had entered a plea to murder, kidnapping and robbery and received a sentence of twenty years. (Vol. 6, TR 324) He did not know the victim but came to Tampa on April 6 and 7, 1995. He met appellant's girlfriend, Maria Vasquez, and went with her to the Orange County jail where she could visit the incarcerated Ruiz. He also met Delio and Lotia Romanes at Maria's house. (Vol. 6, TR 327-328) After appellant got out of jail he and Walter conversed about assisting Ruiz in criminal activities; Ruiz asked Hammonds if he wanted to make some money, $20,000-$30,000, to drive for him. Ruiz said he had to take care of something for Delio and them in Tampa. Hammonds agreed to be his driver. (Vol. 6, TR 331-333) Hammonds learned that appellant was at his home on April 6; when he arrived, Walter and Delio were there. Appellant said he was ready to go and told him to pack clothes for an overnight stay in Tampa. Hammonds owned a 1984 Chrysler Fifth Avenue. (Vol. 6, TR 334-335) Appellant told

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[1]Delio and Lotia Romanes were similarly charged in the same indictment with these offenses. Their convictions are pending appeal in the Second District Court of Appeal.

Hammonds what caliber of bullets to buy and Hammonds bought them with money provided by Delio; ostensibly Delio and Ruiz had no identification to make the purchase. (Vol. 6, TR 336-337) Ruiz referred to another friend, "Gordo", who would buy a pistol. Hammonds drove to a pawn shop directed by appellant and Delio and Gordo returned with a gun, which Ruiz stated was the kind he wanted. (Vol. 6, TR 337-340) They went to Gordo's who was supposed to remove the serial number and Gordo returned ten minutes later. (Vol. 6, TR 340) Hammonds drove his car and Delio and appellant were in Delio's car to Tampa. (Vol. 6, TR 341) They went to a trailer and they showed the gun to Lotia; she asked if this would do the job and appellant said yes. Lotia claimed the guy was hard to kill, part of his head was blown off in the army, he had been shot five times in California and he had turned over two or three cars. Appellant responded, "Don't worry. I can kill him." (Vol. 6, TR 343-344) Lotia told Hammonds that her ex-husband had a daughter living with them and that he had been having sex with the girls for a long time and she was trying to get the girls out of this relationship. This was the first Hammonds realized a specific person was to be murdered. (Vol. 6, TR 345) Appellant and Hammonds drove to the convenience store and unsuccessfully waited for the victim for about two hours. The plan involved taking the victim and the victim's car (Delio had a set of

the victim's car keys). (Vol. 6, TR 347-348) On the subsequent effort to intercept the victim, they learned that the victim had a different car, a maroon Nissan rental and Lotia had pointed out the house where the victim lived (Vol. 7, TR 359). Delio gave appellant a beeper number. (Vol. 7, TR 360) Hammonds and Ruiz followed the victim driving his rental car, lost him after a couple of red lights, then saw the car in a driveway at the same house Lotia had previously pointed out. (Vol. 7, TR 362-363) After twenty minutes, the rental car shot out of the driveway and they followed. (Vol. 7, TR 364) The victim pulled into a convenience store parking lot and started heading towards a telephone. (Vol. 7, TR 365) Ruiz jumped out of the car Hammonds was driving, grabbed the victim, hit him in the face with a pistol and led the victim to the car and they drove off. (Vol. 7, TR 365-366) Ruiz pointed a gun at a man approaching in the parking lot and told him to back off. Hammonds saw a man writing his tag number down as they left. (Vol. 7, TR 367) Ruiz talked to the victim in Spanish who handed his jewelry, money and keys to appellant. The victim was scared. They stopped the car, appellant shot the victim repeatedly and Hammonds and Ruiz drove off. (Vol. 7, TR 368-370) They pulled over near a convenience store and abandoned the car. They called a cab to leave the area and asked the cab driver to sit and wait until friends arrived. Delio and Lotia arrived. (Vol. 7,

TR 372) Hammonds and Ruiz got into Delio's rental car and returned to the convenience store-site of the kidnapping to pick up the victim's rental car. They thought the victim had $10,000 or $20,000 in a bag of money he carried in the car. Hammonds didn't see them get anything after looking throughout the car and wiping it with a rag. They left the victim's car at a bowling alley and went back to the trailer. (Vol. 7, TR 373-377) Appellant dumped out a bag with money and jewelry in it and complained that the victim only had $1,000 and wanted to know where the rest of it was. Appellant gave Hammonds a couple of pieces of jewelry and $350.00. (Vol. 7, TR 379) In two cars -- Romanes's rental and Hammonds' Chrysler which they had picked up -- they went to a motel where two rooms had been rented by Lotia. (Vol. 7, TR 380) Appellant was mad, wanted the rest of the money and the Romanes promised him the rest the next day. (Vol. 7, TR 380) According to Hammonds, Ruiz said the victim was supposed to have $10,000-$20,000 on him, that he only charged the guy $10,000 and if they didn't come up with the rest of the money, "I'm going to have to kill them too." (Vol. 7, TR 382) On Saturday afternoon they gave Ruiz about $2,500. (Vol. 7, TR 382) Hammonds took the tag off his car, parked it in his front yard, purchased a new tag and threw the jewelry in a dresser drawer. (Vol. 7, TR 384-385) Initially, he lied to the police but he was aware the police were searching his house where he had

discarded jewelry from the victim, but then told of his involvement and provided assistance to locate Ruiz, Delio and Lotia. (Vol. 7, TR 387-388) Appellant had hair in April 1995. (Vol. 7, TR 388) At the time of his arrest on April 11, 1995, Hammonds told detectives Ruiz shot and killed the victim. Afterwards, Hammonds was charged anyway. No deal or promises were made at the time he gave a sworn statement to the prosecutor. (Vol. 7, TR 416-417) He entered a plea on January 23, 1996, and has given multiple depositions stating that Ruiz was the shooter. (Vol. 7, TR 418-420)

A neighbor of the victim, Mary Jo Hahn, noticed a car parked near another neighbor's front yard on the street on April 7, 1995. Two men in the maroon or burgundy with white top car (Exhibit 6, photo of Hammonds car) looked out of place; they looked Cuban or Hispanic and were looking back toward the street and house. She and her husband reported the incident at a police substation but the car was gone on their return. (Vol. 7, TR 426-429) Upon seeing a newspaper article that a neighbor was murdered, she recognized one of the photos as a passenger in the car and identified Exhibit 49 (a photo of appellant Ruiz). (Vol. 7, TR 429) Her husband, Joe Hahn, also recalled the out-of-place car in the neighborhood (Vol. 7, TR 446) and recognized a photo in the paper of the driver, a heavier set guy. (Vol. 7, TR 451)

Susie Bates Jacobs, a pawn shop operator, knew customer Abraham Machado who bought a gun. (Vol. 7, TR 455) She identified Exhibit 31, an ATF form she filled out regarding a gun sale to Machado on April 6, 1995, for a semi-automatic .380, probably Italian made IZRZH70. Exhibit 50 was a lay-away ticket for which Machado put down $100 on April 3, three days earlier. (Vol. 7, TR 453-457)

Abraham Machado testified that Ruiz asked him to purchase a gun and he agreed. (Vol. 7, TR 460-461) Appellant was with two other guys when they went to pick out a gun. Appellant and the bald guy looked at the display case while he filled out the paperwork. The black guy (Mickey Hammonds) didn't speak Spanish. Exhibit 49 looked like Ruiz and he identified him in court. (Vol. 7, TR 460-468)

Bail bondsman Edith Priest testified that in March there were two bonds for Ruiz, one for $25,000 and the other for $10,000. (Vol. 7, TR 473) A woman representing herself as appellant's aunt and whose driver's license listed the name as Lotia Romanes (Exhibit 33) made good on a check March 23. (Vol. 7, TR 473-476) Appellant had hair on his head at that time and she identified Exhibit 49 as appellant and identified him in court. (Vol. 7, TR 477) He did not show up for an April 4 court date. (Vol. 7, TR 478)

Dianna Guty was living in Orlando with Mickey Hammonds and David Howard. (Vol. 7, TR 479) On April 6, Ruiz came to the residence with another man (Exhibit 32, depicted Delio Romanes). (Vol. 7, TR 482) Hammonds took a suitcase and left with the two men. (Vol. 7, TR 483)

The parties stipulated that Machado's answer would be yes to a question that he had filed the gun. (Vol. 7, TR 491; Vol. 8, 496-497)

Stop and Shop convenience store employee Charles Via testified that on April 7 a car pulled up, a passenger got out and walked up to a man on the phone and struck him with some kind of wrench -- it appeared shiny and to be a tool. The assailant talked to the victim in Spanish. (Vol. 8, TR 499-504) It was still daylight and this took place at a mere distance of six feet. The assailant had black hair, was Hispanic, about 5'9", in his thirties. Via got the tag number and they called 911. (Vol. 8, TR 506) The 911 police never showed up and somebody later picked up the victim's car. (Vol. 8, TR 508-509) Subsequently, police showed him eight pictures in a photopack and two photopacks and there was no suggestion by police who to select. Via selected #1 in Exhibit 34 and Exhibit 35. (Vol. 8, TR 510-512) Appellant in court had his head shaved unlike the April 7 assailant and the person selected in the photopack. (Vol. 8, TR 519)

Assistant Manager Michael Witty heard Via yell "fight" and saw two men struggling by the pay phone. The assailant hit the victim with pliers and dragged him to the maroon colored Fifth Avenue with white vinyl top car. (Exhibit 6)(Vol. 8, TR 522-524) He got the tag number as he chased the car and telephoned 911. (Vol. 8, TR 525) Witty made an in court identification of appellant as the assailant even though he was not asked by police to make an identification. (Vol. 8, TR 526) Appellant was now missing a lot of hair on top of his head. Police did not respond to the 911 call and just before closing Witty noticed that the victim's car was now missing. On the following day when he called police they responded within fifteen minutes. (Vol. 8, TR 527-529)

Taxicab driver Victor Ojunku testified that on April 7 he got a call to the Rainbow Mart on Westshore; two men walked up and said they called a cab but didn't want to go anywhere. They were waiting for a ride but if the ride didn't show up the cab could take them to the Linebaugh and Gardner area. Ojunku waited there with them with the meter running and after thirty-five minutes their ride arrived. The two men paid and walked to a light-colored car. (Vol. 8, TR 537-538)

Detective Paul Rockhill arrived at the murder scene at 8:40 P.M., a residential neighborhood with primarily single family dwellings. (Vol. 8, TR 543) A white sheet covered the male victim

who appeared to have multiple gun shot wounds to the face. There were no articles of identification or wallet, watch or jewelry on the body. Six shell casings and two projectiles of .380 caliber semi-automatic were recovered. (Vol. 8, TR 545-549) He had not received information of the kidnapping at the convenience store at that time. (Vol. 8, TR 549) There were shoe prints in sand but there is no way to date a shoe print. (Vol. 8, TR 550-552) Rockhill interviewed Witty on April 8, obtained a description and tag number of the vehicle which he learned was registered to Mickey Hammonds in Orlando. (Vol. 8, TR 554-555) On Sunday, April 9, he received information that a missing person case might be his homicide victim. Missing persons deputy Kramer provided the driver's license of missing person Rolando Landrian and learned from family members that the victim had rented a Nissan which was recovered in the parking lot of Crown Bowling Lanes at 5555 Hillsborough Avenue. On April 11, the witness went to Orlando and prepared a search warrant for the automobile and residence of Mickey Hammonds. His car did not have the same license number Witty observed but the VIN showed it to be registered to Hammonds. Jewelry was found in two locations of the Hammonds house matching the victim's jewelry. (Vol. 8, TR 556-562) Exhibit 40 was a pager taken from Hammonds' possession on April 11. (Vol. 8, TR 563) Rockhill got the name and photo of Ruiz from Orange County

authorities and they assisted in providing a computer-generated photopack, Exhibit 34. He returned to Tampa and contacted Via and another employee. He showed the Exhibit 34 photopack and did not suggest who to select (although he mentioned that facial hair can change). (Vol. 8, TR 564-566) Via identified Ruiz at 10:35. Arrest warrants issued April 12 for Ruiz, Delio and Lotia Romanes. (Vol. 8, TR 566) He asked for assistance of the FBI fugitive task force. (Vol. 8, TR 567) On April 12 he obtained a search warrant for Maria Vasquez' home in Casselberry and went to the Zuhay Chalk trailer. (Exhibit 7)(Vol. 8, TR 568) Ruiz was subsequently arrested in the Orange County home of Bonita Griffin on June 22 and at that time had hair on his head. (Vol. 8, TR 569) He did not show the photopack to Michael Witty because at first he couldn't contact him on April 11 and afterwards he had the Via identification. (Vol. 8, TR 574, 577)

Ann Cahill, who resided at 4508 Beachway Drive, heard gunshots between 7:00 and 8:00 P.M. on April 7. She saw a man lying in the grass between the street and sidewalk and later watched a two-tone maroon with lighter colored top vehicle head down the road towards Westshore. She stayed with the victim until paramedics and police arrived. (Vol. 8, TR 579-583)

Detective Julie Massucci participated in the arrests of Lotia and Delio Romanes. (Vol. 8, TR 586) She also went to the

Interchange Motel on Fowler Avenue to check registration receipts. She learned Delio had registered with two guests in Room 201 and numerous phone calls were made from that room. The next day she found another registration (either room 125 or 159) under Romanes' name but no phone calls were associated with the second room. Exhibit 51 was the room registration with phone tolls. (Vol. 8, TR 586-589)

Dr. Lee Miller, associate medical examiner, autopsied the victim Landrian. He described non-gunshot abrasions and scratches. (Vol. 8, TR 601-603) The victim was struck with seven or eight bullets, two were recovered at autopsy, four or five exited the body and one just grazed the body. A fatal wound was to the neck and the victim bled to death. (Vol. 8, TR 608) When a bullet strikes the artery, the artery is severed and the heart pumps blood out that hole and death occurs fairly rapidly. The victim was 5'1" and weighted 118 pounds. (Vol. 8, TR 608)

The state introduced Exhibits 41, 43, 44 and 45. (Vol. 8, TR 618)

Defense witness James Alderman, a jail resident with convictions on fifteen or twenty charges who admittedly lied about being a paralegal to get things from other inmates and who was never in a jail cell with Mickey Hammonds (Vol. 8, TR 625-627), claimed that Hammonds told him that the stepfather of the girl

raped by the victim was the real killer and that Hammonds was being paid by the killer to implicate Ruiz. (Vol. 8, TR 622-623) (Hammonds had testified that while in jail Delio Romanes offered him money to keep him out of it, but he testified against Delio and Lotia -- Vol. 7, TR 412.)

Jorge Rodriguez, convicted on two counts of fraud and presently being held in Jesup George federal prison (Vol. 8, TR 639, 631), claimed that he had seen appellant only once and that on April 7, 1995, when he was dating appellant's ex-wife, Nancy Ruiz, eight days prior to the police-helicopter force surrounding her house. (Vol. 8, TR 632, 636, 647) The state called rebuttal witness William Bibb and introduced Exhibit 54, records showing that Rodriguez had visited appellant in jail after the arrest on this murder charge on June 25 and having placed money in Ruiz' jail account on November 21 and on December 23, 1995. (Vol. 10, TR 897)

Detective Randy Bell identified defense Exhibit 1, a photo of a foot print at the crime scene (Vol. 8, TR 658-659) but added that you can't tell from a photo when the foot print was left there and this is a residential area. (Vol. 8, TR 662) Bell also testified that Hammonds had asserted that he had been in Daytona Beach until he was told that police had recovered jewelry. (Vol. 8, TR 662)

Maria Vasquez had been dating Ruiz but broke up with him in late 1994. (Vol. 8, TR 667) She testified that Machado had a

nickname "Gordo" or "Gago" or something like that. (Vol. 8, TR 668) She did not recall having received a phone call from appellant regarding the payment of $200,000 or that he would kill someone. (Vol. 8, TR 669) On cross-examination she acknowledged that she was also known as Marie Rivera and that her phone number was (407) 831-7089. (Vol. 8, TR 670) She admitted that she had lied to police when asked when she last saw him, on April 12, 1995, when he had spent the night with her. (Vol. 8, TR 672-676)

Appellant's ex-wife, Nancy Ruiz, testified that appellant bonded out of jail and had a court date for April 4. (Vol. 9, TR 685) She claimed she saw him on the following Friday. He had phoned to see the children noting that police were looking for him. She saw him outside the house talking to her children. (Vol. 9, TR 687) Initially she claimed that she had not seen appellant prior to the alleged April 7 meeting at the house with her children, but then admitted that she had <u>also</u> seen him on April 5 and knew he was wanted by the police. (Vol. 9, TR 686, TR 714) She claimed on her deposition that she had met Walter on April 5th in a public place because she was nervous since police had called about his missing court appearance (Vol. 9, TR 687) yet allowed Walter to visit the children in the front yard of her house for three hours on April 7. (Vol. 9, TR 710-718) After appellant's arrest she visited him in jail every week in Orlando and also came to the Hillsborough County

jail and has put money into his jail account while he's been in jail a lot of times. (Vol. 9, TR 730-731)

Coralyes Rodriguez, babysitter and friend of Nancy Ruiz, claimed she saw appellant at Nancy's house on April 7 (Vol. 9, TR 759) and remembered it because she was planning Nancy's birthday which at deposition she thought was around April 9. (Vol. 9, TR 760, 769) Her birthday really was April 27. (Vol. 9, TR 755)

Appellant's mother, Julia Ramirez, helped bond him out of the Seminole County jail and knew that he had an upcoming court date on April 4, 1995, which he didn't make. (Vol. 9, TR 779-780) She claimed that on April 7 he came to her house and accompanied her on errands in Orlando. She tried to talk him into giving himself up and claimed she was with him for five to five and a half hours. (Vol. 9, TR 786-790)

Appellant Walter Ruiz testified and claimed that he was in Orlando on April 7. He contended that he went to his mother's house, they went to an insurance office to pay a bill, then went to K-Mart. He didn't want too many people seeing him because newspapers reported they were looking for him since he didn't make his scheduled April 4 court appearance. His mother tried to persuade him to turn himself in. (Vol. 10, TR 833-837) Afterwards, he went to Nancy's house to see his children (Vol. 10, TR 840) at one point using a car that was "not a legal car". (Vol.

10, TR 845) Appellant claimed that Machado purchased cocaine from him and that Delio and Lotia Romanes became regular cocaine clients of his. (Vol. 10, TR 849) Lotia approached him about a problem she had in Tampa -- Rolando Landrian had molested and physically and sexually abused her daughters for years and she wanted someone to rough him up. (Vol. 10, TR 850) He told her he sold drugs, was "not into that kind of stuff" but suggested Mickey Hammonds to them. (Vol. 10, TR 851-852) Ruiz denied being with Machado on April 3 at the pawn shop but admitted being with him on April 6 and Delio and Mickey Hammonds and was aware they were buying a gun. (Vol. 10, TR 853-854) Ruiz told Machado the gun was for him but Delio was going to pay for it when, in reality according to appellant, the gun was for Delio for his safety in running a store in Tampa. Lotia had paid a large chunk of his bond money not to kill somebody, he claimed, but as prepayment on a ¼ kilo of cocaine. (Vol. 10, TR 854-855) He had seven prior convictions. (Vol. 10, TR 859)

On cross-examination he admitted having been visited in jail by his mother and ex-wife Nancy. He was arrested at the house of his girlfriend, Bonita Griffin, on June 22. (Vol. 10, TR 864-866) He acknowledged buying two pagers for his drug business and may have gone to the Telnet paging store on April 10 to get one for himself and one for Mickey Hammonds. The money people put up to

insure his court appearance in late March he would be able to cover by selling drugs. (Vol. 10, TR 866-870) He claimed not to understand Lotia's situation about wanting the victim hurt when she stayed in the house with him and had real questions if they were telling the truth. (Vol. 10, TR 872) He was told the victim carried a large sum of money and jewelry to be taken. (Vol. 10, TR 873-874) Ruiz was aware that police were looking for him on April 12 for this Tampa murder but he stayed on the run until his June 22 arrest. (Vol. 10, TR 882) Initially he told Detective Rockhill he was with Marie Vasquez on April 7 and when she didn't back him up he claimed she was lying. (Vol. 10, TR 884) He didn't want to bring his mother's name into the situation until he was sure nothing would happen to her. (Vol. 10, TR 886)

The state recalled Julia Ramirez who was shown Exhibit 53, the notarized statement she had subsequently written and admitted appellant told her he didn't want to turn himself in on the store robbery because he didn't act alone. (Vol. 10, TR 891-893) Exhibit 53 was subsequently introduced under the doctrine of completeness. (Vol. 10, TR 918)

The state called rebuttal witness Jeffrey Crook to show that defense Exhibit 4, a check to K-Mart, was for a sale made at 12:22 P.M. on April 7, 1995. (Vol. 10, TR 906-907)

Detective Rockhill was called in rebuttal and testified that

during his interview of appellant on June 22, Ruiz initially claimed he was with his girlfriend, Maria Vasquez, and when told she did not corroborate that story appellant declared that he didn't remember where he was and Ruiz insisted Maria must have denied it because she was afraid of being in trouble and that she had reason to lie. Rockhill informed him that people wouldn't be in trouble if they didn't have anything to do with the murder. (Vol. 10, TR 909-913)

PENALTY PHASE

The state introduced the testimony of Casselberry police officer Jeff Wilhelm who responded to a domestic disturbance on January 18, 1994. The victim was Marie Rivera, there was damage to the apartment and blood on the windows. She was upset and afraid. Appellant was taken into custody. (Vol. 12, TR 1055-1057) Ruiz had to be restrained and when he tried to pull to get away became violent and Wilhelm had his finger smashed. A weapon was recovered in the bedroom of the apartment Ruiz was in and it appeared there was blood on the handle of the gun. Ruiz was charged and convicted (Exhibit 4) with resisting an officer with violence. (Vol. 12, TR 1059)

Bank tellers Cherie Perry and Carol Archer testified they were victims of a robbery at the Central Bank of Florida in June of 1995. The man pointed a gun and demanded all the money. Exhibit

3 was a photo taken at the time of the robbery and the state introduced appellant's conviction of that robbery. (Exhibit 8) (Vol. 12, TR 1063-1067, 1070-1072)

Detective Richard Carson interviewed appellant about the bank robbery, the photos showed Ruiz was the bank robber. (Vol. 12, TR 1075-1076) He also investigated a robbery at Cumberland Farm store in May in which appellant was a suspect; photos were introduced. (Exhibits 2A & B) (Vol. 12, TR 1076-1077) A firearm was used in that robbery. In a search of the apartment where the defendant was arrested, the residence of Bonita Griffin, a gun used in the two robberies -- a 380 nickel-plated semiautomatic -- was discovered. (Vol. 12, TR 1078) The conviction for the Cumberland Farm robbery, Exhibits 9 & 10, was introduced. (Vol. 12, TR 1078) The gun retrieved in the residence was apparently not the murder weapon. (Vol. 12, TR 1080) The state introduced without objection Exhibits 5 and 6, an information and certified copy of the judgment for the November 17, 1994 robbery of a Winn Dixie. (Vol. 16, TR 1080, pp. 92-99)

The defense introduced the testimony of ex-wife Nancy Ruiz, who described appellant's support of the children and described pictures and a videotape exhibiting appellant singing solo at church. (Vol. 12, TR 1082-1109) She claimed she was sexually abused as a child and appellant was understanding when she told

him. (Vol. 12, TR 1114-1115) She wasn't aware he had been selling drugs after their separation in 1992 (Vol. 12, TR 1117) and was aware appellant made a conscious decision not to report for his scheduled April 4 court date. (Vol. 12, TR 1120)

Stepson Aracelis Gil and daughter Wanda Ruiz testified that appellant was a good father and identified letters he had written them while in jail (Vol. 12, TR 1130-1146), as did son Walter Ruiz, Jr. (Vol. 12, TR 1146-1154)

Myra Acosta had never met appellant Walter Ruiz. (Vol. 12, TR 1155) Her parents are Lotia Romanes and Ernesto Acosta, who never married. (Vol. 12, TR 1155-1156) She (Myra) met the victim Rolando Landrian when she was about six years old in California when he started a relationship with her mother. The victim and her mother were together in California until 1980 when Myra was twenty-three years old. (Vol. 12, TR 1157) Her mother moved away from the victim and Myra's younger sister Zuhay (the victim's daughter) and Myra's sister Llorca stayed with the victim in California. (Vol. 12, TR 1158) Her two children (Myra's) and Llorca's three children all were fathered by the victim and Myra's mother was aware of this. Myra claimed that victim Landrian raped her when she was six. (Vol. 12, TR 1159) Myra moved to Tampa with the victim in 1980. She claimed that her mother (Lotia) had told her she wished the victim was dead, had spoken to appellant about what

was going on in Myra's life with the victim and the witness believed that her mother talked to Ruiz about killing the victim. The witness was upset with her mother about talking to anyone about her life. (Vol. 12, TR 1161-1162)

On cross-examination the witness admitted that the victim had offered Delio Romanes, husband of Myra's mother, a job in Tampa and he accepted. The victim offered Delio and Lotia a place to stay in the home in 1995, providing jobs and giving them money. There were no problems between the victim, Delio and Lotia while they lived in the house. (Vol. 12, TR 1169) Myra had stockpiled about $10,000 she had accumulated and hidden and discovered the money was missing after the murder. Delio and Lotia moved back into the house until they were arrested and started running the victim's store. (Vol. 12, TR 1170-1171) The victim did not know appellant Ruiz and she had no conversations with Ruiz. (Vol. 12, TR 1171)

After listening to the prosecutor's argument that death was the appropriate sentence for this execution-murder supported by appellant's prior felony convictions of violence, for this murder in the course of a kidnapping-robbery (Vol. 13, TR 1192-1210) and the defense argument for a life sentence because the victim had been abusing and molesting children (Vol. 13, TR 1218) and the respect and love appellant had for the family (Vol. 13, TR 1219-1221), the plea agreement given to Mickey Hammonds (Vol. 13, TR

1223), that his children call him Papi (Vol. 13, TR 1225), and that Mahatma Gandhi disapproved of an eye for an eye view (Vol. 13, TR 1231), the jury recommended death by a ten to two vote (Vol. 13, TR 1240).

The trial court agreed finding four aggravators (prior violent felony convictions, during a kidnapping, for financial gain, and CCP), no statutory mitigators, and some non-statutory mitigation which were outweighed by the aggravation. (Vol. 3, R 556-560)

SUMMARY OF THE ARGUMENT

ISSUE I. The Court should reject appellant's argument that there was flagrant prosecutorial misconduct mandating a new trial. Most of the errors now complained of were unaccompanied by contemporaneous objection to preserve them for appellate review, were not errors and did not rise to the level of fundamental error. The single remark of the prosecutor that was objected to was immediately sustained by the trial court, was made in response to the defense argument accusing state agents of negligence and indifference; no other relief was sought than the one request for mistrial which the court in the proper exercise of its discretion determined not to be absolutely necessary. If there were any error, it was harmless in light of the overwhelming evidence which included eyewitness identification by disinterested observers.

ISSUE II. The prosecutor's anecdote in penalty phase closing argument regarding her father's sense of responsibility did not constitute fundamental error and the absence of contemporaneous objection precludes review as mere error. The anecdote appropriately reminded the jury that accepting responsibility sometimes required facing unpleasant tasks and making difficult choices, as juries sometimes do.

ISSUE III. The lower court did not err in allowing the state to impeach the defendant with evidence of his prior incarceration

for the offense of robbery. Appellant opened the door in his testimony by falsely suggesting that he was a mere peaceful drug dealer unaccustomed to violence or the use of guns to obtain the property of others and to impeach his testimony that he had told his mother he did not want to turn himself in on pending charges because he was not guilty (rather than that he did not act alone). In any event, any error was harmless.

ISSUE IV. The lower court did not commit reversible error in allowing the state to introduce at penalty phase a close-up crime scene photo of the victim, an enlarged photo of an exhibit previously introduced during the guilt phase. Appellant has failed to show an abuse of the trial court's discretion in the admission of evidence. The photograph was admissible because it showed "the nature of the crime", F.S. 921.141(1), Henyard v. State, 689 So.2d 239 (Fla. 1996), was relevant to demonstrate the CCP aggravating factor and to persuade jurors that this was not simply an attempted robbery gone awry. See Willacy v. State, 696 So.2d 693 (Fla. 1997)(penalty phase evidence of photos depicting victim proper to show aggravating factors of HAC and CCP).

ISSUE V. The details of the incident which led to appellant's prior arrest and conviction for resisting arrest with violence were properly admitted. Tompkins v. State, 502 So.2d 415 (Fla. 1986); Finney v. State, 660 So.2d 674 (Fla. 1995). Appellant did not

preserve for appellate review by objection below any complaint that blood was found on the gun and it was clear it was appellant's bleeding which led officers to escort appellant to a paramedic. Any error is harmless since defendant conceded to the jury in closing argument the existence of the violent felony aggravator for his robbery and resisting arrest convictions. (Vol. 13, TR 1213-1215)

ARGUMENT

ISSUE I

WHETHER APPELLANT SHOULD RECEIVE A NEW TRIAL BECAUSE OF ALLEGEDLY FLAGRANT PROSECUTORIAL MISCONDUCT.

Appellant points to the following incidents[2] to support a thesis that there was flagrant prosecutorial misconduct contributing to his conviction:

(1) the guilt phase rebuttal closing argument at Vol. 11, TR 975-976 (Brief, pp. 53-54);

(2) the comment at Vol. 11, TR 940 referring to gross photos, wherein no objection was interposed, and a reference to Pinocchio (also unobjected to)(Brief, pp. 66-67);

(3) an expression by the prosecutor of his view that defense

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[2]It is not clear whether appellant is complaining that the prosecutor's unobjected-to comment at voir dire that if jurors had a predisposition not even to listen to the testimony of perpetrator Mickey Hammonds "we better pack our bags and go home" (Vol. 5, TR 107) constitutes part of the flagrant prosecutorial misconduct he otherwise urges for reversal. If it is, the failure to object below bars appellate review. The contention is also meritless since it is proper for counsel on both sides to inquire of prospective jurors regarding their ability and willingness to maintain an open mind until all the evidence has been submitted. Just as the defense sought that jurors not immediately judge based on the fact that Ruiz had missed a court appointment (Vol. 4, TR 48), so too one should not be surprised that the prosecutor urged consideration of the testimony of an eyewitness to the murder even if he had also participated in the kidnapping. (Vol. 5, TR 106-108) See Pooler V. State, ___ So.2d ___, 22 Florida Law Weekly S697 (Fla. 1997)(prosecutorial comment at voir dire that you have to presume him innocent but that doesn't mean he is innocent is not an improper statement of law nor constitute an expression of prosecutor's personal belief in guilt).

witnesses Nancy Ruiz and Julia Ramirez may have been lying (Brief, pp. 65-66) - another unobjected-to comment;

(4) the prosecutor's argument at Vol. 11, TR 928 and 931 that appellant had changed his appearance for court (Brief, p. 72) - an unobjected to remark;

(5) a comment by the prosecutor that Delio Romanes was not picked out of a lineup (Vol. 11, TR 931-932) - unobjected to by the defense (Brief, p. 72);

(6) the prosecutor improperly acting as translator on "Gordo - Gago" (Vol. 11, TR 933-934)(Brief, p. 74) in yet another unobjected to and unpreserved for appellate review comment.

(1) As to the prosecutor's rebuttal argument at Vol. 11, TR 975-976, the record reveals the following:

> What interest, ask yourselves what interest does Charles Via, Michael Witty the Hahns, Dianne Guty and Abraham Machado have in seeing that somebody other than the person responsible for this horrible crime be convicted? What interest do we as representatives of the citizens of this county have in convicting somebody other than the person --
>
> MR. DONERLY: Objection, Your Honor.
>
> THE COURT: Yeah, sustained.
>
> MR. DONERLY: Move for a mistrial.
>
> THE COURT: Denied.
>
> MS. COX: Delio Romanes was charged in this case. What interest is there to bamboozle anybody about Delio's real role in this case. Ask yourselves that. No one is saying Delio Romanes has clean hands, but what interest does anybody have in saying that

> Delio Romanes isn't the person responsible for this if he was?
>
> (emphasis supplied)

The challenged comment came in response to the defense argument that Mickey Hammonds should not be believed because the plan by the kidnapper-killers "doesn't make sense" (Vol. 11, TR 945), that the identification made by Mary Hahn was questionable (". . . can you imagine a more suggestive identification procedure . . ." -- Vol. 11, TR 947) and that there was "tremendous pressure on people to be a good citizen , to be a hero. There's a presumption of guilt in the real world" -- Vol. 11, TR 948). The defense further argued that the police did not check Delio Romanes' foot size ("It became obvious that it was of no use in confirming their theory; the blinders go on. We don't disconfirm our theory" -- Vol. 11, TR 953), and did not look for trace evidence in the recovered automobile ("you don't look; you don't find" -- Vol. 11, TR 954). The defense further intimated that Detective Rockhill was a coercive influence (". . . and while I'm not suggesting Detective Rockhill said we'll arrest anyone who testifies for you, it sounded like that. It sounded like that to a scared man sitting in the Orange County jail or the Orange County sheriff's office" -- Vol. 11, TR 971).[3]

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[3]One can hardly imagine a more ridiculous scenario than seven-time convicted Walter Ruiz (Vol. 10, TR 859) who proudly testified that he is a non-violent drug dealer (with penalty phase exhibits

With this assault on the competence and carelessness of state agents it should perhaps not be too surprising that the prosecutor felt the sting of a defense insinuation that state authorities either might not care or indeed might have a self-interest in convicting the wrong person. When the prosecutor -- apparently wrongly-attempted to defend herself by answering that state officials might not have an interest in convicting the innocent, the trial court sustained the defense objection but denied a requested mistrial (Vol. 11, TR 975-976) and there was no other requested relief or complaint to the end of the argument. (Vol. 11, TR 976-996)

Wide latitude is permitted in arguing to a jury; it is within the trial court's discretion to control the comments made to a jury and an appellate court will not interfere unless an abuse of discretion is shown. Moore v. State, ___ So.2d ___, 22 Florida Law Weekly S619, 621 (Fla. 1997); Hamilton v. State, ___ So.2d ___, 22 Florida Law Weekly S673 (Fla. 1997); Cole v. State, ___ So.2d ___, 22 Florida Law Weekly S587, 589 (Fla. 1997); Gudinas v. State, 693 So.2d 953, 963 (Fla. 1997); Terry v. State, 668 So.2d 954 (Fla. 1996); Merck v. State, 664 So.2d 939, 941 (Fla. 1995); Gorby v.

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demonstrating an additional penchant for armed robberies) eager to implicate ex-girlfriend Maria Vasquez in a false alibi (Vol. 10, TR 884) but reluctant to mention his mother who could assertedly truthfully supply a valid defense.

State, 630 So.2d 544 (Fla. 1993); Power v. State, 605 So.2d 856 (Fla. 1992); Breedlove v. State, 413 So.2d 1 (Fla. 1982). A court acts within its discretion when reasonable persons could agree with the trial court's ruling. Hamilton, *supra*.

A prosecutor may appropriately respond to unfair assaults made by the defense in its earlier closing argument suggesting that state agents had no interest in the truth or were simply concerned about acquiring a conviction of the innocent as well as the guilty. See Barwick v. State, 660 So.2d 685 (Fla. 1995)(comments of prosecutor an appropriate response to defense assertion in closing that state was hiding something); Wuornos v. State, 644 So.2d 1012 (Fla. 1994)(defense counsel opened door which urged jury to take its role seriously); Garcia v. State, 644 So.2d 59 (Fla. 1994) (prosecutor's statements at closing argument although clearly improper if taken out of context were proper responses to defense accusation that prosecutor was attempting to use case to attain ambitions and to build a reputation); Street v. State, 636 So.2d 1297 (Fla. 1994)(permissible for state to respond to defense argument to condemn the sin but not the sinner); Stewart v. State, 620 So.2d 177 (Fla. 1993)(cross-examination was fair response to defendant's direct testimony); Williamson v. State, 511 So.2d 289 (Fla. 1987)(prosecutor's argument attempted to rebut co-defendant's argument); Dufour v. State, 495 So.2d 154 (Fla. 1986)(prosecutor's

statement was an invited response rebutting defense argument hinting that inmate could have based his testimony on papers in cell); Schwarck v. State, 568 So.2d 1326 (Fla. 3DCA 1990)(counsel is accorded wide latitude in making arguments to the jury, particularly in retaliation to prior improper remarks made by opposing counsel); United States v. Avery, 760 F.2d 1219 (11th Cir. 1985)(if defense counsel's statement involves attack on government and its conduct of case, prosecutor may present what amounts to a boisterous argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon government or its witnesses). Johnson v. State, 696 So.2d 326, 334 (Fla. 1997)(state was simply providing a brief response once the defense opened the door. In the context of the entire prosecutorial closing argument, we find this one sentence to be both minimal and appropriate).

The trial court could permissibly conclude that the prosecutor's remark even if improper and deserving of a ruling that the defense objection be sustained did not necessitate the extreme remedy of a mistrial. Spencer v. State, 645 So.2d 377 (Fla. 1994); Esty v. State, 642 So.2d 1074 (Fla. 1994); Parker v. State, 641 So.2d 369 (Fla. 1994); Carroll v. State, 636 So.2d 1316 (Fla. 1994); Gorby v. State, 630 So.2d 544 (Fla. 1993). If appellant is complaining ab initio about the remark "what interest is there to

bamboozle anybody about Delio's real role in this case" (Vol. 11, TR 976), the failure to object below constitutes a procedural bar precluding review. Mordenti v. State, 630 So.2d 1080 (Fla. 1994); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990).[4] If appellant thought this latter remark merited a mistrial, it was incumbent upon him to request it. Larkins v. State, 655 So.2d 95 (Fla. 1995). Appellant did not even interpose a non-contemporaneous objection to this remark in his motion for new trial. (Vol. 8, TR 533-537) Even if preserved, the comment was fair rebuttal to the defense argument that the state was wearing blinders or otherwise protective of Delio Romanes. While current counsel for appellant chooses to interpret the "bamboozle anybody" remark as an impermissible assertion of the authority and integrity of the prosecutor's office, it is at least equally susceptible to the interpretation that none of the state

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[4]It is true appellant did preserve for appellate review his singular objection during closing argument (and request for mistrial) to the prosecutor's comment ("what interest do we as representatives of the citizens of this county have in convicting somebody other than the person . . ." -- Vol. 11, TR 975) which was sustained. It is not true as appellant seems to imply that this one objection preserves for appellate review various and sundry objections not made below which appellate counsel has discovered and seeks to raise ab initio. Simpson v. State, 418 So.2d 984, 986 (Fla. 1982)(where a defense objection is sustained he must move for mistrial if he wishes to preserve his objection and he will not be allowed to await the outcome of the trial with the expectations that if he is found guilty his conviction will be automatically reversed).

witnesses had an interest to minimize the role of Delio Romanes (either Hammonds, Machado, or Rockhill or anyone else) -- a valid prosecutorial response to the earlier defense argument that Hammonds would be useless if he implicated Delio (Vol. 11, TR 958) and that not only had the defense suggested that Delio could be the real shooter but had supported it with evidence -- the testimony of James Alderman. (Vol. 11, TR 960)

(2) At the end of the prosecutor's initial closing argument, the prosecutor stated without objection:

> It's the evidence in this case that you're to look at and you look at it and you say, look at this stuff. Is this enough to give me an abiding conviction of guilt? I can't even think of a way that it isn't enough to give you an abiding conviction of guilt, an overwhelming conviction of guilt. There's no way, no stretch of the imagination because let me tell you one thing, if that guy were Pinocchio, his nose would be so big none of us would be able to fit in this courtroom on what he said on there.
>
> You all had an opportunity to watch him. Give me a break, okay? Look to the evidence, think about it. Use your common sense, and don't let anybody get you side-tracked, and all of you are going to come back with the only just verdict you can in this case, and remember what you're here to do is render justice. Truth equals justice, and the truth is he was the hit man. He violently kidnapped, robbed and murdered another human being and after he did that, and you saw those pictures, and how, frankly, how gross they were. After he did that, he had a burger and fries at a Burger King. That's the kind of person we're looking at over there. That's what he thought about another human being. The truth is he did that and justice is that you convict him of it.

(Vol. 11, TR 940-941)

While Ruiz now takes appellate umbrage to certain prosecutorial phraseology (a binding conviction of guilt, Pinocchio, give me a break, how "gross" the photos were), appellant's failure to complain below precludes appellate review, Mordenti, *supra;* nor is there anything approaching error, much less fundamental error.[5] The prosecutor's argument constituted proper advocacy regarding the strength of the state's case and the weakness of the defendant's.

(3) Appellant also complains that the prosecutor improperly accused defense witnesses Nancy Ruiz and Julia Ramirez of lying. (Vol. 11, TR 987, 990) There was no defense objection to preserve this point for appellate review and understandably so since the defense counsel had invited the jury:

> Lastly, there is the alibi testimony. You heard from his mother. His mother, her testimony was backed up by receipts. It was backed up by checks. It showed she is not mistaken about the day. To convict Walter Ruiz, you cannot conclude that she is just mistaken. You have to conclude that she is lying.

(Vol. 11, TR 964)(emphasis supplied)

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[5]If appellant's complaint is that the prosecutor should not have described the photos as gross, the photos were available for jury viewing; if the complaint is that such photographs should not have been introduced, we disagree. See Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987)("We cannot . . . rewrite on the behalf of the defense the horrible facts of what occurred").

See Shellito v. State, ___ So.2d ___, 22 Florida Law Weekly S554, 556 (Fla. 1997):

> No objection was made to the prosecutor's statements; thus, the issue was not properly preserved for review. Further, we do not find, as Shellito asserts, that the statement constitutes fundamental error. In fact, we do not find that the statements were erroneous. See Craig v. State, 510 So.2d 857, 865 (Fla. 1987)(counsel's reference to witness as liar in commenting on witness's testimony was permissible argument as to prosecutor's view of the evidence). The record reflects that Mrs. Shellito's testimony was contradicted and that the prosecutor's statement was made in the context of allowing the jury to determine her credibility.

Similarly, in the case sub judice, Mrs. Ramirez' testimony that appellant was with her in Orlando on the day of the Landrian execution in Tampa was contradicted by the testimony of state witness and her chronology of events at the K-Mart was contradicted by evidence that the K-Mart check was submitted at 12:22 P.M.[6] and the prosecutor could argue she was unworthy of belief. See also Davis v. State, ___ So.2d ___, 22 Florida Law Weekly S331, 333 (Fla. 1997) (prosecutorial argument describing defendant's

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[6]Appellant cites Washington v. State, 687 So.2d 279 (Fla. 2DCA 1997) and Riley v. State, 560 So.2d 279 (Fla. 3DCA 1990) for the proposition that it is improper for a prosecutor to state that the defendant has lied, but whatever the context may have been in those cases, certainly the district court opinions cannot be said to have overruled this Court's precedents Shellito v. State, ___ So.2d ___, 22 Florida Law Weekly S554, (Fla. 1997) and Craig v. State, 510 So.2d 857, 865 (Fla. 1987) especially where the defense had challenged the jury to find that appellant's mother had lied in order to convict Ruiz (Vol. 11, TR 964) and interposed no objection to the prosecutor's argument, knowing it to be proper advocacy.

statements in confessions as "bald faced lies" not improper -- "when it is understood from the context of the argument that the charge is made with reference to the evidence, the prosecutor is merely submitting to the jury a conclusion that he or she is arguing can be drawn from the evidence").

(4) Appellant complains -- once again unsupported by objection below to preserve the point for appellate review -- that the prosecutor in closing argument improperly argued that appellant had changed his appearance for trial. (Vol. 11, TR 928, 931) As with most of the other contentions, the claim is procedurally barred. Mordenti, *supra*. Additionally, the claim is meritless. Witnesses testified that Ruiz' appearance in court had changed since the day of the incident (Mickey Hammonds stated appellant had hair on his head in April of 1995 -- Vol. 7, TR 388; Abraham Machado, who bought the gun for Ruiz as a favor, displayed reluctance when identifying Ruiz in court -- Vol. 7, TR 465-467; bail bondswoman Edith Priest testified that appellant had hair on his head in March but no hair at trial -- Vol. 7, TR 477; Charles Via testified that appellant had a shaved head in court, different from when he observed the kidnapping -- Vol. 8, TR 519; Michael Witty noted that in court Ruiz was missing a lot of hair on top of his head -- Vol. 8, TR 527; Detective Rockhill testified that appellant had hair on his head at the time of arrest -- Vol. 8, TR

569; and appellant acknowledged that it's better to have a bald head than partially bald and it was shaved during his pre-trial incarceration -- Vol. 10, TR 859). The prosecutor's argument constituted fair comment on the evidence, especially since a photograph of Delio Romanes, Exhibit 32, had also been introduced into evidence. (Vol. 7, TR 482)[7] If appellant thought that state witnesses had misidentified Ruiz and that Delio Romanes was the kidnapper-killer, he was free to show those witnesses the photo of Delio Romanes which had been introduced in evidence and asked if he were the perpetrator.

(5) Appellant complains -- again without preservation below -- that the prosecutor incorrectly argued that Delio's picture was not selected out of a line-up. (Vol. 11, TR 931-932) The contention is barred. Mordenti, *supra*. Furthermore, the fact remains that at the time of the stalking and the kidnapping of the homicide victim Landrian, contemporary eyewitnesses Hahn, Via, and Witty made an identification of appellant Ruiz rather than Delio Romanes (whom appellant had alternatively suggested was the killer).

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[7]Appellant cites Jones v. State, 449 So.2d 313 (Fla. 5DCA 1984), a decision clearly distinguishable from the instant case (here appellant was identified by several eyewitnesses in Tampa and many had testified that appellant had changed his appearance from the time of crime to that presented at trial); the case is unlike Jones, a weak prosecution wherein the prosecutor insinuated without any evidence that the defendant intimidated witnesses not to show up.

(6) Appellant also argues that the prosecutor improperly assumed the role of translator by explaining that the nickname "Gordo" is Spanish for fat and "Gago" means stutter. (Vol. 11, TR 933-934) This complaint remains unpreserved by objection below. Mordenti. Defense witness Maria Vasquez testified that Abraham Machado had a nickname, "Gordo or Gago or something like that". (Vol. 8, TR 668) Mickey Hammonds had testified that he didn't speak Spanish but that appellant's friend "Gordo" would buy the pistol and afterwards they went to "Gordo's" to have the serial number removed. (Vol. 6, TR 337, 340) Machado confirmed that Ruiz was with two other guys when they went to get the gun, a black man who didn't speak Spanish [Hammonds] and a bald guy (he identified a photo of Delio Romanes). (Vol. 7, TR 460-462)[8] Appellant Ruiz admitted going to the pawn shop on April 6 with Delio, Machado and Mickey Hammonds to get the gun. (Vol. 10, TR 853-854)

If the appellant's complaint is that the prosecutor was improperly giving testimony or acting as a translator, we disagree that any harmful error occurred. This Tampa jury obviously could bring its life experiences with them and would likely know as the Vox New College Spanish and English Dictionary (Lincolnwood, Ill; NTC Publishing Group 1996) reports, gordo means fat or obese (p.

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[8]It was stipulated that Machado would testify that his answer was yes to the question of whether he did grind the serial number. (Vol. 8, TR 496)

1083) and gago means stammerer or stutterer (p. 1072). Even if they did not, it was undisputed that Hammonds and Ruiz and Machado went to the pawn shop to get the gun. Finally, appellant complains about the prosecutor's rebuttal argument at Vol. 11, TR 978-979, like the other contention unobjected to and thus not preserved for review. Mordenti. In any event, the three full paragraphs of the prosecutor's remarks read:

> Let me talk briefly about Abraham Machado. Two things I want to talk to you about. There's some kind of suggestion it wasn't a suggestion, it's what this man told you under oath, the reason I went to get the gun, the reason I had to go and enlist Abraham Machado's help to get that firearm for Delio Romanes was because Delio needed a go between. Because Abraham Machado didn't know Delio, didn't trust him, didn't want to be involved in a transaction with him, but, wait a minute, in the same breath they want you to believe that Micky Hammonds was the bud of Abraham Machado, right? Micky Hammonds is the one involved in this plot with Delio. Why not use Micky Hammonds? Micky Hammonds is closer to Abraham, right, isn't that what they're telling you?
>
> Let me ask you this: If that's so, then why do we use Walter? Because Walter is the hit man. Because that's not true. That's not so. Micky Hammonds does not know Abraham Machado. He doesn't even know the guy's nickname.
>
> Let me ask one other thing about Abraham Machado. What was that? Abraham, remember when he testified, the whole charade of identifying this man. Ask yourself now if Abraham is going to come in and lie and put him there on the day they selected the gun, and if that's a lie because this man said it didn't happen, then why was he so reluctant, if he's telling this lie, why is he reluctant to look that way? I don't want to look at

> him. You aren't going to make me point at him, are you?

The argument constituted a proper response to the defendant's testimony that he ostensibly had to act as a go-between in the gun purchase because Machado didn't know and trust Delio or be involved with him in the transaction (Vol. 10, TR 854) and simultaneously defense counsel's argument to the jury that Hammonds:

> . . . had met Abraham Machado before Walter Ruiz ever met Abraham Machado. He had met him more than Walter Ruiz had ever met Abraham Machado. He had met him while Walter Ruiz was still in jail.
>
> (Vol. 11, TR 942)

The prosecutor could emphasize this discordant note to urge rejection of the defense argument that Hammonds and Machado were closer than Ruiz and Machado for purposes of buying the murder weapon.[9] The prosecutor's argument constituted fair comment on the evidence, i.e., it would not have been necessary for Ruiz to be involved in the gun purchase (unless he were the hit man) if Hammonds is a closer friend to Machado than Ruiz.

CONCLUSION:

The only pervasive element is the absence of contemporaneous objection to most of the claims now urged. The singular remark of

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[9]Further support for the thesis that Hammonds did not know Machado well can be seen at the cross-examination at Vol.7, TR 390 when witness Hammonds asked defense counsel "Is that Gordo?" when a question was propounded about Machado.

the prosecutor that was objected to below was made in response to a defense argument attacking the conduct of state agents in this case and was thus a fair reply, the objection was sustained and request for mistrial was properly denied as the lower court decided that it was not absolutely necessary to stop the trial. Other asserted errors by the prosecutor -- all of them lacking any contemporaneous objection -- either were not errors at all because they constituted fair comment on the evidence or were a fair rebuttal to the defense argument. See Whitfield v. State, ___ So.2d ___, 22 Florida Law Weekly S558 (Fla. 1997)(majority of claims of improper prosecutorial argument were not properly preserved for review and if they were errors they were not fundamental; those preserved did not constitute error in context or were harmless even when considered cumulatively). Any error that may be present constitutes harmless error since the main substance of eyewitness Mickey Hammonds' account is supported by the disinterested eyewitness testimony of Hahn, Via and Witty and the alibi testimony of ex-wife Nancy Ruiz and Julia Ramirez was unworthy of belief. Phone records at the rooms rented by Delio Romanes show phone calls made to Bonita Griffin -- at whose home appellant would be arrested two months later, to Maria Vasquez who initially lied to investigating officers about not having seen the defendant and whom appellant first lied about an alibi to Detective

Rockhill and to the Telnet office where on the following Monday he purchased two pagers and to the residence of Ruiz' ex-wife. The jury correctly discarded a theory that others were solely responsible, as they correctly rejected at penalty phase the defense argument that the CCP aggravator was inapplicable since Ruiz had a pretense of moral justification in slaying the victim he did not know. (Vol. 13, TR 1218-1221)[10]

[10]Mr. Ruiz can not seek the benefit even of the thought-provoking concurrence and dissent of Justice Anstead in P.J. Hill v. State, 688 So.2d 901, 908-909 (Fla. 1996) since the moral justification urged below -- retribution on a victim whose sexual conduct allegedly did not conform to appellant's family values -- was a pretense repudiated by the perpetrator. (Vol. 10, TR 872)

ISSUE II

WHETHER THERE IS FUNDAMENTAL REVERSIBLE ERROR IN THE PROSECUTOR'S UNOBJECTED COMMENT IN ARGUMENT ABOUT HER FATHER'S MILITARY SERVICE. (RESTATED).

Appellant next contends that the singular unobjected-to reference by the prosecutor to her father's military service in the closing argument constitutes fundamental error mandating reversal of the penalty phase sanction. The prosecutor below argued:

> And it's not easy for any of us to be here. My father was a physician and a commander in the United States Military, US Navy Reserve, and about six years ago, he got orders to go to Operation Desert Storm to command a Naval ship in the Gulf. And as he prepared to close his practice down and leave, they found a shadow on his brain, and the doctors would not commit to anything, but we all knew, the family all knew that that was going to be the cancer that ultimately killed him.
>
> And so I begged him, don't go, your days are numbered. Stay here with your family. Go talk to the people who issued your orders, go talk to the Navy and tell them that you can't go. You've got an excuse now. You've got an excuse that no one can deny. And he said, "I can't do that. This is my duty." And the thing about duty is that it's often difficult and it's usually unpleasant, but it's a moral and in this case a legal obligation.
>
> When you got your jury summons in this case, it was a call to duty, and no one of us is underestimating the difficulty of your task in this case, but it's your duty to make sure that justice is meted out in this case.
>
> It's without any pleasure that the State asks for the ultimate sentence because for there to be justice in our society, the punishment must fit the crime, the crime that was inflicted upon Rolando Landrian, the ultimate act of moral depravity and

> unmitigated evil. And justice can be harsh and demanding, but there's no room in these facts for compassion. There's no room in these facts for mercy.
>
> We ask you to consider this not because it's easy, because we all know it's very difficult, but it's the right thing and we ask that you have the courage and the moral strength to bring justice to this case.
>
> Thank you.
>
> (Vol. 13, TR 1209-1210)
> (emphasis added)

Appellant correctly anticipated that the state would contend that the failure to interpose an objection or seek relief in the lower court should result in a procedural bar precluding appellate review. See e.g., Mordenti v. State, 630 So.2d 1080, 1084 (Fla. 1994):

> [1] The majority of the issues raised by Mordenti were not objected to at trial and, absent fundamental error, are procedurally barred. Davis v. State, 461 So.2d 67 (Fla.1984), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985); Ashford v. State, 274 So.2d 517 (Fla.1973). "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So.2d 1, 3 (Fla.1993).

Accord, Rhodes v. State, 638 So.2d 920, 924 (Fla. 1994); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Farinas v. State, 569 So.2d 425 (Fla. 1990); Tillman v. State, 471 So.2d 32 (Fla. 1985). See also Smith v. State, 521 So.2d 106, 108 (Fla. 1988)(The doctrine of fundamental

error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application);[11] Allen v. State, 662 So.2d 323, 328 (Fla. 1995); Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996); Chandler v. State, ___ So.2d ___, 22 Florida Law Weekly S649 (Fla. 1997).

As appellate counsel fulminates that the prosecutor's argument was "a thing of beauty" (Brief, p. 80) -- the state accepts the compliment -- it apparently did not merit any concerned observation by the defense below either at the time of closing argument or subsequently in the motion and argument for new trial/sentencing. (Vol. 3, R 533-538; Vol. 13, TR 1249-1270). While it certainly remains debatable whether the prosecutor's personal anecdote is persuasive as advocacy, the point of the story is that accepting responsibility -- as jurors do when called upon to sit in judgment of a fellow citizen -- sometimes requires facing unpleasant facts and the exercise of courage and moral strength. The facts of this case -- a hired murder for contract -- was an "unmitigated evil" (Vol. 13, TR 1210) and that the pain of Ruiz' children portrayed in the defense calling them as witnesses should not override the

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[11]Of course if the trial court had interjected with an unrequested, unnecessary mistrial, double jeopardy would have precluded another trial, obviously an acceptable result for appellant who simultaneously urged his innocence and that he had a pretense of moral or legal justification to refute the CCP factor on matters (abuse of others' children) in which he expressly disbelieved. (Vol. 13, TR 1217-22; Vol. 10, TR 872)

judgment that appellant was responsible for his conduct and merited the ultimate sanction. The prosecutor's comment no more amounted to fundamental error than the recitation of an Aesop fable to demonstrate a human quality and was no more fundamentally erroneous than the defense reliance on Mahatma Gandhi (who did not testify) and his asserted views on capital punishment which are irrelevant. (Vol. 13, TR 1231)[12]

Even if this Court were to disregard appellant's default in failing to interpose a contemporaneous objection at trial and even if it concluded the remark was improper, the ill-chosen remark was an isolated one and did not warrant a new sentencing. E. James v. State, ___ So.2d ___, 22 Florida Law Weekly S223, 225 (Fla. 1997); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985).

As this Court observed in State v. Murray, 443 So.2d 955 (Fla. 1984) prosecutorial error alone does not warrant automatic reversal of a conviction unless the error committed was so prejudicial as to

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[12]Other examples of prosecutorial comments involving Biblical references, anecdotes or animal hyperbole not resulting in a finding of fundamental error include Lawrence v. State, 691 So.2d 1068, 1074 (Fla. 1997); Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996); Street v. State, 636 So.2d 1297, 1303 (Fla. 1994); Paramore v. State, 229 So.2d 855, 860-61 (Fla. 1969), vacated in part on other grounds, 408 U.S. 935, 33 L.Ed.2d 751 (1972); Reese v. State, 694 So.2d 678 (Fla. 1997)(story of cute little puppy who grew into a vicious dog); Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704, 51 L.Ed.2d 751 (1977)(referring to defendant as an animal); Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 459 U.S. 882, 74 L.Ed.2d 149 (1982); Crump v. State, 622 So.2d 963, 971 (Fla. 1993)(prosecutorial argument characterizing defense as octopus clouding the water to slither away).

vitiate the entire trial. The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless. In the instant case there was no prosecutorial misconduct or indifference to judicial admonitions; the comment challenged here was unobjected to below and the single comment for which an objection was lodged, the trial court sustained it. (Vol. 11, TR 975)(Issue I) No reversible error appears. See Reaves v. State, 639 So.2d 1 (Fla. 1994).

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ALLOWING STATE TO IMPEACH DEFENDANT WITH EVIDENCE OF HIS PRIOR INCARCERATION FOR ROBBING A STORE.

Prior to trial appellant filed a motion in limine conceding that the fact he was in jail in Seminole County was relevant with respect to his visitors and the allegation that his co-defendants aided in raising his bond prior to the instant homicide, and that Ruiz' failure to appear in court on April 4, 1995 were integrally linked to both the state and defense cases, that his drug sales to his co-defendants (and drug use with them) was inseparable from the case, but that the nature of the charges for which he was incarcerated (robbery) had no relevance and the allegation that Ruiz solicited co-defendant Hammonds to commit robberies in the Orlando area was also irrelevant. (Vol. 3, R 423-424) The court reserved ruling on June 21, 1996. (Supp. Vol. 1, SR 26-27) At a hearing on August 1, 1996 the prosecutor recalled that it was her understanding that unless she came up with a reason she wasn't going to go into it but the fact of appellant's being in jail absolutely was relevant. (Vol. 14, R 1391-1392)

During the testimony of the state's first witness Mickey Hammonds a discussion ensued between respective counsel and the court when the witness answered in the affirmative to the prosecutor's question whether -- prior to appellant's release from jail -- there had been conversations with Ruiz about assisting or

working with him. When the court heard defense counsel's representation that the witness would say he did not agree to Ruiz enlisting him to do robberies, the court ruled:

> . . . if his answer is going to be no, better safe than sorry, I'll sustain it.

(Vol. 6, TR 329-331)

The prosecutor asked whether -- after Ruiz' release from jail -- there were any conversations about assisting appellant in any criminal activities. Hammonds answered that Ruiz brought it up:

> A. He wanted to know if I wanted to make some money robbing -- he didn't say "robbing," he just said do I want to make some money, 20 or 30 thousand dollars, and I said, "What kind of work are you talking about doing?"

(Vol. 6, TR 331)

The court overruled the defense objection when the witness made clear this occurred after appellant had gotten out of jail. (Vol. 6, TR 331-332) Hammonds testified that they never talked about a specific robbery, only that Ruiz asked him to drive for him and he had to take care of something for Delio and them in Tampa. (Vol. 6, TR 332) Hammonds agreed to be a driver for Ruiz. (Vol. 6, TR 333)

When appellant testified on direct examination he claimed he was with his mother on April 7. (Vol. 10, TR 834) Ruiz didn't want too many people to have an eye on him "because they already put me on the news, that they were looking for me, and I was in the paper, also" because he had not made an April 4th court date.

(Vol. 10, TR 836) He claimed his mother was telling him to turn himself in and he explained to her "that they were trying to charge me with some charges that I wasn't -- you know that I wasn't guilty of and that I wasn't going to turn myself in at that time." (emphasis supplied)(Vol. 10, TR 837) When asked how he got back to the motel he claimed he was at, Ruiz testified:

> A. I had a car -- I don't know. I had a car parked in the Dahlia Azalea Park shopping center. That was not my car that I was using.
> Q. And the --
> A. In other words, the car was not a legal car, to be more specific.

(emphasis supplied)(Vol. 10, TR 845)

Ruiz claimed that he met Mickey Hammonds at Bonita Griffin's house shortly before he was arrested and put in the Seminole County jail and saw him again after bonding out of jail on March 23, 1995. (Vol. 10, TR 846-847) Abraham Machado purchased cocaine from appellant and he also sold cocaine to Delio and Lotia Romanes who was introduced by a Ruiz client named Danny. The Romanes became regular clients of appellant. (Vol. 10, TR 848-849) Ruiz testified that Lotia and Delio approached him about a problem that Rolando Landrian (the victim in the instant case) had molested and physically and sexually abused her daughters for years and she was looking for someone to rough him up. (Vol. 10, TR 850) When Lotia would regularly complain and ask for his help, he told her:

I don't do that, man. I'm not into that kind of stuff. I sell drugs, you know.

(emphasis supplied)(Vol. 10, TR 851)

Appellant claimed that he got mad, he pointed out to them that he was just getting out on bond now and didn't want to get involved in this but suggested Mickey Hammonds might do it because "I know what type of character he was." (Vol. 10, TR 851-852) Appellant claimed he told Machado the gun was for him (Ruiz) but Delio Romanes was going to pay for it when actually, Ruiz testified, the gun was for Delio. (Vol. 10, TR 854) The money Lotia Romanes paid to his bondswoman Edith Priest was a prepayment on a ¼ kilo of cocaine -- it had nothing to do with killing anybody. (Vol. 10, TR 855) Ruiz claimed that he had seven prior convictions. (Vol. 10, TR 859)[13]

On cross-examination, Ruiz explained that he intended to repay those who put up collateral on his $35,000 bond, he would be able to cover it since "I made money selling drugs." (Vol. 10, TR 870) He would take care of them "in a business way" and did not want to leave the impression he was "planning on going straight and narrow." (Vol. 10, TR 871) Ruiz also acknowledged that he didn't

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[13]And at penalty phase the state introduced Exhibit 4, the 1994 conviction for resisting arrest with violence (Vol. 16, R 89-91); Exhibit 6, the 1996 conviction for November 1994 robbery of a Winn Dixie store (Vol. 16, R 95-99); Exhibit 8, the conviction for June 1995 armed robbery of a bank (in which custodians Cherie Perry and Carol Archer testified at penalty phase)(Vol. 16, R 102-108); and Exhibit 10, the conviction for robbery with a firearm for the offense occurring in May of 1995 (Vol. 16, R 110-115).

understand the situation presented in Lotia Romanes' story -- how she could want the man hurt for her daughters but staying in the same house with him; he had real questions whether this story of abuse was true. (Vol. 10, TR 872) Appellant was then cross-examined about whether Delio had mentioned robbing the victim Landrian:

> Q. Okay. First let me ask you something. Didn't Delio tell you that Rolando Landrian wore a lot of jewelry and kept lots of money in his car, so it was going to be a robbery?
>
> A. I don't know nothing about no robbery, ma'am. You're putting words into my mouth now.
>
> Q. Well, Delio tells you in the context of what he wants done to Rolando Landrian, that Rolando Landrian wears lots of jewelry and keeps lots of money in his car?
>
> A. What he says is that the person that goes down there to rough him up could take it because he does have a lot of jewelry and he does carry a large sum of money, yes.
>
> Q. And that's a robbery?
>
> A. As far as -- yeah.
>
> Q. You know what a robbery is?
>
> A. How do you know what I know what a robbery is?
>
> Q. Well, are you trying to suggest to this jury -- let me look for a moment. You told Mr. Gonzalez -- not Mr. Gonzalez, I'm sorry, Mr. Donerly that you sell drugs, but you don't do things like hurting people, right?
>
> A. Why should I?
>
> Q. Well, you're more than willing to use a gun in order to get what you want, aren't you?
>
> A. If you have a gun, that doesn't mean you're going to hurt somebody.
>
> Q. Pointing a gun at someone doesn't mean you're willing to hurt someone?
>
> A. If you point a gun at somebody

doesn't mean you're going to shoot the gun. If you point a gun at somebody, it doesn't mean that it's loaded.

(emphasis supplied)(Vol. 10, TR 873-874)

At a bench conference the prosecutor contended that Ruiz had opened the door on direct examination by his responses that he told Lotia after getting out of jail that he sells drugs not the type of thing Lotia was suggesting -- when in fact he was in jail for robbery with a weapon and committed two robberies for which he's been convicted after his jail release. Similarly, the state argued, appellant invited the inquiry with his answer "How do you know what I know what a robbery is." The prosecutor argued that she should be allowed to establish his robberies and that's how appellant knows what a robbery is and that appellant is the right man to recruit for robbing and doing violence to victim Landrian since Ruiz has just been bonded out, by the Romanes, on a robbery charge. Further, appellant was insisting that he missed a court appearance because he didn't commit the crime charged but that the letter (written by his mother) indicated he told his mother he didn't show up for court because he didn't commit robberies alone and wasn't going to go down alone. (Vol. 10, TR 874-875)

The trial court concluded that it would be more prudent not to equate roughing someone up with armed robbery but allowed the prosecutor to talk to appellant's mother Mrs. Ramirez again. (Vol. 10, TR 879-880)

On further cross-examination Ruiz stated that Delio had approached him and said if someone would go down, talk to the guy, rough him up a little that he always carries a lot of jewelry and a large sum of money. (Vol. 10, TR 881) And the point of Delio talking to Ruiz was that Delio wanted someone else to do it rather than doing it himself -- Delio was not merely looking for a driver. (Vol. 10, TR 882) Ruiz admitted that he was aware on April 11 that the police were looking for him for this April 7 homicide and he was not apprehended until June 22 and he told Detective Rockhill at the subsequent interview he was with his girlfriend Maria Vasquez on April 7. (Vol. 10, TR 882-884) He claimed that he didn't want to jeopardize his mother and ex-wife until he was sure nothing would happen to them but didn't mind falsely implicating his friend Maria Vasquez who "was nothing very special to me." (Vol. 10, TR 886)

Appellant's mother Julia Ramirez was recalled and asked if appellant had expressed a concern to her they would lock him up for a long time and that he didn't rob the store(s) alone, at the time she was trying to talk him into giving himself up. The prosecutor showed the witness Exhibit 53, a notarized letter the witness had written and the witness identified the word "this" and confirmed that appellant had mentioned these factors. (Vol. 10, TR 891-893) Subsequently, during a colloquy on what portions of Exhibit 53 should be provided, the court agreed with the defense suggestion

that the doctrine of completeness made it appropriate to introduce the entire letter. (Vol. 10, TR 918)

In summary, Ruiz' testimony on direct examination was that he didn't want many people to see him April 7 when he visited his mother because he had been in the news for missing a court appearance on April 4, that he declined his mother's suggestion to turn himself in because he was charged with offenses he wasn't guilty of (when penalty phase exhibits show he entered a plea and was convicted of such offenses), that after meeting his mother he returned to the motel in a car that "was not a legal car," that cocaine clients Lotia and Delio Romanes had approached him about roughing up the victim and that he was angry about the suggestion since he didn't want to get involved in such matters immediately following his release on bond (that the Romanes had helped put up, as prepayment on a cocaine deal according to Ruiz) but had suggested Hammonds for the job and that he told Machado the purchased gun was for him (Ruiz) but actually it was for Delio.

It was eminently appropriate for the prosecutor to probe and not to leave undisturbed the false impression presented by appellant that he was only a mild-mannered drug dealer shocked at the prospect of being solicited for violence and robbery. It was proper to cross-examine as to the details of Delio's proposal regarding victim Rolando Landrian and appellant admitted that Delio mentioned the victim had a lot of jewelry and carried a large sum

of money. (Vol. 10, TR 873) It was appropriate to ask appellant if he knew what a robbery was and to challenge Ruiz' view that use of a gun is not violent or hurtful because pointing a gun doesn't mean it's loaded. (Vol. 10, TR 873-874) While appellant characterizes the prosecutor as "baiting" appellant, it is perhaps more accurate to say that Ruiz on cross-examination was "baiting" the prosecutor. Why in a trial for the robbery and murder of Rolando Landrian -- and knowing that he had previously plead and been convicted of a robbery of a Winn Dixie store in 1994, the 1995 armed robbery of a bank (see also testimony of Cherie Perry and Carol Archer at penalty phase -- Vol. 12, TR 1063-1072) and the 1995 armed robbery of the Cumberland store (Vol. 16, R 95-115) -- would he invite and challenge the prosecutor to correct the false image he was presenting to the jury with his rhetorical flourishes suggesting he knew nothing about robberies?

If appellant is complaining about any questions propounded by the state on cross-examination of Mr. Ruiz or answers elicited by him, such a claim is meritless. The defense interposed no objection nor sought any testimony stricken in the cross-examination prior to the prosecutor's seeking relief at a bench conference at Vol. 10, TR 874-880. (See Vol. 10, TR 860-874) Nor did the defense object to any subsequent cross-examination of appellant. (Vol. 10, TR 880-886) Consequently, an attempt to seek relief on appellate review for any unobjected-to examination below

should be rejected as procedurally barred. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Mordenti v. State, 630 So.2d 1080 (Fla. 1994).

Turning next to the Julia Ramirez testimony and impeachment, appellant complains about the trial court's allowing the prosecutor to recall her and to ask about whether Ruiz mentioned a concern about being locked up for robbing stores and introducing her letter she wrote at the request of a defense investigator, Exhibit 53.

Initially, appellee would point out that when appellant's mother Julia Ramirez testified as a defense witness she was cross-examined at length regarding inconsistencies in her trial and deposition testimony and the letter summarizing her recollection of the August 7 meeting with her son, Exhibit 53. (Vol. 9, TR 792-826) Most of that letter -- including the excerpt "He had mixed feelings about turning himself in to the police. He mentioned they would lock me up for a long time" -- was read to the jury without any defense objection. (Vol. 9, TR 807) Julia Ramirez was recalled to the stand, identified the word "this" in her letter (Exhibit 53) and acknowledged that appellant had told her during their conversation at the K-Mart on April 7, 1995 that one of the reasons for not turning himself in to the police was he didn't rob the store (or stores) alone. (Vol. 10, TR 892-893)

Appellant contends that the trial court erred in permitting rebuttal testimony of his mother, Julia Ramirez, because (1) the

nature of the prior charge was irrelevant to the crime charged, i.e., that it was inadmissible as similar fact evidence under F.S. 90.404(2)(a) or dissimilar fact evidence under F.S. 90.402 because it lacked relevancy and that it was unduly prejudicial under F.S. 90.403; (2) the purported impeachment went to a collateral issue; (3) the required foundation was not laid; and (4) the purpose of impeachment could have been achieved without the mention of robbery.[14]

Appellee would point out that the testimony of recalled witness Julia Ramirez and the introduction of her notarized letter of August 17, 1995 -- Exhibit 53 -- served legitimate purposes.

(1) F.S. 90.608 permits a party to attack the credibility of

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[14]With regard to appellant's contentions, appellee submits that introduction of evidence that Ruiz had previously been incarcerated on a pending robbery charge was not used or sought to be used as "similar fact" evidence under F.S. 90.404(2)(a). Appellee disagrees that the impeachment went to a collateral issue. The required foundation was laid with respect to Mrs. Ramirez. To the extent that the trial court may have erred and deprived the prosecutor of the opportunity to examine Mr. Ruiz (Vol. 10, TR 880) such error is de minimis and there was no unfairness visited upon appellant. Clearly, Ruiz cannot claim any surprise in the conversation he allegedly engaged in with his mother at the K-Mart on April 7 -- he initiated the discussion of the content of his conversation with her on direct examination. Had the trial court permitted the prosecutor to direct the inquiry to Ruiz and appellant admitted telling her the reason for not turning himself in included he didn't act alone in the store robbery it would have been unnecessary to recall Mrs. Ramirez and if he denied it the state could have refuted his denial with Mrs. Ramirez; in either case the information would be admitted. As to the assertion that impeachment could have been accomplished without the mention of the word rob or robbery, since that was the word used in Mrs. Ramirez' Exhibit 53 it would seem proper in laying the predicate for her answer to use the language she claimed Ruiz used.

a witness by introducing statements of the witness which are inconsistent with the witness' present testimony -- 90.608(1) or proof by other witnesses that material facts are not as testified to by the witness being impeached -- 90.608(5). As reported in Ehrhardt Florida Evidence (1995 edition) § 608.1, pp. 385-386:

> A witness may "open the door" during his direct testimony to impeachment concerning matters that would not otherwise be permissible. Under this concept, the adverse party may be able to introduce extrinsic evidence to contradict a specific factual assertion made during the testimony of the witness, even if it pertains to an otherwise collateral matter. A large measure of discretion is vested in the trial court in determining when the door is opened.

By his testimony on direct examination that he was merely a non-violent drug dealer with no interest or awareness of robberies or using guns to take people's property, Ruiz placed his non-violent character in issue and the prosecutor could legitimately rebut that trait. See F.S. 90.404(1)(a); Lusk v. State, 531 So.2d 1377, 1382 (Fla. 2DCA 1988)(when witness testified as to his non-violent nature, counsel permitted to show his lack of truthfulness regarding his violent nature and to contradict his direct statement to the contrary and admissible for purposes of impeachment and evidence was also admissible as specific instances of conduct to show witness's character for violence once that character trait was put at issue); see also Brown v. State, 579 So.2d 898, 899 (Fla. 4DCA 1991)(no error in permitting witness to be impeached with

evidence that he was fired from his job as a correctional officer after he had previously stated that he had quit); United States v. Benedetto, 571 F.2d 1246, 1250 (2Cir. 1978)("Once a witness - especially a defendant witness - testified as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case"); Walder v. United States, 347 U.S. 62, 74, 98 L.Ed 503 (1954)(when defendant on direct examination initiates an inquiry regarding specific prior conduct other than a criminal conviction, the prosecution may bring forth extrinsic evidence in an attempt to establish prior conduct contrary to the defendant's assertion; thus where witness opened door denying possessing or selling cocaine, rebuttal witnesses could testify to prior dealings); Jackson v. United States, 311 F.2d 686, 690 (5Cir. 1963), cert. denied, 374 U.S. 850 10 L.Ed.2d 1070 (1963)(when witness opens the door with his direct testimony, evidence which contradicts or explains the direct testimony is not collateral evidence). Appellant's testimony made the material relevant. As to the assertion that the mention of an incarcerated offense for robbery, that was not unduly prejudicial in light of appellant's admissions that he was a drug dealer, used a stolen car (or non-legal one) after his alleged visit with his mother, and had seven prior convictions. See Harmless Error section, *infra;* see also Morton v. State, 689 So.2d

259 (Fla. 1997).

It is true that the lower court rejected the state's effort to lay the foundation with appellant but no harm resulted since it was the appellant who initiated the discussion of his alleged conversation with his mother at the K-Mart on April 7 and had he admitted it (as his mother stated) the information would be available to the jury and if he denied it the state could prove through Mrs. Ramirez and Exhibit 53 what he said.[15]

With respect to any assertion that extrinsic evidence was impermissible and that the examiner was limited to the answer elicited from the witness on cross-examination (and as stated above the lower court declined the prosecutor's request to ask appellant), Ehrhardt reports at § 608.1, fn 22, pp. 386-387 that:

> But at least one recognized limitation on this principle is that when the inquiry is initiated on direct examination rather than cross examination, the prosecution may bring forth extrinsic evidence to demonstrate the mendacity of the witness' statements. Jackson v. United States, 311 F.2d 686, 690 (5th Cir., 1963); see White v. United States, 317 F.2d 231, 233 (9th Cir., 1963)."); Jackson v. United States, 311 F.2d 686, 690 (5th Cir.1963), cert. denied, 374 U.S. 850, 83 S.Ct. 1913, 10 L.Ed.2d 1070 (When witness opens the door with his direct testimony, evidence which contradicts or explains the direct testimony is not collateral evidence);

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[15]Moreover if the prosecutor had asked Ruiz and he had denied making the statement to his mother that he declined to turn himself in because he didn't rob the store alone rather than that he was not guilty, apparently the state would have been required to introduce Exhibit 53. See Marrero v. State, 478 So.2d 1155 (Fla. 3DCA 1985); Tobey v. State, 486 So.2d 54 (Fla. 2DCA 1986).

photos in Exhibit 34 and 35 and noted that appellant's head in court was shaved. (Vol. 8, TR 512-513, 519)[16] Michael Witty -- also present at the Stop & Shop during the kidnapping -- identified Ruiz in court as the perpetrator and no one previously asked him to make an identification. (Vol. 8, TR 526-527, 535, 574) Pawn shop operator Susie Bates Jacobs testified and identified Exhibits (31, 50) showing the purchase and transfer of a gun to Abraham Machado on April 6, the day before the killing (Vol. 7, TR 455-457) and Dianna Guty testified that on April 6 appellant came to her residence to see Mickey Hammonds and she identified a photo of Delio Romanes (Exhibit 32) as a man with Ruiz, and the three men left together. (Vol. 7, TR 481-483) Machado testified that appellant and the bald guy (Delio) were with him at the pawn shop on both days (April 3 and April 6) and the other two men looked at and selected the gun purchased while he filled out the paperwork. (Vol. 7, TR 462-464)

Additionally, the phone records retrieved by Detective Massucci from the Interchange Motel where Delio Romanes had rented two rooms (Vol. 8, TR 587-589) corroborates the Mickey Hammonds testimony that appellant made phone calls from the motel room including one to Maria Vasquez Rivera (Vol. 7, TR 405); the phone records show several phone calls made on April 8 (the day after the

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[16]Both eyewitness Via and Detective Rockhill testified there was no suggestion as to whose picture should be selected. (Vol. 8, TR 510, 566)

killing) to the residence of appellant's ex-wife Nancy Ruiz (who subsequently provided alibi testimony), to Maria Rivera who admitted in her testimony that she lied to police on April 12, 1995 when she had seen Ruiz at her home the night before (April 11) (Vol. 8, TR 672), and who appellant initially maintained to police was an alibi witness for this April 7 offense (Vol. 10, TR 882-884), to Bonita Griffin at whose home appellant was subsequently apprehended two months later. (Vol. 10, TR 865; Vol. 8, 569)(Vol. 16, state exhibits 43, 44, and 51) A phone call was also made to the Telnet office in Orlando (Vol. 16, pp 54, 67) where appellant went on the following Monday, April 10, to obtain two pagers. (Vol. 16, p. 48; Vol. 10, TR 869-870)

Appellant argues that the prosecutor's effort to elicit from Mrs. Ramirez (and her letter summarizing her meeting with appellant) that Ruiz was previously charged with a robbery is fatal to sustaining the conviction because there were an equal number of eyewitnesses placing Ruiz in Tampa during the murder (Hammonds, Mary Jo Hahn, Via, Witty) as there were supporting his alibi in Orlando (Nancy Cruz, Mrs. Ramirez, Jorge Rodriguez, and Coralyes Rodriguez). But quantity is not quality. The state's witnesses identifying him in Tampa were -- with the exception of Hammonds -- disinterested observers with no bias. The defense witnesses included appellant's mother, his ex-wife, and two friends, all of whom were severely impeached. For example, Jorge Rodriguez

(presently being held in a federal prison, Vol. 8, TR 630, convicted on two counts for Social Security fraud -- Vol. 8, TR 639) claimed that he had seen appellant only once in his life and that on April 7 at the Nancy Ruiz house and not since (Vol. 8, TR 632, 636, 647) but the state introduced rebuttal evidence that Jorge Rodriguez had not only visited appellant in jail shortly after appellant's arrest on this murder charge but had also deposited money in his jail account. (Vol. 10, TR 897)

Coralyes Rodriguez testified that appellant's ex-wife Nancy Ruiz used to babysit for her and claimed that she saw appellant at Nancy's house on April 7. (Vol. 9, TR 759) She recalled that it was April 7 because they were planning for Nancy's birthday (Vol. 9, TR 760) but at her deposition she indicated she thought the birthday was April 9. (Vol. 9, TR 769) Nancy Ruiz' birthday actually was on April 27. (Vol. 9, TR 755) She and Nancy Ruiz had talked frequently on the phone. (Vol. 9, TR 767)

Nancy Ruiz, appellant's ex-wife, initially stated that she first saw appellant after his April 4 non-appearance at court on Friday (which would have been April 7)(Vol. 9, TR 686) but then admitted on cross-examination that she had also seen him on April 5 prior to her allegedly seeing him at the house on April 7. (Vol. 9, TR 715) They met on the 5th in a public place because she was nervous after learning he missed bond and yet when he visited on the 7th she allowed him to stay for three hours in the front yard.

(Vol. 9, TR 717-718) In her deposition four months prior to trial she claimed that a police SWAT team in helicopters came to her house looking for appellant the day after she saw him at her home on April 7, but acknowledged at trial the police-helicopter visit occurred a week later. (Vol. 9, TR 740-743)

Appellant's mother, Julia Ramirez, who claimed to be with appellant at the K-Mart on April 7 provided a very detailed summary in her letter in which she recited that they arrived at K-Mart at 12:05 P.M., spent several hours shopping and eating pizza at Little Caesar's, then stood in line to pay for the purchased items and left the K-mart at about 6:30 P.M. (State's Exhibit 53, Vol. 16, pp. 70-74) But the check she wrote to K-Mart -- Defense Exhibit 4 -- showed the check was rung up at 12:22 P.M. (Vol. 9, TR 794) In her earlier deposition she claimed that she and appellant had spent close to three hours eating and talking at Little Caesar's prior to buying shoes at the K-Mart. (Vol. 9, TR 814-818) Thus, the fact-finder properly rejected her testimony and concluded that she had been at the K-Mart on April 7 to make a purchase, but not with the appellant.

Lastly, any error in this regard is harmless because there was no mention in the prosecutor's initial closing argument (Vol. 11, TR 925-941) or concluding argument (Vol. 11, TR 972-996) reflecting Ruiz' prior incarceration was for the offense of robbery and thus

there was no exploitation of alleged improperly admitted evidence.[17] The prosecutor did mention at Vol. 11, TR 989 the admission to Mrs. Ramirez at K-Mart that he didn't commit the prior charge "alone" which was contrary to his testimony that he was innocent, but even appellant concedes that that form of impeachment -- without mention of the offense of robbery -- would not be troubling. (Brief, p. 99) The prosecutor mentioned that what we know about his other charges is that ". . . when he missed court, the police, his attorney and the bail bondsman immediately started looking for him and we knew from Nancy Ruiz that his picture was on the media the day that he missed court for those charges". (Vol. 11, TR 993) And that testimony came from appellant and his witnesses. Since appellant in his own direct testimony admitted that he sold drugs -- and would use drug profits to repay the Romanes for getting him out on bond -- that he was using a stolen car to return to his motel after allegedly meeting with him mother at the K-Mart, and that he had <u>seven</u> prior convictions and since defense counsel acknowledged in closing argument that Mr. Ruiz was not a "virgin" in the system, appellee respectfully submits that the jury having additionally heard that the prior incarceration was for a robbery charge did not amount to egregious, reversible error.

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[17]The <u>defense</u> did mention in its closing argument that "I told you back in jury selection that Walter Ruiz was not a virgin to the system, and he's not. He has a certain ringwiseness about him that would allow him to know better than to be out there on April the 14th". (Vol. 11, TR 967)

ISSUE IV

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ALLOWING THE STATE TO INTRODUCE IN THE PENALTY PHASE A CLOSE UP CRIME SCENE PHOTO OF THE VICTIM'S HEAD AND UPPER TORSO.

Prior to the commencement of the penalty phase the defense objected to the admissibility of state's exhibit 1, a blow-up of state's exhibit 2, because it was gory and inflammatory and not in aid of any aggravating circumstance such as HAC. (Vol. 12, TR 1044-45) The defense cited a number of cases urging that multiple gunshot cases did not qualify for HAC. (Vol. 12, TR 1045-48) The prosecutor responded that the injuries sustained by victim Rolando Landrian were the reason the parties were in court. (Vol. 12, TR 1049) The court ruled:

> Well, I think the jurors are entitled to know or perhaps even need to know what happens when you fire a gun at another human being. In addition to that, the picture was already in evidence in Phase I. I don't see much of a distinction in the fact that it's a blowup. So I'll overrule your objection to Exhibit No. 1.
>
> (Vol. 12, TR 1050)

The defense stated that the exhibit was just short of 36 inches high and just short of 23 inches wide (Vol. 12, TR 1050) and the court permitted the defense objection to stand without requiring additional objection before the jury. (Vol. 12, TR 1051) The trial court and prosecutor were eminently correct. In Henyard v. State, 689 So.2d 239 (Fla. 1996) the defendant claimed that the

trial court erred in admitting the testimony of a blood stain pattern analyst because it was not relevant to prove the existence of any aggravating circumstance. The Court rejected the contention noting that Henyard offered evidence he was not the triggerman and argued lingering doubt as to the shooter should be considered in mitigation. The testimony of the blood-spatter evidence was proper to rebut his continued assertion that he did not actually kill the girls; moreover, testimony concerning the close proximity of the defendant to the victim was relevant to show the "nature of the crime". F.S. 921.141(1). Similarly, in the instant case the enlarged photo was relevant to show the nature of the crime and, as explained *infra*, to establish the CCP quality of this kidnapping-execution.

At the guilt phase associate medical examiner Dr. Lee Miller testified regarding the number and location of the wounds to the body of the victim and utilized in his testimony several photographs. (State's Exhibits 20, 24, 27 at Vol. 8, TR 602; Exhibit 26 at Vol. 8, TR 609; Exhibits 14, 15 and 16 at Vol. 8, TR 610; Exhibits 21 and 23 at Vol. 8, TR 613; Exhibit 25 at Vol. 8, TR 611) Appellee understands that Ruiz is not complaining about the admissibility of any of these photos in this issue of the brief, all of which were admitted without objection.[18] The trial court was

[18]And as the index to the record on appeal makes clear there were apparently a number of other photographs which were not introduced into evidence. (Exhibits 4, 5, 8, 9, 10, 11, 12, 13, 18, 19, 28)

correct in its assessment that since a photograph depicting the victim had already been introduced into evidence (actually several depicting the various wounds and injuries), the mere fact of a blowup of one of the photos was not improper.

This Court has repeatedly stated that the admission of photographic evidence is within the trial judge's discretion and will not be disturbed on appeal unless there is a clear showing of abuse. Gudinas v. State, 693 So.2d 953, 963 (Fla. 1997); Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995); Wilson v. State, 436 So.2d 908 (Fla. 1983)[19]. Appellant erroneously assumes that the only legitimate value of such photographs in the penalty phase is to support a prosecutorial assertion that the homicide was especially heinous, atrocious or cruel. While that is frequently the case, it need not be so. See, e.g., Willacy v. State, 696 So.2d 693 (Fla. 1997)(penalty phase evidence of photos depicting victim proper to show aggravating factors of HAC and CCP); Henyard, *supra*. In the instant case, the state urged -- and the trial court found -- that the instant homicide was a killing for hire that occurred during a kidnapping, i.e., that it was a cold, calculated and premeditated execution without any pretense of moral or legal justification and thus not merely an accidental discharge of a

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[19]In Czubak v. State, 570 So.2d 925 (Fla. 1990) cited by appellant the photos at issue showing a decomposed and discolored body with portions eaten away by animals had no relevance; they did not establish identity, did not reveal wounds probative of the cause of death nor did they assist the medical examiner in his testimony to the jury, nor were they corroborative of other relevant evidence.

firearm in a robbery gone awry. Just as the photos in Wilson, *supra*, were relevant to show premeditation, the photo here was relevant to demonstrate the coldness and heightened premeditation for the CCP factor and to help rebut the previous testimony of Ruiz as to his non-violent nature:

> A. If you have a gun, that doesn't mean you're going to hurt somebody.
> Q. Pointing a gun at someone doesn't mean you're willing to hurt someone?
> A. If you point a gun at somebody doesn't mean you're going to shoot the gun. If you point a gun at somebody, it doesn't mean that it's loaded.

(Vol. 10, TR 874)

Finally, any asserted error in this regard must be deemed harmless under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The prosecutor made no extensive reference to the challenged exhibit in closing argument to the jury. (Vol. 12, TR 1176; Vol. 13, TR 1177-1210)

ISSUE V

WHETHER THE LOWER COURT ERRED REVERSIBLY IN PERMITTING THE STATE TO INTRODUCE EVIDENCE AS TO THE DETAILS OF A DOMESTIC INCIDENT AND THE RECOVERY OF A GUN.

Casselberry police officer Jeff Wilhelm testified that on January 18, 1994 he responded to a domestic disturbance at an apartment complex on Cedar Bay Point. There was damage to Marie Rivera's apartment -- the front door had been kicked in and two windows of the side bedroom window had been busted out. There was blood on the windows and Ms. Rivera was very upset and afraid and the officers decided to take appellant Ruiz into custody. Appellant had cuts to his hand and was bleeding; as the officers escorted him downstairs for treatment by paramedics, Ruiz pulled to get away, became violent and in the scuffle Wilhelm's finger was smashed. (Vol. 12, TR 1055-58) In the course of the investigation a weapon with what appeared to be blood on the gun handle was recovered in the bedroom.[20] Ruiz was charged with resisting an officer with violence and Exhibit 4, the judgment and sentence for that offense, was introduced without objection. (Vol. 12, TR 1058-1060) On cross-examination the witness stated that the blood located during the course of this incident was appellant's and did not occur during the confrontation with Wilhelm. (Vol. 12, TR 1060)

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[20]The defense objected on relevancy grounds to the question about recovery of a gun; there was no objection to testimony of blood found on the gun. (Vol. 12, TR 1059)

Appellant now complains that undue prejudice resulted from the mention of the discovery of the gun with blood on the handle. The contention is meritless. Appellant concedes the relevancy of the fact that officers were called in response to a domestic disturbance (Brief, p. 107) and to which there was no objection below. (Vol. 12, TR 1056) The details of the incident which led to appellant's arrest and conviction for resisting arrest with violence (that appellant had blood on his hands and resisted Wilhelm violently when being escorted to the paramedic) was proper since this Court has consistently upheld the admission of facts surrounding the prior violent felony conviction as well as the fact of the conviction. Tompkins v. State, 502 So.2d 415 (Fla. 1986); Rhodes v. State, 574 So.2d 1201 (Fla. 1989); Finney v. State, 660 So.2d 674 (Fla. 1995). Appellant did not interpose any contemporaneous objection to testimony that blood was found on the butt of the gun (Vol. 12, TR 1059) so the claim has not been preserved for appellate review, Steinhorst v. State, 412 So.2d 332 (Fla. 1982), and it was clear appellant's bleeding is what led to the officer's escorting appellant to the paramedic when he started his resistance.

It was appropriate to describe Marie Rivera as upset and afraid since that explained the officer's decision to take appellant into custody. (Vol. 12, TR 1057) Appellant's assertion here that testimony of the recovery of a gun in the bedroom

constitutes improper Williams-rule evidence (a claim not contemporaneously made at trial) must also be rejected since the presence of a gun in a room is not a crime. See Malloy v. State, 382 So.2d 1190, 1192 (Fla. 1979). Finally, any error is harmless; the defense conceded to the jury the existence of the prior violent felony aggravator for his robbery and resisting arrest convictions. (Vol. 13, TR 1213-15)

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Post Office Box 9000, Drawer PD, Bartow, Florida 33831, this 9th day of January, 1998.

COUNSEL FOR APPELLEE